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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

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Appellate Case No. 2023-001351

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Blue Ridge Environmental Defense League, Appellant,

v.

South Carolina Department of Environmental Services and Dominion Energy, Respondents.

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# FINAL REPLY BRIEF OF APPELLANT

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Stephen A. Spitz
A Business Law Firm
334 East Bay Street, #194
Charleston, South Carolina 29401
(843) 577-6531

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181

ATTORNEYS FOR APPELLANT
BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE

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### I. The Army Corp's Issuance of a Section 404 Permit (NWP 12) does not render this appeal moot.

#### A. Recent federal rulemaking expressly states that certifications can be modified *after* issuance of a federal permit.

Contrary to Dominion's contention, the Army Corp's issuance of a federal permit is not "an intervening event that renders BREDL's request for relief impossible." Recent federal rulemaking expressly states that there are no time limits as to when modification of certifications can occur and that modifications of certifications can happen both prior to *and after* issuance of a federal permit. See Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558 (2023) at 66630, stating:

> EPA requested comment on whether the certification modification process should account for (1) whether there is a Federal license or permit modification process already in place and (2) the point in time at which a modification may be made (*e.g.,* if new information supporting a modification arises either before or after issuance of the license or permit). The Agency is not including a time limit on when modifications can occur so that modifications can happen at any time after the reasonable period of time ends, including prior to and after the issuance of a Federal license or permit until the expiration of the license or permit.
>
> […]
>
> After considering public comment, the Agency is promulgating a final rule at § 121.10 that provides the opportunity for certification modification at any point after certification issuance (until the expiration of the Federal license or permit), provided the Federal agency and the certifying authority agree in writing prior to modifying the grant of certification. As commenters noted, changes to an activity with implications for water quality can occur at any point in time after a certification is granted. Accordingly, the Agency finds this approach best reflects the reality that projects change over time and provides flexibility for project proponents, certifying authorities, and Federal agencies to adapt to changing circumstances without needing to reinitiate the certification process. [1]

[1] https://www.govinfo.gov/content/pkg/FR-2023-09-27/pdf/2023-20219.pdf

Footnote 91 of this volume of the Federal Register provides even further guidance on the extent to which the EPA limits modifications of certification decisions. Notably, although the EPA places certain limitations on a certifying authority's ability to *unilaterally* vacate or revoke a certification and even places certain limitations on a certifying authority's ability to revoke a grant of certification pursuant to § 121.10, referenced *supra*, these limitations do not extend to instances where a certifying authority revokes or reverses a certification upon remand from a court or administrative tribunal as BREDL seeks to do in the instant appeal:

> This statement and more broadly § 121.10 of this final rule are not meant to address certifying authority action on a request for certification upon remand from a court or administrative tribunal of the certifying authority's initial action on the request. Section 121.10 is also not intended to address or govern court vacatur of certification decisions, or action by a certifying authority after a court vacatur (although the Agency notes that it is unclear how a vacated certification decision could be ''modified''). This final rule does not address the situations of vacatur or remand by a court or administrative tribunal.

Because modifications of certifications can happen both prior to *and after* issuance of a federal permit, this appeal is not mooted as a result of the Army Corp's issuance of the Section 404 Permit. Further, because limits on modifying certifications do not extend to instances where a certifying authority revokes or reverses a certification upon remand from a court or administrative tribunal, BREDL is free to seek revocation of the 401 Water Certification on appeal.

**B. Issuance of a federal permit does not moot the appeal because this Court has the ability to grant effectual relief in this case.**

Both BREDL and DHEC[2] agree that issuance of the federal permit does not moot this appeal and have previously addressed Dominion's mootness allegation to this Court. (See

[2] During the course of initial briefing, the South Carolina Department of Health and Environmental Control (DHEC) was abolished and all of its functions, powers and duties were transferred to the South Carolina Department of Environmental Services. For purposes of clarity and continuity of record, all references herein continue to be to DHEC.

BREDL Petition for Supersedeas, beginning at R. p. 1269; DHEC Return to Petition for Supersedeas at R. pp. 1396-1403; BREDL Reply to Dominion's Return to Petition for Supersedeas, beginning at R. p. 1559, each of which challenge Dominion's mootness claims).

