STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07--CC
Appellate Case No. 2011-186086

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, ... Appellants,

vs.

South Carolina Department of Health and Environmental Control and Greenville Water System, ... Respondents.

PETITION FOR WRIT OF CERTIORARI

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November 26, 2012

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

Pursuant to SCACR Rule 242, the Appellants Upstate Forever, South Carolina Native Plant Society and South Carolina Wildlife Federation respectfully petition this Court for a Writ of Certiorari by which to review a final decision of the Court of Appeals, dated May 25, 2012.

CERTIFICATE OF COUNSEL

Counsel for Appellants Upstate Forever, South Carolina Native Plant Society and South Carolina Wildlife Federation hereby certify that the Petition for Rehearing was filed with the South Carolina Court of Appeals on June 11, 2012, and the Order Denying Petition for Rehearing was issued on October 23, 2012.

QUESTIONS PRESENTED

I. **Did the Court of Appeals Err in Dismissing this Appeal as Moot by Concluding that DHEC's 401 Water Quality Certification, and the Conditions Imposed Thereunder, Disappear when the Regulated Project is Constructed?**

II. **Did the Court of Appeals Err in Dismissing this Appeal as Moot, Despite the Availability of Effectual Relief Found in Regulation 61-68(D)(1), which Requires DHEC to Maintain Stream Flows Necessary to Protect Classified and Existing Uses and the Water Quality Supporting those Uses?**

III. **Can Lifting the APA's Automatic Stay Render an Appeal Moot and Thus Deprive Appellants of the Right to Administrative or Judicial Review, Despite the Availability of Effectual Relief?**

IV. **Does DHEC have the Authority and Duty Under the Pollution Control Act and the Regulations Promulgated Thereunder to Require Minimum Flow Releases of Water into the South Saluda River as a Condition of GWS's Permit and Water Quality Certification?**

STATEMENT OF THE CASE

Procedural Posture

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a 401 Water Quality Certification[1] and Construction in Navigable Waters permit to Greenville Water System ("GWS"). GWS requested the certification and permit in connection with the construction of a 7.8 mile, 42-inch Raw Water Transmission Main from the Table Rock Reservoir in Pickens County to its end in Greenville County.

The Petitioners filed a timely request for a final review conference before the DHEC Board, which was held on April 9, 2009. (App. pp. 17-22). The Board voted to affirm the staff decision, stating that the agency could not issue conditions for minimum stream flows on the South Saluda River. The Board issued its Order on May 8, 2009. (App. pp. 37-39). The Petitioners filed a timely request for contested case hearing before the Administrative Law Court on June 5, 2009. (App. pp. 26-33). GWS filed a Motion to Lift Automatic Stay, to which the Appellants consented. The Administrative Law Judge issued an Order Lifting Automatic Stay on August 11, 2009. (App. pp. 11-12). On April 14, 2010, the Petitioners' limited their appeal to the question of DHEC's imposition of a

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[1] Section 401 Water Quality Certifications are the state component of the Clean Water Act's regulation of jurisdictional wetland fills. In other words, whenever an activity calls for filling or altering waters that are subject to the Clean Water Act, a Section 401 Water Quality Certification is required from the State, and a Clean Water Act permit is required from the Army Corps of Engineers. As a part of its 401 Certification review, the State (DHEC) is required to impose any conditions on the project necessary to protect State water quality standards. The details of this regulatory system are discussed in the Argument section below.

minimum flow release to the South Saluda River as a condition of its 401 water quality certification.

On September 21, 2010, the Respondents filed a Joint Motion for Summary Judgment. (App. pp. 145-153). On November 10, 2010, the Petitioners filed a Response and Cross Motion for Summary Judgment. (App. pp.186-201). On December 1, 2010, Administrative Law Judge John D. McLeod conducted a hearing on the motions. On January 20, 2011, the ALJ issued an Order Granting Respondents' Joint Motion for Summary Judgment. (App. pp. 1-7).

On February 18, 2011, the Petitioners filed a Notice of Appeal in the Court of Appeals. After final briefing was completed on December 5, 2011, GWS completed construction of the project. On March 2, 2012, Greenville Water Systems and DHEC filed a Joint Motion to Dismiss. (App. pp. 533-547). On March 22, 2012, Appellants filed a Return to the motion (App. pp. 548-564), and Respondents filed a Reply on April 9, 2012 (App. pp. 565-577).

On May 25, 2012, without addressing the merits of this administrative appeal, the Court of Appeals issued a two-page Order dismissing the appeal as moot. (App. pp. 578-579).

The crux of this Petition for Writ of Certiorari is that without this Court accepting jurisdiction, the extent of the Appellants' judicial review beyond the administrative agency itself will have been confined to a legally-flawed, two-sentence conclusion in the Court of Appeals' Order. The Order, if allowed to stand, indicates that 401 Water Quality Certifications issued by DHEC expire upon completion of construction and that

projects completed during the pendency of an appeal render the appeal moot. Both conclusions directly contravene well settled principles of administrative law in South Carolina. The Order is particularly problematic in light of its potential to create significant legal implications beyond the context of this particular case.

Underlying Facts of this Administrative Appeal

The 42-inch water line for which GWS sought a certification and permit removes water from the Table Rock Reservoir ("TRR") in Pickens County and transports it to the Greenville Water Systems treatment plant in Greenville County. The TRR is owned and operated by GWS.

The Appellants' interest in this project centers around the South Saluda River, which originates at the base of TRR, below the dam. The South Saluda is one of South Carolina's very few trout streams. The South Saluda and its tributaries are used for fishing, including trout fishing, swimming, boating, and other public recreational activities. The South Carolina Department of Natural Resources ("DNR") manages the South Saluda River for three species of cold water trout -- brook, brown, and rainbow – and stocks the river with trout to provide for recreational trout fishing opportunities. (App. pp. 218-220). However, all of these activities are currently threatened, as the South Saluda and its resources are presently experiencing significant adverse impacts due to the low flows leaving TRR. Id. In short, Greenville Water is not releasing enough water from the TRR to maintain the historically high quality of the South Saluda.

DNR's uncontradicted opinion is that water temperature regimes and limited flow are significant factors in species diversity, and that trout habitat is limited because the

water is not cold enough to support the trout population in the South Saluda River. Id. Warmer waters and limited flow are having adverse impacts on the designated uses of the River, and could ultimately result in a total loss of the natural, remnant trout population which remain in the stream. Id. Again, these problems are a direct result of Greenville Water's failure to release an adequate of water from the TRR.

According to a U.S. Geological Survey stream gauge, flow in the South Saluda was ***below*** the "7Q10" (the minimum flow needed for water quality and aquatic health under DHEC regulations) 35% percent of the time over the course of a recent five-year measuring period —that is, for one out of every three days, there was not enough water in the river for fish, much less trout, to survive. (App. pp. 221-229).

The problem is perhaps best summed up by DNR, which has expressed that:

> Dewartering one of the states's most important freshwater rivers has, and will continue to, result in vast impacts to aquatic organisms and the entire riverine system for many miles. Lack of water in the river obviously causes direct negative effects upon aquatic resources, but it also impairs the function of the entire ecosystem along the riparian corridor.

(App. p. 203).

With this problem of flow in mind, the Appellants were immediately concerned when Greenville Water proposed a project that would give it the capacity to remove even more water from the TRR and, in turn, deny even more water to the South Saluda. Since the Table Rock Reservoir and dam were built, GWS has been using two 30-inch water lines to transport water from the reservoir to the treatment plant in Greenville County. The project at issue here includes construction of the 42-inch line and removal of one of the existing 30-inch lines, while the remaining 30-inch line will remain in service,

significantly increasing withdrawal capacity.

