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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League, Appellant,

v.

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

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court erred in allowing DHEC to issue Dominion Energy a Section 401 Water Quality Certification to construct a 14.5-mile natural gas pipeline through certain protected waters and wetlands in violation of applicable state and federal statutes and regulations, including the Clean Water Act (33 U.S.C. 1341 et seq.), S.C. Code Ann. Regs. 61-101, and S.C. Code Ann. Regs. 19-450?

2. Whether the Administrative Law Court erred in allowing DHEC to issue a Section 401 Water Quality Certification where:

- A. Feasible, non-water dependent alternatives exist, including a viable “No-Action Alternative,”
- B. Neither Dominion Energy nor DHEC bothered to assess the effect that installation of the pipeline would have on drinking water in a community where wastewater discharges are already in the 75th percentile,
- C. Construction of the pipeline would directly and indirectly impact rare, threatened and endangered species,
- D. Construction of the pipeline would adversely impact special and unique habitats, including multiple navigable waterbodies and a statutorily-designated State Scenic River; and
- E. Neither Dominion Energy nor DHEC properly considered and/or addressed environmental justice concerns of installing yet another pipeline through a low-income, minority community, all while simultaneously taking heirs property in the process?

STATEMENT OF THE CASE

A. Introduction

The central issue in this appeal is whether the Administrative Law Court (“ALC”) erred in allowing the South Carolina Department of Environmental Control (“DHEC”) to issue Dominion Energy South Carolina, Inc. (“Dominion” or “Dominion Energy”) a Section 401 Water Quality Certification (“WQC” or “Certification”) to build a 14.5-mile natural gas main (i.e. pipeline) through certain protected waters and wetlands in violation of applicable state and federal statutes and regulations, including the Clean Water Act (33 U.S.C. 1341, S.C. Code Ann. Regs. 61-101, and S.C. Code Ann. Regs. 19-450.

As set forth below, the Certification should have been denied because (1) Feasible, non-water dependent alternatives exist, (2) Neither Dominion Energy nor DHEC bothered to assess the effect that installation of the pipeline would have on drinking water in a community where wastewater discharges are already in the 75th percentile, (3) construction of the pipeline would directly and indirectly impact rare, threatened and endangered species, (4) construction of the pipeline would adversely impact special and unique habitats, including multiple navigable waterbodies and a statutorily-designated State Scenic River; and (5) neither Dominion Energy nor DHEC properly considered and/or addressed environmental justice concerns of installing yet another pipeline through a low-income, minority community, all while simultaneously taking heirs property in the process.

B. Relevant Procedural History

This matter came before the South Carolina Administrative Law Court pursuant to a Request for Contested Case Hearing filed by the Blue Ridge Environmental Defense League (“BREDL” or “Appellant”) pursuant to section 44-1-60 of the South Carolina Code (2018) and section 1-23-600 of the South Carolina Code (Supp. 2022). (Request for Contested Hearing,

R.__). BREDL challenged the decision of the South Carolina Department of Health and Environmental Control to issue Dominion Energy (“Dominion” or “Dominion Energy”) a Section 401 Water Quality Certification pursuant to regulation 61-101 of the South Carolina Code of Regulations (2012). (Ibid., R.__; Final Order, R.__). The Certification, which the Department issued on February 4, 2022, allows 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. (Certification, R.__; Final Order, R.__)

BREDL 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). (Request for Final Review, R.__). On April 13, 2022, BREDL then filed a Request for Contested Case Hearing with the ALC. (R.__). The ALC conducted a hearing in this matter from February 27 through March 1, 2023. (Trial Transcript, R.__; Depo Designations, Petitioner’s Exhs. 75, 76, and 77, R.__). On July 24, 2023, the ALC issued an order allowing DHEC to issue Dominion Energy a Section 401 Water Quality Certification to construct the subject pipeline. (Final Order, R.__). This appeal follows.

C. Statement of the Facts.

1. The Pipeline Project

The instant appeal arises from Appellant’s challenge to DHEC’s decision to issue Dominion Energy a Section 401 Water Quality Certification pursuant to regulations 61-101 and 19-450 of the South Carolina Code of Regulations. The Certification authorizes the construction of a gas main in Jefferies Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, wetlands, and unnamed tributaries to the Great Pee Dee River in Florence County, South Carolina that will result, *inter alia*, in temporary excavation impacts,

temporary clearing impacts, permanent fill impacts, permanent clearing impacts to wetlands and streams. (Final Order, R.___).

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. (Ibid., Request for Final Review Conference, R.___). The project consists of the installation of a 16-inch gas main within an approximately 40-foot-wide existing easements and a 10-foot-wide expansion of the easement to the west. The 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 jurisdictional wetlands and waters. (R.___). “Jurisdictional” wetlands refer to those wetlands and waters that are subject to jurisdiction and regulation of the U.S Army Corps of Engineers and/or DHEC. (Final Order, p. 6, R.___).

Specifically, the proposed project will result in temporary clearing impacts to the 6.326 acres of wetlands and 53 linear feet of stream, temporary excavation impacts to 8.35 acres of wetlands and 119 linear feet of stream, permanent fill impact to 0.0041 acres of wetlands and 22 linear feet (0.0045 acre) of stream, and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream. (Final Order; Request for Final Review Conference, R. ___). Stated differently, Dominion’s project proposes impacts to 32 separate wetlands or waters, including:

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

(Ibid., R.___).

2. Blue Ridge Environmental Defense League (BREDL)

BREDL is a non-profit 501(c)(3) environmental education organization whose members utilize the tributaries of the Great Pee Dee River for recreation, socialization, leisure, and appreciation of the tributaries' historical and cultural significance. Founded in 1984, BREDL is a six-state organization with chapters from Valdosta, Georgia to Roanoke, Virginia. (Tr., p. 46:1-22, R.___). BREDL is made up of chapters, who each choose a member for the board of directors responsible for the organization's major decision-making. (Tr. 49:9-50:6, R.___). One of the chapters of BREDL with an elected board member is the Pamplico Defense League, which has approximately twenty-three (23) members and is centrally located to the pipeline. (Tr. 50:7-51:8; 77:13-22, R.___).

3. BREDL's Witnesses

Ms. Gail "Kathy" Andrews is a property owner in Pamplico, a member of BREDL and its Pamplico Defense League chapter, and also serves as BREDL's current executive director where she manages a small staff and helps chapters across the country dealing with environmental issues. (Tr. 75:24-76:3; 72:16-24, R.___). Ms. Andrews testified her property borders Jeffries Creek and she joined BREDL upon learning of Dominion's plans to build another pipeline on her property. (Tr. 76:23-77:22; 88:25-89:24, R.___). Ms. Andrews grew up in Pamplico and testified her family has been there for centuries with a large portion of her family still living there to this day. (Tr. 78:17-23; 85:5-17, R.___). Ms. Andrews testified as a child she spent the weekends at her family's farm and paddled Jeffries Creek, Bigham Branch, and Mill Branch in her grandfathers' old paddle boat where she took pictures, congregated with other family members who had motorized boats, and went fishing in her grandmother's favorite spots, so

densely forested they had to use string to find their way back. (Tr. 78:23-81:6; 82:9-13; 86:12-87:4, R. __).

Ms. Andrews utilizes the waters in Pamplico to this day, testifying she'd just boated Jeffries Creek, Bigam Branch, and Mill Creek in a motorized fishing boat the week before trial to take photos with a friend. (Tr. 81:20-83:12). Ms. Andrews also testified that she has concerns about the project's impacts on endangered species, history and habitat loss because she likes taking pictures and viewing the waters and wildlife, such as sturgeon, American eel, shiners and owls. (Tr. 98:19-22; 99:16-100:10; 80:12-84:12). Ms. Andrews also enjoys taking photos of the area, saying, "[c]annonballs have been found in that water, civil war. You know, revolutionary hero Francis Marion went through the swamps of the Great Pee Dee River. Indian artifacts have been found there." (Tr. 98:19-22; 99:16-100:10). As a member of BREDL, Ms. Andrews further testified about her concerns regarding fairness, justice, and environmental justice and stated Dominion's plans for the area raise "an environmental justice issue." (Tr. 96:21-24; 77:10-12).

Reverend Calvin Robinson is a member of BREDL who has participated in numerous BREDL activities and owns property on Mill Branch that his parents live on. (Tr. 34:21-23; 35:11-36:5). Rev. Robinson is a pastor at the 155-year-old Trinity Baptist Church, which has approximately 325 members living in Florence County. (Tr. 34:2-11). Rev. Robinson testified he utilizes his property to enjoy peace and quiet, fresh water, wildlife viewing and target practice. (Tr. 35:11-18; 37:7-20). Rev. Robinson testified he is worried the project will interrupt the serenity he finds on his land. (Tr. 41:14-19). Rev. Robinson testified he'd heard the pipeline was to support growth but he stated that he doesn't see how the project helps Pamplico or Mill Branch because the area is mostly farms. (Tr. 35:6-37:2). Rev. Robinson shares BREDL's concerns about the project and is concerned DHEC's issuance of the permit will allow digging

and wetland damage that may degrade water quality because his water comes from the underground well and the river area. (Tr. 39:5-40:14; 42:10-43:4).

