

Dec 11 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League, Appellant,

v.

South Carolina Department of Health and
Environmental Control and Dominion Energy, Respondents.EMERGENCY PETITION
FOR WRIT OF SUPERSEDEAS
AND MOTION FOR EXPEDITED HEARING

Pursuant to Rule 241, SCACR, Appellant Blue Ridge Environmental Defense League, through its undersigned counsel, hereby respectfully petitions this Honorable Court for an emergency Order granting supersedeas of the Administrative Law Court's *Final Order*, which is currently under appeal before this Court. (Final Order, Exhibit A). Extraordinary circumstances exist, which make it impracticable for Appellant to first seek supersedeas from the Administrative Law Court. Specifically, Appellant has received notice from Dominion Energy that it is commencing work on the gas pipeline expansion project, which is the very subject of the instant Appeal. (Notice, Exhibit B). An Order of Supersedeas is necessitated to prevent a contested issue from becoming moot and avoid irreparable harm to Appellant, its constituents, and the affected geographic area. Alternatively, Appellant respectfully requests that this Court

issue an order temporarily staying the subject order and holding the instant matter in abeyance until further determination can be made by this Court. Finally, given the irreversible impact which the looming project poses, Appellant respectfully requests that this Honorable Court grant an expedited hearing on the instant Petition.

Background

The instant appeal arises from Appellant's challenges the decision of the South Carolina Department of Health and Environmental Control ("SCDHEC") to issue Dominion Energy a Section 401 Water Quality Certification pursuant to regulation 61-101 of the South Carolina Code of Regulations and R. 19-450 Certification ("Certifications"). The Certifications authorize the construction of a gas main in Jefferies Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, wetlands, and unnamed tributaries to the Great Pee Dee River in Florence County, South Carolina that will result, *inter alia*, in permanent fill impacts, temporary excavation impacts, temporary clearing impacts and permanent clearing impacts to wetlands and streams. (Final Order, Exhibit A)

Specifically, Dominion Energy is proposing to construct approximately 76,218 LF of new 16-inch diameter steel natural gas main that runs from River Neck Road to the Kingsburg Valve Station in Florence County, South Carolina. (Request for Final Review Conference, Exhibit C). The project consists of the installation of a 16-inch gas main within an approximately 40-foot-wide existing easements and a 10-foot-wide expansion of the easement to the west. The proposed project will result in temporary clearing impacts to the 6.326 acres of wetlands and 53 linear feet of stream, temporary excavation impacts to 8.35 acres of wetlands and 119 linear feet of stream, permanent fill impact to 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream, and permanent clearing impacts to 2.986 acres of wetlands and 21

linear feet of stream. (Ibid). Stated differently, Dominion's project proposes impacts to 32 separate wetlands or waters, including:

- Twenty-seven (27) temporary excavation impacts totaling 8.378 acres;
- Twenty-nine (29) permanent clearing impacts totaling 2.990 acres;
- Three (3) permanent fill impacts totaling 0.009 acres; and
- Nine (9) temporary clearing impacts totaling 6.337 acres.

Appellant, Blue Ridge Environmental Defense League ("BREDL"), is a regional, non-profit, community-based organization founded on earth stewardship, environmental democracy, social justice, and community empowerment. BREDL's members are citizens and residents of South Carolina who own property, reside and use natural resources in Florence County and specifically in the vicinity where the proposed project is located.

Appellant has grave concerns about the environmental impacts of this project and the justice of placing yet another pipeline in an overburdened community. This pipeline will necessarily have an adverse impact of development on this rural community. BREDL's members use and enjoy natural resources in the vicinity of the proposed project. They breathe the air, drink and use the water, walk and drive in the community and enjoy the wildlife, natural streams and forests in their rural community. BREDL and its members are concerned that this project and related development will harm them and the natural resources they value and enjoy.

Appellant is informed and believes that the DHEC staff's decision was made in violation of applicable statutes, regulations and rules contained in the 401 Water Quality Regulations and R. 19- 450 Regulations. This appeal seeks to address, *inter alia*, whether the project violates the requirements of DHEC Regulations 61-101.F, in that:

1. The project is categorically not water dependent and the project purpose is impermissibly narrow in violation of DHEC Regulations 61-101.F.3(a) and 19-450.9; and
2. There are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulations 61-101.F.5(b), 61-101.F.3(b) and 19-450.9; and
3. The project will permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired and it fails to take into account the physical, chemical, and biological impacts, including cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others in violation of DHEC Regulation 61-101.F.5.(a), 19-450.9 and 61-101(F)(3)(c); and
4. The proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d) and 19-450.9; and
5. The project proposes to fill and make significant alterations to a water of the State violating DHEC Regulations 61-9 and 61-68, and thus also violates Regulation 61-101 and 19-450.9; which require compliance with these additional regulations; and
6. The project calls for permanent impacts to wetlands associated with the project, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9, 61-68, 61-101.F and 19-450.9 in that the benefits from preserving the area in its unaltered state is greater than the proposed use.

STANDARD OF REVIEW

“In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. In appellate matters, the purpose of a supersedeas is to prevent the occurrence of an event that would render judgment or relief, and thus the appeal, meaningless. “A case is moot ‘when judgment, if rendered, will have no practical legal effect upon existing controversy.’” *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 428 S.C. 638, 642, 837 S.E.2d 485 (2020), citing *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). “Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief.” *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

Analysis

In the present case, Appellant has received Notice that Respondent Dominion Energy is commencing work on the gas pipeline expansion project, which is the very subject of the instant Appeal. (Notice, Exhibit B). As set forth above and in the order under appeal, the project will result in permanent fill impacts, temporary excavation impacts, temporary clearing impacts and permanent clearing impacts to wetlands and streams. In addition, the project will undoubtedly impact a historically underserved and underprivileged community, giving rise to potential health risks and environmental concerns. (See Exhibit C, pp. 7-10).

The resulting social and environmental impacts of the project cannot be undone if the project is commenced and/or completed during the pendency of this appeal. Said differently, completion of the project would make it impossible for the reviewing court to grant effectual

relief. Accordingly, Appellant respectfully requests that this Honorable Court grant its Petition for Writ of Supersedeas and stay this matter pending resolution of the appeal. Alternatively, Appellant respectfully requests that this Court issue an order temporarily staying the subject order and holding the instant matter in abeyance until further determination can be made by this Court. Finally, given the irreversible impact which the looming project poses, Appellant respectfully requests that this Court grant an expedited hearing as to this matter.

Conclusion

Based on the foregoing, Appellant respectfully requests that this Honorable Court grant its Petition for Writ of Supersedeas, and stay the Administrative Law Court's *Final Order* while this case is on appeal. An Order of Supersedeas is necessitated to prevent a contested issue from becoming moot. The environmental and social impacts of the pipeline project cannot be undone once the project is commenced and/or completed. Completion of the project would make it impossible for the reviewing court to grant effectual relief. Alternatively, Appellant respectfully requests that this Court issue an order temporarily staying the subject order and holding this matter in abeyance until further determination can be made by this Court. Finally, given the irreversible impact which the looming project poses, Appellant respectfully requests that this Honorable Court grant an expedited hearing on the instant Petition.

[Signatures on following page]

Respectfully submitted,

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

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Environmental Control and Dominion Energy, Respondents.

EXHIBITS TO
PETITION FOR WRIT OF SUPERSEDEAS

1. Exhibit A – Administrative Law Court Final Order under appeal, filed 07/24/23.
2. Exhibit B – Dominion Energy – Notice of Project Commencement – Letter dated December 6, 2023.
3. Exhibit C – Request for Final Review, dated February 18, 2023, with attachments.

[Signatures on following page]

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December 11, 2023

EXHIBIT A

[Administrative Law Court Final Order, filed 07/24/2023]

**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

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 un rebutted 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 a 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.

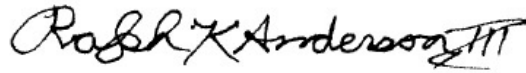
Accordingly, there were multiple opportunities for the community to comment and participate in the permitting process, including two comment periods and a public hearing, and the Department took measures to provide access to a community that had limited internet access despite the challenges of the pandemic. 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.

A handwritten signature in black ink, reading "Ralph King Anderson, III". The signature is fluid and cursive, with the "III" at the end being particularly distinct.

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).

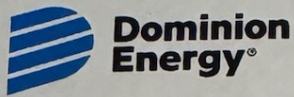


Stephanie Perez
Judicial Law Clerk

July 24, 2023
Columbia, South Carolina

EXHIBIT B

[Dominion Energy – Notice of Project Commencement,
Letter dated December 6, 2023]



Kathy Andrews
307 32nd Avenue South
Atlantic Beach, SC 29582

December 6, 2023

Re: River Neck to Kingsburg Project – Old River Road, Florence County

Dear Landowner:

In the coming weeks, Dominion Energy will begin work on a gas line improvement project within the Old River Road area of Florence County. This project will provide the additional capacity and flexibility needed to meet the growing demand for natural gas in the eastern region of South Carolina and ensure safe, reliable, and affordable energy to our residential, commercial, and industrial customers for years to come.

With a profound respect for the communities we serve, we understand that construction projects can sometimes create temporary noise or traffic. Dominion Energy is committed to completing this work safely and with minimal disruptions to our customers.

If you have any questions or would like additional information about this project, please visit our website at DominionEnergy.com, or contact Paul Thompson at (803) 217-6393

Sincerely,

A handwritten signature in black ink that reads 'Craig M. Bodie'.

Craig Bodie
Project Manager, DESC Energy

EXHIBIT C

[Request for Final Review, dated February 18, 2023]



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

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Lauren Megill Milton | lauren@scelp.org

February 18, 2022

VIA EMAIL AND U.S. MAIL

M. Denise Crawford, Clerk of the Board
South Carolina Board of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
boardclerk@dhec.sc.gov

RECEIVED
Feb 22 2022
Clerk, Board of Health and
Environmental Control
22-RFR-04

RE: DHEC SAC 2019-01427
Request for Board Review (RFR)
Permit to install a gas main in tributaries to the Great Pee Dee River in Florence County

Dear Denise,

Enclosed for filing please find the Request for Final Review Conference in the above-referenced matter submitted on behalf of the Blue Ridge Environmental Defense League (BREDL) along with my certificate of service. Our office manager, Debbie Weiner, paid the \$100 filing fee with credit card by phone this morning (Confirmation #: B3CSRE3KT6SA4). Please return a clocked-in copy by email.

Thank you very much for your kind cooperation and please don't hesitate to reach out if you need anything else. With deep respect and kind regards, I remain;

Sincerely,

Lauren Megill Milton

enclosures

cc: Kathy Andrews (KAndrews@bredl.org)
Ben Cunningham (ben@scelp.org)

Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

Blue Ridge Environmental Defense League,

Requestor,

vs.

Dominion Energy and South Carolina Department of Health and Environmental Control,

Respondents.

RE: Permit to install a gas main in tributaries to the
 Great Pee Dee River in Florence County
P/N#: SAC 2019-01427

REQUEST FOR FINAL REVIEW CONFERENCE

Blue Ridge Environmental Defense League (“BREDL” or “Requestor”) hereby requests that the Board of Health and Environmental Control (“Board”) conduct a Final Review Conference in connection with the DHEC staff’s decision to issue Dominion Energy a 401 Water Quality Certification and R. 19-450 Certification SAC 2019-01427 (collectively referred to as the “Certifications”).

The Certifications authorize the construction of a gas main in Jefferies Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, wetlands, and unnamed tributaries to the Great Pee Dee River in Florence County, South Carolina that will result in permanent fill impacts, temporary excavation impacts, temporary clearing impacts and permanent clearing impacts to wetlands and streams. Approval of a permit for Dominion Energy to install a gas main in tributaries to the Great Pee Dee River cannot, even with the conditions proposed by DHEC staff, be “consistent with the certification requirements of Section 401 of the Federal Clean Water Act and the permitting requirements of R. 19-450,” and therefore the Board should grant Requestor BREDL’s Request for Final Review.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Halfacre, PhD, Marilyn Hemingway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze **Board Member Emeriti** - Frances Close, John Mark Dean, Robert Schofield

Printed on recycled paper

A. BACKGROUND

Dominion Energy is proposing to construct approximately 76,218 LF of new 16-inch diameter steel natural gas main that runs from River Neck Road to the Kingsburg Valve Station in Florence County, South Carolina. The project consists of the installation of a 16-inch gas main within an approximately 40-foot-wide existing easement and a 10-foot-wide expansion of the easement to the west. The proposed project will result in temporary clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream, temporary excavation impacts to 8.35 acres of wetlands and 119 linear feet of stream, permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream, and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream. Stated differently, Dominion proposes impacts to 32 separate wetlands or waters, including:

- Twenty-seven (27) temporary excavation impacts totaling 8.378 acres;
- Twenty-nine (29) permanent clearing impacts totaling 2.990 acres;
- Three (3) permanent fill impacts totaling 0.009 acres; and
- Nine (9) temporary clearing impacts totaling 6.337 acres.

WETLAND ID	IMPACT #	TEMPORARY IMPACT (ACRES / LF)		PERMANENT CLEARING IMPACT (ACRES / LF)		PERMANENT FILL IMPACT (ACRES / LF)		TEMPORARY CLEARING IMPACT (ACRES / LF)		WETLAND TYPE	ACREAGE	FEET
B	1	0.110	0.00	0.030	0.00	0.000	0.00	0.000	0.00	WETLAND	0.140	0.00
A	2	5.140	0.00	1.800	0.00	0.000	0.00	5.640	0.00	WETLAND	12.580	0.00
C	3	0.000	0.00	0.060	0.00	0.000	0.00	0.020	0.00	WETLAND	0.080	0.00
D	4	0.000	0.00	0.125	0.00	0.000	0.00	0.000	0.00	WETLAND	0.125	0.00
E	5	0.000	0.00	0.089	0.00	0.000	0.00	0.000	0.00	WETLAND	0.089	0.00
F	6	0.490	0.00	0.120	0.00	0.000	0.00	0.310	0.00	WETLAND	0.920	0.00
G	7	0.270	0.00	0.094	0.00	0.000	0.00	0.140	0.00	WETLAND	0.504	0.00
AA	8	0.180	0.00	0.042	0.00	0.000	0.00	0.000	0.00	WETLAND	0.222	0.00
BB	9	0.013	0.00	0.017	0.00	0.000	0.00	0.000	0.00	WETLAND	0.030	0.00
CC	10	0.007	0.00	0.014	0.00	0.000	0.00	0.000	0.00	WETLAND	0.021	0.00
DD	11	0.020	0.00	0.036	0.00	0.000	0.00	0.000	0.00	WETLAND	0.056	0.00
EE	12	0.011	0.00	0.015	0.00	0.000	0.00	0.000	0.00	WETLAND	0.026	0.00
FF	13	0.160	0.00	0.040	0.00	0.000	0.00	0.000	0.00	WETLAND	0.200	0.00
GG	14	0.008	0.00	0.005	0.00	0.000	0.00	0.000	0.00	WETLAND	0.013	0.00
HH	15	0.130	0.00	0.014	0.00	0.000	0.00	0.000	0.00	WETLAND	0.144	0.00
II	16	0.017	0.00	0.005	0.00	0.000	0.00	0.016	0.00	WETLAND	0.038	0.00
JJ	17	0.410	0.00	0.100	0.00	0.000	0.00	0.000	0.00	WETLAND	0.510	0.00
KK	18	0.040	0.00	0.007	0.00	0.000	0.00	0.000	0.00	WETLAND	0.047	0.00
TRIBUTARY LL	19	0.019	78.00	0.002	11.00	0.0045	22.00	0.008	27.00	NON-WETLAND WATERS	0.034	138.00
MM	20	0.140	0.00	0.030	0.00	0.000	0.00	0.000	0.00	WETLAND	0.170	0.00
NN	21	0.170	0.00	0.050	0.00	0.000	0.00	0.000	0.00	WETLAND	0.220	0.00
H	22	0.190	0.00	0.050	0.00	0.000	0.00	0.120	0.00	WETLAND	0.360	0.00
I	23	0.120	0.00	0.040	0.00	0.000	0.00	0.000	0.00	WETLAND	0.160	0.00
J	24	0.060	0.00	0.020	0.00	0.000	0.00	0.000	0.00	WETLAND	0.080	0.00
K	25	0.250	0.00	0.070	0.00	0.000	0.00	0.000	0.00	WETLAND	0.320	0.00
L	26	0.150	0.00	0.050	0.00	0.000	0.00	0.080	0.00	WETLAND	0.280	0.00
TRIBUTARY SS	27	0.009	41.00	0.002	10.00	0.000	0.00	0.003	26.00	NON-WETLAND WATERS	0.014	77.00
RR	28	0.044	0.00	0.013	0.00	0.000	0.00	0.000	0.00	WETLAND	0.057	0.00
QQ	29	0.030	0.00	0.000	0.00	0.000	0.00	0.000	0.00	WETLAND	0.030	0.00
OO	30	0.190	0.00	0.050	0.00	0.000	0.00	0.000	0.00	WETLAND	0.240	0.00
C (5-28)	31	0.000	0.00	0.000	0.00	0.0017	0.00	0.000	0.00	WETLAND	0.002	0.00
D (5-28)	32	0.000	0.00	0.000	0.00	0.0024	0.00	0.000	0.00	WETLAND	0.002	0.00
Total	--	8.378	119.00	2.990	21.00	0.009	22.00	6.337	53.00	--	17.714	193.00

See Exhibit A, at p. 9.¹

The upper portion of the project site is located within Watershed 03040201-09. Jeffries Creek, Pye Branch, and Middle Swamp are classified as FW (dissolved oxygen not less than 4 mg/l and pH between 5.0 and 8.5) and the remaining streams in the watershed are classified as FW (Freshwater). The gas main will be installed through a combination of horizontal directional drilling

¹ Exhibit A is the Certifications [https://scdhec.gov/sites/default/files/media/document/BOW_DominionPamplico_NODD.pdf]

(HDD) and open trench excavations. The crossing under Jeffries Creek will be installed by HDD. Jeffries Creek accepts drainage from Beaverdam Creek, Gulley Branch, Pye Branch, Middle Swamp, Eastman Branch, and Cane Branch. Next, Polk Swamp enters the system, followed by Middle Branch, Long Branch, Boggy Branch, More Branch, and Willow Creek. The Jeffries Creek Watershed then drains into the Great Pee Dee River.

The applicant has not proposed mitigation because it claims the project will result in less than 0.01 acre of permanent fill impact in wetlands and less than 0.005 acre of permanent fill impact in streams. Dominion Energy stated the basic purpose of the proposed project is to install a gas main to support the growth in the area by providing the additional capacity and flexibility to meet the current and anticipated customer demands for natural gas. It also defined the overall purpose as provision of natural gas utilities in Florence County, South Carolina for developments requiring natural gas as an energy supply. The U.S. Army Corps of Engineers is reviewing the application to determine whether it complies with Nationwide Permit 12, Utility Line Activities (SAC 2019-01427).

The proposed project corridor is approximately 14.5 miles long, 50 feet wide, and 212.2 acres in total area. The proposed pipeline will begin with a connection to an existing gas regulating station at River Neck Road and will be installed east of North Old River Road and South Old River Road starting near the intersection of River Neck Road and Wross Lane in Florence County, South Carolina (Latitude: 34.09917°North, Longitude: 79.54806°West). The proposed pipeline will terminate with a connection at the Kingsburg Valve Station near the intersection of South Old River Road and East Brazen Road in Florence County, South Carolina (Latitude: 33.9075°North, Longitude: 79.46472°West). DHEC issued its staff decision to approve the Certifications on February 4, 2022, copies of which are attached hereto with the Staff Assessment as **Exhibit A**. BREDL requests that the Board reverse the staff decision because it fails to comply with state laws, regulations and policies.

B. REQUESTOR AND ITS INTERESTS

The Requestor, Blue Ridge Environmental Defense League (“BREDL”), is a regional, non-profit, community-based organization founded on earth stewardship, environmental democracy, social justice, and community empowerment. BREDL’s members are citizens and residents of South Carolina who own property, reside and use natural resources in Florence County and specifically in the vicinity where the proposed project is located.

BREDL has grave concerns about the environmental impacts of this project and the justice of placing yet another pipeline in an overburdened community. This pipeline will necessarily have an adverse impact of development on this rural community. Petitioner’s members use and enjoy natural resources in the vicinity of the proposed project. They breathe the air, drink and use the water, walk and drive in the community and enjoy the wildlife, natural streams and forests in their rural community. They are concerned that this project and related development will harm them and the natural resources they value and enjoy. Petitioner and its members participated in the public hearing and comment process conducted by the DHEC Staff regarding this project.

C. STATUTORY FRAMEWORK

Congress recognized the essential role that States must play in protecting their own waters. Congress enacted the Clean Water Act in part to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 909 F.3d 635, 647 (4th Cir. 2018) (quoting 33 U.S.C. § 1251(b)) (*emphasis omitted*); *see also Piney Run Pres. Ass’n v. Cnty. Comm’rs of Carroll Cnty.*, 268 F.3d 255, 265 n.9 (4th Cir. 2001) (“Under the CWA, states have the primary role in promulgating water quality standards.”). South Carolina exercises this authority through DHEC. The Department, in turn, has promulgated various State water quality standards. One standard, the State’s Antidegradation Policy, included Antidegradation Rules in Section D of S.C. Regulation 61-68, Water Classifications and Standards, which provides in part that “existing water uses and the level of water quality necessary to protect these existing uses shall be maintained and protected regardless of the water classification.” S.C. Code Ann. Regs. 61-68(D)(1).

Under section 401 of the Clean Water Act, an applicant for a federal license or permit for activity that “may result in any discharge into the navigable waters”—such as an applicant for a section 404 dredge-and-fill permit or for a certificate of public convenience and necessity under the Natural Gas Act—must receive a water quality certification: state certification that “any such discharge will comply with the applicable provisions of sections [301–303 and 306–307 of the Clean Water Act].”² As to water quality certification, EPA regulations specify that a water quality certification must include “[a] statement that there is a reasonable assurance that the activity [for which a water quality certification application has been submitted] will be conducted in a manner which will not violate applicable water quality standards.”³ Notably, States may generally regulate water quality more stringently than as required by the Clean Water Act.⁴ Section 401(d) provides additionally that states shall attach conditions to water quality certifications in the form of “effluent limitations and other limitations, and monitoring requirements” necessary to assure compliance with the applicable requirements of sections 301– 303 and 306–307 of the Clean Water Act, “and with any other appropriate requirement of State law set forth in [the water quality certification].”⁵

Under section 401 of the Clean Water Act, South Carolina must determine whether or not “any such discharge [arising from the project] will comply” with applicable water quality requirements. 33 U.S.C. § 1341(a)(1). Thus, DHEC’s 401 Water Quality Certification program requires that the agency consider all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

² 33 U.S.C. § 1341(a)(1). These sections of the Clean Water Act include provisions relating to standards, limitations, and prohibitions for point source discharges, and also relating to state-promulgated water quality standards. 33 U.S.C. §§ 1311–13, 1316–17.

³ 40 C.F.R. § 121.2(a)(3).

⁴ 33 U.S.C. § 1370. EPA regulations note that this non-preemption clause is applicable to water quality standards. 40 C.F.R. § 131.4(a) (“As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by [the EPA water quality standards] regulation.”).

⁵ 33 U.S.C. § 1341(d). Although this provision does not mention section 303, the Supreme Court has held that the reference to section 301 incorporates section 303 by reference, making water quality standards a permissible consideration in setting conditions under section 401(d). *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 712–13 (1994).

- (a) Whether the activity is water dependent and the intended purpose of the activity;
- (b) Whether there are feasible alternatives to the activity;
- (c) All potential water quality impacts of the project, both direct and indirect, over the life 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;
 - (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

S.C. Code Regs. R. 61-101(F)(3)(c).

Further, the regulations explicitly state that certification **will** be denied if: (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; or (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality; or (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species. S.C. Code Regs. 61-101.F.5. Notably, Dominion need only fail to demonstrate compliance with one water quality standard in order for the Department to properly deny water quality certification for the Project. In this case, as outlined below, Dominion has failed to demonstrate compliance with all of the standards.

Moreover, pursuant to S.C. Code Regs. R. 19-450, the Department is responsible for assessing the total impact of the projected activity on the navigable waters and lands subject to the jurisdiction of this regulation, as well as the impact on the economy and natural resources of the state. S.C. Code Ann. Regs. 19-450.9. DHEC designed the Construction in Navigable Waters Permit program “to insure [sic] that the varied interests and uses of South Carolina navigable waters by the general public are fully considered by a comprehensive review of proposed activities.” SCDHEC, Navigable Waters, 1.1.

Navigable waters are “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.” S.C. Code Ann. Regs. § 19-450.2.C. Under this regulation, the Department must assess the “utilization and protection of important state resources and balance the extent and permanence of reasonably foreseeable benefits and detriments of the projected activity including its impact on conservation, economics, aesthetics, general environmental concerns, cultural values, fish and wildlife, navigation, erosion and accretion, recreation, water quality, water supply and conservation, and determine whether the projected activity is consistent with the needs and welfare of the public.” In particular the Department shall consider the comments and objections of the affected agencies as well as the public, and the extent to which:

1. the activity requires construction in, on or over a navigable waterway, and the economic benefits to the state and public from such location;
2. the activity would harmfully obstruct navigability or the natural flow of navigable waters or

- cause erosion, shoaling of navigable channels, or the creation of stagnant waters;
- 3. the activity would impact fish and wildlife, water quality and other natural resource values or could affect the habitats of rare and endangered species of wildlife and irreplaceable historic and archaeological sites associated with public lands and waters;
- 4. the activity could affect public access to, and use of, public lands;
- 5. the economic benefits to the state and public from the authorized use of lands and waters meets or exceeds the benefits from preservation of the area in its unaltered state;
- 6. there is any adverse environmental impact which cannot be avoided by reasonable safeguards;
- 7. all feasible alternatives are taken to avoid adverse environmental impacts resulting from the project; and,
- 8. the long range, cumulative effects of the project, including the cumulative effects of similar projects, may affect navigable waters.

S.C. Code Ann. Regs. 19-450.9.

Dominion has failed to demonstrate compliance with all of the standards and for the reasons outlined below, BREDL asks DHEC to reverse Staff's decision.

D. THE BASIS FOR THIS REQUEST

Requestor is informed and believes that the DHEC staff's decision was made in violation of applicable statutes, regulations and rules contained in the 401 Water Quality Regulations and R. 19-450 Regulations. This request for final review conference in this matter seeks to address whether the project violates the requirements of DHEC Regulations 61-101.F., in that:

- a. The project is categorically not water dependent and the project purpose is impermissibly narrow in violation of DHEC Regulations 61-101.F.3(a) and 19-450.9; and
- b. There are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulations 61-101.F.5(b), 61-101.F.3(b) and 19-450.9; and
- c. The project will permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired and it fails to take into account the physical, chemical, and biological impacts, including cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others in violation of DHEC Regulation 61-101.F.5.(a), 19-450.9 and 61-101(F)(3)(c); and
- d. The proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d) and 19-450.9; and
- e. The project proposes to fill and make significant alterations to a water of the State violating DHEC Regulations 61-9 and 61-68, and thus also violates Regulation 61-101 and 19-450.9; which require compliance with these additional regulations; and
- f. The project calls for permanent impacts to wetlands associated with the project, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9, 61-68, 61-101.F and 19-450.9 in

that the benefits from preserving the area in its unaltered state is greater than the proposed use;

E. THIS PROJECT IS CONTRARY TO OUR LAWS AND POLICIES ON ENVIRONMENTAL PROTECTION

BREDL requests that the Board reverse staff's decision because it fails to comply with state laws, regulations, and policies.

