FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

City of Anderson

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 00 -CP-40- 1255

S.C. Department of Health & Environmental Control et al.

DEFENDANT(S)

FILED
02 SEP -5 AM 10:02
RICHLAND CO. S.C.
CLERK OF COURT
BARBARA G. SCOTT

CHECK ONE:

[ ] **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[✓] **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[✓] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [✓] See attached order; [ ] Statement of Judgment by the Court:

Dated at _____, South Carolina, this _____ day of _____, 20____.

_____
PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 20____, and a copy mailed first class this 5 day of Sept, 2002 to attorneys of record or to parties (when appearing pro se) as follows:

J. Daniel J. Brown
James W. Potter

ATTORNEY(S) FOR THE PLAINTIFF(S)

Ben A. Hagood, Jr.
Samuel L. Finklea III
J. Blanding Holman IV

ATTORNEY(S) FOR THE DEFENDANT(S)

ATTEST
A TRUE COPY
BARBARA G. SCOTT CLK

BY Barbara G. Scott
CLERK OF COURT

SCRCP APP-24, C. P. & C. 9-12-02

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	DOCKET NO.:00-CP-40-1255
COUNTY OF RICHLAND)	
CITY OF ANDERSON,)	
)	
Petitioner,)	
)	
vs.)	
)	
STATE OF SOUTH CAROLINA)	**ORDER DENYING PETITION FOR**
DEPARTMENT OF HEALTH AND)	**JUDICIAL REVIEW**
ENVIRONMENTAL CONTROL,)	
STATE OF SOUTH CAROLINA)	
BOARD OF HEALTH AND)	
ENVIRONMENTAL CONTROL,)	
AND CATAWBA RIVERKEEPER,)	
)	
Respondent.)	
)	

FILED
02 FEB -5 AM 10:02
BARBARA A. SCOTT
C.C.C. & G.S.

This case comes before the Circuit Court on petition for judicial review filed by Plaintiff/Petitioner City of Anderson ("Anderson"). Anderson seeks review of a decision of the South Carolina Board of Health and Environmental Control,[1] specifically the Board's Order of February 24, 2000 ("Board Order") which overturned the order of the Administrative Law Judge Division ("ALJD") dated September 22, 1999 ("ALJD Order").

Oral argument was presented to the Court on July 17, 2001. J. Daniel Brown, Esq. and James W. Potter, Esq. appeared on behalf of Anderson. Ben A. Hagood, Jr., Esq. and Samuel L. Finklea, III, Esq. appeared on behalf of the Board and the Department. J. Blanding Holman, IV, Esq. appeared on behalf of Defendant/Respondent Catawba Riverkeeper ("Riverkeeper"). All parties have had the opportunity to present written briefs, oral arguments and proposed

[1] "Board" refers to the Board of Health and Environmental Control and "Department" or "DHEC" refers to the Department of Health and Environmental Control. The General Assembly created the Department and the Board as separate entities with the Department being administered under the supervision of the Board. S.C. Code Ann. § 44-1-20 (Supp. 2000)

orders for consideration by the Court. The Court also considered the amicus curiae brief filed by the Association of Metropolitan Sewerage Agencies.

For the reasons set forth herein, this Court denies Anderson's petition for judicial review and affirms the Board Order.

FINDINGS OF FACTS

Procedural History

1. Western Carolina Regional Sewer Authority ("WCRSA"), Combined Utility System of Easley ("Easley") and Greenwood Metropolitan District ("Greenwood") (all hereafter referred to as "the Reedy River Parties") operate waste water treatment plants that discharge treated wastewater into several waterbodies including the Reedy River. Anderson operates waste water treatment plants that discharge treated wastewater into the Rocky River which includes Lake Secession.

2. On April 27, 1998, WCRSA filed a petition for administrative review claiming that the Department improperly used the Trophic State Index ("TSI") as a water quality criterion to determine which waterbodies in the state were impaired and thus should be included on the 1998 Federal Clean Water Act § 303(d) list. Rec. 103-9.[2] WCRSA specifically challenged the inclusion of two waterbodies downstream from its plants. Rec. 104. On October 6, 1998, WCRSA filed a second contested case petition challenging the Department's comments on a phosphorus study of the Reedy River, the Department's promulgation of amendments to its water classification regulations, and its methods of monitoring aquatic life use impairment. Rec. 344-

[2] The page number from the three volume record transmitted to the clerk of this Court by the clerk of the DHEC Board, as later corrected and modified by agreement of the parties and order of this Court, is referred to as "Rec. __."

362. The ALJD consolidated the two cases.

3. Anderson, Easley, and Greenwood[3] intervened in support of WCRSA's position and Friends of the Reedy River ("FORR") and Riverkeeper intervened in support of the Department's position. Anderson filed a petition for administrative review challenging the inclusion of Lake Secession, which is downstream from Anderson's Rocky River Facility, on the § 303(d) list. Rec. 563-4. On cross motions for summary judgment, the ALJD ruled for the utilities and entered the ALJD Order on September 22, 1999, finding that the TSI and the concentration limits were used by the Department as "binding norms" and thus should have been promulgated as regulations pursuant to the rulemaking requirements of the South Carolina Administrative Procedures Act ("SCAPA").[4]

4. The Department appealed the ALJD Order by filing its notice of intent to appeal on October 4, 1999 and further moved the Board for a stay of the ALJD Order until the Board decided the merits of the appeal. Riverkeeper filed its notice of intent to appeal and petition for board review on October 22, 1999. On October 27, 1999, FORR filed a proposed notice of intent to appeal and petition for board review.

5. The utilities objected to the specificity of the various notices of appeal and objected to the timeliness of FORR's notice. At its November 4, 1999 meeting, the Board allowed FORR to file its notice of appeal, denied the motions to dismiss the appeals, and granted the Department's

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[3] The Laurens County Water and Sewer Commission ("Laurens"), which discharges into the Bush River arm of Lake Murray, also joined the action challenging the inclusion of Lake Murray on the § 303(d) list. Rec. 570-4. Before entry of the ALJD Order, Laurens entered into a consent order with the Department resolving its claims and dismissing its petition. Rec. 2760, fn. 2.