Mr. Louis Zeller is a member of BREDL and has worked for the organization for several decades in many capacities, including community organizer, administrator, science director, and, ultimately, executive director before his recent retirement. (Tr. 45:23-49:8). On BREDL's behalf, Mr. Zeller submitted comments on the project several times, first in July 2020, then again in June 2021. (Tr. 56:3-63:1). Mr. Zeller shares BREDL's concerns about the project's impact on global warming, testifying the impacts from burning natural gas are just as impactful as other fossil fuels such as coal. (Tr. 67:6-68:4). Mr. Zeller shares the community's concerns about the loss of heirs' properties that have been in some families for a century and the project's impact on Pamplico farmers and their ability to pass down property. (Tr. 66:3-68:4).

BREDL called Department of Natural Resources ("DNR")'s inland environmental coordinator, Greg Mixon, and he testified part of his duties for DNR involve reviewing and commenting on public notices for environmental permits on the agency's behalf as part of DNR's statutory duty to advocate for the state's natural resources. (Tr. 120:24-121:9).

4. DHEC's witnesses

DHEC called Mr. William "Rusty" Wenerick as a fact witness. (Tr. 146:2-13). Mr. Wenerick testified he is a project manager in the water quality certification and methods program. (Tr. 146:22-23). His duties involve reviewing applications for 401 WQC and permits for construction in navigable waters for DHEC. (Tr. 147:1-3). Mr. Wenerick was the project manager who reviewed the application for this case. (Tr. 148:6-10).

During trial, the deposition designation of DHEC's Mr. Chuck Hightower (Ex. 75) was admitted into evidence. Trial Tr. 112:3-114:12. Mr. Hightower was designated as the

representative of DHEC to speak to its issuance of a 401 WQC and the project's implications regarding Regulation 19-450. Ex. 75 (Hightower Designation) 8:3-6, 10-15; 8:24-9:22.¹

5. Dominion's Witnesses

Dominion called Mr. Robert Priester as a witness. (Tr. 216:9-15). Mr. Priester is a project manager for Dominion Energy South Carolina where he oversees projects or various aspects of projects. (Tr. 217:4-9). He began working on the project in late 2019 or early 2020. (Tr. 218:23-219:9). During trial, the deposition designation of Mr. Priester (Ex. 76) was also admitted into evidence. (Tr. 112:3-114:12).

Dominion also called Mr. Darrell Shier as a witness. (Tr. 274:6-8). During trial, the deposition designation of Mr. Shier (Ex. 77) was admitted into evidence. Trial Tr. 112:3-114:12; 293:17-20.² Mr. Shier testified he works for Dominion Energy Services. (Tr. 274:19). Dominion Energy Services provides environmental policy and permitting direction for various capital projects built by Dominion in all of its operating states, which includes projects not only in South Carolina but also in North Carolina, Ohio and Utah. (Tr. 274:20-275:8; 275:13-18). Mr. Shier testified he became manager over his group in late 2020 and it helps communicate with regulatory agencies and direct the work of consultants. (Tr. 276:7-12).

6. Purported Project Need

Dominion asserts that the Project is needed to serve an anticipated increase in 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, testified that Dominion anticipated an increase in natural gas demand for the area served by the Project

¹ See Petitioner's Designations filed February 23, 2023; *see also* Trial Tr. 112:3-114:12 (admitting the deposition designation of Mr. Hightower (Ex. 75) taken Nov. 2, 2022 into the record without objection).

² Compare Petitioner's Deposition Page and Line Designations filed February 23, 2023 *with* Trial Tr. 112:3-114:12; 293:17-20 (admitting Ex. 76, the designation of Mr. Priester, and Ex. 77, the deposition designation of Mr. Shier taken on December 15, 2022, into the record without objection).

through 2050 using information derived from its own Planning Group and population growth estimates from Horry County. (Tr., p. 221:2-223:24, R.___). Mr. Priester was not qualified as an expert witness and, therefore, did not offer testimony to any degree of professional certainty with regard to population growth and projected need that Dominion claims to anticipate.³ Indeed, Mr. Priester testified that he's not aware of a specific level of certainty Dominion has its projected growth will actually occur. (Exh. 76, Priester Desig., 24:4-13, R.___).

Dominion itself: (1) does not know an exact percentage of residential growth compared to commercial growth; (2) has no knowledge of the types of specific industrial or commercial customers growth is anticipated; and (3) has no agreements or obligations necessitating additional capacity aside from its general obligation as a public utility in South Carolina. (Exh. 76, Priester Designation, 24:4-25:12, R.___).

Serving as a fact witness, Mr. Priester did, however, testify that during cold weather events, Dominion currently supplements its system with compressed natural gas and/or liquified natural gas via trucking to maintain reliable services for customers that are served from the existing eight-inch main. (Trial Tr, 223:13-238:4, R.___). Nevertheless, Dominion offered no evidence or testimony at the hearing as to how many trucks it uses during these cold weather events, how frequently it uses them, or how many future trucks would be required if the project were not constructed.

In its Notice of Department Decision (NODD), DHEC 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.” (Exh. 75, Hightower

³ A review of the record demonstrates that neither Dominion nor DHEC qualified any expert witnesses to support their assertions regarding population growth, project need, and the effects that routing this project through protected waterbodies and wetlands would have on water quality.

Desig., 42:16-43:3. R.___).⁴ As the ALC's Final Order notes, DHEC did not conduct its own evaluation of the need for natural gas in the area but rather merely relied on Dominion's assertions and analysis. (Final Order, p. 5, R.___). Nevertheless, DHEC, like Dominion, testified this project is not water dependent, meaning: there is no inherent requirement that the project be routed through any bodies of water or wetlands as currently planned. (Exh. 75, Hightower Desig. 63:3-5, R.___).

The "area" referred to in the project purpose DHEC utilized in reviewing the proposed project is the entirety of the Pee Dee area of South Carolina and the kind of growth to be supported by this proposed project would be business, industrial, and economic development. (Ex. 75, Hightower Desig., 43:4-44:1, R.___). However, DHEC did not know of any specifics on the type of expected business or industrial growth or how proximate any potential growth was to the pipeline expansion at issue here. (Ibid., 44:6-11, R.___). DHEC also: (1) does not know of any customers in the area not having their natural gas needs met; and (2) did not know of any current demand not being met by Dominion in this area; and (3) does not believe it has the expertise to determine whether there was future demand for natural gas in the area. (Ibid., 44:16-20; 44:24-45:16).

Mr. Wenerick, a project manager in DHEC's water quality certification and methods program, testified applications must also describe planned or proposed future development reasonably associated with the proposed project so DHEC can consider the water quality implications of the development. (Tr., p. 195:9-25, R.___). Mr. Wenerick testified Dominion mentioned no future development in the application, indirectly or directly, and though the

⁴ Dominion testified the existing 8-inch pipeline currently serves residential, commercial and industrial customers in eastern South Carolina. (Ex. 76, Priester Desig., 17:9-12, R.___). As set forth herein, Dominion seeks to expand the easement containing the current pipeline, install a new 16-inch pipeline along its side, and condemn heirs property in a historically low-income, minority population.

project's purpose was to support growth, Dominion didn't mention what growth would be supported by the project. (Tr., p. 196:1-11; 20-23, R.___). Further, Mr. Wenerick testified DHEC did not assess the impact the growth serviced by the project would have on water quality in the Pee Dee River basin. (Tr. 196:3-6, R.___). Dominion, for its part, did not introduce any evidence as to the cumulative effects of the growth it claims to anticipate.

7. Project Alternatives

As set forth in the ALC's Final Order, Dominion presented three alternatives for the pipeline project, including a "No Action" alternative, which if selected would mean the Project would not be constructed. (Order, pp. 5-7). However, Dominion contends this "no action" alternative should be rejected because otherwise its claimed project need would not be met. (Ibid., R.___). Despite failing to provide any substantive, verifiable evidence with regard to population growth (i.e. any evidence for the truth of the matter asserted) or any evidence as to why the current method of transporting liquid natural gas (LNG) during cold weather events is in unsustainable, the ALC found that Respondents "credibly and persuasively explained their analysis of both off-site and on-site alternatives, including why the approved Project was considered preferable among the identified alternatives." (Order, pp. 6-7, R.___).

