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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

Appellate Case No. 2023-001351

Blue Ridge Environmental Defense League,

Appellant,

v.

South Carolina Department of Environmental Services
and Dominion Energy,

Respondents.

INITIAL BRIEF OF RESPONDENT DOMINION ENERGY

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INTRODUCTION

Appellant Blue Ridge Environmental Defense League (“BREDL”) challenges the final order of the Administrative Law Court (“ALC”). The ALC affirmed the decision of the South Carolina Department of Health and Environmental Control (“DHEC”)¹ to issue Dominion Energy South Carolina, Inc.² a Section 401 Water Quality Certification (“Certification”). The Certification was issued pursuant to S.C. Code Ann. Regs. 61-101 and pertains to Dominion’s proposed River Neck to Kingsburg 16-inch natural gas main project (the “Project”). The Project is needed to serve the increasing demand for natural gas in South Carolina due to projected residential and commercial growth and current seasonal demand issues. Because the United States Army Corps of Engineers (“Corps”) verified that the Project qualified for coverage under Nationwide Permit 12 (“NWP 12”)³ on October 10, 2023, however, the issues complained of in this appeal are moot. Accordingly, for this independent reason, BREDL’s appeal should be dismissed.

Even if it determines the appeal is not moot, the Court should affirm DHEC’s issuance of the Certification because the ALC’s decision is amply supported by the reliable, probative, and substantial evidence in the record. BREDL’s brief (“Appellant’s Br.”) mischaracterizes the record in this case to contrive grounds for appeal where none exist. BREDL argues the ALC erred in granting the Certification because: (1) feasible, non-water dependent alternatives exist; (2) neither Dominion nor DHEC assessed the effect that installation of the Project would have on drinking

¹ By order dated September 12, 2024, the South Carolina Department of Environmental Services (“SCDES”) was substituted for DHEC as a Respondent in this case. For the purposes of continuity with the record, this brief shall refer to SCDES as DHEC.

² Dominion Energy South Carolina, Inc. is a wholly owned subsidiary of Dominion Energy, Inc.

³ NWP 12, issued by the Corps pursuant to 33 U.S.C. § 1344 (“Section 404”), authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. Like other Section 404 permits issued by the Corps, NWP 12 requires that the State certify that the activity will comply with applicable water quality requirements. See 40 C.F.R. § 121.3.

water in a community where wastewater discharges are already above the 75th percentile indicating that there are a number of entities discharging in the area; (3) construction of the Project would directly and indirectly impact rare, threatened and endangered species; (4) construction of the Project would adversely impact special and unique habitats, including multiple navigable waterbodies and a statutorily-designated State Scenic River; and (5) neither Dominion nor DHEC properly considered and/or addressed environmental justice concerns associated with installing the Project through a low-income, minority community. Further, although not included in BREDL's Statement of Issues on Appeal, BREDL argues (1) that DHEC should not have issued the Certification to Dominion Energy, because according to BREDL, it is a non-existent entity; (2) DHEC did not satisfy subsection (C)(1)(d) of Regulation 61-101, because it allegedly did not know the source of the fill material Dominion will use; and (3) Dominion failed to provide DHEC with a complete description of the proposed permitted activity in violation of subsections 61-101(C)(1)(a) and (b) of Regulation 61-101.

However, the substantial and largely uncontroverted evidence in the record establishes that: (1) DHEC and Dominion ("Respondents") properly considered all feasible alternatives as required by S.C. Code Ann. Regs. 61-101; (2) Respondents were not required to conduct baseline well tests related to drinking water, and BREDL presented no evidence that drinking water wells might be affected by the Project; (3) construction of the Project will not impact rare, threatened and endangered species; (4) construction of the Project will not adversely impact special and unique habitats; and (5) Respondents comprehensively addressed environmental justice concerns—even though such consideration was not required. Additionally, with respect to BREDL's other arguments, the evidence in the record establishes that: (1) BREDL has not shown any evidence of prejudice despite a scrivener's error in Dominion's application; (2) BREDL admittedly presented

no information establishing that Dominion failed to provide fill material information to DHEC; and (3) Dominion supplied sufficient information to comply with subsections 61-101(C)(1)(a) and (b).

Pursuant to Rule 208 of the South Carolina Appellate Court Rules (“SCACR”), Dominion, through counsel, respectfully submits its Brief and requests that the Court affirm DHEC’s issuance of the Certification.

COUNTER STATEMENT OF THE ISSUES ON APPEAL

1. Whether BREDL’s appeal of the Certification is rendered moot by the Corps’ verification that the Project qualifies for coverage under NWP 12.
2. Whether the ALC correctly held that BREDL failed to demonstrate by a preponderance of the evidence that the Certification should not be issued to Dominion for NWP 12.

COUNTER STATEMENT OF THE CASE

On February 4, 2022, DHEC issued the Certification⁴ in connection with Dominion’s application⁵ to the Corps for coverage under NWP 12, which pertains to oil or natural gas pipeline activities. NWP 12, a type of Clean Water Act (“CWA”) Section 404 permit, authorizes Dominion to install an approximately 14.5-mile natural gas main. This main will be constructed along an existing natural gas pipeline corridor, adjacent to an existing 8-inch main operated by Dominion. The Project will traverse Jeffries Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, Bullock Branch, and various wetlands and unnamed tributaries of the Great Pee Dee River

⁴ See Petitioner’s Ex. 2, DHEC’s Notice of Department Decision (“NODD”) (R. ___), admitted into evidence without objection.

⁵ The permit application was submitted in the name of “Dominion Energy” by one of its consultants. Technically, “Dominion Energy” is not a legal entity; rather Dominion Energy of South Carolina, Inc., is the legal entity applying for the permit and it is a wholly owned subsidiary of Dominion Energy, Inc. Communications from Dominion throughout the record were communications from Dominion Energy South Carolina, Inc.

in Florence County, South Carolina. The Certification provides a state-level determination that the Project will not contravene water quality standards and includes 16 enforceable conditions intended to minimize potential environmental impacts. S.C. Code Ann. Regs. 61-101 is the state’s specific regulatory mechanism for enforcing and administering the requirements of the federal 401 Certification within South Carolina. In South Carolina, under S.C. Code Ann. Regs. 19-450.1(A), a permit is generally “required for any dredging, filling or construction or alteration activity in, on, or over a navigable water...” However, when a “project requires another Department permit or certification, including... 401 Water Quality Certifications,” then the project is exempted from the permit requirement. S.C. Code Ann. Regs. 19-450.3(G). This is because the permit conditions otherwise required under S.C. Code Ann. Regs. 19-450 are incorporated into the 401 Certification.

BREDL requested a final review conference with DHEC’s Board, which the Board denied, rendering the staff decision the final agency decision. BREDL then filed a Request for Contested Case Hearing with the ALC on April 13, 2022. The ALC conducted a hearing in this matter from February 27 – March 1, 2023, and issued its Final Order on July 24, 2023. The ALC “[h]aving observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and credibility of the witnesses” determined that BREDL failed to show by a preponderance of evidence that the Certification should not be issued to Dominion. (Final Order at 2, 35, R. __.)⁶

BREDL filed a Notice of Appeal with this Court on August 23, 2023. Then, on September 18, 2023, counsel for BREDL filed a Motion to Withdraw as Counsel and Extend the

⁶ The Project will result in permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet (0.0045 acres) of stream, and permanent tree and brush clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (0.004 acres). (Tr. at 163, R. __.) There will also be temporary excavation impacts (trench and backfill) to 8.35 acres of wetlands and 119 linear feet of stream (0.028 acres), and temporary tree and brush clearing impacts to 6.326 acres of wetlands and 53 linear feet of stream (0.011 acres). (*Id.*; *see also* Respondents’ Ex. 1 at 8, R. __.)

