

RECEIVED

DEC 0 2012

S.C. SUPREME COURT

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, ... Petitioners,

vs.

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

**APPENDIX
VOLUME II OF II
(Pages 000419-000602)**

Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL
LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
(843) 527-0078
Attorneys for the Petitioners

Randy Lowell
Willoughby & Hoefer, PA
P. O. Box 8416
Columbia, SC 29202
Attorneys for Respondent, GWS

Stephen Hightower
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201
(803) 898-3570
Attorneys for Respondent, DHEC

November 30, 2012

RECEIVED

NOV 29 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. 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,

**APPENDIX
VOLUME II OF II
(Pages 000419-000602)**

Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Appellants

Georgetown, South Carolina

November 26, 2012

CONTENTS

1.	RECORD ON APPEAL	000001-000418
2.	FINAL BRIEF OF APPELLANTS	000419-000465
3.	FINAL BRIEF OF RESPONDENT GREENVILLE WATER	000466-000508
4.	FINAL REPLY BRIEF OF APPELLANTS	000509-000532
5.	MOTION TO DISMISS CASE AS MOOT	000533-000547
6.	APPELLANTS RESPONSE TO JOINT MOTION TO DISMISS	000548-000564
7.	REPLY IN SUPPORT OF MOTION TO DISMISS CASE AS MOOT ..	000565-000577
8.	COURT OF APPEALS ORDER DISMISSING	000578-000579
6.	PETITION FOR REHEARING EN BANC	000580-000599
7.	COURT OF APPEALS ORDER DENYING REHEARING	000600-000602

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

James S. Chandler, Jr.
Amy E. Armstrong

April 14, 2010

Staff Attorneys

OFFICE ADDRESS

430 Highmarket Street
Georgetown, SC 29440

MAILING ADDRESS

P. O. Box 1380
Pawleys Island, SC 29585

(843) 527-0078
Fax (843) 527-0540
jchandler@scelp.org
amy@scelp.org

Honorable John D. McLeod
Judge, S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29211

Re: Upstate Forever, South Carolina Native Plant
Society, and South Carolina Wildlife Federation
vs. South Carolina Department of Health and
Environmental Control and Greenville Water
System
Case No. 09-ALJ-07-0226-CC

BOARD OF DIRECTORS

Frances Close
Chairperson
James S. Chandler, Jr.
President
Daryl G. Hawkins
Vice President
Wendy Zara
Kim Diana Connolly
David J. Harmon
Gary W. Poliakoff
Margaret D. Fabri

OUR MISSION

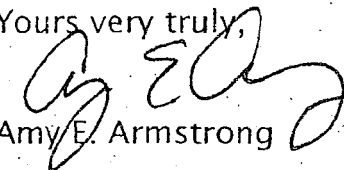
*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

Dear Judge McLeod:

The Petitioners in this case have decided to limit their appeal to the question of whether DHEC has the authority to impose a minimum flow release to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 certification and its construction in navigable waters permit, pursuant to Regulation 61-69, Regulation 61-101, Regulation 19-450, the South Carolina Pollution Control Act, the Clean Water Act, and other applicable laws and regulations.

Accordingly, the Petitioners hereby withdraw all other grounds for appeal that are not related to this issue.

Yours very truly,


Amy E. Armstrong

cc: Stephen Hightower, Esquire
Eugene C. McCall, Jr., Esquire
Brad Wyche, Upstate Forever

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0226-CC

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.

FINAL BRIEF OF APPELLANTS

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL
LAW PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC
29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Petitioners

Georgetown, South Carolina

December 5, 2011

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases, Statutes and Other Authorities	iii
Statement of the Issues on Appeal	vi
Statement of the Case	1
ARGUMENT	2
Summary of the Argument	2
Overview of the Facts	3
I. DHEC HAS EXPRESS AUTHORITY UNDER THE CLEAN WATER ACT, POLLUTION CONTROL ACT AND DHEC REGULATIONS TO REQUIRE MINIMUM FLOW RELEASES IN GWS's PERMIT AND CERTIFICATION	10
A. The Clean Water Act Gives DHEC the Authority to Include a Minimum Flow Release Condition in GWS's Permit and Certification	12
B. DHEC's Regulations Grant Express Authority to Require/Impose a Minimum Flow Release Condition	17
C. Other States Have Upheld the Use of the 401 Certification Process to Impose Any Condition Relating to Water Quality	25
II. THE ALJ DID NOT APPLY THE PROPER STANDARD FOR SUMMARY JUDGMENT	31
III. THE INTERBASIN TRANSFER ACT DOES NOT PREEMPT DHEC'S AUTHORITY TO IMPOSE CONDITIONS ON ITS WATER QUALITY CERTIFICATION	33
A. The Interbasin Transfer Act Has a Limited Scope that Does Not Preempt or Conflict with the CWA, PCA and Regulations Promulgated Thereunder	33
B. GWS's Registration Does Not Preempt or Even Affect DHEC's Authority	36
C. The Interbasin Transfer Act Cannot Preempt the Federal Clean Water Act	37
CONCLUSION	38

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page(s)

CASES

<i>Beaver Dam Comm. Assn., et al. v. SCDHEC, at al.</i> , Docket Nos. 01-ALJ-07-0159-CC & 02-ALJ-07-0012-CC, 2003 WL 1542771 (S.C. Admin Law Court)	22, 23, 24
<i>Berkebile v. Outen</i> , 311 S.C. 50, 426 S.E.2d 760 (1993)	34
<i>Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.</i> , 295 S.C. 243, 368 S.E. 2d 64 (1988).	34
<i>City of Rock Hill v. S.C. DHEC</i> , 302 S.C. 161, 394 S.E.2d 327 (1990).	19, 31
<i>City of Columbia v. Board of Health and Envtl. Control</i> , 292 S.C. 199, 355 S.E.2d 536 (1987).	19
<i>County of Charleston v. Sleepy Hollow Youth, Inc.</i> 340 S.C. 174, 530 S.E.2d 636.	31
<i>Dwyer v. City of Ann Arbor</i> , Mich. App. 177, 261 N.W.2d 231, 79 Mich. App. 113, reversed on other grounds, 387 N.W.2d 926, 402 Mich. 915.	38
<i>Episcopal Housing Corp. v. Federal Ins. Co.</i> 269 S.C. 631, 239 S.E.2d 647 (1977).	37
<i>Evans v. Stephens</i> , 407 F.3d 1272 (11th Cir. 2005).	32
<i>Fernanders v. Market Const. of S. Carolina Inc.</i> , 330 S.C. 470, 499 S.E.2d 509 (S.C. Ct. Of App. 1998).	34
<i>Free v. Bland</i> , 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962).	37, 38
<i>Georgia-Pacific Corp. v. Department of Environmental Conservation</i> , 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992), <i>petition dismissed sub nom. Simpson Paper</i> (Vermont), 62 U.S.L.W. 3454 (U.S. Jan. 5, 1994).	27, 29
<i>Godfrey v. Globe Newspaper Co. Inc.</i> , 928 N.E.2d 327 (Mass. 2010).	32
<i>Griffin Pipe Products Co. Inc. v. Board of Review of County or Pottawattamie</i> , 789 N.W.2d 769 (Iowa 2010).	32
<i>Hodges v. Rainey</i> , 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).	11

<i>In re Vincent J.</i> , 333 S.C. 233, 509 S.E.2d 261 (1998).	11
<i>In re Lava v. Dept. of Environmental Quality</i> , 717 P.2d 1274 (Or. App. 1986).	13, 25, 26, 27, 29
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).	34, 35
<i>Karuk Tribe of N. California v. California Reg'l Water Quality Control Bd., N. Coast Region</i> , 183 Cal. App. 4th 330, 340, 108 Cal. Rptr. 3d 40, 48 (Cal. Ct. App. 2010).	38
<i>Lloyd v. Lloyd</i> , 295 S.C. 55, 367 S.E.2d 153 (1988).	34
<i>MacFarlane v. Manly</i> , 274 S.C. 392, S.E.2d 838 (1980).	31
<i>Northwest Envtl. Advocates v. City of Portland</i> , 56 F.3d 979, 987 (9th Cir. 1995).	17
<i>Octavia Jackson v. Swordfish Investments, L.L.C.</i> , 365 S.C. 608, 620 S.E.2d 54.	31
<i>Park Place Apartments, L.L.C. v. Farmers Union Mut. Ins. Co., Inc.</i> , 247 P.3d 236 (Mont. 2010).	32
<i>Peake v. South Carolina Dept. of Motor Vehicles</i> , 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007).	11
<i>Port of Oswego Authority v. Grannis</i> , 24 Misc. 3d 1042, 881 N.Y.S.2d 283 (N.Y. Sup. Ct. 2009) <i>aff'd</i> , 70 A.D.3d 1101, 897 N.Y.S.2d 736 (N.Y. App. Div. 2010) <i>leave to appeal denied</i> , 14 N.Y. 3d 714, 931 N.E.2d 97 (2010).	27, 28
<i>PUD No. 1 v. Jefferson County</i> , 114 S.Ct. 1900, 511 U.S. 152 (1994).	14, 15, 16, 17, 23
<i>Public Util. Dist. No. 1 v. Dep't of Ecology</i> , 51 P.3d 744 (Wash. 2002).	28, 29, 30
<i>South Carolina Coastal Council v. South Carolina State Ethics Comm'n</i> , 306 S.C. 41, 410 S.E.2d 245 (1991).	11
<i>S.C Dept. of Transp. V. DHEC, et al</i> , Docket No. 06-ALJ-07-0804-CC; 2008 WL 1934476 (S.C. Admin. Law Court).	22
<i>State v. Baker</i> , 310 S.C. 510, 427 S.E.2d 670 (1993).	34
<i>State v. Blackmon</i> , 304 S.C. 270, 403 S.E.2d 660 (1991).	11
<i>Triska v. DHEC, et al</i> , 292 S.C. 190, 355 S.E.2d 531 (1987).	24

<i>Wilson v. Style Crest Ponds</i> , 367 S.C. 653, 627 S.E.2d 733.	31
---	----

<i>Whitner v. State</i> , 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).	11
---	----

STATUTES

33 U.S.C.A. § 1251(a).	12
-----------------------------	----

33 U.S.C.A. § 1252(a).	13
-----------------------------	----

33 U.S.C.A. § 1313.	13, 14
--------------------------	--------

33 U.S.C.A. § 1341.	13, 19, 22, 38
--------------------------	----------------

33 U.S.C.A. § 1341(a).	35
-----------------------------	----

33 U.S.C.A. § 1341(d).	26, 35
-----------------------------	--------

33 U.S.C.A. § 1344.	9, 13
--------------------------	-------

S.C. Code Ann. § 48-1-20.	18, 35
--------------------------------	--------

S.C. Code Ann. 48-1-50(5)	18
--------------------------------	----

S.C. Code Ann. § 48-1-50(17)	18
-----------------------------------	----

S.C. Code Ann. § 48-1-50(23).	18
------------------------------------	----

S.C. Code Ann. § 49-4-70	35
-------------------------------	----

S.C. Code Ann. §49-21-20	34, 35, 36
-------------------------------	------------

S.C. Code Ann. § 49-21-30	36
--------------------------------	----

S.C. Code Ann. §49-21-50	36
-------------------------------	----

S.C. Code Ann. §49-21-50.A	37
---------------------------------	----

REGULATIONS

40 CFR § 131.12 (1993)	20
-----------------------------	----

S.C. Code Ann. Regs. 19-450	20
----------------------------------	----

S.C. Code Ann. Regs. 61-68	2, 6, 18, 19, 20, 21, 33
S.C. Code Ann. Regs. 61-68.C	14
S.C. Code Ann. Regs. 61-68.C.4.a.(2)	20
S.C. Code Ann. Regs. 61-68.D.1	30
S.C. Code Ann. Regs. 61-68.D.1(b)	20, 30
S.C. Code Ann. Regs. 61-68.E.2(b)	8, 21
S.C. Code Ann. Regs. 61-68.F.(1)(a)	20
S.C. Code Ann. Regs. 61-69	2, 4, 14, 18, 19
S.C. Code Ann. Regs. 61-101	2, 18, 19, 21, 22, 33, 36
S.C. Code Ann. Regs. 61-101(A)(5)	22
S.C. Code Ann. Regs. 61-101.F.(3)	21
S.C. Code Ann. Regs. 61-101.F.(4)	22

OTHER AUTHORITIES

U.S. Constitution, Art. VI, cl. 2.19	37
19 S.C. Jur. Constitutional Law § 8	37
82 C.J.S. <i>Statutes</i> § 316 (1953)	34
Congressional Report Service, "PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology: An Expansive Interpretation of State Authority Under the Clean Water Act," (CRS Report 94-601, American Law Div. 1994)	16, 27
Donahue, Debra L., <i>The Untapped Power of Clean Water Act Section 401</i> , 23 Ecology L.Q. 201 (1996)	14
EPA, Wetlands and 401 Certification 23 (April 1989)	14

STATEMENT OF ISSUES ON APPEAL

- I. Did the ALJ Err in Concluding that the S.C. Department of Health and Environmental Control Does Not Have the Authority to Impose Stream Flow Conditions on its 401 Certification of Greenville Water System's Permit When the Clean Water Act Directs States to Establish and Implement Water Quality Standards and Uses and DHEC's Regulations Specifically Authorize Conditions When Necessary to Protect and Maintain Existing Uses and Water Quality?**
- II. Where Evidence Is Undisputed that the Operations of a Dam and Reservoir Have Harmful Impacts on a River, Does DHEC Have a Mechanism to Address the Problem Under the Broad Authorities of Current Laws and Regulations**
- III. Did the ALJ Err in Concluding that the Interbasin Transfer Act, Which Governs the Transfer of Water from One Basin to Another, Preempts DHEC's Authority to Impose Stream Flow Conditions When 1) DHEC's Authority Derives from the Federal Clean Water Act, 2) DHEC's Authority is Implemented Through State Regulations that Are Specific to Water Quality and 3) DHEC Regulations Mandate Consideration of Flow?**
- IV. Did the ALJ Err in Ignoring or Drawing Inferences Against Appellants from Undisputed Facts Presented by the Appellants in Granting Respondents' Motion for Summary Judgment?**

STATEMENT OF THE CASE

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a water quality certification 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 ("RWTM") from the Table Rock Reservoir in Pickens County to its end in Greenville County.

The DHEC staff gave public notice of its decision to issue the certification and permit on February 11, 2009. The Petitioners filed a timely request for a final review conference before the DHEC Board, and a final review conference was held on April 9, 2009. (R. pp. 270-348). 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. (R. pp. 13-16).

The Petitioners filed a timely request for contested case hearing before the Administrative Law Court on June 5, 2009. (R. pp. 26-33). GWS filed a Motion to Lift Automatic Stay, and the Appellants consented to lifting the stay so that the project could proceed. The Appellants also withdrew certain claims relating to the method of installing the water line. The Administrative Law Judge issued an Order Lifting Automatic Stay on August 11, 2009. On April 14, 2010, the Petitioners' limited their appeal to the question of whether DHEC has the authority to impose a minimum flow release to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 water

quality certification and construction in navigable waters permit. On September 21, 2010, the Respondents filed a Joint Motion for Summary Judgment. (R. pp. 145-185). On November 10, 2010, the Petitioners filed a Response and Cross Motion for Summary Judgment. (R. pp. 186-234). On November 22, 2010, GWS filed a Return to Petitioners' motion. 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.

On February 18, 2011, the Petitioners filed a Notice of Appeal in this Court.

ARGUMENT

Summary of Argument

The key issue in this case is whether DHEC has the authority to place a condition requiring minimum flow releases to the South Saluda River on its 401 water quality certification of GWS's permit pursuant to the federal Clean Water Act, the S.C. Pollution Control Act and S.C. Regulations 61-68, 61-69 and 61-101. It is undisputed that a minimum flow release condition would protect and maintain classified and existing uses of the South Saluda, and protect and maintain water quality.

The Administrative Law Judge ruled that DHEC does not have authority to place a minimum instream flow condition on its 401 water quality certification because 1) minimum instream flow releases are outside the scope of DHEC's certification authority and 2) an Interbasin Transfer Registration issued 26 years ago preempts DHEC's authority to impose stream flow conditions on a pending water quality certification.

The ALJ's conclusion is erroneous as contrary to the plain language of the Clean Water Act and DHEC's regulations implementing the Act. The CWA mandates that the States conduct water quality certification review to ensure compliance with state water quality standards and protection of existing and classified uses. DHEC's water quality certification and standards regulations specifically authorize DHEC to impose conditions necessary to protect water quality and existing and designated uses. The regulations specify that stream flows are one mechanism that DHEC can use to protect uses, water quality and to ensure compliance with water quality standards.

The ALC's Order is also erroneous in concluding 1) that the Interbasin Transfer Act is controlling, despite the fact that the Interbasin Transfer Registration does not address water quality and the fact that the CWA, PCA and DHEC regulations are specific to the water quality issues raised in this case and 2) that a state law, the IBTA, preempts the federal Clean Water Act

Overview of the Facts

The undisputed material facts as presented to the ALC during the hearing on the Motion for Summary Judgment include the following:

The South Saluda River

The South Saluda River in Greenville and Pickens Counties is one of South Carolina's very few trout streams. (Ex. D to Pet. MSJ, R. pp. 218-231). It originates at the base of the Table Rock Reservoir. The South Saluda and its tributaries are used for fishing, including trout fishing, swimming, boating, and other public recreational

recreation activities. Farther downstream the river serves as a source of irrigation for agricultural operations. *Id.* The South Saluda River is immediately downstream of the Table Rock Reservoir ("TRR") in northern Pickens County. The TRR is owned and operated by Greenville Water System ("GWS"). *Id.*

The South Carolina Department of Natural Resources ("DNR") manages the South Saluda River for three species of cold water trout -- brook, brown, and rainbow. The South Saluda River is classified as "Trout Put Grow Take" ("TPGT") waters under DHEC's water classification regulations, R. 61-69, indicating that it is suitable for management as stocked trout stream and is capable of supporting year round trout growth. DNR stocks the river with trout to provide recreational trout fishing.

