

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Blue Ridge Environmental Defense League,)
)
)
) Petitioner,
)
) v.
)
South Carolina Department of Health and)
Environmental Control and Dominion)
Energy,)
)
) Respondents.
_____)

Docket No. 22-ALJ-07-0131-CC

FINAL ORDER

RECEIVED
Aug 23 2023
SC Court of Appeals

Appearances:

For Petitioner: Lauren Megill Milton, Esq., and Benjamin D. Cunningham, Esq.

For Respondent Dominion: Elizabeth B. Partlow, Esq., and Brooks M. Smith, Esq.

For Respondent DHEC: Bennett W. Smith, Esq., and Christopher P. Whitehead, Esq.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a request for contested case hearing filed by the Blue Ridge Environmental Defense League (BREDL or Petitioner) pursuant to section 44-1-60 of the South Carolina Code (2018) and section 1-23-600 of the South Carolina Code (Supp. 2022). Petitioner challenges the decision of the South Carolina Department of Health and Environmental Control (Department) to issue Dominion Energy South Carolina, Inc. (Dominion)¹ a Section 401 Water Quality Certification (Certification) pursuant to regulation 61-101 of the South Carolina Code of Regulations (2012). As part of its Certification review, the Department considered the provisions of regulation 19-450 of the South Carolina Code of Regulations (2012), which regulates construction in navigable waters. The Certification, which the Department issued on February 4, 2022, allows Dominion to install a natural gas main under Jefferies Creek and in

¹ Dominion Energy South Carolina, Inc., is a wholly owned subsidiary of Dominion Energy, Inc.



Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, and other wetlands and unnamed tributaries to the Great Pee Dee River in Florence County, South Carolina. Petitioner requested a final review conference with the Department’s Board, which the Board denied, rendering the staff decision the final agency decision. S.C. Code Ann. § 44-1-60(F) (2018). On April 13, 2022, Petitioner then filed a Request for Contested Case Hearing with this Court. The Court conducted a hearing in this matter from February 27 through March 1, 2023.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

The Certification

On February 4, 2022, the Department issued the Certification to Dominion in connection with Dominion’s application for coverage under Nationwide Permit 12, Oil or Natural Gas Pipeline Activities (NWP 12).^{2,3} The Certification provides state-level authorization for Dominion’s proposed River Neck to Kingsburg 16-inch Gas Main (Project), and it includes sixteen enforceable conditions intended to minimize any potential environmental impacts from the Project. As proposed, the Project will be constructed along an existing natural gas pipeline corridor in Florence County that is approximately 14.5 miles long. Dominion intends to expand its existing 40-foot-wide right-of-way, which contains an existing eight-inch natural gas pipeline, by approximately 10 feet to the west, forming an approximately 50-foot-wide right-of-way. The Project would parallel the existing eight-inch pipeline owned and operated by Dominion.

² NWP 12, issued by the United States Army Corps of Engineers (Corps) pursuant to 33 U.S.C. § 1344, authorizes (1) discharges of dredged or fill material into waters of the United States and (2) structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines.

³ The permit application was submitted on behalf of “Dominion Energy” by one of its consultants. Technically, “Dominion Energy” is not a legal entity; rather Dominion Energy of South Carolina, Inc., is the legal entity applying for the permit and it is a wholly owned subsidiary of Dominion Energy, Inc.

BREDL

BREDL is a 501(c)(3) environmental education organization. It is made up of chapters, including the Pamplico Defense League chapter, which has approximately twenty-three members and is located in Florence County. BREDL's members include citizens and residents of South Carolina who own property and/or use natural resources in Florence County and, in some cases, in the vicinity of the proposed Project.

BREDL presented testimony from Reverend Calvin Ernest Robinson, Jr., the Pastor of Trinity Baptist Church in Florence, South Carolina. Rev. Robinson is a member of BREDL and owns approximately thirty acres of land in Mill Branch. His mother lives on his land and he uses the land for walking, bird watching, target practice, and for pumping water. He is concerned about the potential impacts of the Project, including digging and possible damage to wetlands and water quality. He is also concerned about what would happen if the 16-inch pipe ruptured. He does not see how the Project will benefit the local areas of Pamplico and Mill Branch.

Mr. Louis Zeller also testified on behalf of BREDL. Mr. Zeller, likewise, a member of BREDL, has worked in various positions for BREDL over the last thirty-five years, including as a science director and former Executive Director. After receiving public notice of the Project, Mr. Zeller submitted a FOIA request and submitted two comment letters to the Department during the permitting process. According to Mr. Zeller, the Department's responses to his request "left much to be desired" and the contours of the Project were "a moving target." He does not believe the Department provided complete information about the use of horizontal directional drilling (HDD) or threatened and endangered species located within the vicinity of the Project. Mr. Zeller is particularly concerned about the Project's impact on global warming and heirs' property.

Ms. Gail Kathy Andrews, the current Executive Director of BREDL, testified that she owns property that borders Jeffries Creek and is subject to an easement. She and her family have a long history in the area and have used the neighboring waters to boat and fish. She is concerned the Project will cause water contamination in a community where many people rely on wells. She is also concerned the Project will result in a loss of history and habitat loss for wildlife and endangered species. Additionally, she is concerned that Dominion has been vague about the details of the Project, the heavy machinery that will be used, and how the affected

water bodies will be crossed or disturbed. In Ms. Andrews' opinion, Dominion's proposed Project raises an environmental justice issue.

Project Purpose and Need

The Project is needed to serve the increasing demand for natural gas in eastern South Carolina due to projected residential and commercial growth and current seasonal demand issues. Mr. Robert Priester, a Project Manager for Dominion and licensed Professional Engineer in South Carolina, explained that Dominion projected anticipated natural gas demand for the area served by the Project through 2050 using information derived from its Planning Group and population growth estimates from Horry County. Dominion used its Synergi Gas software to model six different scenarios of pipe size, including scenarios without the existing eight-inch pipeline in service, to determine what was most appropriate for the projected need. Typical inputs to the model include the existing pipeline system, the proposed scenarios, and the anticipated demand growth within the pipeline system. Based on that analysis, Dominion determined it would need to construct the Project. In fact, during cold weather events, Dominion must supplement its current system with compressed natural gas and/or liquefied natural gas to maintain reliable service for customers that are served from the existing eight-inch main.⁴

The Project begins at River Neck Road because that is where Dominion receives natural gas from third-party upstream suppliers. Dominion then must transmit that natural gas to its Kingsburg Station, where it splits into multiple smaller pipelines, heading south to Johnsonville (and beyond) and east to Conway (and beyond). Along the way, there are multiple smaller lines that tap off the existing eight-inch main, including one that serves a residential community near Mill Branch Road, one that serves the Town of Pamplico, and another that serves the Lake City area. There are also a few smaller tap lines that serve individual customers or smaller groups of houses. Some of the existing stations will be expanded or replaced to accommodate the addition of the 16-inch pipe, but no new stations will be added. The Project will also cross a 146-acre tract protected by a conservation easement (Front Swamp LLC) and the Pee Dee Station Wildlife Management Area managed by the South Carolina Department of Natural Resources (DNR).

⁴ Supplemental liquefied natural gas or compressed natural gas, when needed, is typically transported by truck to a storage location and injected into the existing eight-inch main.

Although Rev. Robinson stated he did not understand how the Project would help Pamplico and Mill Branch, as explained by Mr. Priester, the Project will help ensure reliable natural gas service to several customers that are currently served by the existing eight-inch tap. Indeed, the Mill Branch AME Church, which Ms. Andrews previously attended, is served from the existing eight-inch main. Consistent with Mr. Priester's testimony, in its Notice of Department Decision (NODD), the Department identified the purpose of the Project as "support[ing] growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas." The Department did not conduct its own evaluation of the need for natural gas in the area but rather relied on Dominion's assertions and analysis.

Project Alternatives

Siting Alternatives

Using a team of in-house representatives and external consultants with expertise in several disciplines, including planning, engineering, environmental, permitting, and mitigation, Dominion evaluated three off-site alternatives and one "No Action" alternative. The team considered the following factors, in order of priority, to guide the alternatives analysis: (1) location within an existing easement; (2) ability to acquire agreements for easements; (3) ability to avoid permanent clearing impacts; (4) distance from River Neck Road Regulating Station to the Kingsburg Valve Station; and (5) accessibility.

Dominion submitted a "No Action" alternative, meaning the Project would not be constructed. However, Dominion contends this alternative should be rejected because it would not address the project need. As described above, the Project is necessary to alleviate actual and expected increases in natural gas demand in the Pamplico area and points east. Even without the anticipated growth, Dominion is currently having to supplement its existing natural gas service using liquified and compressed natural gas during cold weather to ensure reliable service.