1. The project is categorically not water dependent and the project purpose is impermissibly narrow in violation of DHEC Regulations 61-101.F.3(a) and 19-450.9

Regulation 61-101.F.3(a) requires DHEC to assess "whether the activity is water dependent and the intended purpose of the activity." R. 61-101.F.3(a) Similarly, S.C. Code Ann. Regs. 19-450.9.A.7 requires DHEC to assess whether "the activity requires construction in, on or over a navigable waterway, and the economic benefits to the state and public from such location." R. 19-450.9.A.7. This proposed project is not water dependent. Dominion admits as much in its Section 404 Individual Permit Application and the DHEC staff report—upon which the proposed DHEC decision is based admits the same, stating:

(x) No - Pipelines convey materials from point to point. As such, they are not water-dependent and do not require location in or near aquatic resources. Furthermore, when the two points are on opposite sides of a large wetland or long tributary that's not practicable to avoid, in most cases it's possible, although not always practicable, for the pipeline to cross under the wetland or tributary using HDD without direct impacts.

See **Exhibit A**, p. 15, para. A.

This project is admittedly not water-dependent and DHEC staff's position ignores that when a project "is not water dependent" a presumption arises that there are "practicable alternatives [available] that do not involve special aquatic sites" and that "have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(2)-(3). Despite their assertions otherwise, Dominion Energy failed to adequately assess the project's feasible alternatives. Dominion completely failed to seriously consider less-damaging plans, let alone demonstrate that there are no less damaging feasible alternatives. A practicable alternative is one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Dominion and the Staff's position ignores that when a project "is not water dependent" a presumption arises that there are "practicable alternatives [available] that do not involve special aquatic sites" and that "have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(2)-(3). Here, the Staff Assessment and Dominion's June 2, 2021 submittal stated that "the applicant developed the following site selection criteria, listed in order of priority, as a measure of a successful gas main installation from River Neck Road Regulating Station to Kingsburg Valve Station:"

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 Kingsburg Valve Station
5. Readily accessible

See **Exhibit A**, p. 15, para. A.

DHEC has an obligation to determine whether the stated purpose of the Project could be served by less environmentally damaging alternatives. Instead of rebutting the water-dependency presumption as required, Dominion focused on offsite alternatives with the same constrained project purpose in an attempt to foreclose all other alternative sites or less-damaging alternative development designs. 40 C.F.R. 230.10(a)(3) would be meaningless if a project could be defined so narrowly as to require the development of a particular wetland. See *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1367 (11th Cir.2008) (Kravitch, J., dissenting) (“A project is not water-dependent simply because an applicant asks to do it on wetlands, but only where it literally cannot be done elsewhere.”).

Moreover, there is insufficient proof in the Staff Assessment that this project has to be routed through wetlands, much less navigable waters. R. 19-450.9.A.7 (DHEC must assess “the activity requires construction in, on or over a navigable waterway, and the economic benefits to the state and public from such location.”) To the Pamlico community in which this pipeline is proposed to be situated, there will only come financial hardship; not benefit.

In a peer reviewed study published in May 2021 by NC State University, the authors released their nationwide investigation of natural gas gathering and transmission pipelines. It revealed a disturbing correlation between the level of pipeline development and negative social impacts.⁶ The NCSU study considers racial composition, age distribution and socioeconomic factors in a “social vulnerability index” (SVI), a measure of a community’s ability to cope with pollution, accidents and other hazards. BREDL reviewed SVI data compiled by CDC for Florence County, SC which indicates that there are already moderate to elevated levels of social vulnerability in the census tracts in the Pamlico area of Florence County.

The EPA has said “Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁷ The EPA further states that environmental justice will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process, to have a healthy environment in which to live, learn, and work. *Id.* The signing of Executive Order 12,898⁸ in 1994 by President Clinton, which incorporated environmental justice principles into the work of all federal agencies, was generally viewed as a positive step toward involving communities in environmental decision-making and protecting the health of minority and low-income communities. The order specifically requires that federal agencies make achieving environmental justice part of their missions by evaluating the effects of their programs, policies, and activities on minority and low-income populations. As the state’s environmental regulator, and a recipient of

⁶ Ryan E. Emanuel, Martina Angela Caretta, Louie Rivers, Pavithra Vasudevan. “Natural Gas Gathering and Transmission Pipelines and Social Vulnerability in the United States” *GeoHealth*, 2021; DOI: 10.1029/2021GH000442

⁷ <https://www.epa.gov/environmentaljustice>

⁸ Executive Order 12,898, FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS,

federal funding, DHEC was also required to ensure that sensitive minority and low-income communities were considered in their decision-making processes and they acknowledged, “Historically, overburdened communities have experienced higher levels of environmental pollution within their community along with other social and economic burdens.”⁹

As a result of this EO, in 2007, the South Carolina General Assembly passed Act 171 to create an S. C. Environmental Justice Advisory Committee within SC DHEC. The Committee was tasked with identifying existing practices at state agencies regarding environmental justice issues, assessing how they impact economic development and revitalization projects, and making recommendations. As a result, a study was taken of the current landscape and among the key findings were: “Allowing poor communities to have a say in stopping undesirable development [is necessary to revitalize distressed areas]”, “Policy makers often ignore community input, especially that given by poor and African American community members” and “When relocating communities using [eminent] domain, the residents aren’t given a fair price.” See South Carolina Environmental Justice Advisory Committee Final Report.¹⁰ The goal of Executive Order 12,898, however, has not been met, and on January 20, 2021, the Biden administration called for a review of Nationwide Permits consistent with its Executive Order PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT AND RESTORING SCIENCE TO TACKLE THE CLIMATE CRISIS.¹¹ This directive, in relevant part, specifically calls out those “who disproportionately harm communities of color and low-income communities.” *Id.*

The area where Dominion proposes to place this fossil fuel¹² pipeline is one of the exact areas that should be given greater scrutiny under the EOs. Dominion claims, without proof, that this “proposed project is expected to have a positive impact on minority populations due to the creation of jobs,” but does not discuss other negative impacts to minority populations, such as the environmental degradation of the land, water and wildlife around the community. However, purely economic benefits of tax revenue and temporary job creation are insufficient to support grant of permit. *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’t Control*, 434 S.C. 1, 862 S.E.2d 72 (2021), *reh’g denied* (Sept. 1, 2021). The project does not comport with the Clean Water Act, R.61-101, or R.19-4507. To approve the project would cause health risks, environmental devastation, and the taking of precious threatened and endangered species the community enjoys.

The community is frightened that Dominion—with its poor safety record in S.C. and all over the U.S.—will pollute their waters also. They are also scared because they know their community cannot withstand the devastation Dominion has historically brought to other neighborhoods. Dominion previously polluted South Carolina waters and the City of Florence’s drinking water is produced at a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline. African Americans represent 13.2% of the overall U.S. population but comprise more than 35% of U.S. patients on dialysis for kidney failure.¹³ This is not a proposal that will have the least environmentally damaging impact. Numerous community members suffer from kidney failure – a disease that affects African Americans 3x more than the

⁹ <https://scdhec.gov/history-ej>

¹⁰ <https://scdhec.gov/sites/default/files/media/document/EJAdvisoryFinalReportCombined.pdf>

¹¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>

¹² Fossil fuels can cause health impacts indoors, as well. <https://rmi.org/insight/gas-stoves-pollution-health/>

¹³ <https://www.kidney.org/news/newsroom/factsheets/African-Americans-and-CKD>

White population—and some are on dialysis. Environmental justice demands DHEC evaluate the exacerbated risks of a project to sensitive communities, and here, ingesting polluted water would further damage the kidneys of this sensitive population and cause irreversible impacts to the health of both those in the direct line of the pipeline and every downstream resident.

The community also has a higher-than-average percentage of residents below the poverty line when compared to the rest of South Carolina, meaning it cannot withstand Dominion’s unjust billing practices. Just this year, Virginia state regulatory staff found Dominion pocketed a profit of 13.61% from 2017 to 2020, resulting in \$1.143 billion in revenue above a fair profit.¹⁴ Dominion claimed its revenue was not excessive and argued the commission should increase its profit margin further in the future before reluctantly agreeing to return some money to its customers.¹⁵ This is not fair. Dominion’s business and construction practice history must be weighed against DHEC’s knowledge that “overburdened communities [experience] higher levels of environmental pollution within their community along with other social and economic burdens.”¹⁶ This is an area where Dominion has spent the last year and a half intimidating a community that has felt powerless in the face of Dominion’s strong-arm tactics, such as showing up on residents’ porches without notice without following Covid protocols to tell the residents they had “one more chance” to comply with its demands.¹⁷ Dominion has already served several Florence County residents who do not want to part with land that has been in their families for generations. *Id.* In response, the staff assessment states:

Pursuant to the S. C. Eminent Domain Procedure Act, a condemnor may commence an action for the acquisition of an interest in any real property necessary for any public purpose, S. C. Code Ann. § 28-2-60. As a public utility in South Carolina, DE is vested with the power of eminent domain to, among other things, acquire property for natural gas pipelines, appurtenant facilities, and activities related thereto, pursuant to S. C. Code Ann. § 58- 7-10 and S.C. Code Ann. § 28-2-60. As stated in an S.C. Attorney General Opinion: “Thus, our Supreme Court, as well as the General Assembly, deem a natural gas pipeline to be a “public utility” ... This characterization is consistent with the importance of natural gas to business and industry in the State as well as to the general public. As the Court in *Sheppard* stated, a utility, such as natural gas, is a service “essential to the public” “ (Op. S.C. Attorney Gen., July 1, 2015, citing *Sheppard v. City of Orangeburg*, 314 S.C. 240,442 S.E.2d 601 (1994)).

Exhibit A, p. 42.

This does not justify the poor treatment of black and brown families in an overburdened community. In some cases, this land is all the people have and they have been devastated and terrified by Dominion’s attempts to use eminent domain to build the pipeline. Dominion’s tactics, behavior,

¹⁴ <https://scc.virginia.gov/docketsearch/DOCS/5mt%2301!.PDF>; *see also* https://richmond.com/news/state-and-regional/govt-and-politics/dominion-virginiacustomers-should-get-312-million-refund-plus-rate-cut-scc-staff-says/article_d1fc47c1-18b6-5890-a08b-dea6d46fbfe6.html

¹⁵ https://richmond.com/news/state-and-regional/dominion-energy-changes-course-and-agrees-to-330-million-in-customer-refunds-in-ratecase/article_f3594dd3-7d83-54cc-95de-0d132e33d27d.html

¹⁶ <https://scdhec.gov/environment/environmental-justice-ej/history-ej>

¹⁷ <https://apnews.com/article/science-us-news-health-south-carolina-virus-outbreak-18f8fface06f10ee8811679920d7bc2c>

construction and billing practices and flagrant disregard of environmental laws demonstrate that this company should not be allowed to build this pipeline in this sensitive community.

2. There are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulations 61-101.F.5(b), 61-101.F.3(b) and 19-450.9

Regulation 61-101.F.3-5 states in part that “[i]n assessing the water quality impacts of the project, the Department will address and consider the following factors:... (b) whether there are feasible alternatives to the activity... Certification of the activities listed below will be issued when there are no feasible alternatives... Certification will be denied if... (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses,” *Id.* (emphasis added). Similarly, S.C. Code Ann. Regs. 19-450.9.A.7 requires DHEC to assess whether “all feasible alternatives are taken to avoid adverse environmental impact resulting from the project.” R. 19-450.9.A.7.

However, in the DHEC staff report when asked the question, “Are there feasible alternatives to the proposed activity?” DHEC staff answered that question by stating “No,” however that answer is incorrect.¹⁸ This position ignores that when a project “is not water dependent” a presumption arises that there are “practicable alternatives [available] that do not involve special aquatic sites” and that “have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(2)-(3).

Instead of rebutting this presumption as required, Staff allowed Applicant to completely bypass the no-action alternative, which Staff admits was never considered. *Compare Exhibit A*, p. 15, para. B (“The applicant eliminated the no-action alternative as no interpretation of the no-action alternative would meet the project purpose.”) *with* S.C. Code Ann. Reg. 61-101(F)(4) (“Certification of the activities listed below will be issued when there are no feasible alternatives.”). Moreover, the wetlands that will be impacted by the Project have not been fully assessed in terms of uses and functions, and therefore it cannot be concluded by the Department that there will be no adverse impacts to the waters or wetlands.

Moreover, an alternative site does not have to accommodate components of a project that are merely incidental to the applicant’s basic purpose. For example, in *Shoreline Assocs. v. Marsh*, 555 F.Supp. 169, 179 (D.Md.1983), *aff’d*, 725 F.2d 677 (4th Cir.1984), the Corps refused to issue a permit to a developer for building a number of waterfront town houses together with a boat storage and launching facility. *Id.* The developer argued that the Corps’ proposed alternative site for the town houses could not accommodate the boat storage and launch area. The court upheld the Corps’ denial of the permit, observing that the boat facilities were merely “incidental” to the town house development. *Id.* The same is true here; DHEC has allowed incidental easement agreements to drive an improper characterization of purpose that serves to constrain the evaluation of alternatives. 40

¹⁸ DHEC Staff goes on to state as follows: “According to the applicant's June 2, 2021 submittal, alternatives were evaluated based on specific site selection criteria identified during development of the purpose and need of the proposed project. The June 2, 2021 submittal stated that the applicant developed the following site selection criteria, listed in order of priority, as a measure of a successful gas main installation from River Neck Road Regulating Station to Kingsburg Valve Station. 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 Kingsburg Valve Station; 5. Readily accessible.”

C.F.R. 230.10(a)(3) would be meaningless if a project could be defined so narrowly as to require the development to impact wetlands. *See Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1367 (11th Cir.2008) (Kravitch, J., dissenting) (“A project is not water-dependent simply because an applicant asks to do it on wetlands, but only where it literally cannot be done elsewhere.”). It is well-settled that “[t]he cumulative destruction of our nation’s wetlands that would result if developers were permitted to artificially constrain the alternatives analysis by defining the project’s purpose in an overly narrow manner would frustrate the statute and its accompanying regulatory scheme.” *Nat’l Wildlife Fed’n v. Whistler*, 27 F.3d 1341, 1346 (8th Cir. 1994). Because Dominion failed to adequately assess the project’s feasible alternatives, the DHEC board should rescind the Staff’s decision.

3. The project will permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired and it fails to take into account the physical, chemical, and biological impacts, including cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others in violation of DHEC Regulation 61-101.F.5.(a), 19-450.9 and 61-101(F)(3)(c)

Regulation 61–101 states, “Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired.” S.C. Code Ann. Regs. 61–101.F.5(a). Similarly, S.C. Code Ann. Regs. 19-450.9.A.8 requires DHEC to assess how “the long range, cumulative effects of the project, including the cumulative effects of similar projects, may affect navigable waters.”

Here, Department staff applied an incorrect interpretation to the phrase “in the vicinity of the project” by failing to consider the impacts of the requested fill activity on the aquatic ecosystem outside of the actual fill location in the stream. Here, the proposed project will result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream, temporary excavation impacts (trench and backfill) to 8.35 acres of wetlands and 119 linear feet of stream (0.028 acre), temporary clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acre), and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acre). **Exhibit A**, p. 8.

Obviously, the permanent filling of 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acre) will permanently alter the aquatic ecosystem within the wetlands and the stream but that fill will also alter the aquatic ecosystem downstream of the project such that its functions and values are eliminated or impaired. Also, DHEC failed by categorizing as “temporary” the excavation impacts (trench and backfill) to 8.35 acres of wetlands and 119 linear feet of stream (0.028 acre), as well as the “temporary” clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acre). DHEC staff admits the fill for this project is not temporary and by only giving cursory treatment to the environmental impacts the applicant chose to label as “temporary” during the construction phase of the project, the staff ignores the fact that trenching and filling wetlands alters the aquatic ecosystem both onsite and downstream of the project such that the stream and wetlands functions and values are eliminated or impaired. *See Exhibit A*, p. 10, para. A.2 (“Is the fill temporary? (x) No.”).

On p. 31 of the Staff Assessment, Dominion claims “temporary sources of pollution, such as those associated with construction, are deemed not to cause degradation.” It is disingenuous to suggest EPA or South Carolina allows some applicants to pollute as they wish. Further, the statement Dominion included that, “States may allow some limited activities which result in temporary and short-term changes in water quality.” is taken out of context. **Exhibit A**, p. 31. That quote, taken in proper context, is about ONRW.¹⁹ In a further attempt to make its pollution appear legal, Dominion cites *Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 758 (4th Cir. 2019). **Exhibit A**, p. 31. It is notable to mention the opinion cited by Dominion justifies that statement with a Virginia law not applicable in the instant case, 9 Va. Admin. Code 25-260-30A(3)(b)(3).²⁰ South Carolina’s policies in R. 61.101 do not contain any language on temporary impacts and do not encourage pollution.

Dominion’s further claims that “states can rely on compliance with the construction stormwater permit to satisfy antidegradation requirements” is similarly disingenuous, because this project should not have been issued in the first instance. **Exhibit A**, p. 31. The pipeline will be constructed by the “trench” or “horizontal directional drilling” (HDD) methods. *See Exhibit A*, p. 10, para. B (“The gas main will be installed through a combination of horizontal directional drilling (HDD) and open trench excavations. Excavations will be temporary and will impact a total of 8.35 acres of wetlands and 119 linear feet of stream (0.028 acre). Excavated material will be temporarily stockpiled and then used as backfill in trenches following pipeline installation.”) In the trench method, the drainage pipes are placed by digging a trench and placing the pipe in the trench. The contractor uses steel sheet piling to protect the open trench until the pipe is placed. The HDD method involves drilling an underground hole and then pulling the drainage pipe through the hole. The underground hole is created by drilling a pilot hole. The actual drilling is done by hydraulic cutting action with a jet nozzle. After the pilot hole is completed, the hole is enlarged by pulling successively larger cutting assemblies through the hole until it reaches the required diameter. The drainage pipe is then pulled through the hole.

On p. 12 of the staff decision, DHEC acknowledges the water quality impacts that will arise from this project but tries to categorize them as temporary. *See Exhibit A*, p. 12 (“Temporary, water quality impacts from nonpoint sources will be minimized and should not contravene the water quality standards or existing and classified uses of the involved waterbody if the applicant adheres to Best Management Practices (BMPs), the conditions of the Nationwide Permit 12, including the

¹⁹ See Federal Register: November 8, 1983, Part 2. Water Quality Standards Regulation (1983). [available: <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=20003ZVR.txt>]. In context, the full quote states: “Fourth, § 131.12(a)(3) dealing with the designation of Outstanding National Resource Waters (ONRW) was changed to provide a limited exception to the absolute “no degradation” requirement. EPA was concerned that Waters which properly could have been designated as ONRW were not being so designated because of the flat no degradation provision, and therefore were not being given special protection. The no degradation provision was sometimes interpreted as prohibiting any activity (including temporary or short-term) from being conducted. States may allow some limited activities which result in temporary and short-term changes in water quality. Such activities are considered to be consistent with the intent and purpose of an ONRW.”

²⁰ *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 758 (4th Cir. 2019). “Even with respect to Tier 3 waters, the policy states that “[a]ctivities causing temporary sources of pollution may be allowed in [Tier 3] waters ... even if degradation may be expected to occur provided that after a minimal period of time the waters are returned or restored to conditions equal to or better than those existing just prior to the temporary source of pollution.” 9 Va. Admin. Code 25-260-30A(3)(b)(3). Even in the most protected state waters, Virginia does not consider temporary sources of pollution, such as the construction of the ACP, to violate antidegradation policies.”

Charleston District Regional conditions, and the conditions in Section VIII of this staff assessment during and after the project.”) BMPs for prevention of water pollution may not properly prevent contamination events for a number of reasons, such as the correct BMPs were planned, but were not installed correctly or at all; inappropriate BMPs were installed, or BMPs were inadequate for the conditions; or BMPs were improperly operated and maintained. In addition to these permanent and temporary impacts, wetland crossings can result in conversions from forested to either scrub-shrub or herbaceous wetlands, which will nearly always result in a loss of important wetland functions.

Further, none of this is temporary because Dominion proposes to place the line 4-5’ below the surface and conduct maintenance which will require continued, periodic destruction of the wetland. See **Exhibit A**, p. 10, para. B (“According to the applicant, open trench excavation is the preferred method because it allows the gas main to be installed only four to five feet in depth below the ground surface. They stated installing the gas main at a consistent shallow depth is a safer method and allows for the routine maintenance to be performed that is often required on transmission pipelines. They also stated installation using open trench would significantly reduce the potential to impact the existing 8-inch gas pipeline.”) This increasing sedimentation, in turn, may alter the water’s chemical balance or decrease its dissolved oxygen, harming aquatic wildlife. The sedimentation may also harm aquatic wildlife by decreasing light penetration, killing organisms that rely on photosynthesis to produce oxygen. Also, the drying of streams during construction would disrupt the movement of fish and other organisms by imposing physical barriers to upstream or downstream migration.

The proposal of the reissuance of the permit fails to consider the cumulative impact of an infinite number of projects approved near the project, as well as the impact of placing another pipeline next to an existing pipeline. Under S.C. Code Regs. § 19-450.9.A.8, DHEC staff must account for “the long range, cumulative effects of the project, including the cumulative effects of similar projects, may affect navigable waters.” Courts assessing cumulative effects analysis explain that such analysis must not only describe related projects but also enumerate the environmental effects of those projects collectively. See *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide “adequate data of the time, place, and scale” and did not explain in detail “how different project plans and harvest methods affected the environment”). In addition, such analysis must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. See *Klamath-Siskiyou*, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when “it only considers the effects of the very project at issue” and does not “take into account the combined effects that can be expected as a result of undertaking” multiple projects). Even though one single directional boring project standing on its own may not have significant long-range impacts, when considered together, the impacts of all the potential projects covered under this permit is significant. By giving a rubberstamp approval to a multitude of crossing operations without considering how these projects would cumulatively affect navigable waters held in trust by the public, DHEC failed to undertake the required analysis on the long-range cumulative effects the project would have on natural resources protected by the Public Trust Doctrine.

Overall, the conversion of forested/shrub wetlands has lasting and devastating impacts. The applicant baldly asserts that some activities associated with the project will not result in permanent impacts to wetlands, and that wetlands will be restored to pre-existing conditions. This is impossible given that trenching activities would require the permanent removal of vegetation and result in a

decrease in water quality. The permanent impacts to wetlands require mitigation or replacement but the applicant does not address this requirement whatsoever. Because this project will permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired and it fails to account for the physical, chemical, and biological impacts, including cumulative impacts of the proposed activity, the DHEC board should rescind the Staff's decision.

4. The proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species in violation of DHEC Regulations 61-101.F.5.(c) and 19-450.9

South Carolina law provides that certification will be denied if “the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species.” R. 61-101.F.5.(c). Similarly, S.C. Code Ann. Regs. 19-450.9.A.3 requires DHEC to assess “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.” R. 19-450.9.A.3

Here, there are records of several State Wildlife Action Plan (SWAP) fish species in streams proposed to be crossed by the pipeline (Jeffries Creek, Mill Branch, Bigham Branch, Brier Branch, Barfield, Mill Creek and Bullock Branch). **Exhibit A**, p. 42. SCDNR reported records of American Eel (Highest Priority) and Ironcolor Shiner (Moderate Priority) occurring in Mill Branch and Bigham Branch and records of American Eel, Flat Bullhead (Moderate Priority) and Fieryback Shiner (Moderate Priority) occurring in Bullock Branch. *Id.* SCDNR also reported records of several federally listed threatened or endangered species in the project vicinity. *See* FN20, *infra*. They reported that the Great Pee Dee River is Designated Critical Habitat for Atlantic Sturgeon and there are known occurrences of Atlantic Sturgeon and Shortnose Sturgeon (both Federally Endangered) in the river. **Exhibit A**, p. 42. The SCDNR also reported nearby occurrences of the federally listed plant species Canby's Dropwort (Endangered) and Boykin's Lobelia (At Risk). As noted above in this brief, the federally-endangered plant species on this site are not safe without hand-clearing. The wetlands that will be impacted, whether by impacts qualified as temporary or permanent, will suffer unjustifiable harm that will permanently damage the ecosystem. Proof of this can be found by looking no further than Dominion's application materials. *Dominion's Application* at p. 34 (“The construction of this project will have a minimal long-term adverse effect on wildlife that use the habitat.”).

Section 7 of the Endangered Species Act directs each agency to ensure, in consultation with the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) under the Endangered Species Act of 1973, as appropriate, that “any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence” of listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). Under a Section 6 agreement with NMFS, SCDNR is authorized to enter into agreements with federal agencies for the conservation of endangered and threatened species, however DHEC did not follow the recommendations it received.²¹ While the Staff Assessment claims “DE provided documentation in their December 10, 2021 submittal that the U.S. Fish and Wildlife Service

²¹https://s3.amazonaws.com/media.fisheries.noaa.gov/2020-10/Limited%20Agreement%20South%20Carolina%202020_signed.pdf?OmHercjUjKpGRCaCx.V7VnsSDMx9h3d0

concurred with a no-effect determination after reviewing their database, and finding there were no federally-listed species within the proposed area. They also provided documentation of their preapplication consultation with the SCDNR.” and also states, “The SCDNR reviewed the proposed project and evaluated its impact on natural resources. The SCDNR did not object to SCDHEC certifying the application provided their concerns about protected conservation lands within the existing/proposed ROW were adequately addressed, provided their concerns about state and federal species of conservation concern in the project area were adequately addressed, and provided the SCDNR’s specific recommendations included in their comment letter²² as bullets were incorporated as minimization measures.” **Exhibit A**, p. 27, 20. SCDNR’s non-objection was contingent upon all conditions requested being addressed in the permit and they are not. *Compare Exhibit A*, p. 11, para. C. (“The project includes temporary and permanent clearing in wetlands and tributaries. Following initial clearing and pipeline installation, most areas will be stabilized and allowed to revegetate naturally,”) *with* DNR letter dated June 15, 2021 (“Where necessary to remove vegetation, supplemental plantings should be installed following completion of the project. These plantings should consist of appropriate native species for this ecoregion.”).

Moreover, DHEC impermissibly allowed the applicant to modify DNR’s permit conditions. *Compare* DNR letter at FN4 (“Where trench excavation is required across flowing streams, SCDNR recommends the use of a temporary flume bypass instead of a dam-and-pump method, as the latter could entrain or impinge many of the above-mentioned fish species of concern as well as other aquatic organisms.” *with Exhibit A*, p. 20. (“After DE reviewed the draft condition and provided feedback, SCDHEC decided to change the wording of the condition to be more consistent with the terminology and intent of the SCDNR comments (which use the word stream(s) and only mention named tributaries) and with a similar condition in a previous certification for a major pipeline project, which also used the word stream(s).” **Exhibit A**, p. 20.