Trout need oxygenated cold water to survive and reproduce. *Id.* When mountain streams are impounded or dammed like the South Saluda has been with the TRR, there is less flow often resulting in a significantly warmer stream or river downstream. The South Saluda River base flow (below TRR) is currently at a fraction of the historic flow and at a fraction of the potential flow. 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. *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 hold over and remain in the stream. *Id.*

The South Saluda and its resources are presently experiencing significant adverse impacts due to the low flows in connection with the volume of water released from the TRR. The wild population of trout is already so reduced due to low flows and warmer water that it is necessary to stock to maintain a fishery. DNR's current strategy is to stock trout as a replacement or surrogate for a wild population. If flows get any lower than are currently and recently measured, DNR's ability to manage the stream as a hatchery-supported stream would be impaired or eliminated and there could be serious adverse impacts to the trout populations. *Id.*

For five years, the U.S. Geological Survey operated a stream gauge on the South Saluda only a short distance below the Table Rock Dam. (Exhibit E to Pet. MSJ, Affidavit of Dr. Dave Hargett; R. pp. 221-232). According to data from this gauge, flow in the South Saluda was *below* the "7Q10" (the minimum flow needed for water quality and aquatic health under DHEC regulations) 35% per cent of the time—that is, for one out of every three days, there was not enough water in the river for fish, much less trout, to survive. (Exhibit E to Pet. MSJ, R. pp. 221-232). The result of these low flow is that one-third (1/3) of the time, the flow in the South Saluda was insufficient to support the existing and designated uses. The United States Fish and Wildlife Service has expressed concerns to DHEC about the impacts of GWS's management of the dam and reservoir on the South Saluda River and its fisheries:

Table Rock Reservoir and the water distribution system was built in the 1930's, prior to any current State or Federal environmental regulation. Therefore, no minimum flow requirements have been in effect for this reservoir. The result is that the South Saluda River system has had a deficit of stream flow resulting in

impacts to approximately 1 ½ miles of river . . . it is appropriate to require minimal stream flow in order to protect the resources and integrity of the ecology of the system downstream. Minimum flows are very important and integrated flow regimes are needed for both the North and South Saluda Rivers that are controlled by the Greenville Water System.

(Exhibit C to Pet. MSJ, R. pp. 214-217).

DNR has expressed similar concerns to DHEC:

Dewatering 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.

(Exhibit A to Pet. MSJ, R. pp. 202-205).

Petitioners' expert, Dr. David Hargett, agreed with the assessments of DNR and FWS. He opined that the river flow seriously and continuously diminishes the quality of aquatic habitat and reduces the South Saluda's ability to sustain a health reproducing population of trout. (Exhibit E to Pet. MSJ, R. pp. 221-232). He further opined that GWS's management of releases from the Table Rock Reservoir "does not conform to the standard of seasonally adjusted minimum flows adopted by . . . the State of South Carolina [the 7Q10 requirement of R. 61-68] and recommended by DNR." *Id.*

DNR hydrologists have calculated a recommended minimum instream flow from GWS reservoirs. The 7Q10 value is the low flow condition for a continuous seven day period which statistically occurs once every 10 years. The 7Q10 is 7.0 cfs for the South Saluda River and 16.0 cfs for the North Saluda River.

DNR has recommended mean annual daily flow as a seasonally adjusted instream flow be established downstream from the Poinsett and Table Rock Reservoirs - consistent with the South Carolina Water Plan - in order to protect trout habitat and other riverine aquatic resources.

The Table Rock Reservoir

The Table Rock Reservoir was constructed in the 1930s before there were any regulations governing water withdrawals, water quality or recreational uses of our State's waterbodies. No minimum flow requirements have ever been in effect for this reservoir.¹

The Interbasin Transfer Act ("IBTA") was promulgated in 1985. The Table Rock Reservoir received an Interbasin Transfer Registration pursuant to the Act. The Registration involved an abbreviated approval process for existing operators that did not require any consideration of water quality, aquatic resources, wildlife habitat, or recreational uses. That registration is effective until 2016 and does not contain any conditions to assure that existing uses and water quality are protected and maintained. The result is that the South Saluda has had a deficit stream flow resulting in impacts to fish, mussels, and other aquatic organisms. (Exhibits A, B & C to Pet. MSJ; R. pp. 202-217).

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

¹

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.

Carolina. These are the “crown jewels” of our state’s waters—the best of the best. 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.²

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 South Saluda River. The Appellants, 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 to Pet. MSJ, DNR letter, dated June 20, 2008; Exhibit B to Pet. MSJ, DNR letter dated September 15, 2008; Exhibit C to Pet MSJ, USFWS letter, dated September 19, 2008; R. pp. 202-217).

The lower water quality classification and ecological impacts found by DNR and USFWS are the direct result of the lack of adequate flow in the South Saluda River.

Greenville Water System’s New Water Line Project

2

“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).

Since the Table Rock Reservoir and Dam was built, GWS has been using two 30 inch raw water transmission mains ("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.

In order to construct the new water line, 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 pursuant to 33 U.S.C.A. § 1344.

The uncontradicted evidence from DNR, USFWS and Dr. Hargett indicates that the operation of the dam is having, and will continue to have, adverse impacts on the trout fishery due to insufficiency of flow to the South Saluda River. DNR and the USFWS have also opined that the new 42-inch RWTM running in parallel with an existing 30-inch RWTM is likely to increase environmental degradation below the TRR as capacity for water withdrawal increases. (Exhibit A, B & C to Pet. MSJ; R. pp. 202-217). Despite GWS's claims that it will not withdraw a greater capacity of water than it currently withdraws, there is no condition in the permit limiting withdrawal capacity and GWS did not provide any evidentiary support for this claim. The undisputed fact is that GWS will have the ability to withdraw a greater capacity of water without any limitation in place to prevent them from doing so.

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 South Saluda River, impaired water quality, and degradation and harm to the trout fishery. In other words, the amount of water being released from the dam and reservoir is the primary cause for water quality concerns in the South Saluda River.

DNR has proposed a minimum flow release regime that varies with the season of the year and allows lower releases in times of droughts to address the needs of the public and the natural resources dependent on a healthy river system. (Exhibit D to Pet. MSJ; R. pp. 218-220). GWS has rejected the proposal, and DHEC and the ALC refused to require GWS to comply with it.

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. The ALC similarly affirmed the staff decision, ruling that the agency lacks authority to impose flow conditions.

I. DHEC HAS EXPRESS AUTHORITY UNDER THE CLEAN WATER ACT, POLLUTION CONTROL ACT AND DHEC REGULATIONS TO REQUIRE MINIMUM FLOW RELEASES IN GWS's PERMIT AND CERTIFICATION

The ALJ erred in ruling that "instream flow requirements are outside of the scope of the controlling DHEC Regulations and DHEC has no authority to impose such requirements under the Certification at issue." (Order p. 6, R. p. 1-7).

Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (citing *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991)); *Peake v. South Carolina Dept. of Motor Vehicles*, 375 S.C. 589654 S.E.2d 284 (Ct. App. 2007). The language itself is the best guide to legislative intent. *Whitner* at 9: The Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *South Carolina Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 410 S.E.2d 245 (1991). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Yet rather than looking at the applicable statutory and regulatory language and framework, the ALC ignored the clear and plain language of the Clean Water Act, Pollution Control Act and DHEC regulations and utterly failed to point to any legal support for its sweeping conclusion that DHEC has no authority under its regulatory programs.

As discussed below, both the plain language of the Clean Water Act and DHEC's regulations authorize the agency to include minimum instream flow conditions in the GWS permit and certification. When read in conjunction, the CWA and the regulations

collectively make it abundantly clear that the legislative intent was to ensure that designated uses would be maintained, that water quality standards would not be violated, and that the state could impose requirements to effect that intent. The ALJ cites no legal authority for his contrary conclusion, and the controlling statute and regulations dictate the opposite result.

A. The Clean Water Act Gives DHEC the Authority to Include a Minimum Flow Release Condition in GWS's Permit and Certification

The Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), was established with a goal of achieving water quality that protects the propagation of fish, shellfish, and wildlife, as well as for recreational uses:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983; . . .

33 U.S.C.A. § 1251(a).

Congress gave the federal and state governments the authority to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters" giving due regard "to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C.A. § 1252(a).

The Clean Water Act establishes multiple programs to attain these goals, three of which apply to GWS's raw water line construction project. The first program is the § 404 permit because the project involves a discharge into wetlands, which are considered "waters of the United States." 33 U.S.C. § 1344. The second program is the § 401 certification where the State acts with delegated federal authority to review and certify a federal § 404 permit. *See generally In re Lava v. Dept. of Environmental Quality*, 717 P.2d 1274 (Or. App. 1986). Specifically, Section 401 of the Clean Water Act provides that:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C.A. § 1341 (emphasis added).

The third program is the Clean Water Act's requirement that States adopt water quality standards necessary to attain the goals of the Act, which include developing and implementing standards necessary for the protection and propagation of fish and other aquatic life. 33 U.S.C.A. § 1313 ("Section 303"). By enacting these provisions, "Congress meant for the states to impose whatever conditions are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns." Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 Ecology L.Q. 201, 201, 251 (1996); *see also* EPA, Wetlands and 401 Certification 23 (Apr. 1989).

("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, ... and with 'any other appropriate requirement of State law.'")

These water quality standards consist of three parts: 1) designated uses of the navigable water, 2) water quality criteria based upon those uses, and 3) an antidegradation policy that prohibits impairment of the uses. 33 U.S.C. § 1313. DHEC has complied with CWA Section 303 and established designated uses for the State's waters at R. 61-69; water quality criteria at R. 61-68.C, E, F, G & H; and the anti-degradation policy at R. 61-68.C. The water quality standards are applied during the State's § 401 certification review.

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*, 114 S.Ct. 1900, 511 U.S. 152 (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. Like DHEC, the Washington Department of Ecology had adopted comprehensive water quality standards and regulations, including an antidegradation policy.³

³

The Washington antidegradation 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." *PUD No. 1 v. Jefferson Co.*, 114 S.Ct. at 1906-07, 511 U.S. at 707.

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. 511 U.S. at 712, 114 S.Ct. at 908. The U.S. Supreme Court flatly rejected that argument.⁴ 511 U.S. 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.” 114 S.Ct. at 1908, 511 U.S. at 711.

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 requirements. 114 S.Ct. at 1909, 511 U.S. at 711 (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.*; See also *Congressional Report Service*, “PUD No. 1

The State imposed a minimum flow to maintain water quality and natural habitat of indigenous fish and uses of the State’s waters below the dam.

4

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. 114 S.Ct. at 1910, 511 U.S. at 713, FN 3

of Jefferson County v. Wash. Dept. of Ecology: An Expansive Interpretation of State Authority Under the Clean Water Act," (CRS Report 94-601, American Law Div. 1994).

In rejecting the argument that the Clean Water Act and State's § 401 water quality certification 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).

GWS has made an identical argument in this case – that the water line project is not related to how much flow is released into the South Saluda. The argument was rejected by the U.S. Supreme Court, and it should have been rejected by the ALC here. As long as the condition is necessary to enforce water quality standards or protect and

maintain designated uses, it need not directly relate to the discharge which necessitated the § 404 permit and § 401 certification.

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." 114 S.Ct. at 1908, 511 U.S. at 710. The Court 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." 114 S.Ct. at 1912, 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 South Saluda River.⁵

B. DHEC's Regulations Grant Express Authority to Require/Impose a Minimum Flow Release Condition

In response to the Clean Water Act and other federal environmental laws, the South Carolina General Assembly passed the South Carolina Pollution Control Act with the goal of maintaining "reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, maximum employment, the industrial development of the State; the propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other

⁵

The rationale in *PUD No. 1* that a state could require compliance with conditions designed to ensure compliance with designated uses was applied in *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 987 (9th Cir. 1995).

resources." S.C. Code Ann. § 48-1-20. To effectuate this goal, DHEC was required to adopt effluent and emission control regulations, as well as standards and limitations and to undertake "all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control." S.C. Code Ann. 48-1-50(17) & (23).⁶

DHEC did as required, and passed several regulations that have a direct bearing on this case:

- 1) the water quality classification and standards regulations (hereinafter R. 61-68);
- 2) the classified waters regulations (hereinafter R. 61-69); and
- 3) the 401 water quality certification regulations (hereinafter R. 61-101).

Regulation 61-68 establishes the State's official classified water uses for all waters of the State; establishes narrative and numeric water quality criteria necessary to protect and maintain those uses; and establishes an antidegradation policy that prohibits impairment of the uses. S.C. Code Ann. Reg. 61-68.C, D, E, F, G & H.

Regulation 61-69 applies the State's classified water uses to specific water bodies. In this case, R. 61-69 designates the South Saluda River below the dam as "Trout Put, Grow, Take" classified water use, and the TRR above the dam as "Outstanding Resource Water" – the State's highest designation.

⁶

The PCA also gives DHEC express authority to place conditions on permits, as it deems necessary. S.C. Code Ann. 48-1-50(5).

Regulation 61-101 was promulgated to establish criteria and procedures for implementing the State's requirement for water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The certification requirement is used to determine whether a proposed project requiring a federal permit or license will comply with South Carolina's water quality standards and uses. In this case, a federal § 404 permit was required because GWS proposed to place fill materials in wetlands and waters of the United States, which are regulated under the Clean Water Act. This § 404 permit triggered the State's review under § 401, 33 U.S.C. § 1341.

The plain and clear language of these regulations vests the agency with ample and express authority to require a minimum flow release to the South Saluda River. And when "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." *City of Rock Hill v. S.C. DHEC*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Board of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987)).

A goal of Regulation 61-68 is "to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water." S.C. Code Ann. Reg. 61-68.F.(1)(a) (emphasis added). The regulations direct that "All existing water uses and the level of water quality necessary to protect those uses must be

maintained and protected under all circumstances.”⁷ S.C. Code Ann. Regs. 61-68.D.1 (emphasis added).

In passing Regulation 61-68, the General Assembly recognized that water withdrawal, instream modifications and dams would likely effect water quality: “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). To prevent water withdrawals from affecting existing uses and water quality, Regulation 61-68 gives DHEC express authority to impose conditions to “protect classified and existing uses, such as below dams and in tidal situations.”⁸ S.C. Code Ann. Regs. 61-68.C.4.a.(2) (emphasis added). The regulatory language could hardly be more clear.

Regulation 61-68 thus recognizes that water withdrawal may adversely affect existing and classified uses, in this case Trout-Put, Grow and Take waters, which means the waters are suitable for supporting growth of trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b).

7

This provision is referred to as the “antidegradation policy.” 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).

8

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.

Regulation 61-68 mandates that DHEC impose conditions to protect these uses, regardless of whether there is a water quality certification.

In this case, there is a water quality certification giving DHEC even more justification and authority to require a minimum flow release under Regulation 61-101, the water quality certification regulation. Regulation 61-101 is triggered when a § 404 Clean Water Act permit is required, and directs DHEC to “specify where appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act. . . . The Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations.” S.C. Code Ann. Regs. 61-101. In conducting its review, DHEC must 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) (emphasis added).

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. S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). For public water supply projects, the Department “shall condition the certification upon compliance with all measures necessary to minimize adverse effects.” S.C. Code Ann. Reg. 61-101.F.(4).

There is no limitation on the agency’s scope of review and authority under Regulation 61-101, as long as the conditions are necessary to assure maintenance of classified or existing uses, standards, and “other appropriate requirements of State law.” 33 U.S.C. § 1341. Thus, DHEC has authority to impose any conditions or requirements necessary to protect and maintain water quality and existing uses. The uncontradicted evidence from the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service and Dr. David Hargett is that a minimum flow release is necessary to protect the South Saluda’s use as a trout fishery.

Both Respondents concede that DHEC does have the 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 MSJ, p. 7; R. p. 145-185). *See, e.g. S.C. Dept. of Transp. v. DHEC, et al*, Docket No. 06-ALJ-07-0804-CC; 2008 WL 1934476 (S.C. Admin. Law Court) (recognizing that DHEC has the authority to impose conditions to protect water quality in its certifications) and *Beaver Dam Comm. Assn., et al. v. SCDHEC, et al.*, Docket Nos. 01-ALJ-07-0159-CC & 02-ALJ-07-0012-CC, 2003 WL 1542771 (S.C. Admin. Law Court). The Respondents claim that DHEC simply could not do so for this particular project, and the ALC adopted that unfounded reasoning and ruled that DHEC cannot do so for this project because the

construction of the water line “does not involve the reservoir.”⁹ (ALC Order, p. 6). As stated above, the ALJ’s ruling, which unduly narrows the scope of certification review, was rejected by the U.S. Supreme Court in *PUD No. 1* and is patently inconsistent with the Clean Water Act and DHEC Regulations. In addition, it is inconsistent with other ALC and S.C. Supreme Court decisions reflecting DHEC’s broad authority.