[4] The ALJD Order also found that Department adopted and used a "new pH policy" whereby all waters with high pH in nutrient rich waters (low TSI scores) would be included on the 303(d) list

motion to stay the ALJD Order.

6. The utilities then filed petitions for judicial review in circuit court in Greenville and Anderson counties seeking to appeal the Board's November 4, 1999 decisions. By order dated January 19, 2000, the circuit court declined to exercise jurisdiction over these consolidated cases or grant any preliminary relief.

7. WCRSA, Combined Utilities and Greenwood thereafter entered into a settlement agreement with the Department and FORR. At its February 10, 2000 meeting, the Board heard argument on the merits of the appeal of the ALJD Order by the Department and Riverkeeper as it related to Anderson. On February 24, 2000, the Board issued its written order and this petition for judicial review followed.

Notices of Intent to Appeal to DHEC Board

8. The Department filed its Notice of Intent to Appeal with the DHEC Board on October 14, 1999. The notice is set forth below verbatim. Rec. 3-4.

(1) Was it error to find that DHEC used the Trophic State Index to determine use impairment in a way which constitutes a binding norm required to be promulgated in regulation?

(2) (a) Was it error to find that DHEC used concentration-based phosphorus effluent guidelines in a way which constitutes a binding norm required to be promulgated in regulation?

(b) Was it error to find that DHEC used concentration-based phosphorus effluent guidelines in a way which justifies striking down the phosphorus effluent limits in the NPDES permits issued to the Mauldin Road and Lower Reedy River plants (findings of fact III.B.73-84 and paragraphs V.4.a and 4.b, p. 55)?

(c) Was it error to find that DHEC used concentration-based phosphorus effluent guidelines in a way which justifies striking down all the phosphorus TMDLs applicable to Petitioners?

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as impaired for pH.

(d) Was it error to find that DHEC used concentration-based phosphorus effluent guidelines in a way which justifies the language of paragraphs V.4.a and 4.b, p. 55 of the Final Order?

(3) Was it error to find that DHEC used the Trophic State Index to rank water bodies for purposes of inclusion on the 305(b) report in a way which constitutes a binding norm required to be promulgated in regulation?

(4) Was it error to find that DHEC cannot craft any permit, permit effluent limit for specific facilities, monitoring or modeling method, TMDL, Waste Load Allocation, Load Allocation, translator of narrative standards, moratorium and 303(d) list without formal rulemaking pursuant to the APA?

(5) Was it error to prohibit development of TMDLs, WLAs, the 303(d) list to be submitted to EPA in April, 2000, or NPDES effluent limits for any parameter other than phosphorus?

(6) Was it error to require issuance of a permit allowing the Lower Reedy plant to discharge 7.5 million gallons per day, without EPA review of the phosphorus limit as modified by the Final Order?

(7) Was it error for the ALJ to purport to extend its jurisdiction beyond the issuance of the Final Order?

(8) Was it error for the ALJ to lift the moratorium on new construction permits for additional flow to the Lower Reedy plant?

9. The Riverkeeper filed its Notice of Intent to Appeal on October 22, 1999. Its notice was identical to the Department's notice except that instead of issue (8) above, the Riverkeeper identified another error (listed as its issue (5)): " Was it error to order DHEC to disavow the 1998 list of impaired waters as approved by EPA and ignore its obligations relative to those waters under § 303(d) of the Clean Water Act?" Rec. 7-8.

10. City of Anderson filed a motion before the Board to dismiss both notices alleging that the notices failed to meet applicable regulatory requirements. Rec. 2821. On November 14, 1999, during a preliminary hearing, the DHEC Board denied the motion to dismiss after hearing argument. Rec. 2824-5.

Department's Use of Trophic State Index and Concentration Limitations

The Department

11. The Department is the South Carolina state agency charged with the responsibility for enforcing federal and state environmental laws and regulations, and for issuing permits, licenses and certifications for activities which may affect the environment. One of the Department's responsibilities is to protect water quality within the state, including the responsibility to implement and to enforce the federal Clean Water Act (the "CWA"), 33 U.S.C. §§ 1251, *et seq.*, and the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10, *et seq.*

The South Carolina 303(d) List

12. The South Carolina 303(d) list identifies waterbodies within the state that do not meet state water quality standards ("WQS"). Rec. at 987. This list is called the "303(d) list" because § 303(d) of the federal Clean Water Act ("CWA") requires the Department to create this list. 33 U.S.C. § 1313(d).[5] The list ranks the state waterbodies that do not meet water quality standards according to the severity of the pollution. The list is used to improve water quality within South Carolina by identifying state waterbodies for water quality protection plans and processes, including Total Maximum Daily Loads ("TMDLs"). Rec. at 987.

13. One water quality standard to be considered under the 303(d) list is the "aquatic life use" narrative standard found in South Carolina's water classifications and standards, S.C. Code Reg. 61-68 (2000 Supp.). The aquatic life use standard requires that waters classified as

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[5] Section 303(d)(1)(A) of the Federal Clean Water Act ("CWA") requires South Carolina to identify "those waters within its boundaries for which effluent standards are not stringent enough to implement any water quality standard applicable to such waters" and to establish a priority ranking taking into account the severity of the pollution and the uses to be made of such waters.

"Freshwaters" remain suitable for fishing "and the survival and propagation of a balanced indigenous aquatic community of fauna and flora." S.C. Code Reg. 61-68(G)(8) (2000 Supp.). This water quality standard is a narrative standard which must, under federal regulation, be considered by the Department in determining the 303(d) list. 40 C.F.R. § 130.7(b)(3).

