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June 4, 2001

HAND DELIVERED

The Honorable Barbara A. Scott
Clerk of Court
Richland County
P.O. Box 192
Columbia, SC 29202

RE: City of Anderson vs. State of South Carolina Department of Health and Environmental Control, State of South Carolina Board of Health and Environmental Control, and Catawba Riverkeeper
Docket No.: 00-CP-40-1255

Dear Ms. Scott:

Please find enclosed for filing the **Brief of Respondents State of South Carolina Department of Environmental Control, State of South Carolina Board of Health and Environmental Control, and Catawba Riverkeeper** in the above referenced case, along with a Certificate of Mailing. A copy has been provided to clock-in for our office.

By copy of this letter, I am serving the necessary parties.

Thank you for your assistance in this matter.

Yours very truly,

Beth Chaffin
Legal Secretary for

Samuel L. Finklea, III
Chief Counsel for EQC

/bc

Enclosures

cc: Daniel J. Brown, Esq.(via hand delivery)
James W. Potter, Esq. (via hand delivery)
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STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS DOCKET NO.:00-CP-40-1255
CITY OF ANDERSON,)) Petitioner,)) vs.)) STATE OF SOUTH CAROLINA) DEPARTMENT OF HEALTH AND) ENVIRONMENTAL CONTROL,) STATE OF SOUTH CAROLINA) BOARD OF HEALTH AND) ENVIRONMENTAL CONTROL,) AND CATAWBA RIVERKEEPER,)) Respondent.)	**BRIEF OF RESPONDENTS STATE OF SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL CONTROL, STATE OF SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL, AND CATAWBA RIVERKEEPER**

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June 4, 2001

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SUMMARY OF ARGUMENT

This court should deny the relief requested in Anderson's petition for judicial review and uphold the Board Order because:

1. The Board's factual findings are supported by substantial evidence. The Board Order is not made upon unlawful procedure or other error of law that prejudiced substantive rights of Anderson.

2. The notices of intent to appeal filed by the Department and the Riverkeeper were sufficiently specific, under the Board's rules, to confer jurisdiction upon the Board for review of the ALJD Order because the notices contained eight separate specifications of error that were specific, concise and focused on errors of fact and law.

3. The Board correctly found that the Department had not used the trophic state index or a 1 mg/l phosphorous technology guideline as "binding norms" and thus the Department had not engaged in improper rulemaking under the state administrative procedures act.

a. The Trophic State Index was a tool developed by the Department to measure the trophic condition of the state's lakes. It was only one source of information used by the Department in determining the 1998 Section 303(d) list.

b. The 1 mg/l phosphorous limit was viewed by the Department as a readily achievable level of phosphorous control and was a starting point for permit negotiations. It was never uniformly applied as a permit limit.

c. Since the Department was free to exercise discretion in its use of both the Trophic State Index and the suggested 1 mg/l phosphorous limit, and in fact did vary from them, the Department's use of the index and the suggested limit did not constitute rulemaking.

d. Anderson's claim that the Department uniformly included on the 303(d) list all waterbodies with a TSI score of less than 250 is simply false. The 303(d) lists submitted to EPA by the Department in 1994 and 1996 had various waterbodies with a TSI score of less than 250.

e. Likewise, permit limits set by the Department did not uniformly contain a 1 mg/l phosphorous limit.

4. The Board's approval of a settlement agreement between the Department and other parties, and an agreement of Department staff set forth in its brief and served on all parties, did not constitute procedural error that prejudiced Anderson's substantive rights. In making the final agency decision, the Board properly considered this information to conclude that Anderson's challenges to the Department's decisions were moot.

STATEMENT OF THE CASE

This case comes before the Circuit Court on Anderson's petition for judicial review of the Board's Order[1] of February 24, 2000 which overturned the order of the ALJD dated September 22, 1999 ("ALJD Order").

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 the Reedy River. The City of Anderson ("Anderson") operates waste water treatment plants that discharge treated wastewater into the Rocky River which includes Lake Secession.

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[1] As used herein, "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)

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 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. 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 the a phosphorous 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. 344-362. The ALJD consolidated the two cases.

Anderson, Combined Utilities and Greenwood[2] intervened in support of WCRSA's position and Friends of the Reedy River ("FORR") and Catawba Riverkeeper ("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 Reedy River Parties and Anderson and entered the ALJD Order on September 22, 1999, finding that the TSI and the concentration limits were used by the Department as a "binding norm" and thus should have been promulgated as a regulation pursuant to the rulemaking requirements of

[2] 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.

the South Carolina Administrative Procedures Act ("SCAPA").[3]

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.

The Reedy River Parties and Anderson 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 motion to stay the ALJD Order.

The Reedy River Parties and Anderson then filed petitions for judicial review in circuit court seeking to appeal the Board's November 4, 1999 decisions. By order dated January 19, 2000, the circuit court declined to exercise jurisdiction over the case or grant any preliminary relief.

The Reedy River Parties 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.

STATEMENT OF FACTS

The Department

The Department is the South Carolina state agency charged with the responsibility enforcing

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[3] 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 as impaired for pH.

federal and state environmental laws and regulations, and for issuing permits, licenses and certifications for activities which may affect the environment. One 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

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 Section 303(d) of the federal Clean Water Act ("CWA") requires the Department to create this list. 33 U.S.C. § 1313(d).[4] 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).[5] Rec. at 987.

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 "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

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[4]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. 33 U.S.C. § 1313(d)(1)(A).

[5]TMDLs are defined more fully below.

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

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.[6]

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). EPA guidance sets out several situations in which an impaired waterbody may be removed from an approved list as part of the biennial review process. Rec. at 1113-4 (EPA, *August 17, 1997 Guidance*).

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

In developing its 303(d) lists, the Department considers 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.

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[6]The EPA approved the 2000 303(d) List for South Carolina on May 2, 2000. The 2000 List and the EPA approval are not a formal part of the Record before this Court. The Department requests that this Court take judicial notice of the 2000 303(d) List and the EPA approval, copies of which are attached as Attachments 2 and 3.

In addition to the most recent 305(b) Report, the Department also considers the following information in creating the 303(d) List:

a. CWA Section 319 nonpoint sources assessments;

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

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

d. previous 303(d) lists; and

e. fish consumption advisories.

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

g. the 1998 Section 303(d) List checklist dated October 29, 1997 from EPA Region IV; and EPA National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions dated August 27, 1997;

h. EPA Supplemental Guidance on Section 303(d) Implementation dated August 13, 1992; and

i. numerous comments, letters and other information. *See* Table at Rec. at 217, 222.

Rec. at (1998 303(d) List); Rec. at 1471 (Stecker Affidavit).

In developing its 303(d) lists, the Department has 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. Rec. at 987. The Department also solicited public input through public workshops. Rec. at 987.

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 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 Section 303(d) list of impaired waters by letter dated on June 16, 1998. Rec. at 145.

The Trophic State Index ("TSI")

The trophic state index ("TSI") is 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 is nothing more than 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 is one of several pieces of information considered by the Department in determining

whether the waterbody is meeting all applicable water quality standards.

Kathy Stecker, an aquatic ecologist with the Department, developed the TSI from a similar index used by the EPA for the National Eutrophication Study. The TSI itself was not promulgated to enable any mandatory Department action but was, instead, developed to fulfill reporting requirements of Section 314 of the Clean Water Act. Stecker Affidavit, Rec. at 1471. CWA Section 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). Beginning with the 1998 Section 314 report, the information included in the Section 314 report must be included in the Section 305(b) assessment. 33 U.S.C. § 1324(a)(2). The TSI was developed to determine the "eutrophic condition" of lakes for purposes of the § 314 report. As required by federal law, this information was then included in the § 305(b) assessment. The information in this assessment, also as required by federal law, was then considered in determining the 303(d) list.

The index value is derived from a combination of measurements of five parameters: total phosphorus, inorganic nitrogen, chlorophyll, transparency (Secchi depth), and dissolved oxygen.[7] 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 Study 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. A similar evaluation was performed using SCDHEC index values from 1980-81 data, and results of the

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

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.

Although a TSI score of less than 250 designates a waterbody as Category I for the purposes of the State's 305(b) Lake Quality assessment, the Department has never used such scores as a dispositive finding that a waterbody was "aquatic life use" impaired for the purposes of South Carolina's Section 303(d) list. A score of less than 250 on the TSI index shows a likelihood that the waterbody is nutrient-impaired. Rec. at 837a (Stecker Depo. at 235). Nutrient impairment does not automatically place a waterbody on the 303(d) List. As set forth more fully above, nutrient impairment is only one piece of information that the Department considers in creating the 303(d) List. The Department retains the discretion not to place waterbodies with a score of less than 250 on the TSI on the 303(d) List. The Department has clearly exercised that discretion in the past. 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

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.