In yet another example, DNR specifically stated, “Clearing of riparian vegetation within wetlands and waters of the U.S. must be conducted manually and low growing, woody vegetation and shrubs must be left intact to maintain bank stability and reduce erosion.” *See* DNR letter. DNR also specifically requested that “construction activities avoid and minimize, to the greatest extent practicable, disturbance of woody wetland or riparian vegetation within the project area. Removal of vegetation should be limited to only what is necessary for construction of the proposed pipeline and road culvert.” FN20, *supra*. Instead of including it as a permit condition, DHEC impermissibly delegated their authority to Dominion and asked if it wanted to hand-clear in the wetlands. *See Exhibit A*, p. 17. (“SCDHEC also asked the applicant about conducting clearing of riparian vegetation manually within wetlands and waters of the U.S. rather than using mechanized clearing, which the applicant stated was permitted by the USACE.”) The Staff Response notes that Dominion claimed, “Hand clearing is not practicable in these areas because grubbing and rough grading will be required to facilitate a timber mat travel lane for the safe passage of equipment and to prepare a suitably-level work surface for construction,” and DHEC removed that condition from Dominion’s permit. **Exhibit A**, p. 17. Therefore, because the condition precedent for DNR’s concurrence was not met, there is not concurrence. Because there is not concurrence, there should be no permit. R. 61-101.F.6. (“Certification will not be issued unless the Department is assured appropriate and

²² *See* DNR letter dated June 15, 2021 (hereinafter “DNR letter”) [available at: https://scdhec.gov/sites/default/files/media/document/BOW_DominionPamplico_CommentLetter_SCDNR.pdf]

practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.”)

5. The project proposes to fill and make significant alterations to a water of the State violating DHEC Regulations 61-9 and 61-68, and thus also violates Regulation 61-101 and 19-450.9; which require compliance with these additional regulations

DHEC’s responsibilities are triggered when an entity intends to fill a portion of waters of the United States pursuant to section 404 of the Clean Water Act. The permit, also known as a 404 Discharge Permit, is issued by the Corps based upon an evaluation under the Guidelines for Specification of Disposal Sites for Dredged or Filled Material, which Section 401 of the Clean Water Act, 33 USC § 1341, provides that to obtain a Federal permit for discharge, an applicant must first obtain a certification from DHEC that the discharge complies with sections 1311, 1312, 1316, and 1317 of the Act.

To comply with this mandate, South Carolina enacted Regulation 61–101 to establish the certification requirements. In determining whether there may be water quality impacts associated with the proposed project, DHEC considers Reg. 61-68 (Water Classifications and Standards) and Reg. 61-69 (Classified Waters). In addition, Reg. 61-101 specifically incorporates by reference the Federal Clean Water Act, 33 U.S.C. 1341, and regulations promulgated thereunder by the U.S. Environmental Protection Agency. Reg. 61-101(F)(1). DHEC has a mandatory duty to maintain “stream flows necessary to protect classified and existing uses and the water quality supporting these uses.” S.C. Code Ann. Regs. 61-68.D.1.b. Specifically, the regulations provide that:” “[e]xisting water uses and the level of water quality necessary to protect these existing uses *shall* be maintained and protected regardless of the water classification ... Existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The stream flows necessary to protect classified and existing uses and the water quality supporting these uses *shall* be maintained consistent with riparian rights to reasonable use of water.” S.C. Code Ann. Reg. 61-68(D)(1)- 61-68(D)(1)(b) (emphasis added). Similarly, S.C. Code Ann. Regs. 19-450.9.A.1 and 2 requires DHEC to assess whether an activity requires construction in, on or over a navigable waterway and whether “the activity would harmfully obstruct navigability or the natural flow of navigable waters or cause erosion, shoaling of navigable channels, or the creation of stagnant waters.” R. 19-450.9.A.1-2. Moreover, R.19-450.4.A(7): “The permitted activities shall not block or obstruct navigation or the flow of any waters unless specifically authorized herein; no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the work authorized by the permits; and that no spoil, dredged material, or any other fill material be placed below the mean high water or ordinary high water elevation, unless specifically authorized herein.”

The upper portion of the project site is located within Watershed 03040201-09. In this watershed, Jeffries Creek, Pye Branch, and Middle Swamp are classified as FW* (dissolved oxygen not less than 4 mg/l and pH between 5.0 and 8.5) and the remaining streams in the watershed are classified as FW (Freshwater). The majority of the project site is located in the Great Pee Dee River Watershed (03040201-12) where all waters are classified as FW. Jeffries Creek and Great Pee Dee River are listed on the 2016 South Carolina List of Impaired Waters by 12-Digit HUC. As to the

Jeffries Creek impacts, the staff assessment notes: “the entire length of Jeffries Creek that is tributary to the Great Pee Dee River has the following site-specific standards: dissolved oxygen not less than 4 mg/l and pH from 5.0 to 8.5.” **Exhibit A**, at p. 7. South Carolina’s Antidegradation Policy provides that “existing water uses and the level of water quality necessary to protect these existing uses shall be maintained and protected regardless of the water classification.” S.C. Code Ann. Regs. 61-68(D)(1).

On p. 12 of the staff decision, DHEC acknowledges the water quality impacts that will arise from this project but tries to categorize them as temporary. *See Exhibit A*, p. 12 (“Temporary, water quality impacts from nonpoint sources will be minimized and should not contravene the water quality standards or existing and classified uses of the involved waterbody if the applicant adheres to Best Management Practices (BMPs), the conditions of the Nationwide Permit 12, including the Charleston District Regional conditions, and the conditions in Section VIII of this staff assessment during and after the project.”) The application also does not adequately consider the direct and indirect impacts of constructing this pipeline in the middle of a floodplain.²³ DHEC should be required to explain and demonstrate how its conditions would protect the public from water quality impairment and flooding and be enforced instead of relying on the good faith compliance with construction practices and good will of Dominion Energy that in the past has proved to be lacking. Additionally, the applicant claims its land disturbance activity will comply with the South Carolina National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Large and Small Construction Activities (SCR100000) as applicable and will include the use of appropriate grading and sloping techniques and erosion prevention and sediment control measures capable of preventing erosion, migration of sediments, and bank failure. This is also untrue.²⁴ **Exhibit A**, p. 11 at para. F (Remediation only required “if a frac-out or inadvertent return of drilling fluid occurs.”)

²³ Dominion’s application at p. 26 notes that “[a]ccording to the Federal Emergency Management Administration (FEMA) Flood Insurance Rate Map (FIRM), the site is located within a designated floodplain or a floodway.”

²⁴ The Staff Decision states, “DE stated that inadvertent Returns (i.e. frac-outs) will be addressed immediately.” **Exhibit A**, p. 47. However, the vague, non-specific language of this condition does not guarantee complete protection of the water quality of impaired waters, particularly when it remains ambiguous in light of other stated plans. *Compare* NPDES General Permit for Stormwater Discharges from Construction Activities (SCR100000) available at https://scdhec.gov/sites/default/files/media/document/BOW_NPDESStormwaterDischargesGP_01292021_0.pdf (“If BMPs are not operating effectively, then maintenance must be performed within seven (7) calendar days or as reasonably possible, and before the next storm event whenever practicable to maintain the continued effectiveness of BMPs.”) *with* Dominion’s permit materials at, p. 84 (“Drilling fluid releases that persist beyond completion of drilling activities shall be removed within 30 days of completion of drilling, if requested by the Federal or State regulatory agencies having jurisdiction.”) (Emphasis added). Inadvertent returns (IRs) from HDD at river crossings can introduce polluted water into streams and rivers being crossed and it is ridiculous that the onus would be on DHEC or other regulatory agencies to request cleanup of a drilling fluid release weeks after the pollution. Under the Clean Water Act (“CWA”), a state must establish water quality standards with effluent limitations for state waterbodies by creating limits of permissible pollutants levels without impairing designated uses for each waterway. *See* 33 U.S.C. § 1313(c)(2)(A). Additionally, the state is required to set reductions ensuring that dischargers meet the TMDL. *See* 33 U.S.C. § 1313(d)(1)(C). Thus, the activities under the permit should be faced with more scrutiny. Frac-outs, “the unintentional return of drilling fluids to the surface” at directional bored crossings, occur too often for DHEC to not impose more stringent conditions for the remedial plan requirement. *See* <https://utilitymagazine.com.au/what-is-a-frac-out-in-hdd/>; *See also* Osbak, M, Bayat, A, & Murray, C. “The Impact of Risk in Horizontal Directional Drilling.” *Proceedings of the 2012 9th International Pipeline Conference. Volume 1: Upstream Pipelines; Project Management; Design and Construction; Environment; Facilities Integrity Management; Operations and Maintenance; Pipeline Automation and Measurement*. Calgary, Alberta, Canada. September 24–28, 2012. pp. 73-77. ASME. <https://doi.org/10.1115/IPC2012-90742> (containing a study from Canada on 100 HDD sites that found approximately 25 occurrences of frac-outs out of the 100 sites). Frac-

Moreover, the “temporary” qualification of the impacts hinges on the methods that will be used to protect the wetlands during construction and the restoration of the wetlands after construction. It can reasonably be expected that these construction activities will not result in temporary, but permanent, impacts on the wetlands in a multitude of ways. Construction activity, machinery and foot traffic cause compaction that can be, and often is, permanent, even if mats and fabric techniques are employed. There is no evidence—even with conditions—that soil structure and pore spaces that are essential for wetland ecosystems and functions and that compaction does not occur. There will undoubtedly be a permanent elimination of bird watching, hunting, and fishing in discharge areas, as well as adverse effects to the movement of water in the aquatic environment. This change in stream flow, flooding patterns, and surface and groundwater hydrology, which in turn may adversely affect populations of fish and other aquatic animals, should be considered permanent and the application should be denied.

At a minimum, Dominion Energy’s safety record demonstrates that this project could pose serious risks to the environment and citizens. In 2018, Dominion was cited for failing to control sediment near a 55-mile pipeline it built in the upstate of South Carolina.²⁵ Sediment washing off the pipeline’s construction sites wound up in creeks that feed into the South Tyger River, where the Woodruff-Roebuck Public Water District has an intake pipe. The runoff from Dominion’s construction also worked its way into the river and clogged the pipe, causing the Woodruff-Roebuck system to buy water from another utility for more than 10,000 customers south of Spartanburg.²⁶ Ultimately, a \$4,200 fine was issued by DHEC which Dominion Energy later stated had “minimal impact.”²⁷ Here, City of Florence drinking water is produced at a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline.

Because failure of erosion and sediment controls due to improper installation or insufficient maintenance—as well as a lack of approved erosion and sediment control best management practices—have been major sources of violations for Dominion in the past, DHEC staff should have applied increased scrutiny to its current proposal. Increased sedimentation and turbidity resulting from in-stream and adjacent construction activities could displace and impact fisheries and aquatic resources. Sedimentation could smother fish eggs and other benthic biota and alter stream bottom characteristics, such as converting sand, gravel, or rock substrate to silt or mud. These habitat alterations could reduce juvenile fish survival, spawning habitat, and benthic community diversity and health. Increased turbidity could also temporarily reduce dissolved oxygen levels in the water column and reduce respiratory functions for in-stream biota. **Exhibit A**, p. 7 (“Waters on the project site are classified as Freshwaters. In addition, the entire length of Jeffries Creek that is tributary to the Great Pee Dee River has the following site-specific standards: dissolved oxygen not less than 4 mg/l and pH from 5.0 to 8.5.”). Turbid conditions could also reduce the ability for biota to find food

outs pose a risk to plants and animals, especially in aquatic ecosystems. *Id.* However, the special conditions specific to directionally bored crossings do not contain the criteria necessary to sufficiently prevent and properly provide recovery in the event of a frac-out. The lack of stringent requirements for remediating frac-outs and protecting water quality also prevents DHEC from fully complying with the requirements under S.C. Code Regs. § 19-450.9. DHEC staff must consider any reasonably foreseeable detriments of the projected activity, including (but not limited to) its impact on fish and wildlife, general environmental concerns, water quality, and aesthetics. S.C. Code Regs. § 19-450.9.

²⁵ <https://abcnews4.com/news/local/south-carolina-fines-dominion-energy-for-polluting-drinking-water>

²⁶ <https://www.greenvilleonline.com/story/news/2018/05/25/dominion-energy-under-scrutiny-after-mud-clogs-water-system-near-utility-s-c-project/645320002/>

²⁷ <https://www.dominionenergy.com/library/domcom/media/community/environment/reports-performance/water-cdp-2018.pdf?la=en&modified=20191021165021>

sources or avoid prey. Benthic invertebrates and freshwater mussels could also be affected by elevated turbidity and suspended sediments. Aquatic invertebrates, including insect larvae, would generally be unable to avoid work areas.

Studies conducted by the EPA, pollutants from construction activities, especially sediments, have the potential to cause severe impacts to water quality. *NRDC v. United States EPA*, 526 F.3d 591, 597 (9th Cir. 2008). “[E]ven small construction sites may have a significant negative impact on water quality in localized areas,” because construction activities will likely contribute to an increase in sediment in streams and other waterbodies. *Id.* (finding that “it is evident from numerous studies and reports submitted under... the CWA that discharges from construction sites continue to be a major source of water quality problems and water quality standard violations.”). Considering Dominion Energy’s construction practices and procedures and its history of damaging South Carolina’s water supply, the applicant’s activities are nearly certain to cause sedimentation and turbidity, alteration or removal of instream and stream bank cover, stream bank erosion, introduction of water pollutants, water depletions, and entrainment of small fishes during water withdrawals that could increase the rates of stress, injury, and mortality experienced by fish and other aquatic life. For these reasons, BREDL requests that the Board reverse staff’s decision.

6. The project calls for permanent impacts to wetlands associated with the project altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9, 61-68, 61-101.F and 19-450.9 in that the benefits from preserving the area in its unaltered state is greater than the proposed use;

Similarly, S.C. Code Ann. Regs. 19-450.9.A.5 requires DHEC to assess whether an activity requires construction in, on or over a navigable waterway and whether “the economic benefits to the state and public from the authorized use of lands and waters meets or exceeds the benefits from preservation of the area in its unaltered state.” R. 19-450.9.A.5.

To be regulated under Section 404 of the Clean Water Act, a discharge of dredged material involves any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (see 33 CFR 323.2(d)(1)(iii)). *cf.* **Exhibit A**, p. 17. (“SCDHEC also asked the applicant about conducting clearing of riparian vegetation manually within wetlands and waters of the U.S. rather than using mechanized clearing, which the applicant stated was permitted by the USACE.”) DHEC knows the difference between hand-clearing and mechanization both it and the Corps rely on; Mitigation is not required for hand clearing (non-mechanized clearing) of wetlands.²⁸ A regulated discharge of fill material involves the addition of fill material into waters of the United States that has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States. 33 CFR 323.3(e) and (f). The Corps and EPA have clarified that the redeposits associated with the following actions are subject to CWA jurisdiction: “mechanized land clearing, redeposit at various distances from the point of removal (e.g., side casting), and removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals.” § 13:102. SECTION 404 PERMIT PROGRAM AND

²⁸ https://scdhec.gov/sites/default/files/docs/Environment/docs/Mitigation_Guidelines.pdf

Here, according to the applicant, “open trench excavation is the preferred method because it allows the gas main to be installed only four to five feet in depth below the ground surface. They stated installing the gas main at a consistent shallow depth is a safer method and allows for the routine maintenance to be performed that is often required on transmission pipelines.” **Exhibit A**, p. 10 (emphasis added). Using the applicant’s own analysis, the maintenance alone on the pipeline should render the pipeline permanent because for the life of the pipeline, the wetland will “often” be excavated “four to five feet in depth.” *Id.* According to both DHEC and the applicant, this maintenance period can be expected to last longer than 53 years, considering there is an “existing natural gas pipeline that has been in place since the 1960s.” *See Exhibit A*, p. 47.

Pursuant to 33 CFR 323.2(d)(3)(i) the applicant “proposing to undertake mechanized land clearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.” Such burden was not met here, where Dominion states it plans to excavate the wetlands, refill the excavated trench and grade the land again. **Exhibit A**, p. 21. (“As discussed previously, SCDHEC asked the applicant about the feasibility of conducting some or all of the temporary and permanent clearing of riparian vegetation within wetlands and waters of the U.S. manually. The applicant provided additional information explaining why it was determined to be necessary to use mechanized clearing as summarized above.”); *Id.* at 17.

The term “discharge of dredged materials” is defined in the Corps’ regulations. The Corps’ definition has three components. First, it defines “discharge of dredge material” as “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.” 33 C.F.R. § 323.2(d)(1).²⁹ The term specifically includes “runoff or overflow, associated with a dredging operation, from a contained land or water disposal area” and [a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation. *Id.*

An activity associated with a discharge of dredged material destroys a waterbody if it “alters the area in such a way that it would no longer be a water of the United States.” 33 C.F.R. § 323.2(d)(4). The repeated dredging for this pipeline will no doubt destroy the wetlands where it will be placed. First, placing a pipeline in the wetland will undoubtedly change the bottom elevation of a wetland. Second, dredging the wetland—even once—lowers the surrounding water table and dries up adjacent wetlands. Finally, there is no hope of survival for a wetland that often loses the top 4-5 feet of itself for over 50 years.

As to other ways the wetlands will be permanently impacted, Dominion’s proposal will destroy wetlands through right-of-way clearing, brush clear-cutting, and removal of trees, shrubs, and plants both prior to and subsequent to pipeline installation. Mechanical clearing and herbicides will prevent trees and shrubs from growing back so that the right-of-way can be quickly inspected on the ground and from the air. Moreover, the proposed disturbance would mean the impacted wetlands would have reduced carbon storage capabilities. The loss of an existing wetland means not only the loss of that particular carbon sink, but also that the carbon stored in that wetland will

²⁹ EPA regulations now contain a virtually identical definition. *See* 40 C.F.R. § 232.2.

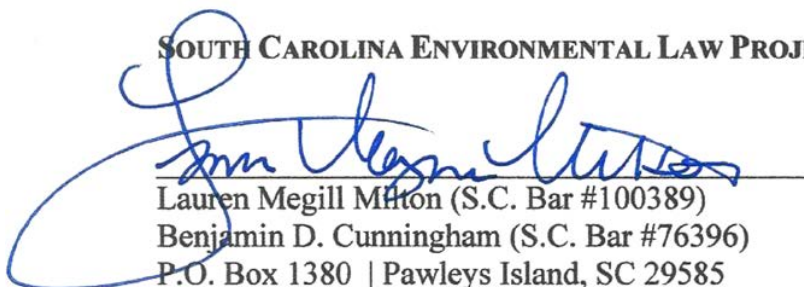
be released. Wetlands are some of the largest stores of carbon on the planet, but when disturbed or warmed, they release the three greenhouse gases (GHGs) that contribute the most to global warming: carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O).³⁰

CONCLUSION

BREDL hereby requests that the Board of Health and Environmental Control conduct a final review conference to review and deny the proposed Water Quality Certification because it is inconsistent with the certification requirements of Section 401 of the Federal Clean Water Act and the permitting requirements of R. 19-450.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT



Lauren Megill Milton (S.C. Bar #100389)

Benjamin D. Cunningham (S.C. Bar #76396)

P.O. Box 1380 | Pawleys Island, SC 29585

ben@scelp.org | lauren@scelp.org

Tel: (843) 527-0078 | Fax: (843) 527-0540

February 18, 2022
Charleston, South Carolina

³⁰ <http://bwsr.state.mn.us/carbon-sequestration-wetlands>

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

Blue Ridge Environmental Defense League,

Requestor,

vs.

Dominion Energy and South Carolina Department of Health and Environmental Control,

Respondents.

RE: Permit to install a gas main in tributaries to the
Great Pee Dee River in Florence County
P/N#: SAC 2019-01427

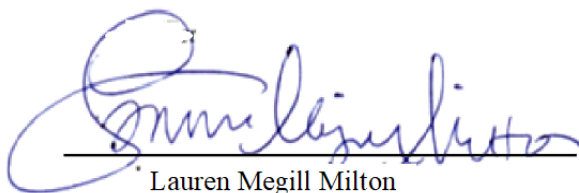
CERTIFICATE OF SERVICE

I hereby certify that on this date I served Respondent SCDHEC by emailing and placing
copies of the foregoing Request for Final Review Conference in the U.S. Mail addressed to:

South Carolina Board of Health
and Environmental Control
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201
boardclerk@dhec.sc.gov

Mr. Michael Greene
Dominion Energy
601 Old Taylor Road
Cayce, South Carolina 29033

Dominion Energy South Carolina, Inc.
c/o C T Corporation System
2 Office Park Court, Suite 103
Columbia, South Carolina 29223



Lauren Megill Milton

Charleston, South Carolina
February 18, 2022



Public Notice # SAC 2019-01427

Public Notice Date: February 4, 2022

**NOTICE OF DEPARTMENT DECISION
WATER QUALITY CERTIFICATION**

DHEC is acting on an application for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act and the permitting requirements of R. 19-450. et. seq., 1976 SC Code of Laws.

Dominion Energy

Permit to install a gas main in

Jefferies Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, wetlands, and unnamed tributaries to the Great Pee Dee River

Florence County

P/N SAC 2019-01427

After reviewing the project plans, DHEC Staff determined that there is a reasonable assurance that the project will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act and the permitting requirements of R. 19-450. et. seq., 1976 SC Code of Laws. Accordingly, DHEC certifies the project with conditions as follows:

1. The applicant must implement appropriate best management practices that will minimize erosion and migration of sediments on and off the project site during and after construction. These practices should include the use of appropriate grading and sloping techniques, mulches, silt fences, or other devices capable of preventing erosion, migration of sediments, and bank failure. All disturbed land surfaces and sloped areas affected by the project must be stabilized.
2. The existing and proposed pipeline corridor/right-of-way crosses an approximately 146-acre tract protected by a conservation easement (Front Swamp LLC), and crosses the Pee Dee Station Wildlife Management Area managed by the SCDNR and leased from the S.C. Public Service Authority (Santee Cooper). The applicant must coordinate appropriately with the corresponding landowners throughout the duration of construction and operation of the pipeline to minimize impacts to the aquatic resources, aquatic ecosystems, water quality, and classified uses within these protected conservation lands.
3. The applicant must make all efforts to avoid and minimize impacts to waters that contain species of conservation concern within the project corridor. The applicant, DE, 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.

4. The applicant is responsible for ensuring compliance with the project's "HDD Inadvertent Return Contingency Plan" dated June 4, 2020, or any subsequent revision approved by the Charleston District USACE and the SCDHEC, in consultation with the SCDNR. The applicant, DE, must keep a copy of the plan and all necessary equipment and supplies specified in the plan onsite during construction involving Horizontal Directional Drill or HDD operations.
5. The applicant must restore stream banks at crossings after construction has been completed, in as little time as is feasible, which will vary based on site-specific conditions. Disturbed stream banks should be restored by using an appropriate riparian seed mixture, planting woody vegetation, and/or using bioengineering techniques for stream bank stabilization.
6. The applicant must conduct construction activities in a manner that avoids and minimizes disturbance of woody wetland and riparian vegetation within the project area to the greatest extent practicable. The applicant must limit removal of vegetation to only what is necessary for construction of the proposed pipeline and road culvert.
7. The applicant must properly and expeditiously stabilize areas disturbed during construction using appropriate methods including seeding with mixes that incorporate seeds of native species, mulching, live staking with native species, and other appropriate temporary and final stabilization measures as required by site-specific circumstances.
8. 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.
9. The applicant must properly install erosion and sediment control devices appropriate to site-specific circumstances prior to land disturbance, and must properly maintain these devices in a functioning capacity until the project area achieves final stabilization.
10. The applicant may only use materials for erosion control, such as hay bales or straw mulch, if they have been certified as free of noxious, harmful, or injurious weeds by the supplier.
11. The applicant must repair any damaged erosion control measures in areas of active construction or equipment operation within 24 hours of identification, or as soon as

conditions allow if compliance with this time frame (in other words waiting up to 24 hours) would result in greater environmental impacts.

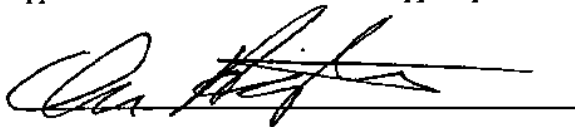
12. The applicant must take all necessary measures to prevent petroleum products, tar, trash, construction debris, and other pollutants from entering the adjacent offsite areas, wetlands, and waters.
13. Once the applicant initiates the project, construction and final site stabilization must be completed in an expeditious manner in order to minimize the period of disturbance to the environment.
14. Upon project completion, the applicant must permanently stabilize all disturbed areas with vegetative cover (preferable), riprap, or other erosion control methods as appropriate.
15. The applicant must construct access-road crossings of Waters of the United States with appropriately sized culverts. Culverts must be sized and designed to prevent alteration of the natural stream morphology. For pipe culverts, the bottom elevation of the culvert or pipe must be at or below the stream bed elevation to allow for natural migration of aquatic organisms upstream and downstream.
16. The applicant must properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

The SC Department of Health and Environmental Control reserves the right to impose additional conditions on this Certification/Permit to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with State standards.

A copy of the staff assessment and related file information are available for review. For a copy of the staff assessment contact William Wenerick, the project manager, at (803) 898-4266.

The final Water Quality Certification will be issued unless there is a timely request for review of the Department Decision based on water quality or water use impacts.

The issuance of this Notice of Department Decision represents a final staff decision that may be appealed. Please see the attached appeal procedures for details.



Chuck Hightower, Manager
Water Quality Certification
and Wetlands Section

Guide to Board Review
Pursuant to S.C. Code Ann. § 44-1-60
Effective May 8, 2014

The decision of the South Carolina Department of Health and Environmental Control (Department) becomes the final agency decision fifteen (15) calendar days after notice of the decision has been mailed to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, unless a written request for final review accompanied by a filing fee in the amount of \$100 is filed with Department by the applicant, permittee, licensee or affected person.

Applicants, permittees, licensees, and affected parties are encouraged to engage in mediation or settlement discussions during the final review process.

If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within thirty (30) calendar days after notice is mailed that the Board declined to hold a final review conference. In matters pertaining to decisions under the South Carolina Mining Act, appeals should be made to the South Carolina Mining Council.

I. Filing of Request for Final Review

1. A written Request for Final Review (RFR) and the required filing fee of one hundred dollars (\$100) must be received by Clerk of the Board within fifteen (15) calendar days after notice of the staff decision has been mailed to the applicant, permittee, licensee, or affected persons. If the 15th day occurs on a weekend or State holiday, the RFR must be received by the Clerk on the next working day. RFRs will not be accepted after 5:00 p.m.
2. RFRs shall be in writing and should include, at a minimum, the following information:
 - o The grounds for amending, modifying, or rescinding the staff decision;
 - o a statement of any significant issues or factors the Board should consider in deciding how to handle the matter;
 - o the relief requested;
 - o a copy of the decision for which review is requested; and
 - o mailing address, email address, if applicable, and phone number(s) at which the requestor can be contacted.