EPA Approval

14. The Department must submit each 303(d) list to the EPA for approval. All lists must be submitted to the EPA "on April 1 of every even numbered year." 40 C.F.R. 130.7(d). The Department developed its first 303(d) list in 1990, and developed updated lists in 1992, 1994, 1996, 1998 and 2000. After considering comments made by various wastewater utilities and further modification of the list by the Department, EPA approved South Carolina's 1998 303(d) list on June 16, 1998. Rec. at 144.

15. The Department subsequently developed a 303(d) list for year 2000. This Court takes judicial notice of the fact that the 303(d) list for 2000 was approved by EPA by letter dated May 2, 2000, but was stayed as to Anderson in a separate ALJD proceeding, Docket No.: 00-ALJ-07-0208-cc.

16. After EPA has approved a 303(d) list, the manner in which the list can be altered is governed by federal regulation. The established mechanism is biennial review. *See* 40 C.F.R. 130.7(d). A waterbody may be removed from a State's § 303(d) list only if: (1) the waterbody is meeting all applicable water quality standards (including numeric and narrative criteria and designated uses) or is expected to meet these standards in a reasonable timeframe (e.g., two years) as a result of implementation of required pollutant controls; (2) upon re-examination, the original basis for listing is determined to be inaccurate; or (3) a TMDL for the waterbody has

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33 U.S.C. § 1313(d)(1)(A).

been established and approved by EPA. (EPA, *August 17, 1997 Guidance*). Rec. at 1113-4.

Information Considered by the Department in Creating the 303(d) List

17. In developing its past 303(d) lists, the Department has considered a variety of information. *See* Rec. at 1565 (1998 303(d) list); Rec. at 1624 (1995 303(d) list); Rec. at 1636 (1996 303(d) list). The Department considered the most recent CWA § 305(b) Report in creating the 303(d) list. *See, eg.*, Rec. 1565. The CWA § 305(b) Report is the Department's biennial report to EPA describing the water quality of all navigable waters in the state and a statement of degree to which each waterbody supports the uses designated in the state's water quality standards. 33 U.S.C. § 1315(b); Rec. 985. In addition to the most recent 305(b) Report, the Department has also considered the following information in creating the 303(d) list:

a. CWA § 319 nonpoint sources assessments;

b. CWA § 314 lakes assessments as required under § 305(b);

c. the State's 304(l) list;

d. previous 303(d) lists;

e. fish consumption advisories.

f. USEPA Region III Guidance for the Prioritization and Targeting of Waters Listed Under § 303(d) of the Clean Water Act and Determination of Existing and Readily Available Water Quality-Related Data and Information for Listing Water Under § 303(d) of the Clean Water Act dated July 15, 1997;

g. the 1998 § 303(d) list checklist dated October 29, 1997 from EPA Region IV;

h. EPA National Clarifying Guidance for 1998 State and Territory § 303(d) Listing Decisions dated August 27, 1997;

i. EPA Supplemental Guidance on § 303(d) Implementation dated August 13, 1992;

and

j. numerous comments, letters and other information. *See* Table at Rec. at 217, 222. Rec. at (1998 303(d) list); Rec. at 1471 (Stecker Affidavit).

18. In developing its 303(d) lists, the Department also considered a variety of information from the public through a public notice process. *See e.g.*, Rec. at 1634 (June 30, 1994 Public Notice); Rec. at 1635 (November 22, 1994 Invitation for Public Comment). Prior to revising the 303(d) list in 1998, the Department issued a public notice in regional newspapers across the state stating its intent to update the list of impaired waterbodies. Rec. at 987. The public notice requested comments regarding the list, list methodology, and other aspects of the list. The Department also mailed the public notice to over three hundred and sixty (360) interested parties, including environmental groups, private individuals, and local governments. Rec. at 987. The Department also placed the public notice on its website and solicited public input through public workshops. Rec. at 987.

19. The Department made the 1998 draft 303(d) list available for public comment on February 17, 1998. The draft was transmitted to EPA on March 2, 1998. EPA responded with comments and questions on March 26, 1998. The Department revised its list to meet EPA concerns and shipped a final submittal on March 31, 1998. EPA responded with suggested changes to the list on April 28, 1998. After more communication with EPA to clarify the requested changes, the Department submitted modifications to EPA on May 11, 1998. The final list differed from the draft as a direct result of public comments, EPA comments and directives and further review by the Department. EPA formally approved South Carolina's 1998 final §303(d) list of impaired waters by letter dated on June 16, 1998. Rec. at 145.

The Trophic State Index ("TSI")

20. The trophic state index ("TSI") was a multi-parameter index used by the Department to measure the trophic state of lakes with surface areas of at least 40 acres that offer public access. *See* Rec. at 818 (Stecker Depo.); Rec. at 1469 (Stecker Affidavit, ¶¶ 2-5(e)). The TSI was a combination of five factors that provide information about a waterbody's "eutrophication" status – that is, the degree to which a waterbody is overly fertilized by nutrients. The TSI information was one of several pieces of information considered by the Department in determining whether the waterbody was meeting all applicable water quality standards.

21. Kathy Stecker, an aquatic ecologist with the Department, developed the TSI from a similar index used by the EPA for the National Eutrophication Survey. The TSI itself was not promulgated to enable any mandatory Department action but was, instead, developed to fulfill reporting requirements of CWA § 314. Stecker Affidavit, Rec. at 1471. The TSI was developed to determine the "eutrophic condition" of lakes for purposes of the § 314 report. The § 314 requires the Department to submit biennial reports to EPA that identify, classify and assess all publicly owned lakes in the state according to their eutrophic condition. 33 U.S.C. § 1324(a)(1).

22. The CWA requires that information included in the § 314 report be considered in determining the § 303(d) list. Specifically in 1998, the Department was required by federal law to include the § 305(b) assessment information in the § 314 report. 33 U.S.C. § 1324(a)(2). The Department was also required to consider the § 305(b) assessment in determining the 303(d) list. 40 C.F.R. §130.7(b)(5)(i).