In addition, once EPA approves a State's 303(d) list, the State must incorporate the list into its current water quality management ("WQM") plan as part of its "continuing planning process." 33 U.S.C. § 303(d)(2), (e); 40 C.F.R. 130.7(d)(2). Such approved plans are a prerequisite for EPA-approved State permitting programs and must include effluent limitations at least as stringent as required in applicable water quality standards and TMDLs as established under Section 303(d). 33 U.S.C. § 303(e)(3)(A), (C).

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 degredation is a central TMDL outcome.

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

City of Anderson

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. The

Department did not impose any binding phosphorous discharge limits on Anderson.[8] Lake Secession was listed on the 1998 303(d) List. It has also been listed on all of South Carolina's four previous EPA-approved lists.

Anderson's petitions and arguments before the ALJ essentially challenged as illegal binding norms the Department's use of the TSI to identify waters as nutrient impaired, use of the TSI to identify waters as pH impaired, and use of concentration based effluent limits to set phosphorous discharge limits. As set forth above, there is no evidence to support these allegations.

ARGUMENT

A. SCOPE OF REVIEW

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) rendering the final agency decision regarding the Department's use of the TSI in future § 303(d) listings and the use of a 1.0 mg/l concentration-based limit as the sole basis for phosphorous permit limitations.

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

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[8]Lake Secession has not been listed by the Department as pH impaired.

(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).

This court must defer to the factual findings of the Board[9] 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).

B. THE NOTICES OF INTENT TO APPEAL FILED BY THE DEPARTMENT AND THE RIVERKEEPER WERE SUFFICIENT TO CONFER JURISDICTION ON THE BOARD.

Anderson argues that the notices of appeal filed by the Department and the Riverkeeper were not specific enough to comply with S.C. Code Reg. 61-72, § 801 and thus the Board did not have jurisdiction to review the ALJD Order. The court should reject this argument based on the notices filed by the Department and the Riverkeeper in this matter and based on the relevant case law. The notices filed by the Department and the Riverkeeper were sufficiently specific to meet the

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[9] 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, 456 S.E.2d 397, 400 (1995).

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).

In support of its argument that the Notices of Intent to Appeal filed by the Department and the Riverkeeper do not meet the standard set forth by Section 801, Anderson cites several obviously distinguishable cases where the petitioners failed to set forth **any** 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).[10]

Anderson further alleges that the Board recently applied a different standard in dismissing a *pro se* citizens' group appeal in the case of *Coker v. DHEC*, Docket No. 00-ALJ-07-0316-CC

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[10]See also *Quality Drug, Inc. v. DHHS*, No. 98-ALJ-08-0334-AP ("By letter dated May 19, 1998, Quality Drug requested an appeal before the Administrative Law Judge Division. The entire text of the notice of appeal reads, 'We are appealing your recent Administrative Law Judges [sic] decision.'"); *Madison v. DHHS*, No. 97-ALJ-08-0141-AP ("The entire text of the appeal request reads as follows: 'I, Frankie J. Madison, am asking that you'll will [sic.] go back into my case, once again, and reconsider my case again. I need help! In [sic.] getting my Doctors bills paid. I need some insurance to help pay my Doctors bills, when I have appointments for check-ups.'")

(DHEC Board March 8, 2001). Appellants' Brief at 7. However, reference to the petition by Coker seeking Board review of the ALJ decision shows that it alleges no error at all. Attachment 1.[11] In its entirety, it consists of signatures of a number of individuals and the following sentence: "The residents of the community would like to appeal the decision for the permit that was issued to Blitch Poultry Farm. Construction Permit No. 18,566-AG, Docket No. 00-ALJ-07-0316-CC." This falls far short of the specificity of the Department's petition for review in this case and in fact does not even rise to the level of the petition found deficient in *Smith*. The Board's dismissal of the *Coker* appeal is in no way inconsistent with its decision in this case.

In contrast to the cases cited by Anderson, the notices filed by the Department and the Riverkeeper in this matter are sufficiently specific to invoke the jurisdiction of the Board. The Department's Notice of Intent to Appeal states:

(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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[11]The Department requests that this Court take judicial notice of the Coker petition attached to this Brief at Attachment 1.

(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?

Rec. 3-4.

The Riverkeeper's Notice of Intent to Appeal was identical 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 Section 303(d) of the Clean Water Act?" Rec. 7-8.

The Notices filed by the Department and the Riverkeeper are legally sufficient. 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 Final Order

believed to be error. At least two grounds identify specific findings of fact and other requirements of the Order.

For the reasons set forth above, the Notices of Intent to Appeal filed with the Board by the Department and by the Riverkeeper were legally sufficient to confer jurisdiction on the Board to review the ALJD Order.

C. THE ACTIONS OF THE DEPARTMENT DID NOT CONSTITUTE RULEMAKING.

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. In seeking to reverse the Board's findings, Anderson would have this Court reinstate the ALJD order that the Board reversed. The ALJD Order concluded that consideration of trophic state information and effluent control performance information "in part . . . or indirectly" transformed these pieces of information into "binding norms" of general applicability and therefore, triggered the formal rulemaking procedures of the SCAPA.

For the reasons explained below, Anderson's argument must be rejected. The Board's rulemaking determinations were legally correct and supported by substantial evidence in the record. Simply put, the Board properly concluded 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." Instead, the Department considered relevant information in making case-

by-case determinations of impairment and in negotiating individual permit terms. In concluding that such case-by-case, informal and individualized determinations constituted binding norms of general applicability, the ALJD Order contained clear reversible error.

1. The Board Correctly Found that the Department's Actions Did Not Constitute Rulemaking Under the S.C. Administrative Procedures Act.

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 depends upon 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.

a. Consideration of Trophic State Index Information in Assessing the Impairment of Individual Streams and Lakes.

The trophic state index is nothing more than 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. As explained below, TSI information is one of several pieces of information considered by the Department in determining eutrophication status and the larger

question of whether the waterbody is meeting all applicable narrative use standards. Anderson's central contention is that "[e]very artificial impoundment in the State with a TSI value less than 250 is automatically identified as nutrient-impaired and placed on South Carolina's 303(d) List" and that "there are no exceptions to this policy." Anderson Br. at 21. On this basis, Anderson contends that TSI information was used as a binding norm. The ALJD Order goes even further by holding that even the partial consideration or indirect use of TSI information amounted to the development of a binding norm for which rulemaking was required.

The ALJD's resolution of the binding norm question contains clear error. The Department exercised case-by-case discretion in considering TSI values in deciding whether to list waterbodies as impaired under Section 303(d). To see that this is so, one need look no further than the 303(d) lists themselves. In years 1994 and 1996, six water bodies with TSI values of less than 250 were ***not*** identified as impaired: Monticello Reservoir, Lake Johnson, Lake Oliphant, and Clarks Hill Reservoir in 1994; and Lake Brown and Lake Oliphant in 1996. Rec. at 1636 (1996 303(d) list), Rec. at 1142 (1994 303(d) list).

The omissions were not accidental. 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, Section 319 nonpoint source assessments, the Section 314 lakes assessments, the Section 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). 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 SC Department of Natural Resources to enhance

fishing. Rec. at 841a (Stecker Dep. at pp 275 - 276). The record supports that the Department considered a broad range of information in addition to the TSI information in submitting its 303(d) list. Rec. at 841a (Stecker Dep. at p. 288, lines 7-19).

The TSI itself was not promulgated to enable any mandatory Department action but was, instead, first used to fulfill reporting requirements of § 314 of the Clean Water Act. Subsequent Section 303(d) guidance called for consideration of a broad array of data sources, including information developed for Section 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 origins, index information was never held out by the agency as a binding standard, and the DHEC board never adopted a TSI "cut-off" as a standard from which the Department could not deviate in determining whether a waterbody was impaired. In fact, the Board, as the agency's governing body, never directed the Department to use the TSI in a way that limits the Department's traditional exercise of discretion. The Department's flexible use of the TSI through the years shows that this discretion was not only available, it was exercised. The ALJD's findings to the contrary were error. In particular, the ALJD Order's conclusion that the Department used TSI information as a "sole criterion" that deprived the Department of all discretion in listing cannot be squared with the uncontested record. See Rec. at 2806 (ALJD Order at p. 48, 49).

