April 3, 2024

VIA U.S. MAIL AND EMAIL (ctappfilings@sccourts.org)

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

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

Dear Ms. Kitchings:

We are writing to advise the Court that the Administrative Law Court entered an Order denying Appellant's Petition for Supersedeas yesterday afternoon. A copy of that Order is attached for the Court's records.

Per Order of the Court of Appeals, filed January 10, 2024, "The parties shall notify this court immediately upon issuance of an order and Appellant may then renew its petition with this court." Appellant Blue Ridge Environmental Defense League wishes to renew its Petition for Writ of Supersedeas with this Court. Accordingly, Appellant respectfully requests ten (10) days leave to re-file its Petition so that it may address the findings contained in the Administrative Law Court's Order.

To the extent a filing fee is deemed necessary for this request, Appellant has deposited a check for $50.00 in today's outgoing 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)
Attorney for Appellant

Cc: Elizabeth B. Partlow, Esq. (Via email only)
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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 **ORDER DENYING MOTION FOR SUPERSEDEAS**

This matter is before the Administrative Law Court (Court or ALC) on a Petition for Writ of Supersedeas (Petition) filed by Petitioner Blue Ridge Environmental Defense League (BREDL) pursuant to Rule 241 of the South Carolina Appellate Court Rules (SCACR). BREDL asks this Court to impose a supersedeas staying the operation of the Court's Final Order in this case pending the resolution of BREDL's appeal. This Court's Final Order affirmed the issuance of a Section 401 Water Quality Certification (401 Certification)[1] by the South Carolina Department of Health and Environmental Control (Department) to Respondent Dominion Energy (Dominion) to install a natural gas main under Jefferies Creek and in 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 (the Project). Since the Court issued its Final Order, BREDL filed an appeal with the South Carolina Court of Appeals, and the U.S. Army Corps of Engineers (Corps) issued a Section 404 permit[2] to Dominion to begin constructing the Project.

[1] A Section 401 Water Quality Certification (WQC) is issued by the state pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251, *et. seq.*, and certifies that a particular activity complies with certain sections of the CWA. 33 U.S.C.A. § 1341(a)(1) (West, Westlaw through P.L. 118-41) ("Any applicant for a Federal license or permit . . . shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.").

[2] A Section 404 permit is a federal permit issued by the Corps pursuant to the CWA, and it authorizes construction activity, fill, and dredging in waters of the United States. 33 U.S.C.A. § 1344 (West, Westlaw through P.L. 118-41).

BREDL argues the supersedeas is necessary because Respondent has indicated it will commence work on the Project, which will render contested issues in BREDL's appeal moot and cause irreparable harm to BREDL, its constituents, and the affected geographic area. Dominion filed a Return in opposition to BREDL's Petition in which it argues a supersedes is not necessary because the Corps' Section 404 permit mooted any issues raised in the appeal of the Section 401 Certification, relief can be granted without a stay, and the Petition was deficient. In the alternative, Dominion requests that if this Court grants the Petition, it impose a bond in the amount of approximately $5.3 million. BREDL filed a Reply in which it argued the Section 404 permit did not moot the issues in this case, adequate relief cannot be granted without the stay, and its Petition complies with Rule 241. The Department did not file a response to the Motion. Instead, by letter dated March 1, 2024, the Department informed the Court that it takes no position on the Petition but nonetheless reserves the right to respond if the parties raise any additional issues or arguments in any further briefing or oral argument that may be required in this matter. The ALC held a hearing on the Petition on March 19, 2024.

BACKGROUND

On February 4, 2022, the Department issued a Section 401 Water Quality Certification to Dominion in connection with Dominion's application for coverage under Nationwide Permit (NWP) 12,[3] Oil or Natural Gas Pipeline Activities (also known as a Section 404 permit). Subsumed within the 401 Certification was a state review for construction in navigable waters pursuant to South Carolina Regulation 19-450.[4] The 401 Certification provided state-level authorization for Dominion's proposed Project, and it included sixteen enforceable conditions intended to minimize any potential environmental impacts from the Project.

