

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

Appellate Case No. 2025-000181

Blue Ridge Environmental Defense League, Appellant,
v.
South Carolina Department of Environmental Services
and Dominion Energy, Respondents.

**BRIEF OF AMERICAN RIVERS, BLACK-SAMPIT RIVERKEEPER, CATAWBA
RIVERKEEPER, CHARLESTON WATERKEEPER, CONGAREE RIVERKEEPER,
FRIENDS OF THE EDISTO, PEE DEE-LYNCHES PROJECT COORDINATOR,
SAVANNAH RIVERKEEPER, SAVE OUR SALUDA, WACCAMAW RIVERKEEPER,
AND WINYAH RIVERS ALLIANCE, AS *AMICI CURIAE* IN SUPPORT OF
APPELLANT**

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INTRODUCTION

To achieve the goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s Waters,” 33 U.S.C. § 1251, the Clean Water Act (the “Act”) relies on cooperation between the federal government and states. Yet pipeline companies have repeatedly attempted to prevent conservation and community groups from attaining meaningful judicial review of section 401 certifications¹ by relegating the state’s role to a mere inconsequential step in the federal permitting process and arguing that courts cannot grant effective relief once a federal permit is issued. Respondents Dominion Energy have now continued this effort in South Carolina. But Dominion’s brief fails to apprise the Court of the important role states play in protecting state waters and fails to inform the Court that multiple courts, including the U.S. Fourth Circuit Court of Appeals, have roundly rejected the argument that issuance of a federal permit or approval prevents a court from granting effective relief in a challenge to a section 401 certification.

In addition to misunderstanding the role states play in the Clean Water Act permitting process and being wrong on the merits, Dominion’s mootness argument would lead to an unworkable and arbitrary result. This Court’s acceptance of the argument would have the effect of allowing challenges to 401 certifications to proceed *if* they can go to federal court while precluding review of potentially identically unlawful 401 certifications if they must proceed in state court, like here. That is because the Natural Gas Act gives exclusive jurisdiction to federal circuit courts over state agency approvals required under federal law for interstate gas infrastructure, including 401 certifications, 15 U.S.C. § 717r(d)(1), and the Fourth Circuit has rejected Dominion’s argument that issuance of federal authorizations preclude courts from

¹ Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, provides states with an important tool to protect water quality by allowing them to place conditions on federally permitted projects.

granting effective relief in 401 challenges. Whether plaintiffs can attain meaningful judicial review of unlawful agency decisions related to pipelines should not turn simply on whether the pipeline is an interstate or intrastate project. Fortunately, this arbitrary outcome need not become a reality because Dominion’s argument is wrong on the merits, as detailed below.

ARGUMENT

I. Issuance of a federal permit for the project does not moot Appellant’s appeal.

A. The Clean Water Act’s cooperative federalism framework requires an active role for states in the permitting process.

Under Section 401 of the Act, a federal agency may not issue a permit authorizing activity that may result in a discharge to waters of the United States unless the state in which the discharge is proposed has issued (or decided to waive) a Section 401 water quality certification. 33 U.S.C. § 1341(a)(1) (“No license or permit shall be granted until the certification required by this section has been obtained or has been waived No license or permit shall be granted if certification has been denied by the State.”).

As part of its 401 certification, DES must assess the project’s water quality impacts, including compliance with water quality standards and protection of classified uses. S.C. Code Ann. Regs. 61-101(F)(1). South Carolina regulation requires DES to consider multiple factors, including the water dependence of the project; “whether there are feasible alternatives to the activity”; and “all potential water quality impacts of the project,” including direct, indirect, and cumulative impacts. *Id.* § (F)(3)(a)-(b). Once the 401 certification is issued, then the federal agency may issue its permit. To guarantee the federal permit sufficiently accounts for a state’s water quality standards, a state issuing a 401 certification may condition its certification “upon any limitations necessary to ensure compliance with state water quality standards or any other

‘appropriate requirements of State law.’” *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 713–14 (1994).

