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June 14, 2001

The Honorable Barbara A. Scott
Clerk of Court for Richland County
RICHLAND COUNTY JUDICIAL CENTER
Post Office Box 192
Columbia, SC 29202

Re: The City of Anderson v. South Carolina Department of Health and Environmental Control, et al.
Civil Action No.: 00-CP-40-1255

Dear Ms. Scott:

Enclosed is the original and two copies of the Reply of City of Anderson to Response Briefs of Respondents DHEC and Catawba Riverkeeper and the Certificate of Service in the above referenced matter. Please file the original and return a date-stamped copy to me in the enclosed self-addressed stamped envelope.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Daniel J. Brown

Daniel J. Brown

DJB/kcs
enclosure:

cc: J. Blanding Holman, III, Esquire
Ben A. Hagood, Jr., Esquire
Robert Guild, Esquire
Samuel L. Finklea, III, Esquire
David W. Burchmore, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	DOCKET NO.: 00-CP-40-1255
	)	
City of Anderson,	)	
	)	
Petitioner,	)	**REPLY OF CITY OF ANDERSON TO RESPONSE BRIEFS OF RESPONDENTS**
	)	
vs.	)	**RESPONDENTS DHEC AND CATAWBA RIVERKEEPER**
	)	
State of South Carolina Department of Health and Environmental Control, State of South Carolina Board of Health and Environmental Control, and Catawba Riverkeeper	)	
	)	
Respondents.	)	
	)	

INTRODUCTION

On April 9, 2001, City of Anderson ("Anderson") filed its Brief (referred to herein as the "Initial Brief") in the above-referenced case pursuant to the Amended Scheduling Order dated December 28, 2000. In the Initial Brief, Anderson argues that DHEC's Trophic State Index ("TSI") threshold of 250 for determining aquatic life use impairment and its phosphorus effluent guideline of 1 mg/L for municipal wastewater treatment plants ("WWTPs") upstream of impaired waterbodies were applied as binding norms and were thus null and void as unpromulgated regulations. Anderson asks this Court to reverse the Order of the Board Regarding Petitioner, City of Anderson ("Anderson") holding that the above-referenced policies were not binding norms, and reinstate the Order on Summary Judgment issued by Judge Marvin F. Kittrell on September 22, 1999 (the "Summary Judgment Order").

The Association of Metropolitan Sewerage Agencies ("AMSA") filed a motion for leave to appear as *amicus curiae* in this action. Although Respondents, South Carolina Department of Health and Environmental Control ("DHEC") and the Catawba Riverkeeper (the "Riverkeeper") did not believe the appearance of an *amicus curiae* party was necessary, they consented to AMSA's motion on the condition that they receive additional time to respond to the Initial Brief and AMSA's *amicus curiae* brief. AMSA filed its Brief of *Amicus Curiae* on April 18, 2001.

Pursuant to the Second Amended Scheduling Order (dated May 4, 2001), the Respondents filed their Brief of Respondents (hereinafter the "Response Brief") on June 4, 2001. The Response Brief contains a number of factual and legal misstatements and mischaracterizations regarding the record before the Board and on judicial review,[1] as well as the relevant case law, statutory law, and regulatory law.

To identify these errors and set the record straight, Anderson hereby files this Reply, as allowed under the original Scheduling Order dated May 5, 2000.

ARGUMENT

I. NEITHER DHEC NOR THE RIVERKEEPER FILED A PROPERLY PERFECTED PETITION FOR BOARD REVIEW

As Anderson noted in its Initial Brief, the Notices of Appeal (the "Notices") filed by DHEC and the Riverkeeper did not contain specific exceptions to each legal proposition complained of, and thus failed to meet the jurisdictional content requirements established by the South Carolina Administrative Procedures Act (the "APA") and DHEC's own Contested Case Regulations, 25 S.C. CODE ANN. REGS. 61-72, § 801. As a result, the DHEC Board did not legally obtain jurisdiction to hear the appeals of DHEC and the Riverkeeper, and the Summary Judgment Order, as a matter of

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[1] The record in front of this Court is referred to herein as simply the "Record."

law, became the Order of the Board after the statutory period for filing properly perfected appeals with the Board lapsed. *See* 25 S.C. CODE ANN. REGS. 61-72, § 801