The "binding norm" finding was properly reversed. The Board was also justified in reversing an erroneously expansive understanding of what actions and decisions constitute rulemaking. The ALJD Order, for example, holds that consideration of the TSI "in part ... or indirectly" in decisions with even 'indirect applicability" to petitioners constitutes void rulemaking which goes beyond the Department's authority. Rec. at 2807 (ALJD Order at p. 49, 53).

Thus, according to the ALJD Order, consideration of TSI information "in part" and "indirectly" in compiling a 303(d) list essentially converts the TSI to a binding norm for which rulemaking is required. The implications of such a view are eye-opening. Whenever Department personnel make a decision using various pieces of information and a large part of discretion – i.e., considering some information "in part" or "indirectly" – the information, and the decision-making, would be subject to rulemaking.

Triska and *Home Health Service* cannot bear this reading. Under those cases, the existence of a binding norm turns on "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," so that as long "as the agency *remains free to consider the individual facts* in the various cases that arise, then the agency action in question has not established a binding norm." *Ryder Truck Lines,* 716 F2d. At 1377 (emphasis added).[12] By definition, information considered only "in part" and "indirectly" leaves the decision-maker "free to consider the individual facts in the various cases." By holding that information considered in part or indirectly could constitute a binding norm, the ALJD Order essentially precludes discretionary decision-making altogether.

Nothing in Anderson's Brief alters this conclusion. Anderson first argues that the relevant standard is whether the agency looks "only" to a certain criterion taking action. Anderson Br. at 20. As explained above, the record amply demonstrates that the TSI could not have been the "only" piece of information the Department considered in making impairment assessments, since several

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[12] *See also Town of Silverstreet v. DHEC,* Docket No. 97-ALJ-0358-cc (SC ALJD 1998) at *7 ("Regulations are statements designed to create a 'binding norm' for which the agency is no longer free to exercise its discretion to follow or not follow a general policy in individual cases.") (*citing Home Health Service, Inc. v. South Carolina Tax Comm'n,* 312 S.C. 324, 440 S.E.2d375 (1994)).

waterbodies with qualifying scores were not listed. In addition to failing to show that TSI information was used as a uniform "norm," Anderson has also failed to show the information was in any way "binding." The TSI information clearly does not "bind" agency personnel, a fact relevant to the court's inquiry. *See Dep't of Environmental Resources v. Rushton Min. Co.,* 139 Pa. Comwlth. 648, 591 A.2d 1168, 1173 (Pa. 1991). " 'Binding norm' means that the agency is bound by the statement until the agency repeals it . . . . ." *Id.* Nor, as discussed more fully in the mootness section of this brief, has Anderson shown itself to be "bound" by any decisions that the TSI may have "in part" or "indirectly" influenced. Perhaps this is because trophic status information is simply one of the pieces of information that the Department used to ascertain water quality.

By federal regulation, if the Department possesses *any* information that a waterbody is not meeting applicable standards, it must identify the water as impaired. 40 CFR § 130.7 (b)(5). The Department also has an expansive mandate under South Carolina law to consider "other scientifically defensible published data which are appropriate for use in . . . evaluating water quality for constituents for which EPA has not developed national criteria or South Carolina has no standards." S.C. Code Reg. 61-68(E)(13). Despite these information-gathering mandates, Anderson argues that the Department *must* promulgate information such as TSI data as "standards for water." This ignores the way in which TSI information and other data sources and information are used by the Department to assess *already existing narrative standards.*

Anderson, and the ALJD Order, would require that the Department promulgate every piece and type of information it considers in assessing narrative standards as numeric "translator" components before such information could be used indirectly or in part. The argument, if accepted, would eviscerate narrative standards. Approved by the General Assembly, South Carolina's

narrative standards prescribe the uses that a water body should support, such as a recreational use for swimming or an aquatic life use by a balanced population of aquatic flora and fauna. Narrative standards are provided for under S.C. Code Ann. § 48-1-60, which governs the development of environmental protection regulations and standards in South Carolina:

> It is recognized that, due to variable factors, no single standard of quality and purity of the environment is applicable to all ambient air, land or waters of the State. In order to attain the objectives of this chapter, the Department, after proper study and after conducting a public hearing upon due notice, shall adopt rules and regulations and classification standards. *The classification and the standards of quality and purity of the environment shall be adopted by the Department in relation to the public use or benefit to which such air, land or waters are or may, in the future, be put.* S.C. Code Ann. § 48-1-60 (emphasis added).[13]

The provision does not apply to every piece of information that the Department gathers in assessing whether narrative standards are being met; it applies to the narrative standards themselves. The distinction makes common sense. Although the General Assembly required rulemaking for the establishment of uses to be protected for classes of waters, it did not hobble the Department with (or want to involve itself in) lengthy rulemaking procedures as the agency goes about considering various sources of water quality information, adopting new procedures and using new equipment for gathering data. Had the General Assembly wanted to take this operational discretion away from Department scientists, it would have mandated adoption of numeric water quality standards instead of approving narrative water quality standards in the first place.

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[13] Narrative standards are also developed under S.C. Code Section 48-1-40, which provides that the Department, after public hearing, "shall adopt standards and determine what qualities and properties of water and air shall indicate a polluted condition and these standards shall be promulgated and made a part of the rules and regulations of the Department. "S.C. Code Ann. § 48-1-40 ("Adoption of standards for water and air").

Furthermore, narrative water quality standards are an accepted and common type of water quality standard that states must adopt under the federal Clean Water Act. *American Paper Inst. v. United States EPA*, 996 F.2d 346 (D.C.Cir.1993) (state water quality standards, developed under the federal regulatory scheme, are often general narrative statements applicable to a wide array of pollutants); *EDF, Inc. v. Costle,* 657 F.3d 275(D.C.Cir. 1981) (water quality criteria may be, and often are, totally narrative); 40 C.F.R. §§ 122.44(d)(1)(vi)) (rule setting forth mechanisms to translate relevant narrative criteria into chemical-specific effluent limitations); 40 C.F.R. § 131.3 (§ 304 criteria are state water quality standards expressed as constituent concentrations, levels or narrative statements).

The ALJD Order, however, requires that before the Department can consider a waterbody impaired (or act to protect it), it must first translate "the narrative water quality criterion . . . on a case-by-case basis . . . into site-specific numeric values." Rec. at 2808 (ALJD Order at 50, ¶ 56). In other words, if massive algal blooms impair swimming or fishing in an impoundment, the Department could not declare the water body impaired, and could not act to protect those uses, until it established lake-specific numeric criteria to calculate the extent to which narrative standards (swimmability, fishability, or aquatic life use) are not being met. Similarly, if a hazardous contaminant were detected in a lake for which no numeric criteria had been established, the Department could not act to control the public health risks until numeric criteria were promulgated through rulemaking. Rec. at 2809 (ALJD Order at 51, ¶ 59).

The United States Supreme Court considered, and rejected, a similar assault on narrative standards in 1994:

> Under petitioner's interpretation of the statute . . . if a particular criteria

> were missing from the list contained in an individual state water quality standard . . . the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the [Clean Water] Act . . . . Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. *Given that there is no textual support for imposing this requirement, we are loathe to attribute to Congress an intent to impose this heavy regulatory burden on the States.*

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) (emphasis added).

The "textual support" cited by the ALJD Order for its erroneous conclusion that narrative standards must be translated is 24 S.C. Code Ann. Reg. § 61.9.122.44. But Section 61.9.122.44 outlines translation procedures for developing individual *permits* – not for narrative standards generally. *See* S.C. Ann. Code R. 61-9.122.33(d)(1)(vi)(C)(1) (effluent limits established that "*the permit* identifies which pollutants are intended to be controlled"); § (vi)(C)(2) (requirements for *individual permit fact sheets*); *id.*, § (vi)(C)(3) ("the *permit* requires"); § (vi)(C)(4) (the "*permit* contains"); and § (vii)(A), (B) (discussing requirements that *individual permit effluent limits* must ensure that applicable water quality standards are met) (emphases added).