Briefing Schedule (“Withdrawal Motion”). The Court granted the Withdrawal Motion on November 20, 2023, allowing BREDL 30 days to find new counsel. BREDL’s current counsel filed a Notice of Appearance with the Court on November 21, 2023, and then requested a 30-day extension to file Appellant’s Initial Brief and Designation of Matter. The Court granted the motion on December 6, 2023, extending the deadline by which BREDL was required to file its Initial Brief and Designation of Matter until January 22, 2024.

BREDL filed an Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing on December 11, 2023 (“Emergency Petition”). On January 10, 2024, this Court remanded the Emergency Petition to the ALC and held the appeal in abeyance. On February 27, 2024, BREDL filed a Petition for Writ of Supersedeas with the ALC (“ALC Petition”). On March 19, 2024, the ALC convened a hearing to consider the ALC Petition. On April 2, 2024, the ALC issued an Order Denying Motion for Supersedeas (“Denial Order”),⁷ and on April 15, 2024, BREDL filed a Petition for Writ of Supersedeas with this Court (“Petition for Writ”). On May 13, 2024, the Court issued an order granting the Petition for Writ. BREDL then sought and obtained additional extensions from the Court and filed its Brief on August 1, 2024.

STANDARD OF REVIEW

This Court may reverse a decision of the ALC only if that decision: (1) violates constitutional or statutory provisions; (2) exceeds the statutory authority of the agency; (3) is made upon unlawful procedure; (4) is affected by an error of law; (4) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (5) is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code

⁷(R. __.) A copy of the Denial Order was attached as Ex. B to Dominion’s Return to Appellant’s Petition for Writ of Supersedeas, filed in this Court on April 25, 2024. (App. __.)

Ann. § 1-23-610(b). Accordingly, this Court’s review “is limited to determining whether the ALC’s findings were supported by substantial evidence, or were controlled by an error of law.” *Deerfield Plantation Phase II B Prop. Owners Ass’n v. S.C. Dep’t of Health & Env’t Control*, 414 S.C. 170, 175, 777 S.E.2d 817, 819 (2015). “Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency’s action.” *Al-Shabazz v. State*, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000); *see also Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control*, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018). Therefore, an appellate court “will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). In other words, “this Court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached.” *Deerfield Plantation Phase II B Prop. Owners Ass’n*, 414 S.C. at 175, 777 S.E.2d at 819. Additionally, “[a]s to questions of fact, the Court may not substitute its judgment for the ALC’s judgment when weighing the evidence.” *Id.*, citing S.C. Code Ann. § 1-23-610(B).

ARGUMENT

I. The Issues in this Appeal Are Moot Because No Justiciable Controversy Remains.

A. Essential Criteria for Justiciability

“A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.” *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quotation omitted). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or

difference of a contingent, hypothetical or abstract character.” *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996).

The concept of justiciability includes the doctrine of mootness. *Jackson v. State*, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 916 n.2 (1997). “An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief. *Id.*

B. The Corps’ Verification That the Project Qualifies for Coverage Under NWP 12 is an Intervening Event That Renders BREDL’s Requested Relief Impossible.

As discussed above, Dominion applied for coverage under NWP 12 from the Corps pursuant to 33 U.S.C. § 1344 (“Section 404”). NWP 12 is a type of Section 404 general permit that authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. “The requirement for a [Section 404] permit from the Corps in turn triggers a requirement under [Section 401 (33 U.S.C. § 1341)] of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards.” *Town of Arcadia Lakes v. S.C. Dep’t of Health & Env’t Control*, 404 S.C. 515, 522, 745 S.E.2d 385, 388 (Ct. App. 2013). “[Section 401] certification is required ‘from the State in which the discharge originates or will originate.’” *Id.* (quoting 33 U.S.C. 1341(a)(1)). DHEC issued the Certification for the Project pursuant to this authority and S.C. Code

Ann. Regs. 61-101.

The Corps verified⁸ that the Project qualified to be covered under NWP 12 on October 10, 2023, and in so doing rendered BREDL's challenges to the Certification moot. South Carolina courts have recognized that DHEC's revocation of a Section 401 certification does not affect the underlying Corps permit. For example, the South Carolina Supreme Court previously determined that even if DHEC properly could revoke a 401 certification at issue in that case, "it would be a futile act unless the [Corps] subsequently suspended and revoked [its] respective permit[]." *Triska v. Dep't of Health & Env't Control*, 292 S.C. 190, 196, 355 S.E.2d 531, 534 (1987).

In response to a request to stay a final order by the ALC affirming the validity of a Section 401 certification issued by DHEC for a different project, the ALC concluded that the Corps' issuance of the corresponding Section 404 permit shortly after issuance of the final order mooted the appeal. *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control*, Docket No. 15-ALJ-07-0404-CC, 2016 SC ENV LEXIS 33, Order Denying Stay (Oct. 10, 2016).⁹ The

⁸ A copy of the verification was attached as Ex. A to Dominion's Return to Appellant's Petition for Writ of Supersedeas, filed in this Court on April 25, 2024. (App. __.)

⁹ In the appeal of the *S.C. Coastal Conservation League* case, the appellants moved for a supersedeas order, arguing not only that the ALC had made specific errors, but also that the case involved both a Section 401 certification and a Coastal Zone Management Certification, the latter being required by state law independent of the federal Section 404 permit. After considering the motion, the return, and the reply, this Court issued a brief order imposing a stay "to prevent contested issues from becoming moot." The order, which was issued on December 15, 2016, contained no additional analysis. *See* Ex. C to Dominion's Return to Appellant's Petition for Writ of Supersedeas. (App. __.) In its Petition, BREDL cited this unpublished order for the proposition that the Court overturned the ALC's holding that the issuance of the Section 404 permit mooted the appeal. This is incorrect. Just a month after imposing the stay, on January 20, 2017, the Court lifted the stay over the objection of the appellants and imposed certain conditions. *See* Ex. D to Dominion's Return to Appellant's Petition for Writ of Supersedeas. (App. __.) Both the motion to lift the stay and the return to the motion recited case-specific facts in support of their respective positions. Appellants moved for reconsideration of the order lifting the stay, which the Court denied on February 6, 2017. *See* Ex. E to Dominion's Return to Appellant's Petition for Writ of Supersedeas. (App. __.) The case later settled. It is impossible to know, based on the available record, whether the Court imposed a stay because it disagreed with the ALC's analysis of the mootness issue based on the Coastal Zone Management Certification, disagreed with the ALC's analysis entirely, or had some other reason to conclude that a stay was necessary to prevent the issues in the case from becoming moot. It is also impossible to know the Court's reasoning for lifting the stay, with conditions, a month later. The Court's brief unpublished orders simply do not tell us, and SCACR Rule 268(d)(2) wisely states that memorandum opinions and unpublished orders have no precedential value and only should be cited in proceedings in which they are directly involved.

ALC held that “it was the Federal Government, through the [Corps], that authorized construction of the road by issuing the Section 404 permit.”¹⁰ Indeed, the Corps’ issuance of the Section 404 permit was an intervening event that rendered the matter moot. *Id.* at 13-14.