Pursuant to 33 C.F.R. § 330.4(7), a State's withdrawal of a 401 Water Quality Certification for substantive reasons can indeed provide sufficient grounds for suspension, modification, or revocation of a Section 404 Permit by the Army Corp. "Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5." 33 C.F.R § 330.4(7). With regard to an NWP 12—the exact type of permit at issue here—footnote 1 of the federal regulation, expressly states that the 401 Water Quality Certification is a requirement of the permit, "NWPs numbered 12, 15, 16, 17, 25, 26, and 40 involve activities which would result in discharges and therefore 401 water certification is required." Id. at n. 1

Here, if BREDL succeeds in having the Section 401 Certification revoked as a result of this appeal, the Army Corp will have a viable basis (i.e. a substantive reason) for reviewing and revoking the permit. As noted above, the Section 401 Water Certificate is a requirement for the NWP 12 permit and the Army Corp is expressly authorized to revoke a previously issued permit upon a state's subsequent withdrawal of a 401 Water Quality Certification—the very relief sought by BREDL in this appeal. See also 33 C.F.R. § 325.7(a), authorizing the Army Corp to "reevaluate the circumstances and conditions of any permit, including regional permits, either on [its] own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made

necessary by considerations of the public interest." Should BREDL prevail in having the 401 Certification revoked as a result of the appeal, the Army Corp will have a substantive reason to revoke the permit on its own initiative or upon the subsequent application of BREDL and/or DHEC.

As stated by the South Carolina Supreme Court, "[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders *any grant of effectual relief impossible for the reviewing court*." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (citation omitted) (emphasis added). Here, both BREDL and DHEC agree that this Court has the ability to render a decision that would grant effectual relief in this case; therefore the case is not moot. (DHEC Return to Petition for Supersedeas at R. pp. 1396-1403).

Specifically, there are at least two grounds for concluding that effectual relief is possible in this case should this Court rule in favor of BREDL. (R. at Ibid.). First, as set for the above, Federal Regulation expressly authorizes the Army Corp to revoke a permit upon a State's withdrawal of a Section 401 Water Quality Certification—the very relief sought by BREDL in the instant appeal. (R. at Ibid.). Because a state-issued 401 Water Quality Certification is expressly required under Federal Regulation in order for the Army Corp to even issue an NWP 12 (the type of Section 404 Permit at issue in this case), there is, minimally, a significant possibility, if not guarantee, that the Army Corp would modify, retract, or suspend the permit. As even DHEC notes, with a supporting affidavit from its own Manager of Water Quality Certification and Wetlands, "there is a significant possibility that the Corps would give effect to a decision of this Court affecting the validity or conditions of the Certification issued to

Dominion." (DHEC Return to Petition for Supersedeas at R. p. 1398; see Affidavit in Support at R. pp. 1410-1412).

Second, the Certification issued to Dominion is not required solely as a precondition to obtaining a federal permit from the Army Corps. The Certification also serves the purpose of assuring the Project will not violate applicable water quality standards, as required by R. 61-101 and the Clean Water Act. (See DHEC Return to Petition for Supersedeas, R. at p. 1399). Further, the Certification serves a second purpose of assuring the Project complies with the requirements of R. 19-450 applicable to construction activities affecting the State's navigable waters. This second purpose is based exclusively in state law, rather than stemming from the requirements of the federal Clean Water Act. (R. at Ibid.).

As previously noted by the ALC, R. 19-450 expressly exempts activities that require a water quality certification (such as this Project) from obtaining a separate permit for construction in navigable waters from DHEC.[3] Crucially, as BREDL and DHEC have previously raised to the Court of Appeals, this exemption from permitting does not mean the Project is exempt from complying with the requirements of R. 19-450, which are at issue on this appeal. On the contrary, R. 61-101 provides the Certification issued by DHEC "will serve as the permit" that would otherwise be required by R. 19-450.[4] In turn, R. 19-450 imposes a requirement on DHEC staff "to insure that the provisions of this regulation are adhered to" in issuing the Certification.[5] Even if issuance of a federal permit were to, assuming *arguendo*, moot any further appellate review focused on whether the Certification complies with the requirements of R. 61- 101 and the Clean Water Act, it would not moot the issue of whether the Certification sufficiently

[3] S.C. Code Ann. Regs. 19-450.3.G.
[4] S.C. Code Ann. Regs. 61-101.A.9.
[5] S.C. Code Ann. Regs. 19-450.3.G.

complies with the provisions of R. 19-450. A decision of this Court could provide effectual relief if it were to identify substantive problems pertaining to R. 19-450.

Finally, BREDL shares DHEC's previously voiced concern that adoption of Dominion's mootness argument as binding law with regard to Section 404 Permits would have the effect of truncating or in some cases precluding review of Department's water quality certification decisions in the Administrative Law Court or judicial review by this State's appellate courts, as specifically contemplated by the Department's enabling statutes and the Administration Procedures Act.[6] (DHEC Return to Petition for Supersedeas at R. p. 1397).