The first off-site alternative Dominion submitted is widening the existing 40-foot right-of-way, currently occupied by Dominion's existing eight-inch natural gas main, by approximately 10 feet to the west to accommodate the Project. This is Dominion's proposed alternative and is the alternative that was ultimately approved by the Department. Using the existing, cleared, and actively maintained right-of-way reduces the need for additional tree and

brush clearing and associated impacts. Under this alternative, the permanent tree and brush clearing impacts required by the Project are expected to be approximately 19.2 acres, with approximately 3.0 acres of permanent tree and brush clearing impacts to jurisdictional⁵ wetlands and waters. Dominion can also rely on its existing easements, minimizing the amount of new property rights that would need to be secured. Due to the presence of the existing eight-inch natural gas main and its proximity to multiple paved roads, the site would be readily accessible with minimal need for temporary access roads.

The second off-site alternative submitted by Dominion was routing the Project primarily via a new easement along existing transportation rights-of-ways. While this alternative would provide ready accessibility to the Project, it would require Dominion to obtain an additional 30-foot-wide easement for most of the Project's length, creating approximately 30 acres of permanent clearing impacts, and approximately 3.5 acres of permanent clearing impacts to jurisdictional wetlands and waters. It would also lengthen the Project route from approximately 14.5 miles to 14.85 miles.

A third off-site alternative Dominion proposed for consideration was establishing a brand new 50-foot easement adjacent to the existing eight-inch natural gas main. Dominion would need to permanently clear the land within the new easement, resulting in total permanent clearing impacts of approximately 70 acres, including approximately 14.6 acres of permanent clearing impacts to jurisdictional wetlands and waters. Because of the significantly increased impacts associated with the new 50-foot easements for the entire length of the Project, Dominion rejected this alternative.

The results of Dominion's alternatives analysis were presented to the Department and were addressed in detail in the Department's written Staff Assessment of the project. Mr. William Russell Wenerick, a Project Manager in the Department's Water Quality Certification and Wetlands Program, testified that Dominion's preferred site for the Project would require the least clearing impacts of any of the alternatives identified by Dominion. Further, Mr. Wenerick testified that resource agencies generally recommend to the Department that new utility projects be located in an existing right-of-way, in order to avoid new areas of disturbance and impacts. I find Respondents credibly and persuasively explained their analysis of both off-site

⁵ "Jurisdictional" wetlands and waters refer to those wetlands and waters that are subject to jurisdiction and regulation of the Corps and/or the Department.

and on-site alternatives, including why the approved Project was considered preferable among the identified alternatives.

On-Site Installation Methods

Dominion also submitted several on-site installation methods, summarized into two alternatives: (1) horizontal directional drilling (HDD) for all wetland and jurisdictional water crossings; and (2) a combination of open trench excavation and HDD. Dominion determined that the all-HDD alternative would require the same amount of permanent tree and brush clearing impacts as the other methods but would also require additional land clearing associated with the temporary workspaces needed to construct bore pits and stage the drilling rigs. For these reasons, and because of the anticipated costs expected to drill all crossings, Dominion proposed rejecting the all-HDD alternative and only mandatorily using HDD to cross Jeffries Creek.

After Dominion submitted its application, the Department asked Dominion to determine if more crossings could be accomplished using HDD. After Dominion explained the complexities associated with using HDD, the Department determined that Jeffries Creek is the only crossing Dominion is required to cross using HDD but noted that Dominion would not be prohibited from using HDD at additional crossings if site conditions dictated it. The Department's determination was reasonable.

Open trench excavation is often the preferred method of natural gas pipeline installation because it helps maintain the pipeline's depth at a consistent four to five feet. Maintaining a consistent four- to five-foot depth also facilitates ongoing operation and maintenance of the pipeline because it ensures accessibility. In contrast, HDD crossings involve drilling under certain features like roads or, in this case, a creek, and thus are usually installed at depths greater than four to five feet. For example, Dominion proposes to use HDD to drill under Jeffries Creek, which will reach a depth of approximately 75 feet below the surface. Because the Project will cross well below the creek bed using HDD, the Department determined the bed and banks of Jeffries Creek will remain undisturbed, and the Project will not affect navigability in any way. In sum, most of the construction and land disturbance associated with the Project will occur within a 50-foot-wide easement and a 25-foot temporary workspace; however, there are several areas where varying workspace configurations exist.

Mr. Priester explained that use of HDD might be limited by other operational considerations, including the availability of workspace to install, weld, and bend the steel pipeline where necessary. Also, site conditions, including topography and geologic conditions, affect the feasibility of using HDD. For example, crossings that are at the edge of a valley may preclude Dominion from safely staging the necessary drilling equipment for HDD. Therefore, Dominion is only committed to using HDD at Jeffries Creek. However, if site conditions at the time the Project is implemented are unfavorable for the open trench method, it may use HDD at up to seven other locations. For example, it may use HDD where areas near crossings temporarily flood or are flooded. Some other potential areas where HDD may be used depending upon conditions are a pond south of Jeffries Creek, Bingham Branch, Brier Branch, and Barfield Mill Creek.

Mr. Darrell Shier,⁶ who assists Dominion's operating subsidiaries with environmental permitting and policy direction, also clarified the complications in using HDD. He explained that HDD installations may not always be less environmentally impactful than open trench installations. Large equipment is needed to drill a hole of sufficient diameter for a 16-inch pipe to pass through via HDD. Each HDD crossing will require multiple bore pits and will need sufficient area to string the pipe together and, potentially, for construction of additional access roads. Any additional land needed to accommodate the HDD process will necessarily require more clearing.⁷

In sum, the evidence established that HDD should not be required at the crossings other than Jeffries Creek. However, it is also reasonable to allow Dominion to elect to use this environmentally acceptable method if operational and site considerations allow its use.

Impacts to Jurisdictional Wetlands and Streams

The Project will only result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acres) of stream, and permanent tree and brush clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acres). There will also be temporary

⁶ Mr. Shier is a licensed professional engineer who serves as an Environmental Manager for Dominion Energy Services, Inc., a subsidiary of Dominion Energy, Inc.

⁷ It was also noted that heavy machinery for HDD can result in spills of hydraulic fluid. However, the evidence established that this is unlikely. Moreover, the Department requires the applicant to have a contingency plan on hand when doing HDD because of potential releases, like hydraulic fluid. Furthermore, even with open trench method, Dominion will potentially have to store hydraulic fluid onsite even for open trench construction because a track hoe is hydraulic equipment with hydraulic oil in various parts of the vehicle.

excavation impacts (trench and backfill) to 8.35 acres of wetlands and 119 linear feet of stream (0.028 acres), and temporary tree and brush clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acres). Mr. Priester acknowledged that future operational or maintenance needs may require excavation of the gas main. However, it is far from certain that future excavation would be required, and if so, it is doubtful Dominion would ever need to excavate a portion of the pipeline that crosses a jurisdictional wetland or stream.⁸

With regard to water quality in the area, Mr. Wenerick explained a temporary increase in turbidity (cloudiness) in the water due to construction sediment is expected, but once construction is completed and the site is stabilized, ambient waterbody conditions will return to normal. Thus, any water quality impacts from the proposed work will be temporary, and Dominion's adherence to best management practices, the conditions of NWP 12 (including the Corps' Charleston District regional conditions), and the Department's enforceable conditions included as part of the Certification, provide reasonable assurance that the water quality standards of regulation 61-68 of the South Carolina Code will not be contravened. Further, the Project will not result in significant degradation to the aquatic ecosystem or remove existing and classified uses of jurisdictional waters and wetlands around the Project site. The classified use of the waters in the Project is "fresh waters." Mr. Wenerick's acknowledged there is a site-specific standard of dissolved oxygen for Jeffries Creek, but none of the dissolved oxygen limitations entered into the consideration of this application. Finally, a segment of the Great Pee Dee River is designated as a state scenic river, but that segment is more than one mile downstream of the Project corridor, and there will be no project-related impacts to that segment.⁹

In terms of monitoring, Mr. Shier did not know of any baseline well testing Dominion conducted or had conducted for any personal water wells in this area prior to doing construction activities for the Project. According to Dominion's review, wastewater discharges for the area are above the 75th percentile indicating there are already a number of industry and other municipal locations discharging in the area.

⁸ Mr. Priester noted that before beginning any maintenance-related excavation, Dominion would consult its environmental experts to determine what types of permits, if any, would be required.

⁹ The Project does not cross any portions of the Great Pee Dee River.