8. Methods of Installation – Open Trench vs. Horizontal Directional Drilling

Dominion's Witness, Mr. Priester, who was never qualified as an expert, testified a pipeline could be installed by either an open trench or by trenchless method (either typically conventional boring or HDD installation). (Tr. 241:11-14). Mr. Priester testified the conventional method of installing a pipeline by open trench, is basically "digging a hole and putting the pipe in in the [hole] with an excavator or piece of equipment like that." (Tr., p. 241:15-20, R.___).

Mr. Shier, who works for Dominion Energy Services, testified the equipment used for an open cut type method would be a bulldozer for the clearing and grubbing, a trackhoe for excavation, and pipe handling equipment. (Tr. 296:6-21, R.__). However, according to Mr. Priester, conventional open cut methods can pose both safety and sedimentation concerns in certain locations where the “ditch will be extremely wide due to the sluffing off of the ditch due to the saturated soils/mud through these areas and in turn putting you extremely close if not on the eight-inch hot line.” (Exh. 76, Priester Desig, p. 123:17-124:11, R.__).

DHEC also anticipates during the construction of the project “there could be” some additional impacts aside from the impacts listed in the permit. (Exh. 75, Hightower Desig, p. 29:12-24, R.__). Among those impacts are temporary turbidity increases that are “impossible to prevent” when one is constructing in a stream. (Ibid., R. p. 33:13-25; 30:19-24). However, a way to prevent sedimentation—as well as other negative impacts to streams and wetlands—is by avoiding the waters entirely. Mr. Priester testified HDD is an installation method utilizing special equipment to effectively go from one side to the other underneath an area. (Tr., p. 242:5-21, R.__). Dominion testified using HDD would avoid stream and wetland impacts. (Ex. 77, Shier Desig, 51:11-16, R.__).⁵ However, it rejected an all-HDD alternative, in part, because of “the anticipated costs expected to drill all crossings” should the project be routed through State waters and wetlands. (Order, p. 7). As a result, the ALC found that “HDD should not be required at the crossings other than Jeffries Creek.” (Order, p. 8).

Mr. Priester, however, did not recall seeing any study evaluating the cost of doing all the wetland and stream crossings with HDD. (Tr., 261:4-9, R.__). Dominion testified some of their temporary workspaces contain streams and wetlands but did not recall undertaking any efforts to

⁵ See also Resp. Ex. 4 (“Additionally, impacts to wetlands will be avoided in some areas using horizontal directional drilling (HDD) technology.”)

assess the cost of easements to avoid wetland and stream impacts. (Exh. 76., Priester Desig. at pp. 42:5-12, 42:25-43:2; 43:4; *see also* Ex. 77, Shier Desig. at 94:3-12, R.__). DHEC wrote to Dominion requesting more information about the project “more than once” and asked Dominion if it was feasible to use HDD at additional crossings. (Tr., R. p. 194:1-9).⁶

In one of DHEC’s requests for additional information, DHEC asked for specific information from Dominion on where HDD could be used as part of the feasible alternatives analysis and Mr. Priester testified Dominion's response to DHEC: (1) did not list any of the three planned HDDs; (2) did not list any specific number of HDDs in its response; (3) did not mention Mill Creek; and (4) did not mention the pond below Jeffries Creek. (Tr., R. p. 272:14-273:17).

DHEC’s witness, Mr. Wenerick, testified in response to DHEC’s request for additional information, he wasn’t told specifically at which waterbodies Dominion Energy would use HDD but said Dominion said it would use HDD at additional crossings “if conditions allowed during construction;” however Mr. Wenerick testified even that was not imposed as a permit condition. (Tr., pp. 194:20-195:4, R.__).⁷ Mr. Priester testified Dominion would have followed any permit condition given by DHEC. (Tr., p. 258:19, R.__).

Curiously, the ALC acknowledged that “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,” but then excused this deficiency on the grounds that “both the Department and Dominion agree that HDD will be used to cross Jeffries

⁶ At trial, Mr. Wenerick was asked if DHEC “specifically requested” that the Applicant exhaust feasible alternatives by using HDD at additional crossings and he clarified DHEC “asked” Dominion if it was feasible for it to use HDD at additional crossings. (Tr. 194:1-9).

⁷ Mr. Priester testified the decision to use HDD at other locations will be made by Dominion's project team (including himself, consultants, environmental personnel and a construction contractor) looking at site conditions at the time of construction. (Tr. 244:25, R.__). However, when listing the factors typically used to determine the most appropriate pipe installation method, Mr. Priester did not list any factor that related to any site conditions that would not be presently known. *Compare* Tr. 253:2-22 *with* Tr. 257:13-258:13.

Creek even if this is not a clause in the Certification.” (Order, p. 17 at n. 16). Respectfully, as set forth further below, a review of the ALC’s order reveals a systematic tendency to allow Dominion to police itself and decide when environmental restraint is necessary.

However, with no permit condition specifying Dominion must use HDD—and where—there is confusion on how each waterbody will be impacted. (*Compare* Ex. 76, Priester Desig., 146:1-4, testifying there are three known HDDs and up to seven potential HDDs, *with* Tr. 244:22-24, Mr. Priester testifying Dominion's only commitment is to use HDD at Jeffries Creek, *and* Petitioner’s Exhibit 2, Notice of Department Decision dated February 4, 2022, showing no obligation to do HDD at any crossing, R.__). When asked if Jeffries Creek will be crossed by HDD, Ms. Kathy Andrews, BREDL’s Executive Director, testified, “Well, I'm not sure. At one time they said horizontal, you know. Then they said, you know, something else. I don't know what they -- and that’s been the problem. They're very vague about what they're going to do.” (Tr., 101:4-11, R.__).⁸ Mr. Louis Zeller, a long-time member of BREDL who served as its former Executive Director, testified that getting information on the project was a “moving target” due to conflicting information on HDD. (Tr. 60:5-61:11, R.__).

Dominion testified there were three HDD crossings in its latest submittal to DHEC in June 2021; however, DHEC testified based on a response it received from Dominion in August 2021, there was only one location where Dominion would definitely use HDD. (*Compare* Ex. 77, Shier Desig., 52:7-12, *with* Ex. 75, Hightower Desig., 49:8-50:25). Dominion testified it did not recall where the seven potential HDD locations were, did not know whether the tributaries were named or unnamed, and didn’t know if these contingency HDDs would be implemented in the

⁸ Ms. Andrews testified she’s concerned how the project will impact wildlife like birds and fish because people live off the land and depend on the wildlife and the water for sustenance, adding “any day you will see people on the banks with a fishing pole.” (Tr. 100:13-101:3).

site plan for this project. (Ex. 76., Priester Desig, 146:1-4;18-24, R.__; *see also* Ex. 77, Shier Desig., 103:4-9, R.__).

9. Navigable Waters

Mr. Hightower, DHEC's 30(b)(6) witness, testified DHEC employs the definition of navigability contained in 19-450. (Ex. 75, Hightower Desig, 120:16-121:1. R.__). Mr. Wenerick testified Jeffries Creek is the only water subject to the permitting requirements for construction in navigable waters. (Tr. 184:12-16, R.__). Regulation 19-450.2(C), however, defines "navigable waters" as "those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable ...by rafts of lumber or timer **or by small pleasure or sport fishing boats.**" S.C. Code Ann. Regs. 19-450.2(C)(emphasis added). Ms. Andrews, BREDL's executive Director who owns property in the project area, however provided uncontradicted testimony that that other waterbodies along the project route were indeed navigable, and that she had navigated Jeffries Creek, Mill Branch and Bigham Branch by boat several times including the week before trial. (Tr., 82:4-12, R.__).⁹ Nevertheless, the ALC refused to address BREDL's arguments that the proposed project site contained multiple navigable waterbodies, stating, "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." (Order, p. 21, R.__).

10. Effect on Drinking Water

As set forth above, BREDL's witnesses expressed concerns about the effect that the proposed project might have on well water, which members of the community rely upon as

⁹ *cf.* Tr. 184:12-16 (Jeffries Creek is the only water subject to the permitting requirements for construction in navigable waters); *see also* Tr. 192:21-24; 170:4-17 (Mr. Wenerick testified because the pipeline would be installed by HDD in Jeffries Creek, the construction and maintenance of this pipeline will not affect the creek's navigability.)

drinking water. (R. p. 3) However, in terms of monitoring water quality, the ALC noted that “Mr. Shier, environmental manager for Dominion, did not know of any baseline well testing Dominion conducted or had conducted for any personal water wells in the 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. However, neither DHEC nor Dominion performed any baseline testing to assess how the project would affect well water.