Because this Court has the ability to render a decision that would grant effectual relief in this case, the appeal is not moot. Accordingly, BREDL respectfully requests that this Honorable Court look beyond Dominions attempt to avoid judicial scrutiny, reverse the ALC decision, and deny Certification.

**C. There is no South Carolina Precedent requiring the Court to find this appeal moot.**

Respectfully, Dominion's return mischaracterizes the case law in this matter, citing *Triska v. Dep't of Health & Env't Conrtol*, 292 S.C. 190, 355 S.E.2d 531, 534 (1987), for the proposition that revocation of a Section 401 Certification would have no effect on a federal permit, rendering judicial challenges moot. This is incorrect.

*Triska* is discussed in the ALC's Supersedeas Order as part of its mootness analysis. As acknowledged by Judge Anderson, that case involved distinct facts and issues from the current case. (Supersedeas Order at R. p. 1261). Specifically, the Department in *Triska* attempted to *unilaterally* revoke a water quality certification five years after its issuance and after issuance of permits by the Army Corps and the South Carolina Coastal Council. The primary issue decided

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

by the Supreme Court had nothing to do with mootness, but rather the decision focused on "whether *DHEC* has authority to review, suspend, and revoke a 401 Certification after it has been granted by the agency *and the appeals process expired*." *Triska*, 29210 S.C. at 194. Emphasis added. Contrary to Dominion's contention, the question of mootness was neither raised nor ruled upon by the Supreme Court.[7] Further, unlike *Triska*, the appeals process in the instant case has not expired.

Dominion's mootness argument is also directly undermined by long-standing cases like *Murphy v. South Carolina Dep't of Health & Envt'l Control,* 396 S.C. 633, 723 S.E.2d 191 (2012). Just like this case, *Murphy* involved a challenge to a 401 Certification granted by DHEC. *See* 396 S.C. 633, 636, 723 S.E.2d 191, 192 (2012). Just like this case, the Corps issued its Section 404 permit after DHEC issued its 401 Certification, and while the challenge to the 401 Certification was pending. *Id.* at 638, 723 S.E.2d 194.

Under Dominion's theory, the Appellant's challenge to 401 Certification in *Murphy* should have been rendered moot when the Corps issued a federal permit. However, the *Murphy* case continued for several years after issuance of the federal permit, with the South Carolina Supreme Court considering whether DHEC should have issued its 401 Certification, even though the Section 404 federal permit had already been issued and had not been challenged. *Id.* ("The issuance of this [Corps 404] permit has not been challenged)." Indeed, the Supreme Court explicitly stated that the Corp's issuance of its Section 404 permit was "not dispositive" to the

[7] The *Triska* Court noted that it would be "a futile act" *for DHEC* to unilaterally revoke its certification "unless the permitting agencies subsequently suspended and revoked their respective permits." 292 S.C. at 196. As supported by Mr. Hightower's affidavit (DHEC's Manager of Water Quality Certification and Wetlands), it is not "futile" for this Court to decide the merits of this case, because a judicial decision granting BREDL relief would create a significant possibility that the Corps would proceed with suspension, modification, or revocation of its authorization for this Project. (DHEC Return to Petition for Supersedeas at R. p. 1401, n. 1; and Affidavit, R. pp. 1410-1412).

Court's 401 Certification analysis. *Id.* at 645, 723 S.E.2d at 198 ("Additionally, although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the District had overcome these presumptions and established no practicable alternatives existed.") Minimally, even if not considered binding precedent, *Murphy* supports the proposition that state court review of water quality certifications can occur well after issuance of a federal permit by the Corps.

Further, as persuasive authority, both BREDL and DHEC note the Montana Supreme Court's analysis in *Hi-Line Sportsmen Club v. Milk River Irrigation Districts*, 786 P.2d 13 (Mont. 1990). (DHEC Return to Motion to Supersedeas at R. p. 10). In that case, litigation was focused on water quality certifications that had been issued by the State of Montana for a hydroelectric project requiring a license from the Federal Energy Regulatory Commission ("FERC"). FERC had amended its regulations to retroactively change the waiver requirements applicable to the state's certifications. As a result of those amendments, it was argued that the State of Montana's certifications for the project had been waived and that the appeal was moot. The Montana Supreme Court rejected this claim based on the following mootness analysis:

> It is however, not clearly established in the record that even though FERC may consider that the certifying agencies in Montana have waived the right to certify, that the decisions of a certifying agency, as modified by the courts, would have no effect on the eventual action of the FERC. In other words, the FERC, as far as the record here discloses, may yet give effect to the action of this state regarding the certifications. The eventual handling of the waiver question by the FERC, and the effect that the FERC will give to any waiver it finds, is completely within the discretion of the FERC and not foreseeable by us. For that reason, we have denied the motion to dismiss these proceedings as moot. *Id.* at 17.

