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SC Court of Appeals

THE 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 Environmental Services
and Dominion Energy, Respondents.

**INITIAL BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES**

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STATEMENT OF THE CASE

This appeal considers whether a water quality certification (“Certification”) was properly issued to Dominion Energy for construction of a natural gas pipeline in the area of Pamplico, South Carolina, in Florence County.

The South Carolina Department of Health and Environmental Control (“SCDHEC” or “Department”)¹ issued a Notice of Department Decision (“NODD”) for the Certification on February 4, 2022. (R. pp. __ (Respondent’s Ex. 1)). Blue Ridge Environmental Defense League (“BREDL”) submitted a request for final review to the SCDHEC Board on February 18, 2022. (R. pp. __ (Request for Board Review)). The SCDHEC Board declined to hold a final review conference on March 17, 2022. (R. pp. __ (DHEC Final Review Conference Denial)). As a result, the NODD became the final agency decision pursuant to S.C. Code Ann. § 44-1-60(F) (2018) (amended by Act No. 60, 2023 S.C. Acts 302, effective July 1, 2024).

On April 13, 2022, BREDL filed a request for contested case hearing before the Administrative Law Court (“ALC”). (R. pp. __ (Request for Contested Case Hearing)). Discovery was conducted among the parties, after which, the ALC held a hearing in this matter from February 27 to March 1, 2023. On July 24, 2023, Chief Administrative Law Judge Ralph King Anderson, III, issued a Final Order (“Order”) upholding issuance of the Certification. (R. pp. __ (Order)).

BREDL appealed on August 23, 2023. This Court granted BREDL’s petition for writ of supersedeas on May 13, 2024.

¹ Pursuant to Act No. 60, 2023 S.C. Acts 302, SCDHEC was abolished and all of its functions, powers, and duties were transferred to and incorporated in the South Carolina Department of Environmental Services effective July 1, 2024. All references herein to the “Department” prior to July 1, 2024 are to SCDHEC.

STANDARD OF REVIEW

When reviewing decisions of the ALC, “the [C]ourt may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-610(B). The Court may only reverse or modify the ALC’s decision if the rights of the petitioner have been prejudiced because a finding, conclusion, or decision 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)(a)-(f).

A decision of the ALC “should not be overturned unless it is unsupported by substantial evidence or is controlled by some other error of law.” *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). “In determining whether the ALC’s decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t. Control*, 411 S.C. 16, 28, 66 S.E. 2d 707, 715 (2014). “When the evidence conflicts on an issue, the court’s substantial evidence standard of review defers to the findings of the fact-finder.” *Be Mi, Inc. v. S.C. Dep’t of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014).

REGULATORY FRAMEWORK

Section 401 of the federal Clean Water Act (“CWA”) provides that an applicant for a federal permit for discharges to the “waters of the United States” must first obtain a water quality

certification from the State where the discharges will originate.² The purpose of this State-level certification is to ensure a proposed activity or project requiring a federal permit complies with specified provisions of the CWA, and with applicable State water quality standards adopted pursuant to the CWA.³

A federal permit from the United States Army Corps of Engineers (“the Corps”) is required for discharges of dredged or fill material to jurisdictional waters of the United States (“WOTUS”).⁴ Therefore, pursuant to Section 401 of the CWA, a State water quality certification is required before obtaining such a permit from the Corps.

In South Carolina, projects requiring a water quality certification in connection with a federal permit are reviewed by the Department pursuant to the provisions of S.C. Code Ann. Regs. 61-101 (“Regulation 61-101”). This regulation sets forth procedures for reviewing applications for certification, including public notice and public hearing procedures.⁵ This regulation also includes a defined “scope of review” for certification of activities requiring a federal permit.⁶

The provisions of S.C. Code Ann. Regs. 19-450 (“Regulation 19-450”) apply to construction activities affecting navigable waters of the State, including activities affecting

² 33 U.S.C.A. §§ 1341, 1344, and 1362(7).

³ *Id.* at 33 U.S.C.A. § 1341; *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 712-714, 114 S.Ct. 1900, 1909-1910 (1994).

⁴ 33 U.S.C.A. §§ 1344 and 1362(7); *see also Murphy v. S.C. Dep’t of Health & Env’t. Control*, 396 S.C. 633, 636-637, 723 S.E.2d 191, 193 (2012) (discussing requirement to obtain permit for discharges of dredged or fill materials from the Corps pursuant to Section 404 of the CWA and water quality certification from SCDHEC pursuant to Section 401 of the CWA).

⁵ Regulation 61-101(D)&(E).

⁶ Regulation 61-101(F).

“submerged lands under the navigable waters of the [S]tate.”⁷ While there is overlapping jurisdiction for some waters, the State navigable waters subject to the jurisdiction of Regulation 19-450 are defined differently from federally regulated WOTUS, and therefore, are not identical to WOTUS.⁸

Regulation 61-101(A)(9) provides that the Department will not issue a separate permit for construction in State navigable waters for activities or projects that require a water quality certification in connection with a federal permit. For such projects, the Department is directed to “consider issues of that permit” that would otherwise be required under Regulation 19-450, and to “insure [*sic*] the provisions of [Regulation 19-450] are adhered to” as part of the water quality certification.⁹

STATEMENT OF FACTS

Project Description and Impacts

The challenged Certification is for a project to construct and install a 16-inch diameter natural gas pipeline (“the Project”) in the area of Pamplico, South Carolina, in the vicinity of the Great Pee Dee River. (R. p. __ (Respondent’s Ex. 1, Staff Assessment p. 1)). The pipeline will be approximately 14.5 miles long. (R. p. __ (*Id.* at Respondent’s Ex.1)). It will connect to existing gas infrastructure at both ends and will be located in an existing 40-foot utility easement where Dominion currently owns and operates an existing 8-inch natural gas pipeline. (R. p. __ (*Id.* at Respondent’s Ex. 1); R. pp. __ (ALC Transcript at 233:21-235:14)). The existing easement will be

⁷ Regulation 19-450.1(A).

⁸ Compare S.C. Code Ann. Regs. 19-450.2(C) with 40 C.F.R. § 120.2; see also S.C. Code Ann. § 49-1-10.

⁹ Regulation 61-101(A)(9); Regulation 19-450.3(G).

expanded by approximately 10 feet to accommodate the new line. (R. pp. ___ (Respondent’s Ex. 1, Staff Assess. pp. 1-2); R. p. ___ (Tr. at 159:11-20)).