Cumulative Impacts

Mr. Wenerick explained the Department considered cumulative impacts from the Project and the Department does not expect any cumulative impacts because the Project will be sited primarily within an existing cleared and maintained natural gas pipeline corridor. Indeed, the Department encourages use of existing corridors for these very reasons to limit cumulative and reasonably foreseeable impacts. Likewise, there are no expected cumulative impacts from any reasonably foreseeable similar projects.

Mitigation

The evidence did not reflect that mitigation was necessary in this case. Specifically, the permanent fill impact to wetlands for this Project was below the Corps threshold for requiring mitigation. Here, the Project will result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acres) of stream. Mr. Wenerick explained the Department relies on the Corps' standards, including the Charleston District's local standard, for whether to impose mitigation. Pursuant to the Corps' guidance, this Project is reviewed under a general nationwide permit 12 for utility line activities, and condition twenty-three of this permit requires compensatory mitigation if there's a loss of .01 acres of wetland. Additionally, the local Charleston District of the Corps requires mitigation if there is a loss of .005 acres of intermittent and/or perennial stream bed. Neither of these thresholds were met in this case. Furthermore, the Project will result in permanent tree and brush clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acres). Mr. Wenerick explained these permanent clearing impacts will convert forested wetlands to emergent wetlands, which will retain wetland soils and wetland hydrology. DNR will sometimes request mitigation, but they did not in this case.

Impacts to Rare, Threatened and Endangered Species

BREDL's witnesses expressed general concerns about the Project's potential impacts on Federal and State rare, threatened and endangered species. For example, Ms. Andrews testified that she is concerned with potential impacts on Sturgeon, the American Eel, and the American Eagle. BREDL also presented the testimony of Mr. Greg Mixon, an Inland Environmental Coordinator with DNR. Mr. Mixon authored a letter dated June 15, 2021, providing DNR's comments to the Department concerning the Project (DNR Comment Letter). With respect to federal species of concern, the DNR Comment Letter stated that "[t]here are

records of several federally listed threatened or endangered species in the project vicinity,” but did not specify what those species were and in fact, did not identify them as being present in the Project area itself. It further stated that the Great Pee Dee River is the Designated Critical Habitat for the Atlantic Sturgeon and the Shortnose Sturgeon, which have been known to appear in the river. Finally, it stated that [t]here are nearby occurrences of the federally-listed plant species Canby’s Dropwort (Endangered) and Boykin’s Lobelia (At—Risk),” but the letter did not specify that these species are present in the Project area. The Department also acknowledged DNR had data that the federally endangered Red-Cockaded Woodpecker has been sighted around the Project area, and that the Project area and surrounds contains *potential* habitat for bald eagles, the threatened wood stork, and the endangered plant species pondberry. However, Mr. Wenerick explained the U.S. Fish and Wildlife Service determined the Project would have “no effect” on federally threatened or endangered species.

With regard to state species of interest, the DNR Comment Letter identified several species listed in South Carolina’s State Wildlife Action Plan (SWAP) in the vicinity of the Project including the American Eel, Ironcolor Shiner, Flat Bullhead, and Fieryback Shiner.¹⁰ Several SWAP plant species are also present in the vicinity of the Project, including the Blue Maiden-Cane, Narrowleaf Sedge, Widow Sedge, Meadow Sedge, Awned Meadowbeauty, May White, Horned Beakrush, Tracy Beakrush, Stalkless Yellowcress, Ovate Catchfly, and Ovate Marsh Fern. The purpose of SWAP is to provide an inventory and goals and objectives for conserving and protecting state species that may not be entitled to Federal protection. SWAP species are identified as species of interest for any number of reasons—they may be rare or threatened in the state, they may be common here but declining somewhere else in the country, or they may be an indicator species for detrimental environmental effects. However, Mr. Mixon did not specifically identify why each SWAP species identified in the Project area was designated a SWAP species. Mr. Mixon further testified SWAP is not a regulation, and he confirmed that the State of South Carolina has a regulation governing threatened and endangered species, regulation § 123-150 of the South Carolina Code of Regulations. Mr. Mixon also confirmed that there are no plant species listed under this regulation.

¹⁰ The letter’s reference to “Fieryback Shiner” should correctly be “Fieryblack Shiner.”

In the DNR Comment Letter, DNR had no objection to the Department's issuance of the Certification, provided the Department incorporated several stipulations into the Certification as minimization measures. Mr. Wenerick sent a copy of the DNR Comment Letter to Dominion and asked Dominion to respond to those comments, which it did. Mr. Wenerick then sent Dominion's responses back to DNR and asked DNR to confirm whether its concerns were addressed. As a result, the Department incorporated the commitments Dominion made in its responses as conditions to the Certification. Mr. Mixon further confirmed that he reviewed the NODD, which included all 16 conditions to the Certification, and stated that he felt the Department addressed DNR's concerns with respect to the Project.¹¹

Impacts to Cultural Resources

Dominion's consultant, Terracon, conducted a cultural survey for the Project. According to the survey, there are six historic resources and eighty-six previously recorded archaeological sites within a half-mile radius of the Project area and twenty-four of those sites are located within/immediately adjacent to the Project area. Of those sites, five are eligible and nine are potentially eligible for listing on the National Register of Historic Places (NRHP). The State Historic Preservation Office (SHPO) found three of the NRHP-eligible sites contain pre-historic artifacts subject to data recovery and archaeological monitoring is required during disturbance for two archaeological sites. Terracon conducted recovery work at the affected sites.

Public Notice

The Department took several steps to provide public notice of the Project and address comments from the public and Dominion. On June 8, 2021, the Department issued a 15-day

¹¹ The 16 conditions included in the Certification substantially incorporated DNR's stipulations from Mr. Mixon's June 15th letter; however, not all DNR's stipulations were included as initially written. For example, one of Mr. Mixon's original stipulations stated: "Maintenance of this right-of-way should be conducted via hand clearing rather than with chemicals to reduce the potential for contamination and negative impacts on aquatic resources." In contrast, the equivalent Certification condition states: "After operation of the pipeline commences, the applicant may maintain the cleared right-of-way using a combination of hand clearing, mowing, and application of EPA-approved herbicides in accordance with FIFRA label requirements and Clemson University's Department of Pesticide Regulation's requirements, as applicable. The applicant may only select and apply herbicides approved for use near waters and in conformance with the Pesticide General Permit issued by SCDHEC. The applicant is responsible for ensuring that all herbicides are applied by trained applicators licensed through Clemson University Extension Service."

public notice of Dominion's application for the Project.¹² That comment period expired on June 23, 2021. A description of the Project and a map was mailed to adjacent property owners, agencies with an interest, and a list of requesters (some agencies and requesters received the information via email). In response to requests for a public hearing and to extend the comment period, and to address concerns about environmental justice, the Department held a virtual public hearing at 6:30 p.m. on October 14, 2021. Notice of this hearing was included on the Department's project webpage, published on the Department's public notice webpage, and published in the Florence Morning News newspaper on September 25, 2021.

The Department created an informational webpage for the Project, including a description of the Project and Certification review process, updated application materials, and copies of comments received during the initial public comment period. The Department added a fillable form to its Project website so interested parties could pre-register to speak at the public hearing.¹³ The Department also notified parties that requested a hearing, as well as Dominion, of the hearing dates. Moreover, the Department's public participation and environmental justice staff distributed a flier discussing the Project and public hearing to two local library branches in Pamplico and Johnsonville. One of the Department's Public Participation Coordinators contacted the Manager/Administrator of the Town of Pamplico, Mr. Edwin P. Rogers, to share information about the hearing.

The Department held the public hearing virtually to facilitate increased attendance and to adhere to social distancing protocols because of COVID-19 concerns. A call-in number was available so that individuals without internet access could still participate. The Department posted a recording of the public hearing on its Project webpage as soon as it was available and opened an additional 15-day public comment period after the public hearing.¹⁴ As demonstrated by the Staff Assessment, the Department and Dominion reviewed and considered comments received from the public.

¹² According to Mr. Zeller, a prior public notice was issued sometime in 2020 that did not include information about HDD and mitigation.

¹³ The notice information included a phone number so interested parties could pre-register to speak even if they lacked internet access.

¹⁴ Notice of the second 15-day public comment period was included in the information sent prior to the public hearing.

Environmental Justice

Mr. Hightower testified the Department's position on environmental justice is: "South Carolina water quality regulations do not require an [environmental justice] analysis or assessment, rather, the regulations direct the Department to conduct a review of potential water quality impacts and to ensure statutory and regulatory obligations are met." Nevertheless, the Department has staff that engages with environmental justice concerns, particularly related to public notice and outreach.

