THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

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

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

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

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE ADMINISTRATIVE LAW COURT ("ALC") ERR IN HOLDING THAT APPROVALS TO PLACE INTO OPERATION ARE NOT STAFF DECISIONS SUBJECT TO APPEAL UNDER S.C. CODE ANN. § 44-1-60?**

STATEMENT OF THE CASE

On January 12, 2016, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") issued to the Town of McBee ("Town") a Final Approval to Place into Operation for Well No. 1 & 2 GAC Contactor Addition for Construction Permit No. 29779-WS ("GAC Approval") and a Final Approval to Place into Operation for McBee Water System Well No. 2 for Construction Permit No. 28475-WS ("Well No. 2 Approval") (collectively "Final Approvals"). (R. pp. 636-39). On January 27, 2016, Appellant A.O. Smith Corporation ("A.O. Smith") requested a final review of the Final Approvals by the South Carolina Board of Health and Environmental Control ("Board") pursuant to S.C. CODE ANN. § 44-1-60(E). (R. pp. 632-39). By letter dated February 17, 2016, the Clerk of the Board notified A.O. Smith of the Board's decision not to conduct a final review of the Final Approvals. (R. pp. 640-41). On March 15, 2016, A.O. Smith filed a Request for a Contested Case Hearing in the Administrative Law Court ("ALC") pursuant to S.C. CODE ANN. § 44-1-60(G). (R. pp. 642-55).

On March 17, 2016, the Town filed a Motion to Dismiss Request for Contested Case. (R. pp. 196-191). On April 5, 2016, A.O. Smith filed a Response in Opposition to Town of McBee's Motion to Dismiss Request for Contested Case. (R. pp. 587-95). On April 15, 2016, the Town filed a reply in support of its Motion to Dismiss. (R. pp. 596-611). On April 26, 2016, a hearing on the Town's Motion to Dismiss was held before the ALC. On May 5, 2016, the ALC issued an Order granting the Town's Motion to Dismiss.

(R. pp. 1-5). On May 19, 2016, A.O. Smith filed a Motion for Reconsideration pursuant to Rule 29(D) of the South Carolina Rules of Procedures for the Administrative Law Court ("SCRPALC"). (R. pp. 612-18). On July 13, 2016, the ALC issued an Order vacating the May 5, 2016 Order pending a ruling on the Motion for Reconsideration. (R. p. 6). On June 10, 2016, and June 13, 2016 respectively, the Town and DHEC filed responses in opposition to the Motion for Reconsideration. (R. pp. 619-31). On September 9, 2016, the ALC issued an Order Granting Respondent's Motion to Dismiss. (R. pp. 7-13). On October 10, 2016, A.O. Smith filed and served it Notice of Appeal of the September 9, 2016 Order.

STATEMENT OF THE FACTS

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

A.O. Smith owns and operates a facility (the "Chesterfield County facility") in an unincorporated area of Chesterfield County, South Carolina, where it manufactures water heaters and boilers. The facility also includes an engineering division which designs and tests company products. The Chesterfield County facility has been fully operational since 1983 and currently employs more than 500 persons. (Affidavit of Jeff Barron, hereinafter "Barron Aff.," ¶ 3, R. p. 209).

A.O. Smith has critical needs for an adequate, dependable water supply for its Chesterfield County facility, including water for its manufacturing and testing operations, fire protection, and domestic uses. The facility currently operates five days per week with two shifts of eight hours each. (Barron Aff., ¶ 3, R. p. 209). During operating hours, the facility's manufacturing, testing, and domestic water requirements are approximately 161 gallons per minute ("gpm") on an average day and approximately 239 gpm on a peak use

day. (Barron Aff., ¶ 5, R. p. 210). Additionally, A.O. Smith's fire protection system requires an additional minimum instantaneous flow for not less than two hours. (Barron Aff., ¶ 5, R. p. 210).

In 1979, A.O. Smith entered a 30-year "non-annexation agreement" with the Town, under which the Town agreed to supply A.O. Smith with water. (Exhibit A to Barron Aff., R. pp. 213-15). That agreement expired in 2009. (*Id.* at ¶ 3, R. p. 214). Although A.O. Smith has continued to purchase water services from the Town, A.O. Smith is not located within the town limits of, or contiguous to, the Town and there is no contract between A.O. Smith and the Town for water service. (Barron Aff., ¶ 4, R. p. 209). Accordingly, A.O. Smith is merely an "at-will" customer of the Town. *See Childs v. City of Columbia*, 70 S.E. 296, 298 (1911) (non-resident has no rights to water service and municipality has no duty to furnish water to a non-resident).