23. The TSI index value is derived from a combination of measurements of five parameters: total phosphorus, inorganic nitrogen, chlorophyll, transparency (Secchi depth), and dissolved

oxygen.[6] Rec. at 828-828a (Stecker Depo. pp. 123-32); Rec. at 1469 (Stecker Affidavit). Each individual parameter has a total value of one hundred points, giving a total possible value of five hundred points. *Id.* Developers of the National Eutrophication Survey index examined index results for lakes and reservoirs with known nuisance algal levels. It was concluded that the index did differentiate high quality lakes from those with the potential for development of nuisance conditions. Rec. 844. A similar evaluation was performed using SCDHEC index values from 1980-81 data, and results of the agency's 1981 lake use survey of groups, individuals, local governments, and state agencies, as well as staff observations from 1980-81 sampling visits. Symptoms of advanced eutrophication, such as excessive algal growth, were associated with TSI values of less than 250.

24. The Department retained and exercised discretion to not include all waterbodies with a TSI score of less than 250 on the § 303(d) list. The Department considered a TSI score of less than 250 as an indication of potential nutrient problems and nuisance eutrophication, which was seen as relevant, but not dispositive, to the question of whether a waterbody should be listed on the § 303(d) list as impaired for aquatic use under the state's "aquatic life use" narrative standard.

25. In years 1994 and 1996, six water bodies with TSI values of less than 250 that were not identified as impaired: Monticello Reservoir, Lake Johnson, Lake Oliphant, and Clarks Hill Reservoir (1994); and Lake Brown and Lake Oliphant (1996). Rec. at 1636 (1996 303(d) list), Rec. at 1142 (1994 303(d) list).

TMDLs

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[6] The index originally included six parameters, but the sixth parameter was dropped in 1993 to eliminate a redundancy in phosphorus measurements.

26. For each segment identified on an EPA-approved 303(d) list, the CWA requires the State to identify the maximum load of pollution that can be loaded into the segment such that it still meets the water quality standard, or use-designation, of concern. This cap, called the total maximum daily load ("TMDL"), must be established at a level necessary to attain and maintain the applicable water quality standard. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. 130.7(c)(1). The Department considers TMDLs in making permitting decisions, but effluent limitations in individual permits are not determined solely by the fact that a water body has been listed on the 303(d) list.

27. TMDL development is a multi-year, public stakeholder process that results in a calculation of the maximum pollutant contributions of point and non-point sources. The outcome of a TMDL process for a particular waterbody for specific point source is difficult if not impossible to project in advance, since the process involves detailed modeling of a waterbody's pollution assimilation capacity and the relative contributions of point and non-point sources. Should a TMDL process result in more stringent controls for specific non-point sources, it may not result in more stringent controls for specific point sources. Identifying the relative contributions to water quality degradation is a central TMDL outcome.

28. The Department has not established TMDLs for phosphorus for the waterbodies at issue in this case.

29. The Department has not imposed any binding phosphorus discharge limits on any City of Anderson wastewater treatment plant, although the Rocky River has been listed as aquatic life use impaired for nutrients for at least six years.

City of Anderson

30. City of Anderson operates a waste water treatment plant on the Rocky River. Lake

Secession is on the Rocky River and is the only waterway at issue downstream of Anderson's plants. Lake Secession has not been listed by the Department as pH impaired. Lake Secession was listed on the 1998 303(d) list and all of South Carolina's four previous EPA-approved lists.

Recent Regulatory Changes

31. The S.C. General Assembly recently approved numeric nutrient standards for lakes in South Carolina. The standards set specific numeric criteria for component elements of the trophic state index, including total phosphorus, total nitrogen, and chlorophyll *a*. S.C. Code Reg.61-68.E.9.a.-e. (2001). These new regulations became effective in June 2001, upon publication in the State Register. June 2001, SR Document No. 2572, p. 30. *See also* S.C. Code Ann. § 1-23-40 (1986); 1-23-120(D)(2000 Supp.).

32. These new numeric standards obviate the Department's consideration of the TSI in determining future § 303(d) lists. In determining future lists, the Department will no longer consider multi-factor information, such as the TSI, to determine if the state's "aquatic life use" narrative standard is being met. Rather, the Department will determine whether specific numeric criteria are met for certain nutrients - total phosphorus, total nitrogen, and chlorophyll *a*.

33. This Court also takes judicial notice of the June 29, 2001 letter, submitted to the Court during oral argument, from the Department to Anderson. This letter notifies Anderson of the change in state regulations and the Department's review of recent water quality data for Lake Secession. The letter states that the headwaters of Lake Secession exceeded the new nitrogen standard in 2% of samples, the new chlorophyll *a* standard in 14% of samples and the new phosphorus standard in 36% of samples. The letter informs Anderson that, based on this recent data and the new regulations, the Department intends to place Lake Secession on the 2002 §303(d) list and to impose a phosphorus permit limit on Anderson's Rocky River plant.

Matters Considered by DHEC Board

34. The Board's hearing was originally scheduled for January 20, 2000 and the Department, Anderson and the Reedy River Parties all filed briefs with the Board in anticipation of that hearing. On agreement of all parties, the Board postponed its hearing until its next monthly meeting, February 10, 2000.

35. Shortly before the February hearing, the Reedy River Parties reached an agreement (the "Settlement Agreement") with the Department whereby the Department agreed to change and clarify some of its approaches to nutrient determinations and the Reedy River Parties agreed that its original contested cases should be vacated. Rec. at 3129-33. Pursuant to the Settlement Agreement, the Department agreed to 1) modify NPDES permits for WCRSA's two plants with respect to annual loading limits for phosphorus, monthly limits for phosphorus and concentration limits; 2) maintain the same combined effluent phosphorus limits for WCRSA's two plants until the Department promulgates a numeric water quality standard for phosphorus; 3) re-evaluate the permit limits for the Greenwood plants and the Easley plants pursuant to a specific methodology; 4) review its state water quality standards and promulgate numeric water quality standards for phosphorus, nitrogen and chlorophyll a; 5) follow certain procedures in developing TMDL's; and 6) take several other related actions.