In *Beaver Dam*, the Petitioners alleged that the possible loss of stream flow as a result of the construction of a sewer line would permanently and adversely impact water quality. Docket Nos. 01-ALJ-07-0159-CC & 02-ALJ-07-0012-CC, 2003 WL 1542771 (S.C. Admin. Law Court). The Petitioners claimed that smaller streams in particular may be lost to a “French Drain” effect, which is a de-watering effect that can be caused by improper construction of adjacent trenches. In that case, DHEC imposed a condition on the water quality certification which required cut-off dams to be installed periodically to prevent the “French Drain” effect from resulting in a loss of stream flow. The ALC upheld DHEC’s certification with a condition to protect stream flow in connection with the construction of a sewer line project. *Id.*

The South Carolina Supreme Court has upheld a DHEC decision that imposed conditions on its 401 water quality certification designed to comply with water quality

9

Even though it is unnecessary that certification conditions be specific to the discharge activity requiring a § 404 permit, Appellants contend that 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; thus, the water line is very much related to the flow discharged from the reservoir.

standards. *See, Triska v. DHEC, et al*, 292 S.C. 190, 355 S.E.2d 531 (1987). In that case, Triska applied to DHEC for a § 401 certification required to build a marina on Murrells Inlet. *Id.* at 192. DHEC issued the certification with "certain conditions" to insure that the project complied with State water quality standards. *Id.* at 192-93. After issuance of the certification, DHEC suspended it to conduct an internal review. *Id.* at 193. DHEC reviewed the project for one month and restored the certification with amendments including "certain modified conditions" which were accepted by Triska. *Id.* While the central issue before the court in *Triska* was whether DHEC had the authority to revoke a 401 Certification after the appeals process had expired, the case represents an acknowledgement by the Supreme Court that DHEC has authority under the CWA and state water quality and certification regulations to place conditions on a 401 certification necessary to protect water quality.

Here, it is apparent that not only is DHEC both capable and required to place conditions and limitations in a § 401 certification to protect water quality, but that it has previously done so since so since at least 1979. *Id.* at 190.

Both Congress and the General Assembly clearly gave DHEC the means and authority to protect and improve water quality through these regulatory programs. The ALJ made a fundamental error of law in failing to apply the plain language of the regulations, which clearly authorize the agency to require flow conditions when necessary to protect and maintain designated uses.

C. Other States Have Upheld the Use of the 401 Certification Process to Impose Any Condition Relating to Water Quality

DHEC and the State of South Carolina are not alone in using the 401 certification process to impose conditions necessary to protect existing uses and ensure that water quality standards are not violated. Several other state agencies have done so, and the exercise of that authority has been upheld by the courts.

For example, the Oregon Supreme Court upheld the state's authority to impose conditions on a § 401 certification in *In re Lava v. Department of Environmental Quality*, 717 P.2d 1274 (Or. App. 1986). The case involved a project which was planned to divert water from a river, use the natural fall of the water to generate hydro-electricity, and then return the diverted water to a downstream location. *Id.* at 1276. The petitioner in that case, General Electric Development, Inc. ("GED"), had previously received a design permit for the project from the Federal Energy Regulatory Commission ("FREC"), and then applied to the FREC to build and manage the hydro electric facility. *Id.* at 1276-77. However, the Oregon Department of Environmental Quality ("DEQ") denied the 401 certification when GED failed to provide a report that the project was consistent with its "comprehensive plan and land use ordinances." *Id.* The DEQ decision was affirmed by the administrative tribunal.

The key issue in *In re Lava* was the criteria that the DEQ could use to determine whether to issue a 401 certification and what conditions the DEQ could place on the 401 certification through CWA Section 401(d), 33 U.S.C. § 1341(d). In addressing this issue, the Oregon Court of Appeals examined the purpose and intent of the CWA itself and

noted that Section 401 allows the consideration of both the CWA's provisions as well as a state's water quality standards and regulations. In remanding the case, the Court discussed section 33 U.S.C. § 1341(d) ("401(d)"), and emphasized that the State could use "any other appropriate requirement of State law set forth in such certification" as a basis for placing limitations or conditions on a certification. *Id.* at 1278. After noting this language, the Court then articulated that while the CWA does not directly allow land use or other issues to be considered when approving or denying applications, such issues may potentially be considered when a state regulatory body is contemplating what limitations to place on a 401 certificate. *Id.* The Court expressly stated that:

[T]he states have inherent authority, independently of the CWA to protect and plan the use of their waters... "[A]ny other appropriate requirement of State law" is thus a Congressional recognition of all state action related to water quality and Congressional authorization to the states to consider those actions in imposing limitations on CWA certificates.

Id. at 1279 (emphasis added).

Applied to this case, the State must comply with all state laws to the extent not displaced by federal law and it has authority to impose conditions as long as they relate to water quality. While acknowledging that some land use goals would not pertain to water quality, the Court expressed that the only way a goal or plan could be found misaligned with the statutory phrase "any appropriate requirement of state law," thereby overriding the State's authority, was where such a plan or goal has no connection to water quality.

A second case supporting the conclusion of *In re Lava* is *Georgia-Pacific Corp. v. Department of Environmental Conservation*. 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992), *petition dismissed sub nom. Simpson Paper* (Vermont), 62 U.S.L.W. 3454 (U.S. Jan. 5, 1994). *Georgia-Pacific* is discussed in a Congressional Research Service Report as involving issuance of a CWA 401 certification which conditioned a FREC relicensing on the creation of both up and downstream fish passages as well as constant flow rates to maintain water quality. *Congressional Research Service Report*, 94-601A at footnote 40 (July 28, 1994). Specifically, the conditional 401 certification required Georgia-Pacific to maintain a minimum flow of 210 cfs over the Gilman Dam during June through October annually to allow the aeration of the Connecticut River, thereby achieving compliance with both the river's dissolved oxygen standards as well as its designated use as a cold water fishery. *Id.* This conditional certification was upheld by the Vermont Supreme Court, which ruled that Vermont's water quality standards encompassed and contemplated both recreational and aesthetic considerations. Further, the Court found that section 401(d) allowed the conditioned spillage requirements due to § 401(d)'s "appropriate requirement of State law" provision. *Id.*

In the case of *Port of Oswego Authority v. Grannis*, the New York Supreme Court reviewed the State Department of Environmental Conservation's ("DEC") decision to impose conditions on a general permit for operation of commercial and larger recreational vessels in State waters, even if the vessels do not discharge pollutants. 24 Misc. 3d 1042, 1047, 881 N.Y.S.2d 283, 287 (N.Y. Sup. Ct. 2009) *aff'd*, 70 A.D.3d 1101, 897 N.Y.S.2d 736 (N.Y. App. Div. 2010) *leave to appeal denied*, 14 N.Y.3d 714, 931

N.E.2d 97 (2010). The conditions included a requirement to flush ballast water with salt water and to install ballast water treatment systems by specified time periods. The Court upheld DEC's decision holding that conditions may be added to the 401 Certification which set forth limitations and monitoring requirements necessary to ensure compliance with the Clean Water Act and with "any other appropriate requirement of State law set forth in the certification." *Id.* at 287 (citing 33 U.S.C. § 1341[d]).

Another case on point is *Public Util. Dist. No. 1 v. Dep't of Ecology* ("PUD II"), 51 P.3d 744 (Wash. 2002), which again involved FREC licensing but with a slight twist. *Id.* Prior to 1956, a company owned and operated a hydroelectric project. *Id.* at 747-48. This project included both a lake and a reservoir, the reservoir being used to store water which was later diverted through a wooden flume to generate electricity. By 1956 the flume had collapsed, thereby ending operation, and the Public Utility District purchased the project, along with a 1907 water right to divert 110 cfs. However, in 1958, the operation was given a 50 year non-use license by the Federal Power Commission allowing the District to maintain its water storage right but essentially ended all operation of the project.

In November of 1994, after feasibility studies, the District applied to the FREC to again establish the hydro project and divert water from the reservoir through a pipeline. Essentially the District wished to resume the pre-1956 operation except on a larger scale. The District filed for a CWA 401 certification with the state's Department of Ecology. The Department certified the project conditioned on maintaining specified levels of flow in Sullivan's Creek, which provided habitat for many fish species and served as a

“recreational and aesthetic resource.” *Id.* at 748. A minimum flow was necessary to protect this use and comply with the State’s antidegradation policy.

The District appealed, among other things, the Department’s decision that the 1907 water rights did not preclude the minimum flow condition. *Id.* at 758. In addressing this issue, the Court, similar to the court in *In re Lava*, first examined the federalism requirements of the CWA and noted the authorization to the States to establish and enforce water quality standards. Expressly noting that CWA Section 303 mandated State-created water quality criteria, the Court recognized that Washington’s water quality standards had been approved by the EPA. The Court then examined the statewide antidegradation policy, focussing on the provisions that “existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.” *Id.* at 759.

Relying on *PUD No. 1*, the Court held the instream flow condition in the § 401 certification was proper to conform to state and federal antidegradation policies and to keep designated uses in place, and that the 1907 diversion right did not preclude or affect that condition.

The reasoning and holdings of *In re Lava*, *Georgia-Pacific*, *Port of Oswego* and *PUD II* are in line with the U.S. Supreme Court’s decision in *PUD No. 1*, and should be applied in this case, as well. There is no material difference between the water quality standard regulations involved in those cases and the ones in effect in South Carolina.

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, South Carolina's antidegradation rules provide:

"[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).

Given that the statutory language in Washington's antidegradation policy is similarly worded as "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed," the Washington Court's reasoning is instructive: *PUD II*, 51 P.3d at 759 (Wash. 2002).

The Respondents concede that if this project involved the construction of a new dam, DHEC would have the authority to require a minimum flow release. (Hearing Tr. p. 24, line 14-19; R. pp. 349-414). The Respondents also concede that if the purpose of the condition was to meet a "specific water quality standard" of "a minimum flow to allow for fish migration," "then we'd agree that there would be a reason for DHEC to impose" such a condition. (Hearing Tr. p. 26, lines 21 - p. 27, line 2; R. pp. 349-414). But Respondents – and the ALJ – improperly draw the jurisdictional line there. The applicable laws and regulations (federal and state) and the case law clearly confirm DHEC's broad authority: As

long as the condition is related to water quality, DHEC can and should impose such a condition in its § 401 certification.¹

II. THE ALJ DID NOT APPLY THE PROPER STANDARD FOR SUMMARY JUDGMENT

The Administrative Law Judge erroneously disregarded the undisputed material facts presented by the Appellants. Courts often phrase the summary judgment inquiry in terms of whether there is a genuine issue of material fact. However, even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *County of Charleston v. Sleepy Hollow Youth, Inc.*, 340 S.C. 174, 180; 530 S.E.2d 636, 640; *Octavia Jackson, Appellant, v. Swordfish Investments, L.L.C.*, 365 S.C. 608, 620 S.E.2d 54; *Wilson v. Style Crest Prods.*, 367 S.C. 653, 656; 627 S.E.2d 733, 735. “[S]ummary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom.” *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980). In this case, the ALJ erred by ignoring a majority of the undisputed facts submitted by the Appellants, and drawing a single strained inference against Appellants, where inferences should have been drawn in favor of the Appellants.

¹ Such a condition can also be included in the construction in navigable waters permit. S.C. Code Ann. Reg. 19-450.4. Even in the absence of a required § 401 certification, DHEC has the authority under the broad provisions of the S.C. Pollution Control Act to require a minimum flow release. *See City of Rock Hill v. S.C. DHEC*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990).

Furthermore, the moving party's burden encompasses more than just proving there are no issues of material fact. Rather, on summary judgment, the court determines whether the moving party has established both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Park Place Apartments, L.L.C. v. Farmers Union Mut. Ins. Co.*, 247 P.3d 236, 239 (Mont. 2010). *See also, Godfrey v. Globe Newspaper Co., Inc.*, 928 N.E.2d 327, 333 (Mass. 2010); *Griffin Pipe Products Co., Inc. v. Board of Review of County of Pottawattamie*, 789 N.W.2d 769, 772 (Iowa 2010). In this case there were no issues of material fact because the Appellants' witnesses submitted the only evidence on the issue of whether minimum releases were needed to protect and maintain designated uses and water quality, but the ALC ignored this evidence in resolving the motion in favor of Respondents. A court may not decline to accept the nonmoving party's version of events at summary judgment. *See Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005).

The ALJ is correct that there are no issues of fact in dispute – the Respondents did not in anyway attempt to contradict the facts presented by the Appellants' witnesses. But that does not make the facts inapplicable or mean that the Judge can ignore those facts not in dispute that directly bear on the issue or draw inferences from those facts that are adverse to the non-moving party. This case was before the ALC on a motion for summary judgment. And there were no material facts in dispute – specifically Appellants' evidence that the requirement of a minimum flow release was essential to protect and maintain water quality

and existing uses. And that fact has a direct bearing on whether DHEC is authorized to impose a condition that would protect water quality pursuant to R. 61-68 and 61-101 in that those regulations authorize DHEC to impose conditions for the protection and maintenance of water quality and designated use. The ALJ erred both in misstating Appellants' evidence and by ignoring the undisputed material fact that a minimum flow release would ensure compliance with water quality standards which are relevant to the pending inquiry. In so doing, the ALC erroneously granted summary judgment in favor of the Respondents.

III. THE INTERBASIN TRANSFER ACT DOES NOT PREEMPT DHEC'S AUTHORITY TO IMPOSE CONDITIONS ON ITS WATER QUALITY CERTIFICATION

A. The Interbasin Transfer Act Has a Limited Scope that Does Not Preempt or Conflict with the CWA, PCA and Regulations Promulgated Thereunder

The ALJ erroneously ruled that because the Interbasin Transfer Registration Act ("IBTR") authorizes the withdrawal of up to thirty-two (32) million gallons of water per day by GWS from the Table Rock Reservoir, DHEC cannot utilize the 401 water quality certification process to require a minimum flow release into the South Saluda River. (Order, p. 5, R. p. 1-7). This conclusion is erroneous because 1) the Interbasin Transfer Registration, which on its face applies to transfer of water from one river basin to another and which was issued twenty-six (26) years ago, is inapplicable to whether the project complies with water quality standards and uses and 2) the Clean Water Act, the Pollution Control Act and the regulations promulgated thereunder mandate that DHEC protect and maintain water quality and existing uses through the regulatory programs.

When there are two state statutes that have some overlap, “the legislature is presumed to know the effect of changes in legal doctrine and to make changes to statutory law as needed.” *Fernanders v. Marks Const. of S. Carolina, Inc.*, 330 S.C. 470, 478, 499 S.E.2d 509, 513 (S.C. Ct. App. 1998) (citing *Berkebile v. Outen*, 311 S.C. 50, 56, 426 S.E.2d 760, 763 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953)).

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *State v. Baker*, 310 S.C. 510, 427 S.E.2d 670 (1993). Statutes in apparent conflict should, if reasonably possible, be construed to allow both to stand and to give effect to each. *Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 368 S.E.2d 64 (1988). Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation. *Lloyd v. Lloyd*, 295 S.C. 55, 367 S.E.2d 153 (1988). *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412-13, 526 S.E.2d 716, 719 (2000).

In this case, there is no conflict between the State IBTA, the Federal CWA or the PCA and DHEC Regulations – all can be read together and given meaning.

The purpose of the IBTA, which has now been repealed by the South Carolina Surface Water Withdrawal Act, Act No. 247, § 4.A, effective January 1, 2011, was to regulate transfer of waters from one river basin to another. S.C. Code Ann. § 49-21-20 (repealed). The IBTA states that “no person shall withdraw, divert, pump or cause directly the transfer . . . water . . . from one river basin and

use or discharge all or any part of the water in a different river basin unless the person shall first obtain a permit.”² *Id.*

Meanwhile, the Pollution Control Act and the DHEC Regulations are specific to protection and maintenance of water quality and existing uses of our state’s waters. The purpose of the Pollution Control Act is to “maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, maximum employment, the industrial development of the State, the propagation and protection of terrestrial and marine flora and fauna.” S.C. Code Ann. § 48-1-20. In conducting a § 401 water quality certification review of a federal § 404 permit, the State “must certify that *any activity* which may result in a discharge into navigable waters will comply with the provisions of sections 1311, 1312, 1313, 1316, and 1317 of the Clean Water Act. 33 U.S.C. § 1341(a). That certification must set forth limitations, or conditions, necessary to ensure that any applicant will comply with any “appropriate requirement of State law set forth in such certification.” 33 U.S.C. § 1341(d) (emphasis added). The appropriate requirements of state law include measures to protect the State’s designated and existing uses; to meet water quality standards; and the antidegradation policy. As discussed above, the DHEC Regulations list very specific water quality criteria and means for protecting and maintaining that water quality and

² The Surface Water Withdraw and Permitting Act provides that “The expiration date of an interbasin transfer permit or an interbasin registration, including any water withdrawal right or authority contained in the permit or registration, in existence on the effective date of this chapter remains effective.” S.C. Code Ann. § 49-4-70. Thus, GWS’s Interbasin Transfer Registration remains effective until 2016.

existing uses. The DHEC regulations pertain directly to protection of water quality and thus prevail over the IBTR.³

The ALC erred in concluding that the IBTA is controlling and that the DHEC regulations, authorized under by the Clean Water Act and Pollution Control Act, are not applicable.

B. GWS's Registration Does Not Preempt or Even Affect DHEC's Authority

The General Assembly passed the Interbasin Transfer Act in 1985 for the purpose of establishing a permitting process for the transfer of water from one river basin to another. S.C. Code Ann. § 49-21-20 (repealed by Act No. 247, Jan. 2011). The IBTA contains criteria related to water quality and stream uses to be applied in reviewing permit applications for interbasin transfers. S.C. Code Ann. § 49-21-30. (repealed by Act No. 247, Jan. 2011). Those criteria, however, are applicable only to new interbasin transfers. Pre-existing transfers, such as the GWS transfer from Table Rock Reservoir, are grandfathered through a simple registration process, which allows the transfer to continue. S.C. Code Ann. § 49-21-50 (repealed by Act No. 247, Jan. 2011). Thus, the IBTA exempts pre-existing transfers from the normal permitting requirements of § 49-21-30.

