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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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MAR 29 2017

SC Court of Appeals

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.

RECORD ON APPEAL
VOLUME I OF II

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Shirley C. Robinson, Administrative Law Judge

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South Carolina Department of Health and Environmental Control
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COLUMBIASTATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**FILED**

MAY 05 2016

SC ADMIN. LAW COURT

A.O. Smith Corporation,

Docket No.: 16-ALJ-07-0082-CC

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Town of
McBee,

Respondents.

**ORDER GRANTING
RESPONDENT'S
MOTION TO DISMISS****Appearances:**W. Thomas Lavender, Jr., Esquire and
Joan W. Hartley, Esquire for Petitioner
Belton T. Zeigler, Esquire and
Kathryn Mansfield, Esquire for McBee
Stephen P. Hightower, Esquire for DHEC**STATEMENT OF THE CASE**

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

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

BACKGROUND

The town of McBee has a public water system, which provides water to customers who are residents of the town and to the manufacturing facility of A.O. Smith, located outside of town limits. Several years ago McBee ceased operating the two wells it used to supply the town's system

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

and instead started purchasing water from a wholesaler, Alligator Rural Water and Sewer Company ("Alligator"). Approximately six years ago, the town decided it was no longer satisfied purchasing water exclusively from Alligator and took steps to reopen its wells. McBee sought permits from the Department to begin operating its wells again. A Public Water System Operating Permit was issued to the town by the Department in 2011, without any challenges from interested parties. In November 2012, the Department issued McBee a construction permit, number 28475-WS, to modify one of the town's two wells by adding, among other things, a new pump. Subsequently, in June 2014, the Department issued a second construction permit, number 29779-WS, to allow McBee to install a filtration system for the two wells. Both construction permits were issued without comment from A.O. Smith.

In January 2016, an engineer certified that McBee had finished the permitted construction and that the wells were ready to go into operation. The Department then issued two "Final Approval to Place into Operation" documents for both wells—one for each construction permit. The final approvals noted that the town's previously issued operating permit contained a "special condition" requiring the town to meet certain capacity standards before operating independently of Alligator. The approvals quoted, in part, "the Town must have at least two DHEC-approved sources of sufficient quantity and quality to ensure compliance," but also stated that 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."

When the Department notified McBee in January 2016 that they could begin operating the wells, A.O. Smith began taking issue with actions of the town and the Department. A.O. Smith challenged the final approvals and requested final review by the South Carolina Board of Health and Environmental Control ("the Board"). In its "Statement of Staff Position" dated February 12, 2016, the Department opposed the Petitioner's request for review. The Statement detailed the procedural history regarding the McBee system and the staff's conclusion that A.O. Smith's attempt to challenge the final approvals was time-barred. On February 17, 2016, the Petitioner was notified that the Board declined the request for review. A.O. Smith subsequently filed for a contested case hearing with this Court.

ISSUE

Whether Petitioner may file for a contested case based on final approvals recognizing completion of construction done in compliance with previously issued construction permits.

DISCUSSION

This motion turns on section 44-1-60 of the South Carolina Code, which provides the exclusive procedure for bringing a contested case regarding permitting or licensing actions taken by the Department. S.C. Code Ann. § 44-1-60(A) (Supp. 2015). According to the procedure, the Department provides public notice when receiving and reviewing a permit application. *Id.* at § 44-1-60(B). After opportunity for public comment or a public hearing, the Department makes an “initial decision” regarding the issuance or denial of the permit, which becomes the “staff decision.” *Id.* at § 44-1-60(B)–(D). The staff decision takes into account “all material public comments received in response to the public notice,” if any are made. *Id.* at § 44-1-60(D). The staff decision becomes the “final agency decision” fifteen calendar days after it has been mailed to the permit applicant and other affected persons who have requested notification. *Id.* at § 44-1-60(E)(1)–(2). If an applicant or other affected person files a request for final review of the staff decision by the Board within that time, the Board determines whether it wishes to review the staff decision or not. *Id.* at § 44-1-60(F). The Board may make its own final agency decision or decide to let the staff decision stand, in which case it becomes the final agency decision. *Id.* Once the Board has declined in writing to review the staff decision, has failed to hold a review conference within sixty days, or has issued its own decision in the matter, the applicant or other affected person has thirty calendar days to file a contested case with the ALC. *Id.* at § 44-1-60(G).

The exclusive process established by section 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies. *See Ward v. State*, 343 S.C. 14, 18–19, 538 S.E.2d 245, 247 (2000) (citations omitted) (“The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few.”). Under the statute, unless the steps prescribed are followed, beginning with the initial decision of the Department, a party may not bring a contested case before this Court. In this matter, the initial staff decisions of the Department were the two construction permits. Because the permits were not challenged, not commented on, and no requests for final review were filed, those staff decisions were and are final. The final approvals to operate after completion of the construction authorized by those permits is not an initial decision which qualifies for a contested case under the law. *See* S.C. Code Ann. § 44-1-60(C) (Supp. 2015). Without previously taking advantage of the remedies offered by the statute, Petitioner simply may not now attempt to challenge the actions of the Department. To allow such an untimely challenge would

not only conflict with the plain language of the statute, it would defeat the public policy purpose of finality through resolution of any conflict regarding a construction project while it is in the initial stages, and not after investment and building has already taken place.²

Furthermore, it appears that Petitioner may have a motive for filing this contested case that is unrelated to the construction permits or the related final approvals. McBee has stated that its intention is to operate its water system independently of Alligator in the future.³ Alligator has allegedly threatened to cut off its water to the town and to A.O. Smith if the town continues down that path. These contract disputes, and disputes regarding federal obligations of the town and A.O. Smith, have caused civil litigation to be filed with the circuit court. Despite A.O. Smith's potentially sympathetic position of being caught between the town and Alligator, those contract disputes and other matters have no bearing on this case and are properly decided by the circuit court. The ALC is designed to provide review of agency actions and decisions, so that citizens of this state will not be bound by state administrative action without due process. See Engaging & Guarding Laurens County's Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014) (citations omitted). Ultimately, Petitioner does not seek review of an agency action, but rather argues that the Department has a duty to provide it with "adequate assurances" that enough water will continue to be provided to its facility during the resolution of the contract disputes between itself, the town, and Alligator. Adequate assurance is a contract term that has nothing to do with the actions of the Department in this case. See Black's Law Dictionary, "assurance," "adequate assurance" (10th ed. 2014). Indeed, Petitioner itself stated at the motions hearing that it in no way seeks review of the construction actually covered by the permits, but rather the capacity of the wells. While the public water system operated by the town has an obligation to comply with capacity requirements under the law, that matter is not before the Court at this time. Because this Court lacks the statutory authority to conduct a contested case predicated upon Petitioner's filing, the Court concludes that this matter must be dismissed.

² Respondents aptly analogized this issue to the construction of a house. You begin by designing the house and getting a construction permit. Once all expenditures are made and construction is complete, you then get a certificate of occupancy. Petitioners are bringing this case at the time of the certificate of occupancy. To allow such a case would jeopardize the administrative process, create great uncertainty, and allow endless contested cases at each stage of a project.

³ There was some dispute about this intention at the hearing on this motion. However, it is quite obvious from the statements made to this Court and contained in the exhibits filed that this is or has been McBee's plan.

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


SHIRLEY C. ROBINSON
Administrative Law Judge

On 11/11/54, a letter was received from the
Director, FBI, Washington, D.C., dated 11/11/54,
concerning the above captioned matter. The letter
was received from the Director, FBI, Washington, D.C.,
dated 11/11/54, and was received by the Director,
FBI, Washington, D.C., dated 11/11/54.

5 MAY 2016
J. E. S. / J. E. S.

FILED

JUL 13 2016

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

A.O. Smith Corporation,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Town of
McBee,

Respondents.

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

**ORDER VACATING ORDER
GRANTING RESPONDENT'S
MOTION TO DISMISS**

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the court") pursuant to a Request for Contested Case Hearing filed March 15, 2016, by counsel for the A.O. Smith Corporation ("Petitioner"). On March 17, 2016, Town of McBee filed a Motion to Dismiss the contested case as well as a Motion for Relief from Stay. A motions hearing was held in this matter before the court on April 28, 2016. This Court issued an Order on May 5, 2016 granting McBee's Motion to Dismiss.¹ Thereafter, on May 19, 2016 Petitioner filed a Motion for Reconsideration under ALC Rule 29(D). Subsequently, Respondents filed responses to Petitioner's Motion for Reconsideration on June 10, 2016 and June 13, 2016.

IT IS HEREBY ORDERED that this Court's Order dated May 5, 2016 shall be and hereby is **VACATED**, pending a decision upon the motions filed by the Petitioner and the Respondent.

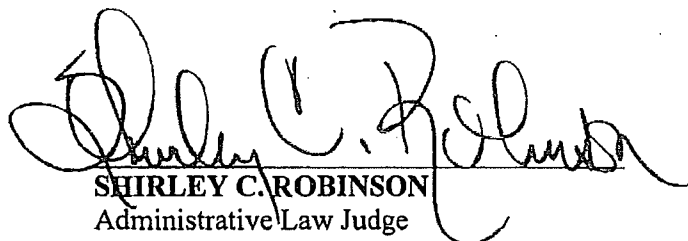
AND IT IS SO ORDERED.

CERTIFICATE OF SERVICE
This is to certify that the undersigned has in some
manner served this order in the above captioned case on all
parties to the cause by depositing a copy thereof
in the United States mail, postage paid at the post office
at Columbia, South Carolina, and by first class
Mail Service addressed to the party/ies at the address/ies

This 13th day of July, 2016
By: Mary Beth Campbell
Judge, Law Clerk

July 13, 2016

Columbia, South Carolina


SHIRLEY C. ROBINSON
Administrative Law Judge

¹ The court did not address the Motion for Relief from Stay in its order as the issue was rendered moot by the court's decision to grant the motion to dismiss.

FILED

SEP 09 2016

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

A.O. Smith Corporation,

Docket No.: 16-ALJ-07-0082-CC

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Town of McBee,

Respondents.

**ORDER GRANTING
RESPONDENT'S
MOTION TO DISMISS**

Appearances:

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

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

Stephen P. Hightower, Esquire for DHEC

STATEMENT OF THE CASE

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

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

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

BACKGROUND

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

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

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

ISSUE

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

DISCUSSION

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

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

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

Section 44-1-60(C) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

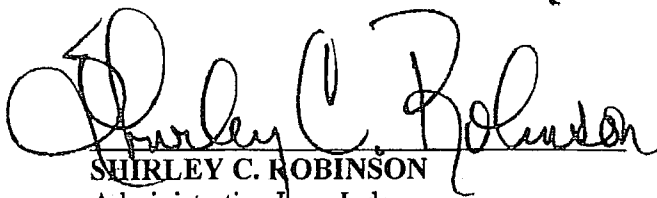
Petitioner failed to timely pursue these administrative remedies, this Court lacks the statutory authority to conduct a contested hearing predicated upon Petitioner's filing. Therefore, the Court concludes that this matter must be dismissed.

ORDER

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

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

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

September 9, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served in accordance with the above entitled action upon a
parties to this cause by depositing a copy thereof
in the United States mail postage paid or in the emergency
Mail Service addressed to the party(ies) or their attorney(s)

This 9 day of September 2016
By Jeckle Henderson
Judee Henderson

**Transcript of the Testimony of
AO SMITH V. SC DHEC AND TOWN OF MCBEE**

Date: April 26, 2016



**CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index**

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 16-ALJ-07-0082-CC

A.O. Smith Corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
South Carolina Department of	)	
Health and Environmental Control,	)	
and Town of McBee,	)	
	)	
Respondents.	)	
_____	)	

ADMINISTRATIVE HEARING

Thursday, April 28, 2016
10:12 a.m. - 11:55 a.m.

The hearing before the Honorable Shirley Canty Robinson, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 28th day of April, 2016 before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.

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EXHIBITS

(No exhibits were marked during this hearing.)

STIPULATIONS

23 It is stipulated and agreed that this hearing
24 is being taken pursuant to the rules of the
Administrative Law Court and the South Carolina Rules
25 of Civil Procedure.

1 THE COURT: Good morning to everyone. Okay. And
2 we're here today to hear arguments on two
3 motions that we've got, two pending motions.
4 And before we get to the arguments, let me just
5 go ahead and identify the case for the record.
6 It is Docket number 16-ALJ-07-0082, it's A.O.
7 Smith Corporation, it's the petitioner, versus
8 the South Carolina Department of Health and
9 Environmental Control and the town of McBee.
10 The motions that we've got pending before us is
11 -- one is the Motion to Dismiss which I do want
12 the parties to pay particular attention to, and
13 -- and the Motion for Relief from the State,
14 which was filed by the town of McBee. We've
15 got the attorneys representing A.O. Smith
16 Corporation, Mr. Lavender.

17 MR. LAVENDER: Yes, ma'am. And Ms. Hartley.

18 MS. HARTLEY: Joan Hartley.

19 THE COURT: Thank you. And we've got Mr. Hightower
20 for the department ---

21 MR. HIGHTOWER: Yes, Your Honor.

22 THE COURT: --- and -- I'm sorry.

23 MR. ZEIGLER: Belton Zeigler representing the ---

24 THE COURT: Mr. Zeigler for McBee.

25 MR. ZEIGLER: --- town of McBee. Kathryn Mansfield

1 of ---

2 MS. MANSFIELD: Kathryn Mansfield.

3 MR. ZEIGLER: --- my firm is with me today.

4 THE COURT: Okay. Very good. Good to have you, Ms.
5 Mansfield.

6 MS. MANSFIELD: Thank you.

7 THE COURT: If everyone is ready, we'll get started
8 with the arguments of the Motion to Dismiss
9 first, and the Motion to Dismiss was filed by
10 the town of McBee.

11 MR. ZEIGLER: Correct, Your Honor.

12 THE COURT: Okay. Mr. Zeigler, I'm ready to hear
13 your arguments.

14 MR. ZEIGLER: Yes, ma'am. I would like to put
15 chronology up as an aid to the argument on the
16 ELMO screen here and walk you through it,
17 because this a case about chronology, it's
18 about timing and about sequencing. The gist of
19 my argument is very simple. The permits that
20 were issued in 2011, '12, and '14 are the
21 operative permits here. Those permits were
22 unappealed, there's no question of any
23 procedural defect related to giving notices or
24 anything of that nature. What we have here is
25 an attempt to use the final approval, which is

1 the final checkoff after construction, in order
2 to reopen matters that had been decided many
3 years before. The best analogy would be that
4 if you were to build a house, and were to go
5 get a building permit, you would build a house
6 in conformity with the permit, and when you
7 were finished, the building inspector would
8 come and see that in fact you had built it in
9 conformity with the permit. He would then
10 issue a certificate of occupancy. The final
11 approval is analogous to a certificate of
12 occupancy. It's a certification by DHEC that
13 the construction was permitted was in fact done
14 in accordance with the plans that were
15 approved. You cannot reopen the question of
16 whether building design was appropriate at the
17 time that the certificate of occupancy is
18 issued. The same way you can't do -- cannot
19 reopen the permit conditions and challenge them
20 at the time the final approvals are in order.
21 Let me explain to you what happened here. In
22 December of 2000, the town of McBee submitted
23 its PDR concerning their desire to re-permit
24 their water system, both the distribution
25 system and the wells in that system, and put it

1 back into operation under their name. It had
2 been operated under Alligator Rural Water and
3 Sewer Company, but there has -- were very good
4 and cogent reasons why the town decided it
5 could not continue with that relationship as it
6 was structured and wanted to take back the
7 authority to operate its system. That PDR was
8 approved on June 13th of 2011, and on June 14th
9 an operating permit for the system was issued.
10 Permit included both the wells and the
11 distribution system. One well required some
12 additional work, and so there were additional
13 permits that followed, but the permit
14 conditions which A.O. Smith is objecting here
15 today were included in that June 14, 2011
16 permit. Those conditions have not changed one
17 bit. That permit was allowed to go final and
18 it was not appealed by any party. As a part of
19 that permit, as part of going to the next step
20 of addressing issues related to the one well
21 that needed to be refurbished, A.O. Smith filed
22 two additional permits with DHEC. One was a
23 permit to modify what's called well number 2,
24 to put in a new pump and to do some other
25 modifications to it. The other was to put in

1 place a granulated carbon cleaning system to
2 take trace elements of some contaminants out of
3 the water. The water of the well in question
4 -- these wells, both of these wells, because
5 the GAC system actually covers both wells. The
6 water has trace elements of some issues, there
7 are some items that are a concern to DHEC, but
8 the water meets drinking water standards as it
9 is; it's not as if there's a direct legal
10 obligation to clean up the water any more than
11 it is coming out of the ground. But DHEC asked
12 and the town agreed to put in this granulated
13 activated carbon system, or GAC system, to
14 clean up the water. Those permits were issued
15 in 2012 and 2014, they're construction permits.
16 Those permits went final in November --
17 November 28th of 2012 and July 15th of 2014.
18 Based on those final permits, the town did what
19 most permittees do, they then go and arrange
20 financing and arrange construction contracts,
21 and build the facilities, make the changes that
22 are contained in those permits. That work is
23 what's happened between that period and today.
24 The town in total has spent over \$450,000 on
25 the improvements that were permitted by the

1 2012 and the 2014 permits. Of that amount, a
2 substantial portion was provided from a grant
3 from the rural infrastructure bank, and so the
4 town is indebted to repay \$250,000 of this
5 \$250,000 debt on those instruments -- on those
6 assets. But the total cost was over \$450,000.
7 When the construction was complete, the town
8 did as DHEC requires and went to DHEC and asked
9 for a final approval to put these completed
10 assets into service. And as is the intent of
11 the regulation and the DHEC practice, DHEC went
12 and inspected and said yes, the facilities you
13 built, the improvements you made, are
14 consistent with the permits that we granted.
15 You may now put them into service, that's what
16 the final approval did. Final approval
17 reiterated a condition verbatim that was
18 contained in the permit that was issued in
19 2011, and that is the condition that -- that
20 A.O. Smith says they can now challenge, but
21 they're challenging late. By our calculation,
22 they're challenging that provision 1,673 days
23 too late. The -- that condition was wrong, if
24 the condition was not appropriate, if DHEC
25 violated the law in proving that condition, the

1 appeal should have been made back in 2011. All
2 that's happened here, all that's happened in
3 the -- in the immediate term is that DHEC has
4 gone out, inspected the construction and said
5 the construction conforms to final and
6 unappealed agency permits that were issued in
7 2012 and 2014. So we're in precisely the
8 situation of a property owner who builds a
9 house based on a valid unappealed building
10 permit and then has a neighbor come and says we
11 don't like the house, we want to go and have a
12 full review of the building permit because
13 there's been a certificate of occupancy issued.
14 That's not the case. I know Your Honor deals
15 with many cases that involves construction
16 permits, and would be very familiar with the
17 fact that when you go to build a landfill, as
18 was the case with the Bees Ferry Landfill, you
19 get a construction permit. If someone thinks
20 that permit is improperly granted, they bring
21 an appeal. If the permit turns out to be
22 defective as was the case there, then the Court
23 so rules, but you don't wait until after the
24 facilities are built to raise those objections.
25 You raise them when the permit is issued.

1 That's the logic of our permitting process.
2 You cannot expect people to invest money,
3 particularly in this case public money, without
4 some assurance that the thing that they're
5 building meets DHEC's regulatory requirements.
6 If we had the situation that is being proposed
7 by A.O. Smith, the entities would -- the
8 governmental entities would never have any
9 assurance that their permit would not be
10 challenged by someone seeking a second review
11 of them after public funds had been expended
12 and the facilities were built. So we're in a
13 situation where the logical permitting process,
14 the clear provisions of the law and the
15 statutes say this appeal, this attempt to
16 request a contested case, is woefully out of
17 time, out of time by years not days. Now we've
18 also included in our filings a petition for a
19 lifting of the stay so that the town can begin
20 operating the system that's built and permitted
21 and expended money on. That is obviously going
22 to be moot if the Motion to Dismiss is granted.
23 We can go into at this time, or you would --
24 after we argue this, it may well be more
25 efficient to argue both motions separately.

1 I'll leave that to Your Honor's discretion.
2 This is a case where the facilities are clearly
3 in compliance with DHEC orders, DHEC has
4 certified the facilities in compliance with
5 DHEC orders, the facilities are in place and
6 ready to go. It's not a situation like you
7 had, say, with the Heath Hill case vis-...-vis
8 SCE&G, where lifting a stay was going to allow
9 an entity to build something that hadn't
10 already been built. Here the facilities are
11 there, they're ready to go into service, and
12 there's no irreparable harm whatsoever for
13 putting them into service. I do want to
14 address one fact here, which I think is
15 important for the Court to understand. A.O.
16 Smith makes a great deal of the fact that
17 Alligator Rural Water System says it's going to
18 cut off it's valves to the town if the town
19 turns on its wells. A.O. Smith fails to see I
20 think that -- that Alligator doesn't have that
21 right. Alligator signed a contract with the
22 town in 2002 to supply up to a specified number
23 of gallons of water. That contract does not
24 require the town to take any specific amount of
25 water from Alligator, it is not what you call

1 a utility business that -- a full requirements
2 contract. It does not -- there's nothing in
3 the contract that says the town cannot supply
4 all or part of its own water or turn on its own
5 wells. There is still a very -- between now
6 and 2022, when A.O. Smith can count -- when the
7 town can count on Alligator to provide whatever
8 additional water service it needs. But there's
9 no need for that connection in any case because
10 as -- as DHEC clearly found, as it stated in
11 the staff report to the board that is part of
12 the record in this case, there is plenty of
13 capacity in the wells that -- that McBee has
14 refurbished and put back into service. Those
15 wells provide a very high quality of water.
16 You're taking water that already meets drinking
17 water standards and putting it through a carbon
18 filtration system so it is -- it is hyper-pure
19 water. The town has a large water tank that is
20 right by the A.O. Smith facility that was built
21 and designed to provide A.O. Smith with the
22 pressure it needs for fire service. If there
23 is additional capacity that's needed in the
24 future, the town is perfectly capable of
25 installing additional wells and building

1 additional tanks, that's very much there. But
2 there's no need for it, and DHEC has so found.
3 So we believe that there is no irreparable harm
4 to allowing the town to turn on its wells and
5 get the return from that investment that its
6 made by cutting its expenses, the expenses it's
7 currently having to pay Alligator Rural Water
8 System. But the core of this case remains the
9 question of whether it's appropriate after
10 construction has taken place to challenge the
11 permits on which construction was carried out,
12 permits which went final and unappealable years
13 before. Is it appropriate to take something as
14 minor and ministerial as a final approval,
15 which is basically a certificate of occupancy,
16 and saying we can reopen any permit condition
17 that we want based on that -- that being
18 issued. Our belief is you cannot do that. Our
19 belief is that anything that goes to the basic
20 permit ability of the system has to be raised
21 at the time that the construction permits or
22 operating permits are issued, not at the time
23 final approvals are issued. You may hear the
24 argument that -- well, because material from
25 that 2011 permit was put into the -- into the

1 final approval, that somehow changes the
2 situation or reopens things. But it really
3 doesn't because that condition should have been
4 challenged, if it were challengeable, in 2011.
5 But if it were to be included in this
6 construction permit it should have been
7 included in the construction permit itself, not
8 the -- not the final approval. Final approval
9 is not the place where that language -- it
10 should be put in place if it's going to be a
11 new permit condition. It wasn't a new permit
12 condition, it's a general condition of the
13 town. You may ask the question why was that
14 condition put in the permit, I think you may
15 want to ask Mr. Hightower that question -- the
16 approval I should say, why does that condition
17 move forward. I think you'll find that -- and
18 I think it stands to logic, that DHEC simply
19 wanted its records to show that condition
20 carrying forward so that there would never be
21 any confusion as to inspections took place
22 since people were looking at the system. They
23 didn't want that term to get lost in the
24 process, but the term had been there since
25 2011. We believe if the Court were to rule

1 other than to dismiss this case, it would
2 create a deep problem in the process by which
3 permits are issued and acted upon in South
4 Carolina. Governmental entities and other
5 entities need to know that when a construction
6 permit is issued, when an operating permit is
7 issued, if they spend money and take action
8 based on that permit, that that permit will not
9 be reopened later and that the conditions of
10 that permit will not be subject to challenge
11 later. We cited to you the Hubbard case, which
12 is one that involved an analogous situation,
13 it's probably even more attenuated than this
14 one, but it's where the permit condition's
15 issues were decided in the grant of an initial
16 permit for a tattoo parlor. Those conditions
17 were issues related to how close it was to
18 schools and other facilities where there's an
19 exclusion zone for tattoo parlors. That was
20 reviewed and decided when the permit was
21 initially issued, then when it came time for
22 permit renewal, parties tried to raise the
23 question of whether the permit was in
24 compliance with the law. The Court quite
25 properly said no, you can't do that, you have

1 to appeal those issues when they're first
2 decided, when the decision is first made. Even
3 though there's a new renewal process going on
4 here, a second process, that does not allow to
5 raise issues that should have been raised when
6 the initial permit was issued, whether it would
7 decide if a permit was issued. But the general
8 principle is the same, the permit that was
9 issued, permits that were issued in 2011, 2012
10 and 2014 are the operative permits here. They
11 were final, they were unappealed, and therefore
12 there's no grounds to have a contested case
13 about conditions that were imposed in those
14 permits.