Courts in other jurisdictions have reached a similar conclusion. *See e.g., Minn. Ctr. for Env’t Advocacy v. Minn. Pollution Control Agency*, Case No. C4-97-1676, LEXIS 953, at **5-6 (Minn. Ct. App. Aug. 18, 1998) (holding that the Corps’ issuance of a Section 404 permit rendered moot a decision on the appeal of Section 401 certification because the state court’s determination as to the validity of the Section 401 certification would have no legal effect on, or impact, the permittee’s ability to go forward with the project); *City of Shoreacres v. Tex. Comm’n on Env’t Quality*, 166 S.W.3d 825, 838 (3d. Tex. Ct. App. 2005) (holding that challenges to Section 401 certification became moot upon the Corps’ issuance of a Section 404 permit because the petitioners’ requested relief would not have had a practical legal effect on the controversy due to the state agency’s inability to alter the Section 404 permit); *see also Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991) (holding that “disputes over [the validity of Section 401 certifications], at least so long as they precede the issuance of any federal license or permit, are properly left to the states themselves.”) (emphasis in original).

Dominion is aware of DHEC’s position that the issuance of the federal permit by the Corps

¹⁰ In *Murphy v. S.C. Dep’t of Health & Env’t Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), the appellant challenged a Section 401 certification issued by DHEC. The Section 401 certification was necessary to accommodate the expansion of Chapin High School, which required a Section 404 permit from the Corps to fill in a portion of the stream on the property. The Corps issued the Section 404 permit during the pendency of the appeal of DHEC’s Section 401 certification. The Supreme Court upheld DHEC’s analysis of practicable alternatives, noting that “although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the [permittee] had overcome these presumptions and established no practicable alternatives existed.” *Id.* at 645, 723 S.E. 2d at 198. While the Supreme Court retained jurisdiction of the appeal after issuance of the Section 404 permit, the Court was silent, and the parties apparently did not raise, whether the issuance of the Section 404 permit mooted the challenge to the Section 401 certification. Accordingly, *Murphy* is distinguishable from and does not invalidate the ALC’s decision in the *S.C. Coastal Conservation League* case.

should not moot the current appeal, as there remains a *possibility* that the Corps could take into account a decision affecting the validity of the Certification. However, as highlighted by the ALC, “the myriad of factors that would influence that result renders this potentiality exceedingly speculative.” (Denial Order at 13, R. __). An “exceedingly speculative” possibility is insufficient to overcome mootness. *See Sloan v. Greenville Cnty.*, 380 S.C. at 535, 670 S.E.2d at 667 (“The court does not concern itself with moot or speculative questions.”).

As the Supreme Court stated in *Triska*, only the permitting agencies have authority to revoke or suspend a permit once it has been issued. 292 S.C. at 196, 355 S.E.2d at 534. The Supreme Court also noted that DHEC is not unduly restrained by the Court’s interpretation of its authority. (*Id.*) Rather, “the proper procedure for DHEC to utilize, if it has concerns about changes in the water quality, is to notify the permitting agencies of the problems in order for these agencies to review the permits.” (*Id.*) As the ALC noted, the issuance of the Certification “*does not authorize Dominion’s construction of the Project.*” (Denial Order at 14 (emphasis in original)(R. __).) On the contrary, “the Corps’ Section 404 permit is the only permit that authorizes Dominion to commence construction of the Project and the only permit for which a stay would be effective to grant BREDL the relief it seeks.” *Id.* Further, DHEC “did not issue an independent state permit under regulation 19-450, the stay of which could possibly halt construction.” *Id.*

For these reasons, the Corps’ issuance of the CWA Section 404 permit renders BREDL’s challenges to the Certification moot, and this case should be dismissed in its entirety.

II. The Substantial Evidence in the Record Supports the ALC’s Decision that DHEC Properly Issued the Certification to Dominion.

The ALC made its findings of fact by a preponderance of the evidence “[h]aving observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and credibility of the witnesses.” (Final Order at 2, R. __.) The ALC’s decision is

supported by substantial evidence in the record, including the testimony of key witnesses and the exhibits submitted to the court. As discussed in detail below, BREDL's arguments fail to show that the ALC's rulings in its Final Order are unsupported by the substantial evidence in the record. Accordingly, BREDL's appeal should be dismissed, and this Court should affirm DHEC's issuance of the Certification to Dominion.

A. The Substantial Evidence in the Record Supports the ALC's Determination That Respondents Properly Considered Feasible Alternatives in Compliance with S.C. Code Ann. Regs. 61-101(F)(3)(b).

i. Dominion Proffered Sufficient Evidence to Establish the Project Need.

BREDL argues that the Certification should have been denied because Dominion failed to provide any substantive, verifiable evidence regarding population growth, which is Dominion's justification for the Project need. (*See* Appellant's Br. at 35.) However, Dominion's witnesses testified ***without contradiction*** that the population in the Myrtle Beach area is growing rapidly. (Final Order at 4-5, R. __.)

Mr. Robert Priester, a Project Manager for Dominion and a licensed Professional Engineer in South Carolina, explained that Dominion projected the anticipated natural gas demand for the area served by the Project through 2050 using data from its Planning Group and population growth estimates¹¹ from the Horry County Imagine 2040 Plan. (Tr. at 217, 220-233, R. __; *see also* Respondents' Ex. 2,¹² [River Neck Road Corridor Pipeline Sizing Report], R. __.) Dominion anticipates that 45 percent of the increased population will need natural gas services. (*See* Tr. at 221-223, R. __.) Utilizing Synergi Gas software, Dominion modeled six different scenarios,

¹¹ Florence County has experienced significant business and job growth in recent years, including securing a \$89 million investment and 403 arriving jobs. *See* Respondents Ex. 3, at 9, R. __.)

¹² Admitted into evidence to establish what Dominion relied upon for its feasible alternative analysis. (Tr. at 229-233, R. __.)

including those without the existing eight-inch pipeline in service. (Tr. at 226-228, R. __; Final Order at 4, R. __.) Inputs to the model included the existing pipeline system, proposed alternative scenarios, and anticipated demand growth within the pipeline system. (Tr. at 229, R. __.) Based on this analysis, Dominion determined that construction of the Project was necessary. (Final Order at 4, R. __.)

The Project must begin at River Neck Road, where Dominion receives natural gas from third-party upstream suppliers, and connect to the Kingsburg Station, where it splits into multiple smaller pipelines heading south to Johnsonville and east to Conway. (Tr. at 233-235, R. __; Final Order at 4, R. __.) Along the route, several smaller lines tap off the existing eight-inch main, serving residential communities, the Town of Pamplico, and the Lake City area, among others. (*Id.*) There are also some smaller tap lines that serve individual customers or smaller groups of houses. (Tr. at 236, R. __; Final Order at 4, R. __.) This strategic routing ensures that the Project will effectively meet the growing energy needs of these expanding communities.

Mr. Priestler further testified that Dominion's analysis regarding projected growth utilized information from Dominion's resource group and information from Horry County for growth population estimates. (Tr. at 221, R. __.) He also testified that during cold weather events, Dominion is forced to supplement its system with compressed natural gas and/or liquefied natural gas via trucks to maintain services for customers served from the existing eight-inch main. (*Id.* at 237-238, R. __.) This evidence shows that even without the projected growth, the existing infrastructure is insufficient to meet the current needs of the customers.

To support its determination that the Project is needed, Dominion submitted Respondents' Ex. 2 into the record, the "River Neck Road Corridor Pipeline Sizing Report," which explains Dominion's analysis of the expected natural gas demand growth necessitating construction of the

Project. (*See* Tr. at 219-233, R. __.) Consistent with Dominion’s testimony, DHEC also 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.” (*See* Respondents’ Ex. 1¹³ (NODD and Staff Assessment) at 7, R. __.) The information presented by Dominion is verifiable and undisputed. Considering the evidence presented as a whole, reasonable minds could reach the same conclusion as the ALC – the “Project is needed to serve the increasing demand for natural gas in South Carolina due to projected residential and commercial growth and current seasonal demand issues.” (Final Order at 4, R. __); *see also* *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control*, 422 S.C. at 636, 813 S.E.2d at 693.