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[3] NWP 12, issued by the United States Army Corps of Engineers (Corps) pursuant to 33 U.S.C.A. § 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.

[4] Importantly, the Department's letter granting the 401 Certification, dated July 28, 2023, is titled: "Certification in Accordance with Section 401 of the Clean Water Act, as amended, **with conditions pursuant to R. 19-450, et. seq., 1976 SC Code of Laws, *Permit For Construction in Navigable Waters***." (emphasis added). Additionally, the Department's letter provides "[the Department] has reviewed plans for this project and determined that there is a reasonable assurance that the proposed project will be conducted in a manner consistent with the Certification requirements of Section 401 of the Federal Clean Water Act, as amended, **and the permitting requirements of R. 19-450 et. seq., 1976 Code of Laws**." (emphasis added). Whether the Department only issued a 401 Certification or also issued a state permit pursuant to South Carolina regulation 19-450 in this case will be addressed later in this order. *See* S.C. Code Regs. Ann. 19-450 (2011).

As permitted, the Project will be constructed along an existing natural gas pipeline corridor in Florence County that is approximately 14.5 miles long. The Project will parallel the existing eight-inch pipeline owned and operated by Dominion. Dominion will 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.

On July 24, 2023, this Court issued its final order affirming the Department's issuance of the 401 Certification.

On August 23, 2023, BREDL appealed this Court's final order to the South Carolina Court of Appeals.[5] BREDL asserts the Department erred because its decision violated applicable statutes, regulations, and rules relating to the 401 Certification and South Carolina Regulation 19-450; specifically:

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.

On October 10, 2023, the Corps issued Dominion a Section 404 permit, which incorporated the sixteen conditions from the Department's 401 Certification, and authorized Dominion to begin construction of the Project.

[5] BREDL did not request a stay of the Court's decision during the pendency of the appeal, nor did it request the Corps delay its permitting decision during the appellate process.

Although issuance of the Crops permit and commencement of the Project was certainly foreseeable, BREDL contends it was not aware that Dominion would begin construction on the Project until one of its members received a letter dated December 6, 2023, stating that "[i]n the coming weeks," Dominion would begin work on the Project. On December 11, 2023, BREDL filed an emergency writ for supersedeas and a motion for an expedited hearing of the writ with the South Carolina Court of Appeals. In an order dated January 10, 2024, the court of appeals granted BREDL's request for an expedited hearing of the emergency writ, held the appeal in abeyance, and remanded the writ back to this Court for consideration. Despite the remand, this Court did not receive or hear anything from the parties or the court of appeals about the supersedeas until February 16, 2024. Thereafter, on February 27, 2024, BREDL filed its Petition with this Court.

On March 19, 2024, the Court held a hearing on the Petition. At the hearing, Dominion presented testimony from Zachary West who is the manager of engineering projects for Dominion in South Carolina. His testimony supplemented his affidavit that was previously submitted with Dominions' Return to the Petition and which explained Dominion's estimated costs if the Project is stayed for three years. Although Mr. West was not qualified as an expert, expert testimony is not required to support a bond. I found Mr. West to be credible. His testimony about his calculations was logical, and he explained that forecasting customer need, capacity, and costs are a regular part of his job with Dominion. He estimated the total cost to Dominion for a three-year delay would be $5.3 million, which represents the total cost of supplementing the current supply with liquified national gas (LNG) to support current and future demand on the pipeline. He supported the estimate with a chart delineating the specific costs that make up this figure, which Mr. West also explained at length.