B. The Town's Public Water Supply System

Prior to the issuance of the Final Approvals, the Town's public water supply system ("Town System") was generally comprised of two (2) elevated tanks, a wholesale connection to a public water system owned and operated by Alligator Rural Water & Sewer Company, Inc. ("Alligator"), and water distribution lines of differing sizes. (Affidavit of Charles K. Parnell, hereinafter "Parnell Aff.," ¶ 7, R. p. 221). Alligator operates a public water supply and distribution system throughout a large area of Chesterfield County, including the area where the A.O. Smith facility is located. In 1999, the Town asked Alligator to assume the operation and maintenance of the Town's water system. (Exhibit I to Parnell Aff., R. p. 478). At that time, DHEC had issued repeated unsatisfactory ratings following annual inspections of the Town's water system. (Exhibits

B, G, and I to Parnell Aff., R. pp. 228, 468, 478). In 1999, the Town entered into a 40-year water supply agreement with Alligator ("1999 Agreement"). (R. pp. 523-26). Since that time, Alligator has been the sole source of the Town's water supply. In other words, although A.O. Smith receives an invoice from and pays the Town for water service, the water used at the Chesterfield County facility has come from Alligator since 1999.

The Town's water lines are primarily small in diameter, with a larger 12-inch line extending along U.S. Highway 1 between the A.O. Smith facility and the town limits near the intersection of US Highway 1 and Juniper Avenue. One of the two elevated tanks is located in the Town near the intersection of US Highway 1 and Juniper Avenue and has a capacity of 75,000 gallons. The other is located adjacent to the A.O. Smith facility and has a capacity of 250,000 gallons. (Parnell Aff., ¶ 7, R. p. 221). In comparison to the Town's total water storage capacity of 325,000 gallons, the Alligator system has approximately 2,300,000 gallons of storage capacity within two miles of the A.O. Smith facility as well as 5.7 million gallons per day of high service pumping. Additionally, Alligator has a 24-inch water line which runs along U.S. Highway No. 1 adjacent to the Chesterfield County facility. (Parnell Aff., ¶ 10, R. p. 221).

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

The Town's two water supply wells were closed in the 2000s when contaminants were detected in the last operating well. (Exhibits C, F, and I to Parnell Aff., R. pp. 243, 465, 478). In June 2011, DHEC issued the Town a Public Water System Operating Permit ("Town's 2011 Operating Permit"). (R. pp. 470-75). The Town's 2011 Operating Permit identifies the connection to the Alligator system is the only water supply authorized under the Permit. (R. p. 472). While the Town's 2011 Operating Permit identifies the Town's

well and treatment facility, the Permit clearly states that the "[w]ell and treatment plant are offline due to EDB [ethylene dibromide] detection, and not included in the reliable system capacity analysis." (R. p. 472). On November 13, 2012, DHEC issued a water supply construction permit to the Town for McBee Water System Well No. 2 ("2012 Construction Permit"). (Ex. A to Town's Motion to Dismiss, R. p. 188). The Primary Drinking Water Regulations do not require public notice for a water supply construction permit. (*See* S.C. Reg. 61-58.1; September 9, 2016 Order, p. 5, R. p. 11). By letter dated October 10, 2013, almost eleven months later, the Town advised A.O. Smith that it intended to place its two existing water supply wells back into operation. (R. pp. 217-18). The Town further advised A.O. Smith that these two wells would meet all of the water source requirements for the Town system, including service to and for the Chesterfield County facility. (Exhibit B to Barron Aff., R. p. 217-18). On June 30, 2014, DHEC issued a water supply construction permit to the Town for Well No 1 & 2 GAC Contactor Addition ("2014 Construction Permit"). (Ex. B to Town's Motion to Dismiss, R. p. 190). Again, the applicable regulations do not require public notice for this permit. (See S.C. Reg. 61-58.1; September 9, 2016 Order, p. 5, R. p. 11).