The Registration does not include any review or consideration of water quality and other factors that apply to new transfers and does not include any conditions related to water quality. S.C. Code Ann. § 49-21-50.A. It simply places limits on the quantity of

³ In addition, Regulation 61-101 took effect in 1990, five years after the IBTA, and thus is more recent in time.

water that can be transferred on a daily basis. *Id.* Thus, the Registration does not preempt or even affect DHEC's authority under the broad authorities of federal and state laws and regulations discussed above.

C. The Interbasin Transfer Act Cannot Preempt the Federal Clean Water Act

The ALJ concluded that the IBTA "expressly preempts the field regarding water flow." (Order p. 5, R. p.1-7). In so concluding, the ALJ committed an error of law because the State Interbasin Transfer Act cannot preempt the federal Clean Water Act.

The Doctrine of Preemption applies when there is a question of whether a federal law preempts a state law under the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl. 2.19. Under the Doctrine of Preemption, United States Supreme Court decisions are absolutely controlling on questions of federal constitutional and statutory law, and Congress may address national problems by enacting "exclusive, comprehensive federal legislation supplanting and barring similar state authority." *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S. C. 631, 239 S. E. 2d 647 (1977). When there is a "collision" between a valid congressional act and a state statute, the state law must yield to the law of Congress. In this way, federal law preempts the operation of the corresponding state law. 19 S.C. Jur. Constitutional Law § 8. The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, invalidates a state law that "interferes with or is contrary to federal law." *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). Only if State law limitation (the IBTA) conflicts with federal law limitations does preemption apply. *Dwyer v. City of Ann Arbor*, Mich.App.1977, 261 N.W.2d 231, 79 Mich.App. 113, reversed on other grounds 387 N.W.2d 926, 402 Mich. 915.

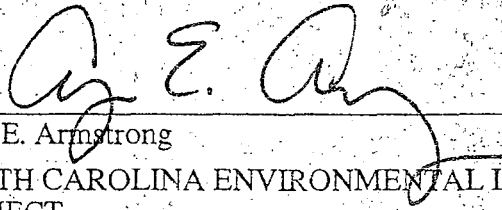
In this instance, the ALJ erred in ruling that the State IBTA preempts the law that established the 401 program authorizing the State to impose conditions to protect water quality – the Clean Water Act, 33 U.S.C. § 1341.⁴ DHEC's authority to require minimum releases derives directly from the Clean Water Act. "[W]here a federal law incorporates state requirements, it makes those requirements federal requirements. For purposes of federal preemption analysis, the substantive requirements of state law applied through the water quality certification analysis become requirements of federal law." *Karuk Tribe of N. California v. California Reg'l Water Quality Control Bd., N. Coast Region*, 183 Cal. App. 4th 330, 340, 108 Cal. Rptr. 3d 40, 48 (Cal. Ct. App. 2010) (internal citation omitted). Because DHEC's authority derives directly from the federal law, the doctrine of preemption cannot apply because the IBTA cannot preempt the federal Clean Water Act requirements.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Court reverse the Administrative Law Court's ruling that DHEC lack authority to include a minimum flow release as a condition of the certification and permit, and remand the decision back to DHEC with instructions to include such a condition.

⁴ In a footnote of the Order, the ALJ cites to § 49-21-50.B. of the IBTA: "The provisions of this chapter shall take precedence over any other state regulatory provision pertaining to the subject of this chapter." As discussed above, the subject matter of the IBTA is withdrawal and transfer of water from one river basin to another, and not water quality. Because neither the subject matter of the IBTA nor GWS's Registration pertain to water quality, there no conflict between the IBTA and the CWA, PCA or DHEC regulations, which are specifically aimed at protecting and maintaining water quality and uses.

Respectfully submitted,



Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

December 5, 2011

STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

Case No. 09-ALC-07-0069-CC

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,

**FINAL BRIEF OF RESPONDENT
GREENVILLE WATER**

Randolph R. Lowell
Chad N. Johnston
Willoughby & hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Eugene C. McCall, Jr.
Ryan W. Trail
McCall Environmental, P.A.
Post Office Box 3027
Greenville, SC 29602-3027

*Attorneys for Respondent
Greenville Water*

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	4
Argument	7
I. The work and impacts in Project areas triggering the Certification have been fully completed; therefore, the case is moot and not justiciable	7
II. Arguments and facts now proffered by the Appellant were abandoned and not preserved below	13
(A) Appellants' factual recitation presents inaccuracies and opinion as fact that are new and not relevant to this appeal	13
(B) Upstate Forever limited its appeal to a single issue before the ALC	15
III. Because the authority sought on behalf of DHEC would be discretionary, at best, this Court's opinion would be advisory	16
IV. The regulatory scope is a narrow one, as the Project is limited to the replacement of an existing water intake pipe	18
V. The Certification in this case relates only to an intake pipe replacement, and in these circumstances no minimum flow restrictions are permissible or warranted	20
(A) Upstate Forever's reliance upon <u>PUD No. 1</u> and its progeny is misplaced	22
(B) Section 401 only applies to "discharges," and there is no discharge from the Project on which to impose minimum flow conditions	23
(C) The Water Quality Standards in Regulation 61-68 are not self-executing, but rather are implemented through a permitting or certification scheme	27

(D)	Section 401 applies to water quality, not water quantity	27
(1)	The Interbasin Transfer Act and Surface Water Withdrawal Act govern water quantity issues	30
(2)	There is no preemption issue and the governing water quality and water quantity regulatory schemes are both separate and consistent.....	32
VI.	Summary Judgment was proper in this case	33
(A)	This Court's review is limited to whether summary judgment in favor of Greenville Water was proper	33
(B)	Summary judgment was properly granted to Greenville Water.....	36
	Conclusion	37

TABLE OF AUTHORITIES

Cases

<u>Arnold Irrigation District v. Dep't of Envtl. Quality,</u> 717 P.2d 1274 (Or. Ct. App. 1986).....	22
<u>Ashmore v. Greater Greenville Sewer Dist.,</u> 211 S.C. 77, 44 S.E.2d 88 (1947)	11
<u>Ballenger v. Bowen,</u> 313 S.C. 476, 443 S.E.2d 379 (1994)	34
<u>Booth v. Grissom,</u> 265 S.C. 190, 217 S.E.2d 223 (1975)	17
<u>Buckner v. Preferred Mut. Ins. Co.,</u> 255 S.C. 159, 177 S.E.2d 544 (1970)	15
<u>Byrd v. Irmo High Sch.,</u> 321 S.C. 426, 468 S.E.2d 861 (1996)	7, 10
<u>Cole v. Manning,</u> 240 S.C. 260, 125 S.E.2d 621 (1962)	12
<u>Colorado Wild, Inc. v. United States Forest Service,</u> 122 F.Supp.2d 1190 (D. Colo. 2000).....	16, 25
<u>Curtis v. State,</u> 345 S.C. 557, 549 S.E.2d 591 (2001)	8, 10
<u>Fisher v. J.H. Sheridan Co.,</u> 182 S.C. 316, 189 S.E. 356 (1936).....	17
<u>Fuller v. Blanchard,</u> 358 S.C. 536, 547, 595 S.E.2d 831 (Ct. App. 2004).....	34, 35
<u>Grazia v. S.C. State Plastering, LLC,</u> 390 S.C. 562, 703 S.E.2d 197 (2010)	17
<u>Great Basin Mine Watch v. Hankins,</u> 456 F.3d 955 (9th Cir. 2006)	16, 27, 32
<u>Great Games, Inc. v. S.C. Dep't of Revenue,</u> 339 S.C. 79, 529 S.E.2d 6 (2000)	13
<u>Holden v. Cribb,</u> 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002).....	7
<u>Home Medical Systems, Inc. v. S.C. Dep't of Revenue,</u> 382 S.C. 556, 677 S.E.2d 582 (2009)	14
<u>I'On, L.L.C. v. Town of Mt. Pleasant,</u> 338 S.C. 406, 526 S.E.2d 716 (2000)	13
<u>Idaho Conservation League v. Caswell,</u> No. CV-95-394-S-MHW, 1996 WL 938215 (Aug. 12, 1996).....	26
<u>In re: Chance,</u> 277 S.C. 161, 284 S.E.2d 231 (1981)	17
<u>In re: Treatment & Care of Luckabaugh,</u> 351 S.C. 122, 568 S.E.2d 338 (2002)	10
<u>Jackson v. State,</u> 331 S.C. 486, 489 S.E.2d 915 (1997)	8

<u>James City County v. U.S. Env'tl. Protection Agency,</u> 12 F.3d 1330 (4th Cir. 1993)	29
<u>McCall v. Finley,</u> 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987).....	12
<u>McCall v. State Farm Mut. Auto. Ins. Co.,</u> 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004).....	15
<u>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,</u> 327 S.C. 238, 489 S.E.2d 470 (1997)	11, 15
<u>Moore v. Waters,</u> 148 S.C. 326, 146 S.E. 92 (1928).....	16
<u>Nat'l Wildlife Fed'n v. Gorsuch,</u> 693 F.2d 156 (D.C. Cir. 1982)	29
<u>North Carolina v. Federal Energy Regulatory Comm'n,</u> 112 F.3d 1175 (D.C. Cir. 1997).....	24
<u>Olson v. Faculty House of Carolina,</u> 354 S.C. 161, 580 S.E.2d 440 (2003)	34
<u>PUD No.1 of Jefferson County v. Washington Dep't of Ecology,</u> 511 U.S. 700 (1994).....	passim
<u>Responsible Econ. Dev. v. S.C. Dep't of Health & Env'tl. Control,</u> 641 S.E.2d 425 (2007)	21
<u>RWE NUKEM Corp. v. ENSR Corp.,</u> 373 S.C. 190, 644 S.E.2d 730 (2007)	33, 34
<u>Save Our Community v. U.S. Env'tl. Protection Agency,</u> 971 F.2d 1155 (5th Cir. 1992)	24
<u>Seabrook v. City of Folly Beach,</u> 337 S.C. 304, 523 S.E.2d 462 (1999)	8
<u>Sierra Club v. Kiawah Resort Assocs.,</u> 318 S.C. 119, 456 S.E.2d 397 (1995)	20
<u>Sloan v. Greenville County,</u> 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003).....	10
<u>Tatnall v. Gardner,</u> 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002).....	13
Statutes	
33 U.S.C.A. § 1251(g)	28
33 U.S.C.A. § 1313	27
33 U.S.C.A. § 1344.....	20
33 U.S.C.A. § 1362.....	24
33 U.S.C.A. § 1362(16)	24
33 U.S.C.A. §§ 1251 et seq.....	9
S.C. Code Ann. § 1-23-505.....	13
S.C. Code Ann. § 15-53-20.....	13
S.C. Code Ann. § 49-4-70(C)	31
S.C. Code Ann. § 49-4-80(B)	31
S.C. Code Ann. §§ 1-23-500 et seq.	13
S.C. Code Ann. §§ 49-21-10 et seq.	5, 30

Other Authorities

123 Cong. Rec. S19677 (Dec. 15, 1977)	28
123 Cong. Rec. S19678 (Dec. 15, 1977)	29
Jean Hoefer Toal, et al., <u>Appellate Practice in South Carolina</u> (2d ed. 2002)	14
Robert W. Hayes, Jr. & Randolph R. Lowell, <u>Protecting South Carolina Water: The Surface Water Withdrawal Act</u> , South Carolina Lawyer (Jan. 2011).....	30

Rules

Rule 29(D), Rules of Procedure for the Administrative Law Court	14
Rule 56(c), South Carolina Rules of Civil Procedure	33
Rule 68, Rules of Procedure for the Administrative Law Court.....	33

Regulations

23 S.C. Code Ann. Regs. 19-450	9
25 S.C. Code Ann. Regs. 61-69	27
25A S.C. Code Ann. Regs. 61-101	19, 20, 23, 28
25A S.C. Code Ann. Regs. 61-101.A.4	27
25A S.C. Code Ann. Regs. 61-101.A.9	6
25A S.C. Code Ann. Regs. 61-101.F.1	19
25A S.C. Code Ann. Regs. 61-68	27
27 S.C. Code Ann. Regs. 121-12 <u>et seq.</u>	5, 30

STATEMENT OF ISSUES ON APPEAL

- (1) Because the portions of the Project requiring certification have been completed, including impacts to all of the stream crossings and wetland areas, is this case moot and thus non-justiciable for this Court's review?
- (2) Are certain of Appellants' arguments and facts unpreserved for this Court's review based on Appellants withdrawing all of its claims except a single legal claim?
- (3) Because the authority sought by Appellants is discretionary, would a decision by this Court amount to an advisory opinion?
- (4) Is the scope of the Certification at issue narrow because the Project is limited to the replacement of an existing water intake pipe?
- (5) Did the Administrative Law Court err when it determined that no minimum water flow restrictions were legally mandated for the replacement of an existing water intake pipe?
- (6) Did the Administrative Law Court err in granting summary judgment in favor of Respondent?

STATEMENT OF THE CASE

This action was commenced with the February 26, 2009, Request for Final Review Conference submitted by Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation¹ (collectively hereinafter referred to as “Appellants” or “Upstate Forever”) to the South Carolina Department of Health and Environmental Control (“DHEC”) Board (“Board”) concerning the DHEC staff decision to issue the Section 401 Water Quality Certification (“Certification”) and Construction in Navigable Waters Permit (“Permit”). (R.pp. 17-25), Request for Final Review. The Certification and Permit authorized Greenville Water to replace an aging water pipe. (R.pp. 416-418), DHEC Notice of Dep’t Decision. A Final Review Conference was held on April 9, 2009. See (R.pp. 271-349). On May 8, 2009, the Board issued its Final Agency Decision, which upheld, without modification, the staff decision to issue the Certification and Permit. (R.13-16). Specifically, the Board held that Appellants’ request for minimum flow requirements, public verification of water withdrawals, and stricter enforcement of the conditions of the Certification and Permit were without merit. Id.

On June 5, 2009, Appellants filed a Request for Contested Case Hearing with the South Carolina Administrative Law Court (“ALC”) pursuant to Sections 1-23-600(H) and 44-1-60(G) of the South Carolina Code. (R.pp. 26-39). Respondent Greenville Water System² (“Greenville Water”) filed, inter alia, a motion to dismiss Appellants’ request.

¹ The Request for Final Review Conference was also joined by the Sierra Club and Save Our Saluda; however, those parties did not join the Request for Contested Case Hearing before the Administrative Law Court and are not parties to this appeal.

² Subsequent to the initiation of this litigation, Respondent’s name has changed to “Greenville Water”; therefore, Respondent will use this name for purposes of this appeal.

(R.pp. 40-74). Thereafter, Greenville Water submitted a motion to lift the automatic stay in the case, seeking to resume construction activities on the project during the pendency of the contested case. **(R.pp. 75-83).** A hearing was held before the ALC with respect to Greenville Water's motion on August 5, 2009, which the ALC granted in an order filed August 11, 2009. **(R.pp. 11-12).** Greenville Water proceeded with the project and has completed the project with respect to all impacts on stream crossings and wetlands areas, which gave rise to the requirement for a Certification and Permit. All that remains to finally complete the project are adjustments and repairs to seven valve pits, all located outside any water of the State or United States and are activities outside the scope of the Certification and Permit.

While initially raising multiple legal and factual issues, in an April 14, 2010 letter to the ALC, Appellants voluntarily limited their contested case challenge of the Board's decision to the single legal issue of whether DHEC has the authority to impose minimum instream flows to the South Saluda River from the Table Rock Dam and Reservoir ("Reservoir") as a condition of issuing its Certification for the intake pipe replacement. **(R.p. 419),** Armstrong Ltr. to Judge McLeod. On September 21, 2010, Greenville Water and DHEC (collectively hereinafter referred to as "Respondents") filed a joint motion for summary judgment with the ALC as to this single issue. **(R.pp. 145-185).** On November 10, 2010, Upstate Forever filed a response and cross-motion for summary judgment. **(R.pp. 186-235).** Thereafter, on November 22, 2010, Respondents filed a return. **(R.pp. 236-268).** A hearing on the foregoing cross-motions was held on December 1, 2010, before the Honorable John D. McLeod, Administrative Law Judge. **(R.pp. 350-415).** On January 20, 2011, the ALC issued its order ("ALC Order") granting Respondents' joint

motion for summary judgment and denying Appellants' cross-motion. (R.pp. 1-7). On February 18, 2011, Appellants filed their notice of appeal to this Court. (R.pp. 269-270).

STATEMENT OF THE FACTS³

Greenville Water completed construction of the Table Rock Dam and Reservoir ("Reservoir") in the mid to late 1920s, and since that time it has protected the surrounding watershed through donations of land for State Parks and grants of conservation easements. (R.p. 1). Due to Greenville Water's efforts, the watershed provides protection and habitat for hundreds of plant and animal species.

Today, the Reservoir and watershed provide drinking water to Greenville, Pickens, Laurens, and Anderson County residents through two 30-inch diameter Raw Water Transmission Mains ("RWTM"). (R.p. 1). RWTM #1 was constructed in 1930,

³ In its initial brief, Appellant presents a series of purported "undisputed facts" to this Court. As discussed more thoroughly below, Greenville Water objects to the inclusion of Upstate Forever's "factual" recitation due to its exclusive reliance on and attempt to inject into this case unsubstantiated facts and the opinions of its purported experts under the guise of being "undisputed." App. Br. at 3. In its Order, the Administrative Law Court clearly and unequivocally holds that there are no issues of material fact with respect to whether DHEC has the authority to impose minimum flow requirements on a 401 Certification issued for the replacement of the intake pipe. (R.pp. 1-8). "[Upstate Forever] ha[s] disputed none of [Greenville Water's] material facts. Because [Upstate Forever] limited [its] appeal to one legal question regarding DHEC's authority to impose minimum flow requirements as a condition of the Certification, all factual claims that the parties may have previously been in disagreement over are no longer in question." (R.p. 4), ALC Order at 4.

