THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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.

RETURN TO APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS

Pursuant to Rule 240(e), SCACR, the South Carolina Department of Health and Environmental Control ("the Department" or "DHEC") respectfully submits this Return to Appellant Blue Ridge Environmental Defense League's ("BREDL") Petition for Writ of Supersedeas ("Petition"). As detailed below, the Department continues to take no position as to whether a supersedeas should be granted or denied in this case, but respectfully contends that the Court should rule on the Petition on grounds other than finding the entirety of the appeal already moot.

RELEVANT BACKGROUND

This appeal arises from a Final Order issued by Chief Administrative Law Judge Ralph King Anderson, III on July 24, 2023. In the Final Order, Judge Anderson affirmed the underlying decision of the Department to issue a water quality certification ("Certification") to Dominion Energy (also referred to as Dominion Energy South Carolina, Inc., and hereinafter, "Dominion") for a project involving construction of an approximately 14.5-mile natural gas pipeline ("the Project") in the general area of Pamplico, South Carolina.

The Project involves discharges of dredged/fill material to wetlands and streams that fall in the proposed path of the pipeline. Such discharges are federally regulated under the Clean Water Act and must be authorized by a federal permit from the United States Army Corps of Engineers ("the Army Corps" or "the Corps").[1]

As a prerequisite to obtaining a federal permit for the Project, Dominion was required to first obtain a water quality certification from the Department pursuant to Section 401 of the Clean Water Act[2] and the provisions of S.C. Code Ann. Regs. 61-101, Water Quality Certification ("R. 61-101"). In order to issue the Certification, DHEC was required to have "reasonable assurance"

[1] 33 U.S.C.A. § 1344; 33 C.F.R. Part 323.
[2] 33 U.S.C.A. § 1341.

that the Project will be conducted in a manner that will not violate applicable water quality standards, and to certify that the Project will comply with applicable portions of the federal Clean Water Act.[3] In addition, as a component of its review of the Project and issuance of the Certification, the Department was required to ensure that the Project adhered to the requirements of S.C. Code Ann. Regs 19-450, Permits for Construction in Navigable Waters ("R. 19-450").[4]

On December 11, 2023, BREDL filed an Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing ("Emergency Petition") with this Court. After receiving a response letter from DHEC and a return from Dominion, and after a reply by BREDL and sur-reply by Dominion, the Court remanded to the Administrative Law Court ("ALC") to hold a hearing on BREDL's petition. The parties appeared before Judge Anderson for a hearing on March 29, 2024, and on April 2, 2024, Judge Anderson issued an Order Denying Motion for Supersedeas ("Supersedeas Order"). On April 3, 2024, BREDL notified this Court of Judge Anderson's ruling and provided a copy of the Supersedeas Order. BREDL filed the instant Petition on April 15, 2024.

ARGUMENT

I. The other parties, but not the Department, have reason to support or oppose the issuance of a writ of supersedeas in this case.

In the Petition, BREDL asserts a supersedeas is necessary to prevent "permanent environmental impacts" to wetlands and streams from occurring during the pendency of the appeal. (Petition at 1-2). According to BREDL, such impacts would have the effect of mooting a contested issue if they were to occur before the Court is able to review fully and rule on this appeal. (*Id*. at 7). Similarly, BREDL also contends a supersedeas is needed "to avoid irreparable harm" to itself

[3] S.C. Code Ann. Regs. 61-101.A.4.
[4] S.C. Code Ann. Regs. 19-450.3.G.

and its constituents during the pendency of the appeal. (*Id.* at 8). Dominion notified BREDL in December 2023 of its intent to commence construction of the Project. (Petition at Exhibit E).

The Department does not take a position on whether a supersedeas should be granted by the Court. The Department has maintained this position throughout the course of the appellate process, both in response to BREDL's Emergency Petition filed on December 11, 2023, and on remand before the ALC. (Exhibit A).