3. RFRs should be filed in person or by mail at the following address: South Carolina Board of Health and Environmental Control Attention: Clerk of the Board

2600 Bull Street
Columbia, South Carolina 29201

Alternatively, RFR's may be filed with the Clerk by facsimile (803-898-3393) or by electronic mail (boardclerk@dhec.sc.gov).

4. The filing fee may be paid by cash, check or credit card and must be received by the 15th day.
5. If there is any perceived discrepancy in compliance with this RFR filing procedure, the Clerk should consult with the Chairman or, if the Chairman is unavailable, the Vice-Chairman. The Chairman or the Vice-Chairman will determine whether the RFR is timely and properly filed and direct the Clerk to (1) process the RFR for consideration by the Board or

(2) return the RFR and filing fee to the requestor with a cover letter explaining why the RFR was not timely or properly filed. Processing an RFR for consideration by the Board shall not be interpreted as a waiver of any claim or defense by the agency in subsequent proceedings concerning the RFR.

6. If the RFR will be processed for Board consideration, the Clerk will send an Acknowledgement of RFR to the Requestor and the applicant, permittee, or licensee, if other than the Requestor. All personal and financial identifying information will be redacted from the RFR and accompanying documentation before the RFR is released to the Board, Department staff or the public.
7. If an RFR pertains to an emergency order, the Clerk will, upon receipt, immediately provide a copy of the RFR to all Board members. The Chairman, or in his or her absence, the Vice-Chairman shall based on the circumstances, decide whether to refer the RFR to the RFR Committee for expedited review or to decline in writing to schedule a Final Review Conference. If the Chairman or Vice-Chairman determines review by the RFR Committee is appropriate, the Clerk will forward a copy of the RFR to Department staff and Office of General Counsel. A Department response and RFR Committee review will be provided on an expedited schedule defined by the Chairman or Vice-Chairman.
8. The Clerk will email the RFR to staff and Office of General Counsel and request a Department Response within eight (8) working days. Upon receipt of the Department Response, the Clerk will forward the RFR and Department Response to all Board members for review, and all Board members will confirm receipt of the RFR to the Clerk by email. If a Board member does not confirm receipt of the RFR within a twenty-four (24) hour period, the Clerk will contact the Board member and confirm receipt. If a Board member believes the RFR should be considered by the RFR Committee, he or she will respond to the Clerk's email within forty-eight (48) hours and will request further review. If no Board member requests further review of the RFR within the forty-eight (48) hour period, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Final Review Conference. Contested case guidance will be included within the letter.

NOTE: if the time periods described above end on a weekend or State holiday, the time is automatically extended to 5:00 p.m. on the next business day.

9. If the RFR is to be considered by the RFR Committee, the Clerk will notify the Presiding Member of the RFR Committee and the Chairman that further review is requested by the Board. RFR Committee meetings are open to the public and will be public noticed at least 24 hours in advance.
10. Following RFR Committee or Board consideration of the RFR, if it is determined no Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Conference. Contested case guidance will be included within the letter.

II. Final Review Conference Scheduling

1. If a Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, informing the Requestor of the determination.
2. The Clerk will request Department staff provide the Administrative Record.
3. The Clerk will send Notice of Final Review Conference to the parties at least ten (10) days before the Conference. The Conference will be publically noticed and should:
 - Include the place, date and time of the Conference;
 - state the presentation times allowed in the Conference;
 - state evidence may be presented at the Conference;
 - if the conference will be held by committee, include a copy of the Chairman's order appointing the committee; and
 - inform the Requestor of his or her right to request a transcript of the proceedings of the Conference prepared at Requestor's expense.

4. If a party requests a transcript of the proceedings of the Conference and agrees to pay all related costs in writing, including costs for the transcript, the Clerk will schedule a court reporter for the Conference.

III. Final Review Conference and Decision

1. The order of presentation in the Conference will, subject to the presiding officer's discretion, be as follows:
 - Department staff will provide an overview of the staff decision and the applicable law to include [10 minutes]:
 - Type of decision (permit, enforcement, etc.) and description of the program.
 - Parties
 - Description of facility/site
 - Applicable statutes and regulations
 - Decision and materials relied upon in the administrative record to support the staff decision.
 - Requestor(s) will state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. [15 minutes]
NOTE: The burden of proof is on the Requestor(s)
 - Rebuttal by Department staff [15 minutes]
 - Rebuttal by Requestor(s) [10 minutes]

Note: Times noted in brackets are for information only and are superseded by times stated in the Notice of Final Review Conference or by the presiding officer.

2. Parties may present evidence during the conference; however, the rules of evidence do not apply.
3. At any time during the conference, the officers conducting the Conference may request additional information and may question the Requestor, the staff, and anyone else providing information at the Conference.
4. The presiding officer, in his or her sole discretion, may allow additional time for presentations and may impose time limits on the Conference.
5. All Conferences are open to the public.
6. The officers may deliberate in closed session.
7. The officers may announce the decision at the conclusion of the Conference or it may be reserved for consideration.
8. The Clerk will mail the written final agency decision (FAD) to parties within 30 days after the Conference. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court or in matters pertaining to decisions under the South Carolina Mining Act, to request a hearing before the South Carolina Mining Council. The FAD will be sent by certified mail, return receipt requested.
9. Communications may also be sent by electronic mail, in addition to the forms stated herein, when electronic mail addresses are provided to the Clerk.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

STAFF ASSESSMENT
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL (SCDHEC)
DIVISION OF WATER QUALITY
WATER QUALITY CERTIFICATION AND WETLANDS SECTION

I. Background Information

Applicant: Dominion Energy,
Robert A. Schwartz

P/N Number: SAC-2019-01427

P/N Date: June 8, 2021

P/N Close: June 23, 2021

Section of Applicable Federal Law: (x) Section 10
(x) Section 404
(x) Section 401

Section of Applicable State Law: () Coastal Zone Consistency Certification
(x) Permits for Construction in Navigable Waters

Brief explanation and purpose of activity:

Dominion Energy (DE) is requesting a permit to install a gas main that they refer to as the River Neck to Kingsburg 16-inch Gas Main, which is also known to the public as the Pamlico Pipeline. The purpose of the pipeline is to support growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas.

Waterbody Name:

Waters on the project site, including wetlands, drain east through Jeffries Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, and unnamed tributaries to the Great Pee Dee River.

Water Classification:

Waters on the project site are classified as Freshwaters. In addition, the entire length of Jeffries Creek that is tributary to the Great Pee Dee River has the following site specific standards: dissolved oxygen not less than 4 mg/l and pH from 5.0 to 8.5.

Waterbody/Project Location:

The proposed pipeline will begin with a connection to an existing gas regulating station at River Neck Road and will be installed east of North Old River Road and South Old River Road starting near the intersection of River Neck Road and Wross Lane in Florence County, South Carolina (Latitude: 34.09917°North, Longitude: 79.54806°West). The proposed pipeline will terminate with a connection at the Kingsburg Valve Station near the intersection of South Old River Road and East Brazen Road in Florence County, South Carolina (Latitude: 33.9075°North, Longitude: 79.46472°West).

The proposed project corridor is approximately 14.5 miles long, 50 feet wide, and 212.2 acres in total area. Of the total width, 40 feet is within an existing DE right-of-way (ROW) easement area that is cleared and actively maintained. The existing 40-foot easement will be expanded by 10 feet to the West to create the proposed 50-foot-wide corridor. The proposed new 16-inch steel gas main pipeline will be installed parallel to an existing DE 8-inch gas pipeline that is within the existing 40-foot easement. The proposed project corridor spans the Pamlico North, Pamlico South, and Gres Ham United States Geological Survey (USGS) Topographic Quadrangle Maps. The approximate center of the project corridor is located at 34.004307° North, 79.523488° West.

According to the applicant, DE, the gas main will be operated at a transmission pressure, which is 20% of Specified Minimum Yield Strength (SMYS) of the steel gas pipeline. The gas main will also be

maintained as a transmission main per Pipeline Hazardous Materials Safety Administration (PHMSA) regulations.

Waterbody on 2018 303(d) list or within an approved TMDL watershed?

(x) Yes

There are a couple of SCDHEC monitoring stations in the project area on the Great Pee Dee River, PD-622 and PD-662, that are listed as impaired for fish consumption use due to mercury, and the Great Pee Dee River, starting at the border between Darlington and Florence Counties and continuing south, is under a fish consumption advisory due to mercury in fish tissue. However, Station PD-076 on the Great Pee Dee River at U.S. Highway 378, just downstream of the project's southern terminus, was found to fully support classified uses when it was last assessed for use support and water quality trends in 2018. SCDHEC does not expect the project to cause or contribute to a fish consumption use impairment due to mercury in fish tissue.

() No

II. Project Description

DE is requesting a permit to install a gas main that they refer to as the River Neck to Kingsburg 16-inch Gas Main, which is also known to the public as the Pamplico Pipeline. The purpose of the pipeline is to support growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas. The U.S. Army Corps of Engineers (USACE) Charleston District is processing the application for authorization under Nationwide Permit (NWP) 12, Oil or Natural Gas Pipeline Activities (SAC 2019-01427). SCDHEC is processing the application for an individual 401 Water Quality Certification (WQC) because the project failed to meet special condition III.a.1 (applicable to projects authorized under NWP 12) of the General State Certification (SC NWP State Cert 2021) issued by SCDHEC on May 13, 2021, which states:

“[t]his NWP is not certified for pipelines with more than 10 aquatic site crossings (not including directionally bored crossings[]).”

The new 16-inch gas main will be installed parallel to an existing 8-inch DE gas pipeline within an existing 40-foot-wide DE ROW easement that will be expanded 10 feet to the west to accommodate the new line. In addition to the 50-foot-wide permanent easement, there will also generally be a temporary 25-foot-wide construction easement to the west of the permanent easement. The gas main will be installed through a combination of horizontal directional drilling (HDD) and open trench excavations. The crossing under Jeffries Creek, a mapped State navigable water, will be installed by HDD. Following the initial clearing and placement of the gas main, native material will be placed to match the preexisting grade and will be allowed to revegetate naturally. A smaller portion of the cleared areas within the permanent ROW will be permanently maintained as cleared land for future maintenance.

In total, the proposed project will result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream, temporary excavation impacts (trench and backfill) to 8.35 acres of wetlands and 119 linear feet of stream (0.028 acre), temporary clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acre), and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acre).

Impacts are listed below in Table 1 by resource type (wetland or non-wetland waters/i.e. tributary), impact type (temporary only = trench and backfill, fill, or clearing), and impact duration (temporary or permanent). All impacts are provided in acres and tributary impacts are also provided in linear feet as required by SCDHEC. Note also that Table 1 is a screen capture of Sheet 37 from the applicant's Section 404 Individual Permit Application Supporting Documentation dated June 2, 2021, which was included in the SCDHEC June 8, 2021 public notice. ID letters and numbers are the same as those used on permit drawings in the applicant's June 2, 2021 submittal titled “Section 404 Individual Permit Application Supporting Documentation” and in the SCDHEC June 8, 2021 public notice.

WETLAND ID	IMPACT #	TEMPORARY IMPACT (ACRES / LF)	PERMANENT CLEARING IMPACT (ACRES / LF)	PERMANENT FILL IMPACT (ACRES / LF)	TEMPORARY CLEARING IMPACT (ACRES / LF)	WETLAND TYPE
B	1	0.110	0.030	0.000	0.000	WETLAND
A	2	5.140	1.800	0.000	5.640	WETLAND
C	3	0.000	0.060	0.000	0.020	WETLAND
D	4	0.000	0.125	0.000	0.000	WETLAND
E	5	0.000	0.089	0.000	0.000	WETLAND
F	6	0.490	0.120	0.000	0.310	WETLAND
G	7	0.270	0.094	0.000	0.140	WETLAND
AA	8	0.180	0.042	0.000	0.000	WETLAND
BB	9	0.013	0.017	0.000	0.000	WETLAND
CC	10	0.007	0.014	0.000	0.000	WETLAND
DD	11	0.020	0.036	0.000	0.000	WETLAND
EE	12	0.011	0.015	0.000	0.000	WETLAND
FF	13	0.160	0.040	0.000	0.000	WETLAND
GG	14	0.008	0.005	0.000	0.000	WETLAND
HH	15	0.130	0.014	0.000	0.000	WETLAND
II	16	0.017	0.005	0.000	0.016	WETLAND
JJ	17	0.410	0.100	0.000	0.000	WETLAND
KK	18	0.040	0.007	0.000	0.000	WETLAND
TRIBUTARY LL	19	0.019	0.002	0.0045	0.008	NON-WETLAND WATERS
MM	20	0.140	0.030	0.000	0.000	WETLAND
NN	21	0.170	0.050	0.000	0.000	WETLAND
HH	22	0.190	0.050	0.000	0.120	WETLAND
I	23	0.120	0.040	0.000	0.000	WETLAND
J	24	0.060	0.020	0.000	0.000	WETLAND
K	25	0.250	0.070	0.000	0.000	WETLAND
L	26	0.150	0.050	0.000	0.080	WETLAND
TRIBUTARY SS	27	0.009	0.002	0.000	0.003	NON-WETLAND WATERS
RR	28	0.044	0.013	0.000	0.000	WETLAND
QQ	29	0.030	0.000	0.000	0.000	WETLAND
OO	30	0.190	0.050	0.000	0.000	WETLAND
C (5-28)	31	0.000	0.000	0.0017	0.000	WETLAND
D (5-28)	32	0.000	0.000	0.0024	0.000	WETLAND
Total	--	8.378	2.990	0.009	6.337	53.00

Table 1. Summary of Impacts. (Impacts are summarized by resource type (wetland or tributary/non-wetland waters), impact type (temporary only = trench and backfill, fill, or clearing), and impact duration (temporary or permanent). All impacts are provided in acres and tributary impacts are also provided in linear feet as required by SCDHEC. Note also that Table 1 is a screen capture of Sheet 37 from the applicant's Section 404 Individual Permit Application Supporting Documentation dated June 2, 2021, which was included in the SCDHEC June 8, 2021 public notice. ID letters and numbers are the same as those used on permit drawings in the applicant's June 2, 2021 submittal and in the SCDHEC June 8, 2021 public notice.)

SCDHEC also notes that impacts were calculated based on a Preliminary Jurisdictional Determination (PJD) dated May 27, 2020 and thus represent all waters of the State on the project site. According to USACE Regulatory Guidance Letter 16-01 (October 2016), a PJD...“may be requested in order to move ahead expeditiously to obtain a Corps permit authorization where the requestor determines that it is in his or her best interest to do so; (2) may be requested even where initial indications are that the aquatic resources on a parcel may not be jurisdictional, if the requestor makes an informed, voluntary decision that it is in his or her best interest not to request and obtain an AJD; (3) may be used as the basis for a permit decision; however, for purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional...” (Emphasis added.)

A. Fill

1. Is fill required?

☒ Yes

The project includes three (3) areas of permanent fill impact listed as impacts 19, 31, and 32 in Table 1 above.

In detail impact 19 involves installing a rock vane, low water crossing, and boulder toe in a tributary (LL) that the pipeline will cross by open-trench excavation. This work is intended to result in a more stable reach with improved function compared to existing conditions and will involve the placement of approximately 5 cubic yards of clean fill material consisting of gravel, rock, or stone in 22 linear feet or 0.0045 acre of tributary.

In detail impacts 31 and 32 involve improving an existing access road while maintaining the hydrologic connection of wetlands on opposite sides of the road (Wetlands C (5-28) and D (5-28)). An existing 11-foot-wide dirt road that currently has a 17-foot-long, 24-inch RCP beneath it will be widened to 16 feet, and the existing RCP will be replaced with a 24-foot-long, 24-inch RCP. Rip rap will be placed at the edge of the road and around the pipe outlets to stabilize the road, dissipate the energy of discharges, and prevent scour/erosion at the outlets of the RCPs. This work will involve the placement of approximately 23 cubic yards of clean fill material consisting of gravel, rock, or stone in approximately 0.41 acre of wetlands.

Amount	Acreage	Linear Feet	Cubic Yards
Total	0.0086	22	27.97
Wetlands	0.0041	N/A	22.93
Open Waters of U. S.	0.0045	22	5.04

☐ No, proceed to Section II- B:

2. Is the fill temporary?

☐ Yes

☒ No

B. Excavation

1. Is excavation required?

☒ Yes; however, the excavation is temporary

The gas main will be installed through a combination of horizontal directional drilling (HDD) and open trench excavations. Excavations will be temporary and will impact a total of 8.35 acres of wetlands and 119 linear feet of stream (0.028 acre). Excavated material will be temporarily stockpiled and then used as backfill in trenches following pipeline installation.

According to the applicant, open trench excavation is the preferred method because it allows the gas main to be installed only four to five feet in depth below the ground surface. They stated installing the gas main at a consistent shallow depth is a safer method and allows for the routine maintenance to be performed that is often required on transmission pipelines. They also stated installation using open trench would significantly reduce the potential to impact the existing 8-inch gas pipeline.

Proposed temporary excavation impacts to aquatic resources in areas containing emergent wetlands will be minimized by returning the excavated material to the open trench, re-grading to the pre-existing natural grade, and stabilizing the disturbed ground immediately following installation of the pipeline.

Amount	Acreage	Linear Feet	Cubic Yards
Total	8.378	119	N/A
Wetlands	8.35	N/A	N/A
Open Waters of U. S.	0.028	119	N/A

() No, proceed to Section II. C.

2. Is dredge spoil site adequately sized for the amount of material?

() Yes

() No

(x) N/A

During trench or bore pit excavations, soil will be stockpiled adjacent to excavated areas. This soil will be used as fill for the site. According to the Stormwater Pollution Prevention Plan dated August 20, 2021, excess soils will be removed in a timely manner to prevent offsite discharge in stormwater.

C. Other Impacts:

(x) Yes

The project includes temporary and permanent clearing in wetlands and tributaries. Following initial clearing and pipeline installation, most areas will be stabilized and allowed to revegetate naturally. A smaller portion of the cleared areas within the permanent ROW will be permanently maintained as cleared land for future maintenance access. The project will result in temporary clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acre), and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acre).

() No

D. Project Modification

Was the project modified from the original SCDHEC public notice of June 8, 2021?

() Yes

(x) No

E. Compensatory Mitigation

Is compensation required by SCDHEC?

() Yes

(x) No

The USACE requires a compensatory mitigation plan when activities authorized by a Nationwide Permit (NWP) result in the loss of 0.01 acre or more of wetlands in accordance with General Condition 23 of the 2021 USACE NWPs. Likewise, the USACE Charleston District requires a compensatory mitigation plan when activities authorized by a NWP 12 result in the loss of 0.005 acre of intermittent and/or perennial stream bed in accordance with 2021 Regional (Charleston District) Condition 10 applicable to NWP 12. In the case of this project, proposed activities will result in less than 0.01 acre of permanent fill impact in (loss of) wetlands and less than 0.005 acre of permanent fill impact in (loss of) intermittent and/or perennial stream beds. The applicant is not proposing compensatory mitigation and the USACE Charleston District has not asked for a compensatory mitigation plan. In addition, the South Carolina Department of Natural Resources (SCDNR) did not ask for a compensatory mitigation plan in comments they submitted in response to the SCDHEC June 8, 2021 public notice (See summary of comments below in Section IV), and the SCDHEC will not require one.

() N/A

F. Remediation

Is remediation required?

(x) Yes, if a frac-out or inadvertent return of drilling fluid occurs.

() No

() N/A

USACE NWP 12 addresses frac-outs or inadvertent returns of drilling fluid in the eighth paragraph:

"This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines." (Emphasis added.)

The USACE Charleston District used the above-referenced authority to address this issue in Regional Condition 7:

"7. For NWPs 12, 57 and 58 activities that involve horizontal directional drilling beneath navigable waters of the United States (i.e., section 10 waters), the PCN should include a proposed remediation plan (i.e., frac-out plan)."

According to the applicant's Section 404 Individual Permit Application Supporting Documentation dated June 2, 2021, HDD will be used to cross under section 10 waters/navigable waters of the United States. In accordance with the above requirement of Regional Condition 7, the applicant's June 2, 2021 submittal included Appendix F, an Inadvertent Release Control Plan for HDD dated June 4, 2020 and prepared by Thomas and Hutton Engineering.

G. Nonpoint Source Concerns

1. Are water quality impacts from nonpoint sources expected?

☐ Yes

☒ Temporary, water quality impacts from nonpoint sources will be minimized and should not contravene the water quality standards or existing and classified uses of the involved waterbody if the applicant adheres to Best Management Practices (BMPs), the conditions of the Nationwide Permit 12, including the Charleston District Regional conditions, and the conditions in Section VIII of this staff assessment during and after the project.

☐ No

2. Has the applicant addressed nonpoint source concerns?

☒ Yes

The applicant included information about stormwater management and other avoidance and minimization measures in the Section 404 Individual Permit Application Supporting Documentation dated June 2, 2021, which was included in the SCDHEC June 8, 2021 public notice:

Page 19 - 20: "The impacts to waters, including wetlands will be minimized through the use of stormwater best management practices during construction activities to minimize sedimentation. Also, mats will be used as applicable to prevent rutting associated with mechanized clearing. Impacts to wetlands will be further minimized by implementing temporary clearing instead of permanent clearing in moist areas of disturbance."

Page 20: "The following avoidance and minimization has been incorporated into this project:

- The site proposed project would avoid impacts to 6.3 acres of jurisdictional aquatic resources.
- The negligible amount of fill impacts (0.009 acres) associated with the project prevents smothering of organisms and disruption of periodic water inundation patterns.
- Most of the proposed impacts will be temporary.
- Stormwater best management practices will be implemented during construction activities to minimize sedimentation and confine suspended particulate/turbidity to a small area where settling or removal can occur
- HDD will be used to cross under Section 10 waters.
- Mats will be used as applicable to prevent rutting associated with mechanized clearing.
- The applicant will employ appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures.
- The applicant will use machinery and techniques that are especially designed to reduce

- damage to wetlands. This may include machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting.
- The applicant has designed access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high-water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement where applicable.
- The project will avoid sites having unique habitat or other value, including habitat of threatened or endangered species."

Page 27: "The applicant will implement best management practices that will minimize erosion and migration of sediments on and off the project site during and after construction. Additionally, land disturbance activity will comply with the South Carolina National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Large and Small Construction Activities (SCR100000) as applicable. These practices will include the use of appropriate grading and sloping techniques and erosion prevention and sediment control measures capable of preventing erosion, migration of sediments, and bank failure. Once the project is initiated, it will be carried to completion in an expeditious manner, minimizing the period of disturbance to the environment.

Temporary best management practices such as silt fence and/or other diversionary structures will be used during construction as applicable. Permanent stabilization of embankments will contain appropriately sized rip-rap over geotextile liner or other similar approved permanent erosion control features where applicable. Temporary and permanent stormwater controls may be used to minimize sedimentation and erosion and minimize impact to the wetland areas."

The applicant's August 20, 2021 response to SCDHEC's July 23, 2021 Request for Additional Information (RAI) included a Stormwater Pollution Prevention Plan (SWPP) for the project dated August 20, 2021 (Attachment 4) that included more detailed information regarding the best management practices that will be implemented during and after construction.

- () No
- () N/A

3. Are any enforceable nonpoint source controls required by SCDHEC?

(x) Yes, water quality impacts from nonpoint sources will be minimized and should not contravene the water quality standards or existing and classified uses of the involved waterbody if the applicant adheres to BMPs, the conditions of the Nationwide Permit 12, including the Charleston District Regional Conditions, and the conditions in Section VIII of this staff assessment during and after the project.

As explained above, the USACE Charleston District is processing the application for authorization under Nationwide Permit (NWP) 12, Oil or Natural Gas Pipeline Activities (SAC 2019-01427). NWP 12 requires that "[t]here must be no change in pre-construction contours of waters of the United States." NWP 12 also requires the following measures that address nonpoint source concerns:

"Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody."

"Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate."

All NWP, including NWP 12, are also subject to 32 General Conditions, one of which specifically addresses nonpoint source concerns as listed below:

"12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides."

Additionally, the USACE Charleston District has authority to include, and often or almost always does include, enforceable, project-specific conditions when issuing NWP authorizations.

National Pollutant Discharge Elimination System (NPDES) Permit Requirements

According to a letter from the applicant to the SCDHEC Stormwater Permitting Program dated May 27, 2021, the applicant, DE, is exempt from NPDES Permit requirements.

DE stated the following in the referenced letter: "Per the following the Riverneck to Kingsburg Gas Transmission Main is exempt from 72-302, 61-9 and National Pollutant Discharge Elimination System (NPDES) permitting:

1) Regs. 72-302.A.(6).(f)- *"land-disturbing activities associated with placement of underground lines for distribution or transmission of electric energy or of gas or communications services."*

2) Regs. 61-9.122.26.(a).(2)- *"The Department may not require a permit for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that has not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations."*

3) NPDES Permitting - Exempt Facilities and Activities:
(see <https://www.epa.gov/npdes/oil-and-gas-stormwater-permitting#types>)

The types of oil and gas facilities and activities subject to the waiver for stormwater permitting fall under "exploration, production, processing or treatment operations, or transmission facilities". These terms are further explained in Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities (bottom page 33635). The list of exempt facilities/activities includes (list not exhaustive):

- *"Natural gas transmission lines (i.e., lower pressure lines from producing field to nearest energy "hub" and cross-country, high pressure intra- and interstate pipelines). The exemption ceases at the distribution center (often referred to as the "City Gate"). The distribution center is where the local gas utilities take delivery of the gas and distribute it via lower pressure service lines to customers"*

SCDHEC notes that the applicant, DE, stated the following in their application materials and in their response to requests for additional information: "The Project has been designed and will remain in compliance with the South Carolina National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities (SCR100000)."

() No

III. Environmental Assessment

A. Are the proposed activities water dependent?

☐ Yes

☒ No

Pipelines convey materials from point to point. As such, they are not water-dependent and do not require location in or near aquatic resources. Furthermore, when the two points are on opposite sides of a large wetland or long tributary that's not practicable to avoid, in most cases it's possible, although not always practicable, for the pipeline to cross under the wetland or tributary using HDD without direct impacts.

B. Are there feasible alternatives to the proposed activity?

☐ Yes

☒ No, according to the applicant's alternatives analysis contained in the Section 404 Individual Permit Application Supporting Documentation dated June 2, 2021 and the applicant's responses (dated August 20 and December 10, 2021; and, January 18 and January 20, 2022) to SCDHEC's requests for additional information as briefly summarized below.

According to the applicant's June 2, 2021 submittal, alternatives were evaluated based on specific site selection criteria identified during development of the purpose and need of the proposed project. The June 2, 2021 submittal stated that the applicant developed the following site selection criteria, listed in order of priority, as a measure of a successful gas main installation from River Neck Road Regulating Station to Kingsburg Valve Station.

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 Kingsburg Valve Station
5. Readily accessible

The applicant eliminated the no-action alternative as no interpretation of the no-action alternative would meet the project purpose. The applicant then considered three alternatives according to the five criteria listed above and as summarized in Table 2 below.