Additionally, BREDL contends the DHEC did not comply with subsection (C)(1)(c) of Regulation 61-101 because DHEC testified that it did not know the type of expected business or industrial growth that was the stated purpose for the Project or proximate growth potential. (Appellant’s Br. at 42-43.) Under this subsection, “[a]s a minimum the application must contain the following information: ... (c) a description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, including planned or proposed future development that relate to water quality considerations.” S.C. Code Ann. Regs. 61-101(C)(1)(c). Although the ALC found that DHEC’s witness did not testify about the specifics of expected growth supporting the Project, it noted that this regulation concerns whether the *application* provided the required description of the proposed activities, not whether the DHEC could recall them. (Final Order at 32-33, R. __.)

The ALC concluded that Mr. Priester clearly explained to the satisfaction of the Court how

¹³ Admitted into evidence over objection for the purpose of establishing DHEC performed its duty as it relates to considering reasonable alternatives. (Tr. at p. 154-157, R. __.)

the application described the Project and why the Project is needed. (*Id.*) Specifically, he explained that demand for natural gas in eastern South Carolina is increasing due to projected residential and commercial growth and current seasonal demand issues. (Tr. at 236-238, R. __.) Further, he testified that part of this demand is in the local community where, during cold weather events, Dominion must supplement its system with compressed natural gas and/or liquefied natural gas to maintain reliable service for customers that are served from the existing eight-inch main. (*Id.*) Therefore, the ALC correctly held that the “preponderance of the evidence shows the application met the requirements of subsection 61-101(C)(1)(c).” (Final Order at 32-33, R. __.)

ii. *Respondents Properly Evaluated Alternatives to the Proposed Project.*

As part of the assessment of water quality impacts for a proposed project, S.C. Code Ann. Regs. 61-101(F)(3)(b) requires DHEC to consider whether there are feasible alternatives to the proposed project. In South Carolina, certification should be denied if “there is a feasible alternative to the activity which reduces adverse consequences on water quality and classified uses.” S.C. Code Ann. Regs. 61-101. The term “feasible” is equivalent to practicableness, meaning “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.” *Murphy v. S.C. Dep’t of Health & Env’t Control*, 396 S.C. 633, 643, 723 S.E.2d 191, 196. Certification should not be denied if an alternative results in significant adverse impacts or is not practicable. *Id.* (affirming the grant of the 401 certification where the ALC found issues with all the alternatives presented by the petitioner’s expert witness).

BREDL generally argues that DHEC should have denied the Certification because the Project is not water-dependent. (*See* Appellant’s Br. at 32.) BREDL merely alleges that the parties agree the Project is not water-dependent but offers no analysis explaining why that determination warrants denial of the Certification. (*Id.*) The non-water-dependent nature of a proposed project

does not automatically justify the denial of a 401 certification. *See Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. at 644-645, 723 S.E.2d at 197-198 (upholding DHEC's issuance of a 401 certification where the proposed project was not water dependent). Furthermore, if BREDL intended to suggest that the ALC should have presumed the existence of less adverse alternatives pursuant to 40 C.F.R. Section 230.10(a)(2)-(3) because the Project is not water-dependent, BREDL is mistaken. The Supreme Court of South Carolina previously rejected the claim that the "practical alternatives" analysis required by Federal regulations must be used in analyzing "feasible alternatives" under S.C. Code Ann. Regs. 61-101. *See id.* Therefore, DHEC was not required to presume that practical alternatives existed simply because the Project is not water-dependent.

iii. *Respondents Properly Considered Using HDD at Additional Locations*

Additionally, BREDL contends that the Certification should have been denied because there was a feasible alternative to the proposed plan that would reduce adverse consequences on water quality. (*See Appellant's Br.* at 33-34.) The sole alternative that BREDL contends DHEC failed to consider was utilizing HDD at additional locations. (*Id.* at 34.) However, BREDL's contentions are inaccurate and disregard the undisputed evidence in the record.

First, Respondents presented, and the ALC considered, evidence supporting the minimal impact of the proposed plan for the Project and demonstrating why Dominion's plan was chosen over other alternatives. (Final Order at 5-8, R. __.) Robert Priester testified regarding Dominion's alternatives analysis. (Tr. at 238-257, R. __; *see also* Respondents' Ex. 3¹⁴ [Terracon Report, R. __], Ex. 4¹⁵[Dominion's Response to Comments, Section 2.0], R. __.) Specifically, he noted that Dominion considered the "No Action" alternative, meaning the

¹⁴ Admitted into evidence to establish what Dominion relied upon for its feasible alternative analysis. (Tr. at 245-246, R. __.)

¹⁵ Admitted into evidence. (Tr. at 246-252, R. __.)

Project would not be constructed, but concluded that it would not address the Project need. (Tr. at 239, R. __; Final Order at 5, R. __.) Dominion’s team also considered the following factors, in order of priority, to guide the alternatives analysis: (1) location within an existing easement; (2) ability to acquire agreements for easements; (3) ability to avoid permanent clearing impacts; (4) distance from River Neck Road Regulating Station to the Kingsburg Valve Station; and (5) accessibility. (Tr. at 238-257, R. __; Final Order at 5, R. __.) As discussed above, the Project is necessary to alleviate actual and expected increases in natural gas demand in the Pamplico area and points east. (Final Order at 5, R. __.)

The ALC determined that Dominion evaluated three off-site alternatives and one “No Action” alternative, using a team of in-house representatives and external consultants with expertise in several disciplines, including planning, engineering, environmental, permitting, and mitigation. (Final Order at 5, R. __.) The first off-site alternative Dominion submitted was widening the existing 40-foot right-of-way, currently occupied by Dominion’s existing eight-inch natural gas main and expanding that by approximately 10 feet to the west to accommodate the Project. (Final Order at 5, R. __.) This was Dominion’s preferred alternative and the alternative that was ultimately approved by DHEC. (Tr. at 169, R. __; Final Order at 5, R. __.) The ALC concluded that using the existing cleared and actively maintained right-of-way minimizes the need for additional tree and brush clearing and associated impacts. (Final Order at 5, R. __.) Total 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

jurisdictional¹⁶ wetlands and waters.¹⁷ (Final Order at 6, R. __.) With this alternative, Dominion is able to rely upon its existing easements, minimizing the amount of land that must be acquired. (*Id.*) Due to the presence of the existing eight-inch natural gas main and its proximity to multiple paved roads, the site would be readily accessible with minimal needs for temporary access roads. (Tr. at 165-169, R. __; Final Order at 6, R. __.)

For the second off-site alternative, Dominion considered routing the Project primarily via new easements along existing transportation rights-of-way. (Tr. at 169, 210, R. __; Final Order at 6, R. __.) While this alternative would provide ready accessibility to the Project, it would require Dominion to obtain an additional 30-foot-wide easement for most of the Project's length, creating approximately 30 acres of permanent clearing impacts, and approximately 3.5 acres of permanent clearing impacts to jurisdictional wetlands and waters. (Final Order at 6, R. __; *see also* Respondents' Ex. 3, R. __.) It would also lengthen the Project route from approximately 14.5 miles to 14.85 miles. (*Id.*)

For the third off-site alternative, Dominion considered establishing a brand new 50-foot easement adjacent to the existing eight-inch natural gas main. (*Id.*) Dominion would need to permanently clear the land within the new easement, resulting in total permanent clearing impacts of approximately 70 acres, including approximately 14.6 acres of permanent clearing impacts to jurisdictional wetlands and waters. (*Id.*) Because of the significantly increased impacts associated with the acquisition of new 50-foot easements for the entire length of the Project, Dominion rejected this alternative. (*Id.*)

¹⁶ "Jurisdictional" wetlands and waters refers to those wetlands and waters that are subject to jurisdiction of and regulation by the Corps and/or DHEC.