11. Adverse Impacts to Rare, Threatened and Endangered Species.

A. Federally Threatened and Endangered Species

Mr. Greg Mixon, Inland Environmental Coordinator with the South Carolina Department of Natural Resources (“DNR”), authored a letter dated June 15, 2021 providing DNR’s comments to DHEC concerning the Project. (DNR Comment Letter, R.__). The DNR comment letter specifically stated, “There are records of several federally-listed threatened or endangered species in the project vicinity. The Greet Pee Dee River is [a] Designated Critical Habitat for Atlantic sturgeon and there are known occurrences of Atlantic sturgeon and shortnose sturgeon (both Federally Endangered) in the river. There are nearby occurrences of federally-listed plant species Canby’s Dropwort (Endangered) and Boykin’s Lobelia (At-Risk). Please keep in mind that this information is derived from existing databases and should not be assumed complete. Areas not yet inventoried by SCDNR biologist may contain other significant species or communities.” (DNR Comment Letter, p. 2, R.__). Despite DNR’s comment stating that federally-listed threatened and endangered species are indeed located in the project vicinity and naming them, the ALC confoundingly dismissed these concerns on the grounds that DNR “did not specify what those species were and in fact, did not identify them as being present in the

Project area itself.” (Order, p. 10-11, R.___). With regard to DNR’s comments regarding federally-listed plant species, the ALC dismissed these concerns on the grounds that DNR’s letter “did not specify that these species are present in the Project Area.” (Ibid. R.___)

DHEC also acknowledged that 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, the ALC, again, dismissed these concerns [on the basis of hearsay evidence], stating “Mr. Wernerick, Project Manager for [DHEC] [an adverse respondent at the hearing], explained the U.S. Fish and Wildlife Service determined that project would have ‘no effect’ on federally threatened or endangered species.”

B. State Species of Interest

As the ALC noted, “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. 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.” Yet again, despite these comments, the ALC dismissed any and all concerns regarding these State

Species of Interest on the grounds that “Mr. Mixon did not specifically identify why each SWAP species identified in the Project area was designated a SWAP species.” (Order, p. 11, R.__).

DNR Comments on Threatened and Endangered Species

Mr. Mixon testified he authored and submitted comments for this project after reviewing a public notice in June of 2021 and at trial those comments were admitted into evidence. (Tr., 121:10-122:23; *see also* Pet. Ex. 8, R.__). Mr. Mixon testified DNR conditioned its approval of the project on certain stipulations minimizing natural resource impacts and the letter stated: “SCDNR has no objection to the issuance of the proposed permit certification provided that the above concerns are adequately addressed, and the following additional stipulations are incorporated as minimization measures.” (Pet. Ex. 8, R.__); *see also* Tr., 127:17-128:4; 129:2-15, R.__). DHEC also understood that DNR’s position on the project was dependent upon whether its conditions were incorporated into the certification. (Ex. 75, Hightower Desig., p.) 91:24-92:4).

Mr. Mixon testified some conditions DNR set forth are designed to minimize clearing impacts within wetlands and waters by avoiding soil disturbance when clearing, leaving low-growing vegetation, and restoring the area once construction is complete. (Tiral Tr, p. 129:16-130:16, R.__); *see also* Pet. Ex. 8, R.__). (“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.”). However, this condition was not put into the certification and Mr. Wenerick testified the pipeline right-of-way would be cleared with machinery during construction. (Tr. 202:17-22, R.__); *see also* Pet. Ex. 2, R.__). Another condition DNR requested was that “[m]aintenance 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.” (Pet. Ex. 8, Bullet #7, R.___). However, this condition also was not included in the permit and Mr. Wenerick testified the right-of-way would be maintained by using chemicals and pesticides. (Tr., 202:6-16; 23-25; *see also* Pet. Ex. 2, R.___). (no permit condition requiring manual hand clearing)). Dominion also testified its pipeline easements are mowed on an annual basis. (*Compare* Ex. 76, Prister Desig., 53:22-25; 50:9-14 *with* Pet. Ex. 8, Bullet #7, R.___).

DHEC and Dominion are aware the site contains potential habitat for the federally endangered plant species pondberry and Canby’s dropwort and were told “[a]reas not yet inventoried by SCDNR biologists may contain other significant species or communities. All efforts should be made to avoid and minimize impacts to these species of concern.” (Ex. 8; Ex. 75, Hightower Designation, 57:7-11; Ex. 77, Shier Designation, 32:16–25, R.___). As set forth above, Mr. Mixon also testified that two federal at-risk species are present in the project area: bay boneset and Boykin’s lobelia. (Tr. 126:25-127:6, R.___). In addition to these federal species, Mr. Mixon also testified DNR provided Dominion’s agent with a letter identifying South Carolina State Wildlife Action Plan (“SWAP”)¹⁰ plant species in the project area including 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. (Tr. 125:20-126:24; *see also* Ex. 77, Shier Desig., 48:17-49:1; 49:17-24, R.___). Dominion received the letter and knew those were all plant species. (Ex. 77, Shier Desig., 47:6-11; 48:13-16, R.___)/

¹⁰ Mr. Mixon testified the SWAP’s purpose is to provide an inventory, goals, and objectives for the state’s wildlife and fishery species. (Tr. 123:1-14, R.___). Mr. Mixon testified SWAP species are those species of greatest conservation need not traditionally covered under any federal funded programs but given conservation priority because they are rare or designated as at-risk due to knowledge deficiencies; species common in South Carolina but listed rare or declining elsewhere; or species that serve as indicators of detrimental environmental conditions. (Tr. 123:15-124:17; *see also* Pet. Ex.8). Mr. Mixon testified there are reports of several SWAP species in the project vicinity (Tr. 124:18-125:13).

Avoiding wetland and stream impacts is important not only due to water quality concerns but also because of the effects construction or fill will have on species reliant on those waters. DHEC testified it defers to DNR as to whether a species has been state or federally listed as threatened or endangered (“T&E”) and, here, DNR notified DHEC there are records of several South Carolina Wildlife Action Plan (“SWAP”) and federally-listed T&E species in the project vicinity and project waters. (Ex. 75, Hightower Desig., 54:17-60:13, R. __; *see also* Petitioner’s Exhibit 8, R. __). Dominion was aware there were several state and federal species in the project area. (Ex. 76, Priester Desig., 139:16-140:4; Ex. 77, Shier Desig., 50:1-11, R. __).

Federally, the Great Pee Dee River is Designated Critical Habitat for Atlantic sturgeon and DNR told DHEC and Dominion that there are known occurrences of Atlantic sturgeon and shortnose sturgeon (both federally endangered) in the river. (Pet. Ex. 8, R. __; *see also* Ex. 77, Shier Desig., 33:12-17, R. __). Federally endangered red-cockaded woodpeckers have been sighted in and around foraging habitat in the project area. (Ex. 75, Hightower Desig., 56:16-57:1; *see also* Ex. 77, Shier Desig., 32:16–25, R. __). DHEC also knew the site contained potential habitat for federally-protected bald eagles and wood storks. (Ex. 75, Hightower Desig., 57:12-15; 56:21-57:1-6, R. __). Moreover, SCDNR told Dominion of multiple aquatic SWAP species in streams around the project including American eel, *Anguilla rostrata*, sawcheek darter, and Santee crayfish, ironcolor shiner, fieryback shiner, and flat bullhead. (*See* Ex. 8; *see also* Ex. 77, Shier Desig., 49:2-16, R. __).

Both Dominion and DHEC testified there is no permit condition requiring Dominion to do anything if it comes upon a rare, threatened, or endangered species during the course of construction. (Ex. 75, Hightower Desig., 57:21-58:6; Ex. 77, Shier Desig., 53:5-16; *see also* Pet. Ex. 2., R. __). Mr. Hightower agreed DHEC’s regulations provide the WQC will be denied if the

proposed activity adversely impacts waters containing state or federally recognized rare T&E species. (Ex. 75, Hightower Desig., 52:17-23, R.___).

At trial, Dominion attempted to argue Regulation 123-150 is the regulation promulgated for threatened and endangered species, however Mr. Mixon testified “we don't regulate state species,” and says DNR has a statutory duty to advocate for the state's natural resources. (Tr. 140:2-9; 121:6-9, R.___). DHEC also testified they defer to DNR’s authority as to whether species designated as SWAPs are rare for the purposes of reviewing an application under R. 61-101(F)(5)(c). (Ex. 75, Hightower Desig., 53:3-12, R.___). When asked how DHEC will enforce and analyze whether DNR’s requested conditions have been complied with, Mr. Hightower testified, “When DNR gives us a recommended condition, we typically put those in our certification if that's what they want us to do. They're a sister agency.” (Ex. 75 Hightower Desig. 99:21-100:8, R.___).