Although the Town advised A.O. Smith in 2013 that it intended to place its wells back into operation and that these wells would be sufficient to meet all of the water source requirements for the Town's public water supply system, DHEC has never required the Town to demonstrate that these two wells alone provide sufficient capacity for the Town's system. Specifically, Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation, which provides as follows:

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

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

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

> This Final Approval to operate is being conditionally approved. The Department has concerns about the water system's capacity if only Well No. 1 and Well No. 2 are the sole sources for water supply. The Town of McBee's Public Water System Operating Permit, Permit Number 1310004, contains the following language:
>
> B. System Specific Conditions
>
> > The Town of Mc Bee shall maintain its water system in compliance with all of the applicable requirements of the State Primary Drinking Water Regulations, 61-58. The operator of record for the treatment system and the distribution system must be of the appropriate grade.
> >
> > The total developed groundwater source capacity shall equal or exceed the design maximum day demand without pumping more than sixteen (16) hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis. If the Town decides to operate and maintain their water systems either by themselves, or through a different contract operator, they can not violate either the water quantity or water quality portion of the SPDWR and the SDWA. Since Alligator's contract for operation and maintenance is linked to their supply of water, this means that prior to possible independent operation

(as contemplated by the preliminary engineering report dated December 6, 2010), the Town must have at least two DHEC-approved sources of sufficient quality and quality to ensure compliance.

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

(Final Approvals, R. pp. 636, 638). The Final Approvals are clearly stated to be "conditionally approved" and state that DHEC "has concerns about the water system's capacity if only Well No. 1 and Well No. 2 are the sole sources for water supply." Moreover, in the Special Conditions of the Final Approvals, DHEC acknowledges that the Town has submitted to the Department a preliminary engineering report ("PER") to support the use of Well No. 1 and Well No. 2 as the sole source for the McBee water system. Again, the Special Condition further acknowledges that the Town has failed to demonstrate that Well No. 1 and Well No. 2 meet the regulatory requirement for source capacity.

DHEC's comments on the PER referenced in the Special Conditions to the Final Approvals further demonstrate that the Town has failed to meet the regulatory requirements for operation of Well No. 1 and Well No. 2 as the primary source for the Town's water system, which should have been a prerequisite to issuance of any approval to operate these wells. (Exhibit I to Parnell Aff., R. p. 477-78). In its 2011 comments on the PER, DHEC states that the "PER was written to support the Town's desire to end its long-standing (since Dec. 1999) operations and maintenance contract with ARW [Alligator Rural Water]." (R. p. 478). Indeed, in its Motion to Dismiss, the Town acknowledges that it "submitted a Preliminary Engineering Report to DHEC regarding this plan to transition the Town's water supply." (Town's Motion, p. 2, R. p. 90). In its Motion to Dismiss, the Town also admitted that the purpose of permitting these two wells

is "to operate its own sources of drinking water and to **cease using water purchased from Alligator**." (Town's Motion, p. 2, R. p. 90) (emphasis added). The DHEC comments on the PER provide in relevant part as follows:

> From 1995 until 1999 the McBee water system received three consecutive unsatisfactory sanitary survey ratings leading up to this O&M agreement with ARW to maintain the system for McBee. DHEC inventory records indicated the McBee system was merged with ARW system when this O&M agreement was initiated and the systems were then one system. However, during this PER review we noted McBee was still an independent system whose only connection to ARW is this agreement.
>
> Since this agreement's inception subsequent sanitary surveys have been satisfactory; however, keep in mind those sanitary surveys cover the entire 'merged' system composed of McBee and ARW but no operational issues have been noted. McBee has significant debt outstanding to USDA Rural Development (RD) for financing its system upgrades. It should be noted here that the final item of Article III, #9, of the O&M agreement between these entities states the O&M "agreement is pledged to the United States of America acting through the United States Department of Agriculture as part of security for a long to the Purchaser and Seller from USDA, Rural Development." The purchaser is McBee and the seller is ARW; this indicates the loan's security lies with both entities, thereby complicating McBee's desires to hire a different operator.
>
> McBee's well #1 was placed offline by ARW in 2009 when "contaminants" were discovered during routine water sampling. This well is still offline and other wells in the system area are showing varying levels of EDB, DBCP, radium, MTBE and dry cleaning fluid, although all detects appear to be under the MCLs so far.