The ALJD Order also cites 40 CFR § 130.7 (b)(3) for the proposition that narrative standards must be translated before the State can assess whether they are being attained. That section contains no such requirement. To the contrary, it requires that states identify waterbodies as impaired if it possesses information that a waterbody is not meeting applicable standards, which are specifically defined to include "numeric criteria, *narrative criteria, waterbody uses* and antidegradation requirements." 40 CFR § 130.7 (b)(3) (emphasis added). Far from supporting the Order's

conclusion that a State must disavow knowledge of impairment based on "non-translated" narrative standards, 40 CFR § 130 *requires* that the State publish any such evidence and submit it to the EPA.[14]

Anderson next argues that the Department's actual practice, rather than the "mind of an agency employee" should drive the binding norm inquiry. However, as explained above, the Department's practice was to use the TSI as a non-binding piece of information in assessing water quality, a pattern that falls far short of a "binding norm." Furthermore, and as Anderson should be aware, an agency's intent and declarations are indeed relevant to determining if a piece of information is used as a binding norm. That point is clearly made by *Town of Silverstreet v. DHEC,* Docket No. 97-ALJ-0358-CC (ALJ Div. May 19, 1998), a case cited in Anderson's brief to this court. In *Town of Silverstreet*, the Administrative Law Judge set forth a three part test for determining if an agency statement rises to the level of a binding norm. One of the three factors is how the policy has been applied in the field. The other two are: (1) "who gave final approval to the statement" and (2) "what has the agency expressed as to its intent." 1998 WL 343067 at *7. To be a regulation, the court held, "the position being advanced by the agency has to rise to the level of a position having the force and effect of law." *Id.* (citing *Wacha v. Kandiyohi County Welfare Board,* 242 N.W.2d 837 (Minn. 1976)).

Town of Silverstreet confirms that the Department's use of TSI information was not "rulemaking." First, the Board never gave final approval to basing impairment determinations solely on TSI information and has, in fact, explicitly disallowed the practice. Second, the Department has

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[14] The ALJD Order's conclusion is not saved by 57 Fed. Reg. 33040 (July 24, 1992) (preamble, III.B.2). The 1992 regulatory preamble language, in addition to being non-binding when written, was subsequently overruled by the Supreme Court in *Jefferson County.*

expressed its clear intent not to use TSI information as a binding norm. Third, the "policy" has not been and will not be uniformly applied in the field. It should be noted, finally, that the ALJ in *Town of Silverstreet* concluded that the actions challenged in that case were *not* regulations. In reaching that conclusion the Court specifically found the challenged guidelines had "not received final approval from the DHEC Board" but were instead identified with individual staff members. *Id.*[15]

b. Consideration of Effluent Control Performance Information in Negotiating Case-by-Case Permit Limits.

The Board properly reversed the ALJD's erroneous conclusion that Department used a 1 mg/l phosphorus 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, makes it clear 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, [16] a fact amply illustrated by the final limits actually promulgated for individual facilities. Those limits,

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[15] The other case cited by Anderson, *Milliken & Co. DHEC*, Docket No. 99-CP-42-1402 (Common Pleas, Aug. 13, 1999), is simply an order denying a motion to dismiss so that the parties could litigate the issue of whether the challenged actions constituted "binding norms." The opinion reaches no conclusions on that question.

[16] *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 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).

which vary from 1 mg/l, confirm that the information was never enforced as a binding norm. 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 we have a calculated number that we're dividing between multiple users.").

Anderson urges the court to find that the 1 mg/l qualifies as a "binding norm" because "DHEC is required to promulgate general criteria and conditions for its NPDES permitting program as 'regulations,'" Anderson Br. at 26 (citing S.C. Code Ann. § 48-1-30). The code section cited, however, requires only that the Department "promulgate regulations to implement this chapter to govern the procedure of the Department with respect to meetings, hearings, filing of reports, the issuance of permits and all other matters relating to procedure." More importantly, the provision goes on to explicitly *prohibit* the Department from specifying "any particular method to be used to reduce undesirable levels" of pollution except where the agency is unable to prescribe an emission standard or performance standard, and affirmatively gives the Department discretion to "grant approval for alternate equipment, operational practice, or emission control method, or combination thereof, where the owner or operator of a source can demonstrate to the Department that such alternative is substantially equivalent to that specified." S.C. Code Ann. § 48-1-30.

Anderson omits citing relevant law that *requires* the Department to make permitting decisions for wastewater treatment plants on an individualized, case-by-case basis. The operative regulatory provision provides that:

> Where the Department has not established a water quality criterion

> for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative water quality standard, the permitting authority must establish effluent limits using one or more of the following options:
>
> (B) *Establish effluent limits on a case-by-case basis, using EPA's water quality criteria*, published under section 307(a) of the CWA, *supplemented where necessary by other relevant information*

S.C. Admin. Code R. 9.122.44(d)(1)(vi)(B) (Section 122.44(d)(1)(vi)(B)) (emphasis added).[17]

The above *mandates* that the Department make case-by-case determinations to protect water quality using EPA water quality criteria "supplemented where necessary by other relevant information." In like fashion, R. 61-68(E)(8) directs that loading of nutrients from WWTPs "shall be addressed on a case-by-case basis." Since the Department is thus required to make case-by-case effluent limit determinations where water quality criterion for a specific chemical pollutant that causes or contributes to an excursion above a narrative water quality standard has not been set, the notion that the Department has been given a "legislative mandate" to promulgate universally applicable guidelines in every such case is a simply wrong in view of these regulatory requirements. Indeed, the ALJD decision, if given effect, would require the Department to (1) make case-by-case considerations of WWTP phosphorus discharges while, at the same time, (2) cease such

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[17] Anderson claims, in a footnote, that it is "important to note" that the ALJ also concluded that the Department failed to follow its own regulations in developing specific water quality based effluent limitations ("WQBELs") under S.C. Admin. Code 61-9.122.44(d)(1)(vi)(A-C). If this were indeed important, it would not appear in a footnote. Perhaps the reason it does is that: (1) Anderson has not properly challenged any particular WQBEL in this action; (2) the ALJD had no jurisdiction over any such permits and was in error purporting to pass on the validity of same; and (3) the ALJD Order manifests a gross misunderstanding of the WQBEL requirements by citing numeric translation procedures for individual *permits* as a basis for requiring numeric translations for narrative water quality *standards*.

determinations until regulations are promulgated defining universal standards applicable in every single case.

Existing law is more sensible. Where the Department has not established a water quality criterion for a specific chemical pollutant (e.g., phosphorus), that causes or contributes to excursions above a narrative water quality standard (e.g., balanced indigenous aquatic community), the Department must establish effluent limits on a case by case basis, and in doing so, may consider "other relevant information" (e.g., phosphorus removal performance and water quality in receiving waters). 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 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), are inapposite.

In summary, then, while available performance information was considered by the Department as one of several factors entering into permit negotiations with dischargers on nutrient impaired waters, a 1 mg/l standard was never adopted as a binding norm and the Department "remain[ed] free to consider the individual facts in [the] various cases." *Ryder Truck Lines*, 716 F.2d at 1377. As with the TSI, the ALJD's findings to the contrary constitute reversible error that could seriously hobble the Department's permitting operations.[18] Of particular concern is the ALJD Order's implication that the Department may not consider the challenged information "in whole or in part, directly or indirectly" in negotiating permit limits. Rec. at 2807 (ALJD Order at 49, ¶ 53).

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[18] Notably, the ALJD Order's findings in this respect would directly impair the Department's duties to develop case-by-case water-quality based effluent limits ("WQBELs") as required by 24 S.C. Code Ann. Regs. § 61-9.122.44(d)(1)(vi)(A)-(C).

This could be read to mean that any information considered "in whole or in part, directly or indirectly" by the Department in its permitting decisions constitutes a binding norm that must undergo rulemaking. In other words, under the ALJD Order, information cannot be considered "in part" in case-by-case permitting decisions unless or until such information goes through the rulemaking process.[19] Such an overreaching holding would paralyze permitting and water quality protection in South Carolina, with disastrous effects for wastewater utilities around the state. the Department, handcuffed, would see a sharp increase in its rulemaking docket with related increases in costs for the Department, the Board and the General Assembly. The Department never intended to use, never did use, and has been ordered not to use 1 mg/l performance information as a binding norm in WWTP permitting. The Department has remained free to consider the individual facts in the various cases, and is in fact required by various laws to do just that. The Department's consideration of the 1 mg/l information did not amount to the development of a binding norm.

2. The Cases Cited in the Amicus Brief Do Not Support Anderson's Position

A close examination of the cases cited in the Amicus Brief of the Association of Metropolitan Sewerage Agencies ("AMSA") reveals that they offer no support for AMSA's or Anderson's position, but in fact support the conclusion that the Department's actions did not amount to illicit rulemaking.