Mr. Hightower testified applicants must comply with all permit conditions but to force the applicant to comply with a condition, DHEC must determine whether or not the condition has been violated. (Ex. 75, Hightower Desig., 101:13-17, R.___). However, Mr. Hightower testified he will not be on site to ensure those conditions are implemented and, though DHEC has regional offices do inspections, he did not know the frequency or what rises to that level. (Ex. 75, Hightower Desig., 33:2-11, R.___). Ms. Andrews testified she is worried about how the project will affect plants in the area and how the roughly three acres of permanent clearing impacts and several acres of temporary excavation and clearing proposed will destroy the habitat with large equipment and bulldozers. (Tiral Tr. 100:13-16; 101:12-102:5, R.___). In total, Dominion testified it plans to clear and grub 27.39 acres. (Ex. 77, Shier Desig., 106:9-12, R.___). Several of these impacts are in wetlands and streams, including temporary trenching and backfilling excavation

impacts to 8.35 acres of wetlands and 0.028 acres of stream, temporary clearing impacts to 6.326 acres of wetlands and 0.011 acres of stream, and permanent clearing impacts to 2.986 acres of wetlands and 0.004 acre of stream. (Tr. 163:14-24, R.___).

Mr. Mixon testified DNR always requests projects be completed as soon as possible to minimize the impacts because “the longer things are disturbed, the more impact.” (Tr. 130:16-23, R.___). Dominion Energy plans to spend about five months working 10-hour days, six days a week constructing this pipeline and there are no windows Dominion is planning to avoid for any T&E species. (Tr. 266:19-267:9; 290:50-19; *see also* Ex. 76, Priester Desig., 66:12-17, R.___). Mr. Shier testified he is not aware of any obligation Dominion has to utilize time-of-year restrictions. (Tr. 289:1-16; 290:50-19, R.___). Mr. Priester testified there's no specific T&E monitoring required as part of the 401 WQC but Dominion would have followed any permit conditions given. (Tr. 271:25-272:4, R.___).

Mr. Mixon also testified the project crosses over a private conservation easement and the Pee Dee Station Wildlife Management Area which is managed by DNR for hunting. (Tr. 128:5-23; *see also* Pet. Ex. 8, R.___). After he reviewed the applicant's responses to his comments, Mr. Mixon submitted no further objections but he did not see the final permit condition language; as far as he knew, the conditions contained in Exhibit 8 were incorporated into the WQC. (Tr., 130:24-131:20; 141:19-142:5, R.___).

12. Adverse Impacts to Special and Unique Habitats

DHEC testified the phrase “cultural values” in Regulation 19-450 is neither defined in any other regulation that applies, nor defined in any internal DHEC document. (Ex. 75 Hightower Desig., 71:20-72:2, R.___). DHEC testified Reg. 19-450's statement: “consistent with the needs and welfare of the public,” is not defined in any other regulation that applies here

or defined in any internal guidance document or anywhere else. (Ex. 75, Desig., 72:3-73:1, R.___).

The impacted waters on the project site, including wetlands, drain east through Jeffries Creek, Mill Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, and unnamed tributaries to the Great Pee Dee River. (Ex. 75, Hightower Desig., 110:11-21; *see also* Tr. 159:23-160:2, R.___). Mr. Hightower testified his understanding is the “area” referred to in the project purpose is the Pee Dee area of South Carolina. (Ex. 75, Hightower Desig., 43:4-18, R.___).¹¹ Dominion plans to construct the 16” pipeline next to the existing 8” pipeline and the proposed pipeline will cross each of these tributaries approximately a mile or less upstream from their confluence with the Great Pee Dee River, which is designated as one of the state's scenic rivers. (Tr. 65:11-15; *see also* Petitioner’s Exhibit 8, R.))).

Mr. Hightower testified the ecosystem in the vicinity of the project is the Pee Dee watershed. (Ex. 75, Hightower, 61:1-16, R.___). Despite defining the vicinity of the project for application of regulatory analyses, Mr. Wenerick did not know how many acres of wetlands, uplands, undeveloped wetland acreage, square miles, or the number of TMDLs there are in the Pee Dee River basin or watershed. (Tr. 197:7-25, R.___).

BREDL is concerned putting a new 16-inch pipeline next to an existing 8-inch pipeline undermines the efforts DHEC should take to look for the least problematic and impactful route; Mr. Zeller testified that “by adding a pipeline next to the existing pipeline, you are actually doing more damage to the community than less.” (Tr. 61:10-66:2, R.___). Dominion testified most of the construction and land disturbance will occur within a 50-foot-wide easement and 25-foot

¹¹ Mr. Hightower agree that R. 61-101(F)(5)(a) talks about alteration of aquatic ecosystems in the vicinity of the project. Ex. 75 (Hightower Designation) 60:9-13. Mr. Hightower testified the ecosystem in the vicinity of the project is the Pee Dee watershed. Ex. 75 (Hightower Designation) 61:1-16. Mr. Hightower testified the Pee Dee watershed is large. Ex. 75 (Hightower Designation) 61:17-19.

temporary workspace; however, there are several areas where varying workspace configurations exist. (Ex. 76, Priester Desig., 101:10-20, R.___). Dominion testified the project will include upgrading three existing regulator stations and adding one new main line valve in regulator station. (Ex. 76, Priester Desig., 90:5-11, R.___). Mr. Wenerick testified he did not assess the impact this project would have on climate change. (Tr., p. 197:2-4, R.___). There is no record evidence that Dominion assessed the climate impacts from this project.

13. Impacts on State Scenic Rivers

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.”). (Order, pp. 21-22). At trial before the ALC, BREDL argued that 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. (Ibid., R.___). However, the ALC dismissed BREDL’s concerns, finding that “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.” (Ibid., R.___, emphasis added). The ALC reasoned, “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,” ignoring that what occurs upstream naturally flows downstream (R.___).

14. Site Background

While DHEC testified it's "possible" there are some historical artifacts identified in the overall project area, (Ex. 75, Hightower, p. 71:10-17, R.__), Dominion testified that there are six (6) historic resources and eighty-six (86) previously-recorded archaeological sites within a half-mile radius of the project area and twenty-four (24) of those sites are located within/immediately adjacent to the project area. (Ex. 77, Shier Desig., 55:7-20; 56:5-10, R.__). Of those sites, Dominion testified five (5) are eligible and nine (9) are potentially eligible for listing on the National Register of Historic Places ("NRHP"). (Ex. 77, Shier Desig., 55:21-56:4, R.__). The State Historic Preservation Office (SHPO) found three (3) of the NRHP-eligible sites contain pre-historic artifacts subject to data recovery and archaeological monitoring is required during disturbance for two (2) archaeological sites. (Ex. 77, Shier Desig, p. 76:25-77:9; 82:8-22; 103:10-104:4, R.__). Historical territory maps indicated the Pee Dee Indian Tribe, the Pee Dee Nation of Upper South Carolina, and the Waccamaw Indian People tribes may have an interest in the project. (Ex. 77, Shier Desig., 70:8-13; 81:1-14, R.__). DHEC testified the applicant recommended avoiding certain sites within the project area because of cultural resource concerns; however Dominion testified it requested to perform site recovery rather than avoiding the areas by HDD and doesn't know if its horizontal directional drilling ("HDD") will go beneath any archaeological sites. *Compare* Ex. 75, Hightower Desig., 73:7-11, *with* Ex. 77, Shier Desig., 77:17-21, R.__).

15. Community Background

This project passes through several census blocks with higher than state average minority populations and lower than state average household incomes. (Ex. 77, Shier Desig., 62:19-21; 63:3-7, R.__). Specifically, the EPA's EJSscreen tool demonstrates the project crosses seven (7)

census block groups with African-American populations higher than state-average and incomes lower than the state average. (Ex. 77 Shier Desig., 69:1-24, R.___). Narrowing further, the communities in the one-mile area around the project route are predominantly minority (57%) and low-income (56%). (Ex. 77 at 79:10-24, R.___). BREDL submitted comments more than once to different agencies on the impact pipelines have on communities and the very high level of social vulnerability—in the 80 percent range—for this project area. (Tr., 61:10-62:25; 64:13-25, R.___).

Mr. Wenerick testified one of Dominion’s alternatives analysis criteria was for the project to be located in an existing easement. (Tr. 198:11-24, R.___). However, Dominion Energy condemned land as part of this project. (Tr. 265:6-7, R.___). Ms. Andrews testified the existing easement would need to be expanded to accommodate the project and she has not offered to sell land to Dominion for the expanded easement. (Tr. 96:1-20; 88:25-89:13, R.___).