(Exhibit I to Parnell Aff., R. p. 478. DHEC expressed serious and multiple concerns in response to the Town's PER which contemplates operation of the Town's water system independent of Alligator. Indeed, DHEC has repeatedly conveyed such concerns to the Town. In a May 25, 2007 letter, DHEC expressed similar concerns to the Town in response to communications regarding the Town's "desire to regain operational control of the McBee water system." (Exhibit B to Parnell Aff., R. p. 228). In this letter, DHEC advises in relevant part:

> According to our records your water system was *merged* with the Alligator Rural Water Company (Alligator) system in August of 2000, indicating to us McBee's customers became customers of Alligator and Alligator assumed ownership of McBee's water system assets. Each of the Department's final three (3) sanitary surveys of the McBee system rated it unsatisfactory due to **lack of quantity to meet the system's customers' needs**, wellhead security issues and distribution system shortcomings. The merger with Alligator led to the resolution of those problems.
>
> Before McBee can terminate the contract with Alligator, the Town must develop and submit an approvable Business Plan that details fully how the system will be operated as a *viable* water system; this business plan must be prepared and submitted to, and approved by, the Department before we can issue an operating permit to the Town of McBee. Please go to our website at www.scdhec.gov/eqc/water/pubs/viability.pdf for the guidance document that is available to assist public water systems in preparing their business plans.
>
> In reviewing the State Primary Drinking Water Regulations (SPDWR), section R.61-58.1, you will note a *viable* water system is defined as having the technical, managerial and financial commitment to consistently comply with the SPDWR and the State Safe Drinking Water Act (SDWA). You will also note a business plan must contain a facilities plan, a management plan and a financial plan.
>
> To become financially viable, an adequate rate structure needs to be established that allows the system's revenues to exceed its operations and maintenance costs and provide a 'cushion' for any unforeseen repairs.

(Exhibit B to Parnell Aff., R. p. 228) (emphasis in bold added; emphasis in italics in original). Again, DHEC acknowledges that the Town has not made met the regulatory requirements to operate the Town's water system independent of Alligator. Moreover, in the February 12, 2016 Statement of DHEC Staff Position submitted to DHEC Board in response to A.O. Smith request for final review by the Board, the DHEC staff contends that the demonstration of viability requirement does not apply to the Town. (Exhibit 4 to Affidavit of Joseph W. McGougan, attached the Town's Motion, R. p. 167). Yet, DHEC's 2011 comments of the Town's PER clearly states the viability must be demonstrated for the Town's independent operation of its water system. (Exhibit I to Parnell Aff., R. p.

478). Both the conditions in the Final Approvals and DHEC's prior communications with the Town regarding its independent operation of its water system unquestionably acknowledge that the Town has not met the regulatory requirements for operation of the Town's water system with the Town's two wells as the primary source of potable water.

D. Alligator's Discontinuation of Service to Town

Alligator has repeatedly advised the Town and DHEC that it will not serve as a back-up water supply if the Town places its wells back into operation. For example, by letter dated September 3, 2013, Alligator advised the Town that it would not serve as a back-up water supply if the Town used its own wells as a source for its system and that Alligator "will physically disconnect lines [Alligator] has tied into the Town of McBee's water system." (Exhibit D to Parnell Aff., R. p. 461). Alligator copied DHEC on this letter and further stated that it had repeatedly communicated to DHEC and Rural Development that it would not serve as a backup to the Town's system. Indeed, the DHEC file on the Town's public water system includes multiple communications from Alligator advising DHEC of this position. (*See, e.g.*, Exhibits E and F to Parnell Aff., R. pp. 463, 465). Based on these communications, A.O. Smith reasonably expects that if the Town is allowed to place its wells into service, those two wells will be the sole source of the Town's water supply. Yet, the Town has failed to demonstrate that the operation of these wells without the Alligator connections will comply with the regulatory requirement of Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation.