DHEC and the Riverkeeper try to rebut this argument by repeatedly emphasizing that their Notices are more detailed than the appeals at issue in the cases cited. However, the Respondents neglect to mention that there was yet another, more recent case decided by the Board in which a fairly detailed petition for Board review was dismissed for failure to comply with the jurisdictional content requirements of the Contested Case Regulations. In *Townsend v. DHEC*, Docket No. 00-ALJ-07-0617-CC (DHEC Bd. Apr. 25, 2001), the Petitioner, Virginia Townsend, filed a petition for Board review challenging the Final Order and Decision of the ALJ dismissing her original petition for administrative review.[2] Ms. Townsend's petition for Board review is three pages long (single-spaced) and specifically references various sections of the three-page ALJ order. *See* Exh. 2. Despite this fact, the Board held that

> The Petitioner never submitted any specific exceptions to the final Order and Decision of the ALJ Division. The appeal, therefore, must be dismissed. *See Smith v. South Carolina Department of Social Services*, 284 S.C. 469, 327 S.E.2d 348 (1985)(dismissing petition for judicial review of administrative petition where petition did not specify any grounds and where court was forced to "grope in the dark" in order to identify errors which in actuality may not exist).

See Exh. 1 at p. 1.

If a three-page single-spaced petition from a *pro se* litigant containing complaints of wrongdoing and references to various sections of a three-page ALJ order under appeal fails to meet the requirements of Section 801 of the Contested Case Regulations, it stretches the imagination to suggest that a two-page list of questions filed by experienced counsel but containing no specific

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[2] The Board Order, the petition for Board review filed by Virginia Townsend, and the Final Order and Decision of the ALJ are attached as Exhibits 1, 2, and 3, respectively.

complaint of error or wrongdoing in response to a 58-page order could possibly meet the requirements of Section 801 of the Contested Case Regulations. The requirement established by the APA and the Contested Case Regulations to allege specific exceptions to each legal proposition is jurisdictional. DHEC Staff must be held to the same standard as everyone else. In this instance they failed to meet that standard and therefore, its appeal and the appeal of the Riverkeeper must be dismissed for lack of jurisdiction.

II. THIS COURT HAS *DE NOVO* AUTHORITY TO REVIEW THE DHEC BOARD'S REVERSAL OF THE SUMMARY JUDGMENT ORDER

In their Response Brief, DHEC and the Riverkeeper fail to correctly state the proper standard of review. This Court is not limited to determining whether there is "substantial evidence" to support the Board's factual findings, but rather must review the Board's reversal of the ALJ's grant of summary judgment to Anderson *de novo*. *See De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1233 (4th Cir. 1989). In reviewing the Board's reversal of the ALJ's grant of summary judgment to Anderson, this Court is to apply the same standard that the Board should have applied (but did not) in reviewing the Summary Judgment Order. *See id.* (*citing Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)). Specifically, this Court must determine whether there are any genuine issues of material fact and whether Anderson is entitled to the requested judgment and relief as a matter of law. *See* Initial Brief at p. 13-14.

If the "substantial evidence" standard had applied to this case, it would have applied to the Board's review of the Summary Judgment Order; not this Court's review of the Board Order. As counsel for DHEC Staff has noted in the past, the DHEC Board no longer has the authority to

conduct its own independent review of the record on appeal and make its own findings of fact.[3] Under the 1993 amendments to the South Carolina Administrative Procedures Act (the "APA"), the DHEC Board, as well as other state agency boards and commissions, were assigned the role of conducting "quasi-judicial review" of decisions of the South Carolina Administrative Law Judge Division. *See* S.C. CODE ANN. § 1-23-610. In so doing, the General Assembly assigned to the DHEC Board and other agency boards and commissions, a role equivalent to the circuit court's role in conducting judicial review of contested cases. *TRMC v. DHEC*, at 3. Correspondingly, the General Assembly limited the scope of review of the agency boards and commissions to essentially the same scope of review as a circuit court conducting judicial review. *See TRMC v. DHEC*, at 3; *compare* S.C. CODE ANN. § 1-23-610(D) *with* S.C. CODE ANN. § 1-23-380(A)(6)(grounds for reversal or modification of decision on judicial review).

The sources of authority cited by DHEC and the Riverkeeper to support their argument that this Court is limited to the substantial evidence standard in reviewing the Board's findings of fact are inapposite for two reasons. First, neither case cited by the Respondents addresses the issue of the appropriate standard of quasi-appellate review on summary judgment. *See Leventis v. DHEC*, 340 S.C. 118, 530 S.E.2d 643 (App. 2000); *Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 125, 456 S.E.2d 397, 400 (1995). Second, both the cases and the regulatory provision cited by the Respondents address the now defunct "hearing officer system" and thus bear no relevance to the appropriate standard of review in this matter. *See id.*; 25 S.C. CODE ANN. REGS. 61-72, § 805 ("The