Also at the hearing, the Court asked the Department to give its legal interpretation of whether issuance of the Corps' Section 404 permit rendered review of the 401 Certification moot. The Department interprets the Section 404 permit to moot review of the 401 Certification except to the extent the state's authorization for construction in state navigable waters under regulation 19-450 is at issue. The Department explained this regulation requires a state permit that is separate and distinct from federal law, although South Carolina has chosen to subsume the issuance of this

permit into its 401 Certification (a separate permit outside of the Section 401 Certification is not issued for compliance with regulation 19-450).[6]

DISCUSSION

The serving and filing of a notice of appeal does not automatically stay the enforcement of an order of this Court. S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2023); S.C. Code Ann. § 1-23-610(A) (Supp. 2023), *see also* Rule 241(b)(11), SCACR (providing appeals from administrative tribunals are an exception to the automatic stay in appeals). However, Rule 241(c), SCACR, provides that when no automatic stay is imposed, a party may move for an order imposing a supersedeas of matters decided in the order being appealed. *See* SCALC Rule 68 ("[T]he South Carolina Appellate Court Rules . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules."). Generally, a supersedeas is a writ or order that suspends or stays the enforcement of a judgment pending appeal. *See, e.g.*, *Supersedeas*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A writ or bond that suspends a judgment creditor's power to levy execution, usu. pending appeal.").

Except in extraordinary circumstances, a petition for a supersedeas must first be made in this Court. Rule 241(d)(1), SCACR. The party seeking the writ of supersedeas "must file a written petition verified by the client." Rule 241(d)(3). And, if the facts are subject to dispute, "the petition shall be supported by affidavits or other sworn statements." Rule 241(d)(4). When determining whether to grant the petition for supersedeas, the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot."[7] Rule 241(c)(2), SCACR. Additionally, the Court has the authority to condition the granting of the supersedeas upon such terms it may deem appropriate, including the filing of a bond. Rule 241(c)(3), SCACR.

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[6] BREDL objected to the Department taking a position on the mootness issue because the Department had previously represented to the South Carolina Court of Appeals that it was not taking a position. However, in its March 1, 2024, letter, the Department reserved the right to take a position, if necessary, in any further briefing or oral argument in this matter. Here, the Department was simply responding to the Court's question at the hearing, which made it necessary for the Department to explain its interpretation of the effect of the Section 404 permit on the 401 Certification. The Court asked the Department to explain its interpretation since the Department is the administrator of the 401 Certification and has the knowledge and experience of how the 401 Certification and Section 404 permit function together.

[7] BREDL makes no argument about whether a stay is necessary to preserve jurisdiction under Rule 241; therefore, I do not address this aspect of the rule.

Mootness of the Case in the Context of a Stay

Before I turn to the narrow issue of whether denying a stay will render contested issues in this case moot, I address Dominion's argument that the intervening action of the Corps granting a Section 404 permit rendered the entire underlying case moot.

This Court should not rule on matters that have become mere academic questions because they are without controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) ("This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy."). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Id.* "This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.*

While Rule 241, SCACR, does not specifically direct the Court to consider whether the underlying case is moot, if the underlying case has been rendered moot by an intervening action, then relief can no longer granted. If relief cannot be granted, then a stay serves no purpose. A stay cannot prevent a contested issue from becoming moot or preserve jurisdiction when the case itself is already moot. *See* Rule 241(c)(2). Thus, the impact of the Corps' permit must be part of this Court's review of the request for supersedeas relief.

Nevertheless, BREDL argues the South Carolina Court of Appeals has already ruled that the underlying case is not moot, or, at the very least, it has ruled that this issue is not before this Court. The court of appeals issued an order on January 10, 2024, that holds: "[W]e deny Dominion's request to dismiss the appeal as moot. Nothing in this order prevents Dominion from arguing the appeal is moot in its brief, however." *Blue Ridge Env't Defense League v. S.C. Dep't of Health & Env't Control*, Op. No. 2023-001351 (S.C.Ct.App. Filed Jan. 10, 2024). Therefore, the court of appeals denied Dominion's motion to dismiss as moot at this particular stage in its review; however, contrary to BREDL's assertion, the ruling is not final because the court of appeals specifically allowed Dominion to argue this issue further in its brief. *See id*. Therefore, the court of appeals did not conclusively rule on whether the underlying case has been rendered moot by the issuance of the Section 404 permit. Accordingly, this Court is not precluded from entertaining this argument for the purpose of evaluating the efficaciousness of a supersedeas under these particular circumstances.