Dominion Energy South Carolina has an existing 8” pipeline on Ms. Andrews’ property by holding a 40’ easement the company’s predecessor, SCE&G, obtained from her late grandfather decades prior. (Tr. 87:5-88:24; 107:7-15, R.___). Ms. Andrews did not know how they had gotten the easement, testifying, “from what I understand, people didn’t get any money from that pipeline. So sold, I don’t know. Especially African Americans.” (Tr. 87:5-88:24; 107:7-15, R.___). Dominion also knew of the possibility that “project impacts would disproportionately impact minority or low-income residents, residents vulnerable due to low education level, or advanced age populations” and testified it targeted some properties for condemnation. (Ex. 77, Shier Desig., 87:9-13; 79:10-24; 67:7-9, R.___). Mr. Hightower testified DHEC’s position on Environmental Justice is: “South Carolina water quality regulations do not require an EJ analysis or assessment, rather, the regulations direct DHEC to conduct a review of

potential water quality impacts and to ensure statutory and regulatory obligations are met.” (Ex. 75, Hightower Desig., 68:15-25-69:5_.

Mr. Wenerick testified under the navigable waters regulation, DHEC must determine whether the activity subject to the regulation is consistent with the needs and the welfare of the public. (Tr. 198:5-10, R. __). Dominion did not evaluate the environmental justice implications of condemning properties owned by minority, low-income populations and is not aware of implementing any concerns from the census blocks into its plans. (Ex. 77, Shier Desig., 64:10-23; 92:12-18, R. __).

STANDARD OF REVIEW

Appellate courts review cases decided by the Administrative Law Court in accordance with the Administrative Procedures Act. *Engaging & Guarding Laurens Cnty. 's Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014) (citing S.C. Code Ann. § 1–23–610(B) (Supp. 2012)). An Appellate court will only reverse the ALC’s decision if it is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1–23–610(B) (Supp. 2011).

Thus, Appellate Courts are limited “to determining whether the ALC’s findings were

supported by substantial evidence or were controlled by an error of law.” An appellate court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1–23–610(B). “In determining whether the [ALC’s] decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the [ALC] reached.” *Hill v. S.C. Dep’t of Health & Env’tl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010). See also, *Dreher v. S.C. Dep’t of Health & Env’tl. Control*, 412 S.C. 244, 772 S.E.2d 505 (2015)

APPLICABLE REGULATIONS

1. S.C. Code Ann. Regs. 61-101

Section 401(a)(1) of the Clean Water Act allows states to exercise veto authority over Federal licenses and permits for discharges to navigable waters if the proposed activity would violate state water quality standards. 33 U.S.C. § 1341(a)(1) and 1341(d). In carrying out its responsibilities, the Act requires states to adopt water quality standards meeting certain minimum national standards. The S.C. Pollution Control Act (“SCPCA”) authorizes and requires DHEC to “maintain reasonable standards of purity of the air and water resources of the State.” S.C. Code Ann. § 48-1-20. Pursuant to the SCPCA, “[a]ny records, reports or information obtained under any provision of this chapter shall be available to the public.”

Furthermore, pursuant to S.C. Code Ann. Regs. § 61-101(A)(5), DHEC established procedures and policies for implementing State 401 WQC requirements under the Clean Water Act, which provides “[a]ny certification issued by 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.” Under S.C. Code Ann. Regs. § 61-101(C)(1), any applicant for certification needed for a federal license or permit must present a complete application to DHEC that “as a minimum” 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; and (b) a complete description of the proposed permitted activity, including the location, affected waterbody(s), purpose, and intent of the project; maps, drawings, and plans sufficient for review purposes (detailed engineering plans are not required); and (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; and (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; and (e) the method of dredging or filling and specific plans for disposal and control of dredge spoils; and (f) the names and addresses of adjacent property owners.

S.C. Code Ann. Regs. § 61-101(C)(1). Thus, South Carolina law requires “as a minimum” an application must contain “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 consideration.” S.C. Code Ann. Regs. § 61-101(C)(1)(c).

Regulation 61-101(F) establishes the scope of DHEC’s review to determine whether a project can be certified. Regulation 61-101(F)(3) sets forth that “[i]n assessing the water quality impacts of the project, the Department is required to address and consider the following factors:”

- (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 Ann. Regs. 61-101(F)(3).

Additionally, Regulation 61-101(F)(5) sets forth that DHEC must deny a certification if there is a feasible alternative to the activity which reduces adverse consequences on water quality or:

- (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;
- (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;
- (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;
- (d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers[.]

S.C. Code Ann. Regs. 61-101(F)(5).

Importantly, Regulation 61-101 (F)(4) also sets forth that certification for “filling or disturbances to facilitate construction of electric transmission lines or other public utility crossings” will be issued “when there are no feasible alternatives.” S.C. Code Ann. Regs. 61-101(F)(4) (emphasis added). Even then, “[w]hen issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management.” S.C. Code Ann. Regs. 61-101(F)(4). Certification will also be denied “unless the Department is assured appropriate and practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” Reg. § 61-101(F)(6).

2. S.C. Code Ann. Regs. 19-450

DHEC’s Bureau of Water also administers the State Construction in Navigable Waters Permitting Program. S.C. Code Ann. Regs. 19-450.9. Navigable waters are defined as “waters which are now navigable, or have been navigable at any time, or are capable of being rendered

navigable [...] by rafts of lumber or timber or by small pleasure or sport fishing boats.” S.C. Code Ann. Regs. § 19-450.2. (C); *see also* S.C. Code Ann. § 49-1-10.

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. *See* S.C. Code Ann. Regs. 61-101(A)(9). The certification will serve as the permit. *Id.* Under S.C. Code Ann. Regs. 19-450.9(A), DHEC 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.” *Id.*

In assessing a project under S.C. Code Ann. Regs. 19-450.9(A), DHEC shall be concerned with 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. S.C. Code Ann. Regs. 19-450.9(A).

In particular DHEC 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 or 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 impact 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(A).

Under S.C. Code Ann. Regs. 19-450.9(B)(1), DHEC 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 if DHEC 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). S.C. Code Ann. Regs. 19-450.9(B)(1).

Under S.C. Code Ann. Regs. 19-450.9(B)(2), however, no compensation or replacement (1) may be made for a project that produces no benefits to the public or state; (2) may be made

where the proposed activity amounts to a taking of public land for private purposes; (3) when there is a reasonable, and feasible alternative, step, effort or activity available that prevents or corrects a detriment created by the proposed activity. A feasible and reasonable alternative, step, effort or activity shall not be deemed unreasonable or infeasible because it would require the applicant to expend more time, effort or expense than the proposed replacement or compensation offered by the applicant. S.C. Code Ann. Regs. 19-450.9(B)(2).

Under S.C. Code Ann. Regs. 19-450.9(C)(1), DHEC “shall review all comments and supporting information and, the materials submitted by the applicant, and, in light of the standards listed above make its preliminary decision in the form of a Notice of Proposed Decision.” S.C. Code Ann. Regs. 19-450.9(C)(1). The preliminary decision shall be supported by findings on the relevant issues, including those raised by the comments and objections, if any, and be supported by materials in the record. S.C. Code Ann. Regs. 19-450.9(C)(2)-(4).

ARGUMENTS

I. The Administrative Law Court erred in allowing DHEC to issue a Section 401 Water Quality Certification.

A. The Certification Should be Denied Because the Project is Non-Water Dependent and Feasible Alternatives Exist.

In order to construe the term “feasible alternatives” in R.61-101 of DHEC’s regulations, it is helpful to review Section 401 of the Clean Water Act, 33 U.S.C. 1341, which the South Carolina regulation implements. In *Bersani v. Robichaud*, 850 F. 2d 36 (2d Cir. 1988), the Court noted that the purpose of the feasible alternative analysis, as stated in the preamble of the Clean Water Act, is to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where feasible alternatives are available in nonaquatic areas to achieve

the basic purpose of the project. In other words, as the Court stated, “The purpose is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site.” *Id.* at 44. The regulations which implement the Federal Clean Water Act define a water dependent activity as one requiring “an access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.” 40 C.F.R. 230.10(a)(3). Here, the project is not water dependent because it does not require access, proximity, or siting within the special aquatic sites in question to fulfill its stated purpose. Indeed, both DHEC and Dominion Energy expressly acknowledged that the project is not water dependent.

Additionally, the State’s minimization requirements flow from the Clean Water Act. The EPA’s regulations specify that States must engage in minimization analysis as part of their antidegradation rules. “Before allowing any lowering of higher water quality,” States must “find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development....The analysis of alternatives shall evaluate a range of **practicable alternatives** that would prevent or lessen the degradation associated with the proposed activity.” 40 C.F.R. § 131.12(a)(2)(ii). An alternative is practicable if “it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). Similarly, the regulations governing permits for construction in navigable waters contain the following definition of “feasible”:

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).

Regulation 61-101 establishes the procedures and policies for implementing State water quality certification requirement of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.” S.C. Code Regs Ann. 61-1-1 (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), 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.”