Where, as here, the underlying federal permit is a Clean Water Act Section 404 permit, the U.S. Army Corps of Engineers (“Corps”) is required to include these conditions in the final permit. 33 U.S.C. § 1344; 33 C.F.R. § 330.4(c)(6) (incorporation of conditions into nationwide permits). Once the Corps issues a final permit, including nationwide permits, it retains continuing regulatory authority and may modify, suspend, or revoke the permit. *Id.* § 330.4(c)(7). Among factors the Corps considers include “[c]hanges in circumstances relating to the authorized activity since the NWP [] was issued . . . ; the continuing need for, or adequacy of, the specific conditions of the authorization; any significant objections to the authorization not previously considered.” *Id.* § 330.5(d). The Corps may thus consider a state court’s finding that a 401 certification is unlawful or deficient even after it approves a final permit for a project. And, if a 401 certification were found to be invalid, the Corps could consider modifying the permit to ensure consistency with any new conditions included on a remanded 401 certification.

In sum, under the Clean Water Act, federal permits are contingent upon issuance of 401 certifications. These 401 certifications are thus “more than a mere step in the federal application process,” they “[have] [their] own existence [that] is separate from the federal permit.” *Mattaponi Indian Tribe v. Commonwealth*, 541 S.E.2d 920, 926 (Va. 2001). Dominion’s mootness argument fundamentally misunderstands this by relegating South Carolina’s 401 certification to a “mere step” in the federal permitting process that is so irrelevant, it does not matter if a court determines it to be unlawful. This is not what the Clean Water Act envisions.

B. Federal and state courts have rejected the very argument Dominion makes here.

In South Carolina, “[a] case becomes moot when judgment, if rendered, will have *no practical legal effect* upon the existing controversy. This is true when some event occurs making it *impossible* for [the] reviewing [c]ourt to grant effectual relief.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (emphasis added). Dominion claims that because the nationwide permit is what allows construction of the pipeline, then reversal of the 401 certification would have no effect. Final Brief of Respondent Dominion Energy at 7 (filed Dec. 10, 2024). Not so. The Court can grant effective relief for a deficient section 401 certification, even after the federal agency issues its permit. As noted above, the Corps may modify, suspend, or revoke a nationwide permit if circumstances related to the permitted activity have changed, including the adequacy of the authorization or specific objections to the authorization have arisen that were not previously considered. 33 C.F.R. § 330.5(d)(1). A decision by this Court that the 401 certification is deficient plainly fits within those circumstances. Thus, the Court can grant effective relief to Plaintiff regardless of the Corps’ issuance of the permit.

Multiple courts have relied on this very reasoning to conclude that issuance of a federal approval does not prevent courts from granting effective relief in a pending 401 certification challenge. Contrary to Dominion’s argument, no South Carolina court has concluded that issuance of a federal permit moots a challenge to a 401 certification. By contrast, the Minnesota Court of Appeals has rejected the argument, as has the U.S. Court of Appeals for the Fourth Circuit and Virginia Supreme Court. This Court should too.

In *Matter of Enbridge Line 3*, the respondents argued that the challenge to a 401 certification was mooted by issuance of a 404 permit because the court could not grant effective relief since reversing the certification would have no impact on the 404 permit, which allowed

the project's construction. No. A20-1513, 2021 WL 3853422, *4 (Minn. Ct. App. Aug. 30, 2021). This is precisely the argument Dominion has made here. Final Brief of Respondent Dominion Energy at 7. The Minnesota Court of Appeals rejected the argument that “effective relief [was] ‘no longer possible.’” *Matter of Enbridge Line 3*, 2021 WL 3853422, *4. In doing so, it relied heavily on a federal Fourth Circuit decision rejecting the argument, discussed later, and explained that to find the case moot, the court would have to predict how the Corps might react to a reversal of the 401 certification and that was not the court's role. *Id.* at 5. Such is the case here.

