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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, Petitioner,

v.

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

**EXHIBITS TO
PETITION FOR WRIT OF SUPERSEDEAS**

1. Exhibit A – Order of the South Carolina Court of Appeals, filed January 10, 2024.
2. Exhibit B – Order of the South Carolina Court of Appeals, filed April 3, 2024.
3. Exhibit C – Administrative Law Court Final Order under appeal, filed July 24, 2023.
4. Exhibit D – Notice of Appeal with Proof of Service.
5. Exhibit E - Dominion Energy – Notice of Project Commencement – Letter dated December 6, 2023.
6. Exhibit F – Verification of Petition for Writ of Supersedeas by Gayle Kathy Andrews, dated April 15, 2024
7. Exhibit G – Administrative Law Order Denying Motion for Supersedeas, filed April 2, 2024.

8. Exhibit H– Request for Final Review, filed February 18, 2023, without attachments.
9. Exhibit I - 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
10. Exhibit J – Court of Appeals’ Order lifting stay on certain conditions, filed January 20, 2017.

STEPHEN A. SPITZ, ESQ.
A BUSINESS LAW FIRM

s/Stephen A. Spitz
Stephen A. Spitz (SC Bar No. 5287)
164 Market Street, Suite 157
Charleston, South Carolina 29401
(843) 577-6531
stephenspitz994@gmail.com

and

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

Attorneys for Petitioner
Blue Ridge Environmental Defense League

April 15, 2024
Charleston, South Carolina

From: Jesse Sanchez jesse@jessesanchezlaw.com 
Subject: Re: Blue Ridge Environmental Defense League v. SCDHEC 2023-001351
Date: April 16, 2024 at 12:25 AM
To: Beth Partlow beth@partlowlaw.com, Brooks M. Smith brooks.smith@troutman.com, Smith, Bennett W. smithbw@dhec.sc.gov, Whitehead, Christopher whitehcp@dhec.sc.gov, Martinez, Sara martinsv@dhec.sc.gov, Steve Spitz stephenspitz994@gmail.com



Counsel,

I was having some trouble downsizing the size of the exhibits and realized you may not have received the complete set in my earlier email. I have re-attached them here and provided a link in case you have any issues. Please let me know if you have any issues opening the file.

Thank you,

Jesse

On Mon, Apr 15, 2024 at 11:54 PM Jesse Sanchez <jesse@jessesanchezlaw.com> wrote:
Counsel,

Attached for service, please find the attached Petition for Writ of Supersedeas, Cover Letter, and [link](#) to Corresponding Exhibits, all of which are being filed momentarily 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
Mount Pleasant, SC 29464
Direct: (843) 814-8181
Fax: (843) 284-3953
jesse@jessesanchezlaw.com

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Mount Pleasant, SC 29464
Direct: (843) 814-8181
Fax: (843) 284-3953
jesse@jessesanchezlaw.com

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Exhibits to Petition 041524.pdf

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Stephen A. Spitz (SC Bar No. 5287)
164 Market Street, Suite 157
Charleston, South Carolina 29401
(843) 577-6531
stephenspitz994@gmail.com

and

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

Attorneys for Petitioner
Blue Ridge Environmental Defense League

April 15, 2024
Charleston, South Carolina

Exhibit A

Order of the South Carolina Court of Appeals,
filed January 10, 2024.

The South Carolina Court of Appeals

Blue Ridge Environmental Defense League, Appellant,

v.

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

Appellate Case No. 2023-001351

ORDER

Blue Ridge Environmental Defense League (BREDL) filed an emergency petition for writ of supersedeas and a motion for expedited hearing of its emergency petition. BREDL moved for an order granting supersedeas of the administrative law court's final order, which is currently on appeal. The final order determined BREDL failed to show by a preponderance of the evidence that the South Carolina Department of Health and Environmental Control (SCDHEC) should not issue a Section 401 Water Quality Certification to Dominion Energy (Dominion).

SCDHEC filed a letter in lieu of a return, taking no position on the emergency petition. Dominion filed a return, requesting this court deny the emergency petition for writ of supersedeas and dismiss the appeal as moot.¹ BREDL filed a reply to the return.² Dominion then filed a motion to file sur-reply. We grant Dominion's motion to file sur-reply.