Greenville Water has maintained that while this project gives it the ability to remove more water than in the past, it will not be doing so. However, whether or not more water will actually be removed from TRR, there is a clear causal connection between the challenged pipe project and the amount of water leaving the TRR, and the Section 401 Certification process allows and requires DHEC to address the water level issues that plague the South Saluda.[2]

The Motion to Dismiss

After briefing in the Court of Appeals was complete, but before arguments, the Respondents moved to dismiss this action as moot. The basis for the motion was the argument that after construction of the certified project (in this case the 42" pipe), the 401 Certification itself vanishes, and its conditions no longer bind the applicant. In particular, the Respondents' stated this position a number of times in a number of ways: "[b]ecause the project construction is complete . . . there is nothing left for the Court to reverse, modify, amend or affirm," (App. p. 534); "construction has been fully completed, and the Certification has no more legal effect," (App. p. 542); "there exists no regulated project," Id.; and "because the work has been completed, the Certification has no more force and effect," Id. The Respondents did not cite any authority for this novel position.

The Respondents' motion further faulted the Appellants' failure to end their

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Again, the Court of Appeals never got to the point of addressing this argument on its merits, so the legal basis for this position is not an issue squarely before the Court. Nevertheless, as will become clear in later sections, the underlying merits of this case are indirectly implicated in the Court of Appeals' Order and therefore warrant some discussion.

appeal of the 401 Certification and institute an appeal of DHEC's "Final Approval to Place Into Operation," a document apparently issued by DHEC upon completion of construction of the new 42" pipe. The motion contends that the 401 Certification is "supplanted by" this document. Id. The Respondents again do not cite any authority for this position; nor a case, statute or regulation explaining whether the Final Approval "supplants" any other document; nor an instance where a "Final Approval to Place Into Operation" has been deemed a contested case.

The Respondents' motion to dismiss concludes with a paragraph challenging this action as presenting a hypothetical question. Specifically, the Respondents maintain that the Appellants have challenged only whether DHEC can impose flow conditions in the South Saluda as a part of their Certification, and not whether they legally should have in this instance. (App. p. 543).

The Court of Appeals' Order of Dismissal

The Court of Appeals granted the Respondents' motion to dismiss the appeal as moot in a two-page Order that did not explain the basis for its decision. The court merely stated: "After careful consideration of the parties' filings, we dismiss this appeal as moot. Furthermore, we find the public importance exception does not apply to this appeal." (App. p. 579) The Court's reasoning behind dismissing the appeal is not provided in the Order, leaving the Petitioner/ Appellants to guess what considerations were taken into account in making the Court's decision.

It is clear, however, that to dismiss this action as moot, the Court of Appeals had to conclude that Section 401 Certifications and their conditions have no legal effect after

the certified project is constructed.[3] Yet the Court of Appeals declined to make explicit even this most fundamental conclusion necessary for its holding. Nevertheless, without this Court's intervention, this Order of dismissal will no doubt be cited as legal precedent that construction of a project terminates the challenge, despite ongoing administrative and/or judicial review. As will be explained below, such a rule is problematic and contrary to law.

ARGUMENT

I. The Court of Appeals Erred in Dismissing this Appeal as Moot by Concluding that DHEC's 401 Water Quality Certification, and the Conditions Imposed Thereunder, Disappear when the Regulated Project is Constructed.

The Court of Appeals did not explain the basis for its decision. Nonetheless, it is reasonable to assume that it accepted one or more of the assertions in Respondents' motion to dismiss. One of these is that Section 401 certifications expire when construction of the certified project is complete. For any one or all of the following reasons, the position is patently without merit. While the construction activity initiates the Certification requirement, there is absolutely no indication that the Certification vanishes upon completion of construction.

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[3] As mentioned above, the Respondents also argued that this case presented a hypothetical question. While the focus of Respondents' Motion to Dismiss, and therefore necessarily the Court of Appeals' Order, was on the validity of the 401 Certification, the Appellants will nevertheless also address the hypothetical question issue below.

A. The 401 Water Quality Certification Regulations Provide for Continuing Obligations that Survive Completion of Construction

Whenever an activity calls for filling/impacting waters that are subject to the Clean Water Act, a Section 401 Water Quality Certification is required from DHEC. The purpose of the certification review is to assess all water quality impacts of a project and determine whether the project meets state water quality standards. S.C. Code Ann. Regs. 61-101.F(2).[4] But it is critical to note that this review consists of more than a "yay" or "nay" decision on whether water quality standards are met. Regulation 61-101 gives DHEC broad authority to establish "**any limitation, conditions, or monitoring requirements necessary to assure maintenance of classified and existing water uses and standards** and compliance with other requirements of these regulations or other appropriate requirements of State law" on an applicant's water quality certification.[5] S.C.

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[4] Regulation 61-101 was adopted to carry out the Clean Water Action Section 401 Certification requirements. Under R. 61-101, DHEC is required to consider "all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(1) impact on existing and classified water uses;
(2) physical, chemical, and biological impacts, including cumulative impacts;
(3) the effect on circulation patterns and water movement;
(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others."

S.C. Code Ann. Regs. 61-101.F.(3).

[5] The Respondents admit that DHEC does have authority to impose the very same requirement Appellants seek in this case – minimum instream flows — as a condition on a 401 water quality certification, and that DHEC has, in fact, imposed a minimum instream flow regime as part of 401 Water Quality Certifications related to dams in the past. (App. p. 151, Respondents' Joint Motion for Summary Judgment).

Code Ann. Reg. 61-101(A)(5) (emphasis added). The argument that DHEC's 401 Certification, along with the conditions, limitations and monitoring requirements attached thereto, have no legal effect after construction is complete is inconsistent with DHEC's regulations and standard practice

DHEC routinely places conditions on 401 Water Quality Certifications that survive well beyond the completion of the construction activity that necessitated the Certification, such as long-term monitoring requirements and continued maintenance and protection of water quality. In fact, DHEC has imposed such conditions in this particular case. The very first condition imposed in DHEC's 401 certification of Greenville Water's project requires GW to follow best management practices "on and off the project site DURING AND AFTER CONSTRUCTION." (App. p. 416) (emphasis added). This condition demonstrates not only DHEC's authority to impose conditions extending beyond the construction period, but also DHEC's authority to impose conditions not directly related to the project activity. As another example, condition 16 of the GWS Certification requires GWS to **maintain** wetlands impacted during construction in an "uncleared or uncut state." (App. p. 417) (emphasis added). Clearly such condition imposes obligations on GWS beyond the period of construction.

DHEC's 401 Certification regulations provide as to "enforcement of certification decision and conditions" that DHEC may pursue enforcement "to correct or prevent adverse water quality impacts from construction or **operation of activities for which certification has been issued.**" R.61-101.H(2). Obviously, operation follows construction and the regulation clearly states that conditions can be imposed on the "operation" of the certified project. Under Greenville Water and the Court of Appeal's

interpretation, "operation" of the certified project would be completely outside the scope of 401 consideration or enforcement.

DHEC's 401 Certification regulations also provide that "[i]n assessing water quality impacts of the project, the Department **will address and consider** . . . all potential water quality impacts of the project, both direct and indirect, **over the life of the project**." R.61-101.F(3) (emphasis added). Thus, the regulation clearly provides that water quality impacts can be addressed during the entire period of time that the project is in operation. Under the argument advanced by Greenville Water, DHEC would "consider" post-construction water quality impacts, "address" those impacts by imposing conditions necessary to protect post-construction water quality, and these conditions would inexplicably die upon completion of construction.