Moreover, in its decision, the *Enbridge* court distinguished the case Dominion seeks to rely on now—*Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*. Final Brief of Respondent Dominion Energy at 9 (citing 644 N.W.2d 457 (Minn. 2002)). The *Enbridge* court explained that this case was distinguishable because there the 401 certification was issued *after* the section 404 permit was approved, which meant the 404 permit was not predicated on the section 401 certification. *Id.* at 5 n.5. By contrast, in *Enbridge* (as well as here) the state issued the 401 certification *before* the federal permit was authorized. *Id.*; *see also* Final Brief of Respondent Dominion Energy at 3, 7 (noting dates of 401 certification and 404 permit).

As noted above and in *Enbridge*, the Fourth Circuit has also rejected Dominion's argument when it was raised in the standing context. In *Sierra Club v. State Water Control Board*, conservation groups challenged Virginia's 401 certification for the Mountain Valley Pipeline. 898 F.3d 383, 384 (4th Cir. 2018). In that case, the Federal Energy Regulatory Commission issued its federal authorization for the project in October 2017, Virginia issued its 401 certification on December 8, 2017, and the Corps verified that the pipeline could rely on

Nationwide Permit 12 on December 26, 2017. *Id.* at 400. The pipeline company argued that the plaintiffs lacked standing because the Federal Energy Regulatory Commission had already issued its authorization for the pipeline and thus the plaintiffs had “no realistic possibility” to “obtain the ultimate relief they sought.” *Id.* at 401. That is, like here, the pipeline company argued that there was no “active case or controversy” because the federal agency may decline to consider or incorporate a subsequently issued 401 certification. 898 F.3d at 400; *see also Matter of Enbridge Line 3*, 2021 WL 3853422, *5 (relying on Fourth Circuit’s *Sierra Club* decision and explaining that the standing analysis is analogous to the mootness inquiry). The Fourth Circuit squarely rejected the argument. *Id.*

The Fourth Circuit explained that analyzing whether a court can issue effective relief “does not require [the court] to predict whether, if [the court] rule[s] for [the plaintiffs] on the merits, they will eventually obtain the ultimate relief that they seek.” *Sierra Club*, 898 F.3d at 401–02. Rather, the court explained that the plaintiffs only had to “demonstrate a ‘realistic possibility’ that they [would] obtain that ultimate relief.” *Id.* at 402. Importantly, it is not relevant that the federal approval the parties pointed to in *Sierra Club* (the Federal Energy Regulatory Commission approval) was different than the federal approval at issue here because the argument premise was the same. Indeed, the Fourth Circuit acknowledged that the plaintiffs would face “several hurdles even after prevailing on the merits,” including, relevant here, that the federal agency may have discretion to “resist [the state’s] efforts” to impose stricter conditions “by arguing . . . that it [was] too late in the process . . . or that further restrictions would be preempted.” *Id.* The court thus acknowledged that there was a possibility that the plaintiffs “could prevail on the petition before [the court] and yet still not obtain the relief they ultimately [sought].” *Id.* at 403.

Nevertheless, the Fourth Circuit concluded that such a possibility was not enough to establish that the court could not issue effective relief. *Id.* The court noted that, like the Corps here, the Federal Energy Regulatory Commission had the ability to impose additional conditions and thus none of the hurdles faced by the plaintiffs were “sufficient to negate the ‘realistic possibility’” that the plaintiffs could obtain more stringent requirements on the pipeline through its challenge to the state’s 401 certification. *Id.* at 401–02. The court concluded that to hold otherwise would require it “to engage in the speculative (if not impossible) task of predicting how [the federal agency] will exercise its discretion.” *Id.* at 402–03; *cf. Sierra Club v. Tenn. Dep’t of Env’t Control*, 133 F.4th 661, 673 (6th Cir. 2025) (concluding that court could afford effective relief in 401 certification challenge despite the fact that the state agency could decide, on remand, in its discretion, to waive certification); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 736 (4th Cir. 2019) (same).