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[3] *See INS v. DHEC*, Docket No. 96-ALJ-07-0558-CC (DHEC Bd. Oct. 14, 1999) Tr. at 27 (According to Samuel L. Finklea, III, counsel for DHEC: "The question you [the Board] then have to face is, is there evidence in the record from which a reasonable person could have reached the same conclusion that the ALJ did."); *accord The Regional Medical Center of Orangeburg & Calhoun Counties v. DHEC*, Civil Action NO. 99-CP-40-0664 (Columbia, S.C., Ct. Common Pleas Nov. 4, 1999)(hereinafter *TRMC v. DHEC*)("The Board may not substitute its judgment for the ALJ as to questions of fact...."). The relevant portion of the transcript of the Board hearing is attached as Exhibit 4. The *TRMC v. DHEC* case is attached to Anderson's Initial Brief as Exhibit 2.

Board may make its own findings of fact ... upon review of the record and the *Hearing Officer's report.*")(emphasis added)

III. THE TSI THRESHOLD OF 250 AND THE PHOSPHORUS EFFLUENT GUIDELINE WERE APPLIED BY DHEC AS BINDING NORMS

Contrary to the Respondents arguments, the TSI threshold and phosphorus effluent guidelines were applied by DHEC as uniform binding norms. In the Response Brief, the Respondents appear to suggest that the Record so clearly demonstrates that the TSI and phosphorus guidelines were not applied as uniform binding norms, no reasonable person could possibly have found otherwise. However, nothing could be further from the truth.[4]

Judge Kittrell found that there was no genuine issues regarding these facts because the testimony relating to the uniform implementation of the TSI threshold of 250 and the phosphorus effluent guidelines were given in the course of a Rule 30(b)(6) deposition testimony by DHEC management personnel designated to testify by DHEC in their respective areas of expertise. Rule 30(b)(6) creates testimony that binds organizational entities. *See Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991). The testimony of a person designated by an organization to testify on certain matters pursuant to Rule 30(b)(6) *is the testimony of the organization. GTE Prod. Corp. v. Gee*, 115 F.R.D. 68, 69 (D. Mass. 1987)(emphasis added). This extends to subjective beliefs and opinions, as well as facts. *See Lepenna v. Upjohn Co.*, 110 F.R.D. 15 (E.D. Pa. 1986). On the basis

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[4] Respondents' suggestion begs an important question: If the Record so clearly demonstrates that DHEC Staff never applied the TSI or the phosphorus effluent guidelines as binding norms, why did DHEC Staff find it necessary to "clarify its ongoing practices" by proposing the Staff Agreement? *See* Rec. at 3228. The answer is simple. DHEC Staff fully recognized that the uniform and binding nature in which the TSI threshold and the phosphorus effluent guidelines were implemented was established *by its own witnesses. See* infra at pp. 6-9; Initial Brief at 21-22 & n.10; Rec. at 2154-2162. The Staff Agreement was nothing more than a desperate attempt to persuade a lay Board that DHEC Staff had a "solution" that would "fix the problem." Of course in submitting this supposed "solution" to the Board, DHEC Staff completely undermined Anderson's right of record review under the APA and Contested Case Regulations. *See* infra at 15-20; Initial Brief at 29-36.

of the binding testimony of DHEC as an organization, through its Rule 30(b)(6) designees, Judge Kittrell correctly determined that there was no genuine dispute that DHEC was in fact applying the TSI threshold of 250 and the phosphorus effluent guideline of 1 mg/L as uniformly-applied binding norms. *See* Rec. at 2787-2790 (findings of fact regarding TSI threshold of 250 and phosphorus effluent guidelines); Rec. at 2796 (conclusion of law regarding the effect of Rule 30(b)(6) testimony).

In arguing that Judge Kittrell erred in making these findings, Respondents mischaracterize the Record in a number of respects. First, the Respondents suggest that Judge Kittrell found that DHEC Staff only relied on the TSI "in part ... or indirectly." This is not the case. Judge Kittrell found that the TSI threshold of 250 was used as the *sole* criterion for listing a lake as aquatic life use impaired due to nutrients on the Section 303(d) List. *See* Rec. at 2787. It is this finding and the finding that the TSI threshold of 250 was not promulgated as a regulation, *see* Rec. at 2788, that formed the basis for Judge Kittrell's conclusion that DHEC Staff violated the APA by applying the TSI threshold as a binding norm. *See* Rec. at 2802-2807.

As a remedy for DHEC's violations, the Summary Judgment Order does void any current regulatory action and does prohibit any future regulatory action that is based "indirectly or in part." on the TSI threshold of 250. *See* Rec. at 2807, 2814, 2515. However, even partial or indirect reliance on this threshold would curtail the Department's practical application of the TSI to the point where it would have to be considered as a binding norm. *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) ("If a disposition turns on affirmative answers to two questions, and an agency adopts a rule giving conclusive answers to the first question once certain data are supplied, the rule is a rule even though it does not purport to answer the second question.")