Furthermore, Dominion voluntarily conducted its own environmental justice review using publicly available tools, which identified higher than average low-income and minority populations in the Project vicinity. It also found a "moderate risk" for environmental justice issues at the Project location, which required Dominion's Investment Review Committee to certify the Project. Dominion also acknowledged that it condemned property to enlarge the easement, including heirs' property. Dominion sent condemnation letters for the heirs' property in January 2021 that were followed up in second letters that included a list of heirs' property resources in March 2021.¹⁵ Based upon the environmental justice concerns, Dominion performed its own targeted outreach. For example, with respect to owners of potential heirs' properties, Dominion sent contact information for organizations that could help them understand their rights. Dominion also held at least one open house event, and contacted area churches to discuss the Project, understanding that local churches can be a good point of contact within the local community.

In conclusion, even if environmental justice could be considered as part of this Certification review, the evidence simply did not establish this factor would mandate the denial of the Project Certification.

ISSUES

1. Whether There Were Feasible Alternatives.
2. Whether Jeffries Creek is the Only Navigable Waterbody in the Project Area.
3. Whether the Project Certification Impacts Special Places.

¹⁵ On cross-examination, Mr. Priester acknowledged the existence of a communication from one of Dominion's land acquisition contractors indicating an endangered species study for the Project was in a report that Dominion could not provide. BREDL contends this communication shows the endangered species study was denied to people in the community whose land was being condemned of the Project. I do not find this communication sufficiently proves this allegation.

4. Whether the Certification Gives Adequate Consideration to Protected Species.
5. Whether the Department Failed to Adequately Assess the Cumulative Impacts of the Project.
6. Whether Compensatory Mitigation Should Be Required for the Project.
7. Whether Consideration Should Be Given to Environmental Justice.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

Standard of Review

In reviewing this matter as a contested case, the Court serves as the finder of fact and conducts its review *de novo*. *Brown v. S.C. Dep't of Health and Env't Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). The standard of proof in a contested case hearing is by a "preponderance of the evidence," *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998), and the burden of proof is on the party asserting the affirmative of an issue. *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017), *reh'g denied* (Jan. 11, 2018). *See also, e.g., Leventis v. S.C. Dep't of Health and Env't Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000). As the Petitioner, BREDL bears the burden of proving that the Department issuance of the Certification was in error under the applicable statutory and regulatory standards.

Whether There Were Feasible Alternatives

BREDL argues that although feasible alternatives exist, the Department nonetheless issued the Certification in violation of several specific subsections of regulation 61-101 and 19-450.9, which I summarize below.

Regulation 61-101 "establishes the procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." S.C. Code Regs. Ann. 61-101 (2012). Subsection 61-101(F)(3)(b) describes the scope of the Department's application review and instructs the Department to consider "whether there are feasible alternatives to the activity." Subsection 61-101(F)(3)(b) further instructs that certification "will be denied" if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." Lastly, subsection 61-101(F)(4) instructs that certification of "filling or disturbances to facilitate construction of . . . public utility crossings" will be issued "when there are no feasible alternatives." This

subsection further provides that when the Department issues a certification under this subsection, it “shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management.”

Regulation 19-450 governs permits for construction in navigable waters. Subsection 19-450.9(A)(1) requires the Department to consider the extent to which the “activity requires construction in, on or over a navigable waterway, and the economic benefits to the state and public from such location.” Subsection 19-450.9(A)(6) requires the Department to consider the extent to which “there is any adverse environmental impact which cannot be avoided by reasonable safeguards.” Finally, subsection 19-450.9(A)(7) requires the Department to consider the extent to which “all feasible alternatives are taken to avoid adverse environmental impact resulting from the project.” Together, these three subsections of regulation 19-450 essentially require the Department to consider if the activity necessarily must impact navigable waters or if there is a feasible alternative to avoid or lessen the impacts.

BREDL argues that HDD is a feasible alternative that was not adequately considered under these subsections of regulation 61-101 and 19-450.9. It argues HDD is clearly feasible at three of the locations in the Project area and possibly feasible in up to ten locations in the Project area. BREDL argues that using HDD “would reduce adverse consequences on water quality and classified uses by avoiding stream and wetland impacts and also turbidity from doing construction in the stream.” BREDL further argues the Department should have required Dominion to assess the feasibility of doing HDD at all stream and wetland crossing, and, at a minimum, conditioned certification of the Project on Dominion utilizing HDD wherever it could have been done.

What constitutes a “feasible alternative” is not defined in regulation 61-101. However, regulation 19-450 includes the following definition of “feasible (feasibility)” that includes a description of “feasible alternatives”:

Feasible (feasibility) is determined by the Department and is based upon the best available information, including but not limited to technical input from the agencies, and consideration of economic, environmental, social and legal factors bearing on the suitability of the proposed activity and its alternatives. It includes the concepts of reasonableness and likelihood of success of achieving the purpose. “Feasible alternatives” applies to both locations or sites and to methods of design or construction and includes a “no action” alternative.

S.C. Code Ann. Regs. 19-450.2(G). Consistent with this definition, the Department, in its review of feasible alternatives, considered economic and financial aspects of feasibility, the legality of proposed alternatives, and whether alternatives would reduce or minimize impacts to wetlands and waters of the U.S., particularly the reduction of permanent impacts.

I conclude the evidence established that potential feasible alternatives were adequately considered under these regulations in this case. Consistent with the definition of “feasible alternatives” under subsection 19-450.2(G), Dominion presented a “No Action” alternative and two off-site alternatives in addition to the Project site accepted by the Department. The “No Action” alternative was reasonably rejected because it would not meet the needs that were demonstrated for additional pipeline capacity. The two other off-site alternatives were rejected because they would require more clearing, fill, and disturbance of land and water compared to siting the gas main primarily within the existing easement. Indeed, siting the gas main within the existing easement is preferred by the Department and other regulatory bodies because it reduces the environmental impact.

Dominion also presented multiple on-site alternatives relying on different installation methods. In its evaluation of the on-site alternatives, the Department agreed Dominion would have to use HDD to cross only one location, Jeffries Creek,¹⁶ because: (1) keeping the pipeline at a relatively constant four-to five-foot depth using the open trench method is preferable for future maintenance; (2) access for large drilling equipment for HDD is constrained in many locations; and (3) there may be increased environmental impacts associated with crossing via HDD at certain locations. I agree with that assessment. Dominion also identified certain other locations where HDD might be possible depending on site conditions or as a contingency option where open trenching is not possible, and the Department indicated that Dominion would not be prohibited from using HDD at other crossings should site conditions necessitate it. Again, this determination properly encourages the use of HDD if the site conditions warrant. However, I equally find that HDD should not be required for the other locations where HDD might be possible.

¹⁶ The location(s) where HDD would be used or possibly used was not included in the Certification. In particular, there is no clause specifying that HDD will be used to cross Jeffries Creek or a clause indicating that HDD may be used in other locations where site conditions allow or require. However, it is clear that both the Department and Dominion agree that HDD will be used to cross Jeffries Creek even if this is not a clause in the Certification.

HDD may reduce the direct impact to wetland and water bodies where it is used because it bores under the water bodies and, therefore, does not disturb the aquatic environment. Nevertheless, this benefit must be balanced against its other environmental impacts and technical limitations to its use, like topography. *See* Reg. 19-450.2(G). HDD requires larger access siting locations for the heavy equipment, thus causing more upland environment impact and displacement. It can also increase the risk for hydraulic spills that could contaminate both upland and aquatic areas. Indeed, at trial, the Court had difficulty discerning whether BREDL believed HDD would reduce or exacerbate environmental impacts because they had so many concerns about its environmental impacts. Moreover, Dominion’s explanation of why it would need to wait and evaluate site conditions before determining whether to use HDD at certain locations was reasonable—in some situations, it may be less economically and environmentally suitable to use HDD at a small crossing where access for HDD equipment would be more disruptive than trench-based installation. In other cases, if the area is flooded, HDD may be the only way to technically install the pipe safely.

Because HDD does not necessarily reduce the Project’s environmental impact and its feasibility is site-dependent at the time of installation, I find using HDD at all water crossing is not a feasible alternative. Specifically, because HDD’s feasibility is site-dependent at the time of installation, while it is possible that HDD could be a feasible alternative in some locations other than Jeffries Creek, feasibility could not be determined at the time of the application, and it may be that none of the locations outside of Jeffries Creek are feasible for HDD at the time of installation. Thus, I find it was reasonable for the Department to approve the Project with only one certain HDD location and leave the option to use HDD at other locations open. Moreover, while the Department did not identify Jeffries Creek or the other potential HDD locations in the Certification, the Department and Dominion are in agreement about how HDD will be utilized for this Project. Finally, the Department included conditions in the Certification to protect against potential adverse consequences of HDD and/or reduce the environmental impact to water bodies if HDD is not utilized. For example, Condition 4 requires Dominion to comply with the Project’s “HDD Inadvertent Return Contingency Plan” to ensure the use of HDD is properly safeguarded. And, Condition 3 provides that Dominion must utilize the “temporary flume bypass method to cross all streams that are flowing at the time of construction unless (HDD or bore methods are employed) including but not limited to

Brier Branch, Barfield Mill Creek, and the specific tributaries where species of conservation concern have been recorded and that are referenced in comments submitted by the South Carolina department of Natural Resources, which include Mill Branch, Bigham Branch, and Bullock Branch.” Under these circumstances, I find the Department’s approval of the Project as having no feasible alternatives was consistent with subsection 61-101(F)(3)(b).