15 THE COURT: Thank you, Mr. Zeigler.

16 MR. ZEIGLER: You're welcome.

17 THE COURT: I think you wrapped both arguments ---

18 MR. ZEIGLER: Okay.

19 THE COURT: --- into one.

20 MR. HIGHTOWER: Good morning, Your Honor

21 THE COURT: Good morning.

22 MR. HIGHTOWER: The department joins in the motion
23 for -- that the town of McBee has made with
24 regard of to dismissing this action based upon
25 the fact that the petitioners have failed to

1 state a cause of action and because the Court
2 doesn't have jurisdiction over a final
3 approval. As stated by counsel, the final
4 approval is analogous to when a building
5 inspector goes to a site after you've gotten
6 your building permit to do a final checklist,
7 make sure you did everything, and say yes, you
8 can now get your certificate of occupancy.
9 Well, that's what happened here. In the staff
10 response, which is attached as an exhibit to
11 the town's motion, the department prepared a
12 chronology of facts relevant to the request for
13 a cont- -- excuse me, not a request for a
14 contested case, but a request for a final
15 review conference before the Board, which
16 essentially is the same arguments that are
17 contained in their request for a contested case
18 hearing. And in that, the department notes
19 that in January of this year, the professional
20 engineer hired by the town had certified, to
21 the department, that the construction that was
22 required for the construction permit that was
23 issued by the department in 2012 and the
24 construction permit issued in 2014, that they
25 had been properly constructed in accordance

1 with the requirements of the permit and the
2 specifications that the applicant had provided
3 to the department. And when the department
4 then received this, it went out, it look- -- it
5 conducted an inspection. In this inspection,
6 the department took notes and decided whether
7 or not the construction had in fact followed
8 the requirements of the permit. It did, and
9 they issued a final approval. Now, much has
10 been made in the petitioner's arguments for the
11 rev- -- contested case hearing about special
12 conditions in the final approval, and that
13 these special conditions show that the
14 department had major concerns about the
15 viability of this system and its ability to
16 provide say, inadequate drinking water. Well,
17 that is incorrect. The special conditions, if
18 you -- if the Court would look at, are the
19 exact same conditions that are contained in the
20 permit. As an exhibit to the staff response,
21 the department included the permits, the cover
22 sheets of the permits, the 2012 permit and the
23 2014 permit, and you will see the special
24 conditions are contained there. And as counsel
25 stated, that was the time to have challenged

1 whether or not the special conditions were
2 adequate, maybe they needed more, whether or
3 not the department had done its review
4 properly, whether or not the information
5 provided by the town was adequate. When those
6 permits were not challenged in 2012 and 2014,
7 respectively, they became final. The
8 department only puts those special conditions
9 in the final approval as a convenience for the
10 now permittee, and for the inspector, that the
11 final approval says oh, you have some special
12 conditions. And as noted by the petitioner,
13 these special conditions really are just
14 emphasizing statutory and regulatory
15 requirements that the town already is aware
16 that they have to meet. They're nothing more
17 than that. And so for these reasons, the
18 department believes that the Court would not
19 have jurisdiction. Because indeed, when the
20 department issued its final approval, it made
21 no determination that can be challenged in a
22 contested case hearing. It did not determine
23 whether or not the construction permit
24 parameters were -- had been reviewed correctly
25 or anything like that. All it had looked at

1 was whether or not they complied with the
2 permit that they received. If they -- by law,
3 if a permittee complies with their construction
4 permit, and the department is able to verify
5 that, then they are then able to operate. The
6 department's final approval just acts as a
7 formal notification that yes, you can go ahead
8 and operate. That does not rise to the level
9 of a contested case. And for these reasons, it
10 also means that the petitioner has failed to
11 state a claim upon which any relief can be
12 granted, because they can't challenge what they
13 really want to, and that is the permits that
14 were issued four years ago and two years ago,
15 respectively. And so for all these reasons,
16 the department believes that this Court should
17 grant the town's motion and dismiss this
18 contested case proceeding. Now with regard to
19 the motion for lifting the stay, the department
20 takes no position in this as this is a matter
21 that is -- solely affects the town and the
22 petitioner and the department has no stake in
23 it. Thank you.

24 THE COURT: Thank you, Mr. Hightower. Mr. Lavender?

25 MR. LAVENDER: Thank you, Your Honor. I think that

1 what we have here is an issue of the department
2 turning it's back on the people on the other
3 side of the water meter and ignoring the
4 obvious. Because we're not challenging whether
5 or not the town of McBee constructed the wells
6 according to the construction permit. What
7 we're challenging is whether or not after they
8 were constructed and after they put in new
9 pumps and after they put in filters, whether
10 the department was satisfied that they had
11 sufficient capacity to operate those wells
12 independently of the Alligator supply. Now Mr.
13 Zeigler says well, that doesn't matter because
14 Alligator's legally obligated. But the record
15 is replete with the clear intention of the town
16 of McBee to improve those wells and cease --
17 and in their words in both motions, cease using
18 Alligator water. Well if it is the de- --
19 town's intention to rely on those two wells to
20 cease using water from Alligator rural water,
21 then we believe that A.O. Smith is entitled to
22 the protection by the department of assuring
23 that it does have adequate capacity from those
24 two wells to meet the minimum requirements that
25 the department's regulation says. The

1 department's staff position, it states that it
2 really considered those two wells as an
3 expansion, an additional capacity above and
4 beyond Alligator. When the record in front of
5 the department, including their PDR, including
6 the questions submitted by the staff to the
7 PDR, are whether or not it's adequate, to the
8 contrary of what the time line stated, if the
9 department was looking at nothing more than
10 whether the engineer could certify that the
11 wells were actually constructed in accordance
12 with the drawings in the construction permits
13 from '12 and '14, why were they writing a
14 letter in September of '14, after all three of
15 the permits to which Mr. Zeigler refers, and
16 says that we know what you're doing, but you
17 still got to demonstrate the ability to provide
18 adequate capacity and water that complies with
19 the regulations. But they were asking that
20 after the construction permits were issued..
21 That puts the issue squarely out there for us
22 to receive that assurance. That's what we're
23 concerned about. And the department seems to
24 be clear in saying that they didn't look at
25 that. That they were simply taking the

1 assurance of the engineer that these two wells
2 and the filters were constructed according to
3 the construction drawings. And by the way, the
4 department suggests that the conditions in the
5 approvals to operate were identical to those in
6 -- as Mr. Zeigler refers, in the 2011 permit to
7 operate. Now first of all, the 2011 permit to
8 operate is predicated upon Alligator being the
9 supplier -- primary supplier, and it says that,
10 that the master meter connection in G on that,
11 and these are all exhibits in the record. But
12 it left out a critical, critical sentence, or
13 paragraph actually, several sentences. At the
14 bottom of page three of the permit to operate
15 from 2011, which is Parnell Exhibit H --
16 Parnell's Af -- Exhibit H to Parnell's
17 Affidavit. And this is the paragraph that's
18 left out, and this is the paragraph that
19 essentially says what the department's going to
20 do if Alligator turns the water off and if
21 McBee doesn't have enough water and we shut the
22 plant down. In the event that the town does
23 not need the -- this is in '11, they didn't put
24 it in the 2016 approvals to operate, if they
25 don't meet the capacity requirements then

1 they'll have to submit a corrective action plan
2 within two months of being notified that they
3 don't have adequate capacity. What happens
4 during that two months and what happens during
5 the next two years while they drill another
6 well? We're sitting there fat and sassy with
7 not enough water. And that's why we're here.
8 We're here because all of the facts suggest
9 that it is the town's intention to cease using
10 water from Alligator. Well, we don't wanna be
11 that ping pong ball. We were a good corporate
12 citizen of Chesterfield County from the time
13 we've gotten there, and the record suggests
14 that this relationship is not something we're
15 going to solve. But we believe we do have a
16 remedy to ensure that whomever the ultimate
17 water provider to A.O. Smith should be required
18 by the department to demonstrate before it goes
19 off on it's own if it's the town, Alligator has
20 apparently has already demonstrated that
21 capacity. But if the town goes off on it's own
22 as it has said, as it's engineer has said, as
23 counsel has plead in their two motions, that
24 they intend to cease using Alligator water.
25 Where is A.O. Smith protected? Not two years

1 out in a corrective action plan, but the day
2 they turn the valve. And the day they turn the
3 valve was the day that the department gave them
4 approval to operate the wells. And so we are
5 extremely concerned about that, we are not
6 trying to go back and -- Mr. Zeigler refers to
7 the Hubbard case, I'm actually intimately
8 familiar with it because I handled the first
9 version. But there's a statute that addresses
10 that and the case actually refers to issues
11 can't be renew- -- on the statute can't be used
12 in the renewal, but -- so that's -- that's not
13 relevant. This is an approval. Mr. Hightower
14 suggests that this is not within the
15 jurisdiction of the court because it's merely
16 verification that they constructed in
17 accordance with the plans. Well, it is an
18 approval that is required by statute and
19 regulation, and if it is then it is a decision
20 subject to this Court's jurisdiction. Now
21 whether or not the issues have been plowed
22 before is in issue for trial we believe. But
23 not to kick us out and not let us have the
24 opportunity to be assured that the department
25 has looked at the capacity issue before A.O.

1 Smith, its employees, and its business
2 operations are placed in jeopardy. But all of
3 these documents suggest that this has been an
4 ongoing concern. It goes back to -- back to
5 2007 when the department wrote, and this is in
6 the record, about the sanitary surveys for the
7 town of McBee and the history. They talk about
8 well they don't have the -- Mr. Hightower said
9 well, they don't have to demonstrate viability.
10 But the record is replete with documents,
11 including as back as '07, if you're gonna do
12 your own thing, you've got to demonstrate that
13 it's viable. That's in the '07 letter. So
14 we've got a lot of vacillations here, but the
15 bottom line is who's looking out for A.O.
16 Smith. At the end of the day, if they turn
17 these wells on and Alligator turns their valve
18 off, and as they said in 2013, 2013 letter from
19 Mr. Blackwell, the president, we will
20 physically disconnect. Well, Mr. Zeigler says
21 well that's a breach of your contract. We
22 don't want to wait around for that fight. We
23 don't want to be put in the position of having
24 our business operations and our employees at
25 risk without sufficient water to operate the

1 business when we have an opportunity right now
2 to get that answer. Do we know right now that
3 the two wells are sufficient to meet the
4 redundancy requirement that DHEC imposes before
5 they allow them, then the town, to operate
6 independently and cease -- as the town's
7 describes their intention, cease using water
8 from Alligator. And that's why we're here,
9 we're not challenging whether or not they
10 constructed the wells, the new pumps, added the
11 filters, in accordance with the specifications
12 -- the plans and specifications. We're trying
13 to determine, and we -- and our engineer has
14 said, those two wells with the pump test -- by
15 the way, you put a new pump in and you add
16 filters, you won't know what the capacity of
17 those wells are until after that work is done.
18 It's physically impossible to anticipate ahead
19 of time that work. So, we wouldn't be in a
20 position to know or challenge whether or not it
21 had adequate capacity until after they've
22 demonstrated. But that's why we're here, we're
23 here because the elephant in the room is an
24 alligator in this case, it's turning the water
25 off. And we believe that we are entitled to

1 the protection by the department, the
2 assurances that this water supplier can operate
3 at the beginning with adequate supply and
4 redundant water sources, not after we have an
5 outage. And after the department comes in and
6 says well, you didn't have sufficient -- as
7 they say in their corrective action, if you
8 don't demonstrate that, then -- then you'll
9 have to submit a corrective action plan within
10 two months, and it'll have to have a schedule
11 for achieving compliance. And when we approve
12 the schedule, it'll become a part of this
13 operating permit. That's too late, that's why
14 we're here, that's too late. I'll move right
15 into the irreparable harm and the motion to
16 lift the stay, because I think they've just
17 been merged. We do not believe that the
18 economic harm that is alleged by the town
19 because they went out and borrowed money after
20 the numerous times having been told by DHEC
21 that you're gonna have to demonstrate adequate
22 capacity -- even in September '14, you're gonna
23 have to demonstrate adequate capacity if you're
24 gonna operate on your own. Well, if they turn
25 the pumps on and Alligator turns the valve off,

1 we're irreparably harmed because we have not
2 been protected by the department with adequate
3 assurance because the department's staff
4 position says that's not what they looked at.
5 They looked at it with Alligator, not without
6 Alligator, and they considered these wells
7 expanding the capacity provided by Alligator.
8 And it just goes without saying that the issue
9 is whether or not there's adequate capacity,
10 not whether they constructed in accordance with
11 2012 and 2014 permits. And I'll be glad to
12 answer any other questions.

13 THE COURT: Mr. Lavender. What my concern is, that
14 your client waited. I mean they knew the
15 construction was ongoing, why did they wait
16 until it was completed?

17 MR. LAVENDER: I just -- I missed -- I obviously
18 didn't explain that. Because we didn't believe
19 we had sufficient information on whether or not
20 these two wells can supply that adequate
21 capacity until they were completed and we've
22 seen the records. We've seen the records of
23 those -- of that, and we believe that those
24 records now demonstrate that there's not
25 adequate capacity without Alligator. And

1 again, it wasn't the construction of the wells
2 themselves, it was the subsequent
3 representations too that they're clearly
4 intending to operate separate from Alligator.
5 And it's that critical situation and the
6 approval of the permits to operate with
7 conditions that say you've got to demonstrate
8 you've got adequate capacity. Well why would
9 you approve the operating permit with a
10 prospective requirement to demonstrate you've
11 got adequate capacity, that's the issue. If --
12 if the issue was about adequate capacity, the
13 department, as late as September of '14 and
14 probably more frequently than that, why would
15 you approve the operation of these wells and
16 continue to condition the operation on
17 demonstrating you've got adequate capacity?
18 That should be a precondition of the approval
19 to operate, not a post-condition -- post-
20 operating condition. And that's where we are.
21 We aren't contesting the ability to construct
22 the wells or construct them according to the
23 plans and specifications, we're contesting the
24 fact that the department has now given what
25 appears on the face of the approvals to

1 operate, the town free reign to cease using
2 Alligator water. And we have information, we
3 have the letter from the president of
4 Alligator, I guess you could call it an
5 anticipatory breach -- that Mr. Zeigler says
6 that they've got a contract, they just don't
7 have to buy any water from them. But why
8 should A.O. Smith be jeopardized and it's
9 business operations jeopardized by a condition
10 that gives the ability to fix the problem, to
11 fix the situation after a problem develops.
12 And that's the issue before us, is do we have
13 -- does the department have adequate assurance,
14 not that it was constructed in accordance with
15 plans, but that they have in fact demonstrated
16 adequate capacity from these two wells to
17 satisfy the redundancy requirement in the
18 regulation that we've set out in verbatim in
19 our pleadings. That it's -- that if the big
20 well goes out, if the pump burns up, can the
21 little well supply the highest day's demand.
22 Our engineer says it cannot based on the
23 information he has obtained from the
24 department's files. And that's the question
25 that we're challenging, has the department made

1 that determination. Because the staff position
2 says no, they did not make that determination.
3 They considered this an expansion of their --
4 an addition of capacity above and beyond
5 Alligator. That begrudges the question and the
6 intentions of what the town says it plans to
7 do, and that is cease using Alligator. Whether
8 the physical connection remains, whether
9 Alligator will be obligated to supply that as
10 an emergency is for another day and another
11 forum between those parties. But we don't
12 believe that that question should be put off
13 until after the problem manifests itself, and
14 that's a different issue than challenging
15 simply whether or not the construction -- if
16 the construction had been completed in
17 accordance with the plans in 2012 and 2014,
18 they wouldn't need to be these special
19 conditions on the well approvals. It remains
20 in the operating permit which is a different
21 vehicle than the construction permits and the
22 permits to approve the operation of the two
23 wells. But it seems very odd that those
24 operating conditions would go into these
25 approvals and apply prospectively to

1 demonstrate that you've got adequate capacity
2 later. And there's where we think we are a
3 ping pong ball. And we think that that
4 assurance should be given to the public and
5 this -- and us a customer of a public water
6 supplier, before the problem persists or
7 manifests itself, not afterward and after a
8 corrective action plan is implemented. And
9 that -- it's interesting that that corrective
10 action plan paragraph was not carried forward
11 in the approvals to operate, it was excluded
12 from the whole paragraph on special system
13 conditions that -- that one was left to believe
14 were extracted from the operating permit they
15 put in these construction approvals. So if we
16 -- we just -- we're not trying to reach back
17 and challenge the issuance of the construction
18 permits. What we're challenging today is the
19 approval to operate those wells independently
20 of Alligator. Because we now know, and
21 including in their pleadings, that that's their
22 intention. Including in their PDR, that's --
23 that's the intention. Well, if they need
24 another well they should put their well, the
25 additional well number three that they referred

1 to in the engineer's report, in before they are
2 allowed to operate independently of Alligator,
3 not after the problem manifests itself. And
4 you can't fix the damage to us after the
5 problem exists and we shut down, or somebody
6 gets sick because something happens to the
7 water -- to the quality of the water because of
8 the inadequacy of the wells and a backflow
9 issue. So there are all manner of conditions
10 that could result from one well going out and
11 having inadequate capacity and drawing a vacuum
12 on a system. And we shouldn't have to wait for
13 that. We should have assurances from the
14 department now before that happens, and before
15 these approvals are allowed to go forward and
16 to be implemented. And if there's a fight
17 between Alligator -- and we're in one. But if
18 there's a fight between Alligator and the town
19 on this issue, on whether or not they can
20 operate independently, and Alligator doesn't
21 have to maintain I guess a standby supply, that
22 shouldn't wait for us. If Alligator physically
23 disconnects as they said they have, I guess
24 they can battle it out, but we want to be
25 protected now from this, for the conditions

1 that exist in an independent system that the
2 town says it wants to operate. You can't say
3 -- have it -- I mean we don't think the town
4 can have it both ways. They need to be -- have
5 adequate assurance now that they've got
6 adequate capacity, not after the fact. It's
7 too late.

8 THE COURT: Now Mr. Lavender, your clients
9 ultimately, just clarify for me, what are they
10 looking for? If the department can't give them
11 the adequate capacity assurance that they're
12 looking for, then what is it that you're client
13 wants the ---

14 MR. LAVENDER: I can make that ---

15 THE COURT: --- town of McBee to do?

16 MR. LAVENDER: I can make that real clear. We want
17 that issue determined. It has not been
18 determined. That's what we think hasn't been
19 determined when these approvals were made, that
20 the demonstration by the town that these two
21 wells meet the requirements of the regulation.
22 Which says, and we quoted it, but it -- the
23 redundance requirement, that with the largest
24 well out of service, the capacity of the
25 remaining wells, in this case the other well,

1 pumping 24 hours a day shall exceed the design
2 maximum daily demand. Well that means, in our
3 opinion, the department says it's not defined
4 so invent what you want it to say. Maximum
5 daily demand, to me that's how much water was
6 used on the day that the most water was used.
7 And we have those numbers. Our engineer has
8 looked at those numbers, and our engineer has
9 compared those numbers to the well yields from
10 these two wells. And when you -- and he says
11 when you take out the largest well, the
12 smallest well won't do what DHEC says it'll do.
13 All we're asking is for DHEC to make that
14 determination. They have said that they have
15 not made that determination because they didn't
16 have to, because it didn't apply. Because they
17 were adding capacity above and beyond
18 Alligator. They didn't consider that provision
19 applicable to just the two wells without
20 Alligator. That's what we're asking for.
21 We're asking for that determination to be made.

22 THE COURT: But you have an expert that is prepared
23 to testify if we go forward with the contested
24 hearing, that it is -- it can't happen with the
25 two wells that the town currently has.

1 MR. LAVENDER: We do. And his affidavit's in the
2 record, and he says that.

3 THE COURT: Okay. At that point, if I agreed with
4 you, then what is it that your client wants to
5 happen?

6 MR. LAVENDER: We beli- -- then the department
7 should require that McBee take whatever actions
8 are necessary to achieve that adequate capacity
9 before they're allowed to operate
10 independently. Before, not after, not two
11 years worth of corrective action, that's what
12 we're asking. We're asking for that
13 determination to be made and that requirement
14 to be imposed before the -- in this case,
15 before the -- we're insisting that it should
16 have been made before these approvals were
17 granted, which we believe that the town
18 interpreted as giving them the right to move
19 forward and operate independently. The town
20 suggests that they've got adequate capacity in
21 these two wells. We say they do not, it's a
22 factual issue obviously, but the department has
23 not weighed in.

24 THE COURT: What caused your clients to -- what
25 raised that red flag for your clients to say

1 that -- you know, just what was it? Was it
2 some incident or ---

3 MR. LAVENDER: June of '15 -- 2015. June of 2015
4 when we had to stop production -- and it's been
5 written about in the reports, June of 2015 they
6 lost pressure, they had a line -- the town had
7 a line break. We don't know what the cause of
8 it was, we've read their version of it, we
9 don't care. But the fact is that the plant had
10 no water pressure, brought in water for its
11 employees, and we began in earnest looking into
12 these records. We engaged an engineer, made a
13 request to find the records from the
14 department, resulting -- which we, you know, we
15 looked at these other issues. We didn't even
16 know that the approvals to operate had been
17 made until the day they were issued. So that's
18 what brought our client's interest to a head.
19 So this an international company that makes
20 water heaters all over the world, they've got
21 a nice facility that's been there a long time
22 in McBee surprisingly. And they want it to
23 continue operating. They lack the ability to
24 expand, but there's not adequate capacity for
25 that either. But we're concerned about the

1 adequate capacity if the town of McBee operates
2 independently of Alligator. And we believe
3 that that approv- -- these approvals are
4 interpreted or will be interpreted to allow
5 that to occur and nobody's looking at the big
6 issue, which we have rai- -- which we are
7 raising, that determination about adequate
8 capacity for just these two wells should be
9 made now and not when it's too late. And our
10 engineer says the numbers don't add up, it
11 would take another well. And their engineer
12 suggests that as a possibility too, and they
13 talk about a new well in their PDR, well number
14 three. But they don't have well number three,
15 and that would take a permit, and drilling, and
16 testing while something else could happen. If
17 they're operating independently of Alligator,
18 and they don't -- and that's what that
19 condition and the operating permit says: Well
20 if you find out after the fact that you don't
21 have adequate capacity, then you've got to
22 submit a corrective action plan. It's too
23 late, we want the assurances now that there's
24 adequate capacity when the -- if, if the large
25 well goes down, that the small well can keep

1 everybody on the system, not just A.O. Smith.
2 The town suggested A.O. Smith is 60 percent of
3 it's customer base demand. Well, we ought to
4 be entitled to more protection than that. And
5 the department owes that to the public. And
6 they owe it to the public before they determine
7 that they don't have adequate capacity, and
8 before they have to implement a corrective
9 action plan. That should be a catastrophic
10 remedy, not a routine condition in a permit.
11 You should have adequate capacity before you
12 start operating independently, and that's the
13 risk and the harm that we've -- that our client
14 fears. From Madison, Wisconsin to McBee, they
15 are really extremely concerned. And they do
16 not think that they're -- that they're plant
17 and their employees should be jeopardized by an
18 interpretation that truly ignores the obvious,
19 the obvious being that it is the town's
20 intention to operate independently of
21 Alligator. I don't know how many times they
22 said that in their pleadings and in the
23 reports, and how many times the department
24 acknowledged that if that's what your intention
25 is, then you've got to demonstrate adequate

1 capacity. When is that gonna occur? Whatever
2 point that is, it should be before we run out
3 of water again. And it's not reaching back to
4 2012 and 2014 permits that simply allow them to
5 construct -- add pumps and tanks and filters.
6 They may very well have done that, we're not
7 challenging whether or not they did all that
8 according to the plans and specifications.
9 What we're challenging is the inadequacy of the
10 department to have made the capacity
11 determination before these approvals to operate
12 and made -- and not condition them upon the
13 capacity determination. And that's a different
14 animal. And I'm sure I'm beating a dead horse.

15 THE COURT: Mr. Zeigler?

16 MR. ZEIGLER: Thank you. Let me begin by giving the
17 Court a little more background on this. Mr.
18 Lavender referred to June of 2015, and that was
19 a very interesting time. In the record is a
20 letter from 2013 from the town of McBee
21 indicating that it was going forward to
22 refurbish its wells and to be in a position to
23 cease buying water from Alligator. McBee has
24 never said that they are going to cut the valve
25 off, Alligator has said that. McBee hasn't and

1 isn't planning to, and I think Mr. -- anyone's
2 confused about that fact we're happy to have
3 the town give us whatever official
4 pronouncement is necessary to say they intend,
5 I think it's already in the record, to hold
6 Alligator to its contract, and that's
7 important. And Alligator of course is subject
8 to DHEC jurisdiction. If Alligator decides to
9 break its relationship, if it decides to
10 abandon or to renege on its contractual
11 obligations, DHEC has a lot to say about that
12 because that's a matter of operating a water
13 system that DHEC has complete authority over.
14 So if that happens, the idea that somehow the
15 town of McBee will go dry because Alligator
16 isn't there never could happen with DHEC with
17 having its regulatory requirements, and it
18 won't happen because -- I'll talk about that in
19 a second. The wells are perfectly adequate.
20 But lets go back to June of 2015, what
21 happened? After the letter from McBee, we
22 believe Alligator went to A.O. Smith and said
23 we'd like to take you as a customer. We want
24 to -- it's in the ---

25 MR. LAVENDER: Your Honor, I don't think those facts

1 are in the record, and there's no -- there's no
2 -- other than some speculation by the mayor.
3 And I just object to some characterization that
4 my client colluded with anybody.

5 MR. ZEIGLER: Well our affidavits are there, you're
6 welcome to read them. Here's what we know
7 happened. The town woke up one day and there
8 was someone building a line to their biggest
9 customer. That day was in June. The town said
10 we have built our system around A.O. Smith,
11 we've built a water tank right by their plant
12 when they came here to give them fire
13 protection service, we have a well for them,
14 what's going on? Turns out we find out they've
15 signed an agreement for highly discounted water
16 service from Alligator. We put that in the
17 record ---

18 MR. LAVENDER: I hate to interrupt, I apologize Your
19 Honor, but I don't believe there's an agreement
20 in the record and we would say that our client
21 is unaware of any signed agreement with
22 Alligator.

23 MR. ZEIGLER: We have -- well there is an agreement,
24 whether it's signed or not, it's certain --
25 we've got that agreement, we'll be happy to

1 provide it to you. In any case, there was
2 construction going on ---

3 THE COURT: Mr. Lavender, I can understand all your
4 objections, but it helps me to just get some
5 understanding of what's going on here.