In *Simpson Tacoma Kraft Co. v. Department of Ecology,* 835 P.2d 1030 (Wash. 1992), an agency's universal use of a. .013 parts per quadrillion ("ppq") standard for an entire class of

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[19] The Order's holding that information becomes a binding norm when it is used by decision makers only "indirectly" and "in part" is plainly erroneous. By definition, information considered only "in part" and "indirectly" by the decision maker leaves the decision maker "free to consider the individual facts in the various cases." The Order's holding would elevate every minor piece of information considered in a decision into a "binding norm" that requires rulemaking.

dischargers was held to be a "rule" of "general applicability" under the Washington APA. The Washington Supreme Court, in its decision, focused on the rule's universal application and the fact that [Department of] Ecology employees [were] bound to apply the [.013 ppq] standard." *Simpson Tacoma Kraft Co.,* 835 P.2d at 1033. As the record in this case indicates clearly, the Department staff, unlike the regulators in Washington, have never been "bound" by TSI information and never applied it as a universal norm.

Wisconsin Electric Power Co. v. Department of Natural Resources, 287 N.W.2d 113 (Wis. 1980), revolved around numeric chlorine limitations imposed under the Wisconsin Pollutant Discharge Elimination System (WPDES). After Wisconsin DNR issued draft limitations using proposed federal guidelines, U.S. EPA wrote a letter strongly advocating substantially stricter limits, limits that were then incorporated in the final, state-issued permits by DNR. *Wisconsin Electric Power Co.,* 287 N.W.2d at 116. The Wisconsin Supreme Court ruled that the agency had violated state statutes by issuing limitations more stringent than those promulgated by EPA. *Id.* at 124. The court also required adoption of numeric chlorine limitations in conformance with proper rule making requirements. *Id.* However, EPA's letter had made it clear that its "chlorine limitations were recommended to apply to *all* of the power plants for which draft permits were submitted to the EPA, and the DNR *uniformly* imposed these limitations in the WPDES permits issued to Wisconsin Electric." *Id.* at 120 (emphasis added). The uniformity of application in binding permits clearly distinguishes *Wisconsin Electric* from the case at bar.

Likewise distinguishable is *Community Nutrition Institute v. Young,* 818 F.2d 943 (D.C. Cir. 1987). There the D.C. Circuit found that "action levels" implemented by the federal Food and Drug Administration ("FDA") needed to go through the rule-making process. However, the numeric

"action levels" in that case were far more prescriptive and rule-like than the Department's use of trophic status or effluent performance information. FDA defined its quantitative "action levels" as the level when "an added poisonous or deleterious substance may be established to define the level of contamination at which food *will be deemed to be adulterated.* An action level may *prohibit any detectable amount of substance in food." Community Nutrition Institute,* 818 F.2d 943, 947. The D.C. Circuit found "[t]his type of mandatory, definitive language is a powerful, even potentially dispositive, factor suggesting that action levels are substantive rules." *Id.* The Department has never made anything like FDA's blunt proclamations concerning trophic status information or phosphorus removal performance information and the way that information would be used. Another factor distinguishing *Community Nutrition* is the agency's establishment, in that case, of explicit "exceptions" to the prescribed action levels B- a further indication that the action levels were binding norms. *Id.* at 947. The Department has never declared specific "exceptions" to its activities, and did not need to - it was involved in case-by-case water quality assessments and permitting negotiations.

Indeed, the Department's actions are more analogous to those at issue in *Professionals and Patients for Customized Care v. Shalala,* 56 F.3d 592 (5th Cir. 1995), a case that distinguishes *Community Nutrition Institute.* In *Professionals and Patients,* FDA implemented a "policy" to help staff determine if a pharmacy was doing so much "compounding" of ingredients that it had entered the regulated realm of drug manufacturing. 56 F.3d at 593. The court found FDA's actions were not rulemaking. First, the court noted that FDA had developed (and treated) its policy as internal decision-making guidance rather than a formal, externally applied rule. *Id.* Stated the court: "the description as 'policy' in the [guidance] itself and the fact that compliance policy guides do not have

binding effect" militated "in favor of a holding that [the guidance] is not a substantive rule." *Id.* at 596. Second, that "the agency remain[ed] free to consider the individual facts in the various cases," further supported the conclusion that FDA had "not established a binding norm." *Id.* at 596- 97. "[E]ven though the mandatory tone of the factors is undoubtedly calculated to encourage compliance, [the guidance] affords an opportunity for individualized determining." *Id.* at 597.

AMSA cites a portion of *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658 (D.C. Cir. 1978), to stress the importance of looking at the challenged action's purpose and effect. The court in that case held, however, that the challenged actions of the Federal Savings and Loan Insurance Corporation ("FSLIC") *did not* constitute rules. Of particular importance was the agency's having retained discretion to depart from its own mandatory-seeming directives. *Id.* at 666. The Department has not only retained such discretion, it has affirmatively exercised it, and the Department never proclaimed the TSI, pH or phosphorus removal performance data to be mandatory directives. Notably, *Guardian Federal* found sufficient discretion where the agency deviated from a supposed directive only one time. The Department has deviated from its "rules" far more.

The cases cited by AMSA, in summary, support the view that the Department's practice and actions in this case did not rise to the level of universally applicable binding norms that triggered legislative-rulemaking procedures under the S.C. Administrative Procedures Act.

In addition to citing cases, AMSA claims that "federal law requires that a State 'translate' the water quality standards into numeric values in order to comply with Section 303(d)." AMSA Br. at 10. For an Amicus representing a national association presumably quite familiar with the Clean Water Act, this statement is remarkable for being patently incorrect. Federal law does not require

translation of narrative standards before the state can determine that those adopted standards are in fact impaired; rather, as explained above, federal law explicitly requires states to report data showing impairment of any sort, including impairment of narrative use standards. *See* 40 CFR 130.7(b)(3).

D. ANDERSON'S ORIGINAL CHALLENGES TO THE DEPARTMENT'S ACTIONS ARE NOW MOOT.

Anderson's principal complaint in this action is that the Department erred in including certain waterbodies as "impaired" on a list submitted to the U.S. Environmental Protection Agency under Section 303(d) of the Clean Water Act. The list was submitted in 1998 as part of a "biennial review" process, whereby states are required to provide EPA an updated list of impaired waters every two years. 40 CFR 130.7(d). In submitting their biennial 303(d) lists, States are to include information on which waterbodies have been added or deleted from the list and which waterbodies were assessed since the last reporting period. Rec. at 1053 (EPA, *April 1991 Guidance.*) While not required to take a formal approval or disapproval action on annual list updates, EPA will approve or disapprove lists every other year. Rec. at 1108 (EPA, *August 17, 1997 Guidance.*)

A waterbody may be removed from a State's section 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 been established and approved by EPA. Rec. at 1113-4 (EPA, *August 17, 1997 Guidance*).

After considering comments made by various wastewater utilities and further modification of the list by the Department, EPA adopted South Carolina's 1998 303(d) list on June 16, 1998. Rec.

at 144. The Department subsequently developed a 303(d) list for year 2000. Like previous lists, the 2000 list did not rely exclusively on TSI information in listing waterbodies as impaired by nutrients. The 303(d) list for 2000 was approved by EPA by letter dated May 2, 2000. Exhibit 3.[20]

Given the context underlying Anderson's claims, its challenge to the 1998 Section 303(d) list should be dismissed as 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, 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).

In the present case, Anderson seeks to have South Carolina's 1998 List set aside. That list, however, was approved and adopted by EPA almost three years ago. The proper and accepted way to challenge a federally-adopted Section 303(d) list is in federal court. *See, e.g., Kingman Park Civic*

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[20] The Court is requested to take judicial notice of the approval letter. In a separate ALJD action, docket no.: 00-ALJ-07-0208-cc, the 2000 list was stayed as to Anderson.

Assoc. v. EPA, No. 1:98CV00758 (D.D.C. filed 1998); *Sierra Club v. EPA*, No. H 97-3838 (D. Md. filed 1997); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996); *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D.Ga. 1996); *American Littoral Society v. EPA*, No. 96-339-MLP (D.N.J. filed 1996); *Northwest Env'tl Advocates v. Browner*, No. C-94-1666R (W.D. Wash. filed 1996); *Wyoming Outdoor Council v. Browner*, No. 97-CV-0140-D (D. Wyom. filed 1996); *Kansas Natural Resources Council, Inc. v. Browner,* No. 95-2490-JWL (D. Kan. filed 1995); *Natural Resources Defense Council v. Fox*, No. 94 Civ. 8424 (S.D.N.Y. filed 1994). Anderson has never sought to invalidate or challenge the 1998 list in federal court and has offered no rationale as to how a state court could unilaterally dissolve a federally-adopted 303(d) list outside of the established system of federal biennial review.