Finally, the enforcement provisions further provide that any State certification condition becomes a condition of the corresponding federal permit. R.61-101.H(1).[6] In other words, DHEC's 401 Certification conditions become conditions of the federal Clean Water Act permit issued by the Corps under Section 404 and are enforceable pursuant to R. 61-101.H(2). If the 401 conditions no longer bind Greenville Water after construction, it must also be true that the Corps' CWA permit is no longer enforceable after construction is completed. Certainly such a conclusion is belied by the monitoring and enforcement actions regularly undertaken by the Corps well after project construction.

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6 See also, Clean Water Act, Section 401(d), explaining that any conditions imposed by the State through the 401 Certification review become a part of the federal Clean Water Act permit issued by the Corps.

B. Completion of Construction Does Not Moot a 401 Certification Because there is a Continuing Obligation to Comply

While there are no South Carolina cases on point, there are federal cases that have held that a case is not moot simply because the construction activity authorized by an environmental permit has been completed. In City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency, 435 F.3d 632, 636 (6th Cir. 2006), the Plaintiffs challenged a Clean Water Act 404 permit and 401 certification for a plan to fill a creek to construct a new airport runway. At the time the appeal was heard, the project was complete and the creek was filled. Even so, the court determined that the case was not moot. The court stated its conclusion as follows: "should Plaintiffs prevail in their suit, the permit issued . . . would have to be invalidated and another permitting process would be required. Because a live controversy exists with respect to the permit itself, we agree that the issues raised in Plaintiffs' complaint are not moot." *Id.* at 636. Certainly the case for mootness was more compelling in City of Olmsted than here, where the relief sought by Appellants remains fully available without any jeopardy to the completed 42-inch pipe.

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996), was a National Environmental Policy Act case in which the plaintiffs also brought challenges related to construction of a new runway. The runway had been constructed by the time the case reached the 10th Circuit. In a holding that draws many parallels to the instant case, the court concluded that the case was not moot because "[t]he majority of environmental concerns surrounding [the new runway] relate not to the actual physical construction of the enlarged runway, but rather to the new patterns of commercial jets using the runway."

Id. at 429. In much the same way, the environmental challenges in this case are not to actual physical construction of the new pipe, but rather to maintenance of minimum stream flows released from the reservoir that the pipe removes water from. The 10th Circuit's holding rested on the fact that it could still award relief, even though construction was complete. The same is true in this case.

We have found no case or other authority supporting the novel proposition advanced by the Respondents and presumably adopted by the Court of Appeals that 401 certifications expire upon completion of construction.[7]

C. In Light of Continuing Obligation to Comply, Effectual Relief Clearly Available

If the 401 Certification and its conditions indeed have legal effect beyond construction, the remedy the Appellants have sought throughout this action is viable, and this case is not moot.

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[7] See also, Ware v. U.S. Fed. Highway Admin., 255 F. App'x 838, 839 (5th Cir. 2007) ("despite the fact that construction is complete, appellants ultimately seek relief from noise brought on by the highway . . . completion of construction does not undermine the benefits of further noise mitigation measures . . . that could be added based on a new, FAHA-compliant noise analysis"); Columbia Basin Land Prot. Ass'n v. Schlesinger, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (challenge to EIS not moot where towers and transmission line had been in place since 1978: "were the Court to find the EIS inadequate, or the decision to build along Route D-1 arbitrary and capricious, the agency would have to correct the decision-making process"); Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 625-26 (3d Cir. 1971) (holding that completion of a road project did not moot claim because "[i]f we found that a violation of the federal statutes relating to the protection of the environment had taken place, the fact that the road was complete would not necessarily preclude the possibility of an equitable decree making right some part of the wrong"); Buck Mt. Cmty. Org. v. TVA, 629 F. Supp. 2d 785, 791 (M.D. Tenn. 2009) (case was not moot because the court could fashion effective relief for NEPA violations despite completion of transmission line).

"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 Court to grant effectual relief." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591. 596 (2001) (citing Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). If the court has the "power to grant a legally cognizable remedy requested by a party" then the case is not moot. United States v. Hahn, 359 F.3d 1315, 1337 (10th Cir. 2004); Smith v. Plati, 258 F.3d 1167, 1179 (10th Cir. 2001) ("An issue becomes moot when it becomes impossible for the court to grant any effectual relief whatsoever on that issue to a prevailing party").

Applying those principles here, it is clear that effectual relief can still be granted. As has been referenced throughout this Petition, the remedy the Appellants' seek is an additional condition on DHEC's 401 Certification that addresses the issue of insufficient flows in the South Saluda. Specifically, the Appellants rely on Regulation 61-101's broad command to DHEC to establish "**any limitation, conditions, or monitoring requirements necessary to assure maintenance of classified and existing water uses and standards**" and Regulation 61-68's imposition of a mandatory duty to protect and maintain stream flows (**"stream flows necessary to protect classified and existing uses and the water quality supporting these uses *shall* be maintained"**). The Appellants contend that, together, these regulations authorize and require a minimum flow condition in this instance. The Appellants were deprived of the opportunity to be heard on this argument by the Court of Appeal's dismissal. However, that condition can easily be included in the 401 Certification for this disputed project, despite the fact that

construction is complete.

In sum, in order for the Court to conclude that this case is moot, it would have to find that no effectual relief or cognizable remedy could be provided. The relief sought in this case (modification of the Certification conditions) is unique in the very fact that construction of the disputed project in no way diminishes availability of the relief.

II. Lifting the Automatic Stay and Completing Construction While this Appeal is Pending Does Not Render the Appeal Moot

The Appellants are asking this Court to exercise its discretion to issue a writ of certiorari and to consider this appeal. A factor weighing in favor of this exercise of discretion is the potentially significant and far-reaching impacts of the Court of Appeals' Order on cases brought under the S.C. Administrative Procedures Act ("APA").

The APA provides for the automatic stay of challenged DHEC decisions, which means that the project in question cannot move forward while the appeal is pending. See, S.C. Code Ann. § 1-23-600(H)(2). However, the APA authorizes the Administrative Law Court to lift the automatic stay "for good cause shown or if no irreparable harm will occur." S.C. Code Ann. § 1-23-600(H)(4). With some regularity, Administrative Law Judges do grant, and parties do consent to, a partial or complete lifting of the automatic stay in instances where relief can be accomplished after construction or partial construction of the permitted activity. See, e.g., Heath Hill v. SCDHEC and S.C. Electric & Gas Co., 2008 WL 3863539 (Order lifting automatic stay for "good cause"); MRI at Bellfair, LLC and Hilton Head Regional Medical Center v. SCDHEC and Southern MRI, 2008 WL 5019941; Randy Slovic v. SCDHEC, OCRM, and Waccamaw Trace, 1999 WL 988662.

When this challenge was filed, the "automatic stay" provision of § 1-23-600(H) was activated, preventing Greenville Water Systems from undertaking any construction activities until the challenge was resolved in the ALC. In this instance, however, the automatic stay served little purpose, as it is the continued operation of the pipe (i.e., the volume of water it takes away from the South Saluda), rather than the actual construction of the pipe, that is at issue.[8] In other words, the Appellants recognize the need for the new water pipe to replace the older deteriorating pipe and do not object to the path and method of pipe construction; the amount of water entering the South Saluda has nothing to do with the actual physical construction of the pipe, and everything to do with Greenville Water's operation of the pipe and the TRR.