Additionally, and significantly, A.O. Smith has engaged an engineer to evaluate the capacity of the Town's system with the Town's two water wells as the primary source of potable water. According to A.O. Smith's engineer, the two water wells will not be

sufficient to meet A.O. Smith's demands, including its instantaneous fire flow demands for its Chesterfield County facility. (Parnell Aff., ¶ 12, R. p. 222). A.O. Smith's engineer further opines that the capacity of the Town wells does not meet the redundancy requirements of Section 61-58.2(B)(1) of the State Primary Drinking Water Regulation. (Parnell Aff., ¶ 12, R. p. 222). The Town is thus incapable of meeting its regulatory obligations without Alligator's water supply. Moreover, if the Town places its wells into operation, A.O. Smith cannot rely on Alligator as either a direct or indirect source of water for its Chesterfield County facility. Pursuant to a Consent Order in a pending action in the Court of Common Pleas for Chesterfield County, Alligator has agreed that it will not provide water service directly to A.O. Smith pending the full and final resolution of that litigation. (Exhibit 4 to Hartley Aff., R. pp. 559-60). Also, as discussed above, Alligator has advised the Town and DHEC that it will disconnect is service line to the Town if the Town places its wells back into operation. Therefore, if the Town places its wells into operation, A.O. Smith's Chesterfield County facility will be left with only the Town's wells as a source of water, and A.O. Smith's engineer has determined that these wells cannot provide an adequate supply of water for the Chesterfield County facility.

E. State Court Litigation

In 2014, A.O. Smith upgraded its fire protection system and its engineer determined that the Town's water storage capacity was not sufficient to support the upgraded system. At that time, A.O. Smith entered into discussions with Alligator to provide water service to the Chesterfield County facility. (Barron Aff., ¶ 6, R. p. 210). In May 2015, Alligator began construction of approximately 925 linear feet of 12-inch water line to connect its 24-inch line to the A.O. Smith facility water system. (Barron Aff., ¶ 7,

R. p. 210). On June 17, 2015, prior to the completion of the Alligator service line for the Chesterfield County facility, the Town commenced an action in the Court of Common Pleas for Chesterfield County, claiming the legal and exclusive right to provide water service to A.O. Smith under federal law. (R. p. 492-504). On August 17, 2015, Alligator filed an answer and counter-claim, also claiming the legal right to provide water service to the Town of McBee and, in turn A.O. Smith, as a customer under federal law. (R. p. 506-27). As noted above, pursuant to a Consent Order in this state action, Alligator has agreed that it will not provide water service directly to A.O. Smith pending the full and final resolution of that litigation. (Exhibit 4 to Hartley Aff., R. p. 559-60).

F. The Order Granting the Town's Motion to Dismiss

On September 9, 2016, the ALC issued an Order Granting the Town's Motion to Dismiss. Specifically, the ALC held that the 2012 Construction Permit and 2014 Construction Permit were the "initial decisions" under S.C. Code Ann. § 44-1-60(C), and because A.O. Smith did not challenge those decisions, the company "cannot now challenge the approvals to operate the wells since they are not the Department staff's initial decisions." (September 9, 2016 Order, p. 4, R. p. 10). Although recognizing that there was no public notice requirement for the 2012 and 2014 Construction Permits, the ALC found that A.O. Smith nonetheless 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." (September 9, 2016 Order, p. 5, R. p. 11). Finally, the ALC rejected A.O. Smith's argument that the Special Conditions in the Final Approvals constitute new, initial staff decisions subject to appeal under section 44-1-60. The ALC found that "[t]he special conditions simply reiterate the requirements of the

State Primary Drinking Water regulations, and the vast majority of the special conditions in the final approvals are the same special conditions included in the Public Water System Operating Permit issued in June of 2011." (September 9, 2016 Order, p. 5, R. p. 11). The ALC thus dismissed this contested case for lack of subject matter jurisdiction.

ARGUMENTS

I. THE ALC ERRED IN FINDING THAT THE FINAL APPROVALS ARE NOT STAFF DECISIONS SUBJECT TO APPEAL UNDER S.C. CODE ANN. § 44-1-60 BECAUSE DHEC HAD A LEGAL DUTY TO ISSUE THE FINAL APPROVALS.

In granting the motion to dismiss A.O. Smith's contested case, the Court finds that the Final Approvals are not "initial decisions" under Section 44-1-60. (Order, p. 3 (citing S.C. CODE ANN. § 44-1-60(B)-(D)). This narrow interpretation of "initial decision" is contrary to Section 44-1-60 and the APA definitions of Department decisions subject to a contested case. S.C. CODE ANN. § 44-1-60 sets forth the procedures for challenging a DHEC decision "involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case." S.C. CODE ANN. § 44-1-60(A). For purposes of a contested case before this Court, the APA defines license as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes." S.C. CODE ANN. § 1-23-310(4); S.C. CODE ANN. § 1-23-505(4) (emphasis added).