The new pipeline will cross jurisdictional WOTUS. These waters include Jeffries Creek, Mills Branch, Bigham Branch, Briar Branch, Barfield Mill Creek, and Bullock Branch, as well as wetlands and unnamed tributaries of the Great Pee Dee River. (R. pp. ___ (Respondent’s Ex. 1, Staff Assess. pp. 1-4); R. pp. ___ (Tr. at 24:22-25, 162:8-163:12)). The pipeline will also cross one State navigable water, Jeffries Creek, which is a “mapped” navigable water. (R. pp. ___ (Respondent’s Ex. 1, Staff Assess., pp. 2 & 11); R. p. ___ (Tr. at 184:12-16)). While the pipeline will cross these waters, it is not considered a “water dependent” activity within the meaning of Regulation 61-101(F)(3)(a), because it does not inherently need to be sited near aquatic resources. (R. p. ___ (Respondent’s Ex. 1, Staff Assess. p. 9); R. p. ___ (Petitioner’s Ex. 75 at 63:3-5); R. p. ___ (Tr. at 168:16-25)).

Due to crossings of WOTUS and associated work, the Project will involve permanently filling 0.0041 acres of wetland and 0.0045 acres of stream.¹⁰ (R. p. ___ (Respondent’s Ex. 1, Staff Assess., p. 2)). In addition, 2.986 acres of wetland and 0.004 acres of stream will be permanently cleared of vegetation for maintenance purposes. (R. pp. ___ (Respondent’s Ex. 1, Staff Assess., pp. 2 & 5)). The permanently cleared wetland areas are expected to retain wetland soil, hydrology, and plant characteristics, so there will not be an overall loss of wetlands as a result of the permanent clearing. (R. p. ___ (Tr. at 166:4-15)).

¹⁰ Permanent fill is required in connection with two access roads at the Project site. As explained by SCDHEC staff, the total amount of acreage that will be permanently filled is very modest, roughly the size of the courtroom where the ALC hearing was held. (R. pp. ___ (Tr. at 162:16-165:21)).

The Project's remaining impacts to jurisdictional wetlands and streams will be temporary. Temporary "open trench" or "trench and backfill" excavation will be used to install the pipeline in 8.35 acres of wetlands and 0.028 acres of stream. (R pp. ___ (Respondent's Ex. 1, Staff Assess., pp. 2 & 4-5); R. pp. ___ (Tr. at 163:17-19 & 241:15-20)). After the pipeline is installed, the excavated material will be returned to the trench and these areas will be re-graded and stabilized. (R. p. ___ (*Id.* at Respondent's Ex. 1)). Similarly, 6.326 acres of wetland and 0.011 acres of stream will be temporarily cleared of trees and brush during construction, but then stabilized and allowed to re-vegetate naturally afterwards. (R. pp. ___ (Respondent's Ex. 1, Staff Assess., pp. 2 & 5)).

Assessment of Potential Water Quality Impacts

SCDHEC granted the Certification after determining the Project will cause only temporary effects on water quality. (R. pp. ___ (Respondent's Ex. 1, Staff Assess., pp. 12 & 42-43); R. pp. ___ (Tr. at 170:20-171:22 & 181:10-183:10)). SCDHEC staff also determined the Project will not contravene applicable water quality standards under S.C. Code Ann. Regs. 61-68 ("Regulation 61-68"), cause significant degradation to the aquatic ecosystem, or remove existing and classified uses of waters.¹¹ (R. pp. ___ (*Id.* at Respondent's Ex. 1); R. pp. (*Id.* at Tr. pp. 170-171 & 181-183)).

The Project's temporary water quality impacts will result from increased turbidity during installation of the pipeline. (R. pp. ___ (Tr. at 170:20-171:8)). As explained by SCDHEC staff, such temporary turbidity is typical and unavoidable during construction activities and is not considered a violation of water quality standards. (R. pp. ___ (*Id.* at Tr. pp. 170-171); R. pp. ___ (Petitioner's Ex. 75 at 33:18-25)). In order to minimize temporary water quality impacts, the Certification is

¹¹ The wetlands and streams in the Project site are classified by the Department as "Freshwaters." (R. p. ___ (Respondent's Ex. 1, Staff Assess., p. 1)). *See generally* S.C. Regulation 61-68 for applicable water quality classifications and standards, *and* Regulation 61-68(G)(10) for water quality standards applicable for waters classified as Freshwaters.

conditioned on use of a number of best management practices, or BMPs, to address erosion and migration of sediments during construction of the pipeline. (R. pp. ___ (Respondent's Ex. 1, NODD & Staff Assess. pp. 12-13); R. pp. ___ (Tr. at 184:17-188:1)). In addition, the Project will need to comply with federal permit conditions serving the same purpose of minimizing erosion and controlling sediment. (R. pp. ___ (Respondent's Ex. 1, NODD & Staff Assess. pp. 12-13); R. pp. ___ (Tr. at 167:16-21 & 181:15-17)).

Project Location and Alternatives

Government resource agencies charged with protecting natural resources generally recommend to the Department that projects be sited in existing easements or rights-of-way, for the purpose of minimizing environmental impacts. (R. pp. ___ (Tr. at 169:20-170:3)). That is exactly what was done for the Project. Two alternative sites for the pipeline were presented by Dominion Energy for SCDHEC's review of the Project. (R. p. ___ (Respondent's Ex. 1, Staff Assess. p. 9)). Both alternatives would have required permanently clearing a greater amount of acreage in jurisdictional WOTUS than the approved location for the pipeline in an existing utility easement. (R. p. ___ (*Id.* at Respondent's Ex. 1); R. pp. ___ (Tr. at 169:11-19, 239:20-240:2, & 279:4-21)).

The approved site for the pipeline is a little over one mile upstream from a segment of the Great Pee Dee River that is designated a State Scenic River. (R. p. ___ (Respondent's Ex. 1, Staff Assess. p. 12)). Based on that distance from the Project site, SCDHEC staff determined there would be no impact on the designated scenic segment of the Great Pee Dee. (R. p. ___ (*Id.* at Respondent's Ex. 1); R. p. ___ (Tr. at 172:17-24)).

In its approved location, the pipeline will need to cross Jeffries Creek, a State navigable water. However, Dominion Energy has committed to crossing underneath Jeffries Creek using an installation method known as horizontal directional drilling ("HDD"). (R. p. ___ (Respondent's Ex.