Nonetheless, even if this Court were to conclude that such prospective relief is too broad, the appropriate remedy is to modify the prospective relief; not to strike the entire Order.

Second, contrary to the Respondents' argument, the fact that several lakes with a TSI threshold of less than 250 were not listed on previous lists as aquatic life use impaired due to nutrients does not change the character of the TSI threshold of 250 for the purposes of the 1998 Section 303(d) List. Only the 1998 Section 303(d) List was challenged in this action. As far as the Section 303(d) lists for prior years are concerned, Respondents read entirely too much into the Record when suggesting that such omissions were the result of the Department's carefully exercised discretion following the consideration of a wide array of information. When asked why Lake Oliphant was left off the Section 303(d) lists for prior years despite having a TSI of less than 250, the only explanation Ms. Stecker, DHEC's TSI expert, could offer was that the South Carolina Department of Natural Resources ("DNR") was fertilizing the lake for fisheries purposes. *See* Rec. at 840a. Ms. Stecker did not offer any other explanation for why Lake Oliphant, or any other lake with a TSI less than 250 was left off Section 303(d) lists for prior years. *See id.*

Whatever DHEC may have done in the past, the Record clearly demonstrates that the TSI threshold of 250 was implemented as a binding norm by the time DHEC Staff began preparing the 1998 Section 303(d) List. *Every* lake with a TSI of less than 250 was placed on the 1998 Section 303(d) List. In fact, Ms. Stecker testified that the Department's insistence in putting all lakes below the TSI threshold of 250 on the Section 303(d) List reflected a substantial change in practice from prior years:

> Q: So there was a policy in place at that point, in 1994 and '96, not to list fertilized water bodies?
>
> A: I don't know if it was a policy. It was a decision that was made, not a policy.

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Q: Now, why was that policy, or that decision, reversed for the 1998 list?

A: [I] believe it was because of the new emphasis on TMDLs and the fact that a TMDL would be developed for such lakes.

Rec. at 840a. At most, the past exceptions made by DHEC for fertilized lakes demonstrate only that the TSI threshold of 250 began to be applied as a binding norm after the 1996 Section 303(d) List and prior to the 1998 Section 303(d) List.

The Respondents also continue to mischaracterize the case law addressing the binding norm test. The Respondents incorrectly suggest that the agency's own self-serving declarations regarding the intent and purpose of a policy are paramount. None of the cases cited by Respondents stand for the principle that an agency's own self-serving statements following the initiation of litigation are the most important consideration. Courts are unwilling to place any significant weight on statements regarding a particular policy after it has been challenged as an unpromulgated rule.[5] As the D.C. Circuit noted in *McLouth*

> EPA's current claim that "it does not consider itself ... bound by [the VHS] model ... is obviously of little weight. The agency's past characterizations, and more important, the nature of its past applications of the model, are what count.

McLouth, 838 F.2d at 1320.

DHEC's action in compiling the 1998 Section 303(d) List speak louder than its own self-serving declarations. *Every single* lake with a TSI of less than 250 was listed as aquatic life use impaired due to nutrients. Rec. at 827a-828. Moreover, DHEC's statements regarding the practical application of the TSI, when made under oath and subject to the cross-examination, clearly

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[5] The case cited by *Town of Silverstreet* for the proposition that expression of agency intent is a relevant factor refused to give any deference to such an expression of intent where it was merely advancing a litigation position. *See Hines v. United States*, 60 F.3d 142, 1449 (9th Cir. 1995)(*citing United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995).

demonstrate an intent to apply the TSI threshold of 250 as a binding norm. Rec. at 827a-828, 830, 832a. (only TSI used in gaging aquatic life use impairment).

Respondents were also incorrect to suggest that federal and State law do not require the numeric translation of narrative standards before they can be applied. The requirement to develop translators for narrative criteria was established as one of the remedies in the Summary Judgment Order. The basis for this requirement was established by EPA in the preamble to the Federal Register notice adopting the federal Total Maximum Daily Load ("TMDL") regulations:

> In the case of a pollutant for which a numeric criterion has not been developed, a State should interpret its narrative criteria by applying a proposed state numeric criterion, an explicit State policy or regulation (such as applying a translator procedure developed pursuant to section 303(c)(2)(B) to derive numeric criteria for priority toxic pollutants), EPA national water criteria guidance developed under section 304(a) of the Act and supplemented with other relevant information, or by otherwise calculating on a case-by-case basis the ambient concentration of the pollutant that corresponds to attainment of the narrative criterion.