Project Criteria	Utilize Existing ROW with Expanded Footprint (Preferred Site)*	Alternative 1- New Easement Along Transportation ROWs*	Alternative 2- Establishing a New Easement Adjacent to the Existing Dominion Energy ROW*
Location within an existing easement	40-feet located within a cleared and actively maintained utility easement	Not within an existing utility easement	Not within an existing utility easement
Ability to acquire agreements for easements	Minimal amount of new easement area required	Unknown	Unknown
Ability to avoid permanent clearing impacts	Total permanent clearing impacts: 19.2 Total Permanent Clearing WOTUS Impacts = 2.99 acres	Total permanent clearing impacts: 30 acres Total Permanent Clearing WOTUS Impacts = 3.5 acres	Total permanent clearing impacts: 70 acres Total Permanent Clearing WOTUS Impacts = 14.6 acres
Distance from River Neck Road Regulating Station to Kingsburg Valve Station	14.5 miles	14.85 miles	14.5 miles
Readily Accessible	Yes	Yes	Yes

Table 2. Summary of Alternative Site Evaluation Based on Site Selection Criteria. (Note: this table is a screen capture from the applicant's June 2, 2021 submittal and the SCDHEC June 8, 2021 public notice, and that the applicant's June 2, 2021 submittal noted that acreages in this table are approximate.)

SCDHEC asked the applicant about utilizing HDD at additional crossings to further avoid impacts. The

applicant provided the following additional information in response to SCDHEC's request in a submittal dated August 20, 2021.

"... There are many factors that affect selection of an appropriate and constructible installation method for a natural gas pipeline. Typical methods of installation include HDD, conventional bores, and/or conventional trench construction. Regulatory implications, environmental impacts, cost, constructability, and pipeline integrity are considered during the design and maintenance of pipelines and thus the selection of crossing methodology.

The use of conventional trench construction is often the preferred method because it allows the pipeline to be installed at a consistent four to five feet depth below land surface for a far greater length when compared to trenchless installations. Maintaining a consistent depth is desired because as the depth of cover increases, so does the difficulty in locating, exposing, and performing routine maintenance that is required for transmission pipelines.

Major streams channels that will be affected by the proposed project were assessed for suitability of bore or HDD pipe installation. Factors typically used to determine the most appropriate method of installation included:

- Physical limitations with respect to bending radius (flexibility) of the 16-inch pipe
- Existing subsurface geologic conditions
- Existing topography and slope to accommodate acceptable entry and exit angle
- Availability of suitable additional temporary workspace necessary to construct bore pits or set up drill rig and associated equipment
- Presence of existing utilities/infrastructure in relation to the new pipe
- Accessibility of the site for the specialized equipment
- Availability of additional land for pipe stringing, welding, and pullback operations
- Additional costs associated with use of "trenchless" technology given the project scale

Because the width of the proposed easement has been reduced at most crossings, safe excavation of the required bore pits is often not feasible. In other areas, many of the streams crossed are incised or located at the bottom of relatively narrow valleys, so excavation of the bore pit and stockpiling of the soils within the corridor is extremely difficult. As the bore pit must be excavated to a depth at which the bore can extend beneath the substrate of a stream or wetland, additional shoring of the pit would be necessary to meet safety standards. Other streams are located within wetland or floodplain areas where the high water table prevents excavation of bore pits that will become filled with groundwater and prohibit safe operation.

Accordingly, it was determined that conventional trench crossing methods would be employed for stream crossings, with the exception of Jefferies Creek. The Jefferies Creek crossing has been designed as an HDD. Other crossings may utilize HDD as the installation method depending on site conditions at the time of construction."

SCDHEC also asked the applicant about the width of the temporary and permanent easements, and permanently cleared areas. The applicant responded in a December 10, 2021 submittal providing the following additional information:

"In an effort to minimize the overall disturbance area, DE is proposing to install the new 16" pipeline adjacent to an existing 8" pipeline that was installed in the 1960's. The proposed project will require a combined temporary and permanent easement of at least 50-foot wide where the pipeline will be installed. DE's project team determined a sufficient width to adequately and safely accommodate the following elements, all of which are necessary with that space: Installation of silt fence or other erosion control devices, along with appropriate offsets within the boundaries of the easement; placement of timber mats or equipment bridges for the travel lane to allow sufficient boom and dipper arm swing radius of excavation and pipe-handling equipment; trench excavation and sloping to a width and depth necessary to accommodate placement of the new pipe and avoid cave-ins or undermine adjacent equipment work space in wet or saturated soils; and space for temporary placement and separate stockpiling of topsoil and subsoil. In upland areas, the work will generally occur within a 75-foot wide area (combined 50-foot permanent and 25-foot temporary

easements.) In general, the workspace will be narrowed to 50 feet at stream/wetland crossings, but in some areas, a wider work area is required to safely accommodate the equipment and work space necessary to install the pipe due to anticipated construction and topographic constraints. See Attachment 7 - Typical Pipeline Construction Workspace Details. Post construction, the 50-foot wide permanent easement will be permanently maintained. The 50-foot width of the proposed permanent easement is required to adequately support: 1) aerial and ground leakage surveys; 2) aerial patrolling for possible encroachment activities near the pipeline; 3) accurate identification of possible repairs and maintenance; 4) promotion of damage prevention in that the easement can be more easily identified by the public, and; 5) minimization of potential canopy encroachment, which creates visibility concerns."

SCDHEC also asked the applicant about conducting clearing of riparian vegetation manually within wetlands and waters of the U.S. rather than using mechanized clearing, which the applicant stated was permitted by the USACE. Recall that the project includes temporary and permanent clearing in wetlands and tributaries. The project will result in temporary clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acre), and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acre). SCDHEC asked the applicant about the feasibility of using hand clearing in all of these areas or in just a portion of these areas. The applicant responded in a January 20, 2022 email providing the following additional information:

"The permanent impacts are different than the temporary impacts. The permanent impacts will result from conversion of forested wetlands to herbaceous wetland within the new permanent easement. The permanent easement will be maintained after construction is complete using a combination of clearing, mowing, and application of EPA-approved herbicides. The temporary impacts will be utilized during construction but allowed to revegetate to their original condition once construction is complete. It should be noted that the temporary work space impacts have been reduced at stream and wetland crossings to the extent practicable. In general, the work will occur within a 75-foot wide work area in upland areas and the work space is reduced to a 50-foot wide work area in wetland, streams, and other sensitive features where feasible. DE is willing to minimize clearing activities between HDD entry and exit location. However, line of sight must be maintained and timber mats required for construction equipment to safely traverse the right of way will be needed in some locations. Due to the proximity and depth of the existing pipeline, a travel lane on top of the existing main is a safety concern and not feasible. Therefore, the timber mat travel lane must be installed on the "working" side of the corridor, which is the new easement side. Hand clearing is not practicable in these areas because grubbing and rough grading will be required to facilitate a timber mat travel lane for the safe passage of equipment and to prepare a suitably-level work surface for construction."

The applicant's December 10, 2021 submittal included a drawing showing a typical pipeline construction workspace within wetlands. Construction notes on the drawing indicate avoidance and minimization measures that should be followed including: using equipment mats or low ground weight equipment in saturated conditions, segregating wetland topsoil, excavating topsoil to an appropriate depth typically not exceeding 12 inches, keeping topsoil clean of all construction debris, maintaining adequate separation between topsoil and trench spoil piles, leaving gaps in spoil piles at obvious drainages, not pushing upland soil into waterbodies or wetlands, and not using topsoil for padding. SCDHEC believes these avoidance and minimization measures should both hasten the recovery of temporarily disturbed wetlands and lead to a more complete recovery of ecological functions temporarily disturbed during construction. See also Section II.G. Nonpoint Source Concerns for more information about proposed avoidance and minimization measures.

C. Navigability Assessment

Will the activities affect the Navigability of the involved waterbody?

☐ Yes

☒ No

Jeffries Creek is the only State navigable water the pipeline will cross. The applicant will install the pipeline under the bed of Jeffries Creek by horizontal directional drilling, which will leave the Creek bed and banks undisturbed, and will not affect navigability in any way.

D. Water Quality Assessment

Water Quality Standards and Designated Uses

In 2002, the lower 70-mile segment of the Great Pee Dee was designated a State Scenic River. This designation extends from the US Highway 378 Bridge crossing between Florence and Marion Counties to the US Highway 17 Bridge at Winyah Bay in Georgetown County. SCDHEC may deny certification if the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers; however, the segment so designated is a little over a mile downstream of the project corridor and downstream of the confluence with Mulyn Creek, therefore the project should not have any effect on this segment. The proposed work may cause a temporary increase in turbidity levels, but ambient conditions should resume once the work is completed and all disturbed land has been effectively and permanently stabilized. Water quality standards will not be contravened and designated uses will not be removed. Potential adverse impacts to water quality can be minimized through the use of BMPs, the conditions of the Nationwide Permit 12 described below, including the Charleston District Regional Conditions, and the additional, enforceable, SCDHEC 401 WQC conditions described below and listed in Section VIII of this staff assessment.

Nationwide Permit 12, Oil or Natural Gas Pipeline Activities

The USACE Charleston District is processing the application for authorization under Nationwide Permit (NWP) 12, Oil or Natural Gas Pipeline Activities (SAC 2019-01427). Before authorizing a proposed project under a NWP, the USACE makes a determination that the proposed activity will result in minimal individual and cumulative adverse environmental effects and is not contrary to the public interest. The specific language of NWP 12 requires that there be no change in pre-construction contours of waters of the United States. NWP 12 also requires the following measures intended to minimize impacts to water quality and designated uses:

“Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.”

“Access roads must be the minimum width necessary...Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at-grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.”

“This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.”

“This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary

mats, necessary to conduct the oil or natural gas pipeline activity.

Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.”

Nationwide Permit Regional Conditions

In addition to the measures described above, the Division Engineer for the USACE South Atlantic Division has approved Regional Conditions for use in the Charleston District (the state of South Carolina), some of which apply to all NWP, and some of which only apply to specific NWP. The following USACE Charleston District Regional Condition applies to all 16 NWP issued in 2021, including NWP 12:

“2. NWP activities are not authorized in areas known or suspected to have sediment contamination.”

The following USACE Charleston District Regional Conditions apply specifically to NWP 12 (SCDHEC notes that the following listing includes updates dated January 19, 2022):

“3. For NWP 12, 57 and 58, temporary structures, fills, and/or work, including the use of temporary mats, are authorized for the minimum amount of time necessary to accomplish the work, which shall not exceed a period of 180 days without additional Corps approval. **However, temporary sidecast material authorized by NWP 12, 57, or 58 cannot ever exceed a period of 180 days.** The temporary structures, fills, and/or work, including the use of temporary mats, shall be removed as soon as the work is complete and the disturbed areas be restored to pre-construction contours and conditions. The temporary mats include timber mats, metal, synthetic and/or artificial mats, or other materials that may serve the purpose of mats.”

4. For NWP 12, 57 and 58 that require PCNs and that involve temporary structures, fills, and/or work, including the use of temporary mats, the PCN should include the following information: (1) a written description and/or drawings of the proposed temporary activities that will be used during project construction; (2) the timeframe that the proposed temporary activities will be in place; and (3) specifications of how pre-construction contours will be re-established and verified after construction. Temporary mats include timber mats, metal, synthetic and/or artificial mats, or other materials that may serve the purpose of mats.”

“7. For NWP 12, 57 and 58 activities that involve horizontal directional drilling beneath navigable waters of the United States (i.e., section 10 waters), the PCN should include a proposed remediation plan (i.e., frac-out plan).”

“8. For NWP 12, 29, 39, 51, 52, 57 and 58 activities that involve crossings, all culverts must be adequately sized to maintain flow. For these activities that require submittal of a PCN, the PCN should include the minimum size of and number of culvert/pipes that are proposed.

9. For NWP 12, 43, 51, 57 and 58, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition 32, for activities that involve the loss of greater than 0.005 acre of 1 stream bed.

10. For NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58 activities that involve the loss of greater than 0.005 acre of stream bed, compensatory mitigation will be required and the PCN should include compensatory mitigation plan.

11. For NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58, the discharge cannot cause the loss of greater than 0.05 acre of stream bed.”

“18. For NWP 12, 57 and 58, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition 32 if the activity involves the discharge of dredged or fill material into waters of the U.S. associated with mechanized land clearing that results in the permanent conversion of forested or scrub-shrub wetlands to herbaceous wetlands for a maintained right-of-way.”

South Carolina Department of Natural Resources (SCDNR) recommendations and enforceable SCDHEC 401 WQC Conditions

The SCDNR reviewed the proposed project and evaluated its impact on natural resources. The SCDNR did not object to SCDHEC certifying the application provided their concerns about protected conservation lands within the existing/proposed ROW were adequately addressed, provided their concerns about state and federal species of conservation concern in the project area were adequately addressed, and provided the SCDNR's specific recommendations included in their comment letter as bullets were incorporated as minimization measures.

After the SCDNR reviewed the information included in the applicant's response dated August 20, 2021, the SCDNR said they had no further objections provided the commitments and stipulations included in the response document and attachments were incorporated as permit conditions. SCDHEC will incorporate DE's commitments and stipulations included in the response document and attachments as enforceable conditions of the 401 WQC as appropriate in accordance with SCDHEC's authority under Regulation 61-101, *Water Quality Certification*, and Regulation 19-450, *Permits for Construction in Navigable Waters*, as Described below, and as listed in Section VIII of this staff assessment.

Regarding protected conservation lands within the existing/proposed ROW, DE stated that they have and will continue to coordinate with the corresponding landowners to minimize impacts to these lands. SCDHEC is including a condition in the 401 WQC requiring DE to do this throughout the duration of construction and operation of the pipeline to minimize impacts to the aquatic resources, aquatic ecosystems, water quality, and classified uses within these protected conservation lands. SCDHEC also notes that DE will not be able to cross these lands without having or obtaining easements from the landowners.

Regarding species of conservation concern in the project area, DE stated that they are taking preventative measures and plan to utilize the flume method to cross the streams referenced in the SCDNR comments as well as all streams that are flowing at the time of construction (except those that will be crossed by HDD or bore methods). SCDHEC will include an enforceable condition in the 401 WQC requiring the use of the temporary flume bypass method of crossing instead of the dam-and-pump method when excavation is required across flowing streams, since the SCDNR stated the latter could entrain or impinge many of the above-referenced species of conservation concern as well as other aquatic organisms. After DE reviewed the draft condition and provided feedback, SCDHEC decided to change the wording of the condition to be more consistent with the terminology and intent of the SCDNR comments (which use the word stream(s) and only mention named tributaries) and with a similar condition in a previous certification for a major pipeline project, which also used the word stream(s).

The SCDNR recommended that all proposed Horizontal Directional Drilling (HDD) crossings follow the stipulations stated in the HDD Inadvertent Return Contingency Plan dated June 4, 2020. DE stated in their response to the SCDNR comments that all HDDs installed for the project will follow the project's HDD Inadvertent Return Contingency Plan. SCDHEC will include an enforceable condition in the 401 WQC requiring DE to be responsible for complying with this plan, or any subsequent revisions approved by SCDHEC and the USACE, in consultation with the SCDNR. This requirement will not obviate the need for the applicant to respond to unforeseen, specific problems that might arise, and to take additional measures not included in the plan to prevent pollution as determined by project personnel based on circumstances at the construction site. SCDHEC will also include an enforceable condition in the 401 WQC notifying DE that they must properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

The SCDNR recommended that clearing of riparian vegetation within wetlands and waters of the U.S. be conducted manually, and that low growing, woody vegetation, and shrubs be left intact to maintain bank stability and reduce erosion. DE responded by saying that mechanized land clearing will be utilized as permitted by the USACE. As discussed previously, SCDHEC asked the applicant about the feasibility of conducting some or all of the temporary and permanent clearing of riparian vegetation within wetlands and waters of the U.S. manually. The applicant provided additional information explaining why it was determined to be necessary to use mechanized clearing as summarized above in Section II.B.

The SCDNR recommended that stream banks at crossings be restored after construction has been completed. The SCDNR stated disturbed stream banks can be restored by planting woody vegetation and by using bioengineering techniques for stream bank stabilization. DE responded stating that stream banks will be stabilized following disturbance using appropriate stabilization techniques. SCDHEC will include an enforceable condition in the 401 WQC requiring DE to restore stream banks at crossings after construction has been completed, in as little time as is feasible, which will vary based on site-specific conditions. After DE reviewed the draft condition and provided feedback, SCDHEC decided to revise the condition to also include the use of appropriate riparian seed mixes.

The SCDNR recommended that Construction activities avoid and minimize, to the greatest extent practicable, disturbance of woody wetland or riparian vegetation within the project area. Removal of vegetation should be limited to only what is necessary for construction of the proposed pipeline and road culvert. DE stated construction activities will be conducted in a manner that avoids and minimizes disturbance of vegetation, with removal of vegetation only conducted when necessary, and minimized to the extent practicable. SCDHEC will include this commitment as an enforceable condition of the 401 WQC.

The SCDNR recommended that where necessary to remove vegetation, supplemental plantings should be installed following completion of the project. The SCDNR stated these plantings should consist of appropriate native species for the ecoregion. DE responded by Stating that areas disturbed during construction will be properly stabilized using appropriate methods including the use of seed mixes that incorporate seeds of native species, mulching, live stakes, and other temporary and final stabilization measures. SCDHEC will include this commitment as an enforceable condition of the 401 WQC.

The SCDNR recommended that Right-of-Ways (ROW) through and adjacent to forested wetlands and riparian areas should be maintained in low growing, native vegetation. The SCDNR stated that 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. The SCDNR stated that if chemicals are used, a 50-foot buffer on either side of the wetland crossing should be established where no herbicide treatments would be allowed. The SCDNR stated that this measure will serve to retain the riparian vegetation while reducing the amount of chemical runoff into the aquatic environment. DE stated that after the pipe is put in service, the cleared ROW will be maintained using a combination of hand clearing, mowing, and application of EPA-approved herbicides and in accordance with FIFRA label requirements and Clemson University's Department of Pesticide Regulation's requirements, as applicable. DE stated that only herbicides approved for use near waters are selected and are applied in conformance with the Pesticide General Permit issued by SCDHEC. DE stated that all herbicides will be applied by trained applicators licensed through Clemson University Extension Service. As mentioned previously, after reviewing DE's response, the SCDNR said they had no further objections provided the commitments and stipulations included in the response were incorporated as permit conditions. SCDHEC will include these commitments as enforceable conditions of the 401 WQC.

The SCDNR recommended that prior to beginning any land disturbing activity, appropriate erosion, and siltation control measures, silt fences or silt barriers must be in place and maintained in a functioning capacity until the area is permanently stabilized. DE responded by stating they will install and maintain erosion and sediment control devices until the project area achieves final stabilization. SCDHEC will include this commitment as an enforceable condition of the 401 WQC.

The SCDNR recommended that materials used for erosion control such as hay bales or straw mulch must

be certified as weed free by the supplier. DE responded by stating that they will utilize approved erosion and sediment control devices. SCDHEC will include an enforceable condition in the 401 WQC requiring that seed mixes be certified to be free of the seeds of noxious weeds.

The SCDNR recommended that any damaged erosion control measures be repaired within 24 hours of identification, or as soon as conditions allow (in other words – sooner than 24 hours) if compliance with this time frame (24 hours) would result in greater environmental impacts. DE responded stating that they will follow SCDHEC permit requirements (referring to NPDES requirements) and BMP manuals specific to addressing erosion and sediment control measures during construction. DE stated they will repair damaged erosion control measures as soon as practicable; however, SCDHEC finds the SCDNR's recommendation to be appropriate and practical. Furthermore, the project has a qualified exemption from the requirement for an NPDES Permit (provided water quality standards are not violated or exceeded) as explained in Section II.G. Nonpoint Source Concerns. The referenced BMP manual generally recommends repairs be carried out immediately. SCDHEC will include an enforceable condition in the 401 WQC requiring the SCDNR's stipulation. After DE reviewed the draft condition and provided feedback, SCDHEC agreed to reword the condition to clarify that this timeframe requirement only applies to areas of active construction or equipment operation. DE stated they would follow applicable SCDHEC NPDES permit inspection and maintenance schedules in other areas (temporarily or finally stabilized) as well.

The SCDNR recommended that all necessary measures be taken to prevent oil, tar, trash, and other pollutants from entering the adjacent offsite areas/wetlands/water. DE responded and stated that project erosion and sediment control measures have been designed to verify that oil, tar, trash and other pollutants are prevented from entering adjacent offsite areas, wetlands, and waters. SCDHEC generally includes this stipulation as an enforceable condition of all 401 WQCs, and will do so in the case of this project as well, calling out gasoline and construction debris, in addition to the other pollutants mentioned.

The SCDNR recommended that once the project is initiated, it must be carried to completion in an expeditious manner to minimize the period of disturbance to the environment. DE responded and stated that they will complete the project expeditiously to minimize the period of disturbance. SCDHEC generally includes this stipulation as an enforceable condition of all 401 WQCs, and will do so in the case of this project as well, specifically calling out both construction and final site stabilization.

The SCDNR recommended that upon project completion, all disturbed areas must be permanently stabilized with vegetative cover (preferable), riprap, or other erosion control methods as appropriate. DE responded and stated that they will install and maintain erosion and sediment control devices until the project area achieves final stabilization. SCDHEC will include these commitments in enforceable conditions of the 401 WQC.

The SCDNR recommended that road crossings of streams or tributaries be accomplished with appropriately sized bridges and/or culverts. The SCDNR stated that culverts must be sized and designed to prevent alteration of the natural stream morphology. The SCDNR stated that they prefer that arched or bottomless culverts are utilized; however, if using boxed culverts or pipes, they recommended that the bottom elevation of the culvert or pipe be at or below the stream bed elevation to allow for natural migration of aquatic organisms upstream and downstream. They also stated again that disturbed stream banks should be restored by using bioengineering techniques for stream bank stabilization. Restoration/stabilization of disturbed streambanks was discussed previously and will be addressed by a condition of the 401 WQC. SCDHEC will include these recommendations as an enforceable condition of the 401 WQC.

The SCDNR recommended that the project comply with any applicable floodplain, stormwater, land disturbance, or riparian buffer ordinances. DE responded and stated that the project will be constructed in accordance with USACE, SCDHEC, and Florence County permit requirements, including all applicable floodplain, stormwater, land disturbance and riparian buffer ordinances. SCDHEC does not have authority to enforce local ordinances and it is not appropriate to include this commitment as an enforceable condition of the 401 WQC.

IV. Public Participation, Summary of Public Comments Received, and DE and SCDHEC Responses, including SCDHEC's Response to the Issue of Environmental Justice

SCDHEC Response to the Issue of Environmental Justice

EJ Screen

The Environmental Justice (EJ) Coordinator for SCDHEC's Office of Environmental Affairs conducted an EJ screen based on a 10-mile radius around the centroid of the proposed pipeline location. The data shows that the area ranks high (above the 80th percentile) for Wastewater Discharge EJ Indicators. Demographic data shows that out of the 9,487 people in the area, 42% identify as people of color and 48% are considered low income.

Public Comments

The Department received comments in opposition to the proposed project based upon impacts the proposed project may have on the minority community. Commenters claim that the proposed project would disproportionately harm underserved and minority populations, thus contravening SCDHEC's stated commitment towards environmental justice.

SCDHEC Response

As stated on our website, SCDHEC is committed to "the fair treatment and meaningful involvement of people of all races, cultures and incomes with respect to the development, adoption, implementation and enforcement of environmental laws, regulations and policies in working towards increasing prosperity of all South Carolinians."

SCDHEC is committed to environmental justice and engaging with communities, environmental justice stakeholders, and applicants to address environmental justice concerns and ensure that citizens in overburdened communities can have meaningful involvement in our decision-making process.

Based on the comments received, the potentially impacted residents have identified themselves as an environmental justice community. In an effort to provide opportunities for meaningful engagement for the community, the Department held a public hearing to communicate information about the proposed project and to provide a process whereby the community's questions and concerns could be heard.

South Carolina water quality regulations do not require an EJ 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. A water quality certification decision is based upon a review of all applicable water quality regulations and a review of all technical and other information submitted (by both the applicant and the public). A water quality certification will only be granted when the applicant demonstrates compliance with requirements for the issuance of the certification.

It is a priority of the Department to empower communities to work closely with regulated facilities and local officials to identify potential community hazards and steps that could be taken to reduce risks. The Department was recently awarded a U.S. EPA grant for environmental justice initiatives that will benefit low-income and minority communities. The Department will use this new funding to further enhance our ability to work collaboratively with environmental justice communities to understand, promote, and integrate approaches that provide meaningful and measurable improvements to public health and the environment. The Department looks forward to working closely with our environmental justice partners across South Carolina as we pilot new training programs and other initiatives to expand statewide.

Background Information on Public Participation: SCDHEC Community Engagement, SCDHEC Public Notice, and SCDHEC Public Hearing.

SCDHEC Community Engagement efforts began around November of 2020 when complaints were received about DE canvassers. The Southeast Rural Community Assistance Project (SERCAP) reached out to SCDHEC Bureau of Water Management. A meeting was subsequently held to discuss SERCAP's

request for information on permits in the Pee Dee region related to DE. As a result of this community engagement, the SC Energy Office hosted an Environmental Justice Workshop that took place May 18, 2021 from 2:00 to 5:00 PM. The interactive, virtual workshop provided participants with an opportunity to learn about energy topics in SC, to gain knowledge and perspective on the relevance of energy to environmental justice communities across SC, and to discuss these issues with a broad group of stakeholders including experts in the energy field and advocates for environmental justice. Organizations involved in the project included SERCAP, the SC Commission on Minority Affairs, and the Pee Dee Tribe of Upper SC. The SCDHEC's Director of the Division of Water Quality was one of the presenters.

SCDHEC initially distributed a 15-day public notice of the application for the proposed pipeline project on June 8, 2021. Regulation 61-101, Water Quality Certification, allows SCDHEC to reduce the normal 30-day notice period to 15 days if it determines that an application is of a type that is routinely granted and the impacts are minor, as is the case with projects processed by the USACE for coverage under a Nationwide Permit. SCDHEC mailed a two-page public notice with project details and a one-page map of the project corridor to adjacent property owners, the applicant and their agent (copies were mailed to the applicant and agent by certified mail) and the SCDHEC's 401 Water Quality Certification (WQC) mailing list. Copies were also distributed by email to SCDHEC's 401 WQC email notification list.

The public notice contained a link to the SCDHEC public notice web page where a copy of the public notice and map were posted, along with most of the application materials, maps, figures, and drawings that the applicant submitted with the joint application to the USACE and SCDHEC. SCDHEC asked the applicant to update these materials just prior to the public notice as the applicant made minor modifications to some of the project details after these materials were originally submitted. SCDHEC also published an abbreviated version of the public notice in the State Newspaper indicating a 15-day comment period. The newspaper notice also contained a link to the public notice on the SCDHEC public notice web page so readers could find additional information about the project.