The jurisdictional problem is compounded by the fact that South Carolina submitted, as required by federal law and regulation, a new 303(d) list in year 2000, which EPA subsequently approved. While Anderson brought an action in South Carolina to challenge this list, it has never brought an action in federal court to stop operation of a federally-required and federally-adopted list of impaired waters for South Carolina. That federally-approved list will, from a federal perspective, remain in full force and effect unless and until it is challenged in federal court -- even were Anderson to prevail in this action. Last year a state court in California was faced with a similar situation. It found challenges to a federally-approved 1998 303(d) moot:

> All causes of action in the petition . . . are moot insofar as they challenge the validity of the list of impaired water bodies that respondent compiled and submitted to the United States Environmental Protection Agency (US EPA) in 1998 pursuant to section 303(d) of the federal Clean Water Act (1998 303(d) list). The 1998 303(d) list was superseded by US EPA's approval of a new list following its review and modification of the 1998 303(d) list.

Sacramento Regional County Sanitation Dist. v. State Water Resources Control Bd., No. 98CS01702 (Sup. Ct. Calif. Nov. 1, 2000) (Attachment 3).

The mootness of Anderson's claims is made even more glaring by the fact that the Board, upon agreement and request of the Department, has affirmatively ordered the Department *not* to use TSI or 1 mg/l information as binding norms. Rec. at 3045; 3229-3231. This order, which the Department is legally compelled to follow, obviates the risk that any complained of practices will be repeated or otherwise evade review. Furthermore, 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), Attachment 4. The legislative review period for the promulgation of this new regulation expired on May 18, 2001 and so the revised regulation will become effective when it is published in the State Register, which is expected to be June 22, 2001. *See* S.C. Code Ann. Section 1-23-40 (1986); 1-23-120(D)(2000 Supp.)[21]

The new numeric standards ensure that the composite index will not be used as a sole basis for listing decisions or as a binding norm. Between the Board's actions and those of the General Assembly, Anderson's complaints regarding TSI information are no longer operational. As stated by the Fourth Circuit, "[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." *Valero Terrestrial Corp. v. Paige,* 211 F.3d 112, 116 (4th Cir. 2000); *see* 73A C.J.S. Public Administrative Law and Procedure § 207, at 247 (1983) ("A court ordinarily

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[21]EPA must still approve the regulation for it to become a water quality standard under the Clean Water Act. 40 C.F.R.131.21(c)

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)).

Anderson, in summary, is challenging past actions that will not be repeated, and actions that this Court is in no position to remedy. Because judgment on those claims, if rendered, "would have no practical legal effect" upon an existing controversy, they are moot and the appeal should be dismissed. *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

F. THE BOARD DID NOT ERR BY ITS LIMITED CONSIDERATION OF THE SETTLEMENT WITH THE REEDY RIVER PARTIES AND THE DEPARTMENT'S PROPOSED AGREEMENT RELATING TO ANDERSON'S CLAIMS.

Anderson claims that the Board violated the APA and the Department's Contested Case Regulations by considering the Board Summary Sheet which attached the proposed settlement agreement between the Department and the Reedy River Parties ("Settlement Agreement") and the Department's January 31, 2000 Brief in the Anderson case which set forth elements of the Settlement Agreement that the Department believed was applicable to the Anderson case ("Staff Agreement"). Rec. at 3040-56; 3129-33. Anderson claims that these materials were not part of the record and thus Anderson was denied its rights to meaningful judicial review.

Anderson argues alleged procedural due process violations but fails to articulate any

prejudice as a result of the alleged violations. As discussed below, the Settlement Agreement was properly submitted to the Board for its consideration and approval of the terms of a settlement that resolved the various issues raised by - and made the final agency decision in regards to - all parties except Anderson. Since the Board, like any reviewing body, must be cognizant of mootness issues, it properly considered those aspects of the Settlement Agreement - the Staff Agreement - that were relevant to determining what issues remained ripe for consideration.

1. The Settlement Agreement with the Reedy River Parties

The facts relevant to the Board's consideration of the Settlement Agreement are as follows. 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. Shortly before the February hearing, the Reedy River Parties reached an agreement with the Department whereby the Department agreed to change 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 this 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.

All parties except Anderson joined in the Settlement Agreement. Although the Department did not settle with Anderson, the Department agreed to follow the same procedures with Anderson that it would follow with the Reedy River Parties. 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. In other words, the Department stated to the Board that although it had not settled with Anderson, it was prepared to treat Anderson the same as the Reedy River Parties. Essentially, the Department agreed 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 stated that it had decided to:

> 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.

In effect, the Department advised the Board that opposing parties have complained that the Department does not have a numeric standard for nutrient impairment, but have used the TSI as the

sole criteria for determining nutrient impairment; the Department does not agree with this position but is willing to address the opposing parties' concerns to avoid further litigation; the Department agrees to develop a numeric standard and to follow the regulation promulgation process to fully enact a regulation setting forth a numeric standard; the Department does not believe that it has used the TSI as the sole criteria for the 303(d) listing but will ensure that it will not do so in the future and agrees to base future decisions on comparing water quality data to numeric standards, narrative standards or use classifications. Rec. at 3132 (Settlement Agreement ¶13). With regard to wasteload allocations in permit limits, the Department agreed not to use the 1 mg/l concentration limit that was based on reasonable treatment technologies that the parties had objected to or base the limits on the TSI, but will use a method that is directly related to water quality. Rec. at 3131 (Settlement Agreement ¶3).

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.

2. The Board Properly Considered the Settlement Agreement Not for the Purpose of Determining that Anderson's Claim Did Not Have merit, but for the Purpose of Determining What Claims Were Left for Determination.

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.* In other words, the Board said, it would not consider the existence of the settlement with the other parties as evidence that the Department was right or wrong in its position on the merits before the ALJD; however, it would consider the settlement to determine whether any of the issues before the ALJD were now moot, or whether previous rulings of the ALJD were now moot.

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).

Furthermore, it was 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.

Thus the Board properly concluded that Anderson's claims that the Department's use of the

TSI and the concentration based limits constituted illegal 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 in the meantime not use the TSI alone, and that it would not impose concentration based permit limits.

Anderson claims that the Board violated the SCAPA because the settlement agreement was not in the record. The SCAPA is not as strict as Anderson claims. The SCAPA and the Board rules have certain flexibility for allowing consideration of matters not strictly within the record, so long as such matters are not presented ex parte but with all parties having notice and opportunity to be heard. The SCAPA provides that the record in a contested case includes not only evidence received or considered, but also "matters officially noticed." S.C. Code Ann. § 1-23-320(g)(3). The Settlement Agreement and the Staff Agreement were included in the briefing papers provided to the Board and served on all parties. The Board chose to consider these matters for the purposes set forth above. Thus they constitute matters noticed by the Board through official briefing procedures. They were served on Anderson who had an opportunity to be, and in fact was, heard.

Similarly, under Board Rule 804, the Board may consider new or additional evidence during its review upon a showing of good cause shown and provided that there is an opportunity for cross-examination and rebuttal by all parties. S.C. Code Reg. 61-72, § 804. This provision, although more specifically applicable to contested evidentiary hearings, demonstrates the same concept of administrative procedure: additional important information can be considered so long as all parties have notice and the opportunity to examine and rebut the evidence.

Anderson quotes Shipley's *South Carolina Administrative Law* for its argument that the Board should consider nothing outside of the record. Brief p. 34. But the quoted provision is taken

out of context. This quote is taken from a paragraph entitled "Ex parte consultations" and follows a description of "a basic requirement of fair procedure": ". . .the decision maker should not be influenced by information which was not communicated to all parties for an opportunity to be disputed, controverted, or clarified." Shipley, David E., *South Carolina Administrative Law* (2d Ed. 1989) 5-93. Thus the fundamental unfairness concern that Shipley addresses is ex parte communication,[22] not some draconian rule prohibiting a board from considering important matters that are not strictly in the record but are before all parties.