6 MR. LAVENDER: I apologize, Your Honor.

7 THE COURT: I'll be honest with you, when I reviewed
8 the file I came away with a lot of questions
9 about just the ---

10 MR. ZEIGLER: So McBee ---

11 THE COURT: --- what's going out here.

12 MR. ZEIGLER: McBee, first they heard that their
13 biggest customer's leaving was when they saw
14 the construction crews in June. So McBee went
15 to the -- to their local counsel, town counsel,
16 and have him file a lawsuit saying under a
17 particular Federal statute, 1926(b), A.O. Smith
18 can't leave. There's a provision in the
19 Federal law that says that if a customer is
20 being served by an entity that's got USDA
21 loans, that customer can't be taken away by
22 another entity. That lawsuit was filed -- the
23 day after the lawsuit was filed was when the
24 events of June took place, within a day or two
25 of it, and I may be wrong as to whether it's 24

1 hours, 48, 72. But almost immediately after
2 that lawsuit was filed this mysterious water
3 break took place. Now what's really
4 interesting about this, this catastrophic loss
5 of service, at that point the town was not
6 operating its wells. Alligator was providing
7 all the water service to the town. If there
8 was a loss of water service to anyone, it was
9 because Alligator caused that to happen. They
10 had control of the valves, the pumps, and the
11 pressure. The leak that was being complained
12 of was a leak in pipe you can pretty much put
13 your hand -- your finger around that was on the
14 other side town. It was less water service
15 being coming out of that than if you were to
16 flush a hydrant. But somehow this causes
17 terrible concern that is now being put before
18 the Court as having caused A.O. Smith to be
19 concerned about service from McBee. But in
20 fact, A.O. Smith had already spent a tremendous
21 amount of money building this line and in some
22 sort of arrangement I understand with
23 Alligator, to take service from Alligator. So
24 the events of June, this water pressure, is a
25 pure red herring. It has nothing to do with

1 the considerations. We believe this is a
2 commercial case. That A.O. Smith has cut a
3 better deal, likes a better -- likes service
4 from Alligator, and is therefore doing all it
5 can to interfere with McBee being able to
6 establish its system and is -- it is doing for
7 this purpose.. Now, let's talk a little bit
8 about what the relief is according to the grant
9 here. There are two permits. One is to
10 operate a well that's got a bigger pump on it
11 than it used to have. The other is to operate
12 a GAC filter system. All the court can do is
13 say you can't operate the filter system and you
14 can't operate the well. So the argument A.O.
15 Smith is making is completely contrary to the
16 relief they're seeking. The relief they're
17 seeking is we want less ability to produce
18 water from McBee and we want to cut off the
19 ability to make that water hyper-pure. Why
20 would they do that? It really is an
21 interesting question to ask. They're doing it
22 because they believe that if they can stop
23 those wells being turned on, they can stop
24 Alligator from violating it's contract. So the
25 real purpose of all this is just to use this

1 Court to be sure that Alligator continues to
2 provide service to the town of McBee. That's
3 the only outcome that can come here. The
4 permits that were issued here were for a
5 limited purpose, a very specific purpose. That
6 purpose was to put in place a well and to put
7 in place a carbon filtration system. Not a new
8 well by the way, just to increase the capacity
9 of a well. The permit to operate those
10 facilities has already been -- I mean that's
11 2011. The only specific issue before this
12 Court is whether the well improvements and the
13 GAC filter system comply with the permits that
14 were previously issued. If there was some
15 issue about capacity, and we don't believe
16 there is one or should be one here, it should
17 have been presented by A.O. Smith back in 2012
18 and 2014. There has been plenty of dialog
19 between DHEC and McBee about capacity issues
20 and what their capacity rights are. All the
21 permit conditions say is that if you're going
22 to go independent of Alligator, you've got to
23 be assured that you can meet those permit
24 conditions. Well, we have submitted an
25 affidavit from our engineer laying out in

1 chapter and verse that the wells in question
2 are fully sufficient to do that. The well
3 number 1 pumped at 24 -- excuse me, well number
4 1 pumped at 24 hours a day is 288,000 gallons
5 a day. Average water usage for the town is
6 230. A.O. Smith, as a manufacturing entity,
7 has a shift worker. I believe A.O. Smith uses
8 a -- uses most of it's water in hydrotests --
9 hydraulically test -- hydrostatically test it's
10 water heaters. That's a fairly -- that's a
11 constant number. That doesn't go up and down.
12 It's not a big -- it's not a big deal. There
13 may be some language saying or something this
14 engineer is saying concerning, well there's
15 been this big peak on one day. Well what
16 happens, of course, is if Alligator wants to
17 create a peak, and Alligator runs the system
18 down, they just run down the level in all the
19 tanks and then pump the tanks up, as well as
20 filling the town's needs in one day. So they
21 can artificially inflate those numbers anyway.
22 And we believe those numbers are artificially
23 inflated. The point is, if there were a
24 dispute about that, it should have been brought
25 to DHEC in 2011 and if not in 2011, in 2012 or

1 2014, not once the construction is done and
2 you've got the permits. DHEC has said in its
3 conditions, we are putting you on a notice, as
4 is the case for every water utility in South
5 Carolina, that you've got to have adequate
6 capacity. Be sure whatever happens in the
7 future you have adequate capacity. DHEC
8 monitors these water systems. DHEC is in
9 regular communication with the engineers for
10 McBee. McBee has done the pump testing that
11 Mr. Lavender is talking about. McBee has
12 determined that it's possible, in fact, to
13 increase the production of these wells by over
14 100,000 gallons a day. That is what is being
15 discussed with DHEC right now. If DHEC decides
16 that there is a need for additional capacity on
17 the McBee system, DHEC can, at any point, bring
18 McBee in and say, you need to do this or we'll
19 put you under a consent order, we believe
20 you're not meeting the regulations. That's the
21 venue if there is one to do this. But there's
22 no need for that because McBee is in constant
23 contact with DHEC and DHEC understands the
24 capacity of the McBee system. What's happening
25 here is an attempt, at the last minute, to use

1 these final approvals to try to stop McBee from
2 going forward with its plans so that A.O. Smith
3 can implement it's reduced price contract, as
4 we understand it, with Alligator for water
5 service. A fact which would cripple the town
6 system because something of the order of 60
7 percent of its revenues and 60 percent of its
8 -- of its service is to A.O. Smith. It would
9 put the town in a terrible position. And so --
10 I think Alligator understands that. That's one
11 of the reasons Alligator is trying to take the
12 service away. But we can't be in a position
13 where a final approval, a certificate of
14 occupancy, a final authorization vis- -vis a
15 construction permit, is used in this manner.
16 It's creates uncertainty for every entity
17 that's out there. If there's a problem with
18 capacity, at any point on any water system
19 anywhere in South Carolina, DHEC has the power
20 to handle it. Appeals of permit of final
21 approvals is not the place to raise those
22 issues. If there were a place to raise those
23 issues, they should have been raised either in
24 2011, 2012, or 2014. It's simply too late in
25 the circumstances. It would throw the entire

1 process of permitting and regulation into
2 confusion if this Court were to rule that every
3 permittee has to understand that after they've
4 invested hundreds of thousands, or in the case
5 of the City of Columbia, hundred of millions of
6 dollars in their facilities when they come to
7 get their final approvals, all the issues that
8 were raised that weren't decided to someone's
9 liking can be brought back before the Courts.
10 That is not the law of the State I believe,
11 Your Honor.

12 THE COURT: Mr. Zeigler, has the town ever operated
13 the system?

14 MR. ZEIGLER: Yes, ma'am. The town operated the
15 system -- the town operates the distribution
16 system today.

17 THE COURT: Okay.

18 MR. ZEIGLER: The distribution system, the town's
19 distribution system, was completely redone with
20 USDA loans back in the early 2000s. It is a
21 first grade system. The town borrowed
22 \$4,000,000 for 400 some odd customers. So it's
23 about 100 -- about \$10,000 a customer was
24 invested in the system. They did not redo the
25 wells at that time because all the water was

1 being supplied by Alligator. And so the town
2 has been operating the system for some years
3 now. They have a couple of professional
4 services, a professional engineer, and a
5 professional operations company that operates
6 smaller water systems for towns around --
7 around the state that operates a system and
8 provides the oversight and the maintenance of
9 the system. They have contractors that are on
10 call to provide those sorts of services. So
11 they have -- they have a very solid operating
12 system in place at this point.

13 THE COURT: Okay. What I wanted to know, have they
14 -- have they actually provided water service to
15 customers?

16 MR. ZEIGLER: Yes. They are -- they're not
17 providing -- except for a brief period of time
18 when they turned the wells on prior to a --
19 prior to this case being filed. They provide
20 all of the service to the 440 and some odd
21 customers in town, plus A.O. Smith and a few
22 other industries. It is their operations
23 people, their billing, their O and M. So they
24 are -- they're up and running and have been for
25 some time in that capacity.

1 THE COURT: Thank you. Mr. Hightower?

2 MR. HIGHTOWER: Your Honor, the petitioner's response
3 is very telling. Mr. Lavender explained about
4 their concern with whether or not the system --
5 the operation of the system can meet State
6 requirements. The department issued the
7 operating permit to the town of McBee in 2011.
8 And that was based on a preliminary engineering
9 report that submitted to the department, I
10 believe it was, December 10th, 2010. And in
11 that preliminary engineering report the town
12 stated that they might, in the future,
13 determine that they would not purchase anymore
14 water. Now that was their ability to do that.
15 And based on the information given to the
16 department, department's approved it. That
17 approval is not here. The final approvals to
18 place into operation that are being challenged
19 here have nothing to do with the 2011 permit.
20 Rather, they have to do with two construction
21 permits. As Mr. Zeigler stated, one was for
22 refurbishing one of the wells and the other one
23 was for putting on a granulated activated
24 carbon filter system on, I believe, a second
25 well. Now those issues have nothing to really

1 do with the operation. The fact that the
2 department put in its special conditions a
3 standard condition which is, every single water
4 system in the state must be able to meet its
5 capacity and flow requirements, the fact that
6 the town of McBee might, and again it's very
7 important it might, decide that's it's no
8 longer going to get water from Alligator is not
9 an issue that is before the department. It was
10 not before the department in 2012, 2014, or
11 2016. It hasn't happened. As Mr. Zeigler
12 said, there's litigation going on in the
13 Circuit Court that deals with this -- deals
14 with the contractual matters that they have
15 with Alligator. The department has nothing to
16 do with that. The petitioner says, well it
17 should have assurance. Well, right now, there
18 is adequate water. Alligator is providing the
19 water. The town actually is not even using the
20 wells. When they use the wells, until the
21 litigation is complete in the Circuit Court,
22 they're probably going to still be getting
23 water from Alligator. So you have a situation
24 where the petitioners are seeking from the
25 department to make a decision which it has not

1 had to make because there has been no
2 definitive statement, yes, this is going to
3 happen. We hear about this anticipatory
4 breach. Well, depending on what the litigation
5 comes out in the Circuit Court, that may or may
6 not occur. What we are here today is solely
7 about the final approval to place into
8 operation two construction wells. Or I should
9 say, to place into operation two wells that had
10 work done on them pursuant to construction
11 permits. And as Mr. Lavender said, they're not
12 challenging whether or not the department's
13 determination that they did the work is
14 correct. Well if they're not challenging that
15 aspect, that's the only aspect that conceivably
16 someone could challenge in a final approval,
17 then they are necessarily going back into the
18 past to 2012 and 2014 to say, well at that time
19 the department knew or should have known that
20 the town was or is going to cease receiving
21 water from Alligator and should have done these
22 calculations and evaluations to determine
23 whether or not there would be adequate flow.
24 Well, that time to make that type of challenge
25 passed. It passed years ago. And there is no

1 way that they can revive that with any claims
2 that they could have had at that time by
3 seeking to do now in the final approval. The
4 department did not make any real determinations
5 here other than getting information, conducting
6 the inspections, saying yes they did what they
7 did what they said were going to do with regard
8 to constructing the wells and the filter
9 system, and that's it. So -- and it's
10 important that this court understand that if
11 the petitioner is correct, the final approvals
12 would always be able to be challenged, then you
13 would have a very unusual system that would not
14 be workable to the department. Because you
15 would have an ability for someone to challenge
16 the permit when it's issued, get determination
17 then, and then when the final approval comes,
18 then challenge it again or a different party
19 challenging it ostensibly going back and
20 saying, well, the first Court got it wrong,
21 let's look at it again. You would never
22 finality. You couldn't. The department would
23 never be able to issue permits as Mr. Zeigler
24 said municipalities, in fact private companies
25 or individuals would never have any certainty

1 if you allow final approvals to be challenged
2 such as this. So for all these reasons the
3 department believes that this case should be
4 dismissed because there is, first of all, no
5 right to challenge a final approval for a
6 permit where there was an opportunity to
7 challenge that permit. And that's what this
8 type of permit here, just in case there's other
9 approvals out there, we're talking about
10 approvals that would come under the bureau of
11 water and its drinking well water -- excuse me,
12 drinking water program. But even if you did,
13 they haven't stated a claim because what Mr.
14 Lavender very eloquently was arguing was issues
15 that more properly should have been considered
16 and challenged with regard to that operating
17 permit. And the permits that are here are not
18 operating permits, they're merely construction.
19 So they are limited. They're limited to did
20 you do the work, the construction as required
21 in that permit. Nothing more, nothing less.
22 How you operate the system is a totally
23 different situation. That is why letters or
24 even in the special conditions it says, well if
25 you're going to really disconnect from

1 Alligator then you need -- at that time you
2 would need to show that you can maintain the
3 required flow. But again, this is a
4 construction permit. Nobody, when they were
5 reviewing, needed to look at that. Whether the
6 town of McBee only uses the wells, puts in a
7 third well, maintains Alligator or finds
8 another supplier, all of that is how they
9 operate it, not whether or not the well was
10 constructed correctly and is working correctly,
11 and whether or not the filter was installed
12 correctly and is being maintained correctly.
13 So, for all these reasons the department
14 believes that you should grant the town's
15 Motion to Dismiss.

16 THE COURT: Okay. Mr. Hightower?

17 MR. HIGHTOWER: Yes, I'm sorry.

18 THE COURT: The capacity issue.

19 MR. HIGHTOWER: Yes.

20 THE COURT: Now you're -- that's something that was
21 not -- the department didn't look at that, the
22 adequacy of the system to provide adequate
23 water to all of its existing customers?

24 MR. HIGHTOWER: Well they did look at that when they
25 looked at the preliminary engineering report

1 back in 2011. And they made a decision at that
2 time.

3 THE COURT: Okay.

4 MR. HIGHTOWER: Now, was that decision correct or
5 not? I assume it's correct. No one challenged
6 it so based on the information that was
7 available at that time, it was correct. But
8 that is the operating permit. These are very
9 specific in stating that they are construction
10 permits. And these permits came after the
11 operating permit. And again, this information
12 is contained in the department's staff response
13 to A.O. Smith's request to the department's
14 board for final review as part of the
15 administrative portion of challenging the staff
16 decision. And it notes in there the fact about
17 the operating permit because A.O. Smith has
18 always blended in the operation with the
19 construction. And you can't do that. They are
20 separate matters. And that is why the -- you
21 have these special conditions that say, well if
22 you're going to go it alone, well, maybe then
23 you have to show that because at the time, in
24 2011, Alligator was providing water. And the
25 information that was provided to the department

1 at that time was that in fact they wanted to
2 operate without Alligator. And the department
3 made a determination. And that determination
4 could have been challenged in this forum but it
5 wasn't, so. Does the Court have any other
6 questions with regard to operation or
7 construction or any other matter.

8 THE COURT: I don't. Thank you, Mr. Hightower.

9 MR. LAVENDER: Your Honor, I'd like to correct one
10 thing that I said earlier in response to a
11 question you asked about what prompted A.O.
12 Smith's interest in this. And I referred to
13 the June of 2015 line break. And Ms. Hartley
14 so aptly reminded me that even in our pleadings
15 and in Mr. Barron's affidavit, it was in 2014
16 when A.O. Smith began to upgrade it's plant
17 fire protection system that its engineer
18 determined that the town storage capacity was
19 not sufficient to support the upgraded fire
20 system, the fire suppression system. And that
21 at that time A.O. Smith entered into
22 discussions with Alligator about providing
23 water service. So I apologize, it goes back to
24 2014, they were in the process of upgrading
25 their fire protect system. Back to Mr.

1 Hightower's comments about whether or not they
2 -- the department looked at it. And both
3 counsels seem to suggest that they did but I
4 don't think that the record confirms that. But
5 most importantly, in the staff's response that
6 was provided to the board on page four, which
7 is Exhibit One to the town's Motion to Dismiss,
8 in response to one of the questions, and I'm
9 quoting, in addition -- and this is the
10 department's response: In addition, although
11 the town of McBee sought a modification of it's
12 system, the modification was for adding
13 additional sources and not an expansion of the
14 system. Therefore, the modification requested
15 by the town did not trigger the capacity
16 requirements in 6158.2(b). They didn't go
17 there. And they said in their own filing they
18 didn't go there. They haven't made this
19 determination. Now to suggest that the
20 approval to operate is merely ministerial, that
21 issue was addressed in the Amisub case that we
22 cited, 403 South Carolina 576, and it says that
23 a staff decision which is subject to a
24 contested case is one who which DHEC has a
25 legal duty to issue. And regulation 6158.1 and

1 58.2 require written approval to place a system
2 into operation. So the department has a legal
3 duty to issue that approval before it can be
4 placed into operation. And going back to prior
5 to 2000 when the town operated independently
6 with these two wells, and before whatever
7 arrangements led to Alligator assuming
8 operation of the system and providing a
9 separate water source, DHEC wrote the letter
10 that stated, May 25, 2007. And that's Parnell
11 Exhibit -- Parnell Affidavit Exhibit B. But in
12 that second paragraph it says, each of the
13 department's final three sanitary surveys of
14 the McBee system rated it unsatisfactory due to
15 a lack of quantity to meet the system's
16 customer's needs. Well has security issues and
17 distribution system shortcomings. The merger
18 with Alligator led to the resolution of those
19 problems. And then it says in the next
20 paragraph, before McBee can terminate the
21 contract, and this is in 2007 during the course
22 of the relationship between the town and
23 Alligator. Before McBee can terminate the
24 contract, the town must develop and submit an
25 approvable business plan that details how it

1 will be operated as a viable water system.
2 So, I mean, the department was telling McBee --
3 the department -- whatever the department, the
4 sanitary surveys, and the actions that predated
5 the contract between the town and Alligator,
6 they included the issue of quantity because
7 that's expressed to the mayor of McBee in 2007.
8 But it's still back to -- and I've been doing
9 this for 40 years, I hate to say it. But in 40
10 years, and I can tell you that a condition like
11 those in this final approval -- these two final
12 approvals to place into operation is
13 extraordinary. It's extraordinary. And to
14 simply restate a section of the regulation that
15 deals with adequate capacity in an approval to
16 operate seems to me to be shirking this
17 determination to -- at the highest order. To
18 say that you still got to determine that the
19 total developed ground water source can equal
20 to design maximum day demand and on and on as
21 it's quoted in there, it still belies the
22 intent. I mean, when is that determination
23 made? I hear what the parties opposing --
24 proponents of the Motion to Dismiss are saying.
25 I hear that they say it's too late, but the

1 department has been saying after -- in the 2014
2 letter, in the September 2014 letter, after the
3 construction permits. They were still talking
4 about demonstrating the ability to provide
5 adequate capacity and water that complies with
6 the regulation. Now why are they asking those
7 questions? Why are they telling McBee those
8 things if all they were doing was giving them
9 a construction permit? Why are they addressing
10 that issue? When is the engineering
11 determination and demonstration going to be
12 made? And that's what we're asking. If -- if
13 the town is absolutely confident, then have the
14 department make that determination. Remand it
15 for the department to make that determination.
16 We're not here to pick sides. We have a
17 preference, and oddly enough, there's language
18 in the department's PER approval that suggest
19 -- the PER approval -- is this in the record?
20 Exhibit I to Parnell's, I think is it. At the
21 last page, the last paragraph, in the
22 department's own review it says, in comparison,
23 Alligator has the benefit of numerous wells, a
24 large service territory and customer base to
25 fall back on in cases of contamination, one of

1 the big issues in here. The -- this economies
2 of scale is a luxury that McBee and paying
3 customers will not enjoy. We're not picking
4 sides, but the department had some concerns and
5 the department was expressing them even when
6 the approved the PER. Why should the
7 department be allowed to say we didn't get to
8 the demonstration of adequate capacity because
9 that just wasn't before us when they kept
10 asking the question. They kept reminding them.
11 Why did they need to remind them if they
12 weren't going to make that determination before
13 they let them get those wells turned on and run
14 the filters? So, I mean, we're still avoiding
15 the obvious, and that is that this system is
16 intended to be operated independently. If some
17 Circuit Court says that A.O. Smith is going to
18 be a customer -- a retail customer of the town
19 of McBee, so be it. But the town of McBee
20 should have to demonstrate that it can provide
21 adequate capacity that the regulation requires.
22 And that's the department's job to make that
23 determination in advance, not after a problem.
24 And that's the issue before us, is if that's
25 what's there -- now Mr. Zeigler referred to the

1 Circuit Court decision. That case does not
2 present these issues. That case is a legal
3 battle with the contract and a federal statute,
4 7 US C 1926(b), between two parties that have
5 financing from the Federal government that's a
6 statute purportedly protects both from poaching,
7 I guess, for lack of a better description. So
8 those issues will ultimately be resolved. Our
9 client is certainly interested in that outcome,
10 has intervened, and has been granted the status
11 in intervention. We'll place -- we'll put our
12 issues there. I don't believe we're required
13 to be a customer of the town of McBee because
14 we're outside the town limits. And under State
15 law we're an at-will customer. And under State
16 law we could go on our own. So, you know,
17 those are not issues here. Right now we're a
18 retail customer of the town of McBee and we
19 should be provided adequate assurances just
20 like all the other retail customers of -- water
21 customers of the town of McBee: that the town
22 of McBee can meet the requirements of the State
23 primary drinking water regulations before they
24 turn the valve, not after they turn the valve
25 on. And that's why we're here. Not that they

1 didn't construct the pump -- put the pump in
2 right. It's not that they didn't put the
3 filters on, but they did their testing after
4 it. And out engineer says their numbers do not
5 comply with the department's requirements. The
6 department says they didn't get to that
7 question because they looked at it as an
8 expansion. Different issues, not the
9 construction. We're not reaching back. We're
10 reaching in the here and now. Now to suggest
11 that if Alligator decides to turn their valve
12 off that the department can inject itself into
13 their contractual relationship is a whole
14 different territory that I don't know exists in
15 terms of the department's authority. So that
16 was -- that seemed to be Mr. Zeigler's
17 suggestion of the remedy that would be left to
18 us, that the department will keep it from
19 happening. So, you know, have faith. We
20 shouldn't have to wait for that remedy. We
21 should be assured now that that adequate
22 capacity exists. We're not here to stop them
23 from doing it. We don't have that remedy.
24 We're not entitled to that remedy here. We're
25 asking simply that before they do it they

1 demonstrate to the department that that
2 adequate capacity exists.

3 THE COURT: Okay. Thank you.

4 MR. ZEIGLER: May I respond on specific points, Your
5 Honor?

6 THE COURT: Of course.

7 MR. ZEIGLER: Mr. Lavender read from the report that
8 the DHEC staff gave to the board and said that
9 particularly the modification requested by the
10 town did not trigger the capacity requirements
11 set forth in 6158.2(b). And that's true
12 because that's a provision that only applies if
13 you're setting up a new green field water
14 system where it's -- where you're expanding
15 into the territory that's not there before.
16 What the department did do, and they cited it
17 in that provision, is they cited the provision
18 of 58 -- and I've got my papers a little bit
19 confused here, hold on a second. 6158.7(b),
20 which is the provision that applies to existing
21 systems. And that is exactly the language,
22 Your Honor, that's included in the permit
23 condition. But the -- what the agency was
24 saying there was that there is an ongoing
25 continuous responsibility for each water system

1 in South Carolina to meet those capacity
2 requirements that are found in 6158.7. And by
3 the way, if you look at the introductory
4 paragraphs to the -- to the staff report, they
5 point that out very clearly that the
6 requirements of 6158.7 apply to the operation
7 and maintenance of water system and water
8 system capacity determinations for existing
9 systems. That's page two of the staff report.
10 So the staff is saying, sorry A.O. Smith,
11 you're citing the wrong regulation. The
12 regulation that applies, which has this
13 substance to it of the 16 hour and the 24-hour
14 tests, that regulation is a different
15 regulation. But they were applying the right
16 regulation. And that's a regulation that
17 appears there in the -- in the permit. That
18 regulation is an interesting -- has an
19 interesting fact, which is, it's not simply
20 limited to permits. Obviously if you come into
21 a permit and you're permit is in violation of
22 ongoing regulations, then your permit should be
23 denied. And if there was a problem with that
24 then that was a problem that should have been
25 raised in 2012 or 2014, not at this point. But

1 the point is that that regulation, that
2 requirement, is a continuing requirement. And
3 that's why I point out McBee and DHEC are in
4 constant communication about the capacity of
5 their system and whether it meets those
6 requirements. And DHEC has the right at any
7 point, with or without a formal proceeding, to
8 investigate whether McBee is complying with
9 those requirements. And to make McBee comply
10 with them if it doesn't. So this is not a
11 point where you've got to either raise this
12 issue now in this context or -- or you never
13 have a right to discuss these things. You
14 can't raise it here because this is a
15 construction permit final approval. And it's
16 just not part of this case. But DHEC has
17 continuing, ongoing regulatory responsibility
18 and authority over McBee to ensure that that
19 provision is being enforced. What we have
20 again is an attempt to use the ministerial act
21 of issuing a final approval to try and stop
22 McBee from putting in place two beneficial
23 improvements to its system that have great
24 benefits to all the customers, including A.O.
25 Smith. A.O. Smith wants to stop that from

1 happening because they believe if they stop
2 that from happening, they can stop McBee from
3 beginning to generate its own water and that
4 would give McBee -- require McBee to stay on
5 the Alligator system. McBee believes that it
6 has and will continue to have all of the
7 capacity required to provide A.O. Smith and all
8 of its customers with quality, reliable, and
9 high quality service. It is unfortunate that
10 they made -- that they can not continue their
11 relationship with Alligator. But the reasons
12 for that are explained in the affidavits you
13 have and I think are very cogent reasons. The
14 town can not continue to put its fate as a
15 town, its growth, its development, in the hands
16 of an entity in which it has so little trust
17 and respect as it does Alligator. And that's
18 what at issue here. So they're moving forward
19 to do that.

20 THE COURT: Mr. Zeigler.

21 MR. ZEIGLER: Yes, ma'am.

22 THE COURT: Or Mr. Hightower, you both have referred
23 to the final construction permit.

24 MR. ZEIGLER: Final approval.

25 THE COURT: Final approval. Now is it for the

1 construction, the final approval, or it's the
2 -- what I'm looking here -- looking at here is
3 a final approval to place into operation. Are
4 those two different documents?

5 MR. ZEIGLER: It's the final approval to place to
6 place into operation of the two -- two things:
7 One is the granulated activated carbon system
8 ---

9 THE COURT: Right.

10 MR. ZEIGLER: --- which, by the way, covers both
11 wells. Both wells feed into it. So all the
12 water goes through that system. The other is
13 the improved pumps and other improvements on
14 the well number two. And so that is basically
15 the post-construction inspection of the matters
16 that were permitted in the 2012 and 2014
17 permits.

18 THE COURT: So is there a document titled, Final
19 Approval on Construction?

20 MR. HIGHTOWER: No, Your Honor.

21 THE COURT: No, okay. I gotcha.

22 MR. HIGHTOWER: This is the final approval and it
23 says you can operate because, yes, you
24 constructed it, so now you can put it into use.

25 THE COURT: I got it. I just wanted to clarify.

1 MR. ZEIGLER: We use that language because it refers
2 to construction permit.

3 THE COURT: The construction permit. Gotcha.

4 MR. ZEIGLER: The final approval under the
5 construction permit.

6 THE COURT: Okay.

7 MR. LAVENDER: Your Honor, if I might have -- and
8 it's not intended to be one last word, but I
9 have one correction from both counsel that I
10 feel obliged that should be made because I
11 think Mr. Zeigler also tried to reiterate that
12 the department's staff position was correct
13 when it asserted that the provisions of
14 58.7(b)12 didn't apply to their decision. But
15 the department -- the quote that I gave you was
16 from the language in that response on page four
17 from the staff which determined the
18 modification did not trigger the capacity
19 requirements set forth in 6158.2(b), as in boy.
20 And I would crave reference to the
21 applicability provisions of section (a) in
22 6158.2, which says that this regulation applies
23 to all new construction and all expansions or
24 modifications of existing public water systems.
25 So, we again say that the capacity

1 determination should have been made by the
2 department.

