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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.

REPLY TO RESPONDENT'S RETURN TO 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 submits this Reply to Respondent's Return.

I. The Corps' Issuance of the Section 404 Permit Does Not Moot the Issues in this Appeal.

Respondent Dominion Energy argues that this Honorable Court should take its cue from the Administrative Law Court's decision in *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control,* Docket No. 15-ALJ-07-0404-CC, and deny the Petition for Writ of Supersedeas, arguing that "nearly identical circumstances exist here." (Respondent's Return, pp. 3-5). Respondent, however, either ignores or is unaware that, in that case, the Court of Appeals disagreed with the ALC's decision to deny supersedeas and later *granted* Appellant's petition, finding that "supersedeas is necessary to prevent contested issues from becoming moot."

(Exhibit A, Court of Appeals' Order granting Petition for Writ of Supersedeas, filed December 15, 2016, App. Case No. 2016-001758, citing Rule 241(c)(2), SCACR). By Respondent's own admission, nearly identical circumstances exist here. Accordingly, Appellant respectfully requests that this Honorable Court grant Appellant's Petition for Writ of Supersedeas just as it did in *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control*.

Contrary to Respondent's contention, the Corp's issuance of a Section 404 Permit does not moot Appellant's ability to challenge DHEC's issuance of a Section 401 Water Quality Certification on appeal. Respondent's position is directly undermined by long-standing cases like *Murphy v. South Carolina Dep't of Health & Envt'l Control,* 396 S.C. 633, 723 S.E.2d 191 (2012). Just like this case, *Murphy* involved a challenge to a 401 Certification granted by DHEC. *See* 396 S.C. 633, 636, 723 S.E.2d 191, 192 (2012). Just like this case, the Corps issued its Section 404 permit after DHEC issued its 401 Certification, and while the challenge to the 401 Certification was pending. *Id.* at 638, 723 S.E.2d 194.

Under Respondent's theory, the Appellant's challenge to 401 Certification in *Murphy* should have been rendered moot when the Corps issued a federal permit. However, the *Murphy* case continued for several years after issuance of the federal permit, with the South Carolina Supreme Court considering whether DHEC should have issued its 401 Certification, even though the Section 404 federal permit had already been issued and had not been challenged. *Id.* ("The issuance of this [Corps 404] permit has not been challenged)." Indeed, the Supreme Court explicitly stated that the Corp's issuance of its Section 404 permit was "not dispositive" to the Court's 401 Certification analysis. *Id.* at 645, 723 S.E.2d at 198 ("Additionally, although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the District had overcome these presumptions and established no

practicable alternatives existed.") Said differently, the Corp's issuance of a Section 404 permit does not in any way moot Appellant's ability to challenge DHEC's Section 401 Certification on appeal.

Respondent's pre-emption argument is further undermined by the fact that States may generally regulate water quality more stringently than as required by the Clean Water Act.[1] Indeed, Section 404 of the Clean Water Act explicitly provides, "Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such state, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements." 33 U.S.C. § 1344(t). Contrary to Respondent's contention, the issuance of a Section 404 Permit does not moot the instant Appeal nor does it deprive this Court of jurisdiction to review the underlying Section 401 Certification.

Relying on its flawed mootness argument, Respondent's Return improperly requests that this Court dismiss the appeal in its entirety. This "back door" request for dispositive relief is inconsistent with the Appellate Court Rules, including the procedures for moving for dismissal under Rule 240, SCACR. For this reason, as well as those reasons set forth above, Respondent's request should be denied and the Petition for Writ of Supersedeas should be granted to prevent contested issues from becoming moot.

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[1] 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.").

II. Extraordinary Circumstances Exist which Merit a Direct Petition to this Court.

Extraordinary circumstances exist, which make it impracticable for Appellant to first seek supersedeas from the Administrative Law Court. Specifically, Appellant received express written notice from Respondent Dominion Energy that it is commencing work on the gas pipeline project—the very subject of the instant appeal. (Exhibit B to Petition, Letter dated December 6, 2023). Dominion Energy does not dispute that the pipeline project will result in direct impacts to 32 separate wetlands or waters, nor does it dispute that the project would result in permanent fill impacts and permanent clearing impacts to this state's wetlands and streams.

Because the proposed impacts will have immediate, permanent effects on the subject lands and waterways, the present case necessitates a decision on the Petition for Supersedeas with finality and without delay. Any delays or errors by the ALC, however inadvertent, would allow Respondent time to proceed with construction of the pipeline project, resulting in permanent, irreparable harm to these wetlands, waters, and the community at large. These are indeed extraordinary circumstances, which render application to the ALC impracticable and which merit direct review by this Honorable Court.