In response to requests for a public hearing, requests to extend the comment period, and concerns about environmental justice issues and adequate public participation, the SCDHEC held a virtual public hearing at 6:30 PM on October 14, 2021. Prior to the hearing, SCDHEC created an informational web page for the proposed pipeline project with a Description of the project, a Description of the 401 WQC review process, the SCDHEC public notice and updated application materials, and copies of the comments received during the initial public comment period. SCDHEC notified parties who requested a hearing, and the applicant and their agent about the public hearing. Information about the public hearing was added to the SCDHEC project web page and notice of the public hearing was also published on the SCDHEC public notice webpage. SCDHEC also added a fillable form to the project web page so interested parties could pre-register to speak at the public hearing. SCDHEC also developed a flier with details about the public hearing and the application for the proposed pipeline. SCDHEC public participation and environmental justice staff reached out to contacts in the community, resulting in the flier being distributed to two local library branches (Pamplico and Johnsonville) to publicize the SCDHEC public hearing and project web page. These library branches posted the flier in their buildings and to their Social Media and web pages. SCDHEC Bureau of Water's Public Participation Coordinator also had a conversation with the Manager/Administrator of the Town of Pamplico, Mr. Edwin P. Rogers, to share details about the forthcoming public hearing.

The information posted and sent out about the public hearing also included a phone number, so individuals without access to a computer, smart phone, or the internet could pre-register to speak at the hearing. The public hearing was implemented virtually to facilitate increased attendance and adherence to social distancing protocols. The hearing was conducted through Microsoft Teams, but a call-in number was also provided, again, so individuals without a computer, smart phone, or internet access could participate. One of SCDHEC's overarching goals is to not allow lack of access to technology to hinder public participation or to be a barrier for community members/stakeholders.

The information posted and sent out about the public hearing also notified the public that the hearing would initiate another 15-day public comment period, and in addition to people participating in the public hearing and making oral statements that were recorded and later transcribed by a court reporter,

organizations and individuals sent comment letters, emails, and voicemails, or made comments directly to the SCDHEC project manager on the phone during the extended public comment period. SCDHEC posted a recording of the public hearing on the project web page as soon as it was available.

Summary of Public Comments Received, and DE and SCDHEC Responses.

The following section provides a brief summary of comments received, emphasizing those related to water quality and classified uses. In addition, this section includes responses to comments from the applicant, DE. SCDHEC asked DE to provide a response to all public comments received, particularly those comments related to water quality and classified uses. The DE responses are interjected in the comments and italicized to set them apart from the comments and any SCDHEC responses or notes. Responses were given headings so they could be referenced rather than repeated when the same or substantially similar response was provided for similar comments from different commenters. The following section also briefly explains how SCDHEC addressed issues within the scope of R.61-101 in any enforceable 401 WQC conditions when applicable, or in other actions prescribed by the regulation when appropriate such as holding a public hearing and/or extending the comment period. Some issues were raised in multiple comments, and sometimes in different ways. The responses are provided the first time issues are raised and may integrate information from applicant submittals from more than one date.

A. Gail Kathy Andrews

Date: June 11 (letter), June 24 (email), October 14 (oral comments), October 28 (email), and November 8, 2021 (email)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Andrews stated the pipeline will damage the environment; the pipeline will destroy acres of vital habitat; the pipeline will pollute the Great Pee Dee River and Jefferies Creek; the pipeline will pollute wildlife habitat; the project will result in loss of valuable water and filtering that forests provide, nothing will grow near the pipeline, not even timber; and, the pipeline will damage the Great Pee Dee River, an area where the local people fish and hunt.

DE Avoidance and Minimization Response

DE has designed the project to avoid environmental impacts and, where that is not possible, to minimize those impacts to the greatest extent possible, consistent with federal and state regulatory requirements. The pipeline route was chosen to minimize potential impacts to the environment, specifically, to minimize tree clearing and disturbing new areas by running alongside an existing pipeline corridor. The primary workspace throughout construction will be within the existing corridor. Where possible, trenchless installations (i.e. Horizontal Directional Drills or HDDs) will be used to avoid impacts to streams and creeks (such as Jefferies Creek). Stormwater management and other measures will be implemented to further protect aquatic resources. We will also protect the surrounding soil and water during construction by following state requirements for erosion and sediment control design and implementing an inspection and maintenance plan to verify erosion controls function as designed throughout construction. After construction, disturbed areas will be stabilized, re-vegetated, and restored. Lastly, it should be noted that the project is not crossing the Great Pee Dee River.

Ms. Andrews stated the pipeline is dangerous to wildlife and people. She stated Dominion has a history of explosions. She stated Dominion has a history of infractions like explosions, groundwater contamination and air pollution. She stated pipelines leak. She stated DHEC issued a report indicating that groundwater contamination was causing bone cancer in elderly people. She stated the pipeline will exacerbate problems experienced by persons living near the river. Ms. Andrews expressed concern about greenhouse gas emissions. Ms. Andrews expressed concern that emissions from the pipeline are linked to increased rates of cancer, poor air quality, on low-income and people of color. Ms. Andrews was also concerned with a history of pipelines causing groundwater contamination and air pollution resulting in cancer, respiratory disease, and diabetes in a region where residents suffer from poverty and health problems.

DE Environmental Justice and Heirs Property Response

DE referred to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses."

DE Pipeline Safety Response

Pipelines are one of the safest methods to transport natural gas. According to research by the National Transportation Safety Board (NTSB), pipelines make up less than .01% of all transportation-related incidents in the U.S. today. Safety is one of DE's core values. DE is committed to safe operations, safe facilities, and safety-minded employees. From construction through operations, safety is the top priority. DE maintains operating policies and procedures that adhere to United States Department of Transportation (USDOT) safety requirements that provide specific directions to inspection, testing, operation, preventive maintenance, repair, and patrols of facilities and more. We operate and maintain our system in accordance with associated regulations. We monitor the flows and pressures on our lines around-the-clock, patrol our system and employ robust programs to verify system integrity. Natural gas remains one of the safest energy sources available. Natural gas does not flow through our pipeline in a liquid form. In the remote/rare case of damage to the pipeline, it will be in gaseous form and dissipate. Additionally, the South Carolina Pipeline Safety department enforces the pipeline safety regulations promulgated by the USDOT and has an agreement in place with the Pipeline and Hazardous Materials Safety Administration (PHMSA) ensuring that all operations in the state comply with PHMSA guidelines. DE highly trained personnel work every day to verify the safety of the public we serve and to verify the integrity of our natural gas system. We monitor the flows and pressures of our system 24/7, patrol our system for leaks and have robust system integrity programs.

Ms. Andrews stated Dominion has a history of environmental and other infractions, like explosions, groundwater contamination, air pollution, and water pollution.

DE Environmental Record Response

DE makes every effort to meet or exceed environmental regulatory requirements and is held accountable if it does not. Following three separate large volume rain events in mid to late April 2018, environmental and sedimentation control measures failed along short sections of the Dominion Carolina Gas Transmission (no longer part of Dominion Energy) Charleston Project's 55-mile pipeline right of way in Spartanburg County. This resulted in small amounts of sediment outside of the right of way. Construction of the project was complete and restoration activities were nearing completion. Dominion Carolina Gas Transmission immediately notified state and federal agencies and took the following actions: 1.) Brought in additional resources to restore areas impacted by the rain, worked with SCDHEC to prioritize areas for restoration to verify compliance; 2.) Corrected the right-of-way issues within 48 hours of the initial inspection to the satisfaction of representatives from SCDHEC and the Federal Energy Regulatory Commission (FERC) visually inspect the completed restoration. DE does not have a history of water pollution. DE's compliance record and commitments speak for themselves. As noted in other responses, other affiliates of Dominion Energy experienced episodic compliance issues in the past, all of which were promptly corrected to the satisfaction of the governing jurisdictional agencies.

Ms. Andrews stated the pipeline will destroy acres of forest, pristine lands, and property in general. She stated the pipeline will devalue land by 40%.

DE Co-location Response

The pipeline route was chosen to minimize potential impacts to the environment by being collocated within an existing DE natural gas pipeline easement. As such, this decision minimizes clearing of trees / forest when compared to constructing the pipeline within a non-co-located easement. As such, this decision minimizes impact to pristine lands as the pipeline will be constructed in areas that have previously cleared / disturbed. The pipeline route was chosen to be co-located in an existing DE natural gas pipeline easement, where rights-of-way were previously obtained, thus verifying that no property will be more than minimally impacted, much less destroyed.

Ms. Andrews asked why Dominion chose the area of mostly heir's property. She stated Dominion chose this area because they think people won't fight back, the company targets the poor, working class persons

who are intimidated. She stated Dominion has intimidated persons by saying "if you don't sign this, then we will put our lawyers on you." She stated that what Dominion is doing is environmental racism, targeting areas with minorities who are dealing with racism, kidney problems, cancer, respiratory disease, asthma and Crohn's disease. She stated that emissions from the pipeline are linked to increased rates of cancer, poor air quality, on low-income and people of color.

DE Environmental Justice and Heirs Property Response

DE referred to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses."

Ms. Andrews stated Dominion will not provide jobs or gas to the people who will be directly impacted by the pipeline. She stated Dominion is vague about what they are doing and stated we heard that they will be exporting the gas or connecting it to Myrtle Beach.

DE Natural Gas ROW Guidelines Response

DE referred to a 2-page document titled "DE's Natural Gas ROW Guidelines" that explains that the ROW can be utilized for various purposes. In addition, the pipeline route was chosen to be co-located in an existing DE natural gas pipeline easement which has co-existed with native vegetation and farms since the early 1960's. DE also referenced a 3-page document titled "Photographs of Typical DE Right of Way (ROW)" that DE included with their December 10, 2021 submittal as Attachment 9.

Ms. Andrews stated endangered species will suffer as indicated by the Department of Natural Resources.

DE Rare, Threatened, or Endangered Species Response

In response to comments regarding Rare, Threatened, or Endangered (RTE) species, DE stated that they completed an assessment for RTE species habitat in the project area. DE provided documentation in their December 10, 2021 submittal that the U.S. Fish and Wildlife Service concurred with a no-effect determination after reviewing their database, and finding there were no federally-listed species within the proposed area. They also provided documentation of their pre-application consultation with the SCDNR.

SCDHEC Response

The SCDNR reviewed DE's RTE species habitat assessment and made the recommendation that all efforts should be made to avoid and minimize impacts to species of conservation concern. Where trench excavation is required across flowing streams, the SCDNR specifically recommended the use of a temporary flume bypass instead of a dam-and-pump method, as the latter could entrain or impinge many of the above-mentioned fish species of concern as well as other aquatic organisms. The DE committed to using this method in the referenced streams and SCDHEC included this commitment as an enforceable condition of the 401 WQC.

Ms. Andrews stated there needs to be an official hearing and a delay in any action because of COVID.

SCDHEC Response

SCDHEC held a virtual public hearing on October 14, 2021 and reopened the public comment period until COB on October 29, 2021, 15 days following the date of the public hearing.

Ms. Andrews requested that SCDHEC send a copy of the Notice of Department Decision to her by email at gkandrews4932@gmail.com.

SCDHEC Response

The SCDHEC Project Manager added Ms. Andrews' email to the distribution list for the Notice of Department Decision.

B. Lora L. Guiles

Date: undated, received June 25, 2021 (letter)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Guiles is against Dominion adding another pipeline on her property. She stated "These pipelines have detrimental effects on the health of those living near them." She expressed her opinion that DHEC should oppose the pipeline too, "as South Carolinians are affected."

DE Response

DE repeated response comments about Pipeline Safety listed previously.

C. Reatha L. Hyman Jefferson on behalf of the Andrew Hyman Heirs

Date: June 16 (letter), and October 14, 2021 (oral comments)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Jefferson stated the pipeline could crack or burst, seep into/contaminate ground water/wells.

She stated the pipeline could cause illness and expressed concern about potential contamination of well water. She stated the pipeline could cause devastating illnesses and asked if the pipeline ruptures, could the gas end up in wells which are used for crops and livestock? She expressed concern that the pipeline could cause cancer.

DE Response

DE repeated response comments about Pipeline Safety listed previously.

Ms. Jefferson stated Dominion is using eminent domain by saying the pipeline is good for the community, but it is not as most of the community members don't use gas, they use electricity.

DE Project Purpose and Benefits Response

DE will construct the project to meet residential, commercial, and industrial growth throughout the area. Increased natural gas capacity can play a key role in attracting new businesses to the region, as well help existing businesses grow. As a result, the project can also provide additional job opportunities for the community, and potentially lower energy costs for residents who choose natural gas in their home. The project will provide the additional capacity and flexibility our system requires to meet both current and anticipated customer needs.

D. South Carolina Environmental Law Project (SCELP), Ms. Lauren Megill Milton (Ms. Milton)

Date: June 23 (letter), October 14 (oral comments), and October 29, 2021 (letter)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

The SCELP submitted a letter to SCDHEC and the USACE on behalf of BREDL dated June 23, 2021.

The SCELP contended the approval process was being rushed to meet a construction timeline laid out by the applicant, depriving the public of adequate records/information and time to review and provide full and meaningful comment. SCELP requested an extension of time to comment and a public hearing. The SCELP also stated that the applicant has not met its burden on demonstrating why this proposal meets both the Corps' and DHEC's guidelines to warrant approval and asked SCDHEC to ultimately deny the application or, at a minimum, require the applicant to modify its application to reduce or eliminate aquatic impacts to the fullest extent possible.

DE Response

DE's application meets the federal and state regulatory requirements, and demonstrates that the project is designed to avoid and minimize impacts to aquatic resources.

SCDHEC Response

When evaluating the proposed work, SCDHEC followed procedures for implementing State Water Quality Certification requirements pursuant to Section 401 of the Clean Water Act, 33 U.S.C. Section 1341, and Regulation 61-101, Water Quality Certification, and Regulation 19-450, Permits for Construction in Navigable Waters. In response to several requests, including the above-referenced request, SCDHEC held a virtual public hearing on October 14, 2021 and reopened the public comment period until COB on October 29, 2021, 15 days following the date of the public

hearing. See also additional information and details about SCDHEC public engagement and public participation in the introduction to this section.

The SCEL P was very critical of the application for being incomplete. They stated the application provided no information on the water quality or cumulative impacts of the proposal to Waters of the U.S. (WOTUS). They stated no information was available on the discharges associated with the project.

DE Response

In response to comments regarding the application being incomplete, DE stated the application included the information required by SCDHEC regulations and DE provided additional information as requested by SCDHEC. In response to comments regarding lack of information on water quality and cumulative impacts, DE referred to Section 5.1.10, titled Water Quality and Supply, of the "Section 404 Individual Permit Application Supporting Documentation" for this information. (SCDHEC notes that the referenced section was included in the SCDHEC Public Notice.)

DE Individual and Cumulative Adverse Effects Response

In response to comments regarding the lack of discussion of cumulative adverse effects to WOTUS, DE stated the following: "Adverse effects are those that reduce the quality and/or quantity of habitat, including direct, indirect, site specific, or habitat wide impacts, including individual, cumulative or synergistic consequences of actions. The current plan balances the least wetland and WOTUS impacts while meeting the project purpose. The degree of threat associated with the proposed wetland impacts are not likely to adversely affect WOTUS and they do not significantly alter the habitat of the site or surrounding region. It should be noted the project is currently under review for issuance of a Nationwide Permit. Pre-construction notifications ensure that NWP activities are consistent with water quality standards, water quality management plans/continuing planning process, total daily maximum loads, and anti-degradation policy."

DE Stormwater Pollution Prevention Plan Response

In response to comments regarding lack of information on the discharges associated with the project, DE stated the following: "The project has been designed and will remain in compliance with the South Carolina National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities (SCR100000) as applicable." DE also referenced a 7-page Stormwater Pollution Prevention Plan (SWPPP) for further information. DE provided the document as Attachment 4 in their August 20, 2021 submittal in response to a SCDHEC request for additional information.

SCDHEC Response:

SCDHEC sent a request for additional information dated July 23, 2021 to DE that asked for the following: 1) a \$100 environmental protection fee, 2) a notarized affidavit of publication of a newspaper notice, 3) additional information about feasible alternatives including information about whether HDD could be utilized at more crossings, 4) a detailed mitigation plan including all appropriate and practical steps to avoid and minimize impacts to water quality and the aquatic ecosystem (SCDHEC did not ask for a compensatory mitigation plan as explained previously in Section II.D of this staff assessment titled Compensatory Mitigation.), and 5) additional information and details regarding construction and post-construction stormwater management. Regarding construction stormwater, SCDHEC notes again that, as explained previously in Section II.G. Nonpoint Source Concerns, DE is exempt from NPDES Permit requirements, unless a water quality criterion is exceeded, and/or the water's designated use is adversely impacted (that is to say, not attained). According to the U.S. Environmental Protection Agency: "Any time one of these triggering events occurs, the operator is required to comply with CWA section 402 stormwater permit requirements, meaning, determine or establish permit eligibility, develop a SWPPP, and submit an NOI to be covered (if using one of the general permits). If the discharger is not eligible for a general permit, apply for an individual permit." (SCDHEC notes that CWA refers to Clean Water Act, SWPP refers to Stormwater Pollution Prevention Plan, and NOI refers to Notice of Intent.)

As explained in Section II of this staff assessment, Project Description, the U.S. Army Corps of Engineers (USACE) Charleston District is processing the application for authorization under Nationwide Permit (NWP) 12, Oil or Natural Gas Pipeline Activities (SAC 2019-01427). In doing this, the USACE makes a determination that the proposed activity will result in minimal individual and cumulative adverse environmental effects and is not contrary to the public interest. As also explained in Section II, SCDHEC is processing the application for an individual 401 Water Quality Certification (WQC) because the project failed to meet special condition III.a.1 (applicable to projects authorized under NWP 12) of the General State Certification (SC NWP State Cert 2021) issued by SCDHEC on May 13, 2021, which states: “[t]his NWP is not certified for pipelines with more than 10 aquatic site crossings (not including directionally bored crossings)].” Individual project-specific review allows SCDHEC the opportunity to request additional information regarding feasible alternatives, and further avoidance and minimization, including stormwater management. The individual certification process also allows SCDHEC to impose project-specific conditions that lead to further avoidance and minimization of impacts when appropriate, including cumulative impacts.

In a section the SCEL P comment letter titled “Environmental Justice,” SCEL P provided extensive background information on the issue of environmental justice and on the history of Federal and State environmental justice programs, concluding by stating that the project is in an area that should be given greater scrutiny according to past Executive Orders, including one issued January 20, 2021 by President Biden.

DE Public Outreach and Environmental Justice Overview Response

In response to comments about Environmental Justice (EJ) issues, DE referred to a 2-page document titled “DE Public Outreach and Environmental Justice Overview.” The document provides details about DE’s community engagement actions and environmental justice review associated with the project.

In a section of their comment letter titled “Whether the activity is water dependent and the intended purpose of the activity,” SCEL P was critical of the applicant’s alternatives analysis. They stated Dominion failed to adequately assess the project’s feasible alternatives. They stated Dominion completely failed to seriously consider less-damaging plans, let alone demonstrate that there are no less damaging feasible alternatives. SCEL P also stated the project is not water-dependent and the applicant’s position ignores the presumptions from the 404(b)(1) guidelines that there are practicable alternatives available that do not involve special aquatic sites and that such alternatives have less impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

DE Alternatives Analysis and Co-location Response

In response to the above comments, DE responded by stating that they conducted an alternatives analysis, considering multiple route options and selecting the one that minimizes impacts to wetlands and streams. DE referred to Section 2.0, titled Practicable Alternatives Analysis, of the “Section 404 Individual Permit Application Supporting Documentation.” They stated potential routes for the project will impact aquatic resources. DE stated they were unable to identify practicable alternatives that do not impact special aquatic sites. They stated the selected route avoids and minimizes impacts to aquatic resources to the maximum extent possible. Moreover, they stated the selected route minimizes impacts compared to the alternatives because it is co-located with an existing DE natural gas pipeline easement, where some disturbance has already occurred, lessening the amount of additional disturbance needed.

SCDHEC Response

SCDHEC agrees the project is not water-dependent as explained in Section III.A of this staff assessment. See also Section III.B of this staff assessment for a discussion of the applicant’s alternatives analysis.

In a section of their comment letter titled “Whether there are feasible alternatives to the activity,” the SCEL P criticized the applicant’s alternatives analysis further. SCEL P stated that instead of rebutting the water-dependency presumption as required, Dominion focused on offsite alternatives with the same

constrained project purpose in an attempt to foreclose all other alternative sites or less-damaging alternative development designs. Regarding site selection criteria, they stated as to site selection criteria 1 and 2, "Location within an existing easement," and "Ability to acquire agreements for easements," respectively, Dominion claims without explanation that "Conformance with this criterion would result in avoidance of new impacts to sensitive resources and other indirect environmental impacts associated with obtaining new easements" and "Constraints regarding owner agreements and easement terms were also a contributing factor for the applicant's section process." Id. SCELPA stated that this statement seems to incorrectly suggest that both the existing easements are not located in the vicinity of sensitive resources and any new easements are located in the vicinity of sensitive resources.

DE Response

DE repeated response comments about the Alternatives Analysis and Co-location listed previously. In addition, DE stated that the ability to acquire agreements for easements was considered as part of the alternative evaluation because it is relevant to the practicable aspect of the analysis.

In the same section of their letter referenced above, SCELPA also stated that there is a question as to whether the alternative sites were adequately assessed before being tossed as failing to meet the threshold analysis of being the Least Environmentally Damaging Alternative (LEDPA). They stated the wetlands that will be impacted by the Project are not classified correctly, are not fully assessed in terms of uses and functions, and therefore it cannot be concluded by the Department that there will be no adverse impacts to the waters or wetlands. They referred to Exhibit B (referring to the SCDHEC Public Notice that included excerpts of the applicant's "Section 404 Individual Permit Application Supporting Documentation"), at p. 16 ("Terracon in no way claims to have specialized knowledge of the aquatic features on the alternative sites evaluated. Each alternative site should be reviewed independently for potential aquatic resources and reviewed by applicable regulatory agencies to determine the presence and extent of aquatic resources as applicable and required by Section 404 of the Clean Water Act."). SCELPA stated that because even the consultants performing the alternatives analysis did not take the aquatic features/resources into account when ruling out alternatives, this project should be denied approval. DHEC cannot allow incidental easement agreements to drive an improper characterization of purpose that serves to constrain the evaluation of alternatives.

DE Response

DE repeated response comments about the Alternatives Analysis and Co-location listed previously. DE also stated again that the ability to acquire agreements for easements was considered as part of the alternative evaluation because it is relevant to the practicable aspect of the analysis. DE added that the review conducted by Terracon (on behalf of DE) included reviewing agency resources, including USGS Topographic Maps, United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map, United States Geological Survey (USGS) National Hydrography Dataset (NHD), USDA-NRCS Web Soil Survey data, topographic data, aerial photographs and other applicable information. The Terracon statement referenced by the commenter was made to explain that these agency resources were relied upon in its desk top review, rather than Terracon's independent knowledge.

In the next section of their letter, titled "All potential water quality impacts of the project, both direct and indirect, over the life of the project," the SCELPA criticized the application further, raising concerns about compliance with antidegradation requirements, floodplain impacts, implementation of stormwater best management practices (BMPs), sediment and erosion control, inadvertent returns from HDD, temporary versus permanent impacts, reclamation/restoration plans, removal of classified/existing uses, pipeline safety, and the applicant's environmental record. This section of the SCELPA letter also mentions compliance with antidegradation provisions as an appropriate requirement.

DE Response

DE stated their application meets South Carolina antidegradation requirements. They stated temporary sources of pollution, such as those associated with construction, are deemed not to cause degradation. They referred to several examples: 48 Fed. Reg. 51400, 51403 (Nov. 8, 1983) ("States may allow some limited activities which result in temporary and short-term changes in water quality."); EPA Water Quality Handbook, Chapter 4, pp. 12-13; see also Appalachian Voices v. State Water Control board, 912 F.3d 746, 758 (4th Cir. 2019). Additionally, they stated states can rely on compliance with the construction stormwater permit to satisfy antidegradation

requirements. See EPA 2017 Construction General Permit Fact Sheet at pp. 53-54 ("As stated in Part 3.1 of the [2012] permit, in the absence of information demonstrating otherwise, EPA expects that compliance with the conditions in this permit will result in stormwater discharges being controlled as necessary to meet applicable water quality standards (which include state antidegradation requirements).").

SCDHEC Response

Regarding compliance with construction stormwater permits, SCDHEC notes that as explained previously in Section II.G, DE is exempt from NPDES permit requirements as long as water quality standards are not exceeded or designated uses are not adversely impacted.

Going into more detail about the criticisms listed above, the SCEL P stated the application does not consider the direct and indirect impacts of constructing this pipeline in the middle of a floodplain.

DE Floodplain Impacts Response

In response to comments regarding floodplain impacts, DE stated that no changes to final grade are proposed and applicable Federal Emergency Management Agency (FEMA) coordination is currently being conducted through Florence County. In their responses to a second round of public comments connected to the hearing and extended comment period, DE provided an update, stating that as of September 29, 2021, DE received an approved Flood Plain Development Permit from Florence County.

SCDHEC Response

SCDHEC also notes that this issue falls outside the scope of this review, but does fall within the scope of Section 404 and should be addressed in the federal permit.

Regarding implementation of stormwater BMPs, the SCEL P stated that the application acknowledges impacts, claiming they will be "minimized through the use of stormwater best management practices" but does not elaborate on these practices to an extent that should assure DHEC those practices will be followed. Additionally, the SCEL P stated that the applicant claims its land disturbance activity will comply with the South Carolina National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Large and Small Construction Activities (SCR100000) as applicable and will include the use of appropriate grading and sloping techniques and erosion prevention and sediment control measures capable of preventing erosion, migration of sediments, and bank failure. The SCEL P stated this is also untrue. They suggested comparing NPDES General Permit for Stormwater Discharges from Construction Activities (SCR100000) available at https://scdhec.gov/sites/default/files/media/document/BOW_NPDESStormwaterDischargesGP_01292021_0.pdf ("If BMPs are not operating effectively, then maintenance must be performed within seven (7) calendar days or as reasonably possible, and before the next storm event whenever practicable to maintain the continued effectiveness of BMPs.") with Attachment B, p. 84 ("Drilling fluid releases that persist beyond completion of drilling activities shall be removed within 30 days of completion of drilling, if requested by the Federal or State regulatory agencies having jurisdiction.") (emphasis added). SCEL P stated that inadvertent returns (IRs) from HDD at river crossings can introduce polluted water into streams and rivers being crossed and it is ridiculous that the onus would be on DHEC or other regulatory agencies to request cleanup of a drilling fluid release weeks after the pollution.