1, Staff Assess. p. 2); R. p. __ (Tr. at 243:8-14 & 244:22-24)). As a result, the pipeline will be installed about 75 feet beneath the creek. (R. pp. __ (Tr. at 161:22-162:7 & 170:8-17)). Based on this installation method, SCDHEC determined that the navigability of Jeffries Creek will not be affected by the Project. (R. pp. __ (*Id.* at Tr. pp. 161-162 & 170)).

For crossings of other waters, the Certification allows Dominion Energy to make a site-specific decision between use of HDD and temporary open trench excavation. (R. pp. __ (Respondent's Ex. 1, Staff Assess. pp. 2 & 9-10); R. pp. __ (Tr. at 194:10-19)). As explained by Dominion Energy during both the application process and at the ALC hearing, there are a number of operational, technical, and environmental factors that go into evaluating whether HDD or open trench excavation is best suited to a specific crossing at the time of installation. (R. pp. __ (*Id.* at Respondent's Ex. 1); R. pp. __ (Tr. at 243:8-246:15, 253:1-257:7, & 285:5-288:10)). In some situations, using HDD for a crossing would cause greater environmental impacts than open trench excavation, rather than minimizing environmental impacts. (R. pp. __ (*Id.* at Tr. pp. 285-288)).

The Certification is subject to conditions intended to ensure that both HDD crossings and open trench excavation crossings are conducted properly. For use of HDD, Dominion Energy must comply with an "HDD Inadvertent Return Contingency Plan"¹² and must dispose of drilling fluid or mud in accordance with State laws and regulations. (R. pp. __ (Respondent's Ex. 1, NODD)). For open trench crossings, Dominion Energy must restore the stream banks at crossings in as little time as feasible after construction and implement other bank stabilization measures. (R. p. __ (Respondent's Ex. 1, NODD)). In addition, Dominion Energy must use a "temporary flume bypass" method when crossing streams via open trench. This method was recommended by the

¹² This plan addresses a scenario where water and other material accidentally releases to the surface during HDD operations. (R. pp. __ (Tr. at 206:22-207:20)).

South Carolina Department of Natural Resources (“SCDNR”) to prevent impingement or entraining of aquatic species while the pipeline is being installed through non-HDD crossings. (R. p. __ (Respondent’s Ex. 1); R. pp. __ (Petitioner’s Ex. 8)).

Assessment of Potential Impacts to Natural Resources

SCDHEC received a comment letter from SCDNR addressing natural resource concerns associated with the Project. (R. pp. __ (Petitioner’s Ex. 8); R. pp. __ (Tr. at 121:20-122:16 & 172:25-173:4)). In particular, this letter addressed documented occurrences of State Wildlife Action Plan (“SWAP”) fish species in waters crossed by the pipeline and SWAP plant species. (R. pp. __ (*Id.* at Petitioner’s Ex. 8)). It also addressed documented occurrences of federally endangered sturgeon species in the Great Pee Dee River, and nearby occurrences of two federally at-risk or endangered plant species in in the vicinity of the Project. (R. pp. __ (*Id.* at Petitioner’s Ex. 8)). Finally, the letter addressed the pipeline’s crossing through the Pee Dee Station Wildlife Management Area, which is managed by the South Carolina Department of Natural Resources, and through a 146-acre private tract that is protected by conservation easement. (R. pp. __ (*Id.* at Petitioner’s Ex. 8)).

The author of the SCDNR comment letter, Greg Mixon, testified before the ALC that he reviewed the conditions included in the Department’s February 4, 2022 NODD for the Certification. (R. pp. __ (Tr. at 136:25-137:16 & 138:7-17)). These conditions were developed by SCDHEC in coordination with Dominion Energy, based on the recommendations or stipulations included in Mr. Mixon’s letter. (R. pp. __ (Tr. at 173:25-175:23)). After reviewing the conditions in the NODD, Mr. Mixon felt SCDNR’s concerns with the Project had been addressed. (R. pp. __ (Tr. at 138:18-22)).

SCDHEC staff testified, as a general matter, that the Department relies on input from State and Federal resource agencies to evaluate impacts to wildlife and plants. (R. pp. ___ (Tr. at 188:2-9); R. pp. ___ (Petitioner’s Ex. 75 at 51:16-22, 53:24-54:3, & 55:3-14)). Mr. William Wenerick, the SCDHEC project manager who reviewed Dominion Energy’s application, testified he received the necessary input from state and federal resource agencies needed to complete the Department’s review of the Project. (R. pp. ___ (Tr. at 190:6-17)). In addition to input from SCDNR, Mr. Wenerick also reviewed, and relied on, a “No Effect” letter from the United States Fish and Wildlife Service addressing potential impacts to federal threatened and endangered species, which was included in Dominion’s application materials for the Project. (R. pp. ___ (Tr. at 188:10-189:12)).

Public Notice and Public Hearing

Dominion Energy submitted initial application materials for the Project to SCDHEC on May 13, 2021 and revised application materials on June 2, 2021. (R. pp. ___ (Respondent’s Ex. 5); R. pp. ___ (Tr. at 283:18-21)).

A public notice for the Project was issued by SCDHEC on June 8, 2021, providing a 15-day period for public comment through June 23, 2021. (R. pp. ___ (Tr. at 158:10-16)). The public notice was published to SCDHEC’s public notice website. Notice of the Project was also provided via mail to adjacent property owners, government agencies with interest in the Project, and to list of parties asking to be informed by mail or email of water quality certifications issued by SCDHEC. (R. pp. ___ (Tr. at 158:17-159:7)). Dominion Energy published notice of its application in the newspaper. (R. pp. ___ (*Id.* at Tr. pp. 158-159)). SCDHEC also published an abbreviated version of the public notice in *The State* newspaper. (R. p. ___ (Respondent’s Ex. 1, Staff Assess. p. 18)).

Beyond the public notice required by for the Project, SCDHEC took additional steps to provide information about the Project. Specifically, the Department created a separate informational webpage for the Project, which included Dominion Energy’s application materials and copies of the comments submitted during the initial 15-day public notice period. (R. p. __ (Tr. at 178:8-16)).