These extraordinary circumstances are further amplified when one considers that the express goal of the Clean Water Act is to preserve "fishable and swimmable waters." *See Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 1999), stating, "One of the well-recognized aims of the Act is to ensure that the nation's waterways are 'fishable and swimmable.' […] Congress proclaimed this goal to provide 'for the protection and propagation of fish, shellfish, and wildlife and provide [ ] for recreation in and on the water.] 33 U.S.C. 1251(a)(2)." Allowing Dominion Energy to proceed with construction of a gas pipeline along these waterways during the pendency of this appeal would undermine the purpose of the Clean

Water Act and effectively render this 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).

Additionally, the Court of Appeals is expressly authorized by statute and the Rules of Civil Procedure to rule on the instant Petition for Writ of Supersedeas. "A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court **or the Court of Appeals**." S.C. Code Ann. § 1-23-600(H)(5). [Emphasis added]. The Court of Appeals is specifically authorized to rule on Petitions for Supersedeas without application to the Administrative Law Court where "extraordinary circumstances make it impracticable." Rule 241(d)(1), SCACR. Appellant respectfully submits that imminent and permanent impacts to this state's wetlands and streams (finite natural resources) present extraordinary circumstances, which merit direct review by this Court. Moreover, whereas Respondent has not shown *any* prejudice resulting from this Court's review of the Petition, Appellant would be prejudiced should Respondent exploit procedural delays in order to commence a project which would permanently impact the subject wetlands, streams, and its surrounding communities.

In an attempt to minimize the risks posed by the pipeline project, Respondent's Return suggests that the permanent impacts posed by the pipeline project are "not irreparable" because if BREDL prevails on appeal, "Dominion could abandon or remove installed segments of the Project and restore any affected areas." (Return, p. 10). Respondent's argument is specious at best. Permanent impacts are by their very definition permanent in nature. They are not

temporary. Permanent impacts cannot be reversed by simply abandoning a project, especially once excavation, filling, and clearing has commenced.

Despite its claims, Dominion offers no evidence that it has the ability to "restore any affected areas" once these permanent impacts are realized. To the contrary, Dominion Energy's safety record demonstrates that this project could pose serious risks to the environment and citizens. In 2018, for example, Dominion was cited for failing to control sediment near a 55-mile pipeline it built in the upstate of South Carolina.[2] 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.[3] Here, City of Florence drinking water is produced at a surface water treatment that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline. Accordingly, this Court should not rely on unsubstantiated claims that Dominion can simply undo any harm caused by construction of the pipeline project during the pendency of this appeal. The pipeline poses a real, permanent threat to the affected wetlands, waters, and surrounding communities. The Petition for Writ of Supersedeas should be granted to prevent these very issues on appeal from becoming moot.

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[2] https://abcnews4.com/news/local/south-carolina-fines-dominion-energy-for-polluting-drinking-water

[3] https://www.greenvilleonline.com/story/news/2018/05/25/dominion-energy-under-scrutiny-after-mud-clogs-water-system-near-utilitys-sc-project/645320002/

III. The Petition complies with Rule 241, SCACR.

Respondent's Return argues that the Petition should be denied because Appellant did not attach a copy of the Notice of Appeal along to its Petition for Supersedeas. The purpose of the Rule, however, is simply to provide the reviewing court with notice that the underlying order has indeed been appealed. Respondent disregards that Rule 241, SCACR, permits a party to seek supersedeas directly from the Court of Appeals when extraordinary circumstances make application to the lower court impracticable. Accordingly, there is no need for Appellant to *re-submit* the Notice of Appeal to the Court of Appeals, particularly where the Court is already aware that the subject order is on appeal, having previously received the Notice of Appeal and corresponding Proof of Service on August 23, 2023.

With regard to the sufficiency of the Petition, Appellant respectfully submits that the Petition provides a sufficient factual background for the Court to understand the Petition and makes clear and intelligible arguments in support of Supersedeas. Further, the Petition is accompanied by a notarized verification, signed by Ms. Gail Kathy Andrews. Ms. Andrews is not only the Executive Director of Blue Ridge Environment Defense League, but also a homeowner who received notice from Dominion that it intends to begin construction of the gas pipeline during the pendency of this appeal. The verification specifically provides that, to the best of her knowledge and belief, the facts set forth in the Petition for Writ of Supersedeas and Motion for Expedited Hearing are accurate, thereby satisfying the requirements set forth under the Rule.