57 Fed. Reg. 33,040, 33,045 (July 24, 1992)(Exhibit 5, to be provided as a supplement to this Reply shortly). EPA reconfirmed this principle as recently as last year, when it adopted new amendments to the TMDL regulations. In responding to comments suggesting that TMDLs should only address numeric, and not narrative, criteria, EPA explained that:

> States ... adopt translator procedures by which to derive a quantified numeric interpretation of the narrative criterion. Such procedures must be scientifically defensible, and are also subject to EPA review and approval. EPA recognizes that narrative water quality criteria are not expressed as numbers and thus are not directly amenable to TMDL calculations. However, as expressed in EPA guidance, a State ... can quantify narrative criteria for use on regulatory actions.

65 Fed. Reg. 43, 586, 43, 642 (July 13, 2000)(attached as Exhibit 6).

Thus, as argued byAMSA, federal law requires the State to adopt some mechanism to "translate" or "interpret" narrative standards for nutrients before they can be used for the purpose of developing TMDLs. The Summary Judgment Order's provisions requiring the development of

such translators do nothing more than mandate what is already required by EPA. And, as discussed earlier, even if this Court believes that this remedy is improper or overly broad, the appropriate cure is to strike or modify this remedy; not strike the entire Order.

IV. THIS CASE HAS NOT BEEN MOOTED AS A RESULT OF EITHER EPA'S APPROVAL OF ANY SECTION 303(d) LIST OR AS A RESULT OF THE SETTLEMENT AGREEMENT OR STAFF AGREEMENT

This case has not been mooted as a result of either EPA's approval of any Section 303(d) List or as a result of the Settlement Agreement or Staff Agreement.[6] A case is not moot until a court concludes that: (1) there is no reasonable expectation that the alleged violations will occur, and (2) the interim relief or events which purport to moot the action have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 99 S.Ct. 1379, 1383 (1979). The burden of proving that a case has become moot is on the party moving to dismiss on mootness grounds. *Davis*, 99 S.Ct. at 2484. This burden is a heavy one. *See Davis*, 99 S.Ct. at 1383.

In arguing that EPA's approval of the 1998 Section 303(d) List moots this action, Respondents seem to suggest that in delegating power to DHEC over the development and implementation of water quality standards in this State, EPA has delegated to DHEC the authority to go beyond the powers granted to it by the General Assembly by implementing unpromulgated regulations and by circumventing State law establishing procedures for review of contested cases whenever it is deemed appropriate. Such a suggestion is absurd on its face. DHEC is an

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[6] Respondents cite a number of cases that purport to establish that federal courts have sole and exclusive jurisdiction over challenges to Section 303(d) lists. *See* Joint Brief at 38-39. The two reported cases cited by Respondents say nothing of the kind. *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996). With the information provided by Respondents, the remaining opinions could not be found by counsel for Anderson through means of a reasonably available database search.

administrative agency which has been created under the laws of *South Carolina*; not the federal Government. DHEC only possesses as much authority as has been granted to it by the General Assembly.

As a creature of State law, DHEC is *required* to promulgate *all* regulations pursuant to procedures established by the South Carolina Administrative Procedures Act, *see* S.C. CODE ANN. §§ 1-23-110, *et seq.* (APA procedures for promulgation of regulations applies to all "agencies.") EPA cannot delegate to DHEC the authority to implement unpromulgated regulations whenever deemed appropriate. Such delegation of authority would be a blatant affront to the principles of federalism upon which our National and State governments are based. *See Printz v. United States*, 117 S.Ct. 2365, 2376-2378(1997)(State governments are separate sovereign entities.) Similarly, EPA *cannot* delegate to DHEC the authority to bypass the administrative court established by the General Assembly for the purpose of reviewing State agency action.

Even EPA disagrees with DHEC's view of the effect of federal approval of DHEC's 1998 Section 303(d) List. As the Respondents note in the Response Brief, any Section 303(d) List can be amended if "[u]pon re-examination, the original basis for listing is determined to be inaccurate." Response Brief at 37. In response to questions about the status of EPA approval of the 1998 Section 303(d) List, EPA noted that

> Should [the contested case] result in changes to South Carolina's Section 303(d) list, the State may send EPA an amended list for approval or disapproval at that time.[7]

[7] EPA has known about this litigation since its beginning and could have intervened if it believed there was an important federal interest it needed to protect.

Rec. at 2051. It is difficult, if not impossible, to see how EPA's approval of the 1998 Section 303(d) List could possibly eradicate the effects of DHEC's violations of the APA when EPA itself has indicated that the Section 303(d) List can be amended on the basis of the outcome of this litigation.

