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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III  
Chief Administrative Law Judge

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Appellate Case No. 2025-000181

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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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**RESPONDENT DOMINION ENERGY'S RESPONSE IN OPPOSITION TO  
AMICUS CURIAE BRIEF OF AMERICAN RIVERS *ET AL.***

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## INTRODUCTION

Respondent Dominion Energy South Carolina, Inc.<sup>1</sup> (“Dominion”) submits this Response in Opposition to the Amicus Curiae Brief in Support of the Appellant filed by 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 (collectively, “Amici”), purporting to offer additional legal context on the role of states in the Clean Water Act (“CWA”) permitting process. Far from clarifying the issues before the Court, Amici merely recast the Appellant’s mootness argument in more ideological terms. Amici’s position misapprehends the structure and limits of cooperative federalism under the CWA and advances a theory of judicial authority that is inconsistent with South Carolina law, federal permitting practice, and basic principles of administrative finality.

Amici argue that this case remains justiciable because the United States Army Corps of Engineers (“Corps”) retains the authority to reconsider its CWA Section 404 authorization for Dominion’s proposed River Neck to Kingsburg 16-inch natural gas main project (the “Project”)<sup>2</sup> in the event of a state court ruling invalidating the South Carolina Department of Environmental Services’ (“SCDES”)<sup>3</sup> issuance of the Section 401 certification to Dominion (the “Certification”). But the mootness doctrine in South Carolina does not turn on abstract possibilities or hypothetical

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<sup>1</sup> Dominion Energy South Carolina, Inc. is a wholly owned subsidiary of Dominion Energy, Inc.

<sup>2</sup> The Project is needed to serve the increasing demand for natural gas in South Carolina due to projected residential and commercial growth and current seasonal demand issues.

<sup>3</sup> On August 20, 2024, the South Carolina Department of Health and Environmental Control (“DHEC”) moved to substitute the SCDES as a Respondent in this case because DHEC was abolished on July 1, 2024.

downstream actions by a third-party agency. It asks a more concrete and disciplined question: whether a ruling from this Court would have a present and practical legal effect on the controversy between the parties. The answer here is unequivocally no. As the Administrative Law Court (“ALC”) correctly held, once the Corps issued its verification that Dominion’s project qualifies for coverage under Nationwide Permit 12 (“NWP 12”), any controversy regarding the state-issued Certification ceased to present a live case or controversy. That federal verification means that NWP 12 is the only operative CWA permit governing Dominion’s right to proceed with the Project. This Court cannot revoke it, alter it, or compel the Corps to revisit it. As this Court recognized in *Triska v. Department of Health & Environmental Control*, 292 S.C. 190, 355 S.E.2d 531 (1987), once the Corps has issued a permit, neither SCDES nor the courts of this state have the power to modify or invalidate it. The proper course in such instances, as *Triska* made clear, is for the state agency to *notify* the Corps of any concerns and leave it to the Corps to determine whether to act. *Id.*, 292 S.C. at 196. That discretionary possibility does not render the controversy live. It underscores why it is moot.

Amici also rely heavily on out-of-jurisdiction decisions that either apply materially different mootness standards (such as Article III standing in federal court) or arise in regulatory contexts not relevant here. They cite no South Carolina authority holding that a state court retains jurisdiction to adjudicate the validity of a Section 401 certification after the federal agency has acted. Nor do they grapple with the practical implications of their position. If courts were to adopt Amici’s theory, no Section 401 certification would ever be final—regardless of federal action—because some litigation risk would always linger, and any change in state judicial interpretation could theoretically provoke a federal agency response. That is not how the CWA functions, and it is not how South Carolina courts determine mootness.

In short, the arguments advanced by Amici—though framed in the language of environmental stewardship—are legally unfounded, factually speculative, and procedurally disruptive. Their position would not only require this Court to issue an advisory opinion on a matter beyond its power to effect, but would also upend the finality and reliability of permitting decisions made by both state and federal agencies. Respectfully, the Court should decline that invitation. This case is moot and should be dismissed.

**I. The Corps' Verification That the Project Qualifies for Coverage Under NWP 12 is an Intervening Event That Renders the Issues in this Appeal Moot**

**A. Dominion Does Not Minimize the Legal Role of the Section 401 Certification**

As an initial matter, Amici incorrectly argue that Dominion's position treats the Certification as a procedural formality or "mere step" in the CWA permitting process—implying that Dominion believes the state's role is so irrelevant that it does not matter if a court determines it to be unlawful. (Amicus Br. at 3.) That is not Dominion's position.