¹⁷ As explained below, the permanent clearing impacts to wetlands will result in wetland conversions, but not loss of wetlands.

The ALC further concluded that Dominion considered several on-site installation methods, summarized into two alternatives: (1) horizontal directional drilling (“HDD”) for all wetland and jurisdictional water crossings; and (2) a combination of open trench excavation and HDD. (*See* Final Order at 7, R. __; Tr. at 241-257, R. __; Respondents’ Ex. 3, R. __; Respondents’ Ex. 4, R. __; Respondents’ Ex. 5 (at 10-20), R. __.) Dominion determined that the all-HDD alternative would require the same amount of permanent tree and brush clearing impacts as the other methods but would require additional land clearing associated with the temporary workspaces needed to construct bore pits and stage the drilling rigs. (Tr. at 243-245, 285-286, R. __.) For these reasons, and because of the anticipated costs expected to drill all crossings, Dominion rejected the all-HDD alternative and specified the use of HDD only to cross Jeffries Creek. (Final Order at 7, R. __.)

The record also establishes that HDD has its own set of environmental and technical limitations that can make it less suitable for certain locations. Mr. Darrell Shier, an Environmental Manager for Dominion Energy Services, Inc.,¹⁸ who holds undergraduate and graduate degrees in chemical engineering and is a licensed Professional Engineer in South Carolina, testified without contradiction that HDD requires larger access sites for heavy equipment, causing more upland environmental impact and displacement, including the clearing of habitat and forest. (Tr. at 274-276, 285-288, R. __.) HDD also necessitates additional installation time, leading to extended noise impacts. (*Id.* at 285-288, R. __.) Additionally, the feasibility of HDD is highly dependent on site-specific conditions at the time of installation. (*Id.*) These site specific conditions can include the physical limitations of the pipe; the physical landscape or topography of the area, which can affect

¹⁸ Dominion Energy Services, Inc. is an affiliate company to Dominion Energy South Carolina (“DESC”) Dominion Energy Services provides environmental policy direction for all of the Dominion entities in its operating states. (Tr. at 274-275, R. __.)

the setup and operation of equipment; subsurface conditions, which can impact the feasibility and method of drilling; the amount of water in the area, which can influence drilling operations; and the availability of workspace and access for equipment. (Tr. at 243-244, 254-257, R. __.) This makes it impractical to mandate HDD for all crossings without knowing the specific conditions at each site at the time of installation. Accordingly, Mr. Shier concluded that HDD is not always the least environmentally impactful alternative. (*Id.* at 288, R. __.)

Mr. Priester also explained that open trench excavation is often Dominion's preferred method of natural gas pipeline installation because it helps Dominion maintain the pipeline's depth at a consistent four to five feet. (*Id.* at 242-243, R. __.) Mr. Priester testified that maintaining a consistent four- to five-foot depth facilitates Dominion's ongoing operation and maintenance of the pipeline by ensuring accessibility. (*Id.*) HDD, which often requires depths in excess of 20 feet, makes accessing the pipeline more challenging.

The results of Dominion's alternatives analysis were presented to DHEC and were addressed in detail in DHEC's written Staff Assessment of the project. (*Id.* at 168-169, R. __; *see also* Respondents' Ex. 1 at 15-17, R. __.) Mr. William "Rusty" Wenerick, a Project Manager in DHEC's Water Quality Certification and Wetlands Program, testified that Dominion's preferred site for the Project would require the least clearing impacts of any of the alternatives identified by Dominion. (*See* Tr. at 146, 169, R. __.) Furthermore, Mr. Wenerick explained that resource agencies generally recommend to DHEC that new utility projects be located within existing rights-of-way to avoid new areas of disturbance and impacts. (*See* Tr. at 169-170, 210, R. __.)

After Dominion submitted its application, DHEC asked Dominion to determine if more crossings could be accomplished using HDD. For the reasons discussed above and reiterated in Dominion's Response to Comments, Dominion determined that except for Jeffries Creek, it would

complete all crossings using the open trench method. (*See* Respondents' Ex. 1 at 15-16, R. __; *see also* Respondents' Ex. 4, R. __.) Consistent with the discussion above, Dominion stated that it might utilize HDD at other crossings depending on site conditions at the time of construction. (Tr. at 244-245, R. __.) Dominion and DHEC identified several factors for determining the most appropriate method of installation (*See* Respondents' Ex. 1 at 16, R. __; *see also* Respondents' Ex. 4 at 5, R. __.) Mr. Wenerick acknowledged that Jeffries Creek is the only crossing Dominion is required to cross using HDD but noted that Dominion would not be prohibited from using HDD at additional crossings if site conditions dictate. (Tr. at 194-195, R. __.)¹⁹

While HDD may reduce direct impacts to wetlands and water bodies by boring under them, the ALC correctly determined that this must be balanced against the other environmental impacts and technical limitations of the HDD method. The ALC found Dominion's explanation of why it would need to wait and evaluate site conditions before deciding whether to use HDD at certain locations to be reasonable. (Final Order at 18, R. __.) Moreover, BREDL did not present any credible evidence disputing Dominion's contentions regarding the feasibility of other proposed alternatives. Thus, the ALC properly concluded that "the evidence established that HDD should not be required at the crossings other than Jeffries Creek. However, it is also reasonable to allow

¹⁹ Mr. Wenerick also discussed potential water quality impacts associated with the Project. (Tr. at 146-147, R. __.) He noted that DHEC expects there to be a temporary increase in turbidity (cloudiness) in the water due to construction-related sediment, but once construction is completed and the site is stabilized, ambient conditions are expected to return to normal. (Tr. at 170-171, R. __.) He further testified that any water quality impacts and proposed work will be temporary, and Dominion's adherence to best management practices, the conditions of NWP 12 (including the Charleston District regional conditions), and DHEC's enforceable conditions included as part of the Certification provide DHEC with reasonable assurance that the water quality standards of S.C. Code Regs. 61-68 will not be contravened. (Tr. at 170-171, R. __; *see also* Respondents' Ex. 1 at 48-49 (Section VI), R. __; Final Order at 9, R. __.) Further, the Project will result in no significant degradation to the aquatic ecosystem or remove existing and classified uses of jurisdictional waters and wetlands around the Project site. (Tr. at 181-182, R. __.) Finally, Mr. Wenerick testified that a segment of the Great Pee Dee River is designated as a state scenic river, but that segment is more than one mile downstream of the Project corridor, and he concluded that there would be no impacts to that segment.¹⁹ (Tr. at 172, R. __; Final Order at 9, R. __.) BREDL did not present any credible testimony rebutting the Respondents' impact assessments.

Dominion to elect to use this environmentally acceptable method if operational and site considerations allow its use.” (Final Order at 7, R. __.)

iv. *Dominion Proffered Sufficient Evidence Regarding a No-Action Alternative.*

BREDL further argues that Respondents failed to provide any evidence explaining why the current method of transporting liquified natural gas during cold weather events is unsustainable (See Appellant’s Br. at 35.) BREDL’s assertion is unfounded. Essentially, BREDL’s position mirrors the “No-Action” alternative. Dominion’s witnesses testified that the No-Action alternative is not sustainable because Dominion would not be able to meet the needs of its customers. (Tr. at 239, R. __.) As Mr. Priester testified, Dominion has had to curtail industrial users due to the pipeline’s lack of capacity, particularly in the winter. (*Id.* at 237, R. __.) Continued population growth in the Project area will exacerbate this problem.

v. *Because No Feasible Alternatives Exist, DHEC Was Obligated to Issue Certification to Dominion for Its Public Utility Crossing.*

In the absence of feasible alternatives, S.C. Code Ann. Regs. 61-101(F)(4)(c) requires DHEC to issue the Certification. This section states that certification of “filling or disturbances to facilitate construction of electric transmission lines or other public utility crossings” will be issued when there are no feasible alternatives. See S.C. Code Ann. Regs. 61-101(F)(4)(c). Dominion Energy South Carolina, Inc. is a public utility regulated by the South Carolina Public Service Commission, and the Project is needed to maintain reliable natural gas service and accommodate expected increased demand. (Tr. at 263-264, R. __; see also Final Order at 20, R. __.) Thus, the ALC properly concluded that DHEC must issue the Certification under this provision, provided DHEC “condition[s] the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management.” (Final Order at 20, R. __.) As noted above,

the Certification includes 16 enforceable conditions intended to minimize potential environmental impacts, and therefore, it was properly issued. (*See* Respondents' Ex. 1, R. __.)