In the present case, the Corps "may yet give effect" to a decision of the Court, should the Court decide to rule against the Department and Dominion and grant relief to BREDL. Accordingly, the appeal is not moot.

## II. There is no substantial evidence in the record to support the ALC's finding that a project need exists.

Dominion contends that it proffered sufficient evidence in the record to support the ALC's finding that the Project is needed to serve an increasing demand for natural gas in South Carolina due to "projected residential and commercial growth" and "current seasonal demands." (Dominion's Final Brief, p. 13, citing Final Order, p. 4). In support of its claims, Dominion points to the testimony of Mr. Robert Priester. (Ibid. at p. 11).

Mr. Priester, a Project Manager for Dominion and licensed Professional Engineer, testified that Dominion anticipated an increase in natural gas demand for the area served by the Project through 2050 using information derived from its own Planning Group and population growth estimates from Horry County. (R. pp. 710:2-712:24). Mr. Priester, however, was notably never qualified as an expert witness and, therefore, did not offer testimony to any degree of professional certainty with regard to claims of projected population growth, commercial growth, or the needs that Dominion claims to anticipate.[8] Indeed, Mr. Priester testified he is not aware with what certainty Dominion claims its projected growth will actually occur. (Exh. 76, Priester Desig., 24:4-13 at R. p. 838). None of his testimony regarding purported project need was offered for the truth of the matter asserted.

This is not the only time that Dominion has run into issues for failing to qualify a witness. During the supersedeas hearing before the ALC on remand from the Court of Appeals, Dominion's witness, Mr. Zachary West (also a Dominion employee and Professional Engineer), could not testify as to any of the calculations on which he based his opinions regarding project

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

need. Specifically, Mr. West acknowledge that he did not perform any of the calculations on which he based his opinion, that his opinion was based on the calculations of other undisclosed persons within the organization, who were not identified or made available for examination. (Transcript, Exhibit A, at R. pp. 1567:6-1570:25). Mr. West also acknowledged that he lacked the requisite knowledge or qualifications to render opinions as to expected population growth, weather, transportation costs, or even statistics. (Ibid). More importantly, as even the ALC acknowledged, Mr. West did not offer a professional opinion to any degree of reasonable certainty, stating, "[H]e didn't give is opinion to a reasonable degree of professional certainty as an engineer. What say—I mean, he had a shot of doing it." (Transcript, Exhibit A, at R. p. 1571:2-8; argument at R. pp. 1572:25 to 1574:10). As Dominion's counsel acknowledged, "[H]e's not here as an expert witness." (Transcript, Exhibit A, at R. p. 1571:6-8).

Dominion itself: (1) does not know an exact percentage of residential growth compared to commercial growth; (2) has no knowledge of the types of specific industrial or commercial customers growth is anticipated; and (3) has no agreements or obligations necessitating additional capacity aside from its general obligation as a public utility in South Carolina. (Exh. 76, Priester Designation, 24:4-25:12 at R. pp. 838-839).

Serving as a lay fact witness, Mr. Priester testified that during cold weather events, Dominion currently supplements its system with compressed natural gas and/or liquified natural gas via trucking to maintain reliable services for customers that are served from the existing eight-inch main. (R. pp. 712:13-727:4). Nevertheless, Dominion offered no evidence or testimony at the hearing as to how many trucks it uses during these cold weather events, how frequently it uses them, or how many future trucks would be required if the project were not constructed.

Further, the Rules of Evidence are clear with regard to lay witnesses. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE. Here, Dominion's witnesses were not qualified as expert witnesses. In fact, they were not even *offered* as expert witnesses. They did not and could not offer they type of reliable, probative, and substantial evidence mandated by S.C. Code Ann. § 1-23-610(B). Mr. West, a Professional Engineer, even acknowledged that he lacked the requisite knowledge or qualifications to render opinion as to expected population growth, weather, transportation costs, or even statistics. (Transcript, Exhibit A, R. at 1567:6-1570:25).