Furthermore, the ALC found the affidavits of Upstate Forever's witnesses to be "extraneous" in light of Upstate Forever's decision to voluntarily dismiss the majority of its original claims including any factual disputes. (R.p. 4), ALC Order at 4. Contrary to the clear holding of the ALC that Respondent Greenville Water's recitation of facts was uncontroverted, therefore restricting the admissibility and relevance of Upstate Forever's factual claims, Upstate Forever presents this Court a reality that does not exist. Not only were these opinions ruled extraneous, a holding from which Upstate Forever has not appealed, but they are entirely irrelevant to the single legal issue to which it decided to limit itself. Consequently, Greenville Water requests this Court disregard Upstate Forever's presentation of "undisputed facts" in its brief, in favor of the facts ruled to be uncontroverted by the ALC.

and RWTM #2 was constructed in 1939. Id. These RWTMs are the conduit through which raw water originating in the Reservoir is "transmitted" to a treatment plant and then provided to the community. Thus, the RWTMs are used to take water from the Reservoir, and are not used for any discharge purposes.

On November 13, 1985, Greenville Water was issued an Interbasin Transfer Registration ("IBTR") pursuant to the South Carolina Interbasin Transfer Act and corresponding regulations. (R.p. 1), IBTR. See S.C. Code Ann. §§ 49-21-10 et seq. (repealed Jan. 1, 2011); 27 S.C. Code Ann. Regs. 121-12 et seq. (repealed Jan. 1, 2011). The IBTR authorizes Greenville Water to withdraw up to thirty-two (32) million gallons of water per day ("MGD") from the Reservoir that may be transferred to another water basin. Greenville Water's IBTR expires on September 1, 2016. Id.

In order to ensure continued service of safe, clean drinking water to the community, Greenville Water proposed to replace RWTM #2, which was found to be aging and the most likely to be involved in an incident. In its place, and as a preventative maintenance measure to minimize future risks of incidents and protect the drinking water supply, Greenville Water proposed to install a 42-inch diameter pipe spanning approximately 7.8 miles ("Project"). (R.p. 2); see also (R.pp. 13-16, 416-418), DHEC Final Agency Decision; DHEC Notice of Dep't Decision. To that end, in 1999, a 42-inch diameter connection was installed at a pump station, with a second 42-inch diameter connection installed at the Reservoir in 2005. (R.p. 2). Greenville Water's replacement intake pipe would connect these existing endpoints and ultimately transmit water to the treatment plant. Id. The remaining intake pipe (RWTM #1) will continue to be used

daily to keep it in operational condition, but its primary purpose will be as a back-up to the replacement intake pipe to provide redundancy in case of an incident or failure. Id.

To that end, on January 29, 2008, Greenville Water submitted a "Joint Federal and State Application for Activities Affecting Waters of the United States" to the United States Army Corps of Engineers, Charleston District ("Corps") and DHEC (for a Section 401 Water Quality Certification). (R.p. 2). On March 28, 2008, Greenville Water submitted a "Permit Application for Construction in Navigable Waters" to DHEC. Id. After review of the applications submitted by Greenville Water, subsequent filings and comments from the public, including Appellants, and other resource agencies, on February 11, 2009, DHEC issued the "Notice of Department Decision – Water Quality Certification and Construction in Navigable Waters Permit."⁴ (R.pp. 416-418). The Project's 7.8 mile route in mostly existing right-of-way had temporary impacts of 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water. (R.pp. 13-14), DHEC Final Agency Decision. The Certification and Permit contained eighteen (18) conditions, which addressed concerns raised by Appellants and others during the public comment period.⁵ (R.p. 2).

⁴ Pursuant to law, one document serves as the Permit and Certification. See 25A S.C. Code Ann. Regs. 61-101.A.9 ("If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit.").

⁵ The conditions include, among other things, protections for wildlife, water quality impacts (such as the imposition of best management practices), and the restoration of natural areas. (R.pp. 416-418), Notice of Department Decision. As the ALC found, these conditions adequately protected water quality from the Project's impacts. (R.p. 7), ALC Order at 7.

Greenville Water has since completed construction of the portions of the replacement intake pipe that implicated the 401 Certification requirements⁶ due to its temporary discharge of material in navigable waters in conjunction with the stream crossings and wetlands areas. All that remains in order to fully complete the Project are adjustments and repairs to seven valve pits, all located on land outside the scope of the Certification and Permit.

ARGUMENT

I. THE WORK AND IMPACTS IN PROJECT AREAS TRIGGERING THE CERTIFICATION HAVE BEEN FULLY COMPLETED; THEREFORE, THE CASE IS MOOT AND NOT JUSTICIABLE.

The portions of the Project which required the Certification and which were challenged by Upstate Forever have been fully completed.⁷ Consequently, this appeal is moot, as there exists no justiciable controversy between the parties and this action does not meet one of the articulated exceptions to the doctrine of mootness.

“A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy.” Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996).

⁶ A thorough discussion of the 401 Certification process and Upstate Forever’s confusion thereof is found *infra*, § V.

⁷ The only issue on appeal involves the Certification. The Appellants have waived and abandoned any challenge to the Permit.

The concept of justiciability includes the doctrine of mootness. Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson, 331 S.C. 486, 489 S.E.2d 915). “A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

As described above, this Project involves the replacement of an existing intake pipe used to withdraw water from the Reservoir for use as drinking water for the surrounding Greenville, Pickens, Laurens, and Anderson counties. This Project is not a new withdrawal from the Reservoir. Additionally, this Project is not a request to withdraw more water from the Reservoir than Greenville Water does currently, or to modify the existing legal restriction on withdrawals from the Reservoir found in the IBTR. Any argument to the contrary is erroneous and contrary to the clear and undisputed evidence in this case. Rather, Greenville Water’s request here is merely to replace an aging intake pipe. **(R.p. 2)**. And in any event, the overall withdrawal limit remains unchanged under Greenville Water’s existing IBTR, effective 1985 and set to expire in 2016, pending renewal under recently enacted legislation. See infra § V(D) (discussing the legal regime of surface water withdrawals).

Nor does this Project relate to construction and/or alteration of the Reservoir. Instead, the basis for the replacement intake pipe’s requirement of permitting and

certification⁸ from both the Corps and DHEC is that, in the construction of the replacement intake pipe, there were temporary impacts to 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water: (R.pp. 13-14), DHEC Final Agency Decision. Because the regulated impacts from installation of the intake pipe now have concluded, there are no more on-going discharges of material into waters and therefore no longer a need for Certification. Therefore, the trigger for Certification is the construction of the actual pipeline in wetlands and navigable waters, not the withdrawal or discharge of water contained in the Reservoir. See infra § IV.

In short, because the portions of the Project implicating and requiring 401 Certification requirements have ended, even taking Upstate Forever's allegation that DHEC has the authority to impose minimum instream flows as true, there exists no regulated project on which to attach Upstate Forever's request; therefore, there exists no case or controversy with respect to these parties, and this action is moot and non-justiciable. This Court, consequently, is without jurisdiction to hear this action and the appeal should be dismissed.

Furthermore, this appeal, as proffered to the Court, is the definition of a hypothetical: does DHEC have the authority to impose a minimum flow release as a condition of its 401 Certification (even when there is no release of flow by the Project)? As discussed below, the Appellants limited themselves to this single question before the

⁸ See 23 S.C. Code Ann. Regs. 19-450 (providing that "a permit issued by the Department of Health and Environmental Control is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water"); see 33 U.S.C.A. §§ 1251 *et seq.*; 25A S.C. Code Ann. Regs. 61-101 (stating that "[a]ny applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department").

ALC. (R.p. 3-4, 419). As presented, this issue does not even allege that DHEC erred in not imposing a minimum flow as a condition to Greenville Water's Certification on this replacement intake pipe. Consequently, Appellants are requesting the Court answer a purely hypothetical question that will have no bearing on this action. See In re: Treatment & Care of Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (stating that a contingent, hypothetical or abstract dispute does not constitute a justiciable controversy) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

Moreover, none of the three recognized exceptions to the doctrine of mootness are applicable to this action.⁹ Cf. Sloan v. Greenville County, 356 S.C. 531, 551-55, 590 S.E.2d 338, 349-51 (Ct. App. 2003) (finding an appeal moot due to the construction project's completion before further finding that an exception existed). First, this Court could take jurisdiction over this matter, despite mootness, if the issue raised is capable of repetition but evading review. Curtis, 345 at 568, 549 S.E.2d at 596. Here, as explained more thoroughly below, DHEC does not have the authority to impose minimum flow requirements under a Certification for a project of this kind. See infra § V. Under a 401 Certification, minimum flow conditions may be imposed if the project in question

⁹ "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (2001); see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id.

discharges into a water of the United States affecting water quality. Greenville Water's intake pipe replacement project does not affect existing flows or even result in any discharge to the Reservoir.¹⁰ Similarly, this Project does not involve the impoundment of water to create a reservoir or dam. See (R.p. 6), ALC Order at 6. Appellants have not appealed this finding; therefore it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). Because a project of this type does not implicate DHEC's authority to impose minimum flow requirements, there is no issue here that would constitute a violation or could be repeated or evade the review of the Court.

Second, this case does not present the Court with a question of imperative or manifest urgency to establish a rule for future conduct in matters of public interest. See Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) (discussing the public interest exception). The Project at issue in this case, and the 401 Certification under which it was undertaken, does not occupy the realm of public importance required to satisfy this exception. This pipe replacement will not in any way change the withdrawal limits in place for the Reservoir. (R.pp. 4-5), ALC Order at 4-5. Additionally, because minimum instream flows are not properly a part of a project of this

¹⁰ Contrary to the inaccurate claim put forward by Upstate Forever, the replacement intake pipe will not affect Greenville Water's withdrawal capacity limitation from the Reservoir. See App. Br. at 9. Although common sense would dictate that replacing a 30-inch diameter intake pipe with a 42-inch diameter intake pipe would permit Greenville Water to physically withdraw more water, that point is irrelevant because Greenville Water's allowable interbasin withdrawal capacity is expressly limited by its existing IBTR, which remains unaffected by Greenville Water's capital improvement project, and by the Reservoir's safe yield. (R.pp. 4-5), ALC Order at 4-5.

type, there is no manifest urgency to decide an issue for future guidance and public interest.¹¹

Finally, this appeal does not present an issue that could affect future events or have collateral consequences for the parties. As the ALC found, flow requirements are outside the scope of DHEC's controlling regulations with respect to the instant Project's Certification; therefore, DHEC is without the authority to impose these requirements going forward. (R.p. 6), ALC Order at 6. Moreover, as presented and at best, this appeal posits only a discretionary standard to be applied by DHEC and cannot be challenged by a court absent extraordinary circumstances. See Cole v. Manning, 240 S.C. 260, 267-68, 125 S.E.2d 621, 625 (1962) ("[C]ourts may not substitute judicial discretion for administrative discretion, and therefore as a general rule will not attempt to interfere with the exercise of discretionary power by a governmental agency...."). Without the possibility that Upstate Forever could force DHEC to impose instream flow requirements, the hypothetical presented by this appeal cannot affect future events. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").¹² See infra § III (explaining why an opinion in this case would be advisory only.)

¹¹ If Appellants seek to change the law, then they should do so through the legislative process. Moreover, the General Assembly has chosen to address surface water withdrawals as they relate to minimum instream flows in a separate regulatory scheme. See infra § V (D) (discussing the Surface Water Withdrawal Act, which provides for and specifies criteria for surface water withdrawals from existing withdrawers and for future new withdrawal applications, including specific criteria for instream flows).

¹² Additionally, it seems likely that Upstate Forever, by its own actions, divested the ALC of jurisdiction to hear the below action and issue the ALC Order from which it appealed to this Court. In an April 14, 2010 letter to Administrative Law Judge John D. McLeod, counsel for Appellant Upstate Forever stated unequivocally that it had:

II. **ARGUMENTS AND FACTS NOW PROFFERED BY THE APPELLANT WERE ABANDONED AND NOT PRESERVED BELOW.**

- (A) Appellants' factual recitation presents inaccuracies and opinion as fact that are new and not relevant to this appeal.

In its opening brief, Upstate Forever presents an overview of the facts, which it disingenuously claims to be "undisputed," but is in fact self-serving, irrelevant to the single issue on appeal, contrary to the clear holding and findings of facts of the ALC, and has no foundation or support in the record. In its Order, the ALC clearly provides that

decided to **limit** [Upstate Forever's] appeal [of DHEC's administrative decision] to **the question** of whether DHEC has the **authority to impose a minimum flow release** to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 certification and its construction in navigable waters permit....

(R.p. 419), Armstrong Ltr. to Judge McLeod (emphasis added). The effect of this limitation was to present to the ALC a request for a declaratory judgment as to DHEC's authority to impose minimum instream flow conditions on a request for 401 Certification. The ALC, as a creature of statute, is a court of limited jurisdiction for purposes of this appeal that has been authorized to hear contested cases from DHEC. See S.C. Code Ann. §§ 1-23-500 et seq. The ALC has not been granted subject matter jurisdiction over declaratory judgments.

Similarly, Upstate Forever's hypothetical does not implicate the ALC's contested case jurisdiction. See S.C. Code Ann. § 1-23-505. In limiting its appeal by voluntarily dismissing its claims related to the underlying merits of Greenville Water's Certification, Upstate Forever effectively divested the ALC of its jurisdiction to hear the request for a contested case. See S.C. Code Ann. § 15-53-20 (providing that "[c]ourts of record **within their respective jurisdictions** shall have power to declare rights, status and other legal relations....") (emphasis added); Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) ("Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong.") (citations omitted); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (holding that the issue of subject matter jurisdiction may be raised at any time including when raised for the first time on appeal) (citations omitted); see also P'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000) (stating an appellate court may affirm for any reason appearing in the record) (citing Rule 220(c), SCACR). Consequently, this Court could dismiss this appeal as the ALC lacked jurisdiction over the subject matter, which was posited by Upstate Forever as a declaratory judgment.

there are no issues of material fact with respect to whether DHEC has the authority to impose minimum flow requirements in a 401 Certification issued for the replacement of the intake pipe: “[Appellants] have disputed none of [Greenville Water’s] material facts. Because [Upstate Forever] limited their appeal to one legal question regarding DHEC’s authority to impose minimum flow requirements as a condition of the Certification, **all factual claims that the parties may have previously been in disagreement over are no longer in question.**” (R.p. 4), ALC Order at 4 (emphasis added). Upstate Forever agreed with the ALC that there were no issues of material fact bearing on the legal issue presented in their claim. See (R.p. 186), App. Mot. for Summ. Judg. at 1; see also (R.p. 419), Armstrong Ltr. to Judge McLeod (limiting Appellants’ appeal to a single legal issue).

Moreover, Upstate Forever has not challenged the ALC’s finding that Upstate Forever had disputed none of Greenville Water’s material facts, either through a motion for reconsideration to the ALC pursuant to Rule 29(D), Rules of Procedure for the Administrative Law Court (“RPALC”), or an appeal of that finding to this Court. See Home Medical Systems, Inc. v. S.C. Dep’t of Revenue, 382 S.C. 556, 677 S.E.2d 582 (2009) (stating definitively that Rule 59(e) motions, or the equivalent thereof, are cognizable in ALC proceedings); see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 60 (2d ed. 2002) (“Post-trial motions are also utilized to raise issues that could not have been raised at trial.... A post-trial motion must also be made when there are errors or inconsistencies in the trial court’s final order.”) (citing Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) and Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995)).

Consequently, the ALC's findings are the law of the case, and Upstate Forever's recitation of facts, where different from those presented by the ALC's Order and reflected above, is unpreserved for this Court's review. See ML-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance"); see also McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (stating an issue must have been raised to and ruled upon by the trial court in order to be preserved for appellate review).

(B) Upstate Forever limited its appeal to a single issue before the ALC.

In an April 14, 2010 letter to Judge McLeod, counsel for Appellants stated unequivocally that it had:

decided to **limit** [Upstate Forever's] appeal [of DHEC's administrative decision] to **the question** of whether DHEC has the **authority to impose a minimum flow release** to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 certification and its construction in navigable waters permit....

(R.p. 419), Armstrong Ltr. to Judge McLeod (emphasis added). According to the self-imposed limitation of the issues on appeal by Appellants, the ALC similarly contained its analysis to the single issue of "does DHEC have the authority to impose minimum instream flow requirements as a condition of the Certification at issue?" (R.p. 4), ALC Order at 4. Now, despite this limitation, Upstate Forever attempts to do nothing short of manufacture a new appeal to suit their desired outcome, including the insertion of unsubstantiated and inaccurate facts, presented under the guise of being "undisputed", as well as inject multiple issues on appeal not embraced by their own self-imposed

limitation. When a party presents a single issue to the lower court, and the lower court rules only on the single issue presented to it, then it is apodictic that the only issue preserved for this Court's appellate review is the same single issue ruled upon by the lower court. Accordingly, Greenville Water respectfully submits that this Court should limit its review to the only issue argued by Upstate Forever and ruled upon by the ALC below.

III. BECAUSE THE AUTHORITY SOUGHT ON BEHALF OF DHEC WOULD BE DISCRETIONARY, AT BEST, THIS COURT'S OPINION WOULD BE ADVISORY.