SCDHEC held a virtual public hearing concerning the Project on October 14, 2021, in response to requests for such a hearing from the public. (R. p. __ (Respondent’s Ex. 1, Staff Assess., p. 18); R. pp. __ (Tr. at 176:19-177:7)). As required by regulation, a second 15-day public comment period was opened by SCDHEC after the public hearing.¹³ (R. p. __ (*Id.* at Tr. p. 176)).

The Department went to great lengths to provide notice of the October 14 public hearing. (R. p. __ (Respondent’s Ex. 1, Staff Assess. p. 18); R. pp. __ (Tr. at 177:8-179:23)). The parties who requested the public hearing were given direct notice. Also, notice of the public hearing was published in the *Florence Morning News*, posted to SCDHEC’s webpage for the Project, and provided via flyers at two library branches in Pamplico and Johnsonville, South Carolina. (R. pp. (*Id.* at Respondent’s Ex. 1 & Tr. pp. 177-179)). The local libraries posted the flyer in their buildings and to their social media accounts. The public hearing was held virtually via Microsoft Teams, but a call-in telephone number was also made available to the public and included in the notices of the public hearing sent by the Department. (*Id.* at Respondent’s Ex. 1 & Tr. pp. 177-179)). The public hearing was held virtually due to concerns related to COVID-19, to facilitate increased attendance and to adhere to social distancing protocols. (*Id.* at Respondent’s Ex. 1 & Tr. pp. 177-179)).

In its written Staff Assessment for the Project, SCDHEC consolidated the public comments concerning the Project submitted via letter, email, voicemail, phone, and at the public hearing. The

¹³ See Regulation 61-101(E)(4).

Staff Assessment includes detailed, substantive responses by SCDHEC and Dominion Energy to those comments, including comments submitted by members of BREDL and on behalf of BREDL. (R. pp. __ (Respondent’s Ex. 1, Staff Assess. pp. 19-42)). The Staff Assessment was made available to the public when the Department’s NODD for the Certification was issued on February 4, 2022. (R. p. __ (Respondent’s Ex. 1, NODD)).

ARGUMENT

I. The ALC properly upheld the Department’s decision to issue the Certification.

The ALC applied a “preponderance of the evidence” standard of proof and allocated the burden to BREDL to meet that standard. (R. p. __ (Order at 15)). This was proper, because BREDL was the party challenging the Department’s issuance of the Certification before the ALC and affirmatively asserting that the Certification should not have been issued. *See Sierra Club v. S.C. Dep’t of Health & Env’t. Control*, 426 S.C. 236, 257-258, 826 S.E.2d 595, 607 (2019) (“Here, Sierra Club undoubtedly bore the burden of proof before the ALC because it was challenging DHEC’s decision to renew Chem-Nuclear’s operating license”); *see also DIRECTV, Inc., v. S.C. Dep’t of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017) (“In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof”).

BREDL failed to carry its evidentiary burden at the contested case stage. On appeal, BREDL continues to bear the burden “to prove convincingly that the agency’s decision is unsupported by the evidence.” *Sierra Club v. S.C. Dep’t of Health & Env’t Control*, 426 S.C. 236, 257, 826 S.E.2d 595, 607 (2019) (citing *Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)).

BREDL has not convincingly raised any issue of fact that would warrant reversing the ALC's Order under this Court's standard of review. Specifically, BREDL has not demonstrated any detrimental impacts to water quality, navigability, or other interests protected by Regulations 61-101 and 19-450, or the federal Clean Water Act. BREDL also has not identified any controlling error of law affecting the ALC's Order.

a. The ALC's analysis of feasible alternatives was supported by substantial evidence.

The ALC's rulings concerning feasible alternatives must be upheld if they are supported by substantial evidence. *See Murphy v. S.C. Dep't of Health & Env't. Control*, 396 S.C. 633, 642 at n. 9, 723 S.E.2d 191, 196 at n. 9 (2012) (stating the applicable standard of review is "whether the ALC's finding that no feasible alternatives exist is supported by substantial evidence such that a reasonable person would reach the same conclusion as the ALC.")

The ALC's Order includes a very thorough, detailed analysis of feasible alternatives under the applicable provisions of Regulation 61-101 and Regulation 19-450. (R. pp. __ (Order at 15-21)). This analysis rested on findings of fact addressing a potential "No Action" alternative in which the pipeline would not be constructed, two potential alternative sites for the pipeline that were considered by Dominion Energy and SCDHEC, and the potential to minimize water quality impacts by using HDD at a greater number of stream and wetlands crossings. (R. pp. __ (Order at 5-8)).

The ALC's analysis of feasible alternatives culminates in a ruling that BREDL "failed to show by a preponderance of the evidence that the requirements of [R]egulations 61-101 and 19-450 with regard to feasible alternatives were not satisfied." (R. p. __ (Order at 21)). Before making that ruling, the ALC considered and made individual rulings concerning all relevant provisions of Regulation 61-101 and Regulation 19-450, including Regulation 61-101(F)(3)(b), (F)(4)(c), and

(F)(5)(b), and Regulation 19-450.9(A)(1), (A)(6), and (A)(7). (R. pp. __ (Order at 15-21)). In the absence of a definition of “feasibility” in Regulation 61-101, the ALC referred to and applied the definition of “feasibility” provided in Regulation 19-450. (R. p. __ (Order at 16)).

Notwithstanding the ALC’s lengthy consideration and detailed rulings on this issue, BREDL contends there are feasible alternatives to the Project, including a “No Action” alternative in which the Project would not be completed. (BREDL Br. at v. & 32). BREDL also argues that Dominion Energy bore the burden of proving the absence of feasible alternatives both in applying for the Certification and at the contested case stage before the ALC. (BREDL Br. at 34). These arguments fail for the reasons set forth below.

i. BREDL has misapprehended the burden of proof as to feasible alternatives.

BREDL attempts to shift the burden of proof on the issue of feasible alternatives, by arguing that Dominion Energy was required to prove the absence of feasible alternatives to prevail before the ALC. (BREDL Br. at 34). This claim is unsupported by the plain text of Regulation 61-101 or Regulation 19-450 and is inconsistent with controlling case law.

Regulation 61-101 requires the Department to consider “whether the activity is water dependent and the intended purpose of the activity” and “whether there are feasible alternatives to the activity.”¹⁴ In addition, Regulation 61-101 includes provisions that certification “will be issued” for certain activities, including public utility crossings, “when there are no feasible alternatives,”¹⁵ and a provision that certification “will be denied if...there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses.”¹⁶

¹⁴ Regulation 61-101(F)(3)(a)-(b).