Respondents cite an unreported case from a trial court in California to support its argument that Anderson's challenge of the 1998 Section 303(d) List has been mooted by EPA's approval of the List.[8] However, this case is completely unpersuasive for two reasons. First, the opinion contains absolutely no discussion of the mootness issue. *See* Response Brief, Attachment 3, p.2. Second, while there is absolutely no indication as to the evidence in the record before the trial court in California, the Record in this case clearly establishes EPA's own belief that the 1998 Section 303(d) List can be changed on the basis of the outcome of this litigation. *See* infra at p. 12-13. If EPA believes the List can be amended on the basis of the outcome of this litigation, this case cannot possibly be moot.

The Respondents also incorrectly suggest that EPA approval of the 2000 Section 303(d) List somehow moots this action. For the same reason discussed above, this is not the case. In addition, in anticipation of possible regulatory changes, EPA did not require States to submit Section 303(d) Lists for the Year 2000. *See* 65 Fed. Reg. 17,166 (Mar. 31, 2000) (attached as Exhibit 7). Certainly, voluntary action that is not even required by EPA cannot be held to moot Anderson's challenge to

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[8] DHEC's reliance on an unreported case from a state trial court in California to support a legal argument is particularly surprising given the following statement made in its initial Brief to the Board:

> In support of their motion [to dismiss for lack of jurisdiction], Petitioners cite two South Carolina cases and one Indiana case. The latter can be discounted readily: whatever an Indiana court thinks about an Indiana agency's compliance with Indiana state law has no relevance to this proceeding.

Rec. at 25. Apparently DHEC seems to believe that case law from other state jurisdictions should not have any persuasive effect unless DHEC is the one relying on it.

the 1998 Section 303(d) List. Finally, the Respondents neglect to tell this Court is that as a result of Anderson's challenge to the Year 2000 Section 303(d) List, DHEC itself agreed that

> [T]he listing of Lake Secession on the Year 2000 Section 303(d) List is stayed until the pending action is finally resolved.

See Order Staying Proceedings (ALJ Div. filed Jul. 12, 2000)(attached herein as Exhibit 8). To agree to such a stay in front of the ALJ Division in order to avoid duplicative litigation, and then come into this Court arguing that EPA's approval of the 2000 Section 303(d) List moots the challenge of Anderson is at best neglectful, and at worst deliberately misleading. In any event, since DHEC itself has agreed to stay the listing of Lake Secession on the 2000 Section 303(d) List, DHEC is estopped from arguing that the submittal to, or approval by, EPA of this List moots this action.[9]

DHEC's suggestion that the appeal is mooted by the Staff Agreement is just as absurd, and not supported by case law. Voluntary cessation of misconduct does not moot an action where the misconduct is capable of recurring. *See South Carolina Dept. of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185 (1990); *Steinle v. Lollis*, 279 S.C. 376, 377, 307 S.E.2d 230, 231-232 (1983). In this case, there has not even been a complete voluntary cessation of misconduct. Despite all of its statements about its intended future actions, DHEC neither removed Lake Secession from the 1998 Section 303(d) List, nor attempted to modify the rationale for its listing determination in any way. Moreover, neither DHEC Staff nor the DHEC Board have ever conceded that DHEC Staff's actions prior to the institution of the Staff Agreement were wrongful in anyway. The Staff

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[9] DHEC's consent to a stay of the listing of Lake Secession on the 2000 Section 303(d) List raises another interesting point. Throughout their Brief, the Respondents suggest that once EPA approves a Section 303(d) List, that is that. At that point, according to the Respondents, DHEC, the Administrative Law Judge Division, and everyone else is bound by the list. Given the fact that DHEC sought and received approval for the 2000 Section 303(d) List, such an argument is inconsistent with DHEC's consent to a stay of the listing as it applies to Lake Secession until this litigation is resolved. On the contrary, DHEC's consent to a stay, while at the same time seeking and receiving approval of the 2000 Section 303(d) list is entirely consistent with the notion that DHEC, and not EPA, is the agency primarily responsible for State implementation of South Carolina's Section 303(d) List.

Agreement does not represent any substantive change in position, but rather is nothing more than a reflection of what DHEC Staff believes it had been doing all along. A case cannot become moot by a State agency declaring that it will no longer do what it continues to deny it ever did in the first place. To allow actions to be mooted on this basis would turn the whole principle of administrative and judicial review of agency action completely on its head.