36. All parties except Anderson joined in the Settlement Agreement. Anderson did, however, participate in the settlement discussions between all the parties. Rec. 3155.

37. In a revised brief to the Board filed January 31, 2000 and served on Anderson, the Department stated its intention to follow the same procedures with Anderson that it had agreed to follow with the Reedy River Parties. Rec. at 3045-6. The Department clarified that it was not going to use the TSI alone in making listing decisions for the 2000 303(d) list, and that it would

not use 1.0 mg/l concentration-based limits as the sole basis for phosphorus permit limitations.

Rec. 3045-6. Specifically the Department clarified that it would:

> 1. Not base nutrient impairment decisions for the year 2000 303(d) list on the TSI alone. Furthermore, the Department has agreed to begin the process of promulgating amendments to the standards portion of R.61-68, Water Quality Classifications and Standards, to address phosphorus criteria development.
>
> 2. Re-evaluate phosphorus permit wasteload allocations under the following approach, unless an alternative approach is mutually agreeable between the Department and the permittee:
>
> > a. Mass and/or concentration limits may be used, but the Department will not use an approach based on reasonable treatment technologies available (e.g., 1 mg/l).
> >
> > b. Any proposed limits will be accompanied by an appropriate rationale demonstrating that the limit is necessary because the discharge will cause, have the reasonable potential to cause or contribute to a water quality standards violation (R.61-9.122.44(d)), and the method of calculating the limit.
> >
> > c. Limits calculations will not be derived from any specific trophic state index value.

Record at 3045-6.

38. The Summary Sheet provided to the Board briefly summarized the Settlement Agreement and recommended that the Board approve the settlement with the Reedy River Parties. Rec. at 3041. The Summary Sheet then described the contested case with Anderson and briefly stated the Department's position. *Id.* The Department's brief pointed out that the Department had agreed to certain actions that should, as a practical effect, resolve Anderson's concerns raised before the ALJD, and as a legal matter render them moot.

39. On February 10, 2000, the Board first heard oral arguments on motions filed by Anderson to strike the information about the settlement that had been submitted to the Board, to recuse the Board members who had actually received the information, and to dismiss the appeal. Rec. 3140-54. The Board then heard oral arguments on the merits of the administrative appeal of the

Department and the Riverkeeper relating to Anderson. Rec. 3156-92. The Board then voted to overturn and reverse the ALJD Order in its entirety. Rec. 3193-94.

40. After hearing and deciding the issues on appeal relating to Anderson, the Board considered and approved the Settlement Agreement relating to the Reedy River Parties. The Board did not consider the Settlement Agreement while determining the merits of the appeal relating to Anderson. *See* Rec. 3134-95; Rec. 3217.

41. The Board entered a written order of its decision regarding Anderson on February 24, 2000. The Board also entered a separate written order approving the settlement between the Department and the Reedy River Parties. It appears from the face of these two orders that the first pages of each of the two orders were inadvertently switched, so that page 1 of the Anderson order was mistakenly placed with the order approving the Settlement Agreement and page 1 of the order approving the Settlement Agreement was mistakenly placed with the Anderson order. *Cf.* Rec. 3197-99 *with* Rec. 3200-12.

CONCLUSIONS OF LAW

42. Anderson seeks judicial review of the Board Order which 1) overturned the ALJD Order granting summary judgment to Anderson and denying summary judgment to the Department and Riverkeeper, and 2) clarified agency practice of not using TSI information as a sole determinant in § 303(d) listings and of not using a 1.0 mg/l concentration-based limit as a binding phosphorus permit limitation. For the reasons set forth herein, this Court denies the relief sought and affirms the Board Order.

Standard of Review

43. In reviewing the Board Order, this court "shall not substitute its judgment for that of the [Board] as to the weight of the evidence on questions of fact" and may only reverse the Board

Order if it prejudices substantive rights of Anderson because the Board Order is:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §§ 1-23-380(A)(6).

44. This court must defer to the factual findings of the Board[7] unless they are not supported by substantial evidence. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence, which, when considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached . . . ." *Welch Moving and Storage Co., Inc. v. Pub. Serv. Comm'n of SC*, 301 S.C. 259, 261, 391 S.E.2d 556, 557 (1990)(quoting *Palmetto Alliance, Inc. v. SC Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence.'" *Grant v. SC Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995)(quoting *Palmetto Alliance, Inc.*, 282 S.C. at 432, 319 S.E.2d at 696).

Mootness

45. This Court finds that Anderson's appeal is now moot. A justiciable controversy must exist before any action can be maintained in a South Carolina court. *Midland Guardian Co. v. Thacker,* 280 S.C. 563, 314 S.E.2d 26 (Ct.App.), *cert. denied*, (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination,

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7 The Board renders the final agency decision, is the ultimate fact finder and may make its own findings of fact. S.C. Code Reg. 61-72, Rule 805; *Leventis v. DHEC*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000); *see Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 125,

as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.,* 249 S.C. 561, 155 S.E.2d 618 (1967). Courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jones v. Dillon-Marion Human Resources Dev. Comm'n,* 277 S.C. 533, 291 S.E.2d 195 (1982). Mootness has been defined as follows: "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973); *see Byrd v. Irmo High Sch.,* 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996).