The sole issue preserved for this appeal is whether DHEC has the authority to impose a minimum instream flow requirement as a condition of its 401 Certification.¹³ Upstate Forever has not appealed DHEC's exercise of discretion to not include minimum flows for the Project. Consequently, Upstate Forever seeks only to establish DHEC's authority to impose these requirements going forward. However, the "authority to impose" does not equate to a "requirement" that DHEC do so. See Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963 (9th Cir. 2006) ("[S]tates *may* set minimum flow standards as part of section 401 certification requirements," but are not required to do so.) (emphasis in original); Colorado Wild, Inc. v. United States Forest Service, 122 F.Supp.2d 1190, 1193 (D. Colo. 2000) (CWA Section 401 does not mandate the imposition of minimum flow requirements); cf. Moore v. Waters, 148 S.C. 326, 146 S.E. 92 (1928) (establishing and distinguishing the clear difference between discretionary and mandatory authority, affirming the trial court's refusal of a writ of mandamus with

¹³ There is no issue or question presented regarding the Construction in Navigable Waters Permit issued by DHEC for the Project. Thus, the appeal is limited strictly to a question of authority as to the Certification.

respect to a discretionary decision); Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356, 360 (1936) (stating that “[t]he Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority”) (citing Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936)).

As a result, even taking Upstate Forever’s best case scenario from this appeal as true—the Court finding that DHEC has the authority to impose minimum instream flows going forward—the authority sought is inherently discretionary with DHEC, and this Court’s opinion would be nothing more than an advisory opinion with no practical effect on Greenville Water’s intake pipe replacement project. See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 577 n.6, 703 S.E.2d 197, 204 n.6 (2010) (vacating the order of a lower court where it addressed an issue that had not been raised to it, finding the analysis of the issue amounted to an advisory opinion); see also In re: Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have “consistently refrained” from issuing purely advisory opinions); Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) (“It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.”). Accordingly, Greenville Water submits that this Court should decline to address Upstate Forever’s single issue on appeal, as its opinion would be purely advisory.

IV. THE REGULATORY SCOPE IS A NARROW ONE, AS THE PROJECT IS LIMITED TO THE REPLACEMENT OF AN EXISTING WATER INTAKE PIPE.¹⁴

Upstate Forever argues against a project that is not before the Court and was not before DHEC in the present case. Further, it argues for unlimited and unbridled agency authority to impose conditions on any aspect of an applicant's operations. In doing so, Upstate Forever relies almost exclusively on case law involving hydropower facilities (e.g., dams) for which the project scope included the permitting of the operation of the facility and its on-going, continuing discharge into a water of the United States. See, e.g., PUD No.1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) (hereinafter PUD No. 1); App. Br. at 14-16.

Here, the Project is the replacement of a 70-plus year-old intake pipe in a proactive effort to minimize the risk of any future line break or accident and to ensure safe and reliable drinking water to the community. Upstate Forever has commented that it supports replacement of the intake pipe. (R.pp. 402-403), ALC Hrg. Transc. 53:21-54:7. Nonetheless, it is taking this opportunity not to challenge the Project, but Greenville Water's overall operations. But see PUD No. 1, 511 U.S. at 712 ("Although § 401(d) authorizes the State to place restrictions on the activity as a whole, **that authority is not unbounded**. The State can only ensure that the **project** complies" with applicable limitations.) (emphasis added). While in this case Upstate Forever is "not ... at all asking for any kind of limitation on what's actually withdrawn[]" from the permitted replacement intake pipe, (R.p. 398), ALC Hrg. Transc. at 49:23-25; Upstate Forever has

¹⁴ Should the Court disagree with Greenville Water's arguments with respect to the preservation of Upstate Forever's arguments beyond the single issue presented to the ALC, Greenville Water submits that its positions on the merits, discussed herein, appropriately and successfully responds to Upstate Forever's remaining arguments.

a “problem” with the “way that the management of the [Reservoir] is being handled by [Greenville Water.]” (R.pp. 402-403), Hrg. Transc. at 53:21-54:3. In essence, Upstate Forever is not challenging the pipeline replacement project at all, but rather the almost 90 year-old creation and operation of the Reservoir.

Indeed, the appellants brief of Upstate Forever specifically discusses imposition of stream flows on the **dam**, and not the replacement intake pipe. App. Br. at 8, 20 (complaining of “the dam itself and [GW’s] operation and management of it” and arguing Regulation 61-68 applies because of that regulation’s application to dams). However, the scope of the Project in this case (i.e., the proposed activity being permitted and certified) is merely the replacement of the intake pipe, not the replacement of the dam. (R.pp. 416-418), DHEC Notice of Dep’t Decision (describing the project as the “[c]onstruction of approximately 7.8 miles of 42-inch diameter raw water transmission main”); (R.pp. 56-57), Corps Ltr. dated March 20, 2008 (showing the project as the replacement of the transmission main). As the DHEC Board concluded, “the scope of this project is the construction of a raw water transmission main for the transmission of raw water from the Table Rock Reservoir, and not the impounding of water to create the reservoir, which was dammed more than seventy (70) years ago.” (R.p. 14), DHEC Final Agency Decision at 2. Therefore, the water quality impacts analyzed and considered are those associated with the replacement of the intake pipe, which is the proposed activity. The operation of the Reservoir, which are attacked by Upstate Forever, are not the proposed activity requiring a federal license or permit. See 25A S.C. Code Ann. Regs. 61-101.F.1 (Certification regulation stating that DHEC “shall prepare a written assessment on each proposed activity requiring a federal license or permit...”). Thus, because the federal

license is the wetlands and water impacts for the replacement of the intake pipe, the scope of the 401 Certification analysis is similarly limited to the scope of the proposed activity (i.e., the intake pipe replacement).

V. THE CERTIFICATION IN THIS CASE RELATES ONLY TO AN INTAKE PIPE REPLACEMENT, AND IN THESE CIRCUMSTANCES NO MINIMUM FLOW RESTRICTIONS ARE PERMISSIBLE OR WARRANTED.

Upstate Forever misunderstands the federal Clean Water Act and its applicability, and specifically misapprehends the Section 401 Water Quality Certification program, process, and limitations. A Water Quality Certification assures that a project complies with Section 401 of the federal Clean Water Act, 33 U.S.C.A. § 1341. It is mandated for any project requiring a **federal** license or permit and which may result in any discharge into navigable waters, including, for example, the discharge of fill pursuant to a Section 404 wetlands "dredge and fill" permit issued by the Corps. 33 U.S.C.A. § 1344; 25A S.C. Code Ann. Regs. 61-101.A.2 ("Any applicant for a federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by federal law to first obtain a certification from the Department."). DHEC is the state agency responsible for conducting the analysis and issuing the Certification for any project requiring such a determination.¹⁵ See Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 123 n.1, 456 S.E.2d 397, 399 n.1 (1995). The

¹⁵ Upstate Forever states that DHEC is acting "with delegated federal authority" in administering the 401 Certification program. App. Br. at 13. This is mistaken. The federal Clean Water Act specifically and directly authorizes and requires states to issue such a certification. This is not an instance of "delegated" federal authority, such as is found in the administration of the discharge permitting program under Section 402 of the federal Clean Water Act, whereby the obligation is upon the federal government (i.e., the U.S. Environmental Protection Agency) and the authority to administer that program is delegated to a state pursuant to a written agreement (e.g., DHEC).

purpose of a Certification is for a state to “certify” that a **federally** authorized discharge will not violate applicable **state** water quality standards.

As Greenville Water and the ALC both acknowledged, DHEC has the authority to impose minimum instream flow conditions in a 401 Certification **under appropriate conditions and circumstances**. See, e.g., (R.p. 6), ALC Order at 6 (“Typically, DHEC would be within their authority to impose a minimum instream flow regime in the case of a 401 certification for the construction of a dam, which impoundment directly affects the amount of water in an otherwise free-flowing river.”). The difference in the positions of Upstate Forever and Greenville Water is that Upstate Forever believes that there “is no limitation on [DHEC’s] scope of review” and that DHEC has the authority not just to impose conditions on the project under review, **but on any other operations of the project applicant**. App. Br. at 9, 22. This position flies in the face of well-established administrative law principles, as administrative agencies such as DHEC possess only the authority conferred upon them by statute. Responsible Econ. Dev. v. S.C. Dep’t of Health & Env’tl. Control, 641 S.E.2d 425, 428 (2007) (“As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature.”).

Consequently, any action beyond that authority—such as the imposition of minimum instream flows without authority—is *ultra vires* and without effect.¹⁶ Here, DHEC has no authority to impose minimum instream flow conditions on an intake pipe when there is no continuing discharge to a water of the United States. **(R.p. 14)**, DHEC Final Agency Decision at 2 (“[C]onditioning the certification ... with a minimal flow

¹⁶ Alternatively, even if such authority existed, it is discretionary with DHEC, and Upstate Forever cannot force the agency to exercise its discretion as Upstate Forever may direct. See infra § III.

requirement from the dam would exceed [DHEC's] authority and would be arbitrary and capricious.”).

(A) Upstate Forever's reliance upon PUD No. 1 and its progeny is misplaced.

Upstate Forever relies exclusively on the United States Supreme Court's decision in PUD No. 1 and its progeny for its unbridled discretion theory. App. Br. at 14-16. However, PUD No. 1 has no applicability in this case because it addressed the situation in which the state affirmatively exercised its discretion to impose minimum streamflow conditions on continuing discharges to a water of the United States resulting from the actual activity or project under consideration. Even Upstate Forever has acknowledged the significant distinction between PUD No. 1 and the current case. As it stated to the ALC, PUD No. 1 “is different because it is for FERC re-licensing, ... that's the construction of a dam.” (R.p. 394), ALC Hrg. Transc. at 45:18-20. Indeed, PUD No. 1 addressed the situation where the project under review was the construction **and operation** of a dam for hydroelectric power generation—a far cry from the replacement of a 70-plus year-old water intake pipe.¹⁷

¹⁷ Moreover, the cases cited by Upstate Forever for the proposition that instream flow conditions can be imposed in a 401 Certification are cases involving projects that were directly discharging into a water of the United States. App. Br. at 25-31. These cases involve different factual situations and have no applicability to the case at bar.

For example, in Arnold Irrigation District v. Department of Environmental Quality (cited by Appellants as “In re Lava”), the question dealt with whether the state could impose land use restrictions on a FERC-licensed hydropower project that included continuing, on-going discharges into a navigable water. 717 P.2d 1274, 1278 (Or. Ct. App. 1986). The factual situation is markedly different than that presented in this case. Nonetheless, the Oregon Court of Appeals specifically held that Section 401 of the CWA “does not ... allow limitations which are not related to water quality.” Id. at 1279. Because the court could not determine whether the land use restrictions related to the water quality impacts of the project, the court remanded for further consideration.

Here, the only discharge associated with the Project—the fill associated with the actual construction of the replacement pipe—has already occurred. Going forward, the Project continues Greenville Water’s 80-plus year ability to withdraw water, but, unlike facts in the cases relied upon by Upstate Forever, the pipe replacement itself results in no ongoing discharge to a water of the United States. It is undisputed, as reflected in the ALC’s Order, that the instream flows for the South Saluda River will not be decreased as a result of the Project. (R.), ALC Order at 4. Because the Project has no impact on instream flow, no instream flow conditions can be imposed.

(B) Section 401 only applies to “discharges,” and there is no discharge from the Project on which to impose minimum flow conditions.

The sole discharge triggering the need for the Corps permit and DHEC Certification was the minor fill of wetlands and water impacts for the replacement of the intake pipe, which has already occurred, been mitigated, and completed. Having waived and abandoned any challenge to the permitted discharge, Upstate Forever instead challenges the operations of Greenville Water related to the Reservoir. However, applying the appropriate scope of review to the activity and Project at issue in this case (i.e., the intake pipe replacement), there is no discharge.¹⁸

“Discharge” is not defined in the state’s 401 Certification regulations. However, as the obligation for water quality certification arises under the federal Clean Water Act (CWA),¹⁹ it is instructive to look to how the term “discharge” is utilized in the

¹⁸ The imposition of a minimum instream flow condition is a restriction or requirement on future, on-going discharges.

¹⁹ “This regulation establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.” 25A S.C. Code Ann. Regs. 61-101.A.1.

definitional section of the CWA, 33 U.S.C.A. § 1362, and interpreted by the federal courts. “The term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 33 U.S.C.A. § 1362(16). The phrases “discharge of a pollutant” and “discharge of pollutants” mean “(A) any addition of any pollutant of navigable water from any point source, and (B) any addition of any pollutant to the waters to the contiguous zone ... from any point source other than a vessel or other floating craft.” 33 U.S.C.A. § 1362(12). As the D.C. Circuit found, “the nearest evidence [] of definitional intent by Congress reflects, as might be expected, that **the word ‘discharge’ contemplates the addition, not the withdrawal**, of a substance or substances.” North Carolina v. Federal Energy Regulatory Comm’n, 112 F.3d 1175 (D.C. Cir. 1997) (emphasis added); see Save Our Community v. U.S. Env’tl. Protection Agency, 971 F.2d 1155, 1165 (5th Cir. 1992) (holding that removal of water from wetlands is not a “discharge” for purposes of Section 404 of the CWA).

Indeed, the D.C. Circuit’s opinion in North Carolina v. Federal Energy Regulatory Commission is directly analogous to the case before the Court. 112 F.3d 1175 (D.C. Cir. 1997). In that case, North Carolina argued that a 401 Certification was required for a power company’s construction and operation of a water intake pipeline. There, as here, the pipeline project would “only withdraw water from and add nothing to” the relevant water body. Id. at 1187. The court “fail[ed] to see how operation of the Pipeline will ‘result in any discharge’ that would require a 401 certification.” Id. at 1187. As the court discussed, “the withdrawal of water ... will add nothing; nor will the withdrawal of water ... increase the volume of water flowing through the turbines of the Project dams....” Id. at 1188. The court then rejected the same argument advanced by

Upstate Forever—that the withdrawal of water could alter discharges and/or streamflow.

The court reasoned that the

existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is “altered.” Section 401(a)(1) certification rights vest only if an activity “may result in” a discharge. This distinction is of no small moment. The word “alter” means to change something from its previous state, Webster’s New Int’l Dictionary 63 (3rd ed. 1961) (“to cause to become different”), implying that the thing changed was already in existence. By contrast, the word “result” implies causation. *See id.* at 1937 (“arise as a consequence”). Obviously, a subsequent event cannot be the cause of something that is already in existence. Given the disparity between petitioners’ proposed test and the words of the Act, we elect to remain faithful to the language chosen by Congress and require that an activity “result in” a discharge in order to trigger the certification requirements of Section 401(a)(1).

Id. at 1188 (internal citation omitted). The court also distinguished the PUD No. 1 case as inapposite. *Id.* at 1188. (“[T]he [Supreme] Court never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of Section 401(a)(1). PUD No. 1 therefore is inapposite.”).

Similarly, in Colorado Wild, Inc. v. United States Forest Service, Colorado Wild challenged the Forest Service’s approval of a master development plan for a ski area which included an artificial snowmaking operation that diverted water from a tributary to the Snake River. 122 F.Supp.2d 1190 (D. Colo. 2000). There, as here, Colorado Wild alleged that the withdrawal of water would negatively impact Snake River’s water quality. The district court granted a motion to dismiss in favor of the defendants. In addressing the same issue raised by Upstate Forever in this case, the court concluded that the Clean Water Act “does not regulate water quality impacts arising from the diversion

of water.” Id. at 1193. Further, the court stated that the “withdrawal of water is not a discharge of pollution under the CWA.”²⁰ Id.

Additionally, in Idaho Conservation League v. Caswell, the Idaho Conservation League (ICL) challenged a decision by the National Forest Supervisor to allow a timber company to build two roads within the Clearwater National Forest in order to gain access to property owned by the timber company that it intended to log, alleging that the decision would cause discharges of sediment into a creek and exacerbate existing violations of water quality standards. No. CV-95-394-S-MHW, 1996 WL 938215 (Aug. 12, 1996). Specifically, the ICL challenged the decision as violating the anti-degradation policy, just as Upstate Forever challenges here. The court granted summary judgment to the defendants Forest Service and timber company, finding that a 401 certification was not required for the road construction. Further, the court distinguished PUD No. 1 and held that there was no discharge from a point source. Id. at *10.

The Greenville Water situation is analogous to these cases. The Project is the replacement of an aging water **intake** pipe and will not result in any on-going, future **discharges**. Per the common-sense and legal rationale of the D.C. Circuit and other courts, there is no “discharge” from the Project, and without an on-going discharge there is nothing upon which to impose minimum flow conditions. Thus, under these circumstances, DHEC cannot impose future flow condition discharge limitations in a 401 Certification.

²⁰ The court also analyzed the Supreme Court’s PUD No. 1 decision, and distinguished that case because, while PUD No. 1 “upholds a state’s right to impose minimum streamflow requirements, it does not contend that such requirements are mandated by the CWA itself.” Id.

- (C) The Water Quality Standards in Regulation 61-68 are not self-executing, but rather are implemented through a permitting or certification scheme.

Upstate Forever's argument regarding water quality standards (including the anti-degradation policy) under Regulation 61-68 is the proverbial red herring.²¹ 25A S.C. Code Ann. Regs. 61-68. Those water quality standards are promulgated by DHEC pursuant to Section 303 of the Clean Water Act. 33 U.S.C.A. § 1313. However, the standards are not self-executing, but instead are the substantive provisions that are incorporated into any applicable permits or certifications. For example, a 401 Certification must consider the Section 303 water quality standards, which in South Carolina is found in Regulation 61-68. 25A S.C. Code Ann. Regs. 61-101.A.4. Thus, the water quality standards are limited in application to the parameters of such permits or certifications, including the scope of the project or activity.