With this in mind, the Petitioners/Appellants were cooperative in consenting to lift the automatic stay. The implications of this consent were considered, and the Petitioners/ Appellants concluded that if they prevailed in the case, DHEC or the Court would require minimum flows in Greenville Water's 401 Certification, regardless of the fact that the new pipe had been constructed. Thus, construction of the new pipe moved forward as the case moved forward in the ALC. Eventually the ALC granted the Respondents' joint motion for summary judgment, and construction of the new pipe was completed while this case was pending before the Court of Appeals.

Greenville Water's novel proposition, which the Court of Appeals presumably accepted, is that where the automatic stay is lifted and the disputed project is completed,

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[8] The Appellants initially objected to the method of constructing the new pipe, but GWS later modified and improved its plan for the stream and wetland crossings.

the case becomes moot. Under GWS's argument and the Court of Appeal's Order, lifting the automatic stay, as specifically provided for under the APA, becomes a tool for mooting administrative cases.[9] Under such circumstances, no court should ever allow the automatic stay to be lifted and no party should ever consent to its lifting. In actuality, however, as the APA provides, lifting of the stay presumes that the project goes forward, but the appeal goes forward as well, with a recognition that the permit or certification under appeal could be reversed or modified by the reviewing court post-construction.

Parties regularly consent to lifting the automatic stay in the ALC when relief can still be granted post-completion. The Respondents have faulted the Appellants' for doing so in this case. The Respondents would apparently have had Petitioners/Appellants oppose the stay, though there was no practical or legal reason for doing so. If the Court of Appeals' Order is allowed to stand, the Respondents will likely have their wish in the future, as it would be incredibly ill-advised for a party to consent to lifting the automatic stay under any circumstances. The Appellants are asking this Court to intervene and prevent the Court of Appeals' Order of dismissal from establishing the dangerous legal precedent that construction of a challenged project necessarily terminates DHEC's ability to regulate that project under Section 401 and the jurisdiction of the court to hear the challenge.

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9 This proposition would also deprive the ALC of its jurisdiction in cases where the project is constructed before the trial date.

III. The Question Raised by Appellants is Not Hypothetical

Respondents' Motion to Dismiss argued that the Appellants' limited their challenge before the ALC to a single hypothetical question. Again, with the two-page Order lacking much explanation, it is unclear whether the Court of Appeals considered this alternate ground for dismissal and, if so, whether it played any role in the Court of Appeals' conclusion that this case is moot. The Appellants consider this to be a secondary issue, just as it was presented in the Respondent's motion to dismiss. (App. pp. 533-547). But in light of the Court of Appeals' decision not to explain the reasons for its dismissal, the Appellants will nevertheless address the issue in full.

The basis for the Respondents' hypothetical question argument is a letter from Appellants' counsel Amy Armstrong to the ALC. The letter reflects Ms. Armstrong's communication to the ALC of the Appellants' strategic decision to focus their challenge on the central issue of flows in the South Saluda River. Neither that decision nor the letter communicating it limits this appeal to a single hypothetical question.

Initially the Appellants filed this case in the ALC challenging both (1) DHEC's failure to impose a minimum flow condition in the South Saluda and also (2) the 42-inch pipe's actual construction. In particular, in the Appellants' Request for Contested Case Hearing (the administrative version of a complaint), the Appellants listed as one of their grounds for challenge that: "DHEC erred in **not requiring** a minimum flow release from the Table Rock Dam and Reservoir into the South Saluda River." (App. p. 30) (emphasis added). Note that there is nothing hypothetical in the statement of this challenge. In other words, the issue raised by the Appellants was not whether DHEC could have imposed a

flow condition, but whether they had to impose that condition. As to the actual pipe construction/path, the Appellants raised a number grounds for challenge,[10] all of which centered around the fact that the new pipe would have 26 total river crossings and would disrupt at least three wetland areas. (App. pp. 27, 29-32).

After Greenville Water modified and improved its plan for these crossings, the Appellants decided to limit the appeal to their most important issue: those related to the level of flow/water in the South Saluda. Having made this decision, Ms. Armstrong wrote a letter to the ALC explaining exactly that: "the Petitioners hereby withdraw all other grounds for appeal that are not related to this issue." (App. p. 419) (emphasis added). As explained in the letter, "this issue" is the "question of whether DHEC has authority to impose a minimum flow release to the South Saluda River." Id.

In their motion to dismiss, the Respondents hung great importance and assigned great meaning to this letter. In particular, they argued that this letter erased the challenge clearly stated in the Request for Contested Case Hearing and left the sole issue as whether, in a hypothetical vacuum, DHEC could impose a flow condition. (App. pp. 566-570).

First, the letter must be considered in the context of the actual pleadings filed by the Appellants in the ALC. Under anything other than the most strained of readings, it is clear from placing Ms. Armstrong's letter in the context of the Request for Contested

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These grounds included: whether construction would "permanently alter the aquatic ecosystem in the vicinity of the project"and whether the river crossings would "adversely affect the use of and access to navigable waters." See (App. pp. 29-32)

Case Hearing that she was simply expressing that all of the grounds related to the actual construction/path of the pipe (the 26 crossings and wetland impacts) were no longer being pursued. This interpretation is obviously bolstered by the fact that the Appellants consented to the automatic stay being lifted, allowing the 26 crossings and wetland impacts to occur while the action continued. Again, the Appellants' pleading filed with the ALC clearly states that "DHEC erred in **not requiring** a minimum flow release from the Table Rock Dam and Reservoir into the South Saluda River."

However, even throwing up blinders to the content of the Request for Contested Case Hearing and strictly interpreting the content of the letter, it is clear that whether DHEC should have imposed South Saluda flow requirements on Greenville Water is "related to" the issue of whether they have the authority to do so. The Appellants' pleadings in fact raised several grounds that are "related to" the issue of DHEC's authority to impose flow conditions for the South Saluda. One of these is of course whether "DHEC erred in **not requiring** a minimum flow release." But other grounds "related to" this issue were raised in the Requested for Contested Case, including that: "The proposed activity would increase the withdrawal capacity from the Table Rock Reservoir, resulting in adverse impacts to circulation patterns and water movement in the South Saluda River, in violation of R.61-101.F.3(c)(3)." (App. p. 30). Ms. Armstrong's letter simply states that these related claims, as they were stated in the Request for Contested Case, will be the Appellants' sole focus going forward.

While the plain language of these relevant documents should be enough to defeat the Respondents' strained reliance on Ms. Armstrong's letter, their argument is further

weakened by the content of the Appellants' filings in the ALC subsequent to the letter.[11] The Petitioners/Appellants have steadfastly argued that DHEC not only has the authority to require minimum flows, but also the mandatory duty to do so under the present circumstances. The Appellants' Cross Motion for Summary Judgment in the ALC is illustrative, in that it contains the following statements of Appellants' argument: the applicable DHEC regulation "mandates that DHEC impose [those] conditions"; "the water classification and standards regulations require that existing uses in all waters shall be protected"; "The Department is required to 'use applicable critical flow conditions for the protection and maintenance of aquatic life'"; "It is precisely these critical flow conditions necessary to protect and maintain the trout fisher and aquatic life of the [South Saluda River] that must be part of DHEC's certification of the GWS permit"; "South Carolina's [water quality regulations] require the imposition of minimum stream flows necessary to protect existing uses and water quality"; and DHEC "has the authority to act, and it must be required to act consistent with the [Pollution Control Act] and its regulations." Exhibit 1, pp. 10-15 (emphasis added).