46. Anderson's appeal is built upon two principal claims: (1) the Department erroneously considered TSI information in its decision to include Lake Secession on the 1998 § 303(d) list, and (2) the Department used 1 mg/l as a concentration based limit in permitting wastewater treatment facilities. Both of these claims are now moot for a number of reasons. First, and most obviously, the 1998 list has now been superseded by an EPA-approved 2000 list. Although the Department has agreed to stay the implementation of the 2000 list as it applies to the City, the Court cannot avoid taking judicial notice of the fact that South Carolina's 303(d) list for year 2000 was, as called for by federal law, submitted to the U.S. Environmental Protection Agency and was formally approved by that agency. Thus the year 1998 list is no longer in actual effect – it has been replaced by the EPA-adopted year 2000 list, just as the 1996 list was replaced by the 1998 list and the 1994 list replaced by the 1996 list. Given that the 1998 list is no longer in effect, vacating it would have no practical legal effect, and the challenge to that list is moot. See *Sacramento Regional County Sanitation Dist. v. State Water Resources Control Bd.,* No.

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456 S.E.2d 397, 400 (1995).

98CS01702 (Sup. Ct. Calif. Nov. 1, 2000) (dismissing state court appeal of state 1998 § 303(d) list as moot because EPA had already approved year 2000 list).

47. Secondly, regardless of what happened before year 2000, the DHEC Board, by its February 2000 decision and subsequent Board Order, explicitly prohibited the Department from using TSI information or a 1 mg/l effluent guideline as a binding norm. Hence, a court order requiring the same would offer Anderson no more legal protection than it already has, and for that reason would have no real or legal effect. *See* 73A C.J.S. Public Administrative Law and Procedure § 207, at 247 (1983) ("A court ordinarily will refuse to review a decision of an administrative body where the application for review shows that the question presented is abstract or moot, or where it has become moot under the circumstances of the case.") (quoted in *Food Mart v. South Carolina Dept. of Health and Environmental Control,* 318 S.C. 384, 387, 458 S.E.2d 47, 48-49 (Ct. App. 1994), *affirmed in part, vacated in part,* 322 S.C. 232, 471 S.E.2d 688 (S.C. May 20, 1996) (affirming mootness holding), *rehearing denied* (Jun 20, 1996)).

48. Finally, the Court is obligated to take notice that the South Carolina General Assembly recently approved numeric nutrient standards that are specifically designed to regulate and govern the very situation that gave rise to this litigation. These new numeric standards will, by law, drive the Department's assessment of aquatic life use impairment on the state's major lakes due to nutrients. Because this regulatory requirement is currently in place, and because the adoption of these numeric standards neutralizes the possibility of the claimed "underground" numeric standards being applied, Anderson's requested relief would have no appreciable legal effect on DHEC practice. See *Valero Terrestrial Corp. v. Paige,* 211 F.3d 112, 116 (4th Cir. 2000) ("[s]tatutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit has

been dismissed"). In a very real sense, then, a court order granting Anderson its requested relief could change nothing. For these reasons, Anderson's appeal must be dismissed as moot.

49. Even were the Court to find that this case is not moot, Anderson has failed to articulate any injury in fact that would give it standing to maintain this appeal. In oral argument, counsel for Anderson complained that the Board's Order erroneously found that Anderson lacked standing and that its claims of injury were not ripe. Yet neither in that argument, nor in its briefs, has Anderson demonstrated, as it must, that it has suffered and will continue to suffer any injury in fact from DHEC's alleged activities. By its own admission, the listing of waterbodies on a 303(d) list simply sets into motion a process of future development of TMDLs for a listed waterbody segment. However, Anderson has not made it clear what immediate effect such listing has or would have on it, and given the uncertainties of the TMDL process, the Court finds any envisioned harm to be completely speculative. Even if DHEC were to immediately begin developing a TMDL for nutrients in Lake Secession, it is possible that the complexities of modeling, and the agency's obligation to address all sources of a problem, could result in more stringent controls for non-point sources as compared to point sources such as the City of Anderson's WWTPs. Not only is Anderson's injury speculative and inchoate, the legal and technical issues surrounding any such possible injury are, at this juncture, completely unformed and not amenable to adjudication. For that reason, Anderson's legal claims concerning the TMDLs and wasteload allocations that might flow from a 303(d) list are unripe.

50. Anderson has likewise failed to demonstrate standing to maintain its claims concerning DHEC's use of phosphorus effluent guidelines. As the record makes clear, Anderson has not had a 1 mg/l limit imposed by virtue of underground rulemaking, and is at no immediate risk of having that occur. Moreover, the proper forum for challenging a negotiated permit limit, or a

denial of a request for effluent limit modifications, is through a direct appeal of any such decision, when or if it ever occurs. In this case, Anderson has complained about a claimed policy that has not yet affected it in any quantifiable or justiciable way. In this connection the Court notes that the promulgation of new numeric standards for phosphorus will henceforth drive DHEC's negotiation of effluent limitations for phosphorus with entities discharging into waterbodies that are phosphorus impaired. Whatever complaints Anderson might have had about the potential application of a perceived 1 mg/l effluent guidelines to its facilities before that numeric standard went into effect, the situation has now changed, and DHEC by law must now proceed with a numeric phosphorus water quality standard informing its permit negotiations. *See* Department's July 29, 2001 letter to Anderson.

Notices of Intent to Appeal

51. The notices filed by the Department and the Riverkeeper were sufficiently specific to meet the requirements of S.C. Code Reg. 61-72, § 801 and to invoke the jurisdiction of the Board. The Department's regulations require that a "request for review must . . . include specific exceptions to the report. Each exception must be concise and concern one finding of fact, conclusion of law, or other proposition believed to be error." S.C. Code Reg. 61-72, § 801. The courts have held that a petition for administrative review must specify an error. *Pringle v. Builders Transport*, 381 S.E.2d 731, 732 (SC 1989); *Smith v. SC DSS*, 327 S.E.2d 348, 349 (S.C. 1985)(a petition is legally sufficient if it directs the court's attention to the abuses below through a distinct and specific statement of the rulings complained of); *Bayview Nursing Center v. SC DHHS*, Docket No. 98-ALJ-08-0586CC (general statement of ruling complained of held sufficient).