The Virginia Supreme Court, in *Mattaponi Indian Tribe v. Virginia*, also determined that state 401 certifications can cause injury, for purposes of standing, regardless of the fact that the federal permit authorizes construction of the underlying project. 541 S.E.2d at 925–26. The state agency in *Mattaponi* alleged that the plaintiffs lacked standing to challenge a Virginia 401 permit because any injury caused by the project stemmed only from the Corps’ issuance of a 404 permit, not the state’s 401 decision. *Id.* In holding that plaintiffs had standing to challenge the state permit, the court determined that “the injuries alleged . . . meet the ‘causation’ prong of the standing criteria, that is, [they] are ‘fairly traceable’ to the decision of the Board to award the state permit, and are not the result of the *independent* action of the Corps.” *Id.* at 925 (emphasis in original). The *Mattaponi* court emphasized that decisions on 401 permits are solely the state’s responsibility. *Id.* at 926 (“[T]he Board *alone* must ensure that the [project’s] operation does not

violate state water quality standards.”). Thus, “the state permit, while a condition precedent to issuance of the federal permit, has its own existence, is separate from the federal permit, and can cause injury. The state permit is more than a mere step in the federal application process; it has a life of its own.” *Id.*

Finally, the cases Dominion cites do not support its argument. *Triska v. Dep’t of Health and Env’t Control* said nothing about either mootness or the effect of federal permits. 292 S.C. 190, 193 355 S.E.2d 531, 533 (1987). Instead, it only held that DES has no statutory authority to unilaterally revoke a 401 certification two-and-a-half years after it was first issued. *Id.* This says nothing about whether a court can grant effective relief by concluding that a 401 certification is deficient or unlawful. *Minnesota Center for Environmental Advocacy*, as noted above, involved a state attempt to issue a 401 certification *after* it had *waived* its authority to do so. *See supra* at 8–9. Again, that is not the issue before the Court, and the *Enbridge* court explicitly declined applying the rationale in that case because, as here, “the [federal] permit *is* predicated on the [state agency’s] section 401 certification and a reversal of the certification may have different implications.” *Matter of Enbridge*, 2021 WL 3853422 at *5 n.5. *Keating v. FERC*, like *Triska*, dealt with a state revocation of its 401 certification and held that a federal agency has the authority to determine whether a state’s revocation complies with the provisions of section 401. 927 F.3d 616 (D.C. Cir. 1991). The sentence quoted by Dominion only referenced federal jurisdiction to determine the validity of a state’s revocation under an earlier version of 33 U.S.C. § 1341 (a)(3).

The only authority Dominion cites that is remotely similar to the present challenge is a decision from a Texas court of appeals—which is not only an outlier, but like Dominion’s position, mistakenly bases its finding of mootness on cases that hold no such thing. *See City of*

Shoreacres v. Tex. Comm'n of Env't Quality, 166 S.W.3d 825, 834–35 (Tex. Ct. App. 2005) (citing *Puerto Rico Sun Oil v. EPA*, 8 F.3d 73 (1st Cir. 1993), which dealt with a 401 certification issued after the regulatory deadline, and citing *Keating* and *Triska*, which dealt with revocation of valid 401 certifications).

Thus, the weight of authorities—in both state and federal courts—supports concluding that the Court can grant effective relief regardless of the issuance of the nationwide permit for the pipeline and Appellant’s challenge is thus not moot. To rule otherwise would establish harmful precedent throughout the state, undermining the intent of the federal Clean Water Act, the carefully drafted 401 program, state Administrative Process Act, and the ability of *Amici* and South Carolina citizens to protect water quality for recreational and commercial uses throughout the state.

CONCLUSION

For the foregoing reasons, the Court should find that the appeal is not moot.

Respectfully submitted,

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