Turning to Dominion's argument, it contends that "[o]nce the Crops verified that the Project qualified for coverage under NWP 12 [Section 404 permit], the issues raised in the appeal

of the [401] Certification became moot." Dominion further argues it was the Corps' Section 404 permit, and not the Department's 401 Certification, that authorized Dominion to begin construction; therefore, staying the operation of the 401 Certification will have no effect on the relief BREDL seeks from the stay: preventing construction from going forward.

In response, BREDL cites to two cases for the proposition that an intervening Section 404 permit issued by the Corps does not moot review of a 401 Certification: *Murphy v. South Carolina of Health & Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), and *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, Docket No. 15-ALJ-07-0404-CC, 2016 WL 3884282, Final Order and Decision (July 7, 2016). BREDL further argues that even if the Section 404 permit preempted the 401 Certification, states may generally regulate water quality more stringently than required under the Section 404 permit. However, BREDL failed to identify what state laws imposing more stringent requirements are at issue in this case outside of the 401 Certification.

Before I address the parties' arguments, it is necessary to describe the statutory and regulatory framework governing the 401 Certification and the Section 404 permit.

Framework

A Section 404 permit is a federal permit pursuant to the Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, and it authorizes construction activity, fill, and dredging in waters of the United States. 33 U.S.C.A. § 1344 (West, Westlaw through P.L. 118-41). A 401 Certification, in contrast, is a prerequisite to the Section 404 permit and gives South Carolina (through the Department) a chance to determine whether a proposed project is consistent with certain sections of the Clean Water Act. *See* 33 U.S.C.A. § 1341(a)(1) (West, Westlaw through P.L. 118-41) ("Any applicant for a Federal license or permit . . . shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."); *see also Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. 633, 637, 723 S.E.2d 191, 193 (2012) ("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 the applicable state agency that the discharge complies with sections 1311, 1312, 1316, and 1317 of the Act."). The Department administers the 401 Certification pursuant to Regulation 61-101 of the South Carolina Code of Regulations (2011).

Thus, when the Department grants a 401 Certification, it means the Department has concluded the proposed project complies with the applicable sections of the Clean Water Act, but, crucially, the 401 Certification **does not itself authorize construction**.[8] *See*, *e.g.*, *City of Shoreacres v. Texas Comm'n of Env't Quality*, 166 S.W.3d 825, 834 (Tex. App. 2005) ("A state's water quality certification does not authorize any activity."). The role of South Carolina and the Department under the Clean Water Act's permitting process is limited to providing input during the process by either (1) issuing a 401 Certification (with or without conditions),[9] (2) denying the 401 Certification, or (3) failing to act (resulting in waiver of state input). 33 U.S.C.A. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be."); *see also Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir. 2018) ("Accordingly, a state receiving a Section 401 application has four options in total: it may grant a certificate without imposing any additional conditions; grant it with additional conditions; deny it; or waive its right to participate in the process.").

Once a state issues or denies a 401 Certification, there is a narrow window of time during which a state may notify the Corps "that there is no longer reasonable assurance that there will be compliance with the applicable provisions" of the Clean Water Act under the 401 Certification. 33 U.S.C.A. § 1341(a)(3). The state has sixty days from when it receives notice of the Corps permit to alert the Corps to substantive issues with its 401 Certification. *See id.* Only certain changes since issuance of the 401 Certification can trigger further review by the Corps under 33 U.S.C.A. § 1341(a)(3), including changes in "(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements." *See id.*; *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (holding "a state may revoke a prior

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[8] Although the 401 Certification includes the Department's review of the Project's compliance with South Carolina regulation 19-450, here I am solely addressing the federal aspect of the 401 Certification as a prerequisite for the Section 404 permit.