Here, "water quality effects of the project are adequately protected by the existing conditions of the certification and by the restrictions of GW['s] interbasin transfer registration and such minimum flow requirements are outside of the scope of the certification." (R.p. 7), ALC Order at 7. As a result, the anti-degradation provision relied upon by Upstate Forever is inapplicable to water withdrawals and therefore inapplicable to this Project. See Great Basin Mine Watch, 456 F.3d at 964 (water withdrawal project was not subject to anti-degradation regulation).

- (D) Section 401 applies to water quality, not water quantity.

Section 401 regulates water quality, while the regulation of water quantity is left to the states through other means.²² The CWA expressly reserves to the states the power

²¹ Similarly, the reference to the Water Classifications found in 25 S.C. Code Ann. Regs. 61-69 does nothing to support Upstate Forever's argument in this case and has no applicability or bearing on the legal analysis of the issues presented.

and authority to govern water withdrawals and water quantity issues. Specifically, Section 101(g) of the CWA states:

Authority of States over water

It is the policy of Congress that the **authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.** It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C.A. § 1251(g) (CWA Section 101(g)) (emphasis added). The Congressional legislative history of this 1977 amendment to the CWA reflects that “[t]his State’s jurisdiction amendment reaffirms that it is the policy of Congress that [the CWA] is to be used for water quality purposes only.” 123 Cong. Rec. S19677 (Dec. 15, 1977).

²² While DHEC is the “state” agency addressing water quality and water quantity, for purposes of analyzing the scope of Section 401, federal law is instructive as for purposes of water quality certifications DHEC is implementing the statutory scheme as set forth in Section 401 of the CWA. 25A S.C. Code Ann. Regs. 61-101.A.1 (“This regulation establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.”). While DHEC maintains the authority to be more stringent than federal law, and has done so in other regulatory areas, it has followed the parameters of federal law in implementing Section 401. As discussed *infra*, DHEC regulates water quantity through the Surface Water Withdrawal Act.

This separation of authority is inherently necessary with the differing state approaches to water rights. Some states—mostly in the West—adhere to a prior appropriation doctrine through which water use may be a property right. Other states—mostly in the East—adhere to a riparian doctrine through which water is subject to a “reasonable use” analysis. Still other states utilize a “regulated riparian” approach, subjecting the utilization of water to a governmental regulatory regime. Indeed, the 1977 amendment to the federal Clean Water Act adding Section 101(g) reiterating a state’s right to govern water quantity is referred to as the “Wallop Amendment” after Senator Malcolm Wallop from Wyoming.

South Carolina was generally considered a riparian state until January 1, 2011, when the effective date of the Surface Water Withdrawal Act moved the state to a “regulated riparian” system.

Notably, the Fourth Circuit “[thought] it significant that the only mention of responsibility for the quantities of water available to communities is contained in section 101(g)” of the Clean Water Act, and that based on that statutory language the regulatory agency’s “only function relating to the quantities of available water is limited to assuring purity in whatever quantities the state and local agencies provide.” James City County v. U.S. Env’tl. Protection Agency, 12 F.3d 1330, 1336 (4th Cir. 1993). Similarly, the D.C. Circuit held that Section 101(g) indicates “that Congress did not want to interfere any more than necessary with state water management” and “inten[ded] to minimize federal control over state decisions on water *quantity*.” Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 179 (D.C. Cir. 1982) (emphasis in original).

The United States Supreme Court PUD No. 1 opinion’s discussion that the distinction between water quality and water quantity is “artificial,” as the two are “closely related,” is consistent with these cases and the legislative history. PUD No. 1, 511 U.S. at 719. The regulatory agency in PUD No. 1 sought to impose minimum flow conditions because the project itself would have involved discharges that would have a direct and immediate impact on water quality. Thus, the regulation of water quantity (vis-à-vis flow conditions) is an “incidental effect” of the primary purpose of protecting water quality regarding the permitted activity. See 123 Cong. Rec. S19678 (Dec. 15, 1977) (it was not the purpose of Section 101(g) to “prohibit those incidental effects” on water usage from “legitimate water quality measures”); U.S. Env’tl. Protection Agency, Mem. Re: State Authority to Allocate Water Quantities – Section 101(g) of the Clean Water Act, dated Nov. 7, 1978 (“EPA should therefore impose requirements which affect water usage only where they are clearly necessary to meet the [CWA’s] requirements.”).

In this case, the regulated activity is the replacement of the intake pipe, which had temporary impacts on 0.332 acres of waters of the State and 0.2451 acres of waters of the United States. (R.pp. 13-14). Those impacts have occurred and been mitigated. There is no continuing and on-going discharge, and it is undisputed that “[i]nstream flows will not be decreased as a result of the Project.” (R.p. 4), ALC Order at 4. In other words, there is no connection to or even “incidental effect” on downstream water quality from the intake pipe replacement. Absent this relationship, there is no authority for DHEC to impose water usage or water quantity restrictions through a 401 Certification for this Project.

(1) *The Interbasin Transfer Act and Surface Water Withdrawal Act govern water quantity issues.*

In South Carolina, water quantity currently is regulated pursuant to the recently enacted South Carolina Surface Water Withdrawal, Permitting, Use, and Reporting Act, Act No. 247 of 201 (R. 300, S. 452), S.C. Code Ann. §§ 49-4-10 et seq. (Surface Water Withdrawal Act), effective January 1, 2011. Generally speaking, the Surface Water Withdrawal Act governs withdrawals of more than three million gallons per month from existing and new surface water withdrawers. See generally Robert W. Hayes, Jr. & Randolph R. Lowell, Protecting South Carolina Water: The Surface Water Withdrawal Act, South Carolina Lawyer (Jan. 2011). Prior to the Surface Water Withdrawal Act, only withdrawals from one water basin with discharges into another water basin—an “interbasin transfer”—was regulated requiring a permit or registration pursuant to the Interbasin Transfer Act, S.C. Code Ann. §§ 49-21-10 et seq. (repealed January 1, 2011); 27 S.C. Code Ann. Regs. 121-12 (repealed January 1, 2011).

Pursuant to former law, Greenville Water obtained a registration for an interbasin transfer of water (IBTR) with an interbasin transfer withdrawal limitation of 32 million gallons per day MGD from the Reservoir. While the Interbasin Transfer Act has been repealed, the withdrawal limitation in the registration remains effective until GW obtains a renewal permit under the Surface Water Withdrawal Act. S.C. Code Ann. § 49-4-70(C).

Thus, the State of South Carolina has made a conscious decision to regulate water quantity through a regulatory scheme independent of its water pollution control regulations under the federal Clean Water Act. In fact, minimum flows are a component of the regulatory scheme for new withdrawers and DHEC must consider the reasonableness of the minimum instream flows in its analysis of surface water withdrawal permits.²³ S.C. Code Ann. § 49-4-80(B).

Here again, Upstate Forever is not challenging the actual Project that was evaluated, permitted, and certified by DHEC, has been substantially completed, and for which all water quality impacts have already occurred. Instead, Upstate Forever seeks to use this proceeding as a vehicle to attach minimum flow conditions to other, unrelated Greenville Water operations in the future. This collateral attack assaults not just Greenville Water's provision of safe drinking water to the community, but also the integrity of the regulatory system as a whole.

²³ While Upstate Forever may complain that the minimum instream flow criteria is not applicable to **existing** surface water withdrawers, the point here is that the legislature has directed DHEC to regulate water quantity, which includes minimum flows per the statute, through the authority of the Surface Water Withdrawal Act. If Upstate Forever is unhappy with the breadth of application reflected in the statute, their remedy is with the General Assembly and not this Court.

- (2) *There is no preemption issue and the governing water quality and water quantity regulatory schemes are both separate and consistent.*

The ALC held that the Interbasin Transfer Act “expressly preempts the field regarding water flow” and that the “only aspect of the Greenville Water project with which the petitioners are concerned (increase physical capacity to withdraw water from TRR) is expressly preempted by the Interbasin Transfer Act and is thereby legally restricted from changing.” (R.p. 5), ALC Order at 5. In other words, the ALC recognized the general rule established by Congress in the CWA that water quantity regulation is left to the states and that South Carolina has other legal authority to address water quantity issues.

Specifically, in South Carolina the 401 Certification and other water quality permitting programs (such as the national pollutant discharge elimination system (NPDES) permitting program under CWA Section 402 and administered by DHEC) address water quality and the Surface Water Withdrawal Act (and previously the IBT laws) govern water quantity. Thus, there exists one regulatory scheme for water quality and a separate regulatory regime for water quantity. Appropriately, DHEC in this case is operating within the scope of its review for each program. See also Great Basin Mine Watch v. Hankins, 456 F.3d 955, 964 (9th Cir. 2006) (the withdrawal of water was regulated under a scheme other than water pollution control (*i.e.*, anti-degradation provisions), and thus the CWA anti-degradation provisions did not apply to water withdrawals).

For this Project, there is no discharge into a water of the United States due to the operation of the intake pipe. Moreover, the operation and utilization of the intake pipe is

subject to the regulation of the current IBTR and forthcoming surface water withdrawal permit, and thus is regulated, albeit under a separate regulatory program. What Upstate Forever seeks here is to obliterate the boundaries of each regulatory program and simply mix-and-match elements of different programs to meet their end goal, regardless of governing law. This, the Court should not allow. It is important to the regulator and the regulated to retain the integrity of the independent permitting and certification programs as delineated by law.

VI. SUMMARY JUDGMENT WAS PROPER IN THIS CASE.

- (A) This Court's review is limited to whether summary judgment in favor of Greenville Water was proper.

The parties submitted this action to the ALC on cross-motions for summary judgment. (R.pp. 145-268). All parties agreed that there were no triable issues of material fact with respect to the single legal issue before the Court, with which the ALC concurred, and all parties argued that they were entitled to judgment as a matter of law. (R.pp. 149-150, 186). Respondents' motion was granted, while Appellants' motion was denied.

A trial court may grant a motion for summary judgment when the pleadings and filings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), South Carolina Rules of Civil Procedure ("SCRCPP"); RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 195, 644 S.E.2d 730, 733 (2007); see also Rule 68, RPALC (providing that the Rules of Civil Procedure may be applied by the presiding ALJ). In determining whether any triable issues of fact exist, a trial court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.

RWE NUKEM Corp., 373 S.C. at 196, 644 S.E.2d at 733 (citing Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988)).

“In considering cross motions [for summary judgment], the court should draw all inferences against each movant in turn.” RWE NUKEM Corp., 373 S.C. at 196, 644 S.E.2d at 733 (quoting 73 Am.Jur.2d Summary Judgment § 43 (2001)). On appeal, “the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” Id. at 196-97, 644 S.E.2d at 733 (citing Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)).

Here, despite Upstate Forever’s attempt, as evidenced by its prayer for relief, to convince the Court that summary judgment would have been properly granted in its favor, that issue is not and cannot be before the Court. The refusal to grant summary judgment is not appealable. Olson v. Faculty House of Carolina, 354 S.C. 161, 580 S.E.2d 440 (2003); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994); see also Fuller v. Blanchard, 358 S.C. 536, 547, 595 S.E.2d 831, 837 (Ct. App. 2004) (Kittredge, J., concurring) (wherein then-Judge Kittredge expressed concern about the jurisdiction of the Court of Appeals to hear the appeal due to the appellant’s arguments centering around the reasons the lower court erred in failing to grant **him** summary judgment). In Fuller, the appellant made no claim that there existed a genuine issue of material fact that warranted this Court’s reversal of the grant of summary judgment in his opponent’s favor. Fuller, 358 S.C. at 547-48, 595 S.E.2d at 837. Here, the only issue properly in front of this Court on appeal is whether the ALC erred in concluding, as a matter of law,

that summary judgment in favor of Respondents, on the single legal issue of DHEC's authority, was proper.

Similar to Fuller, Upstate Forever does not contend that issues of material fact exist to survive summary judgment. Instead, Upstate Forever contends that the ALC disregarded the "undisputed facts" it presented to the court in the form of purported expert and fact witness testimony, which served the purpose of establishing "whether minimum releases were needed to protect and maintain designated uses and water quality." App. Br. at 32. However, the facts argued by Upstate Forever were only germane to the issues underlying the merits of Upstate Forever's original request for a contested case, which it voluntarily dismissed. These "undisputed facts" were in no way relevant to the single legal issue before the ALC of whether DHEC has the **authority** to impose minimum instream flows in the 401 Certification for the Project. Moreover, contrary to Upstate Forever's assertion that the ALC ignored the evidence presented by its witnesses, the ALC expressly found the testimony of Upstate Forever's witnesses extraneous to the legal issue before it.²⁴ (R.p. 4), ALC Order at 4. This finding is proper and unchallenged by Appellants. In sum, the only material facts which could arguably be attributed to Upstate Forever as meeting its burden in appealing from an adverse grant of summary judgment, were found to be irrelevant by the ALC below, a finding which was not appealed by Upstate Forever. Consequently, this Court would be justified in dismissing the non-conforming portions of Upstate Forever's appeal.

²⁴ Upstate Forever neither filed a motion for reconsideration with respect to the finding nor appealed it to this Court, rendering any argument to the contrary unpreserved for appellate review.

(B) Summary judgment was properly granted to Greenville Water.

The evidence in the record fully supports the ALC's grant of summary judgment in favor of Greenville Water. DHEC and the ALC appropriately limited their analysis to the scope of the Certification for the Project, which is merely the replacement of an existing water intake pipe. Upstate Forever does not argue or contend that the Project scope is larger than what was presented by Greenville Water. Instead, Upstate Forever maintains that the statutes and regulations governing the Certification open the door to allow impossible conditions on other operations that have no relationship to the Project. See, e.g., App. Br. at 15-17. Simply put, the statutes and regulations governing this process, as discussed above, do not support or lend credence to Upstate Forever's theory of unbridled agency authority in a 401 Certification. Correspondingly, there is no evidence in the record to support Upstate Forever's arguments in that regard; therefore, summary judgment in favor of Respondents was correct as a matter of law.

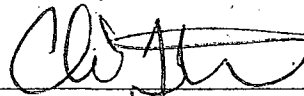
Similarly, summary judgment in Greenville Water's favor was appropriate as a matter of law because Upstate Forever has misapprehended the certification process as it relates to the Project. Because the Certification is authorized only for discharges into navigable waters, and the only discharge occurring in the Project occurred in the temporary construction of the intake pipe, DHEC could not, as a matter of law, have the authority to issue a continuing condition on the Project because there is no continuing discharge. Moreover, because the authority sought by Upstate Forever is discretionary, and Upstate Forever cannot force an agency to exercise its discretion in a manner with which it agrees, then, even viewing the evidence and inferences in the light most favorable to Appellants, Respondents still are entitled to judgment as a matter of law.

Consequently, the ALC properly concluded that summary judgment in favor of Greenville Water was appropriate and this Court should affirm that decision.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal as moot or as purely advisory. In the alternative, the Court should affirm the ALC's determination that under these undisputed facts and circumstances, DHEC has no authority to impose minimum flow conditions on the Project in a 401 Certification.

Respectfully submitted,



Randolph R. Lowell
Chad N. Johnston
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Eugene C. McCall, Jr.
Ryan W. Trail
McCall Environmental, P.A.
Post Office Box 3027
Greenville, SC 29602-3027
gene@mccallenv.com
ryan@mccallenv.com

Attorneys for Respondent
Greenville Water

December 19, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0226-CC

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.