It is clear by taking even a cursory glance at Petitioner's Cross Motion for Summary Judgment, which, unlike the letter relied on by Respondents, is a document to which the court should look for issues of preservation, that Petitioners/Appellants have consistently presented the issue of DHEC's mandatory duty to impose flow conditions

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[11] Regardless of the content of the letter, issues are not preserved based on the content of informal correspondence with a court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding in order to preserve an issue for appeal, it must be raised to and ruled on by trial court).

and have not limited themselves to the hypothetical question Respondents draw from one poorly interpreted letter.

IV. DHEC Has the Authority and Duty to Impose a Minimum Flow Release Condition on GWS' 401 Water Quality Certification

As discussed above and in Section I, DHEC has the authority to impose conditions on 401 Water Quality Certifications, including conditions that survive completion of the permitted activity. See S.C. Code Ann. Reg. 61-101(A)(5). DHEC also has express authority to "protect classified and existing uses, such as below dams and in tidal situations." S.C. Code Ann. Regs. 61-68.C.4.a.(2). And DHEC has a mandatory duty to maintain "stream flows necessary to protect classified and existing uses and the water quality supporting these uses." S.C. Code Ann. Regs. 61-68.D.1.b. Specifically, the regulations provide that:

> "**[e]xisting water uses and the level of water quality necessary to protect these existing uses *shall* be maintained and protected** regardless of the water classification... Existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. **The stream flows necessary to protect classified and existing uses and the water quality supporting these uses *shall* be maintained** consistent with riparian rights to reasonable use of water."

S.C. Code Ann. Reg. 61-68(D)(1)- 61-68(D)(1)(b) (emphasis added).

In combination, these provisions not only authorize a condition providing minimum instream flows to be released from the Table Rock Reservoir into the South Saluda, but also require such condition in order to ensure sufficient flows needed to protect classified and existing uses.

The States' authority to impose flow conditions to ensure compliance with State water quality standards authorized under Section 303 of the CWA was addressed by the United States Supreme Court in PUD No. 1 v. Jefferson County,, 511 U.S. 700, 114 S.Ct. 1900 (1994). The PUD No. 1 case involved a challenge to a state environmental agency's authority to require, as a condition to its § 401 water quality certification for the construction of a hydroelectric facility, the maintenance of minimum instream flows below the dam.

In PUD No. 1, as in this case, the applicant argued that minimum instream flow conditions were unrelated to the specific discharges for which § 401 water quality certification was required. Id. at 712, 114 S.Ct. at 908. The U.S. Supreme Court flatly rejected that argument.[12] Id. at 711, 114 S.Ct. at 1908-09. The Court reasoned that "if § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act," then the applicant's challenge to "the scope of the State's certification authority would have considerable force." Id. at 711, 114 S.Ct. at 1908.

But the Act also contains subsection (d), which "***expands*** the State's authority to impose conditions on the certification of a project . . . 'necessary to assure that *any applicant*' will comply with" the Clean Water Act and any state

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The dissent in PUD No. 1 argued that the State requirements under Section 301 apply only to discharges. The majority rejected that interpretation and ruled that the CWA contains a "broad enabling provision which requires states to take certain actions," including to establish limitations necessary to meet water quality standards. Id. at 713, FN 3, 114 S.Ct. at 1910

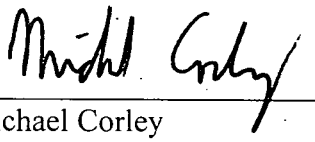
requirements. Id., 114 S.Ct. at 1909 (emphasis added). The purpose of the State's review authority under § 401 is to assure compliance with water quality standards and maintenance of existing uses. In PUD No. 1, the State asserted that minimum instream flows were required to ensure compliance with state water quality standards. The U.S. Supreme Court agreed that under the 401 certification program, the State has the broad authority to impose conditions on the applicant that are unrelated to discharges, but necessary to enforce water quality standards. Id.

The Appellants presented the merits of their challenge, of which this section is only an overview, to the Court of Appeals but were denied consideration on the basis of mootness.

CONCLUSION

The Appellants hereby petition this Court for a Writ of Certiorari to consider whether the Court of Appeals erroneously dismissed this appeal without hearing the merits, and whether the ALC erred in granting summary judgment to the Respondents. If this Court does not accept jurisdiction, the Court of Appeals Order could potentially hold significant implications for future review of DHEC decisions and absolutely will deny the Appellants an opportunity for judicial review of this administrative decision, as guaranteed by Article I, Section 22 of the S.C. Constitution.

Respectfully submitted,



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November 26, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 2011-186086

Upstate Forever, South Carolina Native Plant Society, and
South Carolina Wildlife Federation, ... Appellants,

vs.

South Carolina Department of Health and Environmental Control and
Greenville Water Systems, ... Respondents,

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Appellants' Petition for Writ of Certiorari and Appendix upon counsel for the Respondents GWS and DHEC by placing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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Georgetown, South Carolina

November 26, 2012

Exhibit 1

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, Petitioners, vs. South Carolina Department of Health and Environmental Control and Greenville Water System, Respondents.	Case No. 09-ALJ-07-0226-CC **PETITIONERS' RESPONSE TO RESPONDENTS' JOINT MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT**

TO: ADMINISTRATIVE LAW JUDGE JOHN D. MCLEOD AND ALL PARTIES AND THEIR ATTORNEYS

PLEASE TAKE NOTICE The Petitioners Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation hereby respond to the Respondents' Joint Motion for Summary Judgment and move this Court, pursuant to ALC Rule 19 and SCRCP Rule 56, for an Order granting summary judgment in favor of the Petitioners.

This motion is based on the pleadings and exhibits attached hereto, all of which show that there is no genuine issue of material fact and the Petitioners are entitled to judgment as a matter of law, in that the South Carolina Department of Health and Environmental Control has express or implied authority to impose a requirement for a minimum flow release to the South Saluda River from the Table Rock Dam and Reservoir as 1) a condition of its 401 Water Quality Certification, pursuant to Regulation 61-68 and 61-101 and/or 2) pursuant to its authority under other laws and regulations.

Overview of the Case

Greenville Water System ("GWS") owns and operates the Table Rock Dam and Reservoir ("TRR") in northern Pickens County. Since the dam was built, GWS has been using two 30 inch raw water transmission mains (hereinafter referred to as "RWTM") to transport water from the reservoir to the treatment plant in Greenville County. GWS proposes to construct a 42-inch, 7.8 mile long RWTM from the Table Rock Reservoir. The project includes the removal or segmentation of one of the existing 30 inch RWTMs, while the remaining 30 inch RWTM will remain in service.

Immediately below the dam is the South Saluda River ("SSR"), one of South Carolina's very few trout streams. The SSRand its tributaries are used for fishing (including trout), swimming, boating, and other public recreation activities, as well as a source of irrigation for production of food crops.

Table Rock Reservoir and all of the streams flowing into it are classified as "Outstanding Resource Waters," the highest possible water quality classification in South Carolina. Yet the water quality classification of the South Saluda River immediately below the dam is "Trout Put, Grow and Take," two levels ***below*** the "Outstanding Resource Waters" classification.[1] But for the dam, the SSR would be classified as an Outstanding Resource Water; the lower classification is the direct result of GWS's operation, management, and use of the TRR.