BREDL also argues the Certification violates subsections (A)(1) and (A)(7) of regulation 19-450.9 because there is insufficient proof the Project has to be routed through wetlands or navigable waters. *See* Reg. 19-450.9(A)(1) (requiring the Department to consider the extent to which the “activity requires construction in, on or over a navigable waterway, and the economic benefits to the state and public from such location”). Dominion explained the Project is needed to deliver natural gas from its River Neck Road Station, where it receives natural gas from third-party upstream suppliers, to its Kingsburg Station, where it is distributed to end-users via smaller-diameter pipelines. Constructing a natural gas pipeline between these two points will necessarily require some impacts on wetlands, as demonstrated by Dominion’s evaluation of alternative sites for the Project. The Department reasonably determined that the least impactful route that still meets the needs and thus the Project purpose is to collocate the Project with Dominion’s existing eight-inch natural gas pipeline in an already cleared and maintained corridor. Indeed, both Dominion and the Department presented evidence showing that the further the Project deviates from the existing corridor, the more the impacts to jurisdictional wetlands and streams will increase. BREDL provided no evidence to contradict this evidence or to demonstrate a path for the gas line that would not impact or cross any wetland or navigable waters.

Additionally, the Project will cross only one navigable water subject to the Department’s jurisdiction under regulation 19-450.9--Jeffries Creek. Dominion will utilize HDD to cross Jeffries Creek at approximately 75 feet under the creek bed. Therefore, the construction will not disturb the creek itself and there will be no adverse environmental impact to this navigable water. *See* Reg. 19-450.9(A)(6) (requiring the Department to consider the extent to which “there is any adverse environmental impact which cannot be avoided by reasonable safeguards”); Reg. 19-450.9(A)(7) (requiring the Department to consider the extent to which “all feasible alternatives are taken to avoid adverse environmental impact resulting

from the project”). Accordingly, I conclude a preponderance of the evidence demonstrates the Project is in compliance with subsections 19-450.9(A)(1) and (A)(7).

Based upon the evidence presented, I find BREDL failed to show by a preponderance of the evidence that Dominion failed to present, and the Department failed to adequately consider, feasible alternatives under the applicable regulations. Furthermore, balancing the pros and cons of each alternative site and installation method, I find a preponderance of the evidence supports the Department’s determination that there are no feasible alternatives which reduce adverse consequences on water quality and classified uses. Specifically, siting the Project within the existing easement as approved is clearly the least environmentally impactful option. Next, while HDD may turn out to be a feasible alternative at locations in the Project area other than Jeffries Creek, this feasibility determination must be made based upon site conditions at the time of installation. In consideration of this technical limitation, approving the Project as presented with one location for HDD and a conclusion of no other feasible alternatives in the other areas for HDD was reasonable. *See* Reg. 19-450.2(G) (defining “feasibility” to be determined by “the best available information, including but not limited to technical input from the agencies,” and including the concept of “reasonableness and likelihood of success of achieving the purpose”).

In the absence of feasible alternatives, I conclude subsection 61-101(F)(4)(c) requires the Department to issue the Certification. This subsection states certification of “filling or disturbances to facilitate construction of electric transmission lines or other public utility crossings” will be issued when there are no feasible alternatives. Dominion Energy South Carolina, Inc., is a public utility regulated by the South Carolina Public Service Commission, and the Project is needed to maintain reliable natural gas service and accommodate expected increased demand. Thus, I conclude the Department must issue the Certification under this provision, provided the Department “condition[s] the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management.” *Id.* As noted in the findings of fact, the Department included 16 conditions with the Certification to minimize the already limited adverse effects of the Project. Mr. Wenerick explained, and it is evident from the face of the NODD, that several of the conditions are specifically intended to address stormwater-related issues. *See* regulation 61-101(F)(4) (instructing the Department to “condition the certification upon compliance with all measures necessary to minimize adverse

effects, including stormwater management”). Accordingly, I conclude Petitioner failed to show by a preponderance of the evidence that the requirements of regulations 61-101 and 19-450 with regard to feasible alternatives were not satisfied.

Whether Jeffries Creek is the Only Navigable Waterbody in the Project Area

BREDL argues the Department erred in determining that Jeffries Creek is the only navigable water subject to regulation 19-450 because the Ms. Andrews gave unrebutted testimony that she navigated Mill Branch and Bigham Branch using a motorized boat the week before trial. BREDL further argues that under subsection 19-450.9(A)(2), the Department failed to consider that using an open trench to install the pipeline in Mill Branch and Bigham Branch “would harmfully obstruct navigability or the natural flow of navigable waters or cause erosion” because the open trench method would cause increased erosion, sedimentation, and turbidity whereas HDD would not.

Subsection (C) of regulation 19-450.2 states that

Navigable waters means those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats. Navigability shall be determined by the Department.

Here, the Department determined that Jeffries Creek is the only State navigable water that the Project will cross and that is subject to regulation 19-450. While Ms. Andrews reports having boated in Bigham Branch and Mill Branch, she did not testify that she was in the specific locations where the Project will cross those waters. Furthermore, BREDL has presented no evidence to credibly demonstrate that any other waterways in the Project corridor are navigable waters other than Jeffries Creek. Therefore, I agree with the Department that the only Project crossing subject to regulation 19-450 is the crossing of Jeffries Creek. For this reason, I do not address BREDL’s arguments under subsection 19-450.9(A)(2) related to Mill Branch and Bigham Branch.

Whether the Project Certification Impacts Special Places

Pursuant to subsection (F)(5)(d) of regulation 61-101, the Department must deny a certification if the proposed activity adversely impacts special or unique habitats such as designated State Scenic Rivers. The lower 70-mile segment of the Great Pee Dee is designated a State Scenic River. S.C. Code Ann. 49-29-230(7) (2008 & Supp. 2022) (“The following are designated as scenic river . . . that portion of the Great Pee Dee River located between the U.S.

Highway 378 bridge crossing of the Great Pee Dee River and downstream to the U.S. Highway 17 bridge crossing the Great Pee Dee River.”). BREDL argues construction and installation of the Project violates subsection (F)(5)(d) because it could cause adverse downstream impacts to the River since the proposed pipeline will cross tributaries of the River a mile or less upstream from their confluence with the River.

The section of the Great Pee Dee River that is designated as a State Scenic River is slightly over one mile downstream of the Project. Due to its distance from the Project, the Department determined that the Project would not impact the segment of the Great Pee Dee River designated as a State Scenic River. Moreover, outside of argument by counsel, BREDL did not present any evidence challenging the Department’s determination about this issue; therefore, I conclude that the Department’s issuance of the Certification is consistent with subsection 61-101(F)(5)(d).

BREDL also argues the Certification violates subsection (A)(4) of regulation 19-450.9 by allowing the Project to cross 146-acre tract protected by a conservation easement (Front Swamp LLC) and the Pee Dee Station Wildlife Management Area managed by SCDNR, which could affect public access to and use of public lands. Subsection 19-450.9(A)(4) requires the Department to consider the extent to which “the activity could affect public access to and use of public lands.” The only portion of the Project subject to this subsection is Jeffries Creek and, beyond this conclusory statement, BREDL provided no evidence to support its claim that allowing the Project use HDD at Jeffries Creek will impact Front Swamp LLC and the Pee Dee Station Wildlife Management Area such that the Project could affect public access and use of these lands. *See id.* Accordingly, I do not find BREDL met its burden to show the Project contravenes this subsection.

Whether the Certification Gives Adequate Consideration to Protected Species

BREDL contends the Department erred in concluding that the Project will not adversely impact waters containing state or federally recognized rare, threatened, or endangered species in violation of subsection (F)(5)(c) of regulation 61-101 and subsection (A)(3) of regulation 19-450.9. Subsection 61-101(F)(5)(c) states that certification will be denied if the proposed activity adversely impacts waters containing state or federally recognized rare, threatened, or endangered species. Similarly, under subsection 19-450.9(A)(3), the Department must consider the extent to which “the activity would impact fish and wildlife, water quality and

other natural resource values or could affect the habitats or rare and endangered species of wildlife and irreplaceable historic and archaeological sites associated with public lands and waters.”