¹⁵ Regulation 61-101(F)(4)(c).

¹⁶ Regulation 61-101(F)(5)(b).

Similarly, Regulation 19-450 requires the Department to consider “the extent to which...all feasible alternatives are taken to avoid adverse environmental impact resulting from the project.”¹⁷ As discussed by the ALC, Regulation 19-450.9 also includes two similar provisions in subsections (A)(1) and (A)(6), which, taken together with subsection 19-450.9(A)(7), direct the Department “to consider if the activity necessarily must impact navigable waters or if there is a feasible alternative to avoid or lessen the impacts.” (R. p. __ (Order at 16)).

BREDL erroneously suggests in its brief that feasible alternatives to the Project should have been found based on the non-water dependent nature of the Project. (BREDL Br. at 32-33). However, based on its plain language, Regulation 61-101 does not create a presumption against the applicant for certification that feasible alternatives will exist for any project that is not water dependent.¹⁸

In *Murphy v. S.C. Dep’t of Health & Env’t Control*, 396 S.C. 633, 644-645, 723 S.E.2d 191, 197-198 (2012), the South Carolina Supreme Court rejected an argument that would have required an applicant for water quality certification to overcome a presumption that feasible or “practicable”¹⁹ alternatives exist when an activity is not water dependent.

As indicated by the *Murphy* court’s analysis, Regulation 61-101 does not require the ALC to impose this presumption against applicants for water quality certification in a contested case.

¹⁷ Regulation 19-450.9(A)(7).

¹⁸ Whether an activity is “water dependent” is not a factor in the Department’s review under Regulation 19-450; however, this regulation does not establish any formal presumption against the permit applicant that feasible alternatives will exist for certain types of activities.

¹⁹ The *Murphy* court referred to “practicable” alternatives as well as feasible alternatives because the ALC in that case equated the undefined term “feasible” in Regulation 61-101 with “practicableness” as defined in federal regulatory guidelines.

Such a presumption *is* found in federal regulatory guidelines, known as the 404(b)(1) guidelines, which are used by the Corps to evaluate permits for dredge or fill activities under section 404 of the CWA.²⁰ The ALC in *Murphy* had relied on those guidelines for the purpose of clarifying the undefined term “feasible” in Regulation 61-101. However, the Court held that the ALC was not required to adopt, or “import,” the entire federal regulatory framework for purposes of a proper feasible alternatives analysis under Regulation 61-101. For that reason, the applicant for water quality certification in *Murphy* was not assigned the evidentiary burden of overcoming a presumption that feasible alternative existed. In other words, the applicant was not required to demonstrate an absence of feasible alternatives in order to prevail before the ALC.

Rather than citing *Murphy*, which is on point, BREDL cites *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t. Control*, 411 S.C. 16, 43-44, 766 S.E. 2d 707, 723 (2014), which is not. (BREDL Br. at 34). The latter case dealt with regulatory standards for construction of bulkheads and revetments in coastal waters and tidelands. That Court found in the language of S.C. Code Ann. Regs. 30-12(C) (“Regulation 30-12(C)”) a presumption against the permit applicant, which required the applicant to show there are no feasible alternatives. *Id.* at 44, 766 S.E.2d at 723. Therefore, the Court held that the permit applicant should have borne the burden of overcoming that presumption before the ALC.²¹ This holding was based on the specific project standards and language of Regulation 30-12(C). Those standards are not relevant to the requirements found in Regulation 61-101.

²⁰ See 40 C.F.R. § 230.

²¹ While the permit applicant in *Kiawah Development Partners, II*, was assigned the burden of proof with regard to feasible alternatives, the applicant in that case was the petitioner before the ALC. 411 S.C. at 26, 766 S.E.2d at 713. In other words, the permit applicant in *KDP, II* was positioned like BREDL in this case, as the party affirmatively challenging the Department’s decision before the ALC.

Pursuant to *Murphy*, Dominion Energy was not required to show the absence of feasible alternatives in order for the ALC to uphold issuance of the Certification. BREDL, as the party affirmatively asserting the existence of feasible alternatives, was required to carry the burden of proof on this issue. However, even if the burden were to be placed on Dominion Energy and/or SCDHEC, substantial evidence supports the ALC's rulings on this issue.

ii. The ALC properly evaluated a "No Action" alternative to the Project.

BREDL asserts there is a viable "No Action" alternative to the Project. (BREDL Br. at v & 10). While BREDL presented testimony from Mr. Louis Zeller that "[o]ur alternative is the no-build alternative," this testimony was not accompanied by any other evidence demonstrating it would be feasible for Dominion Energy not to complete the Project. (R. p. __ (Tr. at 70:8-11)). As such, Mr. Zeller's testimony amounts to an expression of policy preference, not a showing of feasibility.

By contrast, Dominion Energy presented detailed testimony explaining its need to construct a 16-inch natural gas pipeline to meet projected energy demand. This testimony addressed, *inter alia*, Dominion Energy's estimates of population growth in the eastern South Carolina area (R. pp. __ (Tr. 219:18-221:14 & 223:4-12)), the percentage of customers in that area anticipated to be served by natural gas (R. p. __ (Tr. 222:2-22)), and the modeling process used by Dominion Energy as a basis for determining that a 16-inch diameter pipeline was needed in addition to the existing 8-inch line (R. p. __ (Tr. 226:22-229:24)). This testimony also explained that Dominion Energy has needed to use a supplemental supply of liquid natural gas or compressed natural gas to meet demand during the winter months. (R. pp. __ (Tr. 237:6-238:4)). Based on these considerations, Dominion Energy rejected a "No Action" alternative because it would not meet its need for the Project. (R. p. __ (Tr. at 239:9-14)).

Similarly, SCDHEC’s Staff Assessment notes that Dominion Energy alternative eliminated the “No Action” because it would not meet the project purpose, which was described as “support[ing] growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas.” (R. pp. __ (Respondent’s Ex. 1, Staff Assess. pp. 2 & 9)).

The ALC thoroughly discussed this evidence in its Order. (R. pp. __ (Order at 4-5 & 17)). Manifestly, this evidence supports the ALC ruling that “[t]he ‘No Action’ alternative was reasonably rejected because it would not meet the needs that were demonstrated for additional pipeline capacity.” (R. p. __ (Order at 17)).