[9] A state may impose its own conditions as part of the 401 Certification, as South Carolina did in this case, and the federal government is required to incorporate these conditions into its permit. 33 U.S.C.A. § 1341(d). Additionally, General Condition 27 of the Corps permit issued in this case states that the "activity must comply . . . with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination."

certification that might otherwise support a subsequent license application, but only pursuant to the terms of, and for the reasons indicated in, [33 U.S.C.A. § 1341(a)(3)]"). Once the sixty days has passed, the state's direct influence on the Corp's permitting decision with respect to the state's 401 Certification ends, even if the state's administrative review process continues after issuance of the Corps' 404 permit. *See*, *e.g.*, *City of Shoreacres*, 166 S.W.3d at 834–35 (holding "states are not authorized under the Clean Water Act to unilaterally revoke, modify, or amend a state water quality certification after the certification process for a federal permit is complete"). Here, BREDL has not argued that 33 U.S.C.A. § 1341(a)(3) is applicable to this case, and the time period to notify the Corps of an issue with the 401 Certification under this section has passed.

Next, as the South Carolina Supreme Court recognized in *Triska v. Department of Health & Environmental Control*, even if the Department's 401 Certification were to be revoked after the Corps issued a permit, "it would be a futile act unless the permitting agencies [the Corps] subsequently suspended and revoked their respective permits." 292 S.C. 190, 196, 355 S.E.2d 531, 534 (1987). In *Triska*, unlike this case, the Department sought to revoke its 401 Certification five years after the Department initially issued its 401 Certification and the Corps had issued a Section 404 permit (after the state appeals process had concluded). *See id.* at 196, 355 S.E.2d at 534. Here, unlike in *Triska*, the state appeals process has not concluded, and BREDL, not the Department, is seeking to overturn the 401 Certification; however, like in *Triska*, because the Corps has already issued a Section 404 permit, the Department has no authority to stop the permitted activity. *See id.* Indeed, in *Triska*, the supreme court advised that "[t]he proper procedure for DHEC to utilize, if it has concerns about changes in the water quality, is to notify the permitting agencies [the Corps] of the problems in order for these agencies to review the permits." *Id.*[10]

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[10] As noted above, BREDL cites to *Murphy v. South Carolina of Health & Environmental Control* in support of its position that this case is not moot. 396 S.C. 633, 23 S.E.2d 191, (2012). In *Murphy*, our supreme court reviewed and affirmed the Department's issuance of a 401 Certification despite the intervening issuance of a Section 404 permit. 396 S.C. at 646, 23 S.E.2d at 198. BREDL argues the supreme court would not have continued with the appeal if it had considered the matter moot after the Corps issued its permit. However, at no point in *Murphy* did the supreme court address whether the Section 404 permit mooted the action; indeed, it appears the issue of mootness was never raised. *Id.* at 646, 723 S.E.2d at 198. Therefore, this case cannot be used to affirmatively hold that review of a 401 Certification is not moot after the Corps issues a 404 permit.

BREDL and Dominion also rely on *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control* to support their arguments. Docket No. 15-ALJ-07-0404-CC, 2016 WL 3884282, Final Order and Decision (July 7, 2016). In *Coastal Conservation League*, the ALC affirmed the Department's issuance of a Section 401 Certification and a Coastal Zone Consistency Certification. 2016 WL 3884282, at *21. Shortly thereafter, the Corps issued a Section 404 permit, and the petitioners filed a Motion for Stay with the ALC. *Coastal Conservation League*, Docket No. 15-ALJ-07-0404-CC, Order Denying Stay (Oct. 10, 2016). The ALC declined to grant the stay, explaining it could not stay the activity authorized by the Section 404 permit

Consistent with the South Carolina Supreme Court's advice in *Triska*, there is limited authority suggesting that if a 401 Certification was reversed on appeal, the Corps could consider the reversal and modify or revoke the Section 404 permit at its **discretion**. Specifically, 33 C.F.R. § 330.4(c)(7) directly addresses what happens when a state attempts to withdraw its 401 Certification:

> Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is **substantial basis** for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

33 C.F.R. § 330.4(7) (West, Westlaw through 89 FR 20841) (emphasis added). Similarly, the Corps is authorized to "reevaluate the circumstances and conditions of any permit, including regional permits, either on [its] own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. 33 C.F.R. § 325.7(a) (West, Westlaw through 89 FR 20841).