BREDL contends the Project violates subsection 61-101(F)(5)(c) because there is abundant evidence that several federal species and state SWAP species inhabit the streams and wetlands in the Project area. BREDL further argues the Department approved the certification without adopting all of DNR’s stipulations in the certification to protect species of concern. Specifically, BREDL notes the certification allows mechanized and chemical clearing, trenching, and backfilling to the site’s wetlands and streams although one of DNR’s stipulations recommended hand-clearing. BREDL contends that because DNR’s stipulations were not properly incorporated into the certification, there is no condition protecting plants from destruction via repeated mowing or chemical application, and the impacts from allowing Dominion to “temporarily” clear 6.326 acres of wetlands and 0.011 acres of stream will be permanent as those rare plant species will not be allowed to grow back. BREDL also argues the Department erred when it did not include a permit condition requiring HDD to avoid impacts to the streams where the protected species live.

Although some federal endangered species, like the Red Cockaded Woodpecker, have been noted to possibly exist in the broader area around the Project, Mr. Wenerick explained that based upon his review of Dominion’s application, the U.S. Fish and Wildlife Service concluded the Project would have “no effect” on federal threatened and endangered species. Additionally, while the DNR Comment Letter stated that “[t]here are records of several federally-listed threatened or endangered species in the project vicinity,” and even identified some of those species, it did not specifically identify them as being present in the Project area itself. For example, it stated that “[t]here are nearby occurrences of the federally-listed plant species Canby’s Dropwort (Endangered) and Boykin’s Lobelia (At—Risk),” but the letter did not specify that these species are present in the Project area. Accordingly, I conclude there are not federally threatened or endangered species located in the Project area.

Mr. Mixon, through his testimony and two DNR comment letters, identified several state SWAP species in the vicinity of the Project. SWAP species are species of special interest for many reasons, including because they are rare. However, Mr. Mixon did not specifically

identify any of the SWAP species in the Project area as rare.¹⁷ Moreover, his letter stated that DNR would not object to certification of the Project provided the stipulations in the letter were incorporated as enforceable conditions in the Certification. The Department shared those stipulations with Dominion, to which Dominion provided responses. Mr. Mixon reviewed those responses, and indicated no further objections on behalf of DNR provided the Department incorporated the commitments Dominion made in its responses as conditions to the Certification. Mr. Mixon confirmed that he reviewed the NODD, which includes all 16 conditions to the Certification, and stated that he felt the Department addressed DNR's concerns with respect to the Project. Thus, although the NODD included conditions that modified the original stipulations recommended by Mr. Mixon in his Comment Letter, Mr. Mixon approved it.

As indicated by Mr. Mixon's testimony, the Certification conditions provided DNR with assurance that SWAP were appropriately addressed. Moreover, BREDL did not submit any evidence contradicting the Department's determination that no federally threatened or endangered species are located within the Project area. For these reasons, I conclude the Project is consistent with subsection 61-101(F)(5)(c).

Similarly, I find the Project does not violate subsection 19-450.9(A)(3). Jeffries Creek is the only body of water subject to this regulation, and Dominion will use HDD to cross the creek. Accordingly, the crossing will have no impact on species living in and around the creek itself. Moreover, with the conditions in place under the Certification, there is no evidence that using HDD in the surrounding environment will negatively "affect the habitats of rare and endangered species of wildlife" such that the Certification should be denied. Reg. 19-450.9(A)(3).

BREDL also argues the Department's decision to issue the Certification violates subsection 19-450.9(A)(3) because the Department did not properly consider how construction in navigable waters could affect "irreplaceable historic and archaeological sites associated with public lands and waters." BREDL elicited testimony about the number of archaeological sites

¹⁷ Indeed, Mr. Mixon stated there are no plant species in the Project area listed in regulation 123-150 of the South Carolina Code of Regulations, which contains the official State List of Endangered and Threatened Wildlife Species of South Carolina. Specifically, none of the species identified as SWAP species in Mr. Mixon's Comment Letter (including American Eel, Ironcolor Shiner, Flat Bullhead, and Fieryblack Shiner) is listed in regulation 123-150 as a South Carolina Threatened or Endangered species.

in and around the Project area and appears to argue the Department should have considered whether HDD could be used to avoid disturbing these areas. The evidence adduced at trial shows the SHPO found three NRHP-eligible sites contained pre-historic artifacts subject to data recovery and archaeological monitoring is required during disturbance for two archaeological sites. Dominion's consultant Terracon conducted recovery work at the affected sites and there was no evidence offered that Dominion would not comply with the SHPO's requirements. Therefore, I conclude that "irreplaceable historic and archaeological sites associated with public lands and waters" were adequately considered and Dominion has taken appropriate action to protect the artifacts and locations to the extent required by SHPO. *See* Reg. 19-450.9(A)(3). I do not find granting the Certification violated subsection 19-450.9(A)(3).

Whether the Department Failed to Adequately Assess the Cumulative Impacts of the Project

BREDL argues the Department improperly concluded that the Project, including cumulative impacts and reasonably foreseeable similar activities, will not permanently alter the aquatic ecosystem in the vicinity of the Project such that its functions and values are eliminated or impaired in violation of regulation subsections 61-101(F)(3)(c), 61-101(F)(5)(a), and 19-450.9(A)(8).

Subsection 61-101(F)(3)(c) requires the Department to analyze the potential water quality impacts of the Project, including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; and (4) the cumulative impact of the proposed activity and reasonably foreseeable similar activities of the applicant and others. Subsection 61-101(F)(5)(a) requires the Department to deny certification where the proposed activity permanently alters the aquatic ecosystem in the vicinity of the proposed activity such that its functions and values are eliminated and impaired.

Here, BREDL argues the Department's issuance of the Certification violates these subsections because the Department accepted the Project without understanding the justification for its need. In particular, BREDL argues: (1) the Department did not know any of the specifics on the type of expected business or industrial growth associated with the Project need; (2) the Department did not know how proximate any potential growth was to the

pipeline expansion at issue here; and (3) the Department did not assess the impact that the growth projected by this project would have on water quality in the Pee Dee River basin or anywhere. Further, BREDL argues that because the Department does not know the specific growth that may arise proximate to Dominion's project and the environmental consequences of this growth, it did not adequately evaluate the cumulative impacts of the proposed activity, nor evaluate the reasonably foreseeable similar activities of the applicant in the entirety of the Pee Dee area of South Carolina. Finally, BREDL argues the Department failed to adequately consider the cumulative impact of placing a pipeline next to an existing pipeline in the streams where wastewater discharges for the area are already above the 75th percentile.

While the Department's witness may not have identified specific statistics about the growth supporting the need for the Project, I find it considered the cumulative effects of the Project. Moreover, BREDL failed to factually establish any cumulative effects of this Project that would justify the denial of the Certification. Indeed, to the contrary, Mr. Priester explained the Project is needed to address increasing demand for natural gas in eastern South Carolina due to projected residential and commercial growth and current seasonal demand issues. He further explained that Dominion projected anticipated natural gas demand for the area served by the Project through 2050 using information derived from its Planning Group and population growth estimates from Horry County. Part of this demand is in the local community where, during cold weather events, Dominion must supplement its system with compressed natural gas and/or liquefied natural gas to maintain reliable service for customers that are served from the existing eight-inch main. BREDL did not present any testimony to contradict the need demonstrated by Dominion; it merely attacked the Department's witness's ability to recall this information provided by Dominion.

Mr. Wenerick explained that the Department does not expect any cumulative impacts because the Project will be sited primarily within an existing cleared and maintained natural gas pipeline corridor. In fact, the Department encourages use of existing corridors to limit cumulative and reasonably foreseeable impacts. BREDL presented no credible testimony that placing the pipeline in another location that did not utilize the existing easement would lessen environmental impacts. Similarly, Mr. Wenerick also explained that there should not be any cumulative impacts from reasonably foreseeable similar projects. I thus find the Department considered "the cumulative impact of the proposed activity and reasonably foreseeable similar

activities,” and the minimization of cumulative impacts by locating the Project in an existing easement to the extent possible consistent with subsection 61-101(F)(3)(c). The evidence does not support BREDL’s assertions that the proposed activity will permanently alter the aquatic ecosystem in the vicinity of the Project such that its functions and values are eliminated and impaired.

Next, BREDL argues the Department did not consider the cumulative impact from allowing Dominion to continually mechanically clear, mow and apply chemicals to the right-of-way to remove vegetation. As evidenced by the Staff Assessment and testimony at the hearing, the Department considered DNR’s comments related to clearing and the use of chemicals, it also considered Dominion’s response, and incorporated conditions in the Certification that it believed would protect vegetation consistent with these comments and responses. DNR had no objections to the conditions in the NODD, including the condition allowing use of specific chemicals authorized by the EPA. Therefore, I find the Department considered the cumulative effects of these actions and the evidence does not support BREDL’s assertions that these means to remove vegetation will violate the regulations.