While BREDL presented no evidence to support the feasibility of a “No Action” alternative, it now argues on appeal that SCDHEC and Dominion Energy “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 [*sic*] natural gas (LNG) during cold weather events is unsustainable.” (BREDL Br. at 35). As discussed above, this claim misconstrues the burden of proof as to feasible alternatives. Moreover, this argument is unconvincing based on the whole record.

The ALC did not admit Horry County’s population projections for the truth of the matter asserted (R. pp. __ (Tr. at 230:3-233:18)). However, Dominion Energy’s analysis of the need for the Project included the company’s own population projections from its Resource Planning group (R. pp. __ (Respondent’s Ex. 2); R. p. __ (Tr. at 221:2-14 & 233:10-21)). These estimates were admitted into evidence by the ALC and, according to testimony from Dominion Energy, these estimates were similar to those of Horry County (R. p. __ (*Id.* Tr. at 223:21-25)). Furthermore, counsel for BREDL could have, and did not, cross-examine Dominion Energy’s relevant witness,

Mr. Priester, regarding LNG or compressed natural gas (“CNG”) in an effort to show that continuing reliance on LNG/CNG operations would be a feasible and sustainable alternative to the Project. (R. pp. __ (Tr. at 237:6-238:4 & 257:13-273:17)). Given this evidentiary record, the ALC properly concluded that a “No Action” alternative would not meet the need for the Project.

- iii. The ALC carefully evaluated whether increased use of HDD constituted a feasible alternative.

BREDL also argues that SCDHEC should have “conditioned the project on utilizing HDD wherever it could have been done” at wetland and stream crossings. (BREDL Br. at 36). This argument is unpersuasive based on the whole record before the ALC.

During its review of the Project, SCDHEC asked Dominion Energy to address whether HDD could be used at additional crossings to avoid further impacts to jurisdictional waters. (R. pp. __ (Respondent’s Ex. 1, Staff Assess. pp. 9-10); R. p. __ (Tr. at 194:5-9)). Dominion Energy provided a detailed response, which was incorporated in part in SCDHEC’s Staff Assessment. (R. p. __ (*Id.* at Respondent’s Ex. 1)). Furthermore, Dominion Energy presented testimony addressing the numerous operational, technical, and environmental considerations involved in determining whether use of HDD is appropriate. (R. pp. __ (Tr. at 243:8-246:15, 253:1-257:7, & 285:5-288:10)).

The ALC’s Order includes a nuanced discussion of the pros and cons of using HDD based on site-specific considerations at the time of construction of the pipeline. (R. pp. __ (Order at 17-19)). This discussion was based on substantial evidence and establishes that it was appropriate and reasonable for SCDHEC to allow Dominion Energy the option to choose between HDD and open trench excavation when conducting stream and wetland crossings. As discussed above (*supra* at 11-12), the Certification includes conditions specifically addressing both HDD and open trench crossings. Those conditions serve the purpose of minimizing environmental and water quality

impacts, regardless of which crossing method is used. BREDL has not demonstrated that these Certification conditions are insufficient to address potential impacts whether from HDD or open trench excavation.

b. The ALC did not err in ruling that baseline well testing to assess potential drinking water impacts was not required under Regulation 61-101(C)(3).

BREDL argues the Certification should have been denied because Dominion Energy and SCDHEC did not assess potential drinking water impacts, and that baseline well testing should have been performed before construction of the pipeline, to assess whether construction and operation of the pipeline will have a detrimental impact on drinking water. (BREDL Br. at 36). As part of this argument, BREDL cites Dominion Energy’s finding that wastewater discharges for the area around the Project are above the 75th percentile, indicating that a number of industry and municipal locations are already discharging in the area. (*Id.*).

The ALC conclusively addressed this argument. (R. p. __ (Order at 32)). As noted by the ALC, Regulation 61-101(C)(3) would enable SCDHEC to require water quality monitoring data, or “other environmental assessment,” as part of its handling of Dominion’s application for the Project. However, this subsection of the regulation uses “the permissive word ‘may.’” Based on this permissive language, ALC concluded that SCDHEC “lawfully exercised its discretion not to enforce such a requirement [for baseline well testing], and the Court cannot find error in its decision based upon the evidence.” (R. p. __ (Order at 32)). This ruling is correct as a matter of law, because the language of Regulation 61-101(C)(3) is discretionary and permissive in nature. *See Cricket Store 17, LLC v. City of Columbia Board of Zoning Appeals*, 428 S.C. 270, 276, 834 S.E.2d 209, 212 (Ct. App. 2019) (“The use of the ‘may’ signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning” (citation and ellipsis omitted)).

BREDL presented testimony from Reverend Calvin Johnson expressing concern about potential impacts to his well water at his property adjacent to the pipeline. (R. pp. ___ (Tr. at 35:11-16, 39:8-12, & 42:10-43:4)). However, BREDL did not elicit testimony from Reverend Johnson about where his drinking water well is located on his property, which is “approximately 30 acres” in size, in relation to the location of the proposed pipeline. (R. p. ___ (Tr. at 34:14)). More generally, BREDL presented no evidence whatsoever of the location of drinking water wells in the community around the pipeline, or any evidence of effects on drinking water or water quality caused by the already existing 8-inch natural gas pipeline. On cross-examination, for example, Mr. Zeller conceded he was unaware of any accidents or damage caused by the 8-inch pipeline (R. pp. ___ (Tr. 70:23-71:3)).

In granting the Certification, SCDHEC determined that the Project will not remove the classified uses of the waters impacted by the Project. (*Supra* p. 9). As indicated in SCDHEC’s Staff Assessment, the waters located in the Project site are classified as “Freshwaters” and the Department considered the water quality standards of Regulation 61-68 in evaluating the Project. (R. pp. ___ (Respondent’s Ex. 1, Staff Assess. pp. 1 & 42)). Under State water quality standards, waters classified as “Freshwater” are considered “suitable...as a source for drinking water supply after conventional treatment in accordance with the requirements of the Department.”²² BREDL has not presented any evidence demonstrating that the classified uses of the waters in the Project site will be impaired, that the Project will impact groundwater on adjacent properties, or that the Project will increase discharges of wastewater in the area.

Accordingly, as a question of substantial evidence, there is no basis for concluding that SCDHEC should have required baseline well testing in completing its review of the Project. *See*

²² Regulation 61-68(G)(10).

Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 605, 670 S.E.2d 674, 676 (Ct. App. 2008) (noting that substantial evidence must be “more than a mere scintilla of evidence.”)