Dominion bore the burden of demonstrating the absence of feasible alternatives before it received its 401WQC and at the contested case stage. *Kiawah Development Partners II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 43-44, 766 S.E.2d 707, 723 (2014) (burden with respect to lack of feasible alternatives on the respondent at the contested case hearing level due to the language of applicable regulation); *see also Sierra Club v. S.C. Dep’t of Health & Envtl. Control*, 426 S.C. 236, 258-59, 826 S.E.2d 595, 567 (2019) (“Although Sierra Club undoubtedly bore the burden of proving its case, Chem-Nuclear nevertheless bore an overarching burden to satisfy the regulatory requirements necessary for Chem-Nuclear to earn its license”). DHEC’s 401 WQC regulations require denial of certification if there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses and because utilizing HDD at additional locations is a feasible alternative that was not adequately considered or conditioned in the permit, DHEC should not have issued the Section 401 certification in this case.

Here, DHEC issued its certification in this matter despite the fact: (1) S.C. Code Ann. Regs. 61-101(F)(3)(b) requires DHEC to address and consider whether there are feasible

alternatives to the activity; (2) S.C. Code Ann. Regs. 61–101(F)(5)(b) sets forth that DHEC must deny a certification if “there is a feasible alternative to the activity which reduces adverse consequences on water quality and classified uses”; (3) S.C. Code Ann. Regs. 61-101(F)(4) provides that certification can only be issued “when there are no feasible alternatives;” (4) S.C. Code Ann. Regs. 61-101(F)(4) provides that DHEC must “condition the certification upon compliance with all measures necessary to minimize adverse effects;” (5) S.C. Code Ann. Regs. 19-450.9(A)(1) requires DHEC 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; (6) S.C. Code Ann. Regs. 19-450.9(A)(6) requires DHEC to consider the extent to which there is any adverse environmental impact which cannot be avoided by reasonable safeguards; and (7) S.C. Code Ann. Regs. 19-450.9(A)(7) requires DHEC to consider the extent to which all feasible alternatives are taken to avoid adverse environmental impact resulting from the project.

Without a requisite showing that DHEC adequately considered feasible alternatives and cumulative impacts, as the relevant regulations require, the Section 401 certification in this case should not have been issued. This project is not water dependent and there are feasible alternatives that would avoid the destruction of wetlands or streams and could further minimize adverse impacts to water quality. Specifically, Respondents failed to provide any substantive, verifiable evidence with regard to population growth (i.e. any evidence for the truth of the matter asserted) or any evidence as to why the current method of transporting liquid natural gas (LNG) during cold weather events is unsustainable. Nevertheless, the ALC found that Respondents “credibly and persuasively explained their analysis of both off-site and on-site alternatives, including why the approved Project was considered preferable among the identified

alternatives.” (Order, pp. 6-7, R.__). According, Appellant respectfully submits that the Certification should be denied because ALC’s findings were not supported by substantial evidence and were controlled by an error of law. *Dreher v. S.C. Dep’t of Health & Env’tl. Control*, 412 S.C. 244, 772 S.E.2d 505 (2015). Further, under its own regulations, DHEC should have required Dominion to assess the feasibility of doing HDD at all stream and wetland crossings, it should have also, at a minimum, conditioned the project on utilizing HDD wherever it could have been done.

B. The Certification Should be Denied Because Neither Dominion Energy nor DHEC Assessed the Effect that Construction of the Pipeline Would Have on Drinking Water in a Community where Wastewater Discharges are Already in the 75th Percentile.

As set forth above, BREDL’s witnesses expressed concerns about the effect that the proposed project might have on well water, which members of the community rely upon as drinking water. As the ALC noted, “Mr. Shier, environmental manager for Dominion, did not know of any baseline well testing Dominion conducted or had conducted for any personal water wells in the area prior to doing construction activities for the project.” (Order, R.__). 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.

Here, neither DHEC nor Dominion performed any baseline testing to assess how the project would affect well water. As a result, there is no method by which either of the Respondents can assess and/or monitor whether construction and operation of a pipeline through State waters and wetlands has a detrimental effect on the drinking water of what is already vulnerable populations. The ALC allowed the certification, finding that Respondents had satisfied the regulatory requirements regarding water monitoring because, “the Department [had] lawfully exercised its discretion not to enforce such a requirement.” (Order, p. 32, R.__). In doing so, the

Court ignored the very reason why the Clean Water Act exists. No one, not Dominion, nor DHEC, ever gave the critical question of safe drinking water a hard look. For that matter, neither entity gave the question of safe drinking water even a passing consideration when issued a Certification to this Project Under Federal Clean Water Act. Because the ALC's findings were not supported by any substantial evidence that the project would not affect the drinking water of the community in which this project is planned, Appellant respectfully requests that this Honorable Court reverse the ALC and deny Certification of this project.

C. The Certification Should be Denied Because Construction of the Proposed Project Would Directly and Indirectly Impact Rare, Threatened and Endangered Species.

As set forth above, under 61-101, DHEC must deny a certification if the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species and, here, there is abundant evidence that several federal and state SWAP species of fish and plants inhabit the streams and wetlands in the project area. S.C. Code Ann. Regs. 61-101(F)(5)(c). Similarly, under Reg. 19-450, *et. seq.*, DHEC was required to consider the comments and objections of DNR as to how 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. S.C. Code Ann. Regs. 19-450.9(A)(3).

Here, Mr. Greg Mixon, Inland Environmental Coordinator with the South Carolina Department of Natural Resources ("DNR"), authored a letter dated June 15, 2021 providing DNR's comments to DHEC concerning the Project. (DNR Comment Letter, R. __). The DNR comment letter specifically stated, "There are records of several federally-listed threatened or endangered species in the project vicinity. The Greet Pee Dee River is [a] Designated Critical Habitat for Atlantic sturgeon and there are known occurrences of Atlantic sturgeon and shortnose

sturgeon (both Federally Endangered) in the river. There are nearby occurrences of federally-listed plant species Canby's Dropwort (Endangered) and Boykin's Lobelia (At-Risk). Please keep in mind that this information is derived from existing databases and should not be assumed complete. Areas not yet inventoried by SCDNR biologist may contain other significant species or communities." (DNR Comment Letter, p. 2, R.___). Despite DNR's comment stating that federally-listed threatened and endangered species are indeed located in the project vicinity and naming them, the ALC confoundingly dismissed these concerns on the grounds that DNR "did not specify what those species were and in fact, did not identify them as being present in the Project area itself." (Order, p. 10-11, R.___). With regard to DNR's comments regarding federally-listed plant species, the ALC dismissed these concerns on the grounds that DNR's letter "did not specify that these species are present in the Project Area." (Ibid. R.___). Because the ALC's findings were not supported by substantial evidence and were controlled by an error of law, this Honorable Court should reverse the ALC and deny certification for this non-water dependent project.

D. The Certification Should be Denied Because Construction of the Proposed Project Would Adversely Impact Special and Unique Habitats, including Multiple Navigable Waterbodies and a Statutorily-Designated State Scenic River.

1. The Project Traverses Multiple Navigable Waters

In addition to its 401 WQC review, it was also incumbent on DHEC to evaluate whether it was appropriate to issue a permit authorizing Dominion's activity in the State's navigable waters. DHEC has promulgated regulations governing the review of the States Navigable Waters permits in S.C. Code Ann. Reg. 19-450, *et seq.* Because Mill Branch and Bigham Branch are both navigable by motorized fishing boat, as evidenced by Ms. Andrews' unrebutted testimony that she'd boated those waters, DHEC and the ALC erred in finding that Jeffries Creek is the only water subject to the permitting requirements for construction in navigable waters. Under

S.C. Code Ann. Regs. 19-450.9(A)(2), DHEC failed to consider that “the activity would harmfully obstruct navigability or the natural flow of navigable waters or cause erosion” when evidence was presented that the conventional open cut methods would cause “sluffing off of the ditch” that would increase erosion, sedimentation, and turbidity in an area where people rely on the waters for sustenance and clean drinking water and the permit is not conditioned on doing HDD.

Moreover, the certification violates the provisions of R. 19-450.9(A)(1) and (A)(7) because there is insufficient proof the project has to be routed through wetlands—much less navigable waters—when Dominion admitted it did not assess the feasibility or cost of easements that would allow it to avoid its wetland and stream impacts and has now found that HDD is clearly feasible in at least three but possibly as many as ten locations. Article 14, Section 4 of South Carolina’s Constitution provides that “[a]ll navigable waters shall forever remain public highways free to the citizens of the State” and allowing construction in navigable waters without the requisite showing that such construction is necessary precludes issuance of the Section 401 certification for this project. Because the ALC findings are not supported by substantial evidence and controlled by an error of law, Appellant respectfully requests that this Honorable Court reverses the decision of the ALC and deny Certification for the proposed project.