B. Substantial Evidence Supports the ALC's Determination That DHEC Properly Exercised its Discretion Not to Require Well Testing.

BREDL asserts that its “witnesses expressed concerns about the effect that the proposed project might have on well water, which members of the community rely on as drinking water.” (*See* Appellant’s Br. at 36.) However, the ALC correctly found that the language in (C)(3) of S.C. Code Ann. Regs. 61-101, which states that DHEC “*may* require the applicant to provide water quality monitoring data, water quality monitoring results, or other environmental assessment” does not mandate that DHEC require assessments like well testing before processing or assessing a Project. (Emphasis added) (Final Order at 32, R. __.) DHEC has discretion to require that additional data. (*Id.*) Moreover, BREDL offered no legal or factual basis for its generalized concerns²⁰ about the number of wells, locations of wells, or quality of well water in the area. As such, the Certification should not be denied on these grounds.

C. Substantial Evidence Supports the ALC's Determination That the Project Complies with S.C. Code Ann. Regs. 61-101(F)(5)(c) Regarding Rare, Threatened, and Endangered Species.

BREDL’s argument that the Project will adversely impact rare, threatened, and endangered species is not supported by the evidence and findings presented in the record. (*See* Appellant’s Br. at 37.) The ALC found that Dominion and DHEC conducted a thorough analysis and implemented appropriate mitigation measures to address potential impacts on these species. BREDL’s witnesses articulated broad and non-specific apprehensions regarding

²⁰ BREDL argues that by concluding that DHEC lawfully exercised its statutory discretion not to require baseline well testing, the ALC ignored the very reason why the Clean Water Act exists. (*See* Appellant’s Br. at 36-37.) Again, BREDL’s contentions are misguided. DHEC might require well tests if it had some indication that a project had the potential to affect groundwater. No such indication has been presented in this case

the Project’s potential impacts on rare, threatened, and endangered (“RTE”) species at both the Federal and State levels. (Final Order at 10, R. __.) For example, Ms. Andrews testified that she is concerned about potential impacts on Sturgeon, the American Eel, and the American Eagle. (Tr. at 82, 99 R. __; Final Order at 9, R. __.)

Dominion’s consultant (Terracon) prepared a Threatened and Endangered Species report for the site dated July 22, 2019 (“Species Report”).²¹ (See Respondents’ Ex. 4 at Appendix D, R. __.) The Species Report detailed Terracon’s field survey work, as well as its coordination (on behalf of Dominion) with DNR and the United States Fish and Wildlife Service (“FWS”). (*Id.*) Based on its review, FWS determined that there are no known occurrences of any Federal RTE species within, or in close proximity to, the Project area. (*Id.*) Accordingly, Mr. Wenerick explained that the Project will have “no effect” on Federal RTE species or critical habitat. (See Tr. at 188-189; Respondents’ Ex. 4 at Appendix D; Final Order at 11, R. __.)

BREDL presented the testimony of Mr. Greg Mixon, an Inland Environmental Coordinator with the South Carolina Department of Natural Resources (“DNR”). (Final Order at 10, R. __.) Mr. Mixon authored a letter dated June 15, 2021, providing DNR’s comments to DHEC concerning the Project (“DNR Comment Letter”). (Tr. at 121-122, R. __; Petitioner’s Ex. 8²² [DNR Comment Letter] , R. __.) 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.²³ (*Id.*)

²¹ The Species Report incorrectly notes that Dominion would use HDD for all wetland and stream crossings. This does not change the “no effect” determination with respect to Federally RTE species or critical habitat because FWS confirmed no known occurrences of any such species or critical habitat.

²² Admitted into evidence with no objections. (Tr. at 121-122, R. __.)

²³ The letter’s reference to “Fieryback Shiner” should correctly be “Fieryblack Shiner.”

Mr. Mixon also read from an earlier DNR letter, dated July 10, 2019, and addressed to Dominion's consultant, identifying several SWAP plant species, 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. (Tr. at 125-126, R. __.) In the DNR Comment Letter, Mr. Mixon stated that DNR had no objection to DHEC's issuance of the Certification provided that DHEC incorporate several recommendations into the Certification as minimization measures. (See Petitioner's Ex. 8, R. __.) Mr. Wenerick testified that he sent a copy of the DNR Comment Letter to Dominion and asked Dominion to respond to those comments, which it did. (Tr. at 173-174, R. __.) Mr. Wenerick then sent Dominion's responses back to DNR and asked DNR to confirm whether its concerns were addressed. (*Id.* at 174-175, R. __.) Mr. Mixon responded with no further objections on behalf of DNR provided that DHEC incorporate the commitments Dominion made in its responses as conditions to the Certification. (*Id.* at 136, R. __.) He confirmed that he reviewed the NODD, which includes all 16 conditions to the Certification, and stated that he felt DHEC addressed DNR's concerns with respect to the Project. (*Id.* at 136-138, R. __.) Indeed, the commitments Dominion made in response to DNR's comments are designed to comply with the NODD. These commitments will apply to the NWP 12, ensuring that the Project will not adversely impact waters containing State or Federal RTE species.

Mr. Mixon further testified that the SWAP's purpose is to provide an inventory and goals and objectives for conserving and protecting state species that may not be entitled to Federal protection. (*Id.* at 123-124, R. __; Final Order at 11, R. __.) He stated that SWAP is not a regulation, and confirmed that the State of South Carolina has a regulation governing threatened and endangered species, S.C. Code Ann. Regs. § 123-150. (Tr. at 139-140, R. __.) Mr. Mixon

confirmed that there are no plant species listed in S.C. Code Ann. Regs. § 123-150, which contains the official State List of Endangered and Threatened Wildlife Species of South Carolina. (*Id.*; Final Order at 11, R. __.) Mr. Shier likewise testified that SWAP species are not entitled to the same protections as regulated RTE species. (*See id.* at 290-291, R. __.)

BREDL incorrectly argues that despite DNR's comment letter which stated that there "are records of *several federally-listed* threatened or endangered species in the project *vicinity*" and identifying that there were "known occurrences of Atlantic sturgeon and shortnose sturgeon" in the Great Pee Dee River, "the ALC confoundingly dismissed these concerns." (Appellant's Br. at 38.) The ALC was correct. The ALC acknowledged and considered that some of the species were mentioned in the DNR Comment Letter, but still found that "while the DNR Comment Letter stated that '[t]here are records of several federally-listed threatened or endangered species in the project vicinity,' and even identified some of those species, it did not specifically identify them as being present in the Project area itself." (Final Order at 23, R. __.) FWS also concluded that there are no known occurrences of any federally recognized rare, threatened, or endangered species within or in close proximity to the Project area.