FINAL REPLY BRIEF OF APPELLANTS

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL
LAW PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC
29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

December 5, 2011

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	ii
ARGUMENT	1
I. THE PLAIN LANGUAGE OF THE REGULATIONS MANDATES FLOW CONDITIONS AND THERE IS NO LEGAL OR FACTUAL BASIS FOR LIMITING DHEC'S AUTHORITY TO IMPOSE SUCH CONDITIONS	2
A. The Plain Language of the 401 Regulations Requires DHEC to Impose Flow Conditions When Necessary to Protect Water Quality	2
B. Water Quality and Water Quantity Are Inextricably Linked, Both Relate to Pollution, and Can Be Regulated Under the 401 Program	3
C. The Project is Directly Related to the Dam	4
D. DHEC's Authority to Protect Water Quality Under the 401 Program Is Broad and Is Not Limited by the Federal Clean Water Act	5
II. THIS CASE IS NOT MOOT BECAUSE CONCRETE, EFFECTUAL RELIEF CAN BE OBTAINED	7
III. APPELLANT HAS NOT ABANDONED ANY FACTUAL ASSERTIONS UNDER THE SUMMARY JUDGMENT STANDARD	11
IV. THE ISSUE ON APPEAL IS WHETHER THE DHEC DECISION WAS IN ERROR AND IT IS PROPERLY PRESERVED FOR REVIEW	14
V. THE OPINION SOUGHT WOULD NOT BE ADVISORY BECAUSE DHEC'S DUTY IS NOT DISCRETIONARY	17
CONCLUSION	20

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

	<u>Page(s)</u>
 CASES	
<i>Adamson v. Richland County Sch. Dist. One</i> , 332 S.C. 121, 503 S.E.2d 752 (Ct. App. 1998)	17
<i>Airport Neighbors Alliance, Inc. v. U.S.</i> , 90 F.3d 426 (10th Cir. 1996)	8
<i>Bowen v. Lee Process Sys. Co.</i> , 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000)	14
<i>City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency</i> , 435 F.3d 632 (6th Cir. 2006)	7, 8
<i>Cowburn v. Leventis</i> , 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)	12
<i>Curtis v. State</i> , 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)	10
<i>Evans v. Stephens</i> , 407 F.3d 1272, 1278 (11th Cir. 2005)	11
<i>Georgetown League of Women Voters v. Smith Land Co.</i> , 393 S.C. 350, 713 S.E.2d 287 (2011)	5
<i>Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.</i> , 349 S.C. 356, 563 S.E.2d 331 (2002)	11
<i>Mapleturn Utils. v. Foxcliff South Assocs.</i> , 673 N.E.2d 5, 10 (Ind. Ct. App. 1996)	14
<i>Mathis v. S.C. State Highway Dep't</i> , 260 S.C. 344, 195 S.E.2d 713 (1973)	7, 10
<i>McNeely v. S.C. Farm Bureau Mut. Ins. Co.</i> , 259 S.C. 39, 190 S.E.2d 499 (1972)	15
<i>PUD No. 1 v. Jefferson County</i> , 114 S.Ct. 1900, 511 U.S. 152 (1994)	3
<i>RIM Associates v. Blackwell</i> , 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004)	15
<i>Schmidt v. Courtney</i> , 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)	11
<i>Seabrook v. Knox</i> , 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006)	7, 10
<i>Sloan v. Friends of Hunley, Inc.</i> , 369 S.C. 20, 630 S.E.2d 474 (2006)	11

<i>Sloan v. Greenville County</i> , 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009), reh'g denied (Jan. 7, 2009)	10
<i>Smith v. Plati</i> , 258 F.3d 1167, 1179 (10th Cir. 2001)	7
<i>Spectre v. DHEC</i> , 386 S.C. 357688 S.E.2d 844 (2010)	5
<i>Trousdell v. Cannon</i> , 351 S.C. 636, 572 S.E.2d 264 (2002)	12
<i>United States v. Hahn</i> , 359 F.3d 1315, 1337 (10th Cir. 2004)	7
<i>WDW Properties v. City of Sumter</i> , 342 S.C. 6, 535 S.E.2d 631 (2000)	12
<i>Williams v. Chesterfield Lumber Co.</i> , 267 S.C. 607, 230 S.E.2d 447 (1976)	11

STATUTES

S.C. Code Ann. § 48-1-10(7)(2)	6
33 U.S.C. § 1341	2
Rule 52(a), SCRCP	14

REGULATIONS

S.C. Code Ann. Regs. 61-62.B.2	18
S.C. Code Ann. Regs. 61-68	2, 15
S.C. Code Ann. Regs. 61-68.C.4.a.(2)	6, 18, 19
S.C. Code Ann. Regs. 61-68.D.1.b.	3, 4, 6, 18
S.C. Code Ann. Regs. 61-68.E.2(b)	18
S.C. Code Ann. Regs. 61-69	2
S.C. Code Ann. Reg. 61-101.A.(5)	2
S.C. Code Ann. Regs. 61-101.F.3.	2, 5, 7

OTHER AUTHORITIES

Reed D. Benson, <i>Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303</i> , 24 Stan. Env'tl. L.J. 199, 201 (2005)	13
---	----

ARGUMENT

The issue in this appeal is whether DHEC erred in failing to impose minimum flows as a condition of the 401 certification of the GWS project, despite the clear mandate that it must do so when necessary to protect existing uses and the water quality needed to protect those uses. The plain language of the 401 Water Quality Certification Regulations and the Water Classification and Standards Regulations and the anti-degradation policy found therein give ample legal basis for, and indeed a mandate for, DHEC to impose minimum flows necessary to protect water quality. Respondent utterly fails to refute the plain language of the regulations discussed at length in Appellants' brief, which provide a solid legal basis for reversing the Administrative Law Court's ("ALC") conclusion that DHEC does not have authority to require minimum flows as a condition of the GWS 401 water quality certification.

Respondents also fail to point to any fact or opinion presented by the Appellants that they have disputed. Indeed all parties agreed at the summary judgment stage that there were no facts in dispute; thus none of the facts presented by the Appellants are disputed by the Respondents. One of those undisputed facts is that a minimum flow release is necessary to protect the South Saluda's use as a trout fishery and for recreation.

Instead of addressing the scope of DHEC's authority, the Respondents attempt to distract the Court by claiming that the issue is moot and not justiciable; incorrectly before the Administrative Law Court; and similar to a handful of federal cases where no 401 certification was required. Respondents ask this Court to put blinders on to the purpose and intent of the GWS project authorized by DHEC and to severely restrict this State's ability to protect water quality, invaluable trout habitat and important recreational uses.

I. THE PLAIN LANGUAGE OF THE REGULATIONS MANDATES FLOW CONDITIONS AND THERE IS NO LEGAL OR FACTUAL BASIS FOR LIMITING DHEC'S AUTHORITY TO IMPOSE SUCH CONDITIONS

A. The Plain Language of the 401 Regulations Requires DHEC to Impose Flow Conditions When Necessary to Protect Water Quality

DHEC “must certify that any activity which may result in a discharge into navigable waters will comply with the provisions of sections 1311, 1312, 1313, 1316, and 1317 of the Clean Water Act.” 33 U.S.C. § 1341(a). Through this certification process DHEC is authorized to impose “**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.” S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added); *see also* 33 U.S.C. § 1341(d). The appropriate requirements of state law include measures to protect the State’s designated and existing uses; to meet water quality standards; and to comply with the antidegradation policy. S.C. Code Ann. Regs. 61-68, *et seq.* & 61-69.E.

The 401 certification regulations require DHEC to look not only at the activity triggering the 401 certification, but also “**all potential water quality impacts of the project, both direct and indirect, . . . including cumulative impacts.**” S.C. Code Ann. Regs. 61-101.F.3. (emphasis added).

Designated and existing uses are found in the water classification regulations at S.C. Code Ann. Regs. 61-69.E. Specific to this project, the water classification of the South Saluda River is “Trout– Put, Grow, Take.” *Id.* The anti-degradation policy, which is applicable to DHEC’s 401 certification of the GWS project, requires that these

“[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 and 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, [therefore] [t]he 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. (emphasis added).

This language clearly authorizes DHEC to impose conditions on 401 certifications, and mandates those conditions when necessary to protect classified and existing uses. Respondents make no attempt to refute this plain and clear language.

B. Water Quality and Water Quantity Are Inextricably Linked, Both Relate to Pollution and Can Be Regulated Under the 401 Program

Respondents in one breath acknowledge the *PUD No. 1 v. Jefferson County*, 114 S.Ct. 1900, 511 U.S. 152 (1994), holding that water quality and quantity are so closely related that any distinction between the two is “artificial” (Resp. Brief p. 29), but then try to make a significant distinction in the regulatory processes affecting water quality and quantity so as to limit DHEC’s authority (Resp. Brief p. 32). Those processes are the 401 water quality certification program and the Interbasin Transfer Act (and the recently enacted Surface Water Withdrawal Act).

A reading of the DHEC regulations discussed above and in Section I.B. of Appellant’s Brief, however, makes it abundantly clear that the legislature recognized that water quality and quantity are inextricably linked and that water quantity can have a

significant influence on water quality. The legislature, therefore, authorized DHEC to place conditions on permits and certifications that will protect water quality vis-a-vis requirements related to water quantity through the water quality program. The antidegradation policy explicitly recognizes that water quality can be affected by water quantity, particularly when the quantity of water is affected by water withdrawals: "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.

Even though there is a separate program relating to water withdrawals, when water quantity is having an adverse impact on water quality, DHEC is clearly authorized to take measures to ensure quantity sufficient to protect quality.

C. The Project Is Directly Related to the Dam

Respondents mischaracterize the project as "just a pipeline." While the activity triggering 401 certification review was the pipeline construction, the Respondents and the ALC ignored the basic purpose and intent of the project. The DHEC certification covers 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 of the system – the dam, the reservoir and the water line – are inextricably linked. The only reason the dam exists is to provide a source of water for the pipeline. The dam is what prevents free flow of

water into the South Saluda. Neither the dam nor the pipeline exists in isolation of each other.

The Respondents' theory that the pipeline has no relationship to the dam is nonsensical because without the dam, and GWS's control of the water behind the dam, there would be no need for the pipeline project. Further, DHEC is required to conduct a broad review of all water quality impacts, including cumulative impacts and direct and indirect impacts, in its 401 certification review. S.C. Code Ann. Reg. 61-101.F.3. The 401 regulations themselves require that broad review, which is in no way limited to just the activity – it applies to all cumulative, direct and indirect impacts over the life of the project. S.C. Code Ann. 61-101.F.3. This provision gives DHEC the ability and authority to review all impacts associated with the project and to require conditions when necessary to protect water quality and existing uses.

**D. DHEC's Authority to Protect Water Quality Under the 401 Program
Is Broad and Is Not Limited by the Federal Clean Water Act**

Respondents attempt to limit South Carolina's ability to protect State waters by citing the Clean Water Act and federal cases interpreting the Clean Water Act. The South Carolina Supreme Court has consistently ruled that federal Clean Water Act requirements do not act as a bar or limitation on this State's authority to protect its wetlands, waters and water quality. *See, e.g., Spectre v. DHEC*, 386 S.C. 357688 S.E.2d 844 (2010); *Georgetown League of Women Voters v. Smith Land Co.*, 393 S.C. 350713 S.E.2d 287 (2011). South Carolina has adopted the S.C. Pollution Control Act, the 401 Water Quality Certification Regulations and the Water Quality Classification and Standards

Regulations. It is those laws that provide DHEC with an independent basis, indeed a mandate, to protect water quality of State waters in cases like this.

The Clean Water Act cases interpreting “discharges” cited by Respondents are irrelevant to the issue in this appeal.¹ (Respondent’s Brief, pp. 24-26). Those cases all relate to challenges to the failure to require a State 401 water quality certification. In each of the cases, there was no “discharge” into waters of the U.S. and thus the courts found that no 401 water quality certification was required from the state. However, in the instant case, there is no dispute that a 401 certification was required for this project because GWS sought approval for the discharge of pollutants into wetlands and waters of the United States. It is that discharge which triggered the requirements for a 401 certification. The inquiry is whether the DHEC 401 regulation requires consideration of cumulative, direct and indirect impacts flowing from the project itself, and DHEC’s scope of review of the project in light of the applicable state regulations.

Respondents simply gloss over the very plain language of the 401 water quality certification regulations, which clearly require DHEC 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;

¹ The South Carolina Pollution Control Act recognizes that withholding water has the same effect as adding pollutants or discharging pollutants, as evidenced by the references to stream flows in connection with water quality protection throughout the regulations. *See, e.g.*, S.C. Code Ann. § 48-1-10(7)(2) (defining “pollution” as “the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water”); S.C. Code Ann. Regs. 61-68.D.1.b. (“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.C.4.a.(2) (gives DHEC express authority to impose conditions to “protect classified and existing uses, such as below dams and in tidal situations”).

- (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.

These regulatory criteria provide DHEC with ample authority to consider the severe and devastating impacts that the Table Rock Dam and GWS’ operation of that dam have had on the South Saluda. And they require DHEC to place conditions on its certification decisions when necessary to protect water quality and existing uses.

II. THIS CASE IS NOT MOOT BECAUSE CONCRETE, EFFECTUAL RELIEF CAN BE OBTAINED

A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (citing *Mathis v. S.C. 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.” (emphasis added)).

In *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency* 435 F.3d 632, 636 (6th Cir. 2006), the Plaintiffs challenged a 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.

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996), was a National Environmental Policy Act ("NEPA") case in which the plaintiffs 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 pipeline, but to minimum stream flows released from the reservoir dam connected to that pipeline. The court's holding rested on the fact that it could still award relief, even though construction was complete. The same is true in this case.

This case does not meet the test for mootness because it is possible for the reviewing court to grant effectual relief and provide a cognizable remedy. The issue is whether DHEC is required by law to place conditions on GWS' permit and certification

requiring minimum flow releases in order to protect water quality. Should this Court rule that DHEC does have the authority and erred by failing to include minimum flow conditions in its certification, then the Court could remand the decision back to DHEC with instructions to place flows conditions necessary to protect water quality.

Only by ignoring the purpose and nature of the GWS project can one argue that this certification decision is moot. 401 Certifications typically impose conditions on projects, and DHEC, in fact, imposed conditions on the 401 certification in this case. As Respondents admit, flow conditions can be imposed on 401 certifications of dam relicensing projects. (R. pp. 416-418) When those flow conditions are placed on such dam projects, they do not vanish the instant the dam is built or the activity causing relicensing has been completed. Rather, those flow conditions attach to the certification for the life of the project (or at least until a new 401 certification is issued).

Likewise, in this case DHEC has imposed certification conditions applicable beyond the construction completion date. For instance, the very first condition imposed in DHEC's 401 certification of the GWS project provides that GWS must follow best management practices "on and off the project site DURING AND AFTER CONSTRUCTION." (R. pp.416-418). 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, DHEC's certification condition 16 addresses how wetlands impacted by GWS's construction must be maintained in the future. GWS must maintain the vegetation in such wetlands in an "uncleared or uncut state." (R.pp.416-418). Clearly such

condition imposes obligations on GWS beyond the period of construction. Respondent's brief focuses on the fact that the pipe has already been constructed – an activity that Appellants consented to – and which was never in dispute, rather than the relief which is sought by the Appellants.

The controversy in this case can still (and easily) be remedied by the imposition of a minimum flow condition. The fact that effective relief can be granted conclusively shows that the case is not moot. *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006); *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).²

2

There are three exceptions to the mootness doctrine. *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009), reh'g denied (Jan. 7, 2009). First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *Id.* "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Id.* at 535 (citing *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). Application of the public interest exception requires the question at issue to be (1) of "public importance," and (2) of "imperative and manifest urgency." See *Sloan v. Greenville County*, 361 S.C. 568, 570–71, 606 S.E.2d 464, 465–66 (2004). Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596; accord *Sloan*, 365 S.C. at 303, 618 S.E.2d at 878.

Appellants have shown that this case is not moot, but assuming *arguendo* that it is, the public interest exception certainly applies. The South Saluda River and its tributaries are used for fishing (including trout), swimming, boating, and other public recreation activities and as a source of irrigation for production of food crops. The South Saluda River, one of South Carolina's very few trout waters, is considered a jewel of the Blue Ridge Escarpment, an area that has been recognized as an ecosystem of global significance.

As a result of GWS' operation, the flow in the South Saluda is so low that it is a fraction of the historic flow and at a fraction of the potential flow. (R.pp. 218-220, DNR Report). The hatchery-supported (surrogate) trout fishery is taxed. *Id.* With the continued low flow conditions that exist in the South Saluda River, DNR may not be able to manage the surrogate trout fishery over the long term. *Id.* With lack of adequate flows DNR believes it is possible to have a total loss of the natural, remnant trout population which hold over and remain in the stream. *Id.* If the flow is any lower that it is now, there could be serious adverse impacts to the trout populations. *Id.* The report of DNR clearly demonstrates the significant public resource that is at stake in this case. Moreover, there is a substantial public interest in resolving the issue of DHEC's authority

III. THERE ARE NO MATERIAL FACTS IN DISPUTE AND APPELLANT HAS NOT ABANDONED ANY FACTUAL ASSERTIONS

A court may not decline to accept the nonmoving party's version of events at summary judgment. *See Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005). The Respondents and Appellants filed cross motions for summary judgment, both asserting that no material facts were in dispute. At no time did GWS or DHEC ever assert that they disagreed with any of the facts presented by Appellant. GWS and DHEC never objected to the admissibility or relevance of Appellants' expert opinions and recommendations. GWS and DHEC never disputed any of the opinions or recommendations of the S.C. Department of Natural Resources ("DNR"), the U.S. Fish and Wildlife Service ("FWS") or Dr. Dave Hargett related to the necessity of flow limits to protect water quality and trout habitat in the South Saluda. In this Court's review of the ALC's Order granting summary judgment in favor of the Respondents, the "appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002) (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); *see also Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. pp.2003) (all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

When reviewing a lower court's order on summary judgment, the appellate court

on flow releases from thousands of dams throughout South Carolina.

applies the same standard of review as the trial court under Rule 56(c), SCRPC. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005) (citing *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). “When an appeal involves stipulated or **undisputed facts**, an appellate court is free to review whether the trial court properly applied the law to those facts.” *WDW Properties v. City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000) (emphasis added). Thus this Court is free to apply the law to those “undisputed facts” – those facts that were not disputed by GWS or DHEC at any stage.

Revealingly, the Respondents do not point to any single fact presented by the Appellants that is contrary to those in the ALC’s Order, nor to any place where the Respondents disagreed with those facts presented by Appellants. Respondents make sweeping statements about so-called “unsubstantiated facts” (Brief p. 13-15), yet not one fact that GWS claims is “unsubstantiated” is referenced. Indeed, the Appellants do not make any factual statements that are inconsistent with the ALC’s findings of fact, nor with GWS’ recitation of the facts presented in its motion for summary judgment or initial brief.

The Appellants submitted facts and expert opinions that dewatering one of the state’s most important freshwater rivers has and will continue to result in severe impacts to the trout fishery, aquatic organisms and the entire riverine systems for many miles. (R. pp.203-205). Those facts and opinions are consistent with the views of the scientific community: “Many rivers and streams have been dramatically altered by water management activities, such as dam operations, diversions of water for offstream uses, or other water withdrawals. The Environmental Protection Agency (EPA) considers such

water management activities, along with other actions such as dredging and dam construction, to be 'hydrologic modifications' that may have adverse effects on aquatic environments. According to a recent EPA report, 'hydrologic modification' is the second-leading source of water quality impairment for U.S. rivers, streams, and lakes." Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 Stan. Env'tl. L.J. 199, 201 