SCDHEC Response

In a July 23, 2021 initial request for additional information, SCDHEC asked for additional details regarding construction and post-construction stormwater management. The request stated "[t]he details should be sufficient to give the Department reasonable assurance that construction and operation of the pipeline will be conducted in a manner which will not violate applicable water quality standards regulations." DE responded, providing a Stormwater Pollution Prevention Plan as Attachment 4 to their August 20, 2021 submittal. SCDHEC also notes that the SCDNR's recommendations included a stipulation to repair any damaged erosion control measures within 24 hours of identification, or as soon as conditions allow if compliance with this time frame would result in greater environmental impacts. SCDHEC included this stipulation as an enforceable condition of the proposed 401 WQC, clarifying that it pertained to areas of active construction and equipment operation. SCDHEC also included an enforceable condition in the proposed 401 WQC

notifying the applicant that they must properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

As listed above, the SCEL P also commented on whether proposed impacts were temporary or permanent, and the applicant's restoration plans, stating: "Moreover, the "temporary" qualification of the impacts hinges on the methods that will be used to protect the wetlands during construction and the restoration of the wetlands after construction. BREDL does not have confidence in the capability of avoiding permanent damage using the methods proposed...Dominion claims—without detail—that the "[i]mpacted areas will be restored to pre-existing contours. Upland areas shall be restored through typical right-of-way practices of seeding and mulching as Described in the reclamation plan for the project." The SCEL P referred to Exhibit B, at p. 84 (the SCDHEC Public Notice that included excerpts of the applicant's "Section 404 Individual Permit Application Supporting Documentation"). They added that there is no detailed explanation of when or how restoration will take place and NWP 12's own general conditions suggest that clearing forested wetlands will have permanent—not temporary—impacts."

DE Detailed Plans, Monitoring, Inspection, and Enforcement Response

In response to comments regarding temporary versus permanent impacts, DE stated that they provided SCDHEC and the USACE with detailed plans to verify the impacts from the project are temporary. (SCDHEC notes that these plans were included in the SCDHEC Public Notice.) They added that in addition to DE's own monitoring of its work, SCDHEC and the USACE will inspect and enforce these requirements.

DE Response

In response to comments regarding restoration, DE stated they will be restoring impacted areas to pre-existing contours and the project's plan for stabilization follows guidelines provided by SCDHEC. They also stated that the referenced portion of Exhibit B is the HDD Inadvertent Return Contingency Plan prepared for the project and is specifically related to areas where HDDs are proposed as the construction method. DE also referenced the 7-page SWPPP mentioned previously for further information. (SCDHEC notes that DE provided the 7-page SWPP document as Attachment 4 in their August 20, 2021 submittal in response to a SCDHEC request for additional information.)

SCDHEC Response

SCDHEC notes that Section H. ENFORCEMENT OF CERTIFICATION DECISIONS AND CONDITIONS of Regulation 61-101, Water Quality Certification, states the following regarding enforcement, and compliance inspections:

- "1. Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law.
2. Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit. Other mechanisms under State law may also be used to correct or prevent adverse water quality impacts from construction or operation of activities for which certification has been issued.
3. The Department may conduct inspections for determining compliance with certification conditions."

Regarding reclamation/restoration plans, the SCEL P stated that "[c]onstruction activity and machinery and foot traffic cause compaction that can be and often is permanent, even if mats and fabric techniques are employed. They stated that there was no evidence of soil testing to measure current soil conditions to ensure that restoration restores the soil structure and pore spaces that are essential for wetland ecosystems and functions and that compaction does not occur."

DE Response

In response to comments about soil compaction, DE stated that the proposed natural gas pipeline will be installed within an existing DE natural gas pipeline easement that is maintained by DE using machinery. The installation within an existing utility easement where soil compaction has already occurred from historic maintenance is preferable to a new easement.

Regarding removal of classified/existing uses, the SCEL P stated that “[t]here will undoubtedly be a permanent elimination of bird watching, hunting, and fishing in discharge areas, as well as adverse effects to the movement of water in the aquatic environment. This change in stream flow, flooding patterns, and surface and groundwater hydrology, which in turn may adversely affect populations of fish and other aquatic animals, should be considered permanent and the application should be denied.”

DE Response

In response to comments regarding elimination of uses, DE stated that there will not be permanent elimination of bird watching, hunting, and fishing related to this project. They stated that potential impacts to recreational uses and water flow are minimized by co-locating the new pipeline with an existing natural gas pipeline easement. Additionally, they stated that the construction activities are temporary and thus will not result in permanent impacts to recreational uses and water flow. DE stated that they plan to utilize construction methods (such as the flume method or horizontal directional drilling) to minimize impacts during construction.

SCDHEC Response

SCDHEC notes that DE will be required to use the flume method and take other measures to avoid and minimize impacts as recommended by the SCDNR. The measures will be required through enforceable conditions of the 401 WQC as explained in detail in Section III.D. Water Quality Assessment of this staff assessment.

As listed above, the SCEL P was also critical of the applicant’s safety and environmental record in this section of the letter. They stated that at a minimum, DE’s safety record demonstrates that this project could pose serious risks to the environment and citizens. They stated that on November 15, 2019 at approximately 1:00 a.m., one of DE’s newly installed gas lines exploded at Pepper Pike 12 in Ohio. They stated that an investigation by the Public Utilities Commission of Ohio (PUCO) resulted in a report issued February 28, 2020, revealing that the cause of the explosion and resulting fire was DE’s “failure to follow established welding procedures, insufficient inspection and oversight at the construction site, and lack of procedures and training regarding auger boring, which led to the pipeline being subject to excessive strain.”

DE Dominion Energy Ohio Pepper Pike Incident Response

In response to comments regarding an incident in Ohio, DE stated the following: “DE acknowledges the occurrence of the Dominion Energy Ohio Pepper Pike incident in November 2019. Dominion Energy Ohio crews quickly responded to the scene, where they isolated the damaged line, shut off the flow of gas, and made the scene safe. Dominion Energy Ohio officials worked closely with village officials, updating them on the incident and the subsequent investigation and repair process. Dominion Energy Ohio immediately took numerous actions to understand what caused the incident and to verify a similar incident did not recur. This included standing down all construction activities, enhancing procedures and inspections, and initiating an in-depth analysis of existing projects to confirm they did not present similar risks. In addition to implementing these immediate actions, Dominion Energy Ohio engaged an industry-leading consulting firm to perform an independent root-cause analysis, develop an implementation plan to respond to the RCA’s findings, and independently validate that the company effectively implemented the plan. The Public Utilities Commission of Ohio approved this plan of action, and Dominion Energy Ohio is well underway in implementing the aforementioned plan. Pipelines remain one of the safest methods to transport natural gas. According to research by the National Transportation Safety Board (NTSB), pipelines make up less than .01% of all transportation-related incidents in the U.S. today.”

The SCEL P stated that in March of last year, DE was forced to pay \$1.4 million in fines after violating numerous state and federal environmental laws after secretly and illegally dumping more than 27 million gallons of polluted coal ash water into Quantico Creek in Virginia.¹³ Confronted with the discharge, DE insisted the discharge was made in compliance with its Clean Water Act permit; however, an investigation showed that was not the case.

DE Quantico Creek Virginia Incident Response

In response to comments regarding an incident in Virginia, DE stated the following: “Dominion Energy Virginia worked cooperatively with EPA and Virginia DEQ to resolve certain alleged Clean Water Act violations at particular power stations and construction stormwater sites in Virginia. The

settlement speaks for itself, but we note that neither agency alleged "secret or illegal dumping." Instead, in 2015, citizen activists made false accusations about Dominion Energy Virginia's lawful discharge of surface water in advance of excavating several ash ponds at Possum Point Power Station. Dominion Energy Virginia previously acknowledged an oversight in not notifying Virginia DEQ of its plan in advance. Resolution of this matter reflects that acknowledgment but makes clear the discharge was compliant with applicable permit limits. For the other alleged violations, corrective actions were quickly implemented and no residual environmental impacts were observed. Enterprise-wide enhancements to Dominion Energy's Environmental Management System were implemented beginning in 2017. Dominion Energy Virginia performed a wholesale evaluation of the program that used to verify environmental compliance and awareness across its entire footprint. This included reviewing and strengthening operating procedures and construction practices and oversight. Most of the issues were self-reported and corrective actions put in place immediately. Additional training has been provided to those who work for our company using a new monitoring and reporting tool that underscores our focus on environmental compliance and reducing impacts our business may have on the environment."

The SCELPL stated that in 2018, Dominion was cited for failing to control sediment near a 55-mile pipeline it had built in the upstate of South Carolina. They stated that sediment washing off the pipeline's construction sites wound up in creeks that feed into the South Tyger River, where the Woodruff-Roebuck Public Water District has an intake pipe. They stated the runoff from Dominion's construction also worked its way into the river and clogged the pipe, causing the Woodruff-Roebuck system to buy water from another utility for more than 10,000 customers south of Spartanburg. They stated that ultimately, a \$4,200 fine was issued by SCDHEC, which DE later stated had "minimal impact." They stated that in the case of the proposed project, City of Florence drinking water is produced at a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline.

DE Response

*In response to comments regarding protection of drinking water sources, DE repeated response comments about their **Environmental Record** listed previously.*

SCDHEC Response

SCDHEC notes that the applicant, DE, will be required through an enforceable condition of the 401 WQC to repair any damaged erosion control measures in areas of active construction or equipment operation within 24 hours of identification, or as soon as conditions allow if compliance with this time frame would result in greater environmental impacts, as recommended by the SCDNR. See also Section III.D. Water Quality Assessment of this staff assessment for an explanation of other enforceable conditions of the 401 WQC. See Section VIII of this staff assessment for a list of conditions to be placed on the 401 Water Quality Certification when issued.

Finally, in this section of the letter, the SCELPL listed potential impacts of increased sedimentation / turbidity on aquatic resources such as fish eggs, benthic biota, stream bottom characteristics, and freshwater mussels for example, concluding the following: "Considering DE's construction practices and procedures and its history of damaging South Carolina's water supply, the applicant's activities are nearly certain to cause sedimentation and turbidity, alteration or removal of instream and stream bank cover, stream bank erosion, introduction of water pollutants, water depletions, and entrainment of small fishes during water withdrawals that could increase the rates of stress, injury, and mortality experienced by fish and other aquatic life. For these reasons, Dominion's application should be denied.

DE Response

Extensive measures have been established for DE to follow when constructing the pipeline to verify that impacts to aquatic resources are avoided and minimized to the maximum extent possible.

SCDHEC Response

In Section III.D of this staff assessment, titled Water Quality Assessment, SCDHEC concluded that the proposed work may cause a temporary increase in turbidity levels, but ambient conditions should resume once the work is completed and all disturbed land has been effectively and permanently stabilized. Water quality standards will not be contravened and designated uses will not be removed. Potential adverse impacts to water quality can be minimized through the use of

best management practices, the conditions of the Nationwide Permit 12, including the Charleston District Regional Conditions, and the additional, enforceable, SCDHEC 401 WQC conditions Described in Section III.D and listed in Section VIII of this staff assessment.

In the final section of the letter before the conclusion, titled "The proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired," the SCEL P stated that the wetlands that will be impacted, whether by impacts qualified as temporary or permanent, will suffer unjustifiable harm that will permanently harm the ecosystem. They stated proof of this can be found by looking no further than Dominion's application materials, referring to Exhibit B (the SCDDHEC Public Notice that included excerpts of the applicant's "Section 404 Individual Permit Application Supporting Documentation"), at p. 34 ("The construction of this project will have a minimal long-term adverse effect on wildlife that use the habitat.").

DE Response

In response to these comments about the project having minimal long-term adverse effects, DE stated that while there will be some minimal impacts resulting from this project, those impacts have been minimized to the extent practicable. They stated the project will be constructed in accordance with federal, state and local requirements to verify that the impacts are minimal

The SCEL P stated the applicant baldly asserts that some activities associated with the project will not result in permanent impacts to wetlands, and that wetlands will be restored to pre-existing conditions. They stated this is impossible given that trenching activities would require the permanent removal of vegetation and result in a decrease in water quality. They stated permanent impacts to wetlands require mitigation or replacement but the applicant does not address this requirement whatsoever. They also stated that in addition to these permanent and temporary impacts, wetland crossings can result in conversions from forested to either scrub shrub or herbaceous wetlands, which will nearly always result in a loss of important wetland functions.

DE Wetland Restoration Response

In situations where vegetation management involves the removal of plants and their roots, the soil surface will be regraded so that there are no changes in pre-construction contours of waters of the United States, including jurisdictional wetlands. Wetlands will be restored and vegetation will be re-established following construction activities in accordance with federal, state and local permitting requirements. Emergent and scrub-shrub wetlands perform valued wetland functions, even though those functions differ to some degree from the functions performed by forested wetlands. See <https://www.federalregister.gov/d/2021-00102/p-350>.

The SCEL P stated that Horizontal directional drilling (HDD)—a stream crossing method in which a tunnel to house the pipeline is drilled underneath a surface water, road, or other feature—is often touted as having minimal impacts to surface waters; however, this method is not without risk; drilling fluid spills and runoff from work areas pose threats to waterways. They stated this is acknowledged even by Dominion, who acknowledges the risk of adverse impacts to aquatic ecosystem. Exhibit B (referring to the SCDHEC Public Notice that included excerpts of the applicant's "Section 404 Individual Permit Application Supporting Documentation"), at p. 78 ("these drilling fluids may adversely impact aquatic and/or terrestrial ecosystems if an IR occurs.") Drilling fluid is composed of bentonite, water, and additives chosen by the company from a list of approved compounds that can be used when drilling public water supply wells. Though bentonite is a type of natural clay, releasing it into streams and wetlands can increase sediment in those areas. BMPs for prevention of water pollution may not properly prevent contamination events for a number of reasons, such as the correct BMPs were planned, but were not installed correctly or at all; inappropriate BMPs were installed, or BMPs were inadequate for the conditions; or BMPs were improperly operated and maintained.

DE HDD Inadvertent Return Plan Response

The Described adverse impacts and pollution are generally the results of improper or inadequate planning and execution, which in-turn should not be considered the industry standard or norm. DE has evaluated and addressed inadvertent return risk management items in the planning and design phases of this project, specifically to address concerns like those Described. In addition, DE has developed a project specific Inadvertent Return Plan which outlines the processes and procedures for minimizing impact should an inadvertent return occur.

SCDHEC Response

As explained in Section III.D and as listed in Section VIII, SCDHEC will require the applicant, DE, to be responsible for ensuring compliance with the project's "HDD Inadvertent Return Contingency Plan" dated June 4, 2020, or any subsequent revision approved by the Charleston District USACE and the SCDHEC, in consultation with the SCDNR. The applicant, DE, will be required to keep a copy of the plan and all necessary equipment and supplies specified in the plan onsite during construction involving Horizontal Directional Drill or HDD operations. The applicant, DE, will also be required to properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

The SCELP also request notification of any action or decision related to this project, preferably via email to lauren@scelp.org.

SCDHEC Response

The SCDHEC Project Manager added Ms. Milton's email to the distribution list for the Notice of Department Decision.

Ms. Lauren Megill Milton, an attorney with SCELP, provided oral comments on behalf of BREDL during the virtual public hearing that SCDHEC held the evening of October 14, 2021. Ms. Milton stated the proposal will be devastating to the surrounding environment by impacting endangered species' habitat, degrading water quality, and disproportionately harming underserved and minority populations.

DE Response

DE repeated response comments about Avoidance and Minimization listed previously.

Ms. Milton also stated that residents fear that the pipeline will cause them to lose their land.

DE Response

DE repeated response comments about Co-location listed previously.

Ms. Milton also stated that residents worry that sediment pollution from construction and leaks from pipeline operations could cause harm.

DE Response

DE repeated response comments about Avoidance and Minimization and Pipeline Safety listed previously.

Ms. Milton also stated the pipeline will cross six tributaries of the Great Pee Dee 32 times and Dominion has not adequately demonstrated a need for the project, but admitted that it will cause about three acres of permanent impact.

DE Response

DE repeated response comments about Avoidance and Minimization listed previously.

DE Streambank Restoration Response

In addition, DE stated crossings of streams or tributaries have been designed in accordance with guidance provided by the USACE and/or SCDHEC. Disturbed streambanks will be restored using appropriate techniques (such as bioengineering solutions).

SCDHEC Response

As explained in section III.D and as listed in Section VIII of this staff assessment, SCDHEC will require the applicant, DE, to restore stream banks at crossings after construction has been completed, in as little time as is feasible, which will vary based on site-specific conditions. The proposed enforceable condition of the 401 WQC goes on to say that disturbed stream banks should be restored by using an appropriate riparian seed mixture, planting woody vegetation, and/or using bioengineering techniques for stream bank stabilization.

Ms. Milton also stated Dominion is trying to characterize 14 acres as temporary impact to fast-track the project, avoid mitigation, and obfuscate the pipeline's effects.

DE Response

DE repeated response comments about Detailed Plans, Monitoring, Inspection, and Enforcement listed previously.

Ms. Milton also stated SCDHEC should assess the cumulative impacts of the project.

DE Response

DE repeated response comments about Individual and Cumulative Adverse Impacts listed previously.

Ms. Milton also stated that there are four federally endangered species including the short nose sturgeon and Atlantic sturgeon that will be impacted by sedimentation of the project. She stated that flumed crossings and HDD could cause sedimentation release and there is a risk that drilling fluid can escape to surface waters.

DE Response

DE repeated response comments about RTE Species and the HDD Inadvertent Return Plan listed previously.

SCDHEC Response

As explained in Section III.D and as listed in Section VIII, SCDHEC will require the applicant, DE, to be responsible for ensuring compliance with the project's "HDD Inadvertent Return Contingency Plan" dated June 4, 2020, or any subsequent revision approved by the Charleston District USACE and the SCDHEC, in consultation with the SCDNR. The applicant, DE, will be required to keep a copy of the plan and all necessary equipment and supplies specified in the plan onsite during construction involving Horizontal Directional Drill or HDD operations. The applicant, DE, will also be required to properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

Ms. Milton also stated that stream construction can cause habitat fragmentation and also disrupt the movement of organisms by imposing physical barriers to movement and these impacts are not temporary, but cumulative effects and DHEC must consider them.

DE Response

DE repeated response comments about Streambank Restoration listed previously.

SCDHEC Response

As explained in section III.D and as listed in Section VIII of this staff assessment, SCDHEC will require the applicant, DE, to restore stream banks at crossings after construction has been completed, in as little time as is feasible, which will vary based on site-specific conditions. The proposed enforceable condition of the 401 WQC goes on to say that disturbed stream banks should be restored by using an appropriate riparian seed mixture, planting woody vegetation, and/or using bioengineering techniques for stream bank stabilization.

Ms. Milton also stated that clearing vegetation, grading along stream banks, constructing in the water will expose additional ground erosion and increase sediment that spill into the river like what happened three years ago when Dominion was cited for failing to control sediment from entering the South Tyger River and its tributaries on their 55-mile pipeline.

DE Response

DE repeated response comments about Wetland Restoration and their Environmental Record listed previously.

The SCELPL sent a second comment letter to SCDHEC and the USACE on behalf of BREDL after the public hearing. The letter states that members of the public pleaded with DHEC to deny the permit, fearing the pipeline's damage to their sensitive community, health, and environment. The letter goes on to list violations by DE in support of this concern. The letter also references CDC data for Florence County to show the area is socially vulnerable.

DE Response

DE repeated a previous response, referring to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses." DE also repeated response comments about Pipeline Safety listed previously.

The SCELPL stated the project is not in agreement with the Clean Water Act, R.61-101, nor R.19-450, which would put the socially vulnerable population at health risk.

DE Response

DE's stated the project filing is in compliance with the Clean Water Act and is under SCDHEC review to certify through the 401 process. DE also repeated portions of response comments about Individual and Cumulative Adverse Effects listed previously. In regard to the health risk of the socially vulnerable population, DE again referred to the document titled "Environmental Justice and Heirs Property Comment Responses."

The SCELPL also stated that Pamplico is one of the areas that should be given greater scrutiny under existing and rapidly expanding environmental justice framework. Too much at risk to allow Dominion to negatively impact the community when it has not demonstrated the need for the pipeline or provide data showing that any growth in the area will justify a second pipeline.

DE Response

Regarding need, DE repeated portions of response comments about Project Purpose and Benefits listed previously. Regarding environmental justice, DE again referred to the document titled "Environmental Justice and Heirs Property Comment Responses."

The SCELPL stated the proposal will not have the least environmentally damaging impact. They stated that numerous community members suffer with kidney failure and environmental justice demands the agency to evaluate the exacerbated risks of the project to sensitive communities such as ingesting polluted water which would further damage the kidneys of the sensitive population.

DE Response

DE repeated a previous response, referring to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses." DE also repeated response comments about Pipeline Safety listed previously.

The SCELPL stated that SCDHEC, as a recipient of federal funds, must ensure that environmental justice communities are considered throughout the decision making process.

DE Response

DE repeated a previous response, referring to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses."

The SCELPL stated that Dominion has categorized many of the discharges of fill associated with construction as temporary, but these will cause permanent impacts to the environment and community if approved.

DE Response

DE repeated response comments about the Stormwater Pollution Prevention Plan and about the Detailed Plans, Monitoring, Inspection, and Enforcement listed previously.

The SCELPL again requested immediate notification of any action or decision related to this project, preferably via email to lauren@scelp.org.

SCDHEC Response

The SCDHEC Project Manager had previously added Ms. Milton's email to the distribution list for the Notice of Department Decision.

- E. Blue Ridge Environmental Defense League (BREDL)/Mr. Louis A. Zeller (Mr. Zeller)
Date: June 23 (letter), October 14 (oral comments), and October 29, 2021 (letter)
(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.
() No objections provided the applicant adheres to the conditions in Section VIII.
() No objections.

() Has elected to not conduct an investigation nor provide any comments.

The BREDL sent a letter to SCDHEC, copying the USACE. The BREDL wrote on behalf of members in South Carolina to supplement comments that were submitted on their behalf under separate cover by the South Carolina Environmental Law Project (SCELP).

The BREDL objected to the granting of a Nationwide Permit 12 for the project, requested an extension of time to comment, and requested a public hearing.

SCDHEC Response

As Described previously in the background information at the beginning of this section, SCDHEC did hold a public hearing and did extend the comment period for an additional 15 days following the date of the public hearing in response to public comments like these. Regarding the objection to the issuance of a NWP 12, SCDHEC noted this comment as an objection to the 401 WQC, albeit without raising any specific issue(s) related to water quality or classified uses that can be addressed through this review.

The BREDL said they had been working with residents in the Pamplico community who have concerns about the pipeline since March 2020. They said that as a result of these efforts, one hundred and eighteen people (118) with property interests in the Pamplico community signed a statement which declares "Pamplico Stop the Pipeline Petition."

SCDHEC Response

Regarding the petition statement "Pamplico Stop the Pipeline Petition," SCDHEC noted this comment as an objection to the 401 WQC, albeit without raising any specific issue(s) related to water quality or classified uses that can be addressed through this review.

The letter also mentioned an official notice issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) on March 20, 2020 and President Biden's Executive Order 13990 of January 20, 2021. The BREDL concluded that DHEC was "obligated to ensure that no waivers, special permits, stays of enforcement or similar measures were or will be granted to pipeline operators."

SCDHEC Response

This objection likewise does not mention any specific issue(s) that can be addressed through this review.

Mr. Louis A. Zeller provided oral comments on behalf of BREDL and its Pamplico Defense League chapter during the virtual public hearing that SCDHEC held the evening of October 14, 2021. He said the chapter was comprised of residents and property owners directly affected by the proposed pipeline.

Mr. Zeller stated that SCDHEC held a conference in November 2019 on public participation as a permitting tool and a presenter advised permit seekers to provide information; obtain feedback; two-way conversations; partner with the public to develop solutions; and public makes decisions. He stated that none of this happened with regards to the current application. He added that Dominion opposes transparency, notification, and public information.

DE Community Engagement Response

In response, DE again referred to a 2-page document titled "DE Public Outreach and Environmental Justice Overview." The document provides details about DE's community engagement actions and communications throughout the project. DE also added that the company has a profound respect for the communities it serves, and the DE project team continues to engage the community in the vicinity of this project. In addition, DE has engaged project stakeholders, including several direct mailings, a project website, public open houses, and meetings with local governments. We have also been engaging with stakeholders by participating in these two SCDHEC public comment periods and providing two sets of response comments. Public participation is a vital part of our process, and we began notifying landowners along the project route in 2019. This is a collaborative process, and we look forward to continued engagement with property owners, the surrounding community, and other stakeholders.

Mr. Zeller stated that Social vulnerability index data for the census tract in Florence County, revealed severe levels of social vulnerability in the 70 percent to 84 percent range in Pamplico. An existing pipeline traces the route of the 16-inch pipeline proposed by Dominion. The combined impacts of past practices and current proposals may already have placed disproportionate impacts on the Pamplico community. It is not in the public interest to place unjust burdens on vulnerable populations. There is a correlation between pipelines and social vulnerability.

DE Response

DE referred again to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses." DE also repeated response comments about Pipeline Safety listed previously.

Mr. Zeller sent a second comment letter to SCDHEC on behalf of BREDL and its Pamplico chapter after the public hearing to supplement his oral testimony at the hearing. The letter included a copy of a petition to stop the pipeline.

The BREDL stated that DE has not justified any credible need for its request beyond bland assertions unsupported by evidence to justify the project's negative environmental impacts on the Pee Dee River and the nearby residents of Pamplico.

DE Response

DE repeated response comments about the Project Purpose and Benefits listed previously.

The BREDL stated that the pipeline company has disrupted the Pamplico community for nearly two years with meet-n-greet style events and intimidating notices and legal paperwork. The company has disregarded basic transparency, notification, and public information. The BREDL stated that no effective measures conforming with SCDHEC five-point plan ((1) provide information, 2) obtain feedback, 3) two-way conversations, 4) partner with public to develop preferred solution, 5) public makes decisions) which was provided in a SCDHEC public participation conference on Nov. 19, 2019, have been employed on the River Neck-Kingsburg permit.

DE Response

In response, DE again referred to a 2-page document titled "DE Public Outreach and Environmental Justice Overview." DE also repeated response comments about Community Engagement listed previously.

The BREDL raises the issue of Environmental Justice in connection with the petition that states "Pamplico Stop the Pipeline Petition," and that was signed by landowners and people fishing along the Great Pee Dee River.

DE Response

DE's project will not have a negative impact to the Great Pee Dee River. The proposed DE project does not cross the Great Pee Dee River. DE's proposed project is located about 1-mile to the west / southwest of the Great Pee Dee River. In addition, Florence County applied for a grant from the Dominion Energy Foundation for the Dewitt Bluff boat landing on the Great Pee Dee River to include the construction of public restrooms. The Dominion Energy Foundation provided a \$20,000 grant for this important project to enhance the boating and fishing experience. In addition, with regard to environmental justice considerations, DE also referred again to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses."

The BREDL cites a study published in May 2021 by NC State University which found a correlation between pipeline density and social vulnerability. The BREDL stated the study considered racial composition, age distribution, and socioeconomic factors in a "social vulnerability index" (SVI), a measure of a community's ability to cope with pollution, accidents, and other hazards. The BREDL stated that CDC data indicates that census tracts in the Pamplico area already have moderate to high levels of social vulnerability, and it is not in the public interest to place unjust burdens on vulnerable populations.