Overall, the Corps, in its discretion, can reconsider its Section 404 permit if a state withdraws its 401 Certification, but the Corps has no obligation to modify or revoke its permit in response. *See* 33 C.F.R. § 330.4(c)(7); 33 C.F.R. § 325.7(a).

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because the ALC's Final Order and Decision did not authorize the activity in the first place. *Id*. On the contrary, the Corps' Section 404 permit authorized the activity. *Id.* Dominion argues the ALC's holding supports its position that the case is moot.

In the subsequent appeal of *Coastal Conservation League* to the South Carolina Court of Appeals, the appellants moved for a supersedeas order to stay the ALC's order. *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, Op. No. 2016-001758 (S.C.Ct.App. Filed Dec. 15, 2016). On December 15, 2016, the court of appeals issued a brief order imposing a stay "to prevent contested issues from becoming moot" with no explanation or analysis. *Id.* Then, on January 20, 2017, the court of appeals lifted the stay over the objection of the appellants and imposed certain conditions. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, Op. No. 2016-001758 (S.C.Ct.App. Filed Jan. 20, 2017). Appellants moved for reconsideration of the order lifting the stay, which the court of appeals denied on February 6, 2017. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, Op. No. 2016-001758 (S.C.Ct.App. Filed Feb. 6, 2017). The case later settled. BREDL argues the court of appeals orders in *Coastal Conservation League* overruled the ALC's order denying the stay because the case was not mooted by the Corps' issuance of a Section 404 permit.

The court of appeals' brief, unpublished orders simply do not explain the court of appeals' reasoning for first granting the stay and then lifting it shortly thereafter; they certainly cannot be read to provide precedent for ruling that Section 404 permits do not moot a contested 401 Certification. Unpublished memorandum opinions and unpublished orders have no precedential value and only should be cited in proceedings in which they are directly involved. Rule 268(d)(2), SCACR.

Finally, I address the framework governing South Carolina Regulation 19-450. The interwoven process of the Section 401 Certification and the Section 404 permit does not preclude a state from regulating its water separately from the federal government. Section 1344 of the CWA provides that "[n]othing 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.A. § 1344 (West, Westlaw through P.L. 118-41). 33 C.F.R. § 330.4 further provides that "NWPs only authorize activities from the perspective of the Corps regulatory authorities and . . . other Federal, state, and local permits, approvals, or authorizations may also be required."

Here, South Carolina has promulgated its own regulation governing navigable waters in the state—regulation 19-450. S.C. Code Ann. Regs. 19-450 (2012). Regulation 19-450.1 provides:

> **Unless expressly exempted, a permit issued by the Department of Health and Environmental Control is required** for any dredging, filling or construction or alteration activity in, on, or over a navigable water, or in, or on the bed under navigable waters, or in, or on lands or waters subject to a public navigational servitude under Article 14 Section 4 of the South Carolina Constitution and 49-1-10 of the 1976 S.C. Code of Laws including submerged lands under the navigable waters of the state, or for any activity significantly affecting the flow of any navigable water.

S.C. Code Ann. Regs. 19-450.1 (2012) (emphasis added). Regulation 19-450.3 lists the exemptions referred to in regulation 19-450.1, and subsection (G) provides:

> **No permit is required for any activity which requires another Department permit or certification, including but not limited to 401 Water Quality Certifications**, water supply permits, National Pollutant Discharge Elimination System permits, wastewater construction permits, and mining permits. These permitting/certification areas will be required to coordinate with the Construction in Navigable Waters Permitting staff to insure the provisions of this regulation are adhered to.

S.C. Code Ann. Regs. 19-450.3(G) (2012) (emphasis added); *see also* S.C. Code Ann. Regs. 61-101(A)(9) (2011) ("If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the 401 WQC will consider issues of that permit and DHEC will not issue a separate permit for construction in State navigable waters.").