Additionally, although BREDL seems to be advocating for more HDDs in this Project, it argues the Department erred when it failed to analyze the cumulative impact of having several HDD rigs operating at the same time in different parts of the Project area at any given time. Dominion determined the all-HDD alternative would require the same amount of permanent tree and brush clearing impacts as the other methods, but would also require additional land clearing for the temporary workspaces needed to construct bore pits and stage the drilling rigs. For this reason, and because of the anticipated costs expected to drill all crossings, Dominion rejected the all-HDD alternative. The Department further reviewed the potential all-HDD alternative and did not require it. I again find the evidence established the mandatory use of HDD only at the Jefferies Creek location was proper under the regulations, and the use of HDD at the other locations may be proper based upon the existing conditions at the time of construction.

BREDL also contends the Department did not adequately consider cumulative effects of the Project because it did not consider the Project’s impact on climate change. I do not find the Department’s failure to consider climate change to be reversible error in its cumulative impact analysis. BREDL did not point to a statute or regulation specifically requiring the

Department to consider climate change. Moreover, I find the underlying intent of subsection 61-101(F)(3)(c) is to address impacts within the Project area and its surrounding area, not the world at large. Climate change may potentially have local consequences, but it is not an issue that is specifically contemplated by regulation 61-101, which seeks to provide guidance for evaluating discrete projects in specific areas.

BREDL next argues the Department failed to consider dissolved oxygen limitations in its application review even though there is a site-specific standard for dissolved oxygen in Jeffries Creek. Here, the issue before the Court is not just whether the dissolved oxygen limitations were considered during the Department's review of Dominion's application, but, if so, whether any action needs to be taken to address this issue based upon the evidence presented to this Court. However, BREDL offered no convincing evidence, if any evidence at all, that the Project would cause cumulative impacts to any applicable dissolved oxygen or water quality standards.¹⁸ Moreover, although Mr. Wenerick did not consider dissolved oxygen limitations for Jeffries Creek in his review, this is not surprising considering Jeffries Creek will be crossed using HDD and its waters, including dissolved oxygen levels in the water, will not be impacted. Furthermore, the water quality impacts of the Project will be temporary, provided Dominion adheres to Best Management Practices, the conditions of NWP 12 (including the Corps' Charleston District Regional Conditions), and the 16 enforceable conditions the Department included with the Certification. *See* Reg. 61-101(A)(5) (providing "the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law").

Additionally, the evidence reflected that Project will not result in any significant degradation to the aquatic ecosystem or remove existing and classified uses of waters in the vicinity of the Project, including wetlands, Jeffries Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, and unnamed tributaries to the Great Pee Dee River. Indeed, BREDL presented no testimony about impairment or elimination of the functions and values of the aquatic ecosystem in the vicinity of the Project. Therefore, I

¹⁸ Similarly, BREDL argued that the Department failed to issue any conditions that would eliminate erosion or sediment migration even though it failed to show that this was an issue that needed to be addressed.

conclude that the Department properly determined the Project will not permanently alter the aquatic ecosystem in the vicinity of the Project such that its functions and values are eliminated or impaired. *See* Reg. 61-101(F)(5)(a).

Finally, subsection (A)(8) of regulation 19-450 requires the Department to consider the extent of the “long range, cumulative effects of the project, including the cumulative effects of similar projects, may affect navigable waters.” However, this subsection applies only to permits for construction in navigable waters, and the only navigable water at issue in this case is Jeffries Creek. As discussed above, the Project will cross Jeffries Creek using HDD at a depth of approximately 75 feet below the bed. Because the Project will cross well below the bed using HDD, the bed and banks of Jeffries Creek will remain undisturbed, and the Project will not affect navigability in any way. The other features associated with navigable waters—fish and wildlife, recreation, water supply, etc.—will not be affected. In other words, there are no long range, cumulative effects of this Project on Jeffries Creek, nor have similar projects been identified that might compound any effects of this Project. Accordingly, I find the Project is consistent with subsection 19-450(A)(8).

Whether Compensatory Mitigation Should Be Required for the Project

BREDL argues that the Department should have required compensatory mitigation. Subsection (B)(1) of regulation 19-450.9 provides:

If the Department tentatively determines: (1) that the proposed activity is likely to produce an adverse impact on navigable waters or other associated natural resources; (2) that the applicant has already agreed to or taken all reasonable and feasible measures to prevent the detriment; and (3) the adverse impact relative to the benefit is not so great as to automatically require a recommendation of disapproval of the proposed activity on that or other grounds; and (4) that the proposed activity otherwise meets the standards in 450.9(A), the Department may request the applicant to submit a proposal that provides or creates natural resource benefits that replace or compensate for the economic, environmental and natural resource benefits lost by the proposed activity so that even considering the detriment or negative impacts of the project, the proposal, including the compensation/replacement, results in a net gain of natural resource benefits to the state.

S.C. Code Ann. Regs. 19-450.9(B)(1).

The Department thus has the authority to request mitigation under subsection 19-450.9(B)(1). In making that determination, the Department relies on the Corps’ standards, including the Charleston District’s local standard. The Corps’ standards require compensatory

mitigation if there's a loss of .01 acres of wetland or a loss of .005 acres of intermittent and/or perennial stream bed. The Project will result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acres) of stream. Therefore, neither threshold is met here. Interestingly, BREDL does not necessarily disagree that the areas of permanent fill do not meet the threshold but argues the Project's permanent clearing impacts push the impacts above the threshold and mitigation. The Project will result in permanent tree and brush clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acres). Mr. Wenerick explained that these permanent clearing impacts will convert forested wetlands to emergent wetlands, which will retain wetland soils and wetland hydrology. Because the permanent clearing will not result in the loss of wetlands, the Project remains under the threshold to require mitigation. Accordingly, I do not find the Department erred in failing to require mitigation.

Whether Consideration Should Be Given to Environmental Justice

BREDL argues the Department should include environmental justice considerations in its permitting decisions, and as long as the Department does not give due consideration to environmental justice issues, disadvantaged communities will continue to be overburdened without a seat at the proverbial table. BREDL contends the low-income, predominately minority community surrounding the Project should not have to bear the burden of having its heirs' property condemned by a company that does not exist as a legal entity in order to construct another gas main through wetlands and waters when feasible alternatives are available.

The Department is not legally required to consider environmental justice concerns or conduct an environmental justice analysis before issuing a permit. However, the Department staff nevertheless held a hearing on the Project at which it addressed, in part, concerns about environmental justice. The Department's public participation and environmental justice staff distributed a flier discussing the Project and public hearing to two local library branches. One of the Department's Public Participation Coordinators contacted the Manager/Administrator of the Town of Pamlico to share information about the hearing. Additionally, the Department included a call number for the hearing for individuals without internet access. Thus, while the Department was not required to address environmental justice concerns, it nonetheless considered them.

Dominion also conducted its own internal environmental justice review, which identified higher than average low-income and minority populations in the Project vicinity. It also found a “moderate risk” for environmental justice issues at the Project location and acknowledged that it condemned property to enlarge the easement, including heirs’ property. Based upon the environmental justice concerns, Dominion performed its own targeted outreach, including sending letters to heirs’ properties with heirs’ property resources, held an open house event, and contacted area churches to discuss the Project.

Therefore, I find that both the Department and Dominion considered environmental justice concerns although that consideration was not legally required as part of its certification decision-making process.

BREDL further argues the Department failed to adhere to several of its own regulations. First, BREDL argues that under subsection (C)(1)(a) of regulation 61-101, Dominion was supposed to supply “[a]s a minimum” an application with the name and other pertinent information of the applicant, and, instead, it supplied the name of a company that does not exist—Dominion Energy—and, ultimately, the Department issued a certification to that non-entity. Subsection 61-101(C)(1)(a) provides that “[a]s a minimum the application must contain the following information: . . . (a) the name, address, phone numbers, principal place of business of the applicant and, if applicable, the name and address of the agent for the applicant.” In this case, the permit application was submitted on behalf of “Dominion Energy” by one of Dominion’s consultants and the Department issued the Certification to “Dominion Energy.” Technically, “Dominion Energy” is not a legal entity; rather Dominion Energy of South Carolina, Inc., is the formal name of legal entity that applied for the permit. It is a wholly-owned subsidiary of Dominion Energy, Inc. However, BREDL has not shown how it was prejudiced by what appears to be a scrivener’s error and certainly not a nefarious plot to hide the name of the true applicant for the Certification. Indeed, BREDL fully participated in the entire permitting and contested case process without issue because it was aware that Dominion Energy referred to Dominion Energy of South Carolina, Inc. As our Supreme Court has held, “[e]rror without prejudice does not warrant reversal.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005). Nevertheless, I do hold that the error should be corrected and an amended Certification reflecting the correct legal name should be issued by the Department.