In its Notice of Department Decision (NODD), DHEC identified the purpose of the project as "support[ing] growth in the area by providing additional capacity and flexibility to meet current and anticipated future customer demands for natural gas." (Exh. 75, Hightower Desig., 42:16-43:3 at R. p. 811). However, as the ALC's Final Order notes, DHEC did not conduct its own evaluation of the need for natural gas in the area but rather merely relied on Dominion's assertions and analysis. (Final Order, R. p. 5). In other words, DHEC also offered no evidence establishing project need. It simply relied on Dominion's assertions. Further, DHEC, like Dominion, testified this project is not water dependent, meaning: there is no inherent requirement that the project be routed through any protected bodies of water or wetlands as currently planned. (Exh. 75, Hightower Desig. 63:3-5 at R. p. 816).

The "area" referred to in the project purpose DHEC utilized in reviewing the proposed project is the entirety of the Pee Dee area of South Carolina and the kind of growth to be

supported by this proposed project would be business, industrial, and economic development. (Ex. 75, Hightower Desig., 43:4-44:1 at R. p. 811). However, DHEC did not know of any specifics on the type of expected business or industrial growth or how proximate any potential growth was to the pipeline expansion at issue here. (Ibid., 44:6-11 at p. 811). DHEC also: (1) does not know of any customers in the area not having their natural gas needs met; and (2) did not know of any current demand not being met by Dominion in this area; and (3) does not believe it has the expertise to determine whether there was future demand for natural gas in the area. (Ibid., 44:16-20 and 44:24-45:16 at R. p. 811).

Mr. Wenerick, a project manager in DHEC's water quality certification and methods program, testified applications must also describe planned or proposed future development reasonably associated with the proposed project so DHEC can consider the water quality implications of the development. (R. p. 684:9-25). Mr. Wenerick testified Dominion mentioned no future development in the application, indirectly or directly, and though the project's purpose was to support growth, Dominion didn't mention what growth would be supported by the project. (R. p. 685:1-11 and 20-23). Further, Mr. Wenerick testified DHEC did not assess the impact the growth serviced by the project would have on water quality in the Pee Dee River basin. (R. p. 196:3-6). Dominion, for its part, did not introduce *any* evidence as to the cumulative effects of the growth it claims to anticipate.

There is no substantial evidence in the record to support the ALC's finding that a project need exists. Accordingly, Appellant respectfully requests that this Honorable Court reverse the ALC's decision and deny Certification of the proposed project. Dominion should not be permitted to construct a 14.5-mile natural gas pipeline through protected waters and wetlands when the project need has clearly not been demonstrated by way of reliable, probative, and

substantial evidence as required by S.C. Ann. § 1-23-610(B). See also, *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 772 S.E.2d 505 (2015), *Hill v. S.C. Dep't of Health & Envtl. Contro*l, 389 S.C. 1, 698 S.E.2d 612 (2010).

### III. The evidence does not support the ALC's ruling that the "No Action" alternative was reasonably rejected.

Respondents argue "the 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.*" (DHEC Final Brief, citing Order at p. 21; emphasis added, see also Dominion Final Brief at p. 21). These purported "project needs" are the ALC's *sole justification* for rejecting the "No Action" alternative—a feasible alternative which would maintain the status quo and avoid construction of the pipeline through protected waters and wetlands. However, as discussed in Section II, *supra*, there is no substantial evidence in the record which supports the ALC's finding that project needs even exist. Accordingly, it was error for the ALC to reject the "No Action" alternative because the ruling itself was based on the court's erroneous and unsubstantiated finding that project needs exist.

Further, as discussed in Appellant's Final Brief, Regulation 61-101 establishes the procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act. S.C. Code Regs Ann. 61-101 (2012). Subsection 61-101(F)(3)(B) describes the scope of the Department's application review and instructs the Department to consider "whether there are feasible alternatives to the activity." Subsection 61-101(F)(3)(b), further instructs that certification "will be denied" if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses."

Appellant respectfully submits that the certification must be denied because a feasible "No Action" alternative exists.

## CONCLUSION

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

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

[Signature on following page]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez
Jesse Sanchez (SC Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181
jesse@jessesanchezlaw.com

and

STEPHEN A. SPITZ, ESQ.
A BUSINESS LAW FIRM

s/Stephen A. Spitz
Stephen A. Spitz (SC Bar No. 5287)
334 East Bay Street, #194
Charleston, South Carolina 29401
(843) 577-6531
stephenspitz994@gmail.com

**Attorneys for Appellant**
**Blue Ridge Environmental Defense League**

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## CERTIFICATE OF COMPLIANCE

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The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez
Jesse Sanchez, SC Bar No. 101906
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
Telephone (843) 814-8181
Facsimile (843) 284-395

**Attorney for Appellant**
**Blue Ridge Environmental Defense League**

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Mount Pleasant, South Carolina