The Final Approvals are unquestionably a "form of permission required by law." Section 44-55-40 of the State Safe Drinking Water Act provides that DHEC's approval is required prior to placing a new or modified facility into operation: "Upon the completion of construction, modification, or extension to a public water system, arrangements must be

made for a final inspection and approval before operation as prescribed by regulation. No new facility may be operated prior to approval by the department." S.C. CODE ANN. § 44-55-40(C). Section 61-58.1 of the State Primary Drinking Water Regulation governs "Construction and Operation Permits," and provides that "[n]ewly-constructed facilities shall not be placed into operation until written approval is issued by the Department, except where it is allowed by a general construction permit." S.C. CODE REGS. § 61-58.1(K)(1). Section 61-58.1 further provides in relevant part: "Failure to obtain written approval from the Department prior to placing any newly constructed drinking water facilities into operation is a violation of the Act (Code Section 44-55-40) and is subject to an enforcement action by the Department." S.C. CODE REGS. § 61-58.1(K)(2). Accordingly, the Final Approvals are permissions to operate which are required by the State Safe Drinking Water Act and the State Primary Drinking Water Regulation.

Additionally, the South Carolina Supreme Court recently examined the question of what constitutes a staff decision giving rise to a contested case. In *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, the Supreme Court held that there was no "staff decision" under S.C. CODE ANN. § 44-1-60 because the exemption at issue in that case was not one which required written proof of the acknowledgement of the exemption from DHEC. *Amisub of South Carolina, Inc. v. South Carolina Dep't of Health and Envtl. Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013). The Court explained: "Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that Piedmont be afforded a contested case hearing before the ALC." *Id.* In contrast, in this case the Final Approvals are written approvals by DHEC

required under both the State Safe Drinking Water Act and the State Primary Drinking Water Regulation. As such, the Final Approvals were issued pursuant to a "legal duty owed by DHEC" and are therefore a staff decision subject to appeal under S.C. CODE ANN. § 44-1-60. The ALC thus erred in holding that the Final Approvals are not staff decisions and thereby dismissing the contested case for lack of subject matter jurisdiction.

II. THE ALC ERRED IN FINDING THAT THE FINAL APPROVALS ARE NOT STAFF DECISIONS SUBJECT TO APPEAL UNDER S.C. CODE ANN. § 44-1-60 BECAUSE THE APPLICABLE REGULATION DOES NOT PROVIDE FOR CONDITIONAL APPROVALS.

Even if approvals to place into operation were not generally subject to appeal under Section 44-1-60, the conditional approval within the Final Approvals is a staff decision subject to appeal under Section 44-1-60. The Final Approvals are not simply a confirmation by DHEC that the wells and filtration system were constructed in accordance with the 2012 and 2014 Construction Permits. Each of the Final Approvals expressly provides that "[t]his Final Approval to operate is being conditionally approved." Section 61-58.1(K) of the Drinking Water Regulation sets forth the requirements for obtaining an approval to place a newly-constructed facility into operation. This section of the Regulation does not authorize DHEC to issue such approval with conditions. *cf.* S.C. CODE REGS. § 61-67.100.E.5 (providing that a final permit decision on a wastewater facility construction permit may be a decision to issue the permit, deny the permit or issue the permit with conditions); S.C. CODE REGS. § 61-62.5 St. 7(q)(2) (an application for an air permit may be approved, approved with conditions, or disapproved). Therefore, DHEC lacks regulatory authority to issue a conditional approval to place the wells and filtration systems into operation.

Additionally, the fact that compliance with 61-58.2(B)(1)(b) could or should have been considered by the DHEC staff in issuing the 2012 and 2014 Construction Permits does not preclude the Court from ruling on the Town's failure to comply with that regulatory requirement in this contested case. The ALC incorrectly found that A.O. Smith had actual notice of the 2012 and 2014 Construction Permit. The ALC cites to the Town's October 10, 2013 letter advising A.O. Smith that the Town intended to place its wells back into operation. (September 9, 2016 Order, p. 5, fn. 2, R. p. 11). As a preliminary matter, this letter does not constitute actual notice of an agency decision. This letter is merely a statement of intent by a regulated entity to take action which would require an agency decision. Moreover, even if such letter could be construed to constitute actual notice of an agency decision, which it cannot, the time to appeal the 2012 Construction Permit had long passed when the Town sent A.O. Smith this letter in October 2013. Therefore, even if the Final Approvals had been a standard approval without any conditions, A.O. Smith's failure to appeal the Construction Permits would not preclude an appeal of the Final Approvals. However, in this case, the conditional nature of the Final Approvals clearly constitutes an action outside of the regulatory authority of the agency and A.O. Smith has the right to appeal such action under Section 44-1-60.