BREDL also complains that under subsection (C)(3) of regulation 61-101, the Department did not require Dominion to do any baseline well testing for the wells in this predominately low-income, minority area, even though it “may require the applicant to provide water quality monitoring data, water quality modeling results, or other environmental assessment related to factors in Article F.3 prior to accepting or processing the application and assessing the impacts of the proposed activity.” As the quoted wording of the statute makes clear by using the permissive word “may,” the Department has discretionary authority to require an assessment like well testing before processing or assessing a project. *See State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) (“The word ‘may’ ordinarily ‘signifies permission and generally means the action spoken of is optional or discretionary.’” (citation omitted)). Here, the Department lawfully exercised its discretion not to enforce such a requirement, and the Court cannot find error in its decision based upon the evidence.

Next, BREDL contends the Department did not satisfy subsection (C)(1)(d) of regulation 61-101, because the Department does not know the source of the fill material Dominion will use. This subsection states that “[a]s a minimum the application must contain the following information: . . . (d) a description of the composition, source, and quantity of any material to be dredged or used as fill and a description of the area to be impacted, including the area of fill in acres.” S.C. Code Ann. Regs. 61-101(C)(1)(d). When asked whether he knew where the rock to fill in Tributary LL would come from, Mr. Wenerick did not know. This is the only testimony in the record regarding the composition of the fill. Additionally, while Dominion’s application was admitted into evidence, it was not admitted for the truth of the matter asserted. Therefore, although BREDL has demonstrated that Mr. Wenerick could not identify the source of the fill for a particular tributary at trial, it is unclear whether the application itself met this regulatory requirement. *See id.* (providing “the **application** must contain the following information: . . . (d) a description of the composition, source, and quantity of any material to be dredged or used as fill” (emphasis added)). Accordingly, I find BREDL failed to show by a preponderance of the evidence that Dominion’s application did not comply with this regulatory requirement or why the failure would justify denying the Certification.

BREDL contends the Department did not comply with subsection (C)(1)(c) of regulation 61-101. Under this subsection, “[a]s a minimum the application must contain the

following information: . . . (c) a description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, including planned or proposed future development that relate to water quality considerations.” S.C. Code Ann. Regs. 61-101(C)(1)(c). BREDL asserts the Department does not know the type of expected business or industrial growth justifying the Project or how proximate any of that potential growth supporting the Project is to the pipeline expansion at issue here. Although the Department’s witness did not provide specifics about expected growth supporting the Project, this regulation concerns whether the application provided the required description of the proposed activities, not whether the Department could recall them. Mr. Priester clearly explained to the satisfaction of the Court how the application described the Project and why the Project is needed. Specifically, he explained that demand for natural gas in eastern South Carolina is increasing due to projected residential and commercial growth and current seasonal demand issues. Part of this demand is in the local community where, during cold weather events, Dominion must supplement its system with compressed natural gas and/or liquefied natural gas to maintain reliable service for customers that are served from the existing eight-inch main. Therefore, I find the preponderance of the evidence shows the application met the requirements of subsection 61-101(C)(1)(c).

BREDL argues Dominion did not supply the Department with “a complete description of the proposed permitted activity including the location [and] affected waterbody” and “all proposed activities reasonably associated with the proposed permitted project” in violation of subsections 61-101(C)(1)(b) and (c). It argues Dominion (1) never provided information on the specific location or waterbodies where it would conduct HDD activities and (2) was still reviewing additional parcel acquisitions required for access needs as of July 2021, well after the public notice period for the project closed. I do not find this to be a violation of subsection 61-101(C)(1)(b). Although the places within the Project where HDD will be used are uncertain other than at Jeffries Creek, based upon the evidence before the Court, the use of HDD at the locations other than Jeffries Creek are dependent upon site conditions at the time of pipeline installation. Indeed, Dominion identified the other potential locations where HDD may be used, but also showed that it was reasonable to determine the use of HDD based upon the site conditions at the time the creek would need to be crossed. Thus, it was reasonable that the

application did not specifically identify all HDD locations.¹⁹ Therefore, I conclude a preponderance of the evidence shows the application met the requirements of subsections 61-101(C)(1)(b) and (c).

BREDL further argues the Department withheld critical information about the HDD locations and threatened and endangered species despite BREDL's FOIA requests and its requests for information at the public hearing. BREDL asserts that owners facing land condemnation by Dominion were told that they could not see the endangered species report for this Project.²⁰ Ultimately, BREDL argues the Department failed to adhere to regulation 61-101 because it failed to properly consider whether this project is consistent with the needs and welfare of the public under regulation 19-450.9 because the surrounding community was not allowed to meaningfully participate in the permitting process as permitted under the Department's own regulations.

I conclude the Department gave the surrounding community ample opportunity to meaningfully participate in the permitting process. The Department initially issued a public notice on June 8, 2021, with a fifteen-day comment period that expired on June 23, 2021. A description of the Project and a map was mailed to adjacent property owners, agencies with an interest, and a list of requesters. In response to requests for a public hearing and to extend the comment period, and to address concerns about environmental justice, the Department held a virtual public hearing at 6:30 p.m. on October 14, 2021. Notice of this hearing was included on the Department's project webpage, published on the Department's public notice webpage, and published in the Florence Morning News on September 25, 2021.²¹ In addition, the

¹⁹ Similarly, Dominion made the Department aware that it would need to increase the size of the easement, which would require the acquisition of additional parcels. BREDL has not argued that a good faith effort was not made to identify all impacted parcels in the application; nor does the language of the statute require such specificity.

²⁰ It is unclear why the obtainment of this information through discovery would not satisfy due process. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 551 S.E.2d 263 (2001) ("An adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body."); *Zaman v. S.C. State Bd. of Med. Examiners*, 305 S.C. 281, 408 S.E.2d 213 (1991) ("One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it.").

²¹ BREDL complains the Department did not timely request an affidavit of publication from Dominion pursuant to subsection (D)(4)(b) of regulation 61-101. Pursuant to this subsection, "[p]ublic notice of the application shall be by each of the following methods: . . . (b) by publication by the applicant of the Notice of Application in a newspaper The applicant shall provide the Department with an affidavit of publication from the newspaper within fifteen (15) days of publication." S.C. Code Ann. Regs. 61-101(D)(4)(b). BREDL contends that here, the Department

Department created an informational webpage for the Project, including a description of the Project and Certification review process, updated application materials, and copies of comments it received. The Department added a fillable form to its Project website so interested parties could pre-register to speak at the public hearing and also included a phone number to call in to pre-register. The Department's public participation and environmental justice staff distributed a flier discussing the Project and public hearing to two local library branches, and one of the Department's Public Participation Coordinators contacted the Manager/Administrator of the Town of Pamplico to share information about the hearing. The Department did not hold an in-person public hearing like it usually does because of the COVID-19 pandemic; however, the Department held the hearing virtually to facilitate increased attendance and to adhere to social distancing protocols. Importantly, a call-in number was available so that individuals without internet access could still participate. The Department posted a recording of the public hearing on its Project webpage as soon as it was available and opened an additional 15-day public comment period after the public hearing.

Accordingly, there were multiple opportunities for the community to comment and participate in the permitting process, including two comment periods and a public hearing, and the Department took measures to provide access to a community that had limited internet access despite the challenges of the pandemic. Moreover, as demonstrated by the Staff Assessment, the Department and Dominion reviewed and considered the comments received from the public and the community. Based on all the steps the Department took to incorporate public and community involvement in the permitting process, I conclude the community surrounding the Project had ample opportunity to meaningfully participate in the permitting process.

CONCLUSION

For the reasons discussed above, I conclude that BREDL failed to show by a preponderance of the evidence that the Certification should not be issued to Dominion.

did not request the affidavit of publication from Dominion until forty-five (45) days after the public notice began in violation of (D)(4)(b). Mr. Wenerick testified he was uncertain if Dominion has submitted an Affidavit of Publication within fifteen days as required by the applicable regulation. Based upon this evidence, it is unclear whether the requirements of subsection (D)(4)(b) were met; regardless, BREDL has failed to show how it was prejudiced if the affidavit of publication was, indeed, untimely submitted. *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984) (“[P]roof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice.”).

IT IS THEREFORE ORDERED that the Certification is **GRANTED**.
AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

July 24, 2023
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

July 24, 2023
Columbia, South Carolina