Based upon these two regulations, an independent permit from the Department for construction in the state's navigable waters pursuant to regulation 19-450 is not required (exempted) when the Department issues a 401 Certification. *See* Reg. 19-450.1; Reg. 19-450.3(G).

Analysis

A case becomes moot some intervening event occurs that makes it impossible for the reviewing court to grant relief. *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864. In this case, an intervening event has occurred—the Corps issued a Section 404 permit. *See id.* The relief BREDL seeks in the case overall is review, and potentially reversal, of the Department's 401 Certification. I conclude that reversal of the Department's 401 Certification in this case during appellate review cannot effectuate BREDL's desired relief on its own because it cannot stop Dominion's construction of the Project as authorized under the Section 404 permit, even if the Department is found to have violated South Carolina Regulation 61-101 (implementing the 401 Certification review) as alleged by BREDL on appeal.

Similarly, based upon how the Department has structured its state permitting authority under regulation 19-450, I find the Department did not issue a separate state permit to Dominion for construction in navigable waters under state law because subsection (G) of regulation 19-450.3 exempts the need for such a permit. To the extent the Department added conditions to the 401 Certification based upon regulation 19-450, those conditions are part of the 401 Certification—and now part of the Section 404 permit—not a separate state permit. Accordingly, South Carolina has not issued an independent state permit authorizing construction in its navigable waters under regulation 19-450 that could be modified or reversed on appeal and impact Dominion's ability to move forward with its Project as planned.

Thus, the circumstances of the underlying case point to it being moot. *See Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy."). BREDL has not cited any applicable state law that is independent of the 401 Certification and that would not be rendered moot by the Section 404 permit. Indeed, BREDL has not even argued that compliance with regulation 19-450 is a separate state issue; the Court has only addressed whether a separate permit was issued under this regulation because of the Department's interpretation of how the 401 Certification and Section

404 permit function together.[11] Nevertheless, while it is possible that reversal of the state's 401 Certification could influence the Corps to grant relief, the myriad of factors that would influence that result renders this potentiality exceedingly speculative. *See* 33 C.F.R. § 330.4(c)(7); 33 C.F.R. § 325.7(a). Accordingly, although I do not rule on whether the case is moot, my analysis in this section demonstrates that a stay cannot grant the relief sought by BREDL and their Petition must be denied for the reasons stated below.

Rule 241(c)(2)—Prevent Contested Issues from Becoming Moot

BREDL moves this Court for a supersedeas on the ground that Dominion's commencement of the Project will render contested issues in its appeal moot. Specifically, BREDL argues that pursuant to the permitted Project, Dominion will impact wetlands and streams in the Project area with permanent fill and permanent clearing, and permanent impacts, by their very nature, cannot be reversed. BREDL also asserts the Project "will undoubtedly impact a historically underserved and underprivileged community, giving rise to potential health risks and environmental concerns." Finally, BREDL asserts "[t]he resulting permanent social and environmental impacts of the project cannot be undone if the project is commenced and/or completed during the pendency of this appeal," thus making it "impossible for the reviewing court to grant effectual relief."

In its Return, Dominion argues BREDL has failed to show relief cannot be effectuated if BREDL wins its appeal; therefore, it has also failed to show contested issues in the case will become moot if work on the Project begins. Dominion asserts even "permanent" impacts are not irreparable. Dominion contends that if it loses on appeal, it could abandon the Project, remove installed portions, and/or restore any affected areas.

I conclude BREDL has failed to meet its burden of proof to show contested issues will become moot if a stay is not granted for two reasons. *See* Rule 241(c)(2), SCACR; *see also* 4 C.J.S. *Appeal and Error* § 531 ("It is the appellant's burden to seek a stay or supersedeas to protect one's rights and preserve the status quo during the pendency of the appeal."). First, BREDL's purpose in requesting the stay is clearly to prevent Dominion from commencing construction on its Project and to prevent Dominion from effecting any change to the environment, particularly to prevent

[11] Even if the issue of compliance with section 19-450 is not mooted by the issuance of the Section 404 permit, BREDL has made no specific legal arguments or pointed to any facts, in affidavits or otherwise, to show how contested issues related to regulation 19-450 will be rendered moot without a stay. Indeed, the only time BREDL mentions regulation 19-450 in its Petition is in its list of issues it contends it will raise in its appeal to the South Carolina Court of Appeals.