- c. The ALC did not err in ruling that issuance of the Certification is consistent with Regulation 61-101(F)(5)(c) and adverse impacts to waters containing State or Federally recognized rare, threatened, or endangered species were not demonstrated.**

BREDL claims the Project will directly and indirectly impact State and Federal rare, threatened and endangered species. (BREDL Br. at 37). This claim cannot survive scrutiny under this Court’s “substantial evidence” standard of review because BREDL has not demonstrated any impacts to rare, threatened, or endangered species or waters containing such species.

In its comment letter concerning the Project, SCDNR noted documented occurrences of several State Wildlife Action Plan (“SWAP”) fish species in waters crossed by the pipeline. (R. pp. __ (Petitioner’s Ex. 8); *supra* at 12) SCDNR also noted documented occurrences of federally endangered sturgeon in the Great Pee Dee River, and federally endangered and threatened plants nearby the Project site. However, based on the testimony of Greg Mixon, who authored the SCDNR letter, SCDHEC’s conditions on the Project as included in the Department’s NODD were sufficient to address SCDNR’s concerns related to these species.²³ (R. pp. __ (Tr. at 138:18-22)). In his testimony, Mr. Mixon also confirmed that several SWAP plant species had been noted in an earlier SCDNR letter, which is not in evidence. (R. pp. __ (Tr. at 125:13-126:24)). Again, however,

²³ As noted in the ALC’s Order and as supported in the record, species may be included as SWAP species by SCDNR for a variety of reasons. Such species are not necessarily rare, threatened, or endangered in South Carolina. (R. p. __ (Order at 11); R. pp. __ (Tr. at 123:1-124:12)). In that regard, it is notable that Mr. Mixon’s letter and testimony do not explain why the particular SWAP species noted to occur in the Project waters were designated as SWAP species. (R. pp. __ (Petitioner’s Ex. 1); R. pp. __ (Tr. at 124:18-126:24)).

Mr. Mixon did raise any concerns that such species would be adversely impacted, based on the NODD conditions he reviewed for the Project.

Further, the record before the ALC shows that potential impacts to other federally protected species were considered by both SCDHEC and Dominion Energy. SCDHEC staff testified to reviewing a “No Effect” determination letter from the U.S. Fish and Wildlife Service that was included in Dominion Energy’s application materials. (R. pp. __ (Tr. at 188:10-189:12)). BREDL suggests this letter was hearsay (BREDL Br. at 16). However, SCDHEC staff testified to their review of Dominion’s application materials and confirmed that these materials contained sufficient input from State and Federal resource agencies. (R. pp. __ (Tr. at 190:6-17)). Dominion Energy offered testimony corroborating that an assessment of threatened and endangered species was included in its application materials. (R. pp. __ (Tr. at 288:11-19)).

Ultimately, BREDL did not submit evidence that any waters containing State or Federal rare, threatened, or endangered species would be adversely impacted. There also is no evidence of standing concerns about the Project on the part of SCDNR or any other government resource agency based on SCDHEC’s conditions for the Project. Based on this evidentiary record, the ALC properly upheld the issuance of Certification under Regulation 61-101(F)(5)(c). *See A.O. Smith Corp. v. S.C. Dep’t of Health & Env’t Control*, 428 S.C. 189, 201, 833 S.E.2d 451, 457 (Ct. App. 2019) (“Substantial evidence is not the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the [ALC] reached in order to justify its action.” (ellipsis omitted; brackets in original)).

In addition to ruling on Regulation 61-101(F)(5)(c), the ALC considered and ruled on Regulation 19-450.9(A)(3), which requires consideration of “the extent to which...the activity would impact fish and wildlife, water quality and other natural resource values or could affect the

habitats or [*sic*] rare and endangered species of wildlife and irreplaceable historic and archeological sites associated with public lands and waters.” As noted by the ALC, Jeffries Creek is the lone State navigable water affected by the Project and it will be crossed via HDD. No impacts to fish and wildlife surrounding Jeffries Creek, or to the habitats of rare and endangered species, were proven by BREDL.²⁴ (R. p. __ (Order at 24)).

d. Substantial evidence supports the ALC’s ruling that special and unique habitats will not be adversely impacted and only one State navigable water is located in the Project site.

The ALC “conclude[d] that [SCDHEC’s] issuance of the Certification is consistent with subsection 61-101(F)(5)(d)” of Regulation 61-101. (R. p. __ (Order at 22)). This subsection provides that “[c]ertification will be denied if... 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.” Further, the ALC ruled that the Project does not violate Regulation 19-450.9(A)(4) by affecting public access to and use of public lands. (R. p. __ (Order at 22)).

Both conclusions were supported by substantial evidence. As discussed by the ALC, BREDL presented no evidence showing that the Project will impact the Great Pee Dee River, the Pee Dee Station Wildlife Management Area, or the privately owned tract protected by a conservation easement. (R. p. __ (Order at 22)). The scenic segment of the Great Pee Dee River is more than a mile downstream of the pipeline. There is also a confluence of another creek between the pipeline and the Great Pee Dee’s scenic portion. (R. p. __ (Respondent’s Ex. 1, Staff Assess.

²⁴ With respect to archeological and historical sites, BREDL has not clearly raised any issue for appellate review. Nonetheless, it is clear that the ALC’s ruling concerning such sites was supported by substantial evidence. (R. pp. __ (Order at 12, 24-25)).

p. 12)). Under these facts, BREDL has not demonstrated how the scenic portion of the river would be adversely affected.

Again, Mr. Mixon testified that SCDHEC's conditions for the Project sufficiently addressed SCDNR's concerns. (R. pp. __ (Tr. at 138:18-22)). As indicated by his letter, Mr. Mixon was aware of both the Project's location in the vicinity of the Great Pee Dee River and of the protected lands crossed by the pipeline, which is unsurprising given the Pee Dee Station Wildlife Management Area is managed by SCDNR. (R. pp. __ (Petitioner's Ex. 8)). Surely Mr. Mixon would have raised any remaining concerns about public access and use of the Pee Dee Station Wildlife Management Area, if such concerns existed.