Finally, "South Carolina policy favors the disposition of issues on their merits rather than on technicalities." *Strother v. S.C. Dep't of Emp't & Workforce* (South Carolina Administrative

Law Court, 2016), *citing Mictronics, Inc. v. S.C. Dep't of Rev.*, 345 S.C. 506, 548 S.E.2d 223 (S.C. App. 2001). In an effort to avoid the merits of both the Petition and underlying appeal, Respondent asks this Honorable Court to deny the Petition on alleged technicalities, which even if true, pose no prejudice to Respondent. Appellant respectfully requests that this Honorable Court look past these diversionary tactics, rule on the merits of its Petition, and grant an Order of Supersedeas so as to avoid having contested issues become moot during the pendency of this appeal.

IV. A Bond would be an Inappropriate Imposition on Appellant and Thwart the Administration of Justice.

In a final attempt to thwart Appellant's ability to pursue its appeal, Dominion requests that Appellant (a regional, non-profit, community-based organization, consisting of local residents) be required to post a **$2.8 Million dollar bond** in the event supersedeas is granted.[4] Dominion, a sophisticated energy giant, with operations across sixteen states, reported yearly revenue of $16.72 billion dollars, and reported assets totaling $103.823 billion dollars,[5] understands that small community-based organizations like BREDL cannot afford to pursue an appeal if such a bond were imposed on them. This is especially true in instances like the present one, where a large segment of the organization's members consist of low-income, minority residents, with long-standing ties to the community.

Pursuant to Rule 241(c)(3), SCACR, the imposition of a supersedeas bond is notably <u>not</u> a requirement for obtaining a writ of supersedeas. To the contrary, the decision on whether or not impose a supersedeas bond is completely discretionary and limited to those circumstance

[4] It is unclear how large of a bond Respondent is actually requesting. In one section, Respondent requests $2.8MM, but in its conclusion, it requests $2MM, further emphasizing the arbitrary nature of the request.

[5] https://www.sec.gov/ix?doc=/Archives/edgar/data/103682/000119312520054469/d854390d10k.htm

where the appellate court deems it appropriate. Rule 241(c)(3), SCACR. Here, the imposition of supersedeas bond is not appropriate.

First, supersedeas in the instant case would not require Dominion to do *anything* other than maintain the status quo—to do what it has always done and continues to do. Dominion readily admits that it is *already* supplementing pipeline-supplied natural gas with liquid natural gas ("LNG") during the coldest months in the Myrtle Beach area. (Return, p. 13). This has been their long-standing practice, and part of their normal operating expense. By seeking a supersedeas bond, Dominion seeks to shift the costs associated with LNG to Appellant despite the fact that LNG has traditionally been a standard operating cost incurred by the company.

Second, while Dominion may speculate as to future population growth and potential costs associated with said growth, this is only speculation. Projections, polls, and industry opinions are not facts, nor are they certainties. Like any form of speculation, they are subject to manipulations, human error, and change.

Third, Dominion's opinions regarding future costs are not based on the projections of an independent, qualified third party. Instead, Dominion attempts to pass off the affidavit of one of its own 21,000 employees as authority. Respectfully, while Mr. West is a professional engineer, he is not an accountant, financial expert, or economist, nor does he possess any qualifications, which would enable him to estimate potential population growth and its associated costs. More to the point, even as a professional engineer, his affidavit does not purport to offer an opinion to any degree of professional certainty. As a result, it should not be given undue weight by this Court. It does not offer a professional opinion and seeks only to shift standard operating costs onto Appellant in an attempt to thwart their pursuit of an appeal altogether.

CONCLUSION

For each of the foregoing reasons, Appellant respectfully request 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 permanent 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 and would directly contravene the stated goals of the Clean Water Act. 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.

[Signature on following page]

Respectfully submitted,

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January 8, 2024

EXHIBIT A

The South Carolina Court of Appeals

South Carolina Coastal Conservation League and South Carolina Wildlife Federation, Appellants,

v.

South Carolina Department of Health and Environmental Control and Horry County Public Works, Respondents.

Appellate Case No. 2016-001758

ORDER

South Carolina Coastal Conservation League and South Carolina Wildlife Federation have filed a petition for supersedeas seeking to stay the issuance of two permits issued by South Carolina Department of Health and Environmental Control. After consideration of the petition for supersedeas, return, and reply, we find supersedeas is necessary to prevent contested issues from becoming moot. Thus, the petition for supersedeas is granted. *See* Rule 241(c)(2), SCACR ("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.").

James E. Lee, Jr. C.J.
FOR THE COURT

Columbia, South Carolina

FILED
December 15, 2016

cc: Amy Elizabeth Armstrong, Esquire
Jessie Allison White, Esquire
Amelia Ann Thompson, Esquire
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