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[1]"Trout Put, Grow and Take" is the current classification for the SSR and includes "freshwaters suitable for supporting growth of stocked trout populations and a balanced indigenous aquatic community of fauna and flora. Also suitable for primary and secondary contact recreation and as a source for drinking water supply after conventional treatment in accordance with the requirements of the Department. Suitable for fishing and the survival and propagation of a balanced indigenous aquatic community of fauna and flora." S.C. Code Ann. Reg. 61-68.E.2(b).

Both the dam itself and GWS's operation and management of it have serious adverse impacts on water quality, aquatic life, and the existing use of Trout-Put, Grow and Take of the SSR. The Petitioners, the S.C. Department of Natural Resources ("DNR") and the U.S. Fish and Wildlife Service ("USFWS") have pointed out the obvious and devastating impacts of GWS's dam operation on the river, the river's trout fishery, other aquatic life, and public recreation (fishing, swimming, wading and paddling). (Exhibit A, DNR letter, dated June 20, 2008; Exhibit B, DNR letter dated September 15, 2008; Exhibit C, USFWS letter, dated September 19, 2008).

Table Rock Reservoir was built in the 1930s, prior to any environmental regulations, and no minimum flow requirements have been in effect for this reservoir.[2] The result is that the SSR has had a deficit stream flow resulting in impacts to fish, mussels, and other aquatic organisms. (Exhibits A, B & C). Trout need oxygenated cold water to survive and reproduce. (Exhibit D, DNR Report, dated September 13, 2010). But when mountain streams are impounded or dammed like the SSR has been with the TRR, there is less flow often resulting in significantly warmer water downstream. *Id.* DNR believes that reductions in flows likely caused the decrease in species diversity of fish present in the SSR. *Id.*

The lower water quality classification and ecological impacts found by DNR and USFWS are the direct result of the lack of a minimum flow release to the SSR.

For five years, the U.S. Geological Survey operated a stream gauge on the SSR only a short distance below the Table Rock Dam. (Exhibit E, Affidavit of Dr. Dave Hargett dated September 13, 2010). According to data from this gauge, flow in the SSR was ***below*** the "7Q10"

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[2]When a reservoir or dam is constructed or re-licensed under current laws, minimum instream flows are regularly included as a condition to the 401 water quality certification.

(the minimum flow needed for water quality and aquatic health) 35% per cent of the time. (Exhibit E).

Both DNR and USFWS point out that the new 42-inch RWTM running in parallel with an existing 30-inch RWTM is likely to cause further environmental degradation below the TRR as capacity for water withdrawal increases. (Exhibit A, B & C). Despite GWS's claims that it will not withdraw a greater capacity of water than it currently withdraws, the fact is that GWS will have the ability to withdraw a greater capacity of water with the water line. But even if there is no increase in water withdrawal, GWS's continued operation and management of the TRR without a required minimum flow release will result in inadequate flow to the SSR and continuing violations of the water quality standards.

DNR has proposed a minimum flow release regime that varies with the season of the year and allows lower releases in times of drought. (Exhibit D). Minimum flows will address the needs of the public and the natural resources dependent on a healthy river system. *Id.* GWS has rejected the proposal, and DHEC refuses to require GWS to comply with it.

In order to construct the RWTM, GWS had to obtain two approvals from DHEC – a Navigable Waters Permit and a 401 Water Quality Certification – and a Clean Water Act Section 404 Permit from the U.S. Army Corps of Engineers.

DHEC issued the Navigable Waters Permit and the 401 Water Quality Certification for the project without requiring a minimum flow release as a condition of the permit and certification, contending that it does not have authority to do so. The DHEC Board affirmed the staff decision on the grounds that the agency lacks such authority.

ARGUMENT

I. The Respondents Have Failed to Provide Any Legal Basis for Granting Summary Judgment

The Respondents argue that they should prevail as a matter of law because 1) minimum instream flow requirements are outside the scope of the water quality certification and 2) the Inter Basin Transfer Registration regulates withdrawals from the reservoir. Neither of these assertions has merit and there is no legal support for Respondents' argument that DHEC does not have authority to impose minimum instream flows as a condition of its water quality certification.

A. There is no statutory or regulatory prohibition on imposing a minimum instream flow condition as a part of DHEC's water quality certification

The Respondents admit that DHEC does have authority to impose minimum instream flows as a condition to a 401 water quality certification, and that DHEC has, in fact, previously done so. (Respondents' Joint Motion for Summary Judgment, p. 7). Respondents simply assert that DHEC cannot impose those minimum instream flow conditions on the water quality certification for GWS's project.

Notably, the Respondents point to no statutory or regulatory support for its position. Respondents' argument has no legal basis and is contrary to the plain language of the 401 Water Quality Regulations at R. 61-101, the Water Quality Standards at R. 61-68, and case law interpreting the 401 program, as discussed more fully below in Section II.

B. The Interbasin Transfer Registration Does Not Preempt the Pollution Control Act and Its Regulations

The Interbasin Transfer Registration ("IBTR") is authorized under the Interbasin Transfer Act ("IBTA"), which regulates water withdrawal rates for the TRR. S.C. Code Ann. § 49-21-10, *et seq.* The IBTA authorizes DHEC to "grant, deny, or issue with conditions as to quantity or qualities of water, a permit to any person for any interbasin transfer of water." S.C. Code Ann. § 49-21-30.A. The stated purpose of the IBTR is to "protect the supply of water within designated river basins through the establishment of procedures to register, permit, and otherwise regulate the interbasin transfer of water." S.C. Code Ann. Regs. § 121.12.1.

The Respondents essentially argue that the IBTA preempts DHEC's authority under the South Carolina Pollution Control Act ("PCA") and other statutes and regulations to require a minimum flow release into the SSR. The argument has no merit. DHEC's authority to impose instream flows derives from a separate statutory and regulatory scheme under which GWS must also receive approval, apart from approval under the IBTA.

Unlike the Interbasin Transfer Act, the Pollution Control Act and its 401 water quality certification and water classification and standards regulations are specifically aimed at protecting water quality and existing uses of our State's waters. The PCA gives DHEC "authority to abate, control, and prevent pollution" in furtherance of the State's policy to "maintain reasonable standards of purity of the air and water resources of the State, consistent with the . . . propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources." S.C. Code Ann. § 48-1-20. DHEC also has authority to "take all action necessary or appropriate to secure to this State the benefits of the

Federal Water Pollution Control Act . . .. . any and all other Federal and State acts concerning air and water pollution control."[3] S.C. Code Ann. § 48-1-50(17). Finally, the PCA gives DHEC authority to "[i]ssue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste or air contaminants or for the installation or operation of disposal systems or sources or parts thereof." S.C. Code Ann. § 48-1-50(5). The 401 water quality regulations and the water classifications and standards regulations implement the directives of the PCA, as more fully discussed in Section II.

There is no conflict or inconsistency between the two programs. The IBTA regulates only the transfer of water from one watershed to another, while the PCA broadly regulates water quality in all watersheds of the State. In fact, the IBTR for the TRR expressly recognizes the applicability and enforceability of laws like the PCAand it regulations: "Nothing in this Registration shall be construed to preclude the institution of any legal action or relieve the registrant from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation." (Exhibit F, IBTR). Clearly, there is no preemption.

The Respondents' motion amounts to general statements unsupported by legal authority and they have failed to carry their burden of proof under the standard for summary judgment.

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[3]Under the Federal Water Pollution Control Act ("CWA"), states are required to establish water quality standards which reflect designated uses of the navigable waters including propagation of fish, wildlife, and recreational purposes. 33 U.S.C. § 1313(c)(2)(A). With established water quality standards, a state is required to "protect the public health or welfare, enhance the quality of water, and serve the purpose of" the CWA. *Id.* The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). A key goal of the CWA is the "protection and propogation of fish, shellfish, and wildlife provid[ing] for the recreation in and on the water." 33 U.S.C. § 1251(a)(2).