3 THE COURT: Okay. Okay. Is there anything
4 additional that either party needs to share
5 with me that might make this -- provide me with
6 a little more information that I might need to
7 make a decision on the -- in the matter? And
8 if not, we are going to adjourn the hearing.
9 And I will be notifying, probably within the
10 next ten days on how I am going to -- I'm
11 ruling on this matter. And we'll ask -- we'll
12 email -- and I may ask for proposed order from
13 both of you all. That might give me a little
14 more clarity. Because this is rather -- it's
15 a rather convoluted issue that I'm not finding
16 has been addressed before. That being said, I
17 will be in touch with you all within the next
18 ten days. And the hearing is adjourned and
19 thank you all for coming.

20 (There being nothing further, the hearing concluded
21 at 11:55 a.m.)

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

A.O. Smith Corporation,	)	Docket No. 16-ALJ-07-0082-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Town of McBee,	)	<u>TOWN OF MCBEE'S MOTION FOR</u> <u>RELIEF FROM STAY</u>
	)	
Respondents.	)	
	)	

The Town of McBee (the "Town") has invested approximately \$250,000 in well improvements and other water system improvements as part of a six year effort to reclaim the Town's water system from a renegade, unregulated, rural water company, Alligator Rural Water and Sewer Company ("Alligator").¹ The Town has made these investments on the basis of permits issued by the South Carolina Department of Health and Environmental Control ("DHEC") in November 2012 and June 2014. The time to appeal those permits has long expired. The Town invested its \$250,000 in reliance on the finality of these permits.

In January of this year, A.O. Smith Corporation, a long-time customer of the Town, acting in concert with Alligator under a secretly negotiated water sales contract at below market prices, intervened in the Town's DHEC permitting dockets to challenge matters that had been decided in 2012 and 2014. The purpose of that intervention is clearly to injure the Town by preventing it from cutting its payments to Alligator and receiving the benefit of its investment in new facilities.

¹ A full description of the Town's difficulties with Alligator can be found in the attached affidavits of Joey Oliver (Exhibit 1), Mayor John Campolong (Exhibit 2), and Joseph McGougan (Exhibit 3).

FILED

MAR 17 2016

The Court should dismiss Petitioner's time-barred request, as discussed in the Town of McBee's motion to dismiss, which is being filed contemporaneously with this motion. In the interim, the Town of McBee respectfully moves for an expedited order lifting the automatic stay that precludes the Town from putting its newly refurbished water works into operation.

BACKGROUND

This case involves the Town of McBee's efforts—over the course of more than six years—to operate its own sources of drinking water and to cease using water purchased from Alligator. The timeline of the Town's work to operate its own water system, and DHEC's consistent approval of those efforts, is fully set out in the attached Statement of DHEC Staff Position (Exhibit 4), and is summarized as follows:

In December 2010, the Town submitted a Preliminary Engineering Report to DHEC regarding this plan to transition the Town's water supply. In June 2011, DHEC issued a Public Water System Operating Permit that authorized the Town to change its water source. No one challenged that permit.

In November 2012, DHEC issued Construction Permit 28475-WS to the Town that authorized it to modify a well that would be used for the Town's water system. No one challenged that permit.

In June 2014, DHEC issued Construction Permit 29779-WS to the Town that authorized it to make additional modifications to its wells. No one challenged that permit.

In January 2016, DHEC received a letter from an engineer certifying that the Town had completed the construction work authorized by the prior permits and that the wells and the Town's water system were ready to become operational. DHEC then issued its final approvals for the Town to place its system into operation.

Only then, more than six years after the Town began seeking this approval, did anyone speak up in opposition. A.O. Smith, who is one of the Town's water customers, requested that DHEC re-review the entire process. The Director of DHEC's Drinking Water Protection Division rightly rejected A.O. Smith's objections as both "time barred" and "without merit" as they are not supported by the law, and the facts and circumstances relevant to this matter." (Ex. 4, Statement of DHEC Staff Position at 6 (Feb. 12, 2016).)

A.O. Smith has now requested a contested case hearing before this Court. Such a request arguably stays operation of DHEC's final approval. S.C. Code Ann. § 1-23-600(H)(2). Accordingly, out of an abundance of caution and in order to protect its customers from further abuses of the water system by Alligator, the Town moves for the stay to be lifted pursuant to South Carolina Code § 1-23-600(H)(4) and Rules 16 and 19, SCALCR.

STANDARD OF REVIEW

When a party seeks relief from an automatic stay, the Court "shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted." S.C. Code Ann. § 1-23-600(H)(4). If either of these circumstances are met, "then the Court is statutorily required to lift the stay." *S.C. Coastal Conservation League v. S.C. DHEC*, Docket No. 15-ALJ-07-0369-CC, 2015 SC ENV LEXIS 31, at *3-4 (S.C. Admin. Law Ct. Nov. 4, 2015); *see also id.* at *3 ("Both good cause and irreparable harm are not required but only one or the other.").

ARGUMENTS AND AUTHORITIES

- I. There is good cause for lifting the stay, as the Town must be able to independently supply its customers with water to avoid systemic abuses from its current supplier.**

Whether good cause exists for lifting an automatic stay must be examined on a case-by-case basis, and a movant need only show that it has a "legally sufficient ground or reason" for seeking relief. *Hill v. S.C. DHEC*, Docket No. 08-ALJ-07-0183-CC, 2008 SC ALJ LEXIS 210,

at *6 (S.C. Admin. Law Ct. July 10, 2008) (quoting Black's Law Dictionary 692 (6th ed. 1990)). The basis for such a motion must extend beyond the inconveniences that are generally encountered by delays in a permitting process. *S.C. Coastal Conservation League*, 2015 SC ENV LEXIS 31, at *9.

This case readily meets this minimal threshold. The Town of McBee currently supplies its customers with water drawn from the Alligator Rural Water and Sewer System. This situation is no longer tenable, and is what prompted the Town to seek to operate its own independent system. As the attached affidavits describe, Alligator employees appear to have disrupted the Town's ability to provide water service to its customers, ostensibly as part of a calculated effort to create a narrative that the Town is not a capable provider.

The Town's water customers cannot be subjected to arbitrary, lawless behavior of a vendor who is not even before the Court, especially when that behavior could create a water shortage during an emergency, such as a fire. Simply put, lifting the stay is the only way to ensure that the Town of McBee can reliably fulfill its core health, safety, and welfare functions as a water supplier. Moreover, continued use of water through Alligator costs the Town approximately \$3,000 per week, most of which it saves if it produces its own water. (Ex. 5, Aff. Terri King ¶ 4.) If it is required to continue purchasing from Alligator, those amounts are money that it will never recover and should not have to expend. For those reasons, the Court should grant this motion.

II. A.O. Smith will not suffer any harm, much less any irreparable harm, if the Court lifts the automatic stay.

In addition to there being good cause for lifting the automatic stay, there is no irreparable harm that will befall A.O. Smith if the Court lifts the stay. Indeed, there will be no harm at all.

An automatic stay should remain in place only in the limited circumstance that the nonmovant will suffer harm that is “actual and imminent” if the stay is lifted. *S.C. Coastal Conservation League*, 2015 SC ENV LEXIS 31, at *22 (quoting *Gracepointe Church v. Jenkins*, Case No. 2:06-cv-1463-DCN, 2006 U.S. Dist. LEXIS 38018, at *9 (D.S.C. June 8, 2006)). Such potential harm must be examined within the context of the specific regulatory structure at issue in the case. *Sisters of Charity Providence Hosps. v. S.C. DHEC*, Docket No. 14-ALJ-07-0332-CC, 2014 SC EVN LEXIS 41, at *11–13 (S.C. Admin. Law Ct. Nov. 5, 2014).

Here, A.O. Smith’s objections to the Town operating its own water system all involve alleged defects in the permitting process under Regulation 61-58, which concluded years ago. That regulatory scheme is designed “to maintain reasonable standards of purity of the drinking water of the State consistent with the public health, safety, and welfare of its citizens.” S.C. Code Ann. Regs. 61-58(A). But none of A.O. Smith’s objections actually relate to any “purity” issues; instead, they relate to “capacity” and “demand” issues. (A.O. Smith’s Request for Contested Case Hr’g at 4–5 (Mar. 15, 2016).)

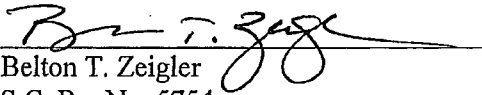
There are no concerns about the purity of the water in the Town’s independent water system, and A.O. Smith has never suggested otherwise. To the extent there are any alleged “capacity” concerns, A.O. Smith will not suffer any conceivable harm because the Alligator water system remains in place and can serve as a failsafe (assuming Alligator suspends its misconduct, which is a concern with or without the automatic stay in place). The Town has a valid contract for water with Alligator, which is not invalidated by the Town’s supplementing Alligator’s water with its own and vice-versa. The Town has no intention of abandoning its rights under that agreement. Accordingly, for this alternate reason, the Court should grant this motion and lift the automatic stay.

CONCLUSION

The sole purpose of an automatic stay is to prevent a contested case from being rendered moot. *S.C. Coastal Conservation League*, 2015 SC ENV LEXIS 31, at *11. There is no risk of that occurring here. For one, the Court does not have jurisdiction to hear A.O. Smith's request for a contested case. But even if it does, the Town can revert back to securing water from Alligator if the Court somehow decides this case on the merits in A.O. Smith's favor. Accordingly, for the reasons explained above and described in the attached exhibits, the Town of McBee respectfully requests that the Court lift the automatic stay in place regarding the Town's permits to operate its water system.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

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Attorneys for the Town of McBee

March 17, 2016
Columbia, South Carolina

Exhibit 1

Affidavit of Joey Oliver

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD
Town of McBee, South Carolina

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AFFIDAVIT OF
JOEY OLIVER
OWNER AND PRINCIPAL,
OLIVER ENVIRONMENTAL SERVICES

Personally appeared before me the undersigned, Joey Oliver, who being duly sworn deposes and states as follows:

1. I am Joey Oliver, Owner and Principal of Oliver Environmental Services, of Ruby, South Carolina.
2. I provide consulting, operating and maintenance services to the Town of McBee's (the "Town") water system. We use outside contractors for larger jobs.
3. I have had this role with the Town for five years and have been DHEC operator of the system since 2012.
4. I currently hold five Class A water and wastewater certifications from the South Carolina Department of Health and Environmental Services (DHEC). I operate water systems on a contractual basis for multiple towns and industrial facilities in the Pee Dee region of South Carolina. I have been in the water and wastewater business for 34 years and am former lead operator of the water and wastewater systems for the DuPont May Plant in Camden, South Carolina.
5. I have firsthand knowledge of the matters discussed in this affidavit.
6. The purpose of my affidavit is to respond to the concerns raised by the Town's largest and most valued customer, A.O. Smith. The first I learned of these concerns was after a meeting between the Town's attorneys and those representing A.O. Smith, which took place on September 3, 2015. These concerns have never been communicated to me or

other members of the team that operates that Town's system before now. This is the first opportunity I have had to respond to them.

7. At the September 3rd meeting, A.O. Smith told our lawyers that they believe that the Town's system has suffered multiple instances of insufficient pressure due to leaks on the system or other operational issues that are the result of the Town failing to maintain its system or operate its reliably. This is not true.
8. The Town has an exceptionally strong distribution system. I understand that in 2002, the Town spent more than \$10,000 per customer to make upgrades to distribution lines and water main lines. It did so using a \$4.5 million grant/loan package from USDA. DHEC officials have told me on more than one occasion that McBee has one of the best small town water systems in the state. As operator of the system, I have found it to be a highly reliable and efficient system.
9. There have only been two water main breaks on the system during the three years I have overseen it. One break occurred in 2015 when a car hit a hydrant. That break was restored without incident. The other was a break that occurred on June 18, 2015 on the Third Avenue 4" line. Apparently, this break was a major point of discussion in the September 3, 2015 meeting, and A.O. Smith has been led to believe that this break caused serious problems on the system and that the Town mishandled the repairs. That is completely untrue.

The Third Avenue Line Break

10. On Thursday, June 18, 2015, I responded to a report of a line break on Third Avenue. The break occurred in a sparsely populated area at the end of our system.

11. When I arrived on site at approximately 5:00 pm, Mr. Glenn Odom, executive director of Alligator Rural Water and Sewer Company ("Alligator") was present taking pictures of the leak site.
12. The break was in a relatively new 4" plastic pipe. We excavated the break and found that a shaft-like object had punched a circular hole of approximately 3/4-inch diameter in the pipe. The hole would be consistent with the hole that would be made if a probe was jammed into the line from above. The force of the blow also crushed the pipe, causing a split that ran along its length for approximately 24".
13. How the break occurred is a mystery. There was no construction or other activity in the area that would explain this happening. The pipe was otherwise in good condition.
14. Alligator was the operator of the Town's system when the Third Avenue Line was installed. The as-built plans which show the location of the cut off valves for this section of pipe are still in Alligator's possession.
15. We used metal detectors to attempt to locate the valve, but were unsuccessful. Alligator's operating personnel told me and our contractors that Mr. Odom told them earlier that day that they would be fired if they helped the Town respond to the break. Mr. Odom drove up to observe our repair efforts repeatedly during this time, but did not assist.
16. The Town's primary maintenance contractor, C&S Construction, was on another assignment that day and was not available to respond to the leak. We called in a back-up contractor, Anderson Construction. Because of the length of the break (24"), it would require slip couplings to repair it. Anderson Construction did not have the right sized slip

couplings. We asked Alligator to assist us by supplying couplings from Alligator's spare parts inventory. Alligator refused.

17. It was now well after business hours. We checked with other local water systems but no one had the necessary parts.

18. As a temporary measure, we fashioned a split-sleeve out of a length of 4" pipe and installed it over the break. This reduced the rate of flow considerably.

19. Before the temporary repair, the amount of water leaking was less than 200 gallons per minute (gpm). The temporary repair reduced the rate to less than 100 gpm.

20. Ordinary hydrant flushing results in a flow rate of over 800 gpm.

21. A leak of this rate would not be expected to cause issues except potentially for customers downstream on the line. This leak caused no issues related to overall system pressure.

22. In any case, I kept personnel at the site all night to ensure the situation remained under control. In the morning, when the supply stores opened, we got the properly sized slip couplings and fixed the pipe immediately.

23. Mr. Odom continued to visit the site to monitor the progress of our repairs. In the morning, when it became apparent that we had the materials needed to complete the repairs, Alligator personnel appeared with the required slip joint from their inventory and copies of the as-built plans of the system showing values not listed on our plans. They told us that Mr. Odom had authorized them to assist us. They then showed us the as-built drawings of the system that included the location of cutoff valves not shown on our plan documents.

24. The Town now stocks its own inventory of sleeves and couplings for all common pipe sizes.

25. Attached as Exhibit A to this affidavit are true and accurate copies of photographs I took of the leak at the time. Note the circular stream of water consistent with the circular hole in the pipe.

26. I have been in the water utility business for 34 years. As indicated above, in my judgment, the leak was discharging no more than 200 gpm before the temporary sleeve was installed, and no more than 100 gpm after it was installed. This was a very minor leak. It could not have caused issues for A.O. Smith or other customers not located downstream of the leak.

Loss of Service to A.O. Smith

27. On Friday, once the Third Avenue break was fixed, we opened hydrants to flush out any sand that may have gotten in the Third Avenue line during repairs. The Town flushes its hydrants quarterly. There is nothing unusual about such flushing. The system is designed for that.

28. While the flushing was underway, I received a call from the Town clerk. She said that A.O. Smith reported that it was without water. That made no sense. The Town's system was fully pressurized. Water was flushing out of the hydrants on the far end of the system just fine.

29. I had my field technician immediately put a valve on the hydrant at Third Avenue and take a picture to record the reading. That photograph is attached as part of Exhibit A.

30. The pressure at the Third Street hydrant was 55 psi. This level of pressure was completely inconsistent with a lack of pressure at A.O. Smith's plant.

31. The A.O. Smith plant is only a few hundred yards from connection to the main 24" line from Alligator which pressurizes the Town's system. The Third Avenue Line is at the

opposite end of our system. If there was pressure at Third Avenue, there had to be pressure at A.O. Smith's meter.

32. I was concerned that Alligator had intentionally cut water service to the Town. I called my counterpart at Alligator and told him I wanted to put my eyes on the Town's master meter from Alligator right then to ensure it was turning. I told him I was on my way to the meter station and to meet me there.

33. Less than two minutes later, I passed the A.O. Smith plant site. I saw my counterpart and Mr. Odom in the yard of the plant.

34. We went to the meter station and we verified that the meter was turning.

35. I have thought long and hard about how service to A.O. Smith could have been interrupted. There was no failure of pressure on the system. The master meter was turning. There was no problem with our line between the Alligator connection and A.O. Smith. Other customers did not lose service. In my opinion, the most reasonable explanation is that something happened to interrupt service at the A.O. Smith meter valve. I do not know how that could have happened other than someone closing the valve.

The Boil Water Notice

36. The Third Avenue break affected service to approximately five customers immediately downstream of the break. Immediately upon discovery of the break, we contacted the affected residents in person. Written notices were left with them or on their doors. I know because I delivered the notices myself.

37. On the morning of June 19, 2015, after the leak was fixed and after I received the call from the Town Clerk about A.O. Smith being out of water, Paula Brown from DHEC

called me. She said that DHEC had just received a call that A.O. Smith 'and others' had lost service and that a boil water notice should be issued. I explained to her that a boil water notice had been issued to all affected residences the night before and that the leak could not have affected other customers. She asked me to issue a second boil-water notice system-wide as a precaution.

38. We began printing the required boil-water notices for distribution to the town hall. Ms. Brown advised us not to bother with hand distribution, but to use the electronic and media notification and alert system which the Town maintains. On her advice, we did.
39. I am not aware of who called DHEC about a loss of service to A.O. Smith and 'others.' I am not aware of any customer other than A.O. Smith reporting a loss of service at this time.

Fire Flow

40. A.O. Smith's lawyers told the Town's lawyers that there have been as many as 20 periods in the past year when levels in the Town's water tanks were insufficient to meet A.O. Smith's fire flow needs and that this will need to be reported to A.O. Smith's insurance providers. This is news to the Town. Until the lawyer meeting on September 3, 2015, there had never been any report from Alligator or A.O. Smith related to this matter.
41. Fire flows for A.O. Smith are provided by the Town's 250,000 gallon Tank No. 2 located adjacent to the plant. I understand that the Town built that tank specifically to provide fire protection for the plant site. There is no reason for that tank not to function as intended.
42. Alligator supplies bulk water service to the Town, and pressurizes the Town's system through its pumping schedule. Alligator has a modern SCADA system that electronically

monitors the level of the Town's Tank No. 1 and controls the valves that allow the tanks to refill or discharge. Alligator's SCADA system should be programed so that when it drops below required levels, check valves on the tanks open, pumps are activated, supply pressures increase and the tanks begin to fill.

43. There is more than enough capacity in the Town's lines and the lines to Alligator to allow the tanks to be kept full. Alligator has a 24" line that connects immediately adjacent to the tank and more than enough pumping and line capacity to ensure that the tank is kept full and regularly cycled.

44. If the tanks were not full, it was because Alligator decided not to fill them. I am not aware of any other possible explanation. Specifically, there has been no operational problem in the Town's system that would explain the failure of the tank to be kept full. This is a matter which the Town will investigate at once.

45. If in fact there are problems, it is disturbing that those problems have never been reported to the Town. As I said earlier, this is the first report we have had of them.

Conclusion

46. I am familiar with all aspects of the Town's system as it has operated over the past five years. It is an excellent system in excellent condition. It operates efficiently. There is no basis to conclude that the Town has mismanaged its system or cannot meet A.O. Smith's needs. It is clear to me that A.O. Smith's concerns about the Town's system are based on information that is untrue.

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FURTHER THE DEPONENT SAITH NOT.