The ALC also discussed BREDL's concerns regarding the presence of federally listed plant species, such as Canby's Dropwort and Boykin's Lobelia. (*Id.*) The ALC correctly found that DNR's comment letter did not specify that these species are present in the Project area itself. (*Id.*) Certainly, there is a difference between being present in the actual Project area and being *near* the Project area. Furthermore, Mr. Mixon testified that there are no plant species listed in S.C. Code Ann. Regs. § 123-150, which contains the official State List of Endangered and Threatened Wildlife Species of South Carolina. (*Id.* at 139-140, R. __.) BREDL did not present any evidence contradicting the determinations made by DNR and FWS. Based on the evidence presented, the

ALC correctly concluded that DHEC properly considered the potential effects on the habitats of rare and endangered species.

D. Substantial Evidence Supports the ALC's Determination That the Project Does Not Impact Special Places.

- i. *The ALC Correctly Found that Jeffries Creek is the Only Navigable Water Impacted by the Project.*

BREDL contends that Mill Branch and Bigham Branch are both navigable by motorized fishing boat, based on “unrebutted” testimony from Ms. Andrews that she used a motorized fishing boat. (Appellant’s Br. at 38.) Specifically, Ms. Andrews, testifying for BREDL, stated that she had previously boated and fished in Jeffries Creek, Bigham Branch, and Mill Branch. (Tr. at 81-83, R. __.) Although she could not specify the type of boat, she described it as “like a fishing boat with a motor on it.” (*Id.* at 83, R. __.) S.C. Code Ann. Regs. 19-450.2(C) states that navigability shall be determined by DHEC. DHEC determined (and the ALC agreed) that, for this Project, the only crossing of a navigable water subject to S.C. Code Ann. Regs. 19-450 is the crossing of Jeffries Creek (Tr. at 184, R. __; Final Order at 21, R. __.) Further, as the ALC noted, Ms. Andrews did not testify that she fished and boated at the specific locations within these waters that the Project will cross. (*Id.* at 81-85; Final Order at 21, R. __.) The ALC found that “BREDL has presented no evidence to credibly demonstrate that any other waterways in the Project corridor are navigable waters other than Jeffries Creek.” (Final Order at 21, R. __.)

BREDL also asserts that the ALC erred because there is insufficient proof that the Project must be routed through wetlands²⁴ or navigable waters in violation of S.C. Code Ann. Regs. 19-450.9(A)(1) and (A)(7). (Appellant’s Br. at 38.) This provision requires DHEC to consider whether a proposed activity requires construction in, on or over a navigable waterway,

²⁴ The term “wetlands” is not even used in R. 19-450.

and the economic benefits to the state and public from such location. DHEC also must consider whether all feasible alternatives will be taken to avoid adverse environmental impacts resulting from the Project. As established *supra*, Jeffries Creek is the only water that will be crossed by the Project to which S.C. Code Ann. Regs. 19-450 applies. Further, it is undisputed that the Project will be installed well beneath the bed of Jeffries Creek using HDD. The evidence also establishes that DHEC correctly determined that there will be no impacts to navigability or the bed and banks of Jeffries Creek. (Tr. at 184, 208, R. __; Final Order at 7, R. __.)

ii. *The ALC Correctly Found That the Project Will Not Adversely Impact Special Places.*

BREDL's argument that the Project will adversely impact designated State Scenic Rivers and special places is not supported by the evidence. (Appellant's Br. at 38.) Pursuant to subsection (F)(5)(d) of S.C. Code Ann. Regs. 61-101,²⁵ DHEC must deny a certification *if* the proposed activity adversely impacts special or unique habitats such as designated State Scenic Rivers. In its Staff Assessment, DHEC noted that a segment of the Great Pee Dee River is designated as a State Scenic River. (*See* Respondents' Ex. 1, Section III.D, R. __.) According to the Staff Assessment, and as affirmed by Mr. Wenerick's testimony, that segment is more than one mile downstream of the Project corridor. (*Id.*; Tr. at 172, R. __.) Due to its distance from the Project Corridor, the ALC properly found that the Project would not impact the segment of the Great Pee Dee River designated as a State Scenic River. (Final Order at 21-22, R. __.) BREDL did not present any evidence of Project impacts on the State Scenic River segment, and the ALC correctly concluded that DHEC's issuance of the Certification is consistent with S.C. Code Ann. Regs. 61-101(F)(5)(d).

Similarly, BREDL's argument that the Certification violates S.C. Code Ann. Regs. 19-

²⁵ Further, S.C. Code Ann. Regs. 61-101(F)(5)(d) does not apply because the Project is a utility crossing.

450.9(A)(4) by allowing the Project to cross a 146-acre tract protected by a conservation easement (Front Swamp LLC) and the Pee Dee Station Wildlife Management Area misses the mark. Subsection 19-450.9(A)(4) requires DHEC to consider the extent to which the activity could affect public access to and use of public lands. The “activity” subject to this provision is the crossing of Jeffries Creek, and the Project will utilize HDD at this location to reduce any potential impacts. Further, as the ALC found that BREDL, beyond its conclusory statement, introduced no evidence that allowing the Project to cross Jeffries creek using HDD would impact Front Swamp LLC and the Pee Dee Station Wildlife Management Area. (Final Order, at 22-23, R. __.) Therefore, the ALC properly concluded that BREDL did not meet its burden to show that the project contravenes this subsection. (*Id.*)

E. Dominion and DHEC Adequately Considered Environmental Justice Concerns.

As a preliminary matter, BREDL’s arguments with respect to environmental justice are irrelevant because “environmental justice concerns” are not criteria for issuing a Certification. Mr. Charles Hightower testified that South Carolina water quality regulations do not require an environmental justice analysis or assessment. Instead, the regulations direct DHEC to review potential water quality impacts and ensure statutory and regulatory obligations are met. (*See* Petitioner’s Ex. 75 [Charles Hightower Deposition] at 68-69, R. __; *see* Final Order at 14, R. __; *see also* Tr. at 204, R. __ (Mr. Wenerick’s testimony that Regulation 61-101 does not mention environmental justice).) BREDL has not (and cannot) point to any legal authority that required DHEC to conduct an environmental justice review prior to the issuance of the Certification. Rather, BREDL merely argues that it *should* be considered, which is insufficient to establish by a preponderance of evidence that the ALC’s reasoned decision should be overturned. *See Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 390, 732 S.E.2d 500, 504 (2012) (finding that testimony

based on speculation, surmise, and conjecture could not constitute substantial evidence.)

BREDL makes the conclusory and demonstrably false allegation that Dominion and DHEC failed to adequately consider environmental justice concerns. (Appellant's Br. at 40.) Even if consideration of environmental justice were required, the substantial evidence in the record establishes that Dominion and DHEC considered and evaluated the environmental justice impact of the Project, as well as the cumulative impacts of the Project. (*See* Tr. at 158-159, 176-181, R. ___; *see also* Respondents' Ex. 1 at Section IV, R. ___.)

DHEC provided extensive public notice and addressed comments from the public. (Final Order, at 12, R. ___.) On June 8, 2021, DHEC issued a 15-day public notice of Dominion's application for the Project. (*See* Tr. at 158-159, R. ___; *see also* Respondents' Ex. 1 at Section IV, R. ___.) That comment period expired on June 23, 2021. (*Id.*) In response to requests for a public hearing and to extend the comment period, and to address concerns about environmental justice, DHEC held a virtual public hearing at 6:30 p.m. on October 14, 2021. (*See* Tr. at 176-181, R. ___; *see also* Respondents' Ex. 1 at Section IV, R. ___.) Notice of this hearing was included on DHEC's project webpage, published on DHEC's public notice webpage, and published in the Florence Morning News on September 25, 2021. (Tr. at 179, R. ___.)