52. The notices filed by the Department and the Riverkeeper in this matter were sufficiently

specific to invoke the jurisdiction of the Board. Each notice contains eight grounds. Each ground stated is concise, separate, distinct and clearly focused on specific errors. Each numbered paragraph relates to a specific proposition in the ALJD Order believed to be error. At least two grounds identify specific findings of fact and other requirements of the Order.

53. This Court finds the cases cited by Anderson factually distinguishable because the notices in those cases failed to set forth any specific grounds for appeal. *See Pringle*, 298 S.C. at 495, 381 S.E.2d at 732 (dismissing a notice that "failed to state the grounds or errors of law in support of the appeal"); *Smith v. SC DSS*, 284 S.C. at 471, 327 S.E.2d at 349 (dismissing a notice that merely represented that petitioner was dissatisfied with the agency decision below); *Coker v. DHEC*, Docket No. 00-ALJ-07-0316-CC (DHEC Board March 8, 2001) (notice dismissed where it merely stated that appellants wanted to appeal the permit decision).

Rulemaking

54. In addition to concluding that Anderson's appeal is now moot, this Court finds that the Board Order should be affirmed on the merits. Anderson challenges the Board's legal conclusion that the Department, by considering trophic status information in determining whether narrative water quality standards were being met, did not engage in "rulemaking" activities under the SCAPA. Anderson also challenges the Board's finding that the Department's use of information about available wastewater treatment technology performance (controlling phosphorus to 1 mg/liter) likewise did not constitute rulemaking. For the reasons explained below, the Court finds that the Board's rulemaking determinations were legally correct and supported by substantial evidence in the record. The Court finds no error in the Board's conclusion that the Department's consideration of trophic status and effluent performance

information did not amount to the development and use of "binding norms" of "general applicability."

Use of TSI in Determining § 303(d) List

55. A regulation, under the SCAPA, is "an agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." S.C. Code Ann. § 1-23-10(4). Whether a particular agency proceeding amounts to a statement of general applicability turns on the extent to which the agency action establishes a "binding norm." *Home Health Service, Inc. v. South Carolina Tax Comm'n.*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994); *Ryder Truck Lines, Inc. v. United States,* 716 F.2d 1369 (11th Cir. 1983). The primary inquiries in this context are the extent to which the challenged policy leaves the agency free to exercise its discretion to follow, or not to follow, that general policy in an individual case, and whether the guideline or policy statement received final agency approval by the governing body of the agency. *Home Health Service, Inc.,* 312 S.C. at 328, 440 S.E.2d at 378; *Ryder,* 716 F.2d at 1377. As long as the agency remains free to consider the individual facts in the various cases that arise, the agency action in question has not established a binding norm. *Ryder,* 716 F. 2d at 1377.

56. The trophic state index is a combination of five factors that provide information about a waterbody's "eutrophication" status – the degree to which a waterbody is fertilized by nutrients. The Department exercised case-by-case discretion in considering TSI values in deciding whether to list waterbodies as impaired under § 303(d), and did not apply the TSI as a "binding norm." In years 1994 and 1996, six water bodies with TSI values of less than 250 were not identified as impaired. In 1994, Monticello Reservoir, Lake Johnson, Lake Oliphant, and Clarks Hill

Reservoir were omitted from the list, and in 1996 Lake Brown and Lake Oliphant were omitted, despite having TSI scores of less than 250. Rec. at 1636 (1996 303(d) list), Rec. at 1142 (1994 303(d) list). The Department, acting in accordance with federal guidance, made deliberate decisions to omit waters after considering a variety of indicators and information sources, including TSI information, § 319 nonpoint source assessments, the § 314 lakes assessments, the § 304(l) list, previous 303(d) lists, fish consumption advisories, and all other existing and readily available data to which the Department had access and which also met the Department's criteria for quality assurance. *See* Rec. at 986 (1998 303(d) list); Rec. at 841a (Stecker Dep. at p. 288, lines 7-19). The decision to exclude Lake Oliphant from the list, for example, was based on the fact that Lake Oliphant has been fertilized deliberately by the S.C. Department of Natural Resources to enhance fishing. Rec. at 841a (Stecker Dep. at pp. 275 - 276).

57. The TSI was developed to help fulfill reporting requirements of § 314 of the Clean Water Act, not to be a binding regulatory standard. Subsequent § 303(d) guidance called for consideration of a broad array of data sources, including information developed for § 314, as well as Santee-Cooper Public Service Authority data and the consultant macroinvertebrate data. Rec. at 837a (Stecker Dep. at pp. 237- 238). Consistent with the TSI's informal and non-binding origins, index information was never held out by the agency as a cut and dry standard, and the DHEC Board never adopted a TSI as a standard to be used by the Department in determining impairment. See *Town of Silverstreet v. DHEC,* Docket No. 97-ALJ-0358-CC, 1998 WL 343067 at *7 (ALJ Div. May 19, 1998) (setting forth three-factor test to determine if policy was rule: (1) how the policy was applied in the field; (2) who gave final approval to the statement; and (3) the agency's expressed intent). Because use of TSI left "the agency free to exercise its discretion to follow or not to follow that general policy in an individual case," and

"free to consider the individual facts in the various cases that arise," DHEC never "established a binding norm." *Ryder Truck Lines,* 716 F2d. At 1377.