Jay Oliver

SWORN to BEFORE me the 9 day of Sept. 2017 ⁽⁹⁹⁾

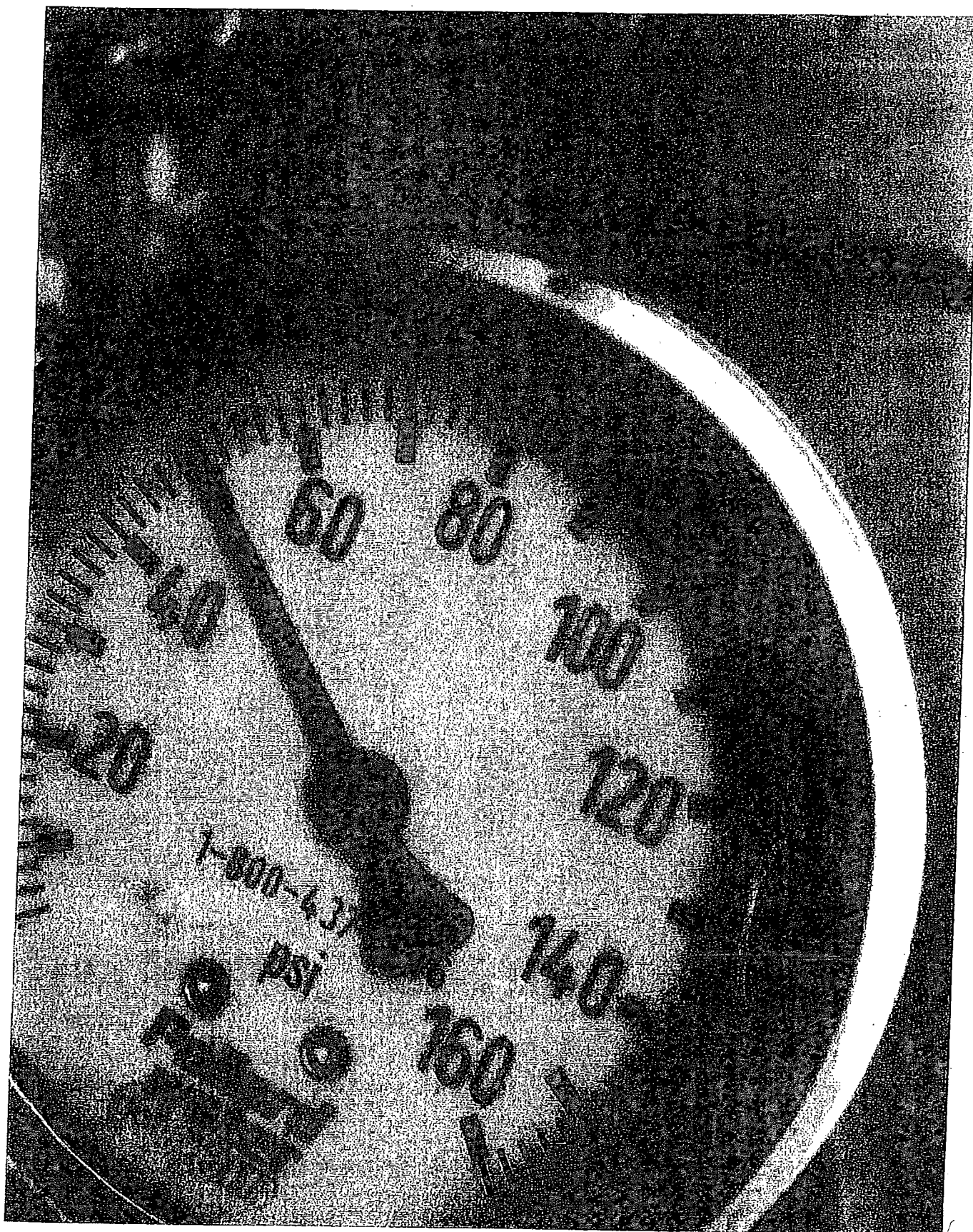
Robert H. King

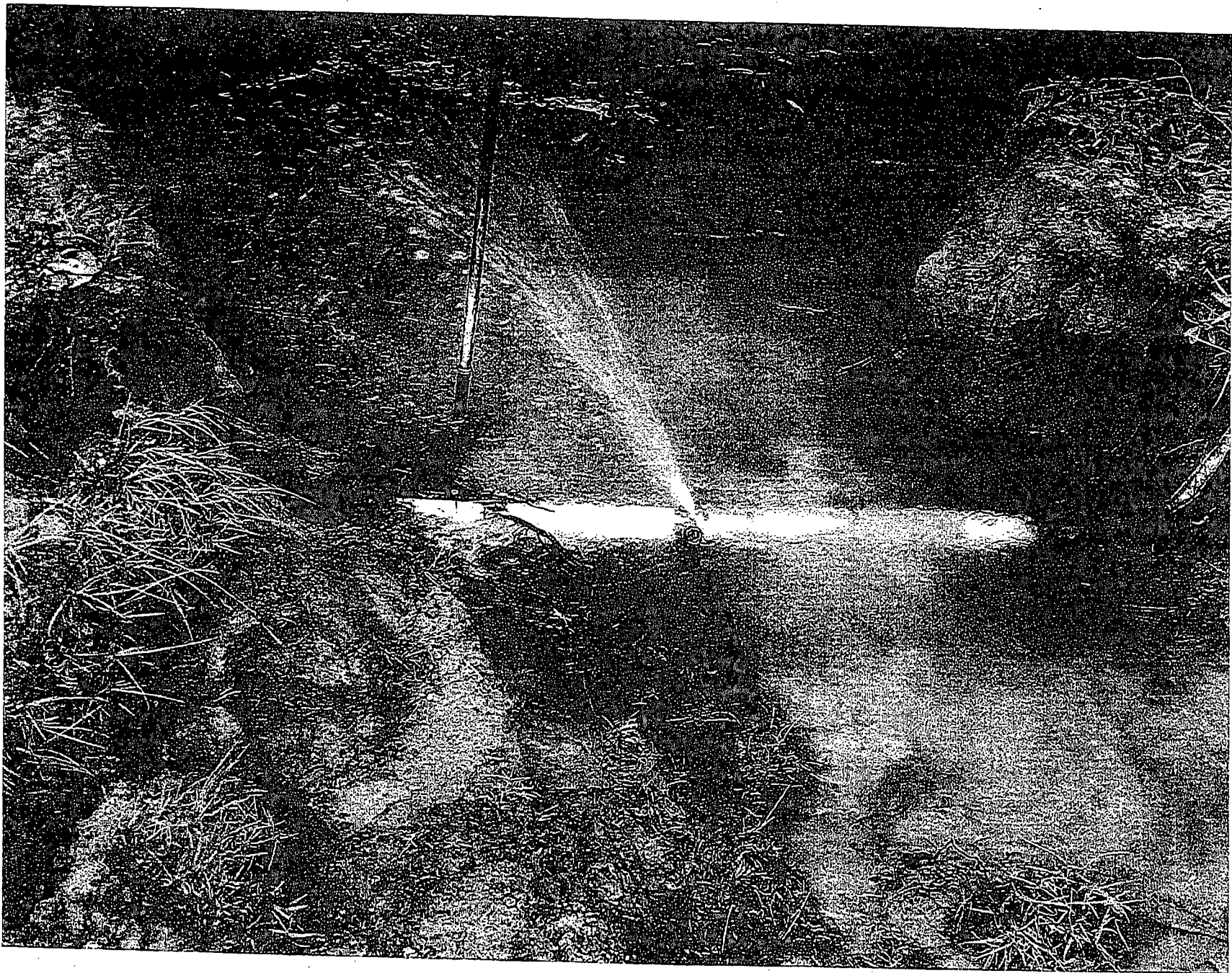
Notary Public for South Carolina

My Commission Expires: 4-28-2018

Exhibit A







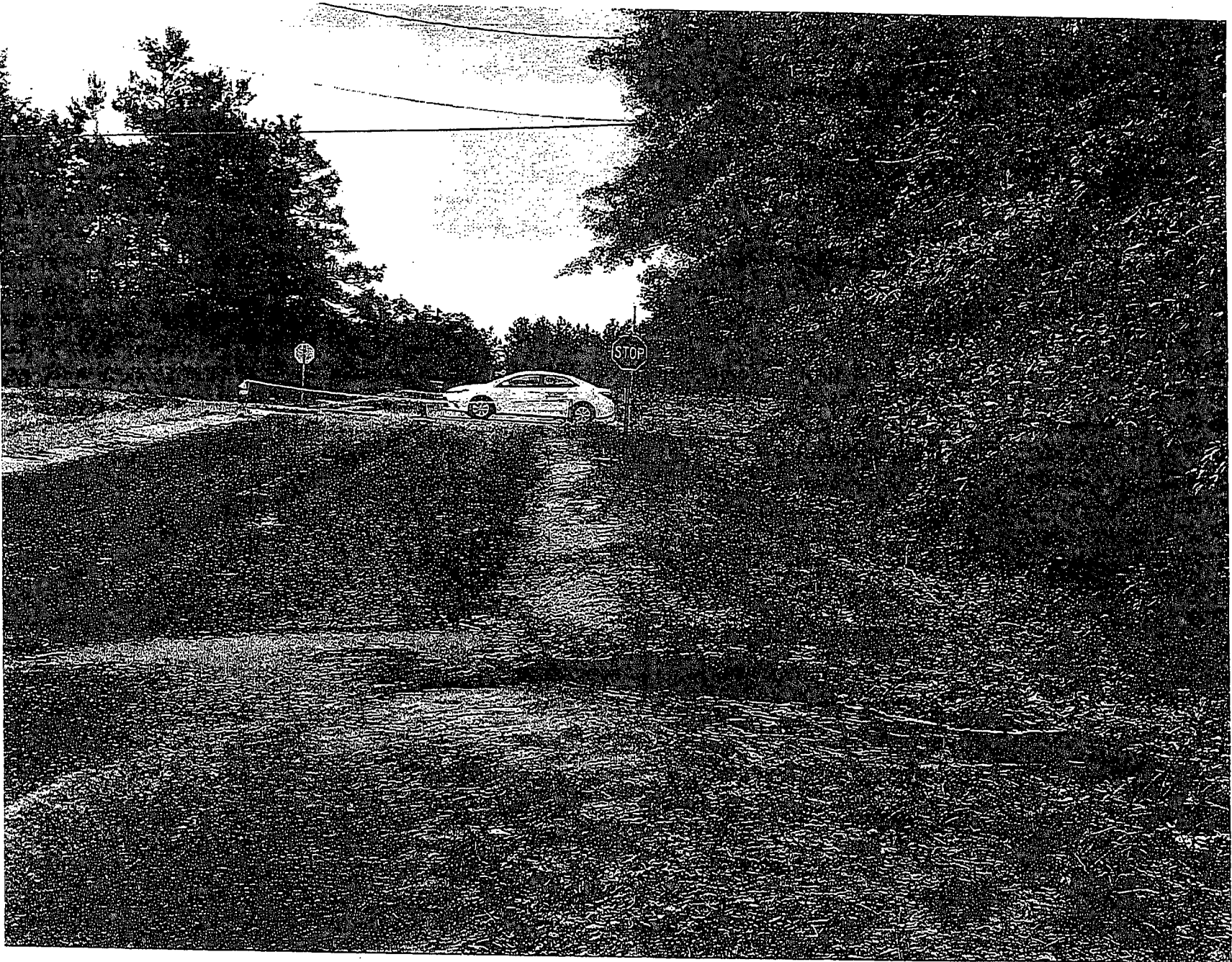


Exhibit 2

Affidavit of Mayor John Campolong

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

Town of McBee, South Carolina

**AFFIDAVIT OF
JOHN CAMPOLONG,
MAYOR OF TOWN OF MCBEE**

Personally appeared before me the undersigned, John Campolong, who being duly sworn states as follows:

1. I am John Campolong, Mayor of the Town of McBee, South Carolina (the "Town"). I was elected Mayor in October 2008 and am currently serving my second term as Mayor.
2. I have been involved in textile manufacturing in McBee for 55 years. I came to the area from Pennsylvania when I was quality control manager and later plant manager at Saucony sportswear manufacturing plant in Cheraw, South Carolina. For a time I was also Southern region quality manager at Saucony. In 1960, I opened my own textile manufacturing facility in McBee, which I have managed since that date. Based on this experience, I understand the importance of reliable water service and fire suppression service to manufacturing facilities. I understand the importance of maintaining cooperative relationships and open communication among suppliers and customers.
3. The Town water system serves approximately 435 individual customers. A.O. Smith represents a little less than 60% of the demand on the Town's system and a similar percentage of the Town's revenues.
4. As Mayor, I have been directly involved in issues related to the Town's water supply system.

Alligator Rural Water and Sewer Company

5. In 2002, the Town signed an agreement to purchase its bulk water from Alligator Rural Water & Sewer Company, Inc. and Alligator Rural Water Company, Inc. ("Alligator").
6. At the time, Glenn Odom was both mayor of the Town and executive director of Alligator.
7. In 2005, the Town received a loan of \$4.5 million from the United States Department of Agriculture ("USDA"). Revenue from the A.O. Smith Corporation ("A.O. Smith") was a critical basis for the USDA loan to the Town.
8. The loan was used to refurbish the Town's water system. For a town which has a customer base of only 435 customers, \$4.5 million dollars was a great deal of money to borrow. Repaying that debt requires approximately 25% of our water revenues. But the result is that we now own a trouble-free system whose capital needs are largely met.
9. I had not been involved in politics before 2008. I agreed to run for mayor in 2008 specifically out of concern for how the then-current mayor, Mr. Odom, was managing the Town and Alligator. I was convinced to run by the other key business and civic leaders in the McBee area who shared my concerns about Mr. Odom and Alligator. Those leaders include John Martin, CEO of Mar-Mac Wire Company, and John McLeod, CEO of Mar-Mac Industries and President of DuPont Protective Clothing. These leaders continue to support me in the effort to ensure that Alligator is not allowed to extend its control over the Town's water system to the detriment of the Town, its citizens and businesses. I would encourage you to reach out to any or all of them to confirm what I say here. You may also want to inquire as to the general reputation of Alligator from the mayor and

City Manager of Hartsville and Cheraw, and the members of our legislative delegation.

They are well aware of these matters.

10. Alligator is a private non-profit rural water company. Alligator is not accountable to elected officials and is not regulated by the South Carolina Public Service Commission.
11. Alligator is governed by a board of directors elected by the individuals listed as members of Alligator on the voting rolls kept by Alligator. The current leadership of Alligator closely controls the election process and membership lists. Only persons who support the current leadership of Alligator have been elected or reelected to the board. Others have encountered stiff resistance.
12. Alligator has no employees. Instead, it pays a for-profit services company, Odom and Associates, for personnel and operating services.
13. My understanding is that the principal of Odom and Associates is Mr. Glenn Odom, executive director of Alligator.
14. I have attached to this affidavit as Exhibit A a report by the accounting firm of Sheheen, Hancock and Godwin, LLP of Camden, South Carolina concerning Alligator's finances.
15. Exhibit 9 to that report is a copy of the 2002 management contract between Odom and Associates and Alligator. It indicates that Odom and Associates is paid a flat rate of \$720,000 per year for operating Alligator, plus certain office expenses and overheads. In addition, Odom and Associates receives 40% of all revenues generated by water sales that exceed 600 million gallons per year, and 40% of all water revenues that are generated by rate increases that are imposed after 2002.
16. Because this compensation is paid as a flat fee, Odom and Associates is not accountable to Alligator for how these funds are spent.

17. Under this contract, Odom and Associates apparently is earning more than Alligator can currently pay. In its 2014 financial reports, Alligator lists an outstanding debt to Odom and Associates of \$1.3 million.
18. The financial data also indicate that Alligator has operated at a net loss in every year for which data is available since 2004. The total loss during that period was more than \$8 million. Alligator's 2014 loss was (\$936,142). Its unrestricted net assets (book value) was negative (\$1.7 million) and its cash balance was \$18,364. Alligator paid Odom and Associates more than \$8 million since 2004.
19. Alligator has outstanding debt to the USDA of \$23.3 million.
20. Long-term, the Town does not consider Alligator to be a viable utility either from a financial or managerial basis.
21. It is for that reason that the Town has decided to reopen its wells and place itself in a position where it no longer is dependent on Alligator.

A.O. Smith's Operational and Reliability Concerns

22. The first time that the Town learned that A.O. Smith was dissatisfied with its service from the Town was when we saw that construction crews were in the field installing a line to by-pass the Town's system and connect A.O. Smith directly with Alligator's system. We only learned of the substance of A.O. Smith's concerns when A.O. Smith agreed to have a discussion with us, albeit on a lawyer-to lawyer basis.
23. A.O. Smith has never communicated with me as mayor, or with any of our utility operations and engineering personnel, about these matters. If this were my company, I would want to know why.

24. I have reviewed Joey Oliver's and Joe McGougan's affidavits. The facts they present are consistent with my understanding of the facts in all respects. The affidavits answer directly the operational issues that A.O. Smith has now communicated to us.
25. If the information on which A.O. Smith has been acting up until now came from Alligator, I can only say that this is consistent with my understanding of Alligator's behavior in the past.
26. Concerning the discussion of fire suppression service, about four years ago, the Town worked closely with A.O. Smith and its insurers to make certain that the Town's fire suppression service was fully adequate to meet A.O. Smith's needs. We released the Town's engineer to prepare a study for A.O. Smith to provide to its insurer on this issue. To support that study, we made all of our data available to A.O. Smith. Our understanding was that A.O. Smith and its insurer were completely satisfied with this study and the service we were providing. This was our last communication with A.O. Smith related to fire protection.

Water Rates

27. In the summer of 2013, the Town received a letter from Alligator imposing a 56% wholesale water rate increase. The Town's response to this increase was discussed in three separate open sessions of council beginning on September 3, 2013.
28. On October 16, 2013, the Town conducted a public hearing on a proposed ordinance to increase the Town's rates 25% in response to this increase from Alligator. The public was informed of the hearing by a posting on the town hall marquee and a Notice of Meeting posted on the door of town hall on October 2, 2013. An agenda for the meeting was posted at town hall 24 hours prior to the meeting. A number of customers came to

the meeting to discuss their concerns. *The Link*, the local newspaper, ran a story on October 22, 2013, discussing the water rate raise. A copy of this story is attached as Exhibit B. Notice of the new water rates was printed at the bottom of November 2013 customer bills.

29. The Town also requested that Alligator provide the backup financial data necessary to support the increase as our contract provides. Our request for this information was met with silence.
30. The Town informed Alligator that it will not begin paying Alligator's new rates until Alligator provides the required financial backup. Alligator now indicates that it will provide the required financial data. We will see.
31. The 2013 rate increase was the first increase in water rates since 2008.
32. The Town has not rescinded the increase pending receipt of the financial documentation from Alligator. Having rates that yo-yo back and forth is not good utility management.
33. The Town has used the funds that it has collected from the increased rates to improve and maintain service, testing and reporting as required by DHEC, to improve the management of the water system, and to support our own meter reading when problems with the accuracy of Alligator's readings became apparent.
34. Even after the increase, the Town's water rates are reasonable. A.O. Smith pays \$2.81 per thousand for its first 20,000 gallons and \$4.50 per thousand thereafter. Alligator's published residential rate is \$6.00 per thousand. Chesterfield Rural Water Company's is \$8.00. The Town of Patrick's is \$8.00. The Town of Pageland's is \$5.20. Chesterfield and Patrick are served by Alligator.

35. A.O. Smith uses a high volume of water on a very consistent basis and therefore contributes significant revenue to the Town. The Town estimates that if A.O. Smith leaves its system, the Town will be required to increase rates by a large amount.

36. The Town is in the process of restarting its wells. The incremental cost of operating these wells will be quite modest. There is no new capital borrowing associated with this project. The Town believes that it can produce water from these wells at least as cheaply as water it buys from Alligator, perhaps more cheaply. Restarting the wells should put downward pressure on rates going forward and give the Town protection from further rate increases from Alligator. The Town does not foresee any increase related to its decision to restart its wells or for any other reason it can identify at this time.

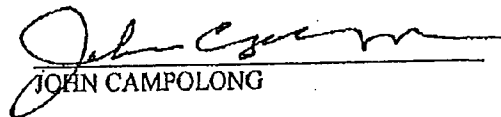
The Town and A.O. Smith

37. The Town and A.O. Smith have had a close and mutually supportive relationship for decades. Both as mayor and before that as a business owner, I personally had a close relationship with district manager, Sam Carver, and former plant manager, Carol Peters. While I am not as close with the new plant manager, Jeff Barron, I consider myself to have a good working relationship with him. I also have a good relationship with Roger Smith, member of the Smith family and Director of Community Affairs of A.O. Smith.

38. If A.O. Smith wants to increase demand from the Town, the Town would be more than happy to negotiate a favorable rate. Furthermore, the Town could install a third well for between \$250,000 and \$500,000, and the additional service to A.O. Smith could easily pay for the capital costs.

39. The Town would welcome the opportunity to put these matters behind us and to renew and strengthen that relationship. The impact to the Town and its customers, many of whom are A.O. Smith employees, will be devastating if A.O. Smith leaves our system.

FURTHER AFFIANT SAITH NOT.


JOHN CAMPOLONG

SWORN to BEFORE me the 8th day of September, 2015.

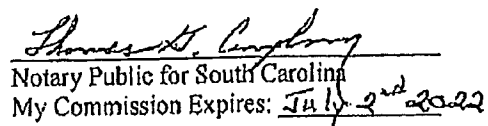

Notary Public for South Carolina
My Commission Expires: July 2nd 2022

Exhibit A

SHEHEEN, HANCOCK & GODWIN, LLP

CERTIFIED PUBLIC ACCOUNTANTS

1011 FAIR STREET

P.O. DRAWER 428

CAMDEN, SOUTH CAROLINA 29021

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August 25, 2015

**Belton T. Zeigler, Esquire
Womble Carlyle Sandridge & Rice, LLP
1727 Hampton Street
Columbia, SC 29201**

Dear Mr. Zeigler,

We were engaged by Womble Carlyle Sandridge & Rice, LLP to perform consulting services for its clients in relation to certain operational and financial documents involving Alligator Rural Water and Sewer Company, Inc. ("Alligator Water"). Our engagement was to assemble information and schedules in a format that is informative and understandable. We read the available audited financial statements, publically available Form 990s "Return of Organization Exempt from Income Tax", Data Collection Forms, loan agreements with the USDA, and other documents made available through Freedom of Information Act requests. This report is intended only for the information and use of Womble Carlyle Sandridge & Rice, LLP.

At the time of preparation of this report, certain financial and operation documents were not available for consideration as part of this engagement, and the management of Alligator Water was not made available for interview and inquiry. Audited financial statements were not available for the 2007 year. In addition, Form 990 tax returns were only available for 2004 through 2013. There were other documents that had been requested through the Freedom of Information Act that had not been received at the time of this report. If the management of Alligator Water and other documents were available, the considerations listed below may have changed or been presented in a different manner. This report is not intended for those who are not aware of these limitations.

Below is an executive summary and overview with a condensed version of key data. Following the Summary and Overview, we have expanded on the findings to provide additional factual information we obtained from our analysis of the documents made available to us.

SUMMARY AND OVERVIEW

The following twelve disclosures are found in Alligator Water's reports. All numbers are as of December 31, 2014 unless otherwise noted. (Information for 2007 was unavailable and not included in the multi-year totals.)

1. In each of the years 2004-2006 and 2008-2014, Alligator Water reports a net loss. That loss is between (\$421,815) and (\$1.2 million).
2. For 2014, Alligator Water reports a net loss of (\$936,142).
3. For 2014, Alligator Water lists its unrestricted net assets (book value) as negative (\$1.7 million) and its cash balance as \$18,364. Alligator Water, therefore, has no unrestricted reserves.
4. For the years 2004-2006 and 2008-2014, Alligator Water reports that it paid Odom & Associates \$7.9 million.
5. For 2014, Alligator Water reports that it had an outstanding debt to Odom & Associates of \$1.3 million. Alligator Water does not disclose the terms of this debt to Odom & Associates.
6. In its 2013 federal tax filings, Alligator Water reported it had no transactions with companies in which its key employees were direct or indirect owners.
7. In its 2013 federal tax filings, Alligator Water also reported that none of its key employees received or accrued compensation from unrelated organizations for services rendered to Alligator.
8. For the years 2004-2006 and 2008-2014, Alligator Water lists having received over \$40.2 million in USDA grants and loans.
9. For 2014, Alligator Water lists its outstanding long-term debt as \$23.3 million.
10. Alligator Water reported that its principal and interest payments on long-term debt during 2015 will be \$2.0 million, or approximately 62% of historical annual revenue.
11. For the years 2008-2013, Alligator Water did not maintain debt service reserves required by USDA.
12. Alligator Water reports funding those reserves with a loan in 2014.

The following content is an expanded summary of the information we observed presented in a manner that we believe is meaningful to Womble Carlyle Sandridge & Rice, LLP and its client as it relates to Alligator Water and related entities. We would recommend further evaluation of these considerations as more information becomes available to present more thorough and conclusive results.

GENERAL BUSINESS CONSIDERATIONS

Based upon reading the audited financial statements, the following matters were considered:

1. From 2004 through 2014, Alligator Water has received over \$40.2 million in capital grants and loan proceeds from the United States Department of Agriculture (USDA), Rural Economic Community Development (RECD). The following is a schedule of the grants and loan proceeds for the years in which they occurred:

<i>USDA - Rural Economic Development</i>			
Year	Grant Proceeds	Loan Proceeds	Total
2004	\$ 1,301,059	\$ 1,917,580	\$ 3,218,639
2005	59,262	60,000	119,262
2006	29,500	3,318,354	3,347,854
2007	<i>Information not available</i>		-
2008	1,799,441	3,750,260	5,549,701
2009	734,705	933,135	1,667,840
2010	3,412,933	4,551,000	7,963,933
2011	10,600,442	5,300,000	15,900,442
2012	2,096,973	-	2,096,973
2013	369,032	-	369,032
2014	-	-	-
	<u>\$ 20,403,347</u>	<u>\$ 19,830,329</u>	<u>\$ 40,233,676</u>

2. As of December 31, 2014, (the most recent date audited financial statements are available), Alligator Water had outstanding long-term debt totaling \$23,333,166. Based on the audit report, long-term debt was comprised of 19 loans from the USDA-RECD totaling \$21,732,125 and 3 loans with a local financial institution totaling \$1,601,041. Of these loans, the amount of principal repayment required in 2015 is \$1,184,648.
3. In addition to the long-term debt summarized in Item #2 above, Alligator Water reported a note payable outstanding to Odom & Associates, a related party, totaling \$1,347,940 at December 31, 2014. The debt repayment terms as described in the audited financial statements are unclear regarding this related party debt because the terms do not disclose an interest rate, required monthly or annual payments of principal and/or interest, and the maturity date of the debt.

General Business Considerations (continued)

4. One of the loans included in the long-term debt summarized in Item #2 above is a real estate loan with a local bank that matures annually and is renewable at the bank's discretion. That real estate loan originated in 2007 and, based upon the 2007 through 2014 audited financial statements, the Company has made no principal payments on that debt since origination. The total debt outstanding on this loan is \$753,422 at December 31, 2014, and includes a variable annual interest rate.
5. At December 31, 2014, Alligator Water reported a cash balance of \$18,364.
6. The 2014 audited financial statements report that principal and interest repayments required on existing long-term debt would be \$2,010,709 during calendar year 2015. Alligator Water reported annual gross operating revenue totaling \$3,263,742 in calendar 2014. Therefore, debt service obligations (principal and interest payments) for 2015 are calculated to be approximately 62% of the Company's total gross operating revenue.
7. As of December 31, 2014, Alligator Water reported a *negative unrestricted net assets* (equity) totaling \$1,709,035 as listed in the Statement of Net Position. This negative amount of unrestricted net position indicates that the Company does not have any unrestricted financial reserves.
8. As of December 31, 2014, Alligator Water had a net operating loss, including interest expense, of \$936,142. Excluding grant income from the USDA for capital purchases, the Company has experienced re-occurring net losses at least 10 of the last 11 years. The accumulated net losses including interest expense from 2004 through 2014 total approximately \$8 million. The following schedule summarizes the annual operating and non-operating income and losses, along with capital grant revenue, of Alligator Water for 2004 through 2014.

Year	Operating Income/(Loss) (A)	Non-Operating Income/(Expense) (B)	Net Operating & Non-Operating Income/(Loss) (A + B)	USDA Capital Grant Revenue (C)	Change in Net Assets (A + B + C)
2004	\$ (275,847)	\$ (267,696)	\$ (543,543)	\$ 1,301,059	\$ 757,516
2005	(209,927)	(211,888)	(421,815)	59,262	(362,553)
2006	(269,767)	(324,746)	(594,513)	29,500	(565,013)
2007	<i>Information not available</i>				
2008	(248,453)	(689,437)	(937,890)	1,799,441	861,551
2009	106,479	(616,181)	(509,702)	734,705	225,003
2010	(330,124)	(728,113)	(1,058,237)	3,659,470	2,601,233
2011	(309,706)	(464,415)	(774,121)	10,715,880	9,941,759
2012	(475,973)	(672,367)	(1,148,340)	2,096,973	948,633
2013	(399,582)	(829,856)	(1,229,438)	509,032	(720,406)
2014	(133,120)	(803,022)	(936,142)	-	(936,142)
Total	\$ (2,546,020)	\$ (5,607,721)	\$ (8,153,741)	\$ 20,905,322	\$ 12,523,354

General Business Considerations (continued)

9. Alligator Water's management explains in its own Management's Discussion and Analysis from the 2012 audited financial statements that "non-operating revenues are revenues received for which services are not provided to clients or community partners". Based upon reading the MD&A, Management includes USDA Grant Revenue as non-operating revenue. Management also states that they "will continue to receive a significant amount of non-operating revenue in the future". The audited financial statements report that all grant revenue from the USDA to Alligator is issued under the Catalog of Federal Domestic Assistance ("CFDA") #10.760 "Water and Waste Disposal Systems for Rural Communities". See *Exhibit 1* for the grant program information obtained from the CFDA website. Exhibit 1 indicates that USDA Grant Revenue from CFDA #10.760 is designated for capital asset purchases, and is not available to support or supplement losses from normal operations of the Company, nor can it be used to pay for interest expense on loans which were used for capital asset purchases. Alligator Water's audited financial statements for 2013 and 2014 did not include the Management's Discussion and Analysis as would normally be required.

10. For the period 2004 through 2013 (excluding payments made in 2007 due to unavailable audited information), Odom and Associates, Inc. received over \$7.9 million for services rendered to Alligator Water. *Exhibit 9* is a copy of an executed Management Agreement between Odom & Associates, Inc. and Alligator Water dated November 19, 2002. The agreement calls for certain monthly fixed and variable payments from Alligator Water to Odom & Associates as compensation for services to be provided to Alligator Water by Odom & Associates, plus the reimbursement of certain out-of-pocket expenses. The variable portion of the monthly payments is based upon the volume of gallons of water and sewer handled by Odom & Associates. The base management fee to be paid by Alligator Water is \$60,000 per month and the term of the agreement is twenty years. We have not been made aware, or provided with copies of any amendments or addendums to this original agreement in 2002, although amendments or addendums may exist that may have changed the terms of the original agreement.

The following schedule has been prepared utilizing information from the audited financial statements and Form 990 information returns filed with the Internal Revenue Service, and lists the cash payments to Odom & Associates, Inc. from Alligator Water for the period described:

<i>Payments to Odom & Associates</i>										
2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
\$ 807,266	924,795	998,256	N/A	1,070,692	696,794	921,022	1,127,478	859,594	572,904	\$ 7,978,801

LOAN COMPLIANCE CONSIDERATIONS

After reading the audited financial statements, loan agreements, projected budgets and USDA letters, the following matters were considered:

1. The 2008 Loan Agreement between Alligator Water and the USDA requires Alligator Water to deposit 10% of the monthly debt payment each month into the *Debt Service Reserve* account until one annual payment is accumulated. In addition, Alligator Water is required to deposit \$777.75 monthly into a *Depreciation Reserve* account. There do not appear to be adequate Reserves reported in Alligator Water's audited financial statements until 2014. – *See Exhibit 2 for excerpts from the 2008 USDA Loan Agreement.*
2. The 2011 annual audited financial statements report a Debt Service Reserve cash account balance in the amount of \$66,384. However, there is not a Debt Service Reserve cash account shown on the 2012 annual audited financial statements. Also, Note E of the notes to the 2012 financial statements states that the Reserve Account balance is zero as of December 31, 2012. The nature of the use of the \$66,384 Reserve account between 2011 and 2012 could not be determined from the information available.
3. The USDA acknowledges in a letter dated February 16, 2012, that Alligator Water did not adequately budget the funding of the required Reserve Accounts. The letter states that as of December 31, 2012, Alligator Water should have a Reserve Account balance of \$572,133.97. The 2012 audited financial statements do not report the existence of a Reserve Account that is currently being funded and maintained for compliance with the loan agreements. – *see Exhibit 3 for the USDA letter dated February 16, 2012.*
4. The USDA also acknowledges in a letter dated February 5, 2014, that Alligator Water did not adequately fund the reserve accounts authorized by the withdrawal schedule. The letter states that as of December 31, 2012, Alligator Water's reserve balance was underfunded by \$568,433.48. The 2012 audited financial statements do not report a balance in any Reserve Account that is required to be funded and maintained for compliance with the loan agreements and it states that the Reserves were required to be \$125,937 for the Depreciation Reserve account and \$568,433 for the Debt Service Reserve account. – *see Exhibit 4*
5. Alligator Water's Independent Auditor, Timothy Cornelison, CPA, LLC, reported on the required Reserve Account loan compliance deficiency in the "Independent Auditors' Report On Internal Control Over Financial Reporting And On Compliance" dated January 5, 2014, and October 8, 2014, for the years ending December 31, 2012, and December 31, 2013, respectively.