In furtherance of the CWA's objectives, the Act requires the State to enforce water quality standards for intrastate transfers. 33 U.S.C. § 1319(a). The State enforces these standards through its Section 401 Water Quality Certification of a Federal CWA Section 404 Permit. 33 U.S.C. § 1341.

II. DHEC Has Authority Under the CWA, the PCA and Regulations 61-68, 61-69 and 61-101 to Require a Minimum Flow Release; Therefore, the Petitioners Are Entitled to Summary Judgment

As a preliminary matter, the 401 water quality certification is the underlying Department activity giving rise to this challenge. The Respondents suggest that if no water quality certification were required, then Petitioners concerns regarding minimum flow limits would exist, but could not be addressed, citing a "hypothetical" under which a water line is constructed entirely in uplands. This hypothetical is inapplicable for two reasons.

First, we do have a required water quality certification in this case and the review authority under the regulations is sufficiently broad to impose minimum flows. Second, even if there were no water quality certification, DHEC has authority under the PCA and Regulation 61-68 to impose minimum instream flows *sua sponte*.

Pursuant to the Clean Water Act and the PCA, DHEC has established its water quality standards program (Regulations 61-68 and 61-69) and its water quality certification program (Regulations 61-101). Under both programs, the agency has the authority to require a minimum flow release to the South Saluda River.

DHEC applies its Water Quality Certification Regulation 61-101 to determine whether a proposed project requiring a federal permit or license will be certified as complying with South Carolina's water quality standards and regulations. The Water Quality Certification Regulations give DHEC the authority to establish "*any limitation, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards* and compliance with other requirements of these regulations or other appropriate requirements of

State law" on an applicant's water quality certification. S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). There is no limitation on the agency's scope of review and authority under Regulation 61-101, and DHEC has the authority to impose whatever conditions or requirements are necessary to protect water quality and existing uses, including minimum flow releases. The DHEC Board affirmed staff's issuance of a 401 certification to GWS in this case, but claimed the above language did not give authority to impose minimum flows.

In order to implement Regulation 61-101's requirement for maintaining "classified or existing water uses and standards," the Department must apply the water classification and standards Regulations 61-68 and 61-69. Similar to Regulation 61-101, the scope of the agency's authority under R. 61-68 and 61-69 is broad and specifies that minimum instream flows must be maintained to protect existing uses and water quality. S.C. Code Ann. Regs. 61-68.D.1. "All existing water uses and the level of water quality necessary to protect those uses must be maintained and protected under all circumstances." S.C. Code Ann. Regs. 61-68.D.1. The overriding principle is improving the quality of the State's waters; all doubts must be resolved in favor of improving water quality and against degradation.

The regulations continue that "*existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained consistent with riparian rights to reasonable use of water.*" S.C. Code Ann. Regs. 61-68.D.1.b.(emphasis added). In addressing "Flow requirements, prohibitions and exceptions," Regulation 61-68 gives DHEC express authority to impose

conditions to "protect classified and existing uses, such as *below dams* and in tidal situations."[4] S.C. Code Ann. Regs. 61-68.C.4.a.(2) (emphasis added).

Regulation 61-68 thus recognizes that water withdrawal may adversely affect existing and classified uses, in this case Trout-Put, Grow and Take waters, and mandates that DHEC impose conditions to protect these uses, regardless of whether there is a water quality certification. Of course, in this case there is a water quality certification, and the PCA and Regulation 61-101, promulgated pursuant to the PCA, authorize DHEC to impose conditions as part of the certification. S.C. Code Ann. Reg. 61-101(A)(5).

The water classification and standards regulations were promulgated pursuant to the PCA to implement the goal of improving the quality of the State's waters. In furtherance of this goal, the water classification and standards regulations require that existing uses in all waters shall be protected. S.C. Code Ann. Regs. 61-68.C.3. As discussed above, the existing use for the SSR is "Trout-Put, Grow and Take," which means the waters are suitable for supporting growth of stocked trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b). The regulations set forth numeric criteria for flow requirements necessary to protect the existing uses.[5]

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[4]DHEC also has express authority to impose conditions in connection with any alteration of existing construction or new construction in the State's navigable waters. S.C. Code Ann. Regs. 19-450.

[5]Numeric criterial for aquatic life and human health are numeric values for specific parameters and pollutants or water quality levels which have been assigned for the protection of the existing and classified uses for each of the classifications in South Carolina. S.C. Code Ann. Regs. 61-68.A.1.b.

The numeric criteria require the Department to "consider conditions that are comparable to or more stringent than 7Q10[6] where appropriate to protect classified and existing uses, such as *below dams* and in tidal situations. Only those situations where the use of 7Q10 flows are determined to be impracticable, inappropriate, or insufficiently protective of aquatic life uses shall be considered as a situation in which the Department may consider other flow conditions." S.C. Code Ann. Regs. 61-68.C.4.a.(2) (emphasis added). The Department is required to "use applicable critical flow conditions for the protection and maintenance of aquatic life for, but not limited to, the following: permit issuance . . ." S.C. Code Ann. Regs. 61-68.C.4.a.(3). It is precisely these critical flow conditions necessary to protect and maintain the trout fishery and aquatic life of the SSR that must be part of DHEC's certification of the GWS permit.

Respondents have provided no indication in their motion why this clear directive does not cover conditions related to minimum flow or does not apply to this project. Regardless of Respondents' contentions about the relationship between TRR and the RWTM, DHEC's scope of review for water quality certifications is sufficiently broad under Regulations 61-68, 61-69 and 61-101 to authorize review of all the water quality impacts stemming from or relating to a proposed action. It matters not that GWS will at some point need to apply for an Interbasin Transfer Registration from DHEC under a separate permitting program. Indeed, the U.S. Supreme Court has ruled that States have authority to impose minimum flow requirements to protect a downstream fishery pursuant to § 401 of the Clean Water Act, despite other permitting

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[6]7Q10 "means the annual minimum seven day average flow rate that occurs with an average frequence of once in ten years as published or verified by the U.S. Geological Survey (USGS) or an estimate extrapolated from published or verified USGS data." S.C. Code Ann. Regs. 61-68.B.2.

requirements. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).

The *PUD No. 1* case is directly on point. In *PUD No. 1*, the Court held that § 401 gave states authority to condition water quality certification based upon minimum instream flow requirements designed to ensure compliance with State water quality standards, or any other appropriate requirement under state law. The *PUD No. 1* case involved a challenge to a state environmental agency's authority to require, as a condition to its water quality certification for the construction of a hydroelectric facility, the maintenance of minimum instream flows below the dam. Like DHEC, the Washington Department of Ecology had adopted comprehensive water quality standards and regulations, including an antidegradation policy.[7]

The Supreme Court affirmed the lower court's ruling that the "antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows." 511 U.S. 700, 710 (1994). Similar to that case, South Carolina's antidegradation provisions require the imposition of minimum stream flows necessary to protect existing uses and water quality from impacts resulting from the operation of dams. Specifically, our State's antidegradation policy states that "[e]xisting uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained consistent with riparian rights to reasonable use of water." S.C. Code Ann. Regs.

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[7]In the *PUD No. 1 of Jefferson County* case, the Washington antidegration policy stated that "[in no case, will any degradation of water quality be allowed if this degradation . . . causes long-term and irreparable harm to the environment." 511 U.S. at 707. The State imposed a minimum flow to maintain water quality and natural habitat of indigenous fish and uses of the State's waters.