Significantly, all of the grounds raised by A.O. Smith in this contested case relate to DHEC's regulatory authority to "conditionally approve" the operation of the facilities and the Special Conditions incorporated into the Final Approvals by DHEC. As such, A.O. Smith is entitled to review of such conditions under Section 44-1-60. The Final Approvals are clearly stated to be "conditionally approved" and acknowledge that the Town has not demonstrated the Town's two wells are sufficient to operate independent of

the Alligator system. The Special Conditions of the Final Approvals includes a verbatim recital of Section 61-58.2(B)(1)(b) of the State Primary Drinking Water Regulation, which provides as follows:

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

S.C. CODE REG. § 61-58.2(B)(1)(b). Although the terms of the Final Approvals clearly state that the Town has failed to demonstrate compliance with this regulatory requirement, the Special Conditions further acknowledge that the Town has submitted to the Department a preliminary engineering report ("PER") which contemplates the use of Well No. 1 and Well No. 2 as the sole source for the McBee water system. The requirements of Section 61-58.2(B)(1)(b) are recited in and made part of the Special Conditions in the Final Approvals and are therefore subject to appeal as a staff decision under Section 44-1-60.

Additionally, the ALC incorrectly found that the Final Approvals were analogous to a certificate of occupancy for construction of a house. (September 9, 2016 Order, p. 5, fn. 3, R. p. 11). However, the "conditionally approved" Final Approvals are not analogous to a certificate of occupancy for construction of a house because a certificate of occupancy does not place conditions on the use of the house. If the construction of a house does not meet all of the code requirements, then the certificate of occupancy will not be issued. The ALC Order acknowledges that "the Town has indicated that at some point in the future it intends to operate the water system independent of Alligator."

(September 9, 2016 Order, p. 6, R. p. 12). DHEC issued the Final Approvals with conditions acknowledging that the Town had not complied with the regulatory ("code") requirements for operation of the Town's water system without Alligator. DHEC also acknowledged that it had not evaluated the two wells for operation independently. Yet, the Special Conditions in the Final Approvals merely "**recommends** that the Town of McBee investigate this capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply of water." (Final Approvals, R. pp. 636, 638). DHEC has thus allowed the Town to circumvent a mandatory regulatory requirement to demonstrate adequate capacity under Section 61-58.2(B) of the State Primary Drinking Water Regulation prior to operating its public water supply system independent of Alligator. This Court recently held that DHEC is required to enforce its regulations:

> Thus, while it is important for private companies such as Chem-Nuclear to comply with applicable regulations, it is equally important, if not more so, that the administrative agency mandated by law to enforce the regulations require adherence to its own standard for compliance. To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens. *See* S.C. CODE ANN. § 48–1–20 (2008) ("It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, . . . [and] that to secure these purposes and the enforcement of the provisions of this chapter, [DHEC] shall have authority to abate, control and prevent pollution.").

Sierra Club v. South Carolina Dept. of Health and Envtl. Control, 414 S.C. 581, 620–21, 779 S.E.2d 805, 825 (Ct. App. 2015). DHEC's action in issuing the "conditionally approved" Final Approvals has allowed the Town to avoid regulatory requirements which were promulgated for the purpose of ensuring safe and reliable sources of drinking water for the citizens of South Carolina. DHEC's failure to require the Town to meet the

regulatory requirements for its public water system places A.O. Smith and all of the Town's other water customers at risk. A.O. Smith is therefore entitled to appeal the Final Approvals pursuant to Section 44-1-60. The ALC erred in dismissing this contested case for lack of subject matter jurisdiction.

CONCLUSION

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

March 29, 2017

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

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

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

v.

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

CERTIFICATE OF COUNSEL

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

March 29, 2017

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