Loan Compliance Considerations (continued)

The Auditor listed the underfunded Reserve Accounts in the "Schedule of Findings and Questioned Costs" and noted that this finding is a *Material Weakness* in internal control at Alligator whereby "There were no procedures in place to require management to maintain these funds.", referring to the required Reserve Accounts. In addition, the Auditor reports "the Company did not comply with requirement regarding CFDA #10.760 US Department of Agriculture Rural Water System" in the "Independent Auditors' Report on Compliance with Requirements That Could Have a Direct and Material Effect on Each Major Program and on Internal Control Over Compliance in Accordance with OMB Circular A-133" dated January 5, 2014.

6. A letter to Alligator Water from the USDA dated May 22, 2013, addresses the 2013 budgeting of the Reserve Accounts. The Depreciation Reserve account and the Debt Service Reserve account should have a balance of \$654,862.86, as of December 31, 2013, based upon the USDA letter. The letter also states that "It does not appear that the budget projects enough revenue to cover all operating and maintenance expenses, debt service and reserve account deposits". – see *Exhibit 5*
7. In March 2014, the Company appears to have provided some funding into the restricted cash account reserves with debt financing obtained from a local bank. The Company borrowed \$650,000 from a local bank for the purpose of providing funds into the required Reserve accounts. The 2014 audited financial statements do not specifically state the balance of the reserves allocated to each required reserve fund as mentioned above, however it reports the total balance of reserves as \$742,450 as of December 31, 2014. While the 2014 financial statements do not specifically indicate the required reserve balance, there does not appear to be a loan compliance deficiency reported by the auditor in the 2014 "Independent Auditors' Report On Internal Control Over Financial Reporting And On Compliance and Other Matters" dated June 2, 2015.

USDA GRANT PROGRAM CONSIDERATIONS

After reading the audited financial statements and grant documents, the following matters were considered:

1. The audited financial statements of Alligator Water report that all federal Grant awards received are from the USDA under CFDA #10.760 "Water and Waste Disposal Systems for Rural Communities". According to the grant program information obtained from the CFDA website, these capital grant funds are not eligible to be spent on interest expense on loans or operating or maintenance costs of the recipient organization. – *See Exhibit 1 for CFDA #10.760 Grant Program information.*
2. Alligator Water received \$10,600,442 from capital grants and \$5,300,000 from loan proceeds within the Water Fund for the year ending December 31, 2011. Alligator spent \$15,573,754 on capital assets based upon the 2011 audited financial statements. This leaves approximately \$362,638 of capital grant funds which could have been left and available to spend in 2012. As of December 31, 2011, the Company reported a cash balance in the Water Fund totaling \$362,638.
3. Alligator Water received \$2,096,973 in capital grants during the year ending December 31, 2012, and spent \$1,933,496 on capital assets during that same year according to the audited financial statements. This leaves a balance of \$163,477 of capital grant funds from 2012 which could have been available to be spent on capital asset purchases in 2013. When added with the unused portions of capital grant funds from 2011 as mentioned in Item #2 above, Alligator could have a balance of unused grant funds totaling \$526,115. As of December 31, 2012, the Company reported a negative cash balance of \$10,280 and zero restricted Reserve cash accounts.

FORM 990 TAX RETURN CONSIDERATIONS

After reading multiple years of the Company's Form 990 tax returns, amended tax returns, and audited financial statements, the following matters were considered:

1. Only 2 of the last 9 years of tax returns matches and agrees to the audit financial statements. The amounts reported as revenues, expenses and net assets per the tax returns do not agree with the corresponding audited financial statements. The following schedule has been prepared utilizing information from the audited financial statements and Form 990 information returns filed with the Internal Revenue Service, and lists the revenues, expenses and net assets for the period described:

Year	Revenues per audited financial statements	Revenues per 990 tax returns	Expenses per audited financial statements	Expenses per 990 tax returns	Net Assets per the audited financial statements	Net Assets per the 990 tax return
2004	\$ 2,749,613	\$ 2,772,219	\$ 1,992,097	\$ 2,014,701	\$ 7,126,582	\$ 7,126,585
2005	1,792,201	1,791,981	2,154,754	2,154,537	6,764,029	6,764,029
2006	1,910,483	1,909,836	2,475,496	2,455,223	6,199,016	6,218,642
2007	* N/A	4,227,506	* N/A	2,961,173	* N/A	7,465,349
2008	4,039,552	4,039,572	3,178,001	2,976,194	8,312,377	8,514,163
2009	3,048,639	3,048,639	2,823,636	2,823,636	8,537,380	8,537,380
2010	5,941,669	5,929,398	3,331,436	3,319,165	11,147,613	11,147,613
2011	13,172,846	13,151,060	3,231,087	3,404,824	21,089,372	20,917,249
2012	4,667,942	4,666,545	3,719,309	3,608,210	22,038,005	22,037,371
2013	3,484,792	3,484,792	4,205,198	4,205,198	21,289,370	21,289,370
2014	3,486,342	* N/A	4,422,464	* N/A	20,317,525	* N/A
Total	\$ 44,294,079	\$ 45,021,548	\$ 31,533,478	\$ 29,922,861	\$ 132,821,269	\$ 120,017,751

*N/A - 2007 audited financial statements were not available
- 2014 990 tax return was not available

Many of the Form 990 tax returns filed by Alligator Water include a reconciling prior period adjustment to net assets which aids in the reconciliation of the balance sheet.

2. The following presents certain facts and circumstances as they relate to Alligator Water and related entities with corresponding applicability to the filed Form 990 tax returns described in Item #3 below.

- a) Alligator Rural Water and Sewer Company, Inc. is registered with the South Carolina Secretary of State's office as a nonprofit organization in good standing. The Secretary lists Glenn C. Odom of 547 Sandy Point Lane, Hartsville, SC 29550 as the Registered Agent.

Form 990 Tax Return Considerations (continued)

- b) The 2012 and 2013 Form 990 of Alligator Water lists the organization as nonprofit, tax exempt organization under 501(c)12 of the Internal Revenue Code.
- c) The 2012 and 2013 Form 990 of Alligator Water lists Glenn Odom as the principal officer on Page 1, Item F. It also lists Glenn Odom as the General Manager of the organization responsible for signing the Form 990 on behalf of Alligator Water for filing purposes on that same Page 1 of the tax return.
- d) The 2012 and 2013 Form 990, Part IV "Governance, Management, and Disclosure", Section C, Item #20 lists Glenn Odom, P.O. Box 810, McBee, SC as the "person who possesses the books and records of the organization".
- e) The 2012 and 2013 Form 990, Part VII, "Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors" Section A, Item #1A lists Glenn Odom, General Manager, as a "Key Employee" with annual reportable compensation from Alligator Water totaling \$12,079 and \$11,249, respectively.
- f) The 2013 audited financial statements of Alligator Water include a copy of the "Corrective Action Plan" letter dated October 8, 2014, as written to the USDA and submitted by Alligator Water. The letter was addressed by Glenn Odom, Chief Executive Officer.
- g) The South Carolina Secretary of State's website (www.sos.sc.gov) lists a for-profit organization named Odom & Associates, Inc. as an entity in good standing and incorporated on January 30, 1998. The Secretary lists Glenn Odom of 378 W. Pine Avenue, McBee, SC 29101 as the Registered Agent of Odom and Associates, Inc. The registered agent was changed from Peggy J. Odom to Glenn Odom on July 8, 2014.
- h) The 2013 Form 990, Part VII "Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors" Section B. "Independent Contractors", Item #1A lists Odom and Associates, Inc. of P.O. Box 810, McBee SC 29101 as the Management Company who received compensation totaling \$572,904 in 2013. (See Page 4, Item #10 of this report for a schedule of historical payments to Odom and Associates, Inc.)

Form 990 Tax Return Considerations (continued)

- i) The 2014 audited financial statements of Alligator Water describe a contract in Note E on Page 14 whereby Alligator Water "owes the management company \$1,347,940 as of December 31, 2014, compared to \$916,743 as of December 31, 2012". The note further describes the debt as "long-term" and that "Management expects it will be three years before substantial debt payments will be made". No other mention of the relationship between Odom and Associates, Inc. and Alligator Water is referenced in the audited financial statements.

3. The Form 990 "Return of Organization Exempt from Income Tax" for the year ended December 31, 2013, (and other previous tax years) as regulated by the Internal Revenue Service, require the filing organization to respond to various questions and present certain required schedules. The following presents certain questions and answers which should be further evaluated in coordination with the information present in Item #2 above:

- a) The 2013 Form 990 Part IV, Item #26 questions whether "a loan to or by a current or former officer, director, trustee, key employee, highest compensated employee, or disqualified person" was outstanding as of December 31, 2013. The answer reported by Alligator Water was "No". If the answer had been "Yes", Alligator Water would have been required to complete and present Schedule L, Part II. No Schedule L was presented in the 2013 Form 990.
- b) The 2013 Form 990 Part IV, Item #28 is a multi-part questions which asks "Was the organization a party to a business transaction with one of the following parties":
 - i. "A current or former officer, director, trustee or key employee?"
 - ii. "A family member of a current or former officer, director, trustee, or key employee?"
 - iii. "An entity of which a current officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner?"

The 2013 Form 990 was marked "No" for each of the above questions. If the answer had been "Yes", Alligator Water would have been required to complete and present Schedule L, Part IV. No Schedule L was presented in the 2013 Form 990.

- c) The 2013 Form 990 Part IV, Item #34 questions whether the organization was "related to any tax-exempt or taxable entity?" The answer reported by Alligator Water was "No". If the answer had been "Yes", Alligator Water would have been required to complete and present Schedule R. No Schedule R was presented in the 2013 Form 990.

Form 990 Tax Return Considerations (continued)

- d) The 2013 Form 990 Part VI, Section A, Item #2 questions whether “any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee”. The answer reported by Alligator Water was “No”.
- e) The 2013 Form 990 Part VI, Section A, Item #3 questions “Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?”. The answer reported by Alligator Water was “Yes”.
- f) The 2013 Form 990 Part VI, Section B, Item #12a questions “Did the organization have a written conflict of interest policy?”. The answer reported by Alligator Water was “No”.
- g) The 2013 Form 990, Part VII, “Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors” Section A, Item #1A lists Glenn Odom, General Manager, as a “Key Employee” with annual reportable compensation from Alligator Water totaling \$11,249. The same Part VII, Section A, Item #5 questions if “any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization?” The answer reported by Alligator Water was “No”. If the answer had been “Yes”, Alligator Water would have been required to complete and present Schedule J. No Schedule J was presented in the 2013 Form 990.
- h) The 2013 Form 990, Part V, Item #28 “Enter the number of employees reported on Form W-3, transmittal of wage and tax statements, filed for the calendar year ending” is answered with “9”. However, on the same Form 990 Part IX, “Statement of Functional Expenses”, no salary amounts are reported under Item #5, #6, or #7 for salaries expense. According to the management agreement, all salary expenses are to be incurred by Odom & Associates, Inc. – See *Exhibit 9*

FINANCIAL STATEMENT & REPORTING CONSIDERATIONS

After reading the available audited financial statements and data collection form reports, the following matters were considered:

1. The audited financial statements for the year ended December 31, 2012, was subject to the Single Audit Act (expenditures of \$500,000 or more of federal funds) and, therefore, were required to be completed nine months after year end (September 30, 2013), unless a longer period is agreed to in advance by the cognizant or oversight agency. The financial statements were not completed until January 5, 2014. The late completion of the audited financial statements has been an on-going issue for several years prior to 2012. The audited financial statements for the years ended December 31, 2013, and 2014, were not subject to the Single Audit Act and, therefore, were not subject to regulatory timing requirements.— *See Exhibit 6*
2. A Data Collection Form is required to be filed with the Federal Clearinghouse when a single audit is performed, and is also due nine months after year end unless a longer period is agreed to in advance by the cognizant or oversight agency. According to the Federal Clearinghouse website, the Data Collection Forms for Alligator Water are being filed late and there are no reports listed for either 2010 or 2011, even though Alligator Water expended over \$500,000 in federal awards in those years. If a Data Collection Form was not timely filed by Alligator Water for 2010 or 2011, then a non-compliance finding would be required to be reported in 2011 or 2012 audited financial statements according to the Single Audit Act. There were no findings reported in the audited financial statements in 2011 or 2012 related to the non-filing of Data Collection Forms. — *See Exhibit 7*
3. *Governmental Accounting Standards Board (GASB) Statement 34* outlines a number of elements *required* to be included in the Management Discussion and Analysis of a properly presented annual financial report. These required elements are presented in Exhibit 8 attached to this report. We could not locate or identify a number of the required elements within the Management Discussion and Analysis of the 2012 audited financial statements of Alligator Water. The audited financial statements for the years ended December 31, 2013 and 2014, did not include the Management Discussion and Analysis and the Auditor's Report did not appropriately address that the required supplemental information was not included. - *See Exhibit 8*
4. Under generally accepted accounting principles and governmental accounting standards, there are a multitude of financial and nonfinancial disclosure requirements which must be presented in the annual financial statements to avoid misleading the financial statement reader and misrepresenting the financial condition and operations of the reporting organization. Note disclosures are an integral part of the financial statements.

Financial Statement & Reporting Considerations (continued)

While our report could provide a detailed listing of each of the required disclosures that we believe could be absent from the financial statements, it would not be prudent to list these details without further discussion with the auditor and management of Alligator Water. Certain note disclosures are required to be presented if determined to be quantitatively or qualitatively *material* to the overall financial statements. *Materiality* is a relative concept and sometimes based upon a reasonable user of the financial statements.

5. The 2012 and 2013 audited financial statements report federal Grant Revenues received from the USDA CFDA #10.760 as "Nonoperating Revenue" on the annual Statements of Revenues, Expenditures and Changes in Fund Net Assets on page 8. ***Governmental Accounting Standards Board (GASB) Statement 34***, paragraph 100, stipulates that resources restricted to the acquisition of capital assets should be reported as "Capital Contribution Revenue" after Nonoperating Revenue and Expenses. Presenting capital grant revenue as nonoperating revenue instead of capital contributions revenue could mislead the financial statement reader to believe that the grant revenue is available for use in general operations.

This report has been prepared in accordance with the Statement on Standards for Consulting Services promulgated by the American Institute of Certified Public Accountants. The terms and use of the report are limited to the information and use of Womble Carlyle Sandridge & Rice, LLP. Our firm is not obligated to update or amend this report based upon new information made available subsequent to the date of issuance of this report.

Sincerely,

Sheheen Hancock & Godwin L.L.P.

Sheheen Hancock & Godwin, L.L.P.
Camden, South Carolina

Exhibit 2 - 2008 Loan Agreement

Kenneth R. Sox, President
Alligator Rural Water and Sewer Co., Inc.

5

expenses including but not limited to operation and maintenance, customer deposits, and depreciation of short-lived assets.

It has been determined as part of this funding proposal that you have sufficient funds to establish reserves for the following purposes and amounts:

Operation and Maintenance	\$80,004
Existing Debt Service Reserve	\$22,783
Depreciation Short-Lived Assets	\$ 9,333

As a part of this RD loan proposal you must establish and fund monthly a debt service reserve fund equal to 10% of the monthly payment each month over the life of the loan until you accumulate one annual installment. This reserve is required to establish an emergency fund for maintenance and repairs and debt repayment should the need arise. Ten percent of the proposed loan installment would equal \$3,621 per month.

In addition, you must fund a depreciation reserve for short-lived assets by depositing a sum of \$777.75 monthly in addition to that required for the debt service reserve.

7. Users - This letter of conditions is based upon you providing evidence or a certification that there will be at least 117 bona fide users on the proposed system when construction has been completed. The RD loan and grant commitment is based on providing service to 17 large volume users.

Before RD can agree to the project being advertised for construction bids, you must provide evidence or a certification that the total required number of bona fide users are currently using the system or signed up to use the system. You must provide evidence or a certification to show those users will actually be connected to the system when the project is completed and that the monthly water usage projected for each by the engineer is reasonable. In the event any of the large volume users discontinue the offered service, you must obtain enough additional revenue (i.e., increase in user rates, sign up of an adequate number of other users, reduction in project scope to reduce debt service and O&M, etc.) to make up the projected income that would be lost by not having those users on the system.

The usage of current and proposed large volume users will be re-evaluated based on information current at that time, before we concur with advertising for bids. Also the viability of the large volume users will be analyzed before bidding.

Mandatory Hookups: A certification attesting to the number of users will be required prior to advertisement for construction bids.

Sewer User Agreements: Evidence attesting to the number of users will be required prior to advertisement for construction bids will include the enclosed

Exhibit 3



United States Department of Agriculture
Rural Development
Florence Area Office
Florence, South Carolina

February 16, 2012

Alligator Rural Water & Sewer Co., Inc.
PO Box 810
McBee, SC 29101

Dear Glenn:

The review of your proposed budget for FY 2012 has been completed. It does not appear that the budget accounted for all of the required reserve account deposits. The amount shown in the "Reserve Account" on Schedule 2 was \$67,000, which was about the same amount shown on the 2010 balance sheet. That means that the required annual deposits weren't budgeted for FY 2012. The reserve account balance, as of 12/31/12, should be \$572,133.97. Please make sure that the required deposits are being made to the reserve account.

If you have any questions, please let me know.

Sincerely,

S. Stewart Hucks

S. Stewart Hucks
Area Specialist

216 Third Loop Road • Suite 100 • Florence, SC 29506
Phone: (843) 689-9598 • Fax: (843) 685-9284 • Web: <http://www.rurdev.usda.gov/sc>

Committed to the future of rural communities

USDA is an equal opportunity provider, employer and lender.
To file a complaint of discrimination write USDA, Director, Office of Civil Rights, Room 326
Independence, SW, Washington, DC 20250-9410 or call (202) 725-5524
Yillion Building, 14th and
Office of TOD



Exhibit 4

United States Department of Agriculture
Rural Development
Florence Area Office
Florence, South Carolina

February 5, 2014

Alligator Rural Water & Sewer Co., Inc.
Attn.: Glenn Odom
PO Box 810
McBea, SC 29101

Dear Glenn:

The review of your audit for the period ending December 31, 2012 has been completed. The audit was prepared in accordance with GAAP, and the findings are as follows:

1. There was a positive cash flow for the year for both water & sewer.
2. The audit was not received on time, but we were informed about the delay.
3. The reserve account was not adequately funded, in accordance with the authorized withdrawal schedule. The account was underfunded by \$568,433.48. *Additional deposits must be made to the reserve account to bring it current.*
4. It was unclear whether the "Data Collection Form" was submitted. *Please let us know if the form was submitted as required.*
5. The balances reported for deposit accounts at financial institutions was zero. *The water company is required to maintain adequate cash flow to pay all operating & maintenance costs and debt service, in addition to funding the reserve accounts mentioned above. If current revenue is not sufficient to support operations, a rate increase could be necessary.*

If you have any questions, please call 843-669-9686, ext. 137.

Sincerely,

S. Stewart Hucks

S. Stewart Hucks
Area Specialist

215 Third Loop Road, Suite 100, Florence, SC 29505
Phone: (843) 669-9686 • Fax: (843) 669-0789 • Web: <http://www.rurdev.usda.gov/sc>

Committed to the future of rural communities.

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If you wish to file a Civil Rights program complaint of discrimination, complete the **USDA Program Discrimination Complaint Form (PDF)**, found online at http://www.water.usda.gov/complint/filing_csr.html, or at any USDA office, or call (866) 632-9922 to request the form. You may also write a letter containing all of the information requested in the form. Send a completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, N., Washington, D.C. 20250-9410, by fax (202) 690-7442 or e-mail program.makc@usda.gov.

Exhibit 5



United States Department of Agriculture
Rural Development
Florence Area Office
Florence, South Carolina

May 22, 2013

Alligator Rural Water & Sewer Co., Inc.
PO Box 810
McBee, SC 29101

Dear Glenn:

The review of the FY 2013 budget has been completed. It does not appear that the budget projects enough revenue to cover all O&M expenses, debt service, and reserve account deposits. The reserve account balance as of 12/31/13 should be \$654,862.86, but it could not be determined what the projected balance would be based on the information submitted.

Please make the appropriate revisions to the budget and return a copy to me for review.

If you have any questions, please let me know.

Sincerely,

S. Stewart Hucks

S. Stewart Hucks
Area Specialist

215 Third Loop Road • Suite 100 • Florence, SC 29505
Phone: (843) 680-8080 • Fax: (843) 686-8284 • Web: <http://www.rurdev.usda.gov/so>

Committed to the future of rural communities.

To file a complaint of discrimination, write to: USDA, Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights,
1400 Independence Avenue, S.W., Stop 10, Washington, DC 20250-0410; or call toll-free (866) 632-2 (English) or (800) 877-0339 (TDD) or
(866) 377-8642 (English) (Federal Relay). USDA is an equal opportunity provider, employer, and lender.

Exhibit 6

Circular No. A-133

Revised to show changes published in the *Federal Register*
of June 27, 2003 and June 26, 2007
Audits of States, Local Governments, and Non-Profit Organizations

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Audits of States, Local Governments, and Non-Profit Organizations

1. Purpose. This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502, and the Single Audit Act Amendments of 1996, P.L. 104-156. It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.

2. Authority. Circular A-133 is issued under the authority of sections 503, 1111, and 7501 et seq. of title 31, United States Code, and Executive Orders 8248 and 11541.

3. Rescission and Supersecession. This Circular rescinds Circular A-128, "Audits of State and Local Governments," issued April 12, 1985, and supersedes the prior Circular A-133, "Audits of Institutions of Higher Education and Other Non-Profit Institutions," issued April 22, 1996. For effective dates, see paragraph 10.

4. Policy. Except as provided herein, the standards set forth in this Circular shall be applied by all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the subsequent statute shall govern.

Federal agencies shall apply the provisions of the sections of this Circular to non-Federal entities, whether they are recipients expending Federal awards received directly from Federal awarding agencies, or are subrecipients expending Federal awards received from a pass-through entity (a recipient or another subrecipient).

This Circular does not apply to non-U.S. based entities expending Federal awards received either directly as a recipient or indirectly as a subrecipient.

5. Definitions. The definitions of key terms used in this Circular are contained in § __.105 in the Attachment to this Circular.

6. Required Action. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in the Attachment to this Circular. Federal agencies making awards to non-Federal entities, either directly or indirectly, shall adopt the language in the Circular in codified regulations as provided in Section 10 (below), unless different provisions are required by Federal statute or are approved by the Office of Management and Budget (OMB).

7. OMB Responsibilities. OMB will review Federal agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to ensure uniform, effective and efficient implementation.

8. Information Contact. Further information concerning Circular A-133 may be obtained by contacting the Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, Washington, DC 20503, telephone (202) 395-3993.

the finding occurred was submitted to the Federal clearinghouse;

(ii) The Federal agency or pass-through entity is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) Corrective action plan. At the completion of the audit, the auditee shall prepare a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan shall provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan shall include an explanation and specific reasons.

§ __.320 Report submission.

(a) General. The audit shall be completed and the data collection form described in paragraph (b) of this section and reporting package described in paragraph (c) of this section shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the cognizant or oversight agency for audit. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the data collection form and reporting package shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period.) Unless restricted by law or regulation, the auditee shall make copies available for public inspection.

(b) Data Collection. (1) The auditee shall submit a data collection form which states whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The form shall be approved by OMB, available from the Federal clearinghouse designated by OMB, and include data elements similar to those presented in this paragraph. A senior level representative of the auditee (e.g., State controller, director of finance, chief executive officer, or chief financial officer) shall sign a statement to be included as part of the form certifying that: the auditee complied with the requirements of this part, the form was prepared in accordance with this part (and the instructions accompanying the form), and the information included in the form, in its entirety, are accurate and complete.

(2) The data collection form shall include the following data elements:

- (i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).
- (ii) Where applicable, a statement that significant deficiencies in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses.
- (iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee.
- (iv) Where applicable, a statement that significant deficiencies in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses.
- (v) The type of report the auditor issued on compliance for major

Exhibit 7

Results from Query of Single Audit Database

The following is a key for the status field
 P = The FAC is processing the audit.
 W = The FAC is waiting for the auditee to send additional information. (see below)
 W-1 = Missing Form.
 W-2 = Missing Components/Form Errors.
 W-3 = Missing Components.
 W-4 = Form Errors.
 W-5 = Form Errors - Audit package forwarded to Federal Agencies for follow-up.
 W-6 = Pending Cognizant Agency Assessment.
 C = The audit is complete.

Your search has produced 10 records

These results are based on the following search criteria:
 Auditee Name: ALLIGATOR.