DE Response

DE referred again to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses." DE also repeated response comments about Pipeline Safety listed previously

The BREDL stated that company land agents are improperly trying to get landowners to sign right-of-way easements for the pipeline under eminent domain. The BREDL is critical of the acquisition of land by eminent domain, quoting a resident's letter stating that it will not benefit anyone in Davis Town nor in Fleming Town.

DE Response

DE responded by stating the following: Pursuant to the S.C. Eminent Domain Procedure Act, a condemnor may commence an action for the acquisition of an interest in any real property necessary for any public purpose, S.C. Code Ann. § 28-2-60. As a public utility in South Carolina, DE is vested with the power of eminent domain to, among other things, acquire property for natural gas pipelines, appurtenant facilities, and activities related thereto, pursuant to S.C. Code Ann. § 58-7-10 and S.C. Code Ann. § 28-2-60. As stated in an S.C. Attorney General Opinion: "Thus, our Supreme Court, as well as the General Assembly, deem a natural gas pipeline to be a "public utility" ... This characterization is consistent with the importance of natural gas to business and industry in the State as well as to the general public. As the Court in Sheppard stated, a utility, such as natural gas, is a service "essential to the public"" (Op. S.C. Attorney Gen., July 1, 2015, citing Sheppard v. City of Orangeburg, 314 S.C. 240, 442 S.E.2d 601 (1994)).

The BREDL stated the pipeline could pollute drinking water reservoirs.

DE Response

DE repeated response comments about Avoidance and Minimization and about Pipeline Safety listed previously.

F. South Carolina Department of Natural Resources (SCDNR)

Date: June 15 (letter) and November 15, 2021 (email)

() Objects to the proposed project, see discussion in Section VI, Conclusions.

(x) No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

The SCDNR stated the existing and proposed pipeline ROW crosses an approximately 146-acre tract protected by a conservation easement (Front Swamp LLC) as well as the Pee Dee Station Wildlife Management Area managed by SCDNR and leased from the SC Public Service Authority (Santee Cooper). They recommended the applicant coordinate with the appropriate landowners to minimize impacts to these protected conservation lands.

The SCDNR reported records of several State Wildlife Action Plan (SWAP) fish species in streams proposed to be crossed by the pipeline (Jeffries Creek, Mill Branch, Bigham Branch, Brier Branch, Barfield Mill Creek and Bullock Branch). The SCDNR reported records of American Eel (Highest Priority) and Ironcolor Shiner (Moderate Priority) occurring in Mill Branch and Bigham Branch and records of American Eel, Flat Bullhead (Moderate Priority) and Fieryback Shiner (Moderate Priority) occurring in Bullock Branch. The SCDNR also reported records of several federally-listed threatened or endangered species in the project vicinity. They reported that the Great Pee Dee River is Designated Critical Habitat for Atlantic Sturgeon and there are known occurrences of Atlantic Sturgeon and Shortnose Sturgeon (both Federally Endangered) in the river. The SCDNR also reported nearby occurrences of the federally-listed plant species Canby's Dropwort (Endangered) and Boykin's Lobelia (At-Risk). The SCDNR stated the information was based on existing records and may not be complete and recommended the applicant make all efforts to avoid and minimize impacts to these species of concern.

The SCDNR did not object to DHEC certifying the application provided the above-listed concerns were adequately addressed and provided a list of stipulations they provided were incorporated as minimization measures.

DE Response

See previous discussion at the end of Section III.D of this staff assessment, titled Water Quality Assessment that includes a brief Description of commitments and stipulations that DE made in response to the SCDNR's comments and recommendations.

After the SCDNR reviewed the information included in the applicant's response dated August 20, 2021, the SCDNR stated they had no further objections provided the commitments and stipulations included in the response document and attachments were incorporated as permit conditions.

SCDHEC Response

See previous discussion at the end of Section III.D of this staff assessment, titled Water Quality Assessment that includes a Description of how the SCDNR's comments and recommendations, and DE's commitments and stipulations, were incorporated as enforceable conditions of the 401 WQC per the SCDNR's qualified "no objection."

G. Theresa Hyman

Date: October 14, 2021 (oral comments)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Hyman stated Dominion has not addressed noise pollution.

DE Response

The project consists primarily of the installation of a below grade natural gas pipeline. Typical construction hours are during daylight hours (7am - 7pm), Monday - Saturday. Noise generated during construction will follow applicable local, state, and federal regulations. Noise emissions are not anticipated once construction is complete. The proposed project does not include compression facilities, which may produce noise and require noise attenuation.

SCDHEC Response

SCDHEC notes that this issue does not fall within the scope of review Described in regulation 61-101, *Water Quality Certification*, is not related to water quality or classified uses and cannot be addressed through this review. However, this is a public interest factor that falls within the Scope of CWA Section 404 and may be addressed through the federal permit.

Ms. Hyman stated Dominion will contaminate the drinking water, food, air, and water used for irrigation.

DE Response

DE repeated response comments about Avoidance and Minimization Measures listed previously.

Ms. Hyman stated Dominion claims to have a lifetime right of way on my land but they are there illegally.

DE Response

Dominion Energy South Carolina, Inc. has an existing easement recorded in Book A21 at Page 65 in the Florence County Register of Deeds and a separate existing easement recorded in Book A21 at Page 146 in the Florence County Register of Deeds for the properties in which Ms. Hyman's husband has an interest.

H. Shirley Willson

Date: October 14, 2021 (oral comments)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Wilson stated the pipeline will destroy the land, kills humans and wildlife, poisons the water and is toxic to the soil.

DE Response

DE repeated response comments about Pipeline Safety listed previously.

I. Becky Ryan

Date: October 14, 2021 (oral comments)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Ryan made comments at the SCDHEC virtual public hearing, identifying herself as the North Coast Office Director with the Coastal Conservation League. She stated that she wanted "to reiterate that Dominion has a record of impairing water quality. As Lauren Megill Milton briefly referred to, DHEC fined Dominion in 2019 for illegally discharging sediment and impacting the North and South Tyger Rivers, contributing to the Woodruff-Roebuck water district's mud-clogged intake pipe, and forcing them to buy water from another utility. Dominion has a poor record and so should be held to a high standard for water quality permits, especially with so many acres of streams and wetlands at risk."

DE Response

DE repeated portions of their response comments about DE's Environmental Record listed previously.

J. Sheila Daughtry

Date: October 14, 2021 (oral comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Daughtry made comments at the SCDHEC virtual public hearing, stating that "in listening to all these people, people getting sick and people that are irresponsible at Dominion with the water and poisoning, and then hearing about the endangered species, and eels, and sturgeon -- I heard a quote by Lauren Megill earlier, and she said it's not a request. It's your duty, and you have the power. You all have the power, and it should be all of our duty to make sure that our waters are clean and not polluted."

SCDHEC Response

When evaluating the proposed work, SCDHEC followed procedures for implementing State Water Quality Certification requirements pursuant to Section 401 of the Clean Water Act, 33 U.S.C. Section 1341, and Regulation 61-101, Water Quality Certification, and Regulation 19-450, Permits for Construction in Navigable Waters.

K. Carolyn Cooper

Date: October 18, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Cooper called SCDHEC to say no to the pipeline. She stated the pipeline was not needed in the area. She stated the pipeline would cause cancer in a lot of people, and she was trying to keep people safe.

DE Response

DE repeated response comments about Pipeline Safety that were listed previously.

SCDHEC Response

Regulation 61-101, *Water Quality Certification*, necessarily charges SCDHEC with considering the purpose of a project, but nowhere does the regulation mention need. SCDHEC also notes that the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration is the federal pipeline safety authority and is responsible for setting and enforcing regulations and standards for the design, construction, operation, maintenance or abandonment of pipelines by pipeline companies.

L. Carletta Anderson

Date: October 22, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Anderson called SCDHEC to say no to the pipeline.

SCDHEC Response

This commenter's objection does not raise any specific issue that can be addressed through this review.

M. Wanda Davis

Date: October 22, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Davis called SCDHEC to say no to the pipeline.

SCDHEC Response

This commenter's objection does not raise any specific issue that can be addressed through this review.

N. Donna Lewis

Date: October 24, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Lewis called SCDHEC to say no to the pipeline.

SCDHEC Response

This commenter's objection does not raise any specific issue that can be addressed through this review.

O. Tree Jackson

Date: October 24, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Jackson called SCDHEC to state that she is against the pipeline.

SCDHEC Response

This commenter's objection does not raise any specific issue that can be addressed through this review.

P. Edua Guajardo

Date: October 22, 2021 (telephone comments)

☒ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☐ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Ms. Guajardo called SCDHEC to say no to the pipeline.

SCDHEC Response

This commenter's objection does not raise any specific issue that can be addressed through this review.

Q. Marshall D. Munn, Mayor, Town of Pamplico

Date: October 21, 2021 (email)

☐ Objects to the proposed project, see discussion below and in Section VI, Conclusions.

☐ No objections provided the applicant adheres to the conditions in Section VIII.

☒ No objections.

☐ Has elected to not conduct an investigation nor provide any comments.

Mr. Munn sent an email to SCDHEC identifying himself as a resident of Pamplico and natural gas user. He also stated he owns property that will be crossed by the proposed pipeline. He stated in times past the

existing pipeline did not cause any problems of which he was aware. He offered his opinion that the additional pipeline is needed now and for the future due to growth that he said the townspeople all know is coming. He stated the proposed new pipeline will once again cross the creek/stream that borders his property. He expressed his confidence in today's technology and said he believed precautions will be taken to ensure a safe installation, concluding by saying he supported the project. He provided phone numbers and offered to discuss his views further.

SCDHEC Response

This commenter offered no objection and no response is required.

- R. Christine Ellis on behalf of Winyah Rivers Alliance (WRA) – finalize after SCELPA and BREDL**
Date: October 29, 2021 (email)

(x) Objects to the proposed project, see discussion below and in Section VI, Conclusions.

() No objections provided the applicant adheres to the conditions in Section VIII.

() No objections.

() Has elected to not conduct an investigation nor provide any comments.

Ms. Ellis wrote on behalf of the WRA to ask SCDHEC to deny certification of the application. She stated the WRA is a 501(c)(3) nonprofit organization whose mission is to protect, preserve, monitor and revitalize the health of the greater Winyah Bay watershed (aka Lower Pee Dee Basin). In South Carolina, she stated the WRA team watches over the Pee Dee Basin, including dedicated River Keepers for the Waccamaw and the Lumber River watersheds.

Ms. Ellis stated the Pamlico Pipeline represents environmental racism.

DE Response

DE referred again to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses."

She stated the pipeline threatens groundwater, potentially impacting local water wells.

DE Response

DE repeated response comments about Pipeline Safety listed previously.

She stated the pipeline threatens the drinking water source for the City of Florence.

DE Response

DE's proposed project will not threaten the City of Florence's drinking water source and Florence City council agrees with DE's position. Specific to the comment about the project threatening the City of Florence's drinking water source, DE will not impact said drinking water source for multiple reasons including the following: 1.) The City's Utility Director indicated that DE's proposed project is located approximately 20 to 30 river miles downstream from the City of Florence's water intake and 2.) the proposed DE project does not cross the Great Pee Dee River. DE's proposed project is located about 1-mile to the west / southwest of the Great Pee Dee River. SCDHEC notes that DE referenced a document included with their December 10, 2021 submittal titled "Attachment 8: Excerpt from Florence City Council Meeting Minutes, Sept. 14, 2020," which is part of the administrative record for this proposed decision.

She stated that forested wetlands that are cleared and not regenerated/restored will be permanently impacted, impairing filtration capacity, threatening water quality and impacting the plant and animal life native to the watershed. These impacts threaten already impaired waterways in the project area and disrupt the ecosystem services of water filtration, recreational benefits and flood protection. Impacts to wetlands require mitigation and/or restoration to ensure that these ecosystem services are not disrupted.

DE Response

DE repeated response comments about Wetland Restoration listed previously.

She asked for consideration of how the pipeline will impact the flood zone, stating the consequences of flooding on water quality and the integrity of the pipeline must be considered.

DE Response

DE repeated response comments about Floodplain Impacts listed previously, stating again that as of September 29, 2021, DE received an approved Flood Plain Development Permit from Florence County.

SCDHEC Response

SCDHEC also notes that the proposed natural gas pipeline is being co-located with an existing natural gas pipeline that has been in place since the 1960s.

She asked for consideration of climate change and the fact that methane is a powerful greenhouse gas as part of the decision making process.

DE Response

Dominion Energy has been at the forefront of efforts to reduce methane emissions. The company has been a founding member or leading participant in the EPA's Natural Gas STAR Program, the EPA's Methane Challenge Program, the Natural Gas Sustainability Initiative, and the ONE Future Coalition. Moreover, Dominion Energy's environmental strategy focuses heavily on achieving net zero carbon and methane emissions from our electric and natural gas operations by 2050. We are pursuing a diverse mix of cleaner, more efficient, and lower-emitting methods of generating and delivering energy, while advancing aggressive voluntary measures to continue reducing emissions from traditional generation and delivery and maintaining reliable service and affordability. While DE agrees that greenhouse gas reductions are important, we agree with SCDHEC when they noted that "DHEC's role in reviewing this project is very specific. We must determine whether or not any discharges associated with this project, both direct or indirect [sic], will adversely affect the quality or uses of waters of the state."

She stated that DE has received numerous violations associated with its lack of erosion and sedimentation controls. She stated that Allegheny-Blue Ridge Alliance's (ABRA), Compliance Surveillance Monitoring team based in Virginia and West Virginia documented numerous cases of severe erosion and sedimentation associated with the ACP project in Virginia and West Virginia. She stated that this occurred despite DE's Erosion and Sedimentation Plan and despite State oversight. She stated WRA is concerned that improper installation and/or inadequate maintenance will result in increased sedimentation and turbidity in the project area and downstream and negative impacts on clean water and aquatic resources in the Pee Dee River.

DE Response

DE repeated a previous response, stating that extensive measures have been established for DE to follow when constructing the pipeline to verify that impacts to aquatic resources are avoided and minimized to the maximum extent possible.

She stated WRA is concerned about the threats of release of drilling fluid, compromising water quality and the health of the river's aquatic resources. She stated that assurances to eliminate releases and for prompt cleanup when a release does occur, immediately as opposed to "within 30 days", are critical.

DE Response

DE stated that inadvertent Returns (i.e. frac-outs) will be addressed immediately.

SCDHEC Response

SCDHEC is proposing to include an enforceable condition in the 401 WQC to make the applicant, DE, responsible for ensuring compliance with the project's "HDD Inadvertent Return Contingency Plan" dated June 4, 2020, or any subsequent revision approved by the Charleston District USACE and the SCDHEC, in consultation with the SCDNR. The proposed condition will also require the applicant, DE, to keep a copy of the plan and all necessary equipment and supplies specified in the plan onsite during construction involving Horizontal Directional Drill or HDD operations. SCDHEC is also proposing to include an enforceable condition in the 401 WQC notifying DE that they must properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

Ms. Ellis stated Sturgeon (both Atlantic and Short Nose species) are native to the Pee Dee River. She said these and other important species and their protection needs to be adequately considered as part of the permitting process.

DE Response

DE repeated response comments about RTE Species listed previously.

SCDHEC Response

The SCDNR reviewed DE's RTE species habitat assessment and made the recommendation that all efforts should be made to avoid and minimize impacts to species of conservation concern. Where trench excavation is required across flowing streams, the SCDNR specifically recommended the use of a temporary flume bypass instead of a dam-and-pump method, as the latter could entrain or impinge many of the above-mentioned fish species of concern as well as other aquatic organisms.

The DE committed to using this method in the referenced streams and SCDHEC proposes to include this commitment as an enforceable condition of the 401 WQC.

She stated the application fails to adequately evaluate direct, indirect and cumulative impacts of the pipeline on water quality, protected species, and natural resources in the project area and Pee Dee watershed.

DE Response

DE repeated response comments about Individual and Cumulative Adverse Effects listed previously.

She stated impacted landowners have expressed their concerns, including impacts on Heir's Property, loss of use of property and loss of property value, the lack of local benefits from the project, environmental impacts, and the unavoidable risks of methane gas pipelines. The pipeline poses the risk of leakage, fire and explosions, putting these Environmental Justice communities in the sacrifice zone.

DE Response

DE referred again to a 3-page document titled "Environmental Justice and Heirs Property Comment Responses." DE also referred again to a 2-page document titled "DE's Natural Gas ROW Guidelines" that explains that the ROW can be utilized for various purposes. DE also repeated response comments about Pipeline Safety listed previously.

V. Consistency with the Coastal Zone Management Program; R. 48-39-10 et seq.

Did the staff of the Office of Ocean and Coastal Resource Management (OCRM) find the project consistent with the S.C. Coastal Zone Management Program? ☐ Yes ☐ No ☒ N/A

Date:

☐ Per revisions

☐ Per conditions included in Section VIII.

☐ If no, provide Sections of Coastal Zone Management Program cited.

VI. Conclusions on Water Quality Impact and Classified Uses

DE is requesting a permit to install a gas main that they refer to as the River Neck to Kingsburg 16-inch Gas Main, which is also known to the public as the Pamplico Pipeline. The purpose of the pipeline is to support growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas.

When evaluating the proposed work, SCDHEC followed procedures for implementing State Water Quality Certification requirements pursuant to Section 401 of the Clean Water Act, 33 U.S.C. Section 1341, and Regulation 61-101, Water Quality Certification, and Regulation 19-450, Permits for Construction in Navigable Waters.

The water quality impacts of the proposed work will be temporary provided the applicant adheres to BMPs, the conditions of Nationwide Permit 12 (including the Charleston District Regional Conditions), and the enforceable, SCDHEC 401 WQC conditions listed below in Section VIII of this staff assessment. DHEC has reasonable assurance that the water quality standards of Regulation 61-68 will not be contravened as a result of the proposed work. The proposed work will result in no significant degradation to the aquatic ecosystem or remove existing and classified uses of waters on the project site, including wetlands, that drain east through Jefferies Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield

Mill Creek, Bullock Branch, and unnamed tributaries to the Great Pee Dee River. The project is in compliance with the above regulations provided the applicant adheres to BMPs, the conditions of Nationwide Permit 12 (including the Charleston District Regional Conditions), and the enforceable, SCDHEC 401 WQC conditions listed below in Section VIII of this staff assessment. The above assessment also ensures that the proper sequencing of avoidance, minimization, and appropriate compensation for unavoidable impacts has been demonstrated. Information about the technical aspects of this application is available from Rusty Wenerick, the project manager, by calling (803) 898-4266 or by e-mailing weneriwr@dhec.sc.gov.

SCDHEC reserves the right to impose additional conditions on this Certification/Permit to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with the Construction in Navigable Waters Permitting Program.

VII. Staff Recommendation

Issue 401 Water Quality Certification with conditions, and with provisions consistent with the Permits for Construction in Navigable Waters Regulations.

VIII. Conditions to be Placed on 401 Water Quality Certification When Issued

1. The applicant must implement appropriate best management practices that will minimize erosion and migration of sediments on and off the project site during and after construction. These practices should include the use of appropriate grading and sloping techniques, mulches, silt fences, or other devices capable of preventing erosion, migration of sediments, and bank failure. All disturbed land surfaces and sloped areas affected by the project must be stabilized.
2. The existing and proposed pipeline corridor/right-of-way crosses an approximately 146-acre tract protected by a conservation easement (Front Swamp LLC), and crosses the Pee Dee Station Wildlife Management Area managed by the SCDNR and leased from the S.C. Public Service Authority (Santee Cooper). The applicant must coordinate appropriately with the corresponding landowners throughout the duration of construction and operation of the pipeline to minimize impacts to the aquatic resources, aquatic ecosystems, water quality, and classified uses within these protected conservation lands.
3. The applicant must make all efforts to avoid and minimize impacts to waters that contain species of conservation concern within the project corridor. The applicant, DE, 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, Bigam Branch, and Bullock Branch.
4. The applicant is responsible for ensuring compliance with the project's "HDD Inadvertent Return Contingency Plan" dated June 4, 2020, or any subsequent revision approved by the Charleston District USACE and the SCDHEC, in consultation with the SCDNR. The applicant, DE, must keep a copy of the plan and all necessary equipment and supplies specified in the plan onsite during construction involving Horizontal Directional Drill or HDD operations.
5. The applicant must restore stream banks at crossings after construction has been completed, in as little time as is feasible, which will vary based on site-specific conditions. Disturbed stream banks should be restored by using an appropriate riparian seed mixture, planting woody vegetation, and/or using bioengineering techniques for stream bank stabilization.
6. The applicant must conduct construction activities in a manner that avoids and minimizes disturbance of woody wetland and riparian vegetation within the project area to the greatest extent

practicable. The applicant must limit removal of vegetation to only what is necessary for construction of the proposed pipeline and road culvert.

7. The applicant must properly and expeditiously stabilize areas disturbed during construction using appropriate methods including seeding with mixes that incorporate seeds of native species, mulching, live staking with native species, and other appropriate temporary and final stabilization measures as required by site-specific circumstances.
8. 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.
9. The applicant must properly install erosion and sediment control devices appropriate to site-specific circumstances prior to land disturbance, and must properly maintain these devices in a functioning capacity until the project area achieves final stabilization.
10. The applicant may only use materials for erosion control, such as hay bales or straw mulch, if they have been certified as free of noxious, harmful, or injurious weeds by the supplier.
11. The applicant must repair any damaged erosion control measures in areas of active construction or equipment operation within 24 hours of identification, or as soon as conditions allow if compliance with this time frame (in other words waiting up to 24 hours) would result in greater environmental impacts.
12. The applicant must take all necessary measures to prevent petroleum products, tar, trash, construction debris, and other pollutants from entering the adjacent offsite areas, wetlands, and waters.
13. Once the applicant initiates the project, construction and final site stabilization must be completed in an expeditious manner in order to minimize the period of disturbance to the environment.
14. Upon project completion, the applicant must permanently stabilize all disturbed areas with vegetative cover (preferable), riprap, or other erosion control methods as appropriate.
15. The applicant must construct access-road crossings of Waters of the United States with appropriately sized culverts. Culverts must be sized and designed to prevent alteration of the natural stream morphology. For pipe culverts, the bottom elevation of the culvert or pipe must be at or below the stream bed elevation to allow for natural migration of aquatic organisms upstream and downstream.
16. The applicant must properly dispose of drilling fluid or mud in accordance with applicable requirements of State laws and regulations as administered by the SCDHEC Solid Waste Permitting and Monitoring Program.

Prepared by:

Michael R. [Signature]

Date:

2/3/22

Reviewed &

Approved by:

[Signature]

Date:

2/3/22

(2/24/22)

RECEIVED

Dec 11 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League, Appellant,

v.

South Carolina Department of Health and
Environmental Control and Dominion Energy, Respondents.

VERIFICATION

I, Gail Kathy Andrews, Executive Director of Appellant Blue Ridge Environmental Defense League, verify that to the best of my knowledge and belief, the facts set forth in the foregoing Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing, dated December 11, 2023, are accurate.

[Notarized Signature on Following Page]


Gail Kathy Andrews, *Executive Director*
Blue Ridge Environmental Defense League

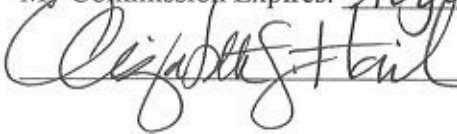
FURTHER AFFIANT SAYETH NOT.

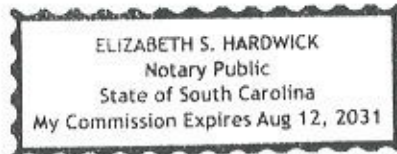
Sworn and Subscribed before Me This 11th day of December, 2023.

 Signature
Gail Kathy Andrews Print Name

Notary Public for South Carolina

My Commission Expires: August 12, 2031

 Signature



STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League, Appellant,

v.

South Carolina Department of Health and
Environmental Control and Dominion Energy, Respondents.

PROOF OF SERVICE

I, the undersigned, certify that I have served Appellant's *Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing* via electronic mail on Counsel for Respondent Dominion Energy, Elizabeth B. Partlow, Esq. at her AIS-designated email address (beth@partlowlaw.com) and Brooks M. Smith, Esq. at his designated email address (brooks.smith@troutman.com), and Counsel for Respondent South Carolina Department of Health and Environmental Control, Bennet W. Smith, Esq. (smithbw@dhec.sc.gov), Christopher Patrick Whitehead, Esq. (whitehcp@dhec.sc.gov), and Sara Volk Martinez, Esq. (martinsv@dhec.sc.gov) at their respective AIS-designated email addresses on December 11, 2023.

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate

Court Rules (As Amended May 6, 2022), a copy of the aforementioned email correspondence to counsel is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181
jesse@jessesanchezlaw.com

**Attorney for Appellant
Blue Ridge Environmental Defense League**

Mount Pleasant, South Carolina
December 11, 2023

From: Jesse Sanchez jesse@jessesanchezlaw.com 
Subject: Re: Blue Ridge Environmental Defense League v. SCDHEC 2023-001351

Date: December 11, 2023 at 11:42 AM

To: beth@partlowlaw.com, brooks.smith@troutman.com, smithbw@dhec.sc.gov, whitehcp@dhec.sc.gov, martinsv@dhec.sc.gov,
Steve Spitz stephenspitz994@gmail.com



Counsel,

Attached for service, please find the following: 1) Appellant's Petition for Writ of Supersedeas and Motion for Expedited Hearing; 2) Exhibits to the Petition; and 3) the corresponding Cover Letter, all of which are being filed momentarily with the South Carolina Court of Appeals via OneDrive Electronic Submission.

Regards,

Jesse

PLEASE NOTE WE HAVE A NEW ADDRESS:

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
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Supersedeas.pdf**



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118 KB



**BREDL - Exhibits to Petition for
Writ of Supersedeas.pdf**
7 MB



**BREDL Letter to Kitchings 121123
.pdf**





December 11, 2023

VIA ONE DRIVE ELECTRONIC SUBMISSION
AND UNITED STATES MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

Dec 11 2023

SC Court of Appeals

RE: Blue Ridge Environmental Defense League v. SCDHEC
Appellate Case No. 2023-001351

Dear Ms. Kitchings:

Attached for filing, please find the follow:

1. Appellant Blue Ridge Environmental Defense League's Petition for Writ of Supersedeas and Motion for Expedited Hearing;
2. Exhibits to the Petition for Writ of Supersedeas and Motion for Expedited Hearing;
3. Verification; and
4. Proof of Service

A check for the fifty dollar (\$50.00) filing fee has been deposited in today's mail. Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

THE LAW OFFICE OF JESSE SANCHEZ, LLC

751 Johnnie Dodds Blvd., Suite 200, Mount Pleasant, SC 29464 P: 843.814.8181 F: 843.284.3953
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Letter to The Hon. Jenny Abbot Kitchings
December 11, 2023
Page 2

Enclosures (as stated)

Cc: Elizabeth B. Partlow, Esq. (Via email only)
Brooks M. Smith, Esq. (Via email only)
Bennet W. Smith, Esq. (Via email only)
Christopher Patrick Whitehead, Esq. (Via email only)
Sara Volk Martinez, Esq. (Via email only)
Stephen A. Spitz, Esq. (Via email only)