2. The Project Impacts Special Places

Under S.C. Code Ann. Regs. 61-101(F)(5)(d) DHEC must deny a certification if the proposed activity adversely impacts designated State Scenic Rivers. In 2002, the lower 70-mile segment of the Great Pee Dee was designated a State Scenic River. S.C. Code Ann. 49-29-230 (7) (“The following are designated as scenic rivers...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.”). Not only did DHEC approve the certification, no HDD is required by the permit conditions despite the fact it would avoid stream impacts and turbidity that could cause adverse downstream impacts to the River since the proposed pipeline will cross each of its impacted tributaries a mile or less upstream from their confluence with the River. *See* S.C. Code Ann. Regs. 61-101(F)(5)(d). The Certification violates the provisions of R. 19-450.9(A)(4) by allowing a project to cross 146-acre tract protected by a conservation easement (Front Swamp LLC) as well as the Pee Dee Station Wildlife Management Area managed by SCDNR, which could affect public access to and use of public lands. Accordingly, the ALC’s decision to allow Certification of the project should be reversed.

E. Certification should be denied because neither Dominion Energy nor DHEC properly considered and/or addressed environmental justice concerns of installing yet another pipeline through a low-income, minority community, all while simultaneously taking heirs property in the process.

There is evidence that a disproportionate number of environmental hazards, polluting facilities, and other unwanted land uses are located in communities of color and low-income communities. Nicky Sheats, *Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy*, 41 Wm. & Mary Env’tl. L. & Pol’y Rev. 377, 382 (2017). However, DHEC’s position is that South Carolina water quality regulations do not require an Environmental Justice analysis and as long as that remains DHEC’s position, disadvantaged communities will continue to be overburdened without a seat at the proverbial table. *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003)(“The purpose of an EJ analysis is to determine whether a project will have a

disproportionately adverse effect on minority and low-income populations.”). As Justice Douglas pointed out decades ago, “the route selected was through the poor area of town, not through the area where the politically powerful people live.” *Friends of Buckingham v. State Air Pollution Ctrl Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (internal cites omitted).

DHEC should, at a minimum, place the consideration of a community who relies on clean water above that of a company that failed to provide the requisite minimal showing that it was entitled to a water quality certification. Under 61-101(C)(1)(a), Dominion was supposed to supply “as 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 as a legal entity and, ultimately, DHEC issued a certification to that non-entity.¹²

DHEC should include environmental justice considerations in its permitting decisions. DHEC’s position is that its duties are limited to conducting a review of potential water quality impacts and to ensure statutory and regulatory obligations are met, however, it failed to do even that and the low-income, predominately minority community at issue in this case should not have to bear the burden of having its heirs property—property held by low-income, minority community members, some of whom live off the land and are afraid of how Dominion's past pollution instances in the state might affect the waters they depend on for clean water and sustenance—condemned by a company that does not exist as a legal entity¹³ in order to construct

¹² As a nonexistent entity, Dominion Energy should not have applied for the 401 WQC and DHEC should not have issued a 401 WQC to Dominion Energy. The Clean Water Act (“CWA”) prohibits “the discharge of any pollutant by any person” except as provided in the Act, 33 U.S.C. 1311(a), and defines “person” at 33 U.S.C. § 1362(5) as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” See also S.C. Code Ann. § 48-1-340 and S.C. Code Ann. § 48-1-320.

¹³ Pursuant to S.C. Code Ann. § 28-2-30(7) a condemnor is a person or other entity empowered to condemn and because Dominion Energy “doesn't actually exist” and is “not a legal entity,” it is neither an entity, nor a person under S.C. Code Ann. § 28-2-30(16). Moreover, S.C. Code Ann. § 58-4-5(6) provides that “public utility” is defined in S.C. Code Ann. § 58-5-10, which specifically provides that a public utility is inclusive of only a “corporation” or “person.” S.C. Code Ann. § 58-5-10 (4). Because Dominion Energy is “not a legal entity” it would neither be

another pipeline in the waters when feasible alternatives are available. DHEC erred by allowing a company that does not exist as a legal entity to condemn land and impact wetlands and streams without assessing the feasibility or cost of easements that would allow it to avoid those impacts even when Dominion stated its project criteria required it to be built in an existing easement. Under S.C. Code Ann. Regs. § 61-101(C)(3), DHEC had the power to “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” but did not require the applicant to do any baseline well testing for the personal water wells in this predominately low-income, minority area when DHEC knew BREDL’s members and the community rely on their wells for drinking water. Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of a community, *i.e.*, their ability to withstand or recover from additional exposures under consideration. Here, DHEC should have assessed the cumulative impact of destroying wetlands, streams and vegetation to construct and maintain a pipeline next to an existing pipeline in an area already burdened by disproportionate wastewater discharges.

Moreover, under Reg. 61-101(C)(1)(d), Dominion was supposed to supply DHEC with an application that contained the source of any fill material, yet DHEC does not know where the material used for fill would come from and no evidence was introduced to further clarify the mystery. Under 61-101(C)(1)(c), Dominion was supposed to provide DHEC with 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 consideration,” yet DHEC testified it didn’t know the type of expected business or

defined as a corporation under S.C. Code Ann. § 58-5-10(2), nor a “person” under S.C. Code Ann. § 58-5-10(3) such that it would be defined as a public utility, much less one with condemnation powers under S.C. Code Ann. § 58-7-10. *See also* S.C. Const. art. I, § 13(A).

industrial growth that was the stated purpose for the project or how proximate any of that potential growth was to the pipeline expansion at issue here. Dominion was also supposed to provide DHEC 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 its application under both 61-101(C)(1)(a) and (b), however, it never provided information on the specific location or waterbodies where it would conduct HDD activities and Dominion was still reviewing additional parcel acquisitions required for access needs as of July 2021, well after the public notice period for the project closed.

All of these decisions by DHEC deprived this predominantly minority, low-income community from meaningfully participating in the permitting process. Under DHEC’s own regulation—S.C. Code Ann. Regs. 61-101(D)(2)—a public notice must provide thirty (30) days from the date of notice within which interested persons can submit comments and under 61-101(D)(4)(b), the applicant is supposed to provide DHEC with an affidavit of publication from the newspaper within fifteen (15) days of publication evidencing it met its requirements to publish the public notice of the application but here, DHEC did not request the information until forty-five (45) days after the public notice began and twenty-eight (28) days after the public notice period closed on June 23rd, 2021. S.C. Code Ann. Regs. §61-101(D)(2) and (D)(4)(b).

The omission of HDD crossing and T&E species information deprived the community of its ability to meaningfully comment on the project. BREDL was aware of the project because it had been tracking it since the first public notice in 2020, yet even it was denied critical information on the project despite sending numerous FOIA requests and its requests for a public hearing that would actually serve to inform the public were denied for a project where DHEC admits it withheld material from the application package from the public notice. Even the

incomplete information put out by DHEC on the project lacked crucial information on HDD and T&E species; even owners facing land condemnation by Dominion were told that they could not see the endangered species report for this project. Because DHEC failed to adhere to its own regulations under S.C. Code Ann. Regs. 61-101 and failed to properly consider whether this project is consistent with the needs and welfare of the public under S.C. Code Ann. Regs. 19-450.9. The environmental justice community was not allowed to meaningfully participate in the permitting process as allowed for under DHEC's own regulations.

CONCLUSION

For each of the foregoing reasons, Appellant Blue Ridge Environmental Defense League respectfully requests that this Honorable Court reverse the ALC and deny Certification of the proposed project. Certification should be denied because the ALC erred in allowing DHEC to issue Dominion Energy a Section 401 Water Quality Certification to construct a 14.5-mile natural gas pipeline through certain protected waters and wetlands in violation of applicable state and federal statutes and regulations, including the Clean Water Act (33 U.S.C. 1341 et seq.), S.C. Code Ann. Regs. 61-101, and S.C. Code Ann. Regs. 19-450.

The Certification should have been denied because (1) Feasible, non-water dependent alternatives exist, (2) Neither Dominion Energy nor DHEC bothered to assess the effect that installation of the pipeline would have on drinking water in a community where wastewater discharges are already in the 75th percentile, (3) construction of the pipeline would directly and indirectly impact rare, threatened and endangered species, (4) construction of the pipeline would adversely impact special and unique habitats, including multiple navigable waterbodies and a statutorily-designated State Scenic River; and (5) neither Dominion Energy nor DHEC properly considered and/or addressed environmental justice concerns of installing yet another pipeline

through a low-income, minority community, all while simultaneously taking heirs property in the process.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League, Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Respondent complies with Rule 211(b),
SCACR.

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