EIN	Auditee Name	Fiscal Year End Date	Status	Street 1	Street 2	City	State	Zip Code	Initial Date Received	Form Date Received	Component Date Received	FAC Accepted Date
591173103	ALLIGATOR POINT WATER RESOURCES DISTRICT	9/30/2001	C	PO BOX 155		PANACEA	FL	32346	01/30/2002	01/30/2002		01/30/2002
570878765	ALLIGATOR RURAL WATER & SEWER CO. INC.	12/31/2001	C	P O BOX 810		MCBEE	SC	29101	10/09/2002	10/09/2002		10/09/2002
570878765	ALLIGATOR RURAL WATER & SEWER CO. INC.	12/31/2006	C	PO BOX 810		MCBEE	SC	291010810	09/27/2007	09/27/2007	09/27/2007	09/27/2007
570878765	ALLIGATOR RURAL WATER & SEWER CO. INC.	12/31/2007	C	PO BOX 810		MCBEE	SC	291010810	12/18/2008	12/18/2008	12/18/2008	12/18/2008
570878765	ALLIGATOR RURAL WATER & SEWER COMPANY INC	12/31/1998	C	P O BOX 810		MCBEE	SC	29101	10/28/1999	10/28/1999		10/28/1999
570878765	ALLIGATOR RURAL WATER & SEWER COMPANY INC.	12/31/2002	C	P.O. BOX 810		MCBEE	SC	29101	12/03/2003	09/02/2005		09/02/2005
570878765	ALLIGATOR RURAL WATER & SEWER COMPANY INC.	12/31/2003	C	PO BOX 810		MCBEE	SC	29101	01/20/2005	05/12/2005	01/20/2005	05/12/2005
431757115	ALLIGATOR RURAL WATER AND	12/31/2012	C	378 W PINE AVENUE		MCBEE	SC	29063	03/19/2014	03/11/2014		03/11/2014

570878765	SEWER COMPANY ALLIGATOR RURAL WATER AND SEWER COMPANY, INC.	12/31/2004	C	PO BOX 810		MCBEE	SC	29101	02/15/2006	02/15/2006	02/15/2006	02/15/2006
570878765	ALLIGATOR RURAL WATER AND SEWER COMPANY, INC.	12/31/2009	C	378 WEST PINE AVENUE		MCBEE	SC	291019229	01/25/2012	01/25/2012		01/25/2012

[Return to Status Entity Search](#)

Exhibit 8

Management's Discussion and Analysis (MD&A) 8. The basic financial statements should be preceded by MD&A, which is required supplementary information (RSI). MD&A should provide an objective and easily readable analysis of the government's financial activities based on currently known facts, decisions, or conditions. The financial managers of governments are knowledgeable about the transactions, events, and conditions that are reflected in the government's financial report and of the fiscal policies that govern its operations. MD&A provides financial managers with the opportunity to present both a short- and a long-term analysis of the government's activities. 7 9. MD&A should discuss the current-year results in comparison with the prior year, with emphasis on the current year. This fact-based analysis should discuss the positive and negative aspects of the comparison with the prior year. The use of charts, graphs, and tables is encouraged to enhance the understandability of the information. 10. MD&A should focus on the primary government. Comments in MD&A should distinguish between information pertaining to the primary government and that of its component units. Determining whether to discuss matters related to a component unit is a matter of professional judgment and should be based on the individual component unit's significance to the total of all discretely presented component units and that component unit's relationship with the primary government. When appropriate, the reporting entity's MD&A should refer readers to the component unit's separately issued financial statements. 11. MD&A requirements established by this Statement are general rather than specific to encourage financial managers to effectively report only the most relevant information and avoid "boilerplate" discussion. At a minimum, MD&A should include:

- a. A brief discussion of the basic financial statements, including the relationships of the statements to each other, and the significant differences in the information they provide. This discussion should include analyses that assist readers in understanding why measurements and results reported in fund financial statements either reinforce information in government-wide statements or provide additional information.
- b. Condensed financial information derived from government-wide financial statements comparing the current year to the prior year. At a minimum, governments should present the information needed to support their analysis of financial position and results of operations required in c, below, including these elements: (1) Total assets, distinguishing between capital and other assets (2) Total liabilities, distinguishing between long-term liabilities and other liabilities (3) Total net assets, distinguishing among amounts invested in capital assets, net of related debt; restricted amounts; and unrestricted amounts (4) Program revenues, by major source (5) General revenues, by major source (6) Total revenues (7) Program expenses, at a minimum by function (8) Total expenses (9) Excess (deficiency) before contributions to term and permanent endowments or permanent fund principal, special and extraordinary items, and transfers (10) Contributions (11) Special and extraordinary items (12) Transfers (13) Change in net assets (14) Ending net assets
- c. An analysis of the government's overall financial position and results of operations to assist users in assessing whether financial position has improved or deteriorated as a result of the year's operations. The analysis should address both governmental and business-type activities as reported in the government-wide financial statements and should include reasons for significant changes from the prior year, not simply the amounts or percentages of change. In addition, important economic factors, such as changes in the tax or employment bases, that significantly affected operating results for the year should be discussed.
- d. An analysis of balances and transactions of individual funds. The analysis should address the reasons for significant changes in

fund balances or fund net assets and whether restrictions, commitments, or other limitations significantly affect the availability of fund resources for future use. e. An analysis of significant variations between original and final budget amounts and between final budget amounts and actual budget results for the general fund (or its equivalent). The analysis should include any currently known reasons for those variations that are expected to have a significant effect on future services or liquidity. f. A description of significant capital asset and long-term debt activity during the year, including a discussion of commitments made for capital expenditures, changes in credit ratings, and debt limitations that may affect the financing of planned facilities or services. g. A discussion by governments that use the modified approach (paragraphs 23–25) to report some or all of their infrastructure assets including: (1) Significant changes in the assessed condition of eligible infrastructure assets from previous condition assessments (2) How the current assessed condition compares with the condition level the government has established (3) Any significant differences from the estimated annual amount to maintain/preserve eligible infrastructure assets compared with the actual amounts spent during the current period. h. A description of currently known facts, decisions, or conditions that are expected to have a significant effect on financial position (net assets) or results of operations (revenues, expenses, and other changes in net assets).

Document Header:

Checkpoint Contents

Accounting, Audit & Corporate Finance Library

Standards and Regulations

GASB

Original Pronouncements

Statements of the Governmental Accounting Standards Board (GASBS)

GASBS 34 — Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments

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Exhibit 9

MANAGEMENT AGREEMENT

BETWEEN

ODOM & ASSOCIATES, INC.

AND

ALLIGATOR RURAL WATER AND SEWER COMPANY, INC.

★ ★ ★ ★ ★

Handwritten signature

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD) MANAGEMENT AGREEMENT

AGREEMENT made and entered into this 19th day of November, 2002, by and between *Odom & Associates, Inc.*, a South Carolina corporation ("Odom & Associates"), and *Alligator Rural Water and Sewer Company, Inc.*, a South Carolina corporation (the "Water Company").

PREAMBLES :

Whereas, the Water Company owns facilities which furnish water and sewer service to the general public in certain counties in the Pee Dee area of South Carolina; and

Whereas, Odom & Associates have experience and expertise in the management and operation of facilities which provide water and sewer service to the general public; and

Whereas, the Water Company desires to avail itself of the services of Odom & Associates to manage and operate its water production and sewer facilities and Odom & Associates desires to provide such services to the Water Company; and

Whereas, both parties desire to reduce their agreement to writing;

Now, Therefore, in consideration of the premises and the consideration arising out of the mutual promises hereinafter set forth, the parties hereto agree as follows:

During the period of this agreement or any extension thereof, Odom & Associates shall perform the following services for and in behalf of the Water Company:

I - GENERAL MANAGEMENT

1. Compile the annual budget for the Board of Directors of the Water Company and Rural Development;

2. Plan and develop for future expansion and meet with Rural Development, engineers and other agencies to implement expansion plans;
3. Complete loan and grant applications from Rural Development, EDA or state resources;
4. Meet with local and state officials to promote development in the Water Company's service area;
5. Verify work completion and approve pay requests from contractors;
6. Act as legal agent in Magistrate's Court to prosecute fraudulent checks and meter tampering violations; and
7. Arrange for the annual budget retreat for the Board of Directors of the Water Company, including arranging for speakers and planning for meals and accommodations.

II - OFFICE MANAGEMENT

1. Provide a general manager, office manager, administrative assistant along with a properly equipped office necessary to carry out its functions under this agreement;
2. Service, bill and collect accounts for retail and wholesale water and sewer customers;
3. Maintain appropriate bank accounts for collections of water and sewer customers and for construction projects; reconcile bank accounts monthly; and provide financial information to the Water Company's Board of Directors and its accountant;
4. Assist the accounting firm for the Water Company by providing financial data and all available information relevant to the preparation of the Water Company's tax return; and
5. Complete the necessary reports required by Rural Development for construction loans and assist the attorneys and engineers involved with the loans and construction projects.

III - OPERATION AND MAINTENANCE

1. Employ six (6) water treatment plant operators, two (2) certified backflow testers and one (1) certified distribution operator;
2. Monitor and test water quality daily at nine (9) wells and nine (9) sewer pump stations;
3. Employ a trained operator for the SCADA system to monitor the wells;
4. Provide operators and maintenance personnel on call at all times for water and sewer emergency calls;
5. Service over 1700 residential water customers to include reading meters monthly, repairing minor leaks at tap sites and installing taps for new customers;
6. Repair water lines or coordinate with outside contractors if line work is too large (total estimated cost of repair in excess of \$1000.00) for in-house repairs; and
7. Cut grass and maintain all well, sewer and tank sites.

IV - COMPLIANCE WITH DHEC REGULATIONS

1. Perform monthly field bacteria tests and deliver to DHEC for analysis;
2. Perform annual lead and copper tests;
3. Maintain and perform annual tests on all valves and commercial backflow devices;
4. Meet with DHEC officials for annual inspection; and
5. Prepare an annual consumer confidence report and publish it to the public.

During the period of this agreement or any extension thereof, Odom & Associates and the Water Company agree upon the following additional terms of this agreement:

V - COMPENSATION

For all services hereunder Odom & Associates shall be paid the base sum of Sixty

Thousand Dollars (\$60,000.00) per month. This sum shall cover all costs incurred by Odom & Associates to operate the water and sewer facilities of the Water Company, except for the cost of major repairs. The level of compensation paid hereunder shall be adjusted based upon the volume of water and sewer handled by Odom & Associates above 600 million gallons per year in water sales and 40 million gallons per year of sewage. The base management fee will be increased by forty percent (40%) of sales revenue on water sales in excess of 600 million gallons per year. The base management fee will also be increased by twenty-five percent (25%) of revenues for transporting sewage in excess of forty (40) million gallons per year. The base management fee will also be increased by forty percent (40%) and twenty-five percent (25%), respectively, for increased sales revenues for the base amount of water and sewer which is generated by cost increases imposed by the Water Company on its customers.

The Water Company shall pay the expenses of any continuing education courses or seminars which the employees of Odom & Associates are required to attend by the Water Company's Board of Directors, plus travel reimbursement at the standard mileage rate allowable under U.S. Treasury Regulations for car expenses incurred in carrying on a trade or business and a per diem allowance for meals of twenty dollars (\$20.00) per day.

The Water Company shall pay for all telephone expense incurred by Odom & Associates which is directly related to Water Company business. All other office overhead expenses, including, but not limited to postage, stationery or account statements shall be paid for by Odom & Associates.

The Water Company shall pay all fidelity bond premiums for Odom & Associates employees in conformity with requirements of Rural Development.

VI - LENGTH OF AGREEMENT; AGREEMENT ASSIGNABLE

The term of this agreement shall be for a period of twenty (20) years from its

effective date. In the event of any breach of a covenant hereunder, this agreement may be terminated in writing at the option of the non-defaulting party. The duties of either party hereunder shall be assignable upon the approval of the Board of Directors of the other party, which approval shall not be unreasonably withheld.

VII - REMEDIES UPON DEFAULT

Upon an actual or threatened breach of any provision of this agreement, the injured party may not have an adequate remedy at law and may pursue injunction or specific performance or any other remedy at equity or at law.

VIII - GOVERNING LAW; AGREEMENT BINDING UPON SUCCESSORS AND ASSIGNS

This agreement shall be governed by and construed under the laws of the state of South Carolina and shall be binding upon and inure to the benefit of the parties hereto, their successors and permitted assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be subscribed by their duly authorized officers on the date first above written.

Witnesses:

Cornelia L. Carr
Kenneth R. Self

Cornelia L. Carr
Kenneth R. Self

Parties:

Odom & Associates, Inc.

By: Steve C. Odom

Its: President

Alligator Rural Water and Sewer
Company, Inc.

By: Harvey L. Gigg

Its: President

Exhibit B

Exhibit 3

Affidavit of Joseph McGougan

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

Town of McBee, South Carolina

**AFFIDAVIT OF
JOSEPH W. MCGOUGAN**

Personally appeared before me the undersigned, Joseph W. McGougan, who being duly sworn states as follows:

1. I am Joseph W. McGougan, President of MBD Consulting Engineers, P.A.
2. I have been licensed as a Professional Engineer since 1987 and have over 33 years of civil engineering consulting experience, specializing in water and wastewater treatment and water and wastewater plant and infrastructure design.
3. I have been personally involved with the water supply system in the Town of McBee ("Town"), since 2008, and serve as the Town's engineer.
4. In this capacity, I have direct knowledge of the Town's water system from an engineering and operating standpoint.
5. The purpose of my affidavit is to assist the town in responding to concerns raised by A.O. Smith in a meeting A.O. Smith's lawyers held with the Town's lawyers on September 3, 2015.
6. At that meeting, A.O. Smith raised concerns about the Town's system related to fire protection and future raw water supply.
7. I am not aware of any of these concerns being raised before the meeting. This is my first opportunity to respond to them. A.O. Smith's failure to raise these issues before now is a matter of concern. If there are operational problems that jeopardize the safety of the A.O.

Smith plant and the future reliability of our system, we would have expected A.O. Smith's engineers and plant management to have raised them to us at once.

Raw Water Supply

8. The Town currently operates under a raw water supply agreement with Alligator Regional Water and Sewer System ("Alligator"). The agreement dates to 2002, when Alligator's executive director, Mr. Odom, was also the Mayor of the Town. As I understand it, at that time, Alligator took over operation of the Town's water system and had the South Carolina Department of Health and Environmental Control ("DHEC") transfer the operating permits for the system to Alligator.
9. In the years that followed, Mr. Odom was replaced as mayor.
10. In the years following 2002, South Carolina Department of Health and Environmental Control (DHEC) discontinued the Town's Operational Permit for its supply wells and for the entire water system and transferred them to Alligator. In 2012, the Town petitioned and received the Operational Permit for the entire system. The Town recently applied to DHEC for authority to be allowed to place the two existing wells back into operation.
11. In the September 3, 2015 attorneys meeting, A.O. Smith's lawyers raised concerns about the ability of the Town to meet the plant's fire flow requirements in reliance on its two wells.
12. These concerns are without substance.
13. The Town's average current water usage per day, including A.O. Smith, is 230,088 gallons per day (gpd).
14. A.O. Smith required, on average, 136,956 gpd in 2014. See Exhibit A attached.

15. Town Well No. 1 has a capacity of 384,192 gpd when pumped for 16 hours a day.
16. Town Well No. 2 has a capacity of 192,096 gpd when pumped for 16 hours a day.
17. The wells' total combined capacity is 576,288 gpd when pumped for 16 hours a day, or 250 % of average daily demand.
18. In emergency circumstances, *i.e.*, if Well No. 1 fails, Well No. 2 can be pumped 24 hours a day, seven days a week. Under those circumstances, Well No. 2 can supply in excess of 288,000 gpd or 125 % of average daily demand.
19. In addition, the Town has two storage tanks with a combined storage capacity of 325,000 gallons. The larger of these two tanks, Tank No. 2, was specifically engineered and constructed to provide fire flow reserves for A.O. Smith. It is located adjacent to the plant. Town Well No. 2 was placed adjacent to Tank No. 2 to allow it to efficiently serve A.O. Smith's fire protection needs.
20. The Town intends to remain interconnected with Alligator. Alligator will represent an additional source of backup supply to the town and to A.O. Smith in case of emergency, and the Town will represent the same to Alligator.
21. In my engineering opinion, and based on my knowledge of the Town's system, with the two wells in operation, the Town will be fully capable of meeting 100% of all customers' requirements, including fire protection service for A.O. Smith. This is true both under normal operating conditions and in emergency conditions when Well No. 1 is out of service.

22. We have modeled the cost to the Town of ceasing to take all of its water supply requirements from Alligator. We determined that restarting the Town wells will reduce the cost of operating the Town's system significantly.
23. In my engineering judgment, the Town can fully meet all DHEC permit requirements in reliance on the two wells.

Well Contamination

24. In the September 3, 2015 attorneys meeting, A.O. Smith's lawyers raised concerns about the contaminants in the Town's wells. These concerns are groundless.
25. The Town's two wells have been extensively tested as part of the recent relicensing process. They fully comply with DHEC drinking water standards regarding all constituents of concern. I am not aware of any test results where the wells have not met all state and federal water quality standards.
26. In the Chesterfield County area, there are three common constituents of concern in ground water. One is radium, which occurs naturally in the area but is very unevenly distributed. Radium has not been found at levels that exceed the MCL (Maximum Contaminant Level) in any of the sampling performed.
27. The other two constituents of concern for wells in the area are the organic compounds ethylene dibromide ("EDB"), and 1,2-Dibromo-3-chloropropane ("DBCP"). EDB and DBCP occurrence in the area well is sporadic. While some amount of these compounds has been found in the Town's wells, I am not aware of any test results where the levels have exceeded the MCL for drinking water. The Town could meet drinking water standards without further treatment of this water.

28. Even though water from the Town's wells' levels meets all drinking water standards, DHEC has asked the Town to install carbon filtration, and the Town has agreed to do so. DHEC took this position based on 'public concerns' raised during the permitting process. It is not clear who in the public raised these concerns with DHEC. Rather than contest this issue with DHEC, the Town obtained state grants to underwrite the cost of the filtration. These concerns did not derail the restarting of the wells as was initially feared.
29. When the wells go into operation, the quality of the water set out into the Town's system will exceed all applicable drinking water standards. Carbon filtration will ensure that this is the case regardless of future circumstances.

Current Fire Suppression Capability

30. Keeping Tank No. 2 filled is the key operating requirement for meeting A.O. Smith's needs for fire suppression capacity. Alligator presently monitors the water level in the 125,000 gallon tank downtown and is responsible for keeping this tank filled. Due to the proximity of the two tanks and the connection to the Alligator system, if the tank downtown has water, the tank at A.O. Smith has water (the level at the A.O. Smith tank would hydraulically be slightly higher than the level downtown).
31. I have reviewed Mr. Oliver's affidavit concerning the fire suppression service. What he says is completely accurate. Alligator directly meters and controls the water tanks, their levels, and the level in Tank No. 2. There is no engineering or operating constraint on the Town's system that would prevent Alligator from ensuring that Tank No. 2 is properly filled at all times. It is Alligator's operating responsibility to ensure that there is sufficient water in both tanks. If Tank No. 2 has not been filled properly, Alligator failed in its operating responsibilities.

32. As I mentioned above, this is the first I have heard of this issue. This is a serious issue and accountability needs to be determined. As Town engineer, I expect the Town to conduct a full engineering study to determine why this happened. In my opinion, this issue reinforces the wisdom of the Town's decision to no longer rely exclusively on Alligator for wholesale supply or hydraulic management of its system.

The Third Avenue Break

33. I have also reviewed Mr. Oliver's conclusions and the discussion in his affidavit related to the Third Avenue break, and the 'interruption of service' to A.O. Smith on June 19, 2015.

34. Mr. Oliver's analysis is correct from an engineering and hydrological perspective. The Third Avenue break and the flushing that was done afterwards could not have caused a loss of service to A.O. Smith's plant. There is no engineering basis to explain a loss of service to A.O. Smith on June 19, 2015.

Conclusion

35. In my engineering judgment, the Town has operated its system using good engineering and operating practice. It has provided safe and reliable service to all its customers, including A.O. Smith, and will continue to be able to provide such service in reliance on the two wells it has recently permitted with DHEC. If there have been problems maintaining proper levels in Tank No. 2, those problems were caused by Alligator.

FURTHER THE AFFAINT SAITH NOT.



JOSEPH W. MCGOUGAN

SWORN to BEFORE me the 9th day of September, 2015.

Jennifer L. Graham
Notary Public for South Carolina
My Commission Expires: 8/22/2022

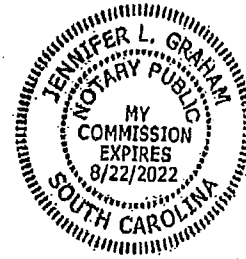


Exhibit A

TOWN OF MCBEE

COUNCIL MEMBERS:

Mrs. Marilyn Fields
Mr. Shlon Green
Mr. A. C. McLeod
Mr. Charlie Sutton



MAYOR:

Mr. John Campolong

ADMINISTRATOR:

Terri King

AO Smith Water Usage Analysis 2014

The following information is a twelve month analysis of water usage for all meters assigned to AO Smith:

Total Gallons Used: 49,989,130

Average Gallons per Day: 136,956

Total Invoiced Amount: \$242,822.06

Average Cost per Day: \$665.27

Exhibit 4

Statement of DHEC Staff Position (February 12, 2016)

**BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STATEMENT OF STAFF POSITION**

Requestor: A.O. Smith Corporation

In re: Town of McBee Final Approvals to Place into Operation
Well No 1 & 2 GAC Contactor Addition (Construction Permit No. 29779-WS)
McBee Water System Well No. 2 (Construction Permit No. 28475-WS)
R. 61-58, State Primary Drinking Water Regulation
Docket Nos.: 16-RFR-7 and 16-RFR-8

RECEIVED

FEB 12 2016

Clerk, Board of Health
and Environmental Control

Date: February 12, 2016

SUMMARY

The Requestor, A.O. Smith Corporation ("A.O. Smith") is a water supply customer of the Town of McBee's Public Drinking Water System ("PWS") which was permitted pursuant to the requirements contained in 4 S.C. Code Ann. Regs. 61-58 (2011) (hereinafter referred to as "R.61-58"), State Primary Drinking Water Regulations. In particular, A.O. Smith has filed two Requests for Final Review ("RFR"), Docket Nos.: 16-RFR-7 and 16-RFR-8, in which it is challenging the following Department staff actions:

- The January 12, 2016 issuance of a Final Approval To Place Into Operation to the Town of McBee for the operation of a potable water system permitted under Construction Permit No. 28475-WS ("McBee Water System Well No. 2"), which was issued on June 15, 2012; and
- The January 12, 2016 issuance of a Final Approval To Place Into Operation to the Town of McBee for the operation of a potable water system permitted under Construction Permit No. 29779-WS ("Well Nos. 1 & 2 GAC Contactor Addition"), which was issued on June 30, 2014.

In its RFRs, A.O. Smith claims that it will be harmed by an inadequate supply of potable water purportedly caused by the Department's authorization to the Town of McBee to supply water to its customers from two wells instead of supplying water purchased from a rival water system, Alligator Rural Water & Sewer Company. As will be discussed in detail below in the Section entitled Response to Grounds(s) Stated in Requests for Review, A.O. Smith's claims are time barred because it did not challenge the Department's analysis and decision making under R.61-58 when the Department respectively issued Construction Permit Nos. 28475-WS and 29779-WS to the Town of McBee.

GENERAL BACKGROUND

Public Drinking Water Systems ("PWS's") are permitted based on 4 S.C. Code Ann. Regs. 61-58 (2011) (hereinafter referred to as "R.61-58"), State Primary Drinking Water Regulations. The requirements in R.61-58.2, Groundwater Sources and Treatment, apply to all new construction

and modifications that expand an existing system. The requirements in R.61-58.7 apply to the operation and maintenance, and water system capacity determinations for existing systems.

CHRONOLOGY OF FINAL APPROVALS

December 7, 2010 – The Town of McBee submitted a Preliminary Engineering Report ("PER") to the Department for its review. The PER set forth the Town's plan to use its own sources of drinking water and no longer use water from the Alligator Rural Water System for operation and maintenance ("O&M"). Because the PER included financial information, a business plan wasn't required.

June 13, 2011 - Staff approved the PER.

June 14, 2011 - Staff issued a Public Water System Operating Permit to Town of McBee. No affected party challenged the issuance of the Permit despite the fact it authorized the Town to substitute its water source.

January 10, 2012. – The Town of McBee submitted an application (28475-WS) to the Department to modify Well No. 2. The modification included installation of a new 200 horsepower ("Hp") submersible pump to be set at a depth of 228 ft., a High-Density Linear Polyethylene ("HDLPE") tank, sodium hypochlorite feed system, two chemical feed pumps, and associated piping and appurtenances.

November 13, 2012 – The Department issued Construction Permit 28475-WS to the Town of McBee. No affected party challenged the issuance of the Permit despite the fact that it authorized the Town to modify its water system. A copy of the Construction Permit is attached hereto as Exhibit A.

November 11 & 13, 2013 -Testing of the water from Well Nos. 1 & 2 by the Town of McBee indicated that both wells were contaminated with Ethylene Dibromide ("EDB") and 1,2-Dibromo-3-chloropropane ("DBCP"). To make use of the water in Well Nos. 1 & 2, the Town of McBee decided to add treatment to remove contaminants.

December 20, 2013 – The Town of McBee submitted an application for the construction of two (2) granulated activated carbon ("GAC") contactors and associated appurtenances to be connected to Well No. 1 and Well No. 2.

June 30, 2014 - The Department issued Construction Permit 29779-WS to the Town of McBee authorizing the construction of the GAC contactors. No affected party challenged the issuance of the Permit despite the fact that it authorized the Town to modify its water system. A copy of the Construction Permit is attached hereto as Exhibit B.

January 12, 2016 – After receiving the letter of certification signed by Joseph McGougan, P.E. (South Carolina Registration No. 12335), certifying that that the Town had installed the new submersible pump, sodium hypochlorite feed system, and associated piping and appurtenances in accordance with Construction Permit 28475-WS, the Department issued its Final Approval to Place into Operation to the Town.

January 12, 2016 – Also after receiving the letter of certification signed by Joseph McGougan, P.E. (South Carolina Registration No. 12335), certifying that that the Town had installed the two GAC contactors and all necessary appurtenances to Well Nos. 1 & 2 in accordance with Construction Permit 29779-WS, the Department issued its Final Approval to Place into Operation to the Town.

RELEVANT LAW

The Approvals to Place into Operation were issued pursuant to the following statutes and regulations:

S.C. Code Ann. § 44-55-10 *et seq.* (Rev. 2002 & Supp. 2015), State Safe Drinking Water Act; and

4 S.C. Code Ann. Regs. 61-58 (2011), State Primary Drinking Water Regulations

RESPONSE TO GROUND(S) STATED IN REQUESTS FOR REVIEW

The Board should not grant Requestor's RFRs for two reasons. First, the claims raised by Requestor are time barred since they should have been raised years ago when the Construction Permits were issued. Second, even if the claims were not time barred, they are without merit.

With regard to the first ground, Requestor sets 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 in 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 contained 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.

With regard to the second ground, Requestor's claims in 1, 2, 3, 7, 8, and 9 are as follows:

1. The Bureau has failed to require the submittal of data necessary to make a determination that Town Well No. 1 and Well No. 2 has sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).

2. The "System Specific Conditions" of the January 12, 2016 Approvals recognize the operation of the Town's public water system as "contemplated by the preliminary engineering report dated December 6, 2010" does not meet the requirements of SC regulation 61-58.2(B).
3. The January 12, 2016 Approvals include a "recommendation" which requires the Town to "investigate the capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply for water." As such, the January 12, 2016 Approvals recognize that such demonstration under SC Regulation 61-58.2(B) has not been made even though the preliminary engineering report dated December 6, 2010 contemplates that the Town will operate independent of the current potable water source provided by a connection to the Alligator System.
7. Based upon available information from the Department's records it appears that Town Wells No. 1 and No. 2 do not have sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).
8. The January 12, 2016 Approvals are not based on accurate peak day usage for the Town's public water system as required to demonstrate sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).
9. The January 12, 2016 Approvals are based on monthly usage for the Town's customers which cannot be used to determine the "maximum day demand" for the Town's public water system as required to demonstrate sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).