Dominion has never disputed that Section 401 certifications play a vital and substantive role in the permitting of projects that may discharge into navigable waters. Indeed, Dominion sought and obtained the Certification in full compliance with South Carolina law, and the Corps' issuance of its NWP 12 verification pursuant to 33 U.S.C. § 1344 ("Section 404") required either a state-issued certification or a state waiver of certification. Specifically, Dominion noted that "The requirement for a [Section 404] permit from the Corps in turn triggers a requirement under [Section 401 (33 U.S.C. § 1341)] of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards...[Section 401] certification is required 'from the State in which the discharge originates or will originate...DHEC issued the Certification for the Project pursuant to this authority and S.C. Code Regs. 61-101.'" (See Respondent Dominion's Final Br. at 7.) Far from minimizing the role of state oversight,

Dominion has treated the Certification as a prerequisite to obtaining federal approval.

What Dominion does assert—and what Amici’s brief fails to confront—is that the legal effect of the Certification changes once it has served its purpose and the federal agency has issued the Section 404 authorization (in this case, NWP 12). At that point, the Certification decision has been incorporated into a federal permitting action that this Court has no authority to revoke, amend, or enjoin. It is not that the Certification was unimportant; it is that any challenge to it now—after the Corps’ action—is moot under South Carolina law, because a court ruling would have no practical legal effect. Dominion’s position accords with the CWA’s cooperative federalism structure, which gives states a meaningful but time-limited opportunity to assess water quality impacts and impose conditions *before* a federal permit is issued. Once the federal permitting decision is final, South Carolina courts lack the power to unwind it through retrospective state-court review. That is not a diminishment of the state’s role—it is the structure Congress enacted, and federal agencies apply.

The CWA’s cooperative federalism framework ensures that states have an opportunity to review proposed discharges through the Section 401 certification process. But once that certification has been granted and the Corps has relied on it to issue a Section 404 permit, the Corps’ action becomes final under federal law. *See* 33 U.S.C. § 1344; 33 C.F.R. §§ 330.4(c), 330.5(d). Amici emphasize that federal regulations allow the Corps to reconsider a NWP verification, but cite no rule *requiring* the Corps to revisit its verification simply because a state court later disagrees with the state’s original certification. (Amicus Br. at 3.) To the contrary, the CWA provides that federal agencies may proceed with permitting once a state certifies compliance. *See* 33 U.S.C. § 1341(a)(1). If Amici’s theory were accepted, no permit would ever be final, and infrastructure development could be paralyzed by indefinite litigation over already-

issued certifications. Amici’s suggestion that the Corps *might* revisit or revoke the permit at some unspecified point based on a state-court ruling disregards the finality afforded to completed federal agency action.

### **B. Amici’s Mootness Theory is Incompatible with South Carolina Law**

Amici’s central claim is that reversal of the state-issued Certification would still have a legal effect on the controversy because the Corps could—at some future time—revisit or revoke its NWP 12 verification. (Amicus Br. at 4.) But South Carolina law requires more than theoretical possibilities to avoid mootness. ““A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.”” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001), quoting *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). The question is not whether a federal agency *could* act on a state court’s ruling—it is whether such relief is legally mandated or sufficiently certain to produce a concrete outcome. Amici’s position fails that test.

The mere possibility that the Corps could take into account a decision affecting the validity of the Certification is insufficient to overcome mootness. As the ALC correctly recognized, “the myriad of factors that would influence that result renders this potentiality exceedingly speculative.” (Denial Order at 13, R. p. 1527.) South Carolina courts do not base justiciability on speculation. Indeed, it is well established that South Carolina appellate courts do not concern themselves with moot or speculative questions. *See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty.*, 424 S.C. 298, 303, 818 S.E.2d 224, 227 (Ct. App. 2018); *Grant v. Osgood*, 241 S.C. 104, 108, 127 S.E.2d 202, 204 (1962).

In *Triska*, the South Carolina Supreme Court expressly recognized that once the Corps has issued a federal Section 404 permit, neither SCDES nor state courts have authority to revoke or

modify that permit. 292 S.C. 190, 196, 355 S.E.2d 531, 534. *Triska* underscores that any further action would be a “futile act unless the [Corps] subsequently suspended and revoked [its] respective permit.” *Id.* Dominion has already received federal authorization. Thus, any subsequent state ruling on the Certification has no operative legal consequence unless the Corps independently decides to act. Such a speculative future contingency cannot satisfy the requirement that this Court’s ruling have a “practical legal effect.”

## **II. Amici’s Reliance on Federal and Out-of-State Cases Is Misplaced**

Amici cite a series of federal and state appellate cases—including *Sierra Club v. State Water Control Board*, 898 F.3d 383 (4th Cir. 2018), and *Matter of Enbridge Line 3 Replacement Project*, 2021 WL 3853422 (Minn. Ct. App. Aug. 30, 2021)—to suggest that similar mootness arguments have been rejected elsewhere. But these cases are legally and factually distinguishable from the instant case.