61-68.D.1(b). South Carolina's antidegradation policy is consistent with EPA's regulations implementing the Clean Water Act, which require that state water quality standards include "a statewide antidegradation policy" to ensure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993).

The Supreme Court in *PUD No. 1* ruled that the state's authority to impose minimum flow requirements would not be limited on the theory that it interfered with FERC's authority to license hydroelectric projects. The GWS project is similar to the *PUD No. 1* case in that both projects required a water quality certification in addition to another permit or authorization to implement the project. The Supreme Court definitively ruled that the State's authority to impose minimum flow requirements under the water quality certification program could not be limited simply because the project requires an alternate additional permit.

In rejecting the argument that the Clean Water Act does not apply to flow issues, the Supreme Court held that:

> In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation, or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. This broad conception of pollution—one which expressly evinces Congress' concern with the physical and biological integrity of water—refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, section 304 of the Act expressly recognizes that water "pollution"

> may result from "changes in the movement, flow, or circulation of navigable waters ....including changes caused by the construction of dams." This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require that existing dams be operated to attain designated uses.

511 U.S. at 719-20 (citations omitted). The Court also held that "the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an '[e]xisting in stream water us[e]' will be maintained and protected." 511 U.S. at 719 (citation omitted). The Court's decision resolves all doubts about DHEC's authority to require a minimum flow release to the SSR.

In this case stream flows necessary to protect classified and existing uses of the SSR can be maintained and protected through conditions imposed on its water quality certification, which are clearly authorized by the PCA and the water quality certification and water classification and standards regulations.

The Respondent's contention that the "pipeline project" is "in no way related to, nor will it alter, the amount of water released from TRR" is untenable. (Resp. Motion, p. 7). Yet DHEC believes that it lacks the authority in this case because the permit that it is certifying does not apply directly to the Table Rock dam itself. This is an overly narrow, unreasonable and wrong assessment of the agency's authority under the CWA, the PCA, and the water quality regulations. DHEC is certifying the construction of a 7.8 mile long water line that will take water out of the Table Rock Reservoir and transport it to the treatment plant. The dam was constructed to create the reservoir and provide a source of water for GWS. The three elements — the dam, the reservoir and the water line — are inextricably linked, essentially three parts of

one system.[8]

Moreover, it is clear that GWS's operation of the dam has had—and continues to have—devastating impacts on the SSR. The operation has caused—and is causing—countless violations of the CWA, the PCA, and the water quality regulations. DHEC clearly has the authority to address and correct this situation. Its antidegradation policy requires that "[a]ll existing water uses and the level of water quality necessary to protect those uses must be maintained and protected under all circumstances". Reg. 61-68.D.1. In this case, the uses include a trout fishery and public recreation. Fish do not do well, and it is hard to enjoy, a river that has little or no water in it. DHEC does not have to stand by and watch helplessly as this condition persists and as these violations mount. It has the authority to act, and it must be required to act consistent with the PCA and its regulations as set forth above.[9]

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[8]Assuming *arguendo* that a more direct link is required, the increased capacity of GWS's new system would provide it. The old system used two 30 inch lines (total of 60 inches), while the new system consists of a 42 inch line and one of the old 30 inch lines (72 inches)—a 20 per cent increase in total capacity. DHEC's refusal to include in the certification a restriction on how often and under what circumstances the old line can be used creates the potential risk that water withdrawals from the reservoir will increase.

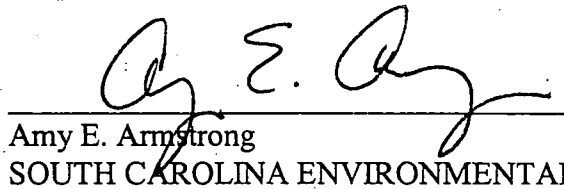
[9] Even in the absence of the water quality certification, DHEC would have the authority to take action and require a minimum flow release. *See City of Rock Hill v. DHEC,* 302 S.C. 161, 394 S.E.2d 327 (1990) in which the South Carolina Supreme Court held: "By necessity, however, a regulatory body possesses not only the powers expressly conferred upon it but also those which must be inferred or implied to effectively carry out the duties for which it is charged. Also, where an administrative agency such as DHEC is acting for the protection of the health of the environment, the delegation of authority to that agency should be construed liberally." 302 S.C. at 164, 394 S.E.2d at 330 (citing *City of Columbia v. Board of Health and Environmental Control,* 292 S.C. 199, 355 S.E.2d 536 (1987)).

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court enter an Order:

1. Granting Summary Judgment in their favor;
2. Declaring that DHEC has the authority to require a minimum flow release into the South Saluda River;
3. Remanding the case to DHEC with instructions to require GWS to provide an adequate minimum flow release into the South Saluda River; and
4. Granting Petitioners such other relief as may be appropriate.

Respectfully submitted,



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Attorney for the Petitioners

Georgetown, South Carolina

November 10, 2010

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation Petitioners, vs. South Carolina Department of Health and Environmental Control and Greenville Water System, Respondents.	)	Case No. 09-ALJ-07-0226-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the Petitioners' Response to Respondents' Joint Motion for Summary Judgment and Cross Motion for Summary Judgment upon counsel for the Respondents GWS and DHEC by placing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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Greenville, SC 29605

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November 10, 2010

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Lawyers for the wild side of South Carolina

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OUR MISSION

To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

November 26, 2012

RECEIVED
NOV 29 2012
S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
1231 Gervais Street
Columbia, SC 29211

RE: *Upstate Forever, et al. vs. SCDHEC and Greenville Water Systems*

Dear Mr. Shearouse:

Enclosed for filing please find one original and six copies of the Petition for Certiorari of the Appellants, along with my filing fee and Certificate of Service in the above-referenced case. I am also contemporaneously mailing one bound and one unbound copy of the Appendix for this Petition.

Please return a clocked-in copy of the Petition in the enclosed postage-paid envelope.

Thank you very much for you kind cooperation and assistance.

Sincerely,

Michael G. Corley

cc: Stephen Hightower, Esq. (w/encl.)
Randolph R. Lowell, Esq. (w/encl.)

The Supreme Court of South Carolina

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT, INC. 11/28/2012

RECEIPT #66396

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	7313
Check/Money Order Date:	11/25/2012
Comments:	UPSTATE FOREVER, et.al. v. SCDHEC AND GREENVILLE WATER SYSTEM

S.C. Environmental Law Project
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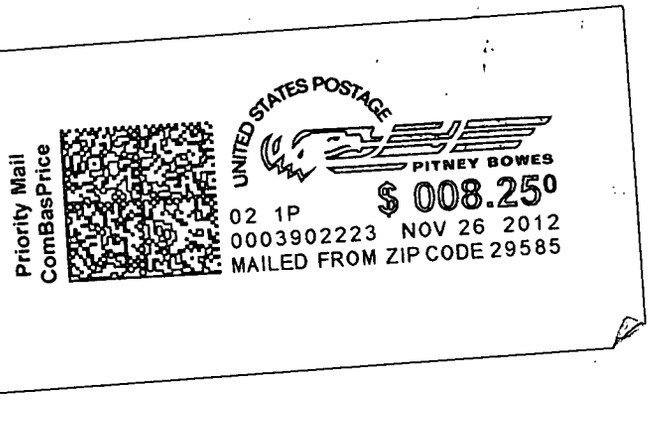
Pawleys Island, SC 29585



Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201