If granted, a writ of supersedeas will stay or suspend the matters decided in the Final Order but will not reverse or impair the force of the Order. SCACR 241(c)(1); *see Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) ("As a rule, a supersedeas…does not reverse, annul, or undo what has already been done, or impair the force…of the judgment, order, or decision of the trial court… ."") (citing 4A Corpus Juris Secundum, *Appeal and Error* § 662 at 497)(1957)). Therefore, the Department is within its rights to neither oppose nor support the issuance of a supersedeas, while ultimately asking the Court to uphold the Final Order affirming the Certification was properly issued.

As the Project's applicant and proponent, Dominion has an understandable concern to fully preserve its ability to advance completion of the Project while the appeal is pending. As noted in a prior filing, Dominion wishes to avoid delays to the Project that would affect its capacity to provide natural gas via pipeline (rather than through supplemental supplies of liquid natural gas) to the growing population in the Myrtle Beach area.[5] To the extent that a writ of supersedeas granted by this Court may delay or otherwise impact Dominion's ability to proceed with construction of the Project while the appeal is ongoing, it falls to Dominion to continue opposition to the issuance of that writ.

[5] Dominion's Return to Appellant's Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing, filed December 22, 2023, at 12-13.

The Department has its own, distinct concern in this matter as a regulatory agency—namely, to ensure the Project complies with all applicable requirements of state and federal law, rather than to promote the completion of the Project itself. *See generally, Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."). Specifically, DHEC's charge in this case was to review the Project under the provisions of R. 61-101 and R. 19-450 and applicable portions of the federal Clean Water Act in order to ensure compliance with water quality standards and requirements for projects involving activities in the State's navigable waters.

On the merits of this appeal, the Department is prepared to argue it issued the Certification to Dominion based upon the determination of its staff that the Project will comply with applicable water quality standards and requirements for the State's navigable waters. The Department maintains that issuance of the Certification to Dominion was proper, and that the ALC correctly affirmed the issuance of the Certification in its Final Order. However, the question of whether a supersedeas should be granted is distinct from the question of whether the Final Order should be upheld and, in this case, the Department sees no basis within its regulatory purview for either opposing or supporting a supersedeas.

II. Issuance of a federal permit for the Project by the Army Corps should not moot this appeal.

As discussed in BREDL's Petition, the ALC's Supersedeas Order issued on April 2, 2024 includes a mootness analysis as one basis for denying BREDL's petition for supersedeas. In the Supersedeas Order, Judge Anderson concluded issuance of a federal permit for the Project by the Army Corps constituted an "intervening event" that has the effect of mooting further review of the

Certification in state court. (Supersedeas Order at 12). The Department does not agree with this conclusion and urges the Court to rule on the Petition on grounds other than mootness.

A. It is possible for the Court to render a decision that would grant effectual relief in this case; therefore the case is not moot.

The Department agrees to a significant extent with Judge Anderson's discussion in the Supersedeas Order of the regulatory framework governing the Certification. (Supersedeas Order at 7-12). Of particular importance, the Department does not dispute that the federal permit issued by the Corps—not the Certification issued by the Department—provides Dominion with authorization to discharge dredged or fill materials to waters of the United States, as necessary to construct the pipeline through several wetlands and streams and complete the Project. (*Id*. at 8). The Certification is a necessary State-level prerequisite to issuance of a federal permit by the Corps but, by itself, the Certification does not confer Dominion with any right to engage in activity that is federally regulated under the Clean Water Act.

Proceeding from this point, the ALC's Supersedeas Order concludes the Corps' issuance of a federal permit for the Project moots the appeal by foreclosing any possibility of effectual relief in state court. (*Id*. at 12). The Department does not accede to this conclusion which, if adopted into binding law, could have the effect of truncating or in some cases precluding review of the Department's water quality certification decisions in the Administrative Law Court or judicial review by the state's appellate courts, as contemplated by DHEC's enabling statutes and the Administrative Procedures Act.[6]

As stated by the South Carolina Supreme Court, "[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders *any grant of effectual relief impossible for the reviewing court*." *Sloan*

[6] See S.C. Code Ann. § 44-1-60(F); S.C. Code Ann. § 1-23-380; *and* S.C. Code Ann. § 1-23-600.

v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (citation omitted) (emphasis added). The Department can point to two grounds for concluding effectual relief is possible in this case if the Court ultimately rules against DHEC and Dominion and decides to reverse, modify, or remand the Final Order.