First, *Sierra Club* addressed standing, not mootness, and arose under the federal Natural Gas Act, which confers exclusive jurisdiction on federal courts to review certain interstate natural gas pipeline authorizations. *Sierra Club*, 898 F.3d at 401. There, the Fourth Circuit held that petitioners had standing to challenge a Section 401 certification even after federal authorization had issued, because to satisfy redressability, the petitioners need only demonstrate a “realistic possibility” that they might ultimately obtain the relief they sought. 898 F.3d at 402. That standard—used by federal courts to determine standing under Article III—is different from the standard South Carolina courts apply to determine mootness. *See, e.g., Curtis*, 345 S.C. at 567, 549 S.E.2d at 596 (holding that in South Carolina, a “case becomes moot when judgment, if rendered, will have *no practical legal effect* upon the existing controversy.”) (Emphasis added).

Moreover, the Fourth Circuit’s analysis in *Sierra Club* highlights the speculative nature of

Amici's position here. In assessing redressability, the court acknowledged that evaluating whether petitioners would ultimately obtain relief "would involve courts in the speculative (if not impossible) task of predicting how an agency will exercise its discretion." *Sierra Club*, 898 F.3d at 401. That observation supports—not undermines—the ALC's conclusion in this case that the effect of a state-court ruling on the Corps' federal permit is "exceedingly speculative" and thus insufficient to defeat mootness in South Carolina. (Denial Order at 13, R. p. 1527.); *see, e.g., Skydive Myrtle Beach, Inc.*, 424 S.C. at 303, 818 S.E.2d at 227; *Grant v. Osgood*, 241 S.C. at 108, 127 S.E.2d at 204.

Second, *Enbridge* involved an appeal under Minnesota law, where the state court relying on the analysis in *Sierra Club* was not convinced that ultimate relief was impossible. *See Matter of Enbridge Line 3 Replacement Project*, No. A20-1513, 2021 WL 3853422, at \*5. But the reasoning in *Enbridge* is not binding on this Court, and further, as stated *supra*, reliance on *Sierra Club* is misplaced because it involves issues of standing and relates to the federal Natural Gas Act where federal courts retain exclusive jurisdiction to review appeals of a Section 401 certification associated with an interstate natural gas pipeline. These are not the facts of the instant case.

Further, as stated *supra*, in South Carolina, mootness occurs when the judgment from the Court will have no practical legal effect upon the existing controversy. *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596, quoting *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715. No purported authority cited by Amici establishes a legal duty requiring the Corps to rescind or even consider rescinding its NWP 12 verification following a state court decision. On the contrary, this Court has already acknowledged the absence of such authority. *See Triska*, 292 S.C. at 196, 355 S.E.2d at 534. Accordingly, the cases cited by Amici are distinguishable from the facts of the instant case and should be disregarded.

### **III. Amici’s Position Would Undermine Regulatory Finality and Create Endless Uncertainty**

Amici’s position—that federal permit decisions remain indefinitely vulnerable to collateral attack through ongoing state-court proceedings—would wreak havoc on regulated entities, permitting agencies, and public infrastructure. It would render federal authorizations provisional, chilling investment and eroding intergovernmental coordination.

Congress intended a state’s issuance or waiver<sup>4</sup> of Section 401 certifications to operate as a prerequisite to federal permitting, not as a perpetual license for litigation. Once the prerequisite is satisfied by the issuance of a certification and the Corps has acted, that federal permit becomes the operative authorization under the CWA. While a state has authority to condition its certification or to deny it to prevent the Corps from issuing its federal authorization, nothing in the CWA allows a state court to retroactively void a federal permit or require the Corps to reprocess it.

Amici’s effort to elevate the Section 401 certification above the final federal permit reverses the proper hierarchy and invites judicial overreach. South Carolina’s courts should not engage in speculative rulings that cannot redress the alleged injury.

### **CONCLUSION**

This Court should reject the arguments advanced by Amici and affirm the ALC’s holding that the appeal is moot. The Corps has issued its permit, and the Certification has already served its purpose as a predicate for the NWP 12 verification. No meaningful relief remains for this Court to grant. Accordingly, the appeal should be dismissed.

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<sup>4</sup> Indeed, under the CWA, a state or tribe waives its Section 401 certification authority if it refuses or fails to act on a Section 401 water quality certification application “within a reasonable period of time (which shall not exceed one year).” 33 U.S.C. § 1341(a)(1). This timeframe for waiver further supports Congress’ intention for states to have a meaningful *but time-limited opportunity* to assess water quality impacts and impose conditions before a federal permit is issued.

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Respectfully submitted,

**DOMINION ENERGY, INC.**

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