With respect to navigability, the ALC agreed with SCDHEC that Jeffries Creek is the only State navigable water located in the Project site that is subject to the provisions of Regulation 19-450. (R. p. __ (Order at 21)). Definitive testimony to this effect was offered by Mr. Wenerick, the SCDHEC project manager whose specific duties with the Department include review of applications for permits for construction in navigable waters projects, in addition to water quality certification applications. (R. p. __ (Tr. at 184:12-16)). Mr. Wenerick noted the same conclusion in the Staff Assessment, indicating that Jeffries Creek is a "mapped" State navigable water and that its navigability will not be impacted by the Project. (R. pp. __ (Respondent's Ex. 1, Staff Assess. pp. 2 & 11)).

BREDL's witness, Ms. Kathy Andrews, testified she had recently used a motorized boat in Jeffries Creek, as well as two other waters crossed by the pipeline, Mill Branch and Bigham Branch. (R. pp. __ (Tr. at 81:20-83:12)). However, as noted by the ALC, Ms. Andrews did not testify whether the locations where she boated were near proposed pipeline crossings. (R. p. __ (Order at 21)). Ms. Andrews also did not describe how frequently she boats on Mills Branch or

Bigham Branch, or how great a stretch of those waters she has used for boating. (R. pp. __ (Tr. at 81:20-83:12)). BREDL presented no additional evidence to substantiate its argument about the navigability of Bigham Branch or Mills Branch or use of those waters for boating.

Having considered Ms. Andrews' testimony, 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." (R. p. __ (Order at 21)). The ALC, as fact finder, is entitled to broad discretion in determining the credibility or believability of witnesses. *See Small v. Pioneer Mach. Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997). Moreover, the ALC is permitted to utilize the specialized knowledge of Department staff, such as Mr. Wenerick's knowledge of permitting requirements for State navigable waters. *See* S.C. Code Ann. § 1-23-330(d); S.C. Code Ann. § 44-1-60(F)(2) (2018) (amended by Act No. 60, 2023 S.C. Acts 302, effective July 1, 2024); *and* S.C. Code Ann. § 48-6-30(D)(2).

In the face of conflicting evidence concerning the issue of navigability, the ALC's findings of fact should be accorded deference, because they were supported by substantial evidence. *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) ("When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder."); *see also Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 605, 670 S.E.2d 674, 676 (Ct. App. 2008) ("The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." (citation omitted)).

Furthermore, pursuant to S.C. Code Ann. § 1-23-610(B), the ALC's Order should not be overturned or reversed unless its rulings cause prejudice to BREDL's substantive rights. Here, even if Mills Branch and Bigham Branch can be used to some extent for boating, BREDL has not

established any prejudice caused by the ALC's conclusion that those waters are not navigable waters subject to the provisions of Regulation 19-450.

BREDL will not be prejudiced if the Project is completed in accordance with the Certification. The Certification is conditioned on appropriate best management practices for all stream and wetland crossings, intended to minimize temporary turbidity and other potential impacts. (R. pp. __ (Respondent's Ex. 1, NODD & Staff Assess. pp. 12-13); R. pp. __ (Tr. at 184:17-188:1)). Furthermore, whether Mills Branch and Bigham Branch are crossed via HDD or open trench excavation, there will be no impact to the suitability of those waters for boating once the pipeline is installed. In that regard, it is striking that there is an existing 8-inch pipeline that is already located in the Project site, which crosses Jeffries Creek, Mills Branch, and Bigham Branch. (R. p. __ (Respondent's Ex. 1, Staff Assess. p. 1); R. pp. __ (ALC Transcript at 233:21-235:14)). The record discloses no evidence that this existing pipeline has hindered or impacted the navigability of Jeffries Creek or any other water in the Project site.

- e. The ALC correctly ruled that Regulations 61-101 and 19-450 do not require consideration of environmental justice, but also that Respondents did consider environmental justice.**

The ALC ruled that the Department was not legally required to consider environmental justice concerns or to conduct an environmental justice analysis before issuing the Certification. However, the ALC also found that both SCDHEC and Dominion Energy did consider environmental justice as part of the Certification decision-making process. (R. pp. __ (Order at 30-31)).

BREDL does not seriously challenge the legal propriety of the ALC's ruling by citing a provision of Regulation 61-101 or Regulation 19-450 that requires consideration of environmental justice. Instead, BREDL asserts that "DHEC *should* include environmental justice concerns in its

permitting decisions” (emphasis added), and that DHEC “failed to consider whether this project is consistent with the needs and welfare of the public” under Regulation 19-450.9(A). (BREDL Br. at 42 & 44).

These arguments are without merit. BREDL’s brief almost entirely ignores the extensive efforts made by SCDHEC to provide information about the Project to the public and to obtain public input through a public hearing, as well as the significant efforts made by the agency to respond to public comments in its Staff Assessment. BREDL also ignores Dominion Energy’s independent efforts to address environmental justice concerns, which were described in testimony. (R. pp. __ (Tr. at 291:4-292-6)).

The Department’s environmental justice coordinator for the agency’s Office of Environmental Affairs completed an environmental justice screen for the area surrounding the proposed pipeline coordination. (R. p. __ (Respondent’s Ex. 1, Staff Assess. p. 17)). This coordinator also assisted with reaching out to contacts in the community around the pipeline and using local libraries for purposes of giving notice of the public hearing. (R. pp. __ (Tr. at 178:25-179:7)). Furthermore, the Department chose to hold a public hearing to solicit community input and involvement, even though the number of requests received for a hearing was not great enough to require one under Regulation 61-101(E)(2). (R. pp. __ (Tr. at 179:24-180:11)).

BREDL attempts to find flaws in the application materials submitted by Dominion Energy to the Department that would warrant denial of the Certification under Regulation 61-101(C). (BREDL Br. at 41-44). The ALC addressed each of those alleged flaws persuasively and in detail, explaining either why BREDL’s rights were not prejudiced or why, under the ALC’s preponderance of the evidence standard, the Certification was properly issued based on the requirements of Regulation 61-101(C). (R. pp. __ (Order at 31-35)). Ultimately, BREDL cannot show that its

members or other community members were deprived of meaningful involvement at any stage of SCDHEC’s review and issuance of the Certification; on the contrary, as stated by the ALC, “the Department gave the surrounding community ample opportunity to meaningfully participate in the permitting process.” (R. p. __ (Order at 34)).

CONCLUSION

Wherefore, for the foregoing reasons, Respondent South Carolina Department of Environmental Services respectfully requests that the Court affirm the decision of the Administrative Law Court upholding the Department’s issuance of the Certification.

Respectfully Submitted,

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