Determination of Phosphorus Concentration Limits

58. As with TSI information, the Department never used a 1 mg/l phosphorus effluent limit as a "binding norm." Testimony from Jeff deBessonet, the Department's Director of Water Facilities Permitting Division, and Mike Montebello, Director of Domestic Wastewater Permitting, clarified that, while 1 mg/l was viewed as a readily-achievable level of phosphorus control for wastewater treatment plants (WWTPs) that would protect nutrient-impaired waters, the Department never applied a 1 mg/l binding norm in establishing permit limits. The Department used the information as a starting point for discussions with permittees, not an enforceable endpoint.[8]

59. The final limits actually promulgated for individual facilities demonstrate that a 1 mg/l phosphorus effluent limit was not use a "binding norm." Those limits vary from 0 to 2 mg/l. Rec. at 766 (deBessonet Dep. at 62) (Mauldin Road facility limit of 1.3 mg/l); Rec. at 771 (deBessonet Dep. at 124) (Laurens County limit of 2 mg/l); *see* Rec. at 739 (Montebello Dep. at 230 – 231 ("[T]hey range from one milligram per liter, which I explained in Newberry's case, to the Mauldin Road and Lower Reedy situation where we have a value and 18 Mile Creek where

[8] *See, e.g.*, Rec. at 768a (deBessonet Deposition at p. 93-94) ("[T]here may be special cases, depending on the system type, depending on influent phosphorus characteristics where there may be another number that would be more suitable. There may be some industries out there that have a significantly higher phosphorus influent loading to a plant where it would be reasonable to get down to 1 milligram/liter on average. But they may have some other reasonable target that they can meet."); Rec. at 769a (Dep. at p. 106-107) (""Our goal in some of these meetings was to have a common broad understanding of how to approach watershed permitting consistently . . . recognizing the differences in different systems."); Rec. at 770a (Dep. at p. 119-120) (existing performance helps provide "sense for the big picture, a big picture sense of whether its reasonable to expect somebody to get .5 or 1 or 2 or 10 or whatever."); Rec. at 771 (Dep. at p. 123) ("So I would say, as a matter of principle, we have not intended to be dogmatic about some of these numbers. We try to recognize that some of these numbers, there's room for

we have a calculated number that we're dividing between multiple users.").

60. Under existing law, DHEC must make permitting decisions for wastewater treatment plants on an individualized, case-by-case basis. S.C. Admin. Code R. 9.122.44(d)(1)(vi)(B) (§ 122.44(d)(1)(vi)(B)). See also R. 61-68(E)(8) (directing that loading of nutrients from WWTPs "shall be addressed on a case-by-case basis.") In the face of these case-by-case requirements, combined with the Department's clear practice of diverging from a 1 mg/l "limit," DHEC cannot be said to have pronounced, established or carried out a "binding norm" of general applicability. Because current law is premised on the Department not going through rulemaking procedure in making each case-by-case determination, the authorities cited by Anderson as requiring an agency to undergo rulemaking where a statute so commands are inapposite. *See e.g., Captain's Quarters, Charleston Television, Inc. v. Budget & Control Bd.,* 301 S.C. 468 (1990); *Haley Farms v. DHEC,* No. 97-ALJ-07-0102-CC (ALJD May 4, 1998). Not only did the Department "remain[] free to consider the individual facts in [the] various cases," it was legally required to do so. *See Ryder Truck Lines*, 716 F.2d at 1377. The Department did not use - and has been specifically ordered not to use - 1 mg/l performance information as a binding norm in setting permit limits.

Board Consideration of Settlement

61. This Court finds that the Board did not prejudice Anderson's substantive rights by considering the Board Summary Sheet which attached the proposed Settlement Agreement between the Department and the Reedy River Parties, and the Department's January 31, 2000 Brief in the Anderson case which set forth elements of the Settlement Agreement that the

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negotiation given the specific situation of that facility or of a particular facility."); *see* Rec. at 771 (Dep. at p. 124-125) (discussing variations according to status of receiving waterbody).

Department believed was applicable to the Anderson case ("Staff Agreement").

62. Consideration of such information did not constitute an error of law. The Board explicitly stated in its Order that it considered the Settlement Agreement with the Reedy River Parties only for the purposes of deciding which issues remain for decision in the contested case with Anderson. Rec. at 3221, fn. 2. The Board explicitly stated that it considered the Settlement Agreement and the Staff Agreement, as set forth in the Department's Brief, not for the purpose of determining the merits of the case with Anderson, but solely for the purpose of determining what issues remain for decision and what remedies should be considered. *Id.*

63. It was not an error of law for the Board to consider the settlement for purposes other than determining the merits of the controversy before it. Even a trial court may consider the existence of a settlement agreement between some of the parties for the purpose of determining which issues remain for trial. *See* Rule 408, SCRE (evidence of compromising a claim is not admissible to prove liability for the claim but is admissible if offered for another purpose); *Poston v. Barnes,* 294 S.C. 261, 363 S.E.2d 888 (1987) (secret settlement agreement between plaintiff and one defendant was admissible before the jury in order to facilitate justice and equity in the judicial process); *United States v. Curry,* 512 F.2d 1299, 1303 (4th Cir. 1975)(trial court did not err in allowing prosecution to admit evidence that co-defendants had entered pleas of nolo contendere).

64. It was also appropriate for the Board to consider whether any of the issues before it had become moot as a result of the settlement. A reviewing court will not concern itself with moot or speculative questions and may decline to hear and determine the merits where it is evident that there are no longer practical questions to be resolved between the parties. *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951). *Mathis,* 195 S.E. 2d at 715, *Byrd,* 468 S.E. 2d at 864.

65. Thus the Board could properly have considered the Agreement of Staff to conclude that Anderson's claims of improper rulemaking were moot issues because the Department had committed to the Reedy River Parties and to Anderson that it would promulgate numeric nutrient limits and clarified that, in the meantime, it would not use the TSI alone nor impose concentration based permit limits.

66. Even if it was error for the Board to consider this information, Anderson has made no showing that such error prejudiced Anderson's substantive rights.

CONCLUSION

67. Based upon the Findings of Fact and Conclusions of Law set forth above, this Court finds that the Board Order did not prejudice substantive rights of Anderson through any error of law, clearly erroneous findings in light of substantial evidence of record, or clearly unwarranted exercise of discretion.

68. This Court therefore affirms the February 24, 2000 Order of the South Carolina Board of Health and Environmental Control.

IT IS SO ORDERED

L. Casey Manning, Judge
Court of Common Pleas
Richland County

~~October~~ 4, 2002

A TRUE & EXACT COPY
Barbara A Scott CRR
C. C. C. P. & C. S. 2-12-02