First, as raised by the Department's counsel during the ALC's supersedeas hearing on March 29, 2024, it is possible the Corps would use its discretionary authority to modify, suspend, or revoke its permit for the Project in response to a decision of this Court.[7] The ALC's Supersedeas Order does address the discretionary legal authority of the Army Corps to reverse or modify its permitting decision in the event the Certification is reversed on appeal. (Supersedeas Order at 10). However, the ALC characterizes the possibility of the Army Corps taking such an action as "exceedingly speculative" and not sufficient to avoid mooting of this case. (*Id.* at 13).

Following the ALC's supersedeas hearing on March 29, 2024, the Department's counsel consulted further with Department staff regarding the likelihood that a decision of this Court could have an effect on the federal permit issued by the Corps. The Department submits action by the Corps based on a decision of this Court is not "exceedingly speculative." The Corps' legal discretion would allow it to modify, retract, or suspend its permit for the Project based upon outcomes in state court litigation and, in practice, such an exercise of discretion by the Corps is possible. The Department contends there is a significant possibility that the Corps would give effect to a decision of this Court affecting the validity or conditions of the Certification issued to Dominion. In support of this position, the Department offers the affidavit of Mr. Charles Hightower. (Exhibit B).

[7] 33 C.F.R. Part 330.5; *see also* Dominion's Return to Appellant's Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing, filed December 22, 2023, Exhibit A at 3-4.

Second, as raised by the Department's counsel during the ALC's supersedeas hearing on March 29, 2024, the Certification issued to Dominion is not required solely as a precondition to obtaining a federal permit from the Army Corps. As discussed above, the Certification serves the purpose of assuring the Project will not violate applicable water quality standards, as required by R. 61-101 and the Clean Water Act. It also serves a second purpose of assuring the Project complies with the requirements of R. 19-450 applicable to construction activities affecting the State's navigable waters. This second purpose is based exclusively in state law, rather than stemming from the requirements of the federal Clean Water Act.

As Judge Anderson observed in the Supersedeas Order, R. 19-450 expressly exempts activities that require a water quality certification (such as this Project) from obtaining a separate permit for construction in navigable waters from DHEC.[8] (Supersedeas Order at 11). Crucially, this exemption from permitting does not mean the Project is exempt from complying with the requirements of R. 19-450. On the contrary, R. 61-101 provides the Certification issued by DHEC "will serve as the permit" that would otherwise be required by R. 19-450.[9] In turn, R. 19-450 imposes a requirement on DHEC staff "to insure that the provisions of this regulation are adhered to" in issuing the Certification.[10] Even if issuance of a federal permit were to moot any further appellate review focused on whether the Certification complies with the requirements of R. 61-101 and the Clean Water Act, it should not moot the issue whether the Certification sufficiently complies with the provisions of R. 19-450. A decision of this Court could provide effectual relief if it were to identify substantive problems pertaining to R. 19-450 and reverse, remand, or modify the ALC's Final Order on that basis.

[8] S.C. Code Ann. Regs. 19-450.3.G.
[9] S.C. Code Ann. Regs. 61-101.A.9.
[10] S.C. Code Ann. Regs. 19-450.3.G.

If it is not "impossible" for this Court to render "any grant of effectual relief," then this case should not be found moot. *Friends of Hunley, Inc.*, 369 S.C. at 26.

B. There is no South Carolina precedent requiring the Court to find this appeal moot.

South Carolina case law does not offer binding precedent on the question of whether a federal permit issued by the Corps moots state court review of an associated water quality certification. *Murphy v. S.C. Dep't of Health & Env'tl Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), as cited by BREDL in the Petition, involved a fact pattern in which state judicial review of a water quality certification continued after the issuance of a federal permit by the Army Corps; however, as noted in the Supersedeas Order, there is no indication in *Murphy* that the issue of mootness was ever raised, and mootness was not ruled upon by the South Carolina Supreme Court. (Supersedeas Order at 9, fn. 10). At most, *Murphy* supports the proposition that state court review of water quality certifications has continued to occur after issuance of a federal permit by the Corps.