Caselaw and the Board's rules demonstrate that the Board has dual roles: to determine contested cases and to make the final agency decision. Board Rule 101 defines the roles of the Board as follows:

> A. Adjudicatory hearing. A trial-type proceeding held before the Board of Health and Environmental Control or its designee as part of administrative review of a Department decision and shall include a contested case as defined in the Administrative Procedures Act.
>
> B. Administrative review. The process by which the Board reviews the Department decisions in order to render a final agency decision.

Rule 805 also provides that

> [t]he Board's decision shall be the final agency decision in the case . . . The Board may make its own findings of fact and conclusions of law upon review of the record and the Hearing Officer's report. The Board may adopt, reject, or modify the Hearing Officer's recommendation, and may grant any relief warranted, including the assessment of civil penalties. The Board is not limited in its decision to conditions or penalties assessed by the Department. S.C. Code Regs. 61-72, Rule 805.

The courts have recognized that the Board, in the process of hearing appeals, makes the final

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[22] Ex parte communication is expressly prohibited under the SCAPA. S.C. Code Ann. 1-23-360 (1986). There is no allegation or issue of ex parte communication in this case.

agency decision. *See, eg., South Carolina Baptist Hospital v. South Carolina Dep't of Health...,* 291 S.C. 267, 353 S.E.2d 277 (1986) (preliminary decision regarding hospital certificate of need made by the Department but the Board, on appeal, makes the final agency decision).

Furthermore, Anderson was not even entitled to the full procedural requirements of the APA because the issues considered by the Board in this case did not constitute a "contested case" for the purposes of the APA. The South Carolina courts have recognized that not every agency decision entitles the aggrieved party to a contested case hearing pursuant to the APA. Some decisions are simply governed by the requirements of S.C. Constitution Article I, § 22 for notice, opportunity to be heard and judicial review. *See Triska v Department of Health & Environmental Control,* 355 SE2d 531 (SC 1987) ; *Stono River Environmental Protection Assn. v SC DHEC,* 305 SC 90, 406 SE2d 340 (1991). [23] S.C. Code Ann. §§ 1-23-310(3)(2000 Supp.) defines a "contested case" as ". . . a proceeding, including, but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing."

In *Triska* and *Stono River*, the court recognized that the key consideration in determining whether a case is "contested" is whether "the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing." Here there is no requirement, under federal or state law, for the Department to hold a hearing on its 303(d) List

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[23] In both cases, the Court found that there was no requirement at that time in South Carolina or federal law that there be an opportunity for a hearing in a 401 water quality certification, and therefore, a "contested" case did not exist in which an adjudicatory hearing is required. However, the court held that even though it was not a "contested case" under the APA, constitutional due process apart from the APA required notice and opportunity to be heard. *See also League of Women Voters of Georgetown County v. Litchfield-by-the-Sea,* 305 S.C. 424, 409 S.E.2d 378 (1991) (The process for a proposed sanitary sewer system to be certified consistent with the Coastal Zone Management Program was not a "contested case" reviewable by the Administrative Procedures Act); *Byrd v. Irmo High School,* 321 S.C. 426, 468 S.E.2d 426 (1996) (due process is not inflexible; nature of hearing to be provided depends on the nature of the interest affected).

determinations. Thus Anderson's challenges to the 1998 303(d) list are not technically governed by the SCAPA.

Thus the Board proceeding was not constrained by the statutory requirements of the SCAPA. The Board was free to make an appropriate decision, as the agency that administers and supervises the Department. The Board properly considered not only the issues in dispute, but also the commitment by the Department that it would promulgate numeric water quality standards for nutrients, and it would ensure that the TSI and concentration based limits were not used as binding norms.

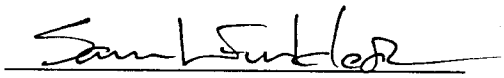
Finally, even if the APA applies and the Board violated some technical provision of the APA, reversal of the Board's decision is not warranted if the Board's procedures comported with substantial due process. *See Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (S.C App. 2000)

The Board's consideration of the Settlement Agreement and the Staff Agreement complied with the APA and substantial due process requirements, and did not prejudice Anderson's substantive rights.

CONCLUSION

For the reasons set forth above, and based on the entire record, Anderson's petition for judicial review should be denied and the Board Order should be affirmed.

Respectfully Submitted,



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Attorneys for the Catawba Riverkeeper

June 4, 2001

ATTACHMENT 1
PETITION FOR JUDICIAL REVIEW
Coker v. DHEC, Docket No. 00-ALJ-07-0316-CC (DHEC Board March 8, 2001)

November 16, 2000

Dear Sirs,

The residents of the community would like to appeal the decision for the permit that was issued to Blitch Poultry Farm. Construction permit No. 18,566-AG, Docket No. 00-ALJ-07-0316-CC.

Trey Burch
Debra Robinson
Josephine Walker
Clayton Chubb
Johnnie Mae Johnson
Tommie Lee Johnson
Edgar Coker
Hamm Coker
Andrew H. Cooper Jr
Grace Cooper
Virginia Coker
Anna Robertson
Margaret H. Corbett
Mary Jo Cooper
Gerald Chubb
Kim Coker
Casey L. Chubb
Donnie Robinson
Chanel Robinson

RECEIVED
NOV 21 2000
Office of Commissioner
SC DHEC

RECEIVED
NOV 21 2000
Clerk of DHEC Board

November 16, 2000

RECEIVED
NOV 21 2000
Clerk of DHEC Board

Dear Sirs,

The residents of the community would like to appeal the decision for the permit that was issued to Blitch Poultry Farm. Construction permit No. 18,566-AG, Docket No. 00-ALJ-07-0316-CC.

[illegible]
Craig A. William
Mae Mack
Eartha Washington
Wanda E. Gadson
Virgie Lee James
Helen McMillian
Tommy McMillan
Ruther M. Talbert
Carl V. Talbert
Jackie Johnson by Sis.
Samuel McMillian

ATTACHMENT 2
EPA APPROVAL LETTER FOR
STATE OF SOUTH CAROLINA SECTION 303(d) LIST FOR 2000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

MAY 2 2000

Mr. Alton C. Boozer, Chief
Bureau of Water
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

SUBJ: Final 2000 § 303(d) List

Dear Mr. Boozer:

The U.S. Environmental Protection Agency (EPA), Region 4 has received March 30, 2000 correspondence from the State of South Carolina transmitting its final 2000 § 303(d) list for approval. EPA has conducted a complete review of the 2000 § 303(d) list and supporting documentation and information. Based on this review, EPA has determined that South Carolina's 2000 list of water quality limited segments still requiring total maximum daily loads meets the requirements of § 303(d) of the Clean Water Act and EPA's implementing regulations. Therefore, by this order, EPA hereby approves South Carolina's 2000 § 303(d) list.

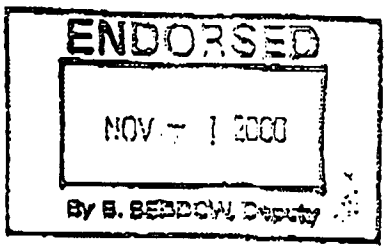
If you have any questions, please contact Ms. Gail Mitchell of my staff at 404/562-9234.

Sincerely,

Robert F. McGhee, Director
Water Management Division

cc: Ms. Gina Kirkland
South Carolina Bureau of Water

ATTACHMENT 3
Sacremento Regional County Sanitation Dist. V. State Water Resources Control Bd.,
No. 98CS01702 (Sup. Ct. Calif. Nov. 1, 2000



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

SACRAMENTO REGIONAL COUNTY SANITATION DISTRICT,

Petitioner and Plaintiff,

v.

STATE WATER RESOURCES CONTROL BOARD; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE CENTRAL VALLEY REGION; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE SAN FRANCISCO BAY REGION,

Respondents and Defendants.

CALIFORNIA ASSOCIATION OF SANITATION AGENCIES; SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED TREATMENT WORKS,

Intervenors.

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER, INC.; and SAN FRANCISCO BAYKEEPER, INC.

Intervenors.