Finally, the Respondents' argument that this action is mooted by recent amendments to DHEC's Water Quality Standards is wrong for the simple reason that these changes have not resulted in the discontinuance of the challenged practice. Lake Secession is still listed as an impaired waterbody on the basis of its TSI being below 250. DHEC has made no determination of impairment yet on the basis of its recently-amended regulations. Moreover, these regulations have no effect on DHEC's phosphorus effluent guidelines. As long as Lake Secession remains on the Section 303(d) List, Anderson remains at risk of being subject to permit limitations based on actions taken in violation of the APA. As such, the new numeric standards for nutrient parameters have not completely and irrevocably eradicated the effects of DHEC's alleged violations of the APA.

V. THE DHEC BOARD IMPROPERLY CONSIDERED MATERIALS OUTSIDE THE RECORD

As Anderson noted in its Initial Brief, DHEC Staff and the DHEC Board acted improperly, and materially prejudiced Anderson's right to meaningful contested case review by submitting and considering the Settlement Agreement and the Staff Agreement, neither of which were part of the record on appeal. Again, as it has in other parts of its Brief, the Respondents make a number of factual and legal misstatements to support their argument that it was appropriate for these extra record materials to be considered and received, and for the Board to conduct an additional extrajudicial procedure for the purpose of considering the Settlement Agreement

First, the Respondents incorrectly suggest that the DHEC Board only considered the Staff Agreement for the purpose of determining whether this action was moot. There is no support for this proposition either in the Anderson Order or anywhere else in the Record. In adopting the Staff Agreement, the Board states in the Anderson Order only that:

> 20. [T]he Proposed Agreement of Staff is reasonable and consistent with the Department's duties and discretion and hereby adopts the Proposed Agreement of Staff as the order of this Board.

Rec. at 3229. Nowhere in the Anderson Order does the Board state that the Staff Agreement "moots" Anderson's challenge. In fact, what the Anderson Order actually states is that the Staff Agreement was considered

> [a]s relevant only to the *remedies* that should be considered in deciding this contested case involving Anderson.

Rec. at 3221 n.2. (emphasis added) This statement itself is directly contradicted in other parts of the Anderson Order. *See* Rec. at 3229 (as discussed above, finding that Staff Agreement is "reasonable and consistent with the Department's duties and discretion...") However, even if this statement was accurate, it would still demonstrate that the Staff Agreement was considered in passing on the merits of the Anderson challenge, rather than being used solely for the purpose of determining mootness. The appropriateness of certain remedies as opposed to others goes to the heart of the merits of this case, or any other case. To suggest that this supposed limited consideration of the Staff Agreement had nothing to do with the merits of the case is simply ludicrous.

Recognizing the weakness of its arguments, the Respondents argue, for the first time, that two provisions establishing limited exceptions to the principle of record review apply here. The Respondents argue that the Staff Agreement and Settlement Agreement were appropriately allowed into the record before the Board: (1) as "officially noticed" documents under S.C. CODE ANN. § 1-

23-320, and (2) as supplements to the record allowed for good cause pursuant to Section 804 of the Contested Case Regulations. At the outset, both arguments suffer from one glaring defect. Nowhere in the Record is there any indication of a Board ruling allowing either document in under either provision.

The Respondents' argument that the Staff Agreement and Settlement Agreement were properly considered as "officially noticed" documents is particularly odd. The Respondents state that

> 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. Thus they constitute matters noticed by the Board through official briefing procedures.

Response Brief at 46. This appears to suggest that it is proper for the Board to receive and consider whatever materials it chooses for whatever purpose it designates so long as the materials constitute "official briefing papers." This assertion is absurd on its face, as it would essentially eliminate the concept of record review.

This statement also reflects a clear misunderstanding of the concept of "official notice." "Official notice" is the administrative review analog of judicial notice. *See* BONFIELD, ARTHUR & ASIMOW, MICHAEL, STATE AND FEDERAL ADMINISTRATIVE LAW (1989) 212-213. "Judicial notice" is

> The act by which a court, in conducting a trial, or framing its decision, will, of its own motion or on request of a party, and without the production of evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety.

BLACK'S LAW DICTIONARY (6th ed. 1990) 849; *see also* SCRE 201(a)("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial

jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.") The principle of "judicial notice" allows courts to take notice of facts such as the laws of the state in which the court is located, international law, historical events, and main geographical features. *See* BLACK'S LAW DICTIONARY (6th ed. 1990) 849. The analogous principle of "official notice" allows a reviewing tribunal to take notice of similar facts without the need for evidence plus certain other facts within the agency's special technical expertise. *See* S.C. CODE ANN. § 1-23-330(4).