Response: R.61-58.2.B outlines the requirements for determining water system capacity for the design of new public water systems and modifications. The requirements for determining capacity for existing water systems is contained in R.61-58.7.D(12). The term "design maximum daily demand" used in R.61-58.2.B is not defined in the regulation, and the Department interprets it as an expected demand used to design a new water system when existing use data does not exist. In addition, although the Town of McBee sought a modification of its system, the modification was for adding additional sources and not an expansion of the system. Therefore, the modification requested by the Town did not trigger the capacity requirements set forth in R.61-58.2(B).

In its fourth claim, Requestor claims that:

The January 12, 2016 Approvals appear to allow the operation of the Town's public water system without the potable water source provided by the Alligator System.

Response: The Town of McBee is allowed to operate the water system within the conditions outlined in the Public Water Supply Permit issued on June 14, 2011 and the operational approvals to the Construction Permits issued on January 12, 2016.

In its fifth claim, Requestor claims that:

The Town has failed to demonstrate that the Town (sic) operation of Town Well Nos. 1 and 2 meet the requirements of a "viable water system" as defined in R.61-58(B).

Response: The requirement for a viable water system in R.61-58.1(B)(4) applies to new water systems. The Town of McBee is an existing system; therefore, the demonstration of viability requirement does not apply.

In its sixth claim, Requestor claims that:

Since the January 12, 2016 Approvals were issued without a prior determination by the Bureau that Well No. 1 and Well No. 2 have sufficient capacity to meet the requirements of SC Regulation 61-58.2(B), the January 12, 2016 Approvals subject A.O. Smith to potential interruptions in or inadequate service for the continued operations at the A.O. Smith Facility.

Response: The Final Approval to Operate, which authorizes the Town of McBee to make use of two additional water sources made available by the Town's completion of the construction approved by the Construction Permits, will contribute more water to the water distribution system than is currently available. The additional water sources are an improvement to the total system capacity.

In its tenth claim, Requestor claims that:

The January 12, 2016 Approvals are based on data which does not meet generally accepted practices for demand.

Response: The Department decisions were based on information provided by the Town's consultant engineer, which was provided in the PER and in the applications for the Construction Permits. When the staff reviewed the information for the PER approved in 2011, and the information submitted for the Construction permits in 2012 and 2014, staff found no indication that the information provided was incorrect.

Finally, in its eleventh claim, Requestor claims that:

The Well No. 1 and 2 GAC Contactor Addition is not sized in accordance with the stated yield of the two Town Wells.

Response: The technical review for Construction Permit 29779-WS required that the consulting engineer submit the sizing calculations for the GAC contactor as part of the construction application. As part of its review for that permit in 2014, staff determined

that the submitted calculations complied with R.61-58.2.D(9)(d). In issuing the Final Approval to Place into Operation for Construction Permit 29779-WS, staff was not required to and did not consider again whether the GAC contractor was properly sized.

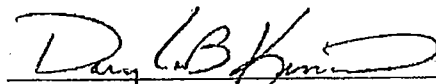
CONCLUSION

The Requestor's claims are time barred and should not be considered as a basis for challenging the Department's issuances of Final Approvals to Place into Operation for the Construction Permits. Moreover, even if the Board were to consider the Requestor's claims they are without merit as they are not supported by the law, and the facts and circumstances relevant to this matter.

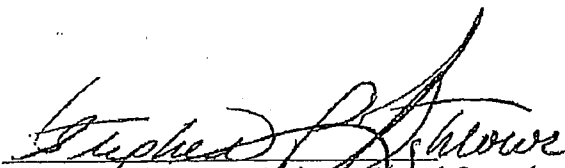
REQUESTED ACTION

The Board should deny the Requestor's request for a final review conference.

Respectfully submitted,



Douglas B. Kinard, PE, Director
Drinking Water Protection Division
Bureau of Water, SCDHEC



Stephen P. Hightower, Assistant General Counsel
SCDHEC Office of General Counsel

EXHIBIT A

Water Supply Construction Permit Bureau of Water



Permission is Hereby Granted To: **MCBEE TOWN OF**
PO BOX 248
MCBEE SC 29101

for the construction of a chemical feed in accordance with the construction plans, specifications, design calculations and the SC DHEC Construction Permit Application signed by Joseph McGougan, Registered Professional Engineer, S.C. Registration Number:

Project Name: MCBEE WATER SYSTEM WELL NO.2 **County:** Chesterfield
Location: OFF HIGHWAY 1, MCBEE SC

Project Description: Modifications to McBee Well #2, including new 200 gpm submersible pump (set at a depth of 228 ft.), sodium hypochlorite feed system (200 gal. HDLPE tank, two chemical feed pumps), associated piping and appurtenances.

Service By: The water will be provided by McBee Town Of (System Number: 1310004)

Special Conditions

1. Before an approval to "Place Into Operation" can be issued for the proposed construction, an operation and maintenance (O&M) manual must be developed. This must be a comprehensive O&M manual developed for all facility processes. The complete O&M manual must be available for review at the time of final inspection. Note that if an O&M manual already exists for a facility then only an addendum for the proposed work is required.
2. The chemical, physical and bacteriological quality of the well water must meet EPA primary and secondary standards or treatment may be required. The water must be evaluated for corrosivity to comply with the Lead and Copper Rule.
3. An operator with the appropriate certification for treatment must be provided.

In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

This is a permit for construction only and does not constitute State Department of Health and Environmental Control approval, temporary or otherwise, to place the system in operation. An Approval to Place in Operation is required and can be obtained following the completion of construction by contacting the FLORENCE EQC OFFICE at 843-661-4825. Additional permits may be required prior to construction (e.g., stormwater).

Permit Number: 28475-WS
Date of Issue: November 13, 2012
Expiration Date: Construction must be completed prior to November 13, 2014 or this permit will expire.
WCB


Douglas B. Kinard, P.E., Director
Drinking Water Protection Division

WW-1672-09

Bureau of Water, DHEC, 2600 Bull Street, Columbia, SC 29201

EXHIBIT B

Water Supply Construction Permit Bureau of Water



Permission is Hereby Granted To: **MCBEE TOWN OF**
PO BOX 248
MCBEE SC 29101

for the construction of a treatment system in accordance with the construction plans, specifications, design calculations and the SC DHEC Construction Permit Application signed by Joseph McGougan, Registered Professional Engineer, S.C. Registration Number: 12335.

Project Name: WELL NO 1 & 2 GAC CONTACTOR ADDITION **County:** Chesterfield
Location: OFF HIGHWAY 1, MCBEE, SC

Project Description: Construction of two (2) GAC contactors at Well #1 (366 cu ft) and Well #2 (241 cu ft) in the Town of McBee.

Service By: The water will be provided by McBee Town Of (System Number: 1310004)

Special Conditions

1. Before an approval to "Place Into Operation" can be issued for the proposed construction, an operation and maintenance (O&M) manual must be developed. This must be a comprehensive O&M manual developed for all facility processes. The complete O&M manual must be available for review at the time of final inspection. Note that if an O&M manual already exists for a facility then only an addendum for the proposed work is required.

In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

This is a permit for construction only and does not constitute State Department of Health and Environmental Control approval, temporary or otherwise, to place the system in operation. An Approval to Place in Operation is required and can be obtained following the completion of construction by contacting the FLORENCE EQC OFFICE at 843-661-4825. Additional permits may be required prior to construction (e.g., stormwater).

Permit Number: 29-79-WS
Date of Issue: June 30, 2014
Expiration Date: Construction must be completed prior to June 30, 2017 or this permit will expire.
TLS


Douglas B. Kinard, P.E., Director
Drinking Water Protection Division

WW-1731-08

Bureau of Water, DHEC, 2600 Bull Street, Columbia, SC 29201

Exhibit 5

Affidavit of Terri King

CERTIFICATE OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, via United States mail, postage prepaid, to the following address(es):

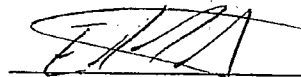
Pleading: Town of McBee's Motion for Relief from Stay

Parties Served: W. Thomas Lavender, Jr.
Joan W. Hartley
Nexsen Pruet, LLC
1230 Main St., Ste. 700
Columbia, South Carolina 29201

Attorneys for Petitioner

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

*Attorneys for the South Carolina Department of Health and
Environmental Control*



Edwin T. Mathis

March 17, 2016

FILED

MAR 17 2016

SC ADMIN. LAW COURT

MAR 21 2016

NEXSEN PRUET, LLC
COLUMBIA

Respondents.

00176

In November 2012, DHEC issued Construction Permit 28475-WS to the Town that authorized it to modify a well that would be used for the Town's water system. No one challenged that permit.

In June 2014, DHEC issued Construction Permit 29779-WS to the Town that authorized it to make additional modifications to its wells. No one challenged that permit.

In January 2016, DHEC received a letter from an engineer certifying that the Town had completed the construction work authorized by the prior permits and that the wells and the Town's water system were ready to become operational. DHEC then issued its final approval for the Town to place its system into operation.

Only then, more than six years after the Town began seeking this approval and after the Town had invested over \$250,000 into this project, did anyone speak up in opposition. A.O. Smith, who is one of the Town's water customers, requested that DHEC re-review the entire process. The Director of DHEC's Drinking Water Protection Division rightly rejected A.O. Smith's objections as both "time barred" and "without merit as they are not supported by the law, and the facts and circumstances relevant to this matter." (Ex. 1, Statement of DHEC Staff Position at 6 (Feb. 12, 2016).)

A.O. Smith has now attempted to perpetuate its obstructionism by masquerading its objections as a request for a contested case hearing before this Court. Because these challenges are time-barred, the Court should dismiss this case for lack of jurisdiction.

ARGUMENTS AND AUTHORITIES

It is hornbook law that a party who seeks review of a decision must timely appeal the decision, and that appellate bodies do not have authority to extend the time for appeal. *See generally* Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* 299 (3d ed. 2016) ("As

with appeals in civil and criminal matters, the time for service of the notice of appeal in administrative matters is jurisdictional and cannot be extended by the appellate courts. Likewise, an administrative tribunal lacks the authority to extend the statutorily authorized time limit for filing an internal appeal.”) (internal citations omitted).

This Court has recognized that these principles and limitations on its jurisdiction reach contested cases such as this. *See Hill v. S.C. DHEC*, Docket No. 10-ALJ-07-0625-CC, 2010 SC ENV LEXIS 71, at *7-9 (S.C. Admin. Law Ct. Dec. 9, 2010) (applying the reasoning that a court cannot enlarge a time frame within which a party must trigger the court’s jurisdiction to the statutory timing requirements for seeking a contested case).

Here, South Carolina Code § 44-1-60(C) provides that initial decisions regarding the issuance or denial of permits by DHEC “shall be a staff decision.” The staff decision then becomes a department decision based on the entire administrative record, “which shall consist of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file” for the requested permit. *Id.* § 44-1-60(D).

DHEC must send notice of its department decisions to the applicant and to “affected persons who have requested in writing to be notified.” *Id.* § 44-1-60(E)(1). Recipients have “fifteen calendar days” from the date notice was mailed to submit a written request for “final review” of the agency’s decision. *Id.* § 44-1-60(E)(2). If no such request for final review is submitted, “[t]he staff decision becomes the final agency decision.” *Id.*

A DHEC decision can only come to this Court as a contested case after DHEC declines a request for final review, DHEC fails to conduct a final review within sixty days of its receipt of a request for final review, or DHEC issues a “final agency decision resulting from the final review conference.” *Id.* § 44-1-60(G).

In this case, DHEC issued the following permits to the Town of McBee:

- (1) Public Water System Operating Permit (issued June 2011);
- (2) Construction Permit 28475-WS (issued November 2012); and
- (3) Construction Permit 29779-WS (issued June 2014).

No request for final review was ever made for any of these department decisions. They are, therefore, beyond the Court's jurisdiction. S.C. Code Ann. § 44-1-60(E)(2).

Nor can A.O. Smith save its petition by suggesting that its objections merely relate to the "Final Approvals" issued by DHEC in January 2016. Those approvals were nothing more than acknowledgements that the Town of McBee satisfied conditions contained in the previously-issued permits; DHEC itself even recognizes this limited scope of the final approvals. (Ex. 1, Statement of Staff Position at 3 (Feb. 12, 2016).)

Instead, as is clear from the face of its petition, A.O. Smith is attempting to challenge steps in the administrative process that predate the November 2012 and June 2014 permits. (*See* Request for Contested Case Hr'g at 4-5 (Mar. 15, 2016) (arguing that DHEC did not properly assess the Town's capacity to meet demand during the permitting process).) But those decisions are now unreviewable, as A.O. Smith did not timely seek review years ago when the opportunity to do so was available. *See, e.g., Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (holding that the law-of-the-case doctrine precludes appellate review of intermediate determinations that could have been, but were not, timely appealed).

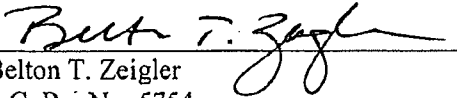
Because those permitting determinations are now final and unreviewable, the Court lacks jurisdiction over this matter. It should dismiss this case accordingly.

CONCLUSION

DHEC issued its final permitting decisions as to the Town of McBee's water system in June 2011, November 2012, and June 2014. The Town has expended untold resources since then working to get its system online and available to meet the needs of its customers. Not until January 2016 did A.O. Smith ever suggest that there were any procedural defects in the permitting process. In addition to being groundless on their merits, those objections are too late, and the Court should dismiss this case.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

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1727 Hampton Street

Columbia, South Carolina 29201

(803) 454-6504

Attorneys for the Town of McBee

March 17, 2016

Columbia, South Carolina

**BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STATEMENT OF STAFF POSITION**

Requestor: A.O. Smith Corporation

In re: Town of McBee Final Approvals to Place into Operation
Well No 1 & 2 GAC Contactor Addition (Construction Permit No. 29779-WS)
McBee Water System Well No. 2 (Construction Permit No. 28475-WS)
R. 61-58, State Primary Drinking Water Regulation
Docket Nos.: 16-RFR-7 and 16-RFR-8

RECEIVED

FEB 12 2016

Clerk, Board of Health
and Environmental Control

Date: February 12, 2016

SUMMARY

The Requestor, A.O. Smith Corporation ("A.O. Smith") is a water supply customer of the Town of McBee's Public Drinking Water System ("PWS") which was permitted pursuant to the requirements contained in 4 S.C. Code Ann. Regs. 61-58 (2011) (hereinafter referred to as "R.61-58"), State Primary Drinking Water Regulations. In particular, A.O. Smith has filed two Requests for Final Review ("RFR"), Docket Nos.: 16-RFR-7 and 16-RFR-8, in which it is challenging the following Department staff actions:

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In its RFRs, A.O. Smith claims that it will be harmed by an inadequate supply of potable water purportedly caused by the Department's authorization to the Town of McBee to supply water to its customers from two wells instead of supplying water purchased from a rival water system, Alligator Rural Water & Sewer Company. As will be discussed in detail below in the Section entitled Response to Grounds(s) Stated in Requests for Review, A.O. Smith's claims are time barred because it did not challenge the Department's analysis and decision making under R.61-58 when the Department respectively issued Construction Permit Nos. 28475-WS and 29779-WS to the Town of McBee.

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and modifications that expand an existing system. The requirements in R.61-58.7 apply to the operation and maintenance, and water system capacity determinations for existing systems.

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June 13, 2011 - Staff approved the PER.

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November 13, 2012 – The Department issued Construction Permit 28475-WS to the Town of McBee. No affected party challenged the issuance of the Permit despite the fact that it authorized the Town to modify its water system. A copy of the Construction Permit is attached hereto as Exhibit A.

November 11 & 13, 2013 -Testing of the water from Well Nos. 1 & 2 by the Town of McBee indicated that both wells were contaminated with Ethylene Dibromide ("EDB") and 1,2-Dibromo-3-chloropropane ("DBCP"). To make use of the water in Well Nos. 1 & 2, the Town of McBee decided to add treatment to remove contaminants.

December 20, 2013 – The Town of McBee submitted an application for the construction of two (2) granulated activated carbon ("GAC") contactors and associated appurtenances to be connected to Well No. 1 and Well No. 2.

June 30, 2014 - The Department issued Construction Permit 29779-WS to the Town of McBee authorizing the construction of the GAC contactors. No affected party challenged the issuance of the Permit despite the fact that it authorized the Town to modify its water system. A copy of the Construction Permit is attached hereto as Exhibit B.

January 12, 2016 – After receiving the letter of certification signed by Joseph McGougan, P.E. (South Carolina Registration No. 12335), certifying that the Town had installed the new submersible pump, sodium hypochlorite feed system, and associated piping and appurtenances in accordance with Construction Permit 28475-WS, the Department issued its Final Approval to Place into Operation to the Town.

January 12, 2016 – Also after receiving the letter of certification signed by Joseph McGougan, P.E. (South Carolina Registration No. 12335), certifying that that the Town had installed the two GAC contactors and all necessary appurtenances to Well Nos. 1 & 2 in accordance with Construction Permit 29779-WS, the Department issued its Final Approval to Place into Operation to the Town.

RELEVANT LAW

The Approvals to Place into Operation were issued pursuant to the following statutes and regulations:

S.C. Code Ann. § 44-55-10 *et seq.* (Rev. 2002 & Supp. 2015), State Safe Drinking Water Act; and

4 S.C. Code Ann. Regs. 61-58 (2011), State Primary Drinking Water Regulations

RESPONSE TO GROUND(S) STATED IN REQUESTS FOR REVIEW

The Board should not grant Requestor's RFRs for two reasons. First, the claims raised by Requestor are time barred since they should have been raised years ago when the Construction Permits were issued. Second, even if the claims were not time barred, they are without merit.

With regard to the first ground, Requestor sets 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 in 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 contained 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.

With regard to the second ground, Requestor's claims in 1, 2, 3, 7, 8, and 9 are as follows:

1. The Bureau has failed to require the submittal of data necessary to make a determination that Town Well No. 1 and Well No. 2 has sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).

2. The "System Specific Conditions" of the January 12, 2016 Approvals recognize the operation of the Town's public water system as "contemplated by the preliminary engineering report dated December 6, 2010" does not meet the requirements of SC regulation 61-58.2(B).
3. The January 12, 2016 Approvals include a "recommendation" which requires the Town to "investigate the capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply for water." As such, the January 12, 2016 Approvals recognize that such demonstration under SC Regulation 61-58.2(B) has not been made even though the preliminary engineering report dated December 6, 2010 contemplates that the Town will operate independent of the current potable water source provided by a connection to the Alligator System.
7. Based upon available information from the Department's records it appears that Town Wells No. 1 and No. 2 do not have sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).
8. The January 12, 2016 Approvals are not based on accurate peak day usage for the Town's public water system as required to demonstrate sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).
9. The January 12, 2016 Approvals are based on monthly usage for the Town's customers which cannot be used to determine the "maximum day demand" for the Town's public water system as required to demonstrate sufficient capacity to meet the requirements of SC Regulation 61-58.2(B).

Response: R.61-58.2.B outlines the requirements for determining water system capacity for the design of new public water systems and modifications. The requirements for determining capacity for existing water systems is contained in R.61-58.7.D(12). The term "design maximum daily demand" used in R.61-58.2.B is not defined in the regulation, and the Department interprets it as an expected demand used to design a new water system when existing use data does not exist. In addition, although the Town of McBee sought a modification of its system, the modification was for adding additional sources and not an expansion of the system. Therefore, the modification requested by the Town did not trigger the capacity requirements set forth in R.61-58.2(B).

In its fourth claim, Requestor claims that:

The January 12, 2016 Approvals appear to allow the operation of the Town's public water system without the potable water source provided by the Alligator System.

Response: The Town of McBee is allowed to operate the water system within the conditions outlined in the Public Water Supply Permit issued on June 14, 2011 and the operational approvals to the Construction Permits issued on January 12, 2016.

In its fifth claim, Requestor claims that:

The Town has failed to demonstrate that the Town (sic) operation of Town Well Nos. 1 and 2 meet the requirements of a "viable water system" as defined in R.61-58(B).

Response: The requirement for a viable water system in R.61-58.1(B)(4) applies to new water systems. The Town of McBee is an existing system; therefore, the demonstration of viability requirement does not apply.

In its sixth claim, Requestor claims that:

Since the January 12, 2016 Approvals were issued without a prior determination by the Bureau that Well No. 1 and Well No. 2 have sufficient capacity to meet the requirements of SC Regulation 61-58.2(B), the January 12, 2016 Approvals subject A.O. Smith to potential interruptions in or inadequate service for the continued operations at the A.O. Smith Facility.

Response: The Final Approval to Operate, which authorizes the Town of McBee to make use of two additional water sources made available by the Town's completion of the construction approved by the Construction Permits, will contribute more water to the water distribution system than is currently available. The additional water sources are an improvement to the total system capacity.

In its tenth claim, Requestor claims that:

The January 12, 2016 Approvals are based on data which does not meet generally accepted practices for demand.

Response: The Department decisions were based on information provided by the Town's consultant engineer, which was provided in the PER and in the applications for the Construction Permits. When the staff reviewed the information for the PER approved in 2011, and the information submitted for the Construction permits in 2012 and 2014, staff found no indication that the information provided was incorrect.

Finally, in its eleventh claim, Requestor claims that:

The Well No. 1 and 2 GAC Contactor Addition is not sized in accordance with the stated yield of the two Town Wells.

Response: The technical review for Construction Permit 29779-WS required that the consulting engineer submit the sizing calculations for the GAC contactor as part of the construction application. As part of its review for that permit in 2014, staff determined

that the submitted calculations complied with R.61-58.2.D(9)(d). In issuing the Final Approval to Place into Operation for Construction Permit 29779-WS, staff was not required to and did not consider again whether the GAC contactor was properly sized.

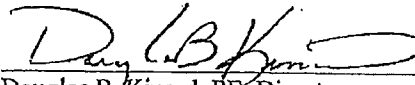
CONCLUSION

The Requestor's claims are time barred and should not be considered as a basis for challenging the Department's issuances of Final Approvals to Place into Operation for the Construction Permits. Moreover, even if the Board were to consider the Requestor's claims they are without merit as they are not supported by the law, and the facts and circumstances relevant to this matter.

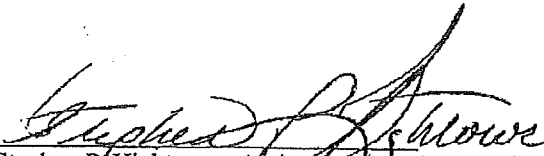
REQUESTED ACTION

The Board should deny the Requestor's request for a final review conference.

Respectfully submitted,



Douglas B. Kinard, PE, Director
Drinking Water Protection Division
Bureau of Water, SCDHEC



Stephen P. Hightower, Assistant General Counsel
SCDHEC Office of General Counsel

EXHIBIT A

Water Supply Construction Permit Bureau of Water



Permission is Hereby Granted To: **MCBEE TOWN OF**
PO BOX 248
MCBEE SC 29101

for the construction of a chemical feed in accordance with the construction plans, specifications, design calculations and the SC DHEC Construction Permit Application signed by Joseph McGougan, Registered Professional Engineer, S.C. Registration Number: .

Project Name: MCBEE WATER SYSTEM WELL NO.2 **County:** Chesterfield
Location: OFF HIGHWAY 1, MCBEE SC

Project Description: Modifications to McBees Well #2, including new 200 gpm submersible pump (set at a depth of 228 ft.), sodium hypochlorite feed system (200 gal. HDLPE tank, two chemical feed pumps), associated piping and appurtenances.

Service By: The water will be provided by Mcbees Town Of (System Number: 1310004)

Special Conditions

1. Before an approval to "Place Into Operation" can be issued for the proposed construction, an operation and maintenance (O&M) manual must be developed. This must be a comprehensive O&M manual developed for all facility processes. The complete O&M manual must be available for review at the time of final inspection. Note that if an O&M manual already exists for a facility then only an addendum for the proposed work is required.
2. The chemical, physical and bacteriological quality of the well water must meet EPA primary and secondary standards or treatment may be required. The water must be evaluated for corrosivity to comply with the Lead and Copper Rule.
3. An operator with the appropriate certification for treatment must be provided.

In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

This is a permit for construction only and does not constitute State Department of Health and Environmental Control approval, temporary or otherwise, to place the system in operation. An Approval to Place in Operation is required and can be obtained following the completion of construction by contacting the FLORENCE EQC OFFICE at 843-661-4825. Additional permits may be required prior to construction (e.g., stormwater).

Permit Number: 28475-WS
Date of Issue: November 13, 2012
Expiration Date: Construction must be completed prior to November 13, 2014 or this permit will expire.
WCB


Douglas B. Kinard, P.E., Director
Drinking Water Protection Division

WW-1472-09

Bureau of Water, DHEC, 2600 Bull Street, Columbia, SC 29201

EXHIBIT B

Water Supply Construction Permit Bureau of Water



Permission is Heret y Granted To: **MCBEE TOWN OF**
PO BOX 248
MCBEE SC 29101

for the construction of a treatment system in accordance with the construction plans, specifications, design calculations and the SC DHEC Construction Permit Application signed by Joseph McGougan, Registered Professional Engineer, S.C. Registration Number: 12335.

Project Name: WELL NO 1 & 2 GAC CONTACTOR ADDITION **County:** Chesterfield
Location: OFF HIGHWAY 1, MCBEE, SC

Project Description: Construction of two (2) GAC contactors at Well #1 (366 cu ft) and Well #2 (241 cu ft) in the Town of McBee.

Service By: The water will be provided by McBee Town Of (System Number: 1310004)

Special Conditions

1. Before an approval to "Place Into Operation" can be issued for the proposed construction, an operation and maintenance (O&M) manual must be developed. This must be a comprehensive O&M manual developed for all facility processes. The complete O&M manual must be available for review at the time of final inspection. Note that if an O&M manual already exists for a facility then only an addendum for the proposed work is required.

In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

This is a permit for construction only and does not constitute State Department of Health and Environmental Control approval, temporary or otherwise, to place the system in operation. An Approval to Place in Operation is required and can be obtained following the completion of construction by contacting the FLORENCE EQC OFFICE at 843-661-4825. Additional permits may be required prior to construction (e.g., stormwater).

Permit Number: 29179-WS
Date of Issue: June 30, 2014
Expiration Date: Construction must be completed prior to June 30, 2017 or this permit will expire.
TLS


Douglas B. Kinard, P.E., Director
Drinking Water Protection Division

WW-1731-08

Bureau of Water, DHEC, 2600 Bull Street, Columbia, SC 29201

CERTIFICATE OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, via United States mail, postage prepaid, to the following address(es):

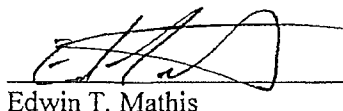
Pleading: Town of McBee's Motion to Dismiss Request for Contested Case

Parties Served: W. Thomas Lavender, Jr.
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South Carolina Department of Health and Environmental Control
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Columbia, South Carolina 29201

Attorneys for the South Carolina Department of Health and Environmental Control



Edwin T. Mathis

March 17, 2016

FILED

MAR 17 2016

SC ADMIN. LAW COURT