Dominion from effecting any permanent impacts. However, as expressly outlined in the discussion above, this Court approved the issuance of the 401 Certification, which **does not authorize Dominion's construction of the Project**. Additionally, the Department did not issue an independent state permit under regulation 19-450, the stay of which could possibly halt construction. Rather, the Corps' Section 404 permit is the only permit that authorizes Dominion to commence construction of the Project and the only permit for which a stay would be effective to grant BREDL the relief it seeks.[12] Therefore, a stay of this Court's decision regarding the 401 Certification would have no effect on Dominion's ability to commence and complete the Project. Moreover, even if this Court were to agree that Dominion's completion of the Project and effectuation of the permanent impacts would render contested issues on appeal moot, this Court's hands are tied because it has no authority to stay the effect of the Crops permit, which, again, is the permit that authorizes Dominion's construction. *See* Rule 401(c)(2). On this basis, BREDL's Petition is denied.

Second, while it may be true that permanent impacts are irreversible, BREDL has not supported this assertion with law or facts, and Dominion disputes this assertion. Importantly, BREDL has not provided affidavits to support its assertion. *See* Rule 241(d)(4) (instructing that if the facts are subject to dispute, "the petition shall be supported by affidavits or other sworn statements"). Additionally, BREDL's arguments that the Project will "undoubtedly impact a historically underserved and underprivileged community, giving rise to potential health risks and environmental concerns" are broad, conclusory arguments that are not supported by citations to facts or law. Consequently, I find BREDL's Petition lacking in terms of the requirements of Rule 241 because it does not include affidavits to support its contentions or relevant law for some of its arguments; nevertheless, I do not deny the stay solely on this basis. *See* Rule 241(d)(4), SCACR (outlining the requirements for what the petition shall contain).

In sum, BREDL has failed to show how granting its request for supersedeas will preserve the status quo (undisturbed waters and no construction), which is the central purpose of a supersedeas order. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) ("The general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error."). This Court has no authority to

[12] Indeed, a petition for a stay of, or a challenge to, the Corps 404 permit in federal court would appear to be the proper remedy; however, BREDL has not filed any action in federal court to this Court's knowledge.

stay the Section 404 permit; therefore, granting BREDL's request for a supersedeas would not provide the relief BREDL seeks, and the Court has no additional means of affording BREDL the relief it seeks. *Cf.* Rule 241(c)(3), SCACR ("Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate."). Additionally, since this Court cannot stay the Section 404 permit, and, to this Court's knowledge, the South Carolina Court of Appeals likewise cannot stay a Section 404 permit, then denying the supersedeas will have no effect on the viability of BREDL's appeal to the extent it is not moot. *See* 4 C.J.S. Appeal and Error § 530 ("A court may also consider whether the object of the appeal will be defeated if the stay is denied, and it is an abuse of discretion to deny supersedeas where a refusal to supersede the judgment would deny the right to any appeal."). For all the reasons stated above, BREDL's request for supersedeas is denied.

Bond

While I deny the stay, and therefore decline to impose a bond, because Dominion provided testimony regarding the issuance of a bond, I make the following findings of fact should this order be reversed, and a stay imposed. I find Dominion provided credible testimony showing by a preponderance of the evidence that if its Project is delayed for three more years during the estimated pendency of this appeal, it will incur expenses in the amount of $5.3 million. *Anonymous (M-156-90) v. State Bd. of Med. Examiners*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding "the standard of proof in administrative hearings is generally a preponderance of the evidence").

ORDER

IT IS THEREFORE ORDERED that BREDL's Petition for Supersedeas is **DENIED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

April 2, 2024
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

April 2, 2024
Columbia, South Carolina