It is absurd to suggest that both the contents of the Staff Agreement and its effect on Anderson's challenge can be officially noticed.[10] The content of the Staff Agreement goes to the heart of the dispute in this case. This action arose as a result of the belief of Anderson and other parties that DHEC Staff were implementing the TSI threshold of 250 and the phosphorus effluent guideline of 1 mg/L as uniformly-applied binding norms. An ALJ agreed in spite of DHEC Staff's consistent denials of these assertions throughout this entire litigation. Given DHEC's repeated denials, it is quite likely that DHEC believes it can comply with the requirements of the Staff Agreement without modifying its behavior in any way, shape or form.

For similar reasons, it is equally absurd to suggest that the Staff Agreement and Settlement Agreement could have been allowed in under a provision in the Contested Case Regulations allowing the supplementation of the record before the Board with additional evidence where there is good cause for doing so. Even if the DHEC Board had allowed the Staff Agreement and the Settlement Agreement under this provision (and there is absolutely nothing in the record to suggest

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[10] In the *INS v. DHEC* case, cited earlier in this Reply, the Board would not even take official notice of prior permits issued by DHEC Staff. *See* Initial Brief, Exh. 10.

that it did), then it violated its own regulations in doing so. Under Section 804 of the Contested Case Regulations

> The Board shall not consider new or additional evidence during its review except upon good cause shown *and provided that there is an opportunity for cross-examination and rebuttal by all parties.*

24A S.C. CODE ANN. REGS. 61-72, § 804 (emphasis added); *see* Initial Brief, Exh. 10. At no time did the Board ever provide an opportunity for Anderson an opportunity to cross-examine either the authors of the Staff Agreement, or the personnel that would be responsible for implementing it. The DHEC Board is bound by its own regulations in conducting administrative appellate review. *See Triska v. DHEC*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). The lack of any opportunity for cross-examination of DHEC personnel regarding either the Staff Agreement or the Settlement Agreement demonstrates either that these documents were not in fact allowed in under this provision, or were admitted in direct contravention of this provision.

Finally, the Respondents' suggestion that Anderson was not entitled to the due process protections and evidentiary requirements of the APA because this proceeding did not actually meet the definition of "contested case" is absolutely incorrect. In support of this argument, the Respondents cite case law standing for the proposition that not every not every agency decision entitles an aggrieved party to a contested case hearing under the APA. *See* Response Brief at 47-49. This is a correct statement of the law in South Carolina. However, the Respondents neglect to mention that in response to the very cases they cite, DHEC amended its Contested Case Regulations to eliminate any distinction between contested cases and any other adversarial proceeding involving DHEC. *See* 17 S.C. STATE REG. 14 (Jan. 24, 1992)("Significant changes [to the Contested Case Regulations] include ... eliminating the distinction between 'contested cases' as a proceeding 'for which the legal rights, duties or privileges of a party are required by law to be determined by an

agency after an opportunity for hearing' and other decisions.") (attached as Exhibit 9). As DHEC itself noted in the preamble, the Contested Case Regulations were amended to

> [r]eflect... the fact that, following the cases of *Triska v. DHEC* and *Stono River EPA v. DHEC*, many agency decisions affect substantial rights although there may not be any explicit statutory or regulatory grant of a right to a hearing.

Id. This fact was reflected by the following change to the Contested Case Regulations:

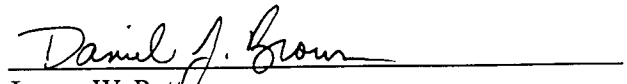
> The provisions of this regulation shall apply to all proceedings, except as modified by agreement of the parties or as otherwise provided by law or regulation, in which the right to a hearing ... *is required by due process under the South Carolina or United States Constitutions*.

Id. at 16 (*codified* at 25 S.C. CODE ANN. REGS. 61-72, § 102)(emphasis added).

In very plain and unmistakable terms, DHEC expanded the scope of the Contested Case Regulations over nine years ago to include every possible type of proceeding that would require notice and an opportunity to be heard under the South Carolina or United States Constitutions. DHEC is now estopped from trying to suggest that some of the proceedings do not meet the definition of contested case under the Contested Case Regulations or the APA.

CONCLUSION

The main purpose of this Reply is to point out the factual and legal errors and inconsistencies in the Response Brief filed jointly by DHEC Staff and the Riverkeeper. As Anderson has argued in its Initial Brief, Judge Kittrell was correc in concluding that the TSI threshold of 250 and the phosphorus effluent guideline of 1 mg/L are binding norms and thus void and without legal effect as unpromulgated regulations. Moreover, the remedies ordered by the ALJ are reasonable and in accordance with the law. Therefore, Anderson respectfully requests that this Court reverse the Anderson Order in its entirety, reinstate the Summary Judgment Order and grant such other and further relief as is just and appropriate.



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