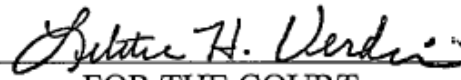
After careful consideration of the petition, amended return, amended reply, and sur-reply, we grant expedited hearing of the emergency petition. Next, we deny Dominion's request to dismiss the appeal as moot. Nothing in this order prevents Dominion from arguing the appeal is moot in its brief, however.

Finally, we remand the petition for writ of supersedeas to the administrative law court for its consideration of Appellant's emergency petition for writ of

¹ Dominion's motion to amend its return is granted.

² BREDL's motion to amend its reply is granted.

supersedeas. *See* Rule 241(d)(1), SCACR ("Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal."). We hold this appeal in abeyance and remand to the administrative law court to hear Appellant's petition for supersedeas on an expedited basis and issue an order setting forth findings of fact and conclusions law. The parties shall notify this court immediately upon the issuance of an order and Appellant may then renew its petition with this court.


FOR THE COURT

Columbia, South Carolina

cc:

Bennett W. Smith, Esquire
Christopher Patrick Whitehead, Esquire
Sara Volk Martinez, Esquire
Elizabeth B. Partlow, Esquire
Brooks M. Smith, Esquire
Jesse Sanchez, Esquire
Stephen A. Spitz, Esquire

FILED
Jan 10 2024

Exhibit B

Order of the South Carolina Court of Appeals,
filed January 10, 2024.

The South Carolina Court of Appeals

Blue Ridge Environmental Defense League, Appellant,

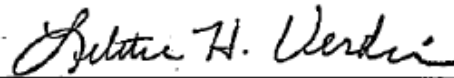
v.

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

Appellate Case No. 2023-001351

ORDER

On January 10, 2024, this court remanded Appellant's petition for writ of supersedeas to the administrative law court (ALC). We directed the parties to notify this court immediately upon the issuance of an order and noted Appellant may renew its petition with this court at that time. The ALC issued an order on April 2, 2024, denying the petition for writ of supersedeas. Appellant informed this court of the ALC's decision on April 3, 2024, and requested ten days to serve and file a petition for writ of supersedeas with this court. After careful consideration, Appellant's request is granted. Appellant shall serve and file its petition for writ of supersedeas within ten days of the date of this order.



FOR THE COURT

Columbia, South Carolina

cc:

Bennett W Smith, Esquire

Christopher Patrick Whitehead, Esquire

Sara Volk Martinez, Esquire

Elizabeth B. Partlow, Esquire

Brooks M. Smith, Esquire

Jesse Sanchez, Esquire

Stephen A. Spitz, Esquire

FILED
Apr 03 2024

Exhibit C

Administrative Law Court Final Order,
Filed July 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.

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 D

Notice of Appeal with Proof of Service

RECEIVED

Aug 23 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

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

Blue Ridge Environmental Defense League,

Appellant,

vs.

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

Respondents,

NOTICE OF APPEAL

Blue Ridge Environmental Defense League hereby appeals from the Final Order, issued by the Honorable Ralph King Anderson, Chief Administrative Law Judge, on July 24, 2023 and received by Appellant on July 24, 2023 as well.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

s/Lauren Megill Milton

Lauren Megill Milton

Benjamin D. Cunningham

P.O. Box 1350 | Pawleys Island, SC 29585

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

lauren@scelp.org | ben@scelp.org

Attorneys for the Appellants

Columbia, South Carolina

August 23, 2023

Other Counsel of Record:

Law Offices of Elizabeth B. Partlow, LLC
Elizabeth B. Partlow, Esq.
P.O. Box 2444 Columbia, S.C. 29202
beth@partlowlaw.com
Attorney for Respondent Dominion Energy

Troutman, Pepper, Hamilton Sanders LLP Brooks M.
Smith, Esq.
1001 Haxall Street
Richmond, VA 23219
brooks.smith@troutman.com
Attorney for Dominion Energy Services, Inc.

SCDHEC-Office of General Counsel
Bennett W. Smith, Esq.
Christopher P. Whitehead, Esq.
Sara V. Martinez, Esq.
2600 Bull Street, Columbia, S.C. 29201
smithbw@dhec.sc.gov
martinsv@dhec.sc.gov
whitehcp@dhec.sc.gov
Attorneys for Respondent SC DHEC

RECEIVED

Aug 23 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge
Docket No. 22-ALJ-07-0131-CC

Blue Ridge Environmental Defense League,

Appellant,

vs.

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

Respondents,

PROOF OF SERVICE

I hereby certify that on this date I served the foregoing Notice of Appeal upon the
Respondents by U.S. Mail, with electronic notification distributed to the following:

Law Offices of Elizabeth B. Partlow, LLC
Elizabeth B. Partlow, Esq.
P.O. Box 2444 Columbia,
S.C. 29202
beth@partlowlaw.com
Attorney for Dominion Energy

Troutman, Pepper, Hamilton Sanders LLP
Brooks M. Smith, Esq.
1001 Haxall Street
Richmond, VA 23219
brooks.smith@troutman.com
Attorney for Dominion Energy Services, Inc.

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

SCDHEC-Office of General Counsel
Bennett W. Smith, Esq.
Christopher P. Whitehead, Esq.
Sara V. Martinez, Esq.
2600 Bull Street, Columbia, S.C. 29201
smithbw@dhec.sc.gov,
martinsv@dhec.sc.gov, whitehcp@dhec.sc.gov
Attorneys for SC DHEC


Debbie Weiner

Georgetown, SC
August 23, 2023



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

*PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 |
www.scelp.org*

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Senior Managing Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org

Staff Attorneys
Lauren Megill Milton | lauren@scelp.org
Emily Poole | emily@scelp.org

August 23, 2023

RECEIVED

Aug 23 2023

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Notice of Appeal
Blue Ridge Environmental Defense League vs. SCDHEC and Dominion Energy,
Docket No. 22-ALJ-07-0131-CC

Dear Ms. Kitchings:

Please find enclosed a Notice of Appeal in the above-referenced matter. I am also enclosing the filing fee. By copy of this letter I am serving all parties, as well as through the Court's electronic filing system. Thank you very much for your kind cooperation and assistance. With deep respect and kind regards, I remain;

Sincerely,

Lauren Megill Milton

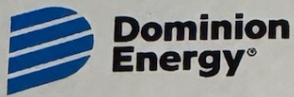
Enclosures

cc: Elizabeth B. Partlow, Esq.
Sara V. Martinez, Esq.
Bennett W. Smith, Esq.
Christopher P. Whitehead, Esq.
Brooks M. Smith, Esq.

Our Mission We use our legal expertise to protect land, water and communities across South Carolina.

Exhibit E

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 F

Verification of Petition for Writ of Supersedeas
Gayle Kathy Andrews, April 15, 2024

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.

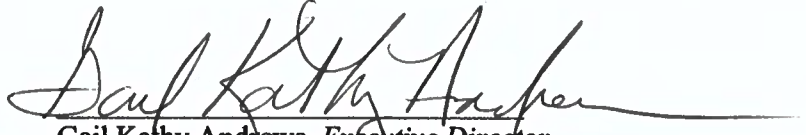
VERIFICATION

I, Gail Kathy Andrews, Executive Director of Appellant Blue Ridge Environmental Defense League (BREDL), verify that to the best of my knowledge and belief, the facts set forth in the Petition for Writ of Supersedeas, dated April 15, 2024, are accurate and correct.

I further attest that I am the recipient of the Notice of Project Commencement, attached as Exhibit E to the Petition. Because the proposed pipeline project calls for permanent fill impacts and permanent clearing impacts to South Carolina wetlands and streams, I respectfully request that this Honorable Court grant a stay for those reasons stated in the Petition and, specifically, to prevent a contested issue from becoming moot during the pendency of the appeal.

[Notarized Signature on Following Page]

Verification of
G. Kathy Andrews
Page 1 of 2


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

FURTHER AFFIANT SAYETH NOT.

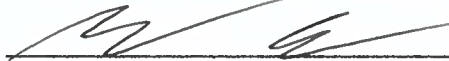
Sworn and Subscribed before Me This 15th day of April, 2024.

 Signature

Matthew Milligan Print Name

Notary Public for South Carolina

My Commission Expires: 3/31/2032

 Signature

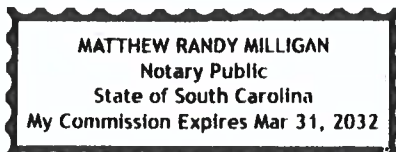


Exhibit G

Administrative Law Court Order Denying Motion for
Supersedeas, filed April 2, 2024

**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 permit² 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 supersedeas 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.

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.

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 be 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 Corps 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

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

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).

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 “NWP 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 Corps 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

Exhibit H

Request for Final Review,
Filed February 18, 2023, without attachments



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 / (843) 527-0078 /

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Staff Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org
Michael G. Martinez | mike@scelp.org
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

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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.

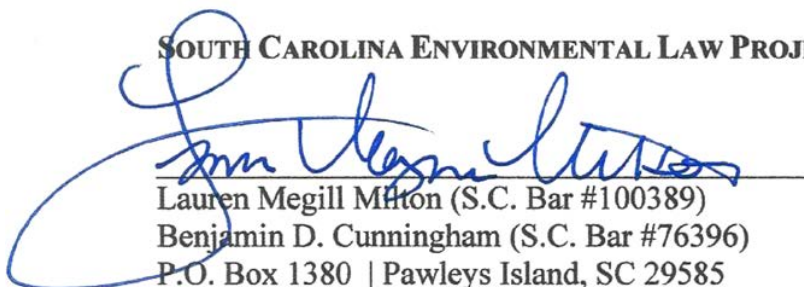
be released. Wetlands are some of the largest stores of carbon on the planet, but when disturbed or warmed, they release the three greenhouse gases (GHGs) that contribute the most to global warming: carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O).³⁰

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

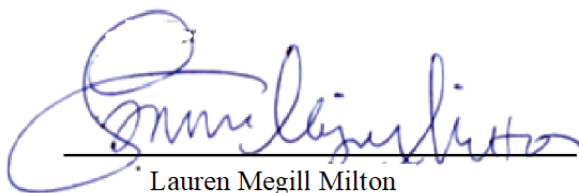
CERTIFICATE OF SERVICE

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

Exhibit I

Court of Appeals Order granting Petition for Writ of
Supersedeas, December 15, 2016, App. Case No. 2016-001758

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.").


FOR THE COURT

Columbia, South Carolina

FILED

December 15, 2016

cc: Amy Elizabeth Armstrong, Esquire
Jessie Allison White, Esquire
Amelia Ann Thompson, Esquire
Nathan Michael Haber, Esquire
Michael Smoak Traynham, Esquire
Stanley E. Barnett, Esquire

Exhibit J

Court of Appeals lifting stay on certain conditions, filed January
20, 2017 - App. Case No. 2016-001758

The South Carolina Court of Appeals

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

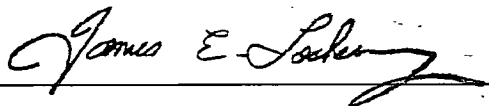
v.

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

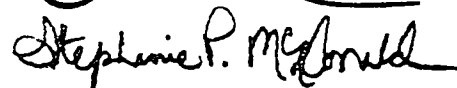
Appellate Case No. 2016-001758

ORDER

Respondents have filed a motion to vacate the stay imposed by this court. After careful consideration and based on the representations made by the parties since this court's initial issuance of the stay, we no longer believe a stay "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." *See* Rule 241(c)(2), SCACR. Accordingly, Respondents' motion to vacate the stay is granted under the condition that the road will only be used for emergency vehicles and Horry County will not connect the road to adjacent properties until the remittitur has been sent down in this case.

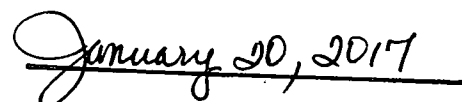
 C.J.

 J.

 J.

Columbia, South Carolina

FILED



cc:

Amy Elizabeth Armstrong, Esquire

Jessie Allison White, Esquire

Amelia Ann Thompson, Esquire

Nathan Michael Haber, Esquire

Michael Smoak Traynham, Esquire

Stanley E. Barnett, Esquire