Dept. 33

No. 98CS01702

ORDER

On August 11, 2000, this court heard the petition and complaint of Sacramento Regional County Sanitation District (petition or petitioner), the petition and complaint in intervention of the California Association of Sanitation Agencies and the Southern California

Alliance of Publicly Owned Treatment Works (petition in intervention or petitioners in intervention), and the motion for reconsideration of petitioners in intervention. Paul S. Simmons appeared for petitioner. Deputy Attorney General Marc N. Melnick appeared for respondents State Water Resources Control Board, Regional Water Quality Control Board for the Central Valley and Regional Water Quality Control Board for the San Francisco Bay Region. Colin Lennard and Patricia J. Chen appeared for petitioners in intervention. David S. Beckman and Alex N. Helperin appeared for intervenors Natural Resources Defense Council, Inc., Santa Monica Baykeeper, Inc., and San Francisco Baykeeper, Inc. After careful consideration of the evidence and the written and oral arguments presented by the parties, the court orders that:

1. The motion of petitioners in intervention for reconsideration of the order entered March 28, 2000, rejecting the first cause of action in the petition in intervention, is denied. The motion is untimely and is not based on new or different facts, circumstances or law. (See Code Civ. Proc., § 1008.)

2. The petition and the petition in intervention are denied in their entirety for the following reasons:

a. All causes of action in the petition and the petition in intervention are moot insofar as they challenge the validity of the list of impaired water bodies that respondent compiled and submitted to the United State Environmental Protection Agency (US EPA) in 1998 pursuant to section 303(d) of the federal Clean Water Act (1998 303(d) list). The 1998 303(d) list was superseded by the US EPA's approval of a new list following its review and modification of the 1998 303(d) list.

b. With respect to the third, fourth and sixth causes of action in the petition and the fourth and fifth causes of action in the petition in intervention, petitioner and petitioners in intervention have not shown that the Listing Guidelines, developed and used by respondents to compile the 1998 303(d) list in accordance with US EPA directives, violate the requirements of the Porter Cologne Water Quality Control Act for the adoption and implementation of water quality standards and objectives. The Listing Guidelines provide a methodology for assessing whether water bodies are impaired, i.e., whether water bodies meet

existing applicable water quality standards and objectives. The Listing Guidelines do not themselves establish or constitute water quality standards or objectives and thus are not subject to the Porter Cologne requirements.

c. With respect to the fifth and seventh causes of action in the petition, petitioner has not shown that either the Listing Guidelines or the 1998 303(d) list violate the California Environmental Quality Act (CEQA). Neither the Listing Guidelines nor the 1998(d) list constitute a project subject to CEQA environmental review requirements because no direct or reasonably foreseeable indirect physical changes in the environment result from the Listing Guidelines or the 1998 303(d) list. (See Pub. Resources Code §§ 21065, 21080; 14 Cal.Code Regs. § 15378; *Kaufman & Broad-South Bay, Inc.* V. *Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 472-476.) Additionally, even if the Listing Guidelines and the 1998 303(d) list were projects for purposes of CEQA, they would be categorically exempt from environmental review as data collection and resource evaluation activities. (See 14 Cal.Code Regs. § 15306.)

d. With respect to the eighth cause of action in the petition and the sixth cause of action in the petition in intervention, petitioner and petitioners in intervention have not shown that the 1998 303(d) list violates the requirements of the Administrative Procedure Act (APA) for the adoption of administrative regulations. Respondents' compilation of a 303(d) list is an action directly mandated by and executed pursuant to the federal Clean Water Act and does not constitute a rule or standard of general application adopted by respondents to implement, interpret or make specific a law which they enforce or administer. Thus, the 1998 303(d) list is not a regulation within the meaning of the APA (see Gov. Code § 11342, subd. (g)) and is not subject to the APA requirements for regulations.

e. With respect to the ninth cause of action in the petition and the seventh cause of action in the petition in intervention, petitioner and petitioners in intervention have not shown that respondents' compilation of the 1998 303(d) list was arbitrary, capricious, lacking in evidentiary support, or procedurally deficient. Substantial evidence supports respondents' identification of diazinon, mercury and other pollutants in the 1998 303(d) list as pollutants that cause violations of applicable water quality standards in the Delta. Additionally,

US EPA guidance documents sanction the listing of water bodies that are impaired by a class of pollutants or by unknown pollutants.

f. With respect to the tenth cause of action in the petition and the eighth cause of action in the petition in intervention, petitioner and petitioners in intervention have not shown that respondents improperly included water bodies on the 1998 303(d) list instead of another list pursuant to section 303(d)(3) of the federal Clean Water Act.

g. With respect to the eleventh cause of action in the petition and the second cause of action in the petition in intervention, petitioner and petitioners in intervention have not shown that the 1998 303(d) list is invalid because an allegedly required basis for compilation of the list, a report prepared by respondents under section 305(b) of the federal Clean Water Act (305(b) report), omitted a requirement of section 305(b) for an estimate of the social and economic costs and benefits of achieving water quality objectives. As previously determined in the court's order entered March 28, 2000, a 305(b) report is not a prerequisite to the compilation of a 303(d) list. Rather, when respondents compile a 303(d) list, they are required to consider all existing and readily available water quality-related data and information about various categories of waters, including waters identified in the most recent 305(b) report. (See 40 C.F.R. § 130.7(b)(5).) No provision of law requires respondents to consider an estimate of social and economic costs and benefits of achieving water quality objectives or other sections of a 305(b) report in the course of compiling a 303(d) list.

h. Petitioner is deemed to have waived a determination of the twelfth cause of action in the petition. Petitioner presented no evidence or argument in support of the twelfth cause of action on or before the hearing on the merits of its petition.

Dated: NOV - 1 2001

LLOYD G. CONNELLY

LLOYD G. CONNELLY
JUDGE OF THE SUPERIOR COURT

ATTACHMENT 4

S.C. Code Reg. 61-68.E.9.a-e (2001) (expected to be published in State Register on June 22, 2001)

E. GENERAL RULES AND STANDARDS APPLICABLE TO ALL WATERS.

9. In order to protect and maintain lakes and other waters of the State, consideration needs to be given to the control of nutrients reaching the waters of the State. Therefore, the Department shall control nutrients as prescribed below.

a. Discharges of nutrients from all sources, including point and nonpoint, to waters of the State shall be prohibited or limited if the discharge would result in or if the waters experience growths of microscopic or macroscopic vegetation such that the water quality standards would be violated or the existing or classified uses of the waters would be impaired. Loading of nutrients shall be addressed on an individual basis as necessary to ensure compliance with the narrative and numeric criteria.

b. Numeric nutrient criteria for lakes are based on an ecoregional approach which takes into account the geographic location of the lakes within the State and are listed below. These numeric criteria are applicable to lakes of 40 acres or more. Lakes of less than 40 acres will continue to be protected by the narrative criteria.

(1) for the Blue Ridge Mountains ecoregion of the State, total phosphorus shall not exceed 0.02 mg/l, chlorophyll *a* shall not exceed 10 ug/l, and total nitrogen shall not exceed 0.35 mg/l

(2) for the Piedmont and Southeastern Plains ecoregions of the State, total phosphorus shall not exceed 0.06 mg/l, chlorophyll *a* shall not exceed 40 ug/l, and total nitrogen shall not exceed 1.50 mg/l

(3) for the Middle Atlantic Coastal Plains ecoregion of the State, total phosphorus shall not exceed 0.09 mg/l, chlorophyll *a* shall not exceed 40 ug/l, and total nitrogen shall not exceed 1.50 mg/l.

c. In evaluating the effects of nutrients upon the quality of lakes and other waters of the State, the Department may consider, but not be limited to, such factors as the hydrology and morphometry of the waterbody, the existing and projected trophic state, characteristics of the loadings, and other control mechanisms in order to protect the existing and classified uses of the waters.

d. The Department shall take appropriate action, to include, but not limited to: establishing numeric effluent limitations in permits, establishing Total Maximum Daily Loads, establishing waste load allocations, and establishing load allocations for nutrients to ensure that the lakes attain and maintain the above narrative and numeric criteria and other applicable water quality standards.

e. The criteria specific to lakes shall be applicable to all portions of the lake. For this purpose, the Department shall define the applicable area to be that area covered when measured at full pool elevation.

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)	
DEPARTMENT OF HEALTH AND)	
ENVIRONMENTAL CONTROL,)	
STATE OF SOUTH CAROLINA)	
BOARD OF HEALTH AND)	
ENVIRONMENTAL CONTROL,)	
AND CATAWBA RIVERKEEPER,)	
)	
Respondent.)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of June, 2001, a copy of the **Brief of Respondents State of South Carolina Department of Environmental Control, State of South Carolina Board of Health And Environmental Control, and Catawba Riverkeeper** was served upon all parties to this matter by depositing the same in the United States mail, first class, postage prepaid and addressed to:

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