Triska v. S.C. Dep't of Health & Env't Control, 292 S.C. 190, 355 S.E.2d 531 (1987) is discussed in the Supersedeas Order as part of the mootness analysis. As acknowledged by Judge Anderson, this case involved distinct facts and issues from the current case. (Supersedeas Order at 9). The Department in *Triska* attempted to revoke a water quality certification five years after its issuance and after issuance of permits by the Army Corps and the South Carolina Coastal Council. The primary issue decided by the Supreme Court had nothing to do with mootness, but rather the decision focused on "whether DHEC has authority to review, suspend, and revoke a 401 Certification after it has been granted by the agency and the appeals process expired." *Triska*, 292

S.C. at 194. The question of mootness was evidently neither raised nor ruled upon by the Supreme Court.[11]

In *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control*, Docket No. 15-ALJ-07-0404-CC, the ALC denied a motion for a stay based on a mootness analysis similar to that of the Supersedeas Order. As discussed by BREDL and Judge Anderson, the Court of Appeals subsequently granted a stay for a period of about a month, after which the stay was vacated subject to conditions. (Petition at 9-10; Supersedeas Order at 9-10, fn. 10). The Court of Appeals did not issue a published opinion addressing the ALC's mootness analysis in this case. Notably, this case involved two Department decisions—a water quality certification and a coastal zone consistency determination—that were each required as a prerequisite to a federal permit from the Corps. As discussed above, the current case before the Court presents a different fact pattern. It features a DHEC water quality certification that was a prerequisite to issuance of a federal permit by the Corps. However, the same Certification also functions to ensure compliance with state law requirements that are separate from the requirements of the federal Clean Water Act.

Lastly, as persuasive authority, the Department notes the Montana Supreme Court's analysis in *Hi-Line Sportsmen Club v. Milk River Irrigation Districts*, 786 P.2d 13 (Mont. 1990). In that case, litigation was focused on water quality certifications that had been issued by the State of Montana for a hydroelectric project requiring a license from the Federal Energy Regulatory Commission ("FERC"). FERC had amended its regulations to retroactively change the waiver requirements applicable to the state's certifications. As a result of those amendments, it was argued

[11] The *Triska* Court noted that it would be "a futile act" for DHEC to revoke its certification "unless the permitting agencies subsequently suspended and revoked their respective permits." 292 S.C. at 196. As supported by Mr. Hightower's affidavit, at Exhibit B, it is not "futile" for this Court to decide the merits of this case, because a decision granting BREDL relief would create a significant possibility that the Corps would proceed with suspension, modification, or revocation of its authorization for this Project.

that the State of Montana's certifications for the project had been waived and that the appeal was moot. The Montana Supreme Court rejected this claim based on the following mootness analysis:

> It is however, not clearly established in the record that even though FERC may consider that the certifying agencies in Montana have waived the right to certify, that the decisions of a certifying agency, as modified by the courts, would have no effect on the eventual action of the FERC. In other words, the FERC, as far as the record here discloses, may yet give effect to the action of this state regarding the certifications. The eventual handling of the waiver question by the FERC, and the effect that the FERC will give to any waiver it finds, is completely within the discretion of the FERC and not foreseeable by us. For that reason, we have denied the motion to dismiss these proceedings as moot.

Id. at 17.

In this case, the Corps "may yet give effect" to a decision of the Court, should the Court decide to rule against the Department and Dominion and grant relief to BREDL. The fact that the Corps would have legal discretion in deciding how to respond to such a ruling does not necessarily point to this case being moot.

CONCLUSION

For the reasons set forth above, the Department takes no position as to whether a writ of supersedeas should be granted, but respectfully asks the Court to rule on BREDL's Petition on grounds other than mootness.

[*signature page follows*]

Respectfully Submitted,

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