DHEC created an informational webpage for the Project, including a description of the Project and Certification review process, updated application materials, and copies of comments received during the initial public comment period. (*Id.* at 178, R. ___.) DHEC added a fillable form to its Project website so interested parties could pre-register to speak at the public hearing. DHEC also notified parties that requested a hearing, as well as Dominion, of the hearing dates. (*Id.*) Moreover, DHEC's public participation and environmental justice staff distributed a flyer discussing the Project and public hearing to two local library branches (Pamplico and

Johnsonville). (*Id.* at 178-179, R. __.) One of DHEC’s Public Participation Coordinators contacted the Manager/Administrator of the Town of Pamplico, Mr. Edwin P. Rogers, to share information about the hearing. (*Id.* at 179, R. __.)

Due to concerns regarding the Covid-19 pandemic, DHEC held the public hearing virtually to facilitate increased attendance and to adhere to social distancing protocols. (*Id.*; *see also* Final Order at 13, R. __.) A call-in number was available so that individuals without internet access could still participate. (Tr. at 179; *see also* Final Order at 13, R. __.) Although Ms. Andrews testified that people in her community would not have internet, she testified that they would have a telephone. (Tr. at 93, R. __.) DHEC posted a recording of the public hearing on its Project webpage as soon as it was available and opened an additional 15-day public comment period after the public hearing. (*See* Tr. at 176-181, R. __; *see also* Respondents’ Ex. 1 at Section IV, R. __.) As demonstrated by the DHEC Staff Assessment, DHEC (and Dominion) reviewed and considered comments received via letter, email, voicemail, phone, and the public hearing. (*Id.*) This comprehensive approach ensured that all stakeholders had ample opportunity to voice their interests or concerns and provided transparency throughout the review process.

Dominion voluntarily conducted its own environmental justice review using publicly available tools, which identified higher low-income and minority populations in the Project vicinity. (Tr. at 291-292, R. __.) It found a “moderate risk” for environmental justice issues at the Project location. (Tr. at 294, R. __.) Dominion also acknowledged that it condemned property to enlarge the easement, including heirs’ property.²⁶ (Tr. at 295, R. __.) Based upon the environmental justice considerations, Dominion performed its own targeted outreach. (Tr. at 291-

²⁶ Heirs’ property refers to land that is jointly owned by descendants of a deceased individual who did not leave a will, resulting in a form of ownership known as tenancy in common.

292, R. __.) For example, with respect to owners of potential heirs' properties, Dominion sent contact information for organizations that could help them understand their rights as heirs' property owners and to obtain clear title to their property. (*Id.*) Dominion also held at least one open house event, and contacted area churches to discuss the Project, understanding that local churches can be a good point of contact within the local community. (*Id.*) This targeted outreach demonstrates Dominion's commitment to addressing the needs and interests or concerns of all affected communities.

BREDL failed to provide any testimony or other evidence regarding actions Dominion and DHEC should have undertaken beyond their substantial community engagement efforts. Moreover, BREDL provides no legal or factual basis to support its contention that taking these unspecified additional actions would have altered the decision.

F. BREDL's Additional Arguments Are Also Meritless, Violate SCACR 208, And Should Be Disregarded.

BREDL asserts multiple arguments that are not listed in its statement of issues on appeal. Pursuant to SCACR 208(b)1(B), "no point will be considered which is not set forth in the statement of the issues on appeal." Therefore, these arguments should not be considered by the Court. Nevertheless, to the extent that the Court does consider them, these arguments still fail on the merits.

First, BREDL argues that DHEC should not have issued the Certification to Dominion Energy, because according to BREDL, it is a non-existent entity. (Appellant's Br. at 41.) Dominion's permit application was submitted on behalf of "Dominion Energy" by one of its consultants and DHEC issued the Certification to "Dominion Energy." (Tr. 249-251, R. ___; *see also* Petitioner's Ex. 2, R. __.) "Dominion Energy" is a shorthand form of reference to a legal entity. Dominion Energy of South Carolina, Inc., is the formal name of the legal entity that applied

for the permit, and it is a wholly-owned subsidiary of Dominion Energy, Inc. (*Id.*) However, the ALC properly found that despite what appears to be a scrivener's error, BREDL has not shown any evidence of prejudice or "a nefarious plot to hide the name of the true applicant for the Certification." (Final Order at 31, R. __.) As the ALC noted, BREDL fully participated in the entire permitting and contested case process without issue because it was aware that Dominion Energy referred to Dominion Energy of South Carolina, Inc. (*Id.*) The South Carolina Supreme Court has also held that "[e]rror without prejudice does not warrant reversal." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005). Therefore, the ALC properly determined that the Certification should not be denied on these grounds.

Next, without citation to the record, BREDL argues that DHEC did not satisfy subsection (C)(1)(d) of Regulation 61-101, because it allegedly did not know the source of the fill material Dominion will use. (Appellant's Br. at 41.) This subsection states that "[a]s a minimum the application must contain the following information: . . . (d) a description of the composition, source, and quantity of any material to be dredged or used as fill and a description of the area to be impacted, including the area of fill in acres." S.C. Code Regs. 61-101(C)(1)(d). BREDL's assertion that DHEC is purportedly unaware of the source of Dominion's fill material does not prove that Dominion never provided it to DHEC as part of the application process. Rather, it is mere speculation without support. *See Hutson*, 399 S.C. at 390, 732 S.E.2d at 504. More importantly, BREDL has the burden to establish by a preponderance of the evidence that the Certification should not issue. Accordingly, because BREDL presented no information establishing that Dominion did not provide that fill material information to DHEC, the ALC properly found that "BREDL failed to show by a preponderance of the evidence that Dominion's application did not comply with this regulatory requirement or why the failure would justify

denying the Certification.” (Final Order at 32, R. __.)

Finally, BREDL argues that Dominion did not supply 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 violation of subsections 61-101(C)(1)(a) and (b). (Appellant’s Br. at 43.) Specifically, it argues Dominion (1) never provided information on the specific location or waterbodies where it would conduct HDD activities and (2) was still reviewing additional parcel acquisitions required for access needs as of July 2021, well after the public notice period for the project closed. (*Id.*) However, based upon the evidence presented, the ALC determined that the use of HDD at the locations other than Jeffries Creek is dependent upon site conditions at the time of pipeline installation. (Tr. at 244-245, R. __; *see* Respondents’ Ex. 4., R. __; *see also*, Respondents’ Ex. 1 at 15-16, R. __; Final Order at 33, R. __.) Dominion also identified other potential locations where HDD may be used based upon site conditions at the time of installation. (*See* Respondents’ Ex. 1 at 16, R. __; *see also* Respondents’ Ex. 4 at 5, R. __.) Therefore, the ALC determined it was reasonable that the application did not specifically identify all HDD locations, and appropriately concluded that the application satisfied the applicable requirements. (Final Order at 34, R. __.) Additionally, Dominion identified the Project area as required for its application. (*See* Respondents’ Ex. 3 at 5, R. __.) The status of additional property acquisition is irrelevant. Accordingly, BREDL’s arguments are meritless.

CONCLUSION

The Corps’ verification that the Project qualifies for coverage under NWP 12 moots BREDL’s appeal, and the Court need not look any further. If the Court does not agree that BREDL’s appeal is moot, it should find that the ALC’s decision to affirm DHEC’s issuance of the Certification to Dominion is firmly supported by substantial evidence. The ALC thoroughly

evaluated the credibility of witnesses and the evidence presented, and correctly determined that Dominion and DHEC properly considered all feasible alternatives and complied with applicable regulatory requirements. BREDL's arguments fail to demonstrate that the ALC's findings were erroneous. Accordingly, Dominion respectfully requests that this Court affirm DHEC's issuance of the Certification for the Project.

[Signatures on following page.]

Dated: September 19, 2024

Respectfully submitted,

DOMINION ENERGY, INC.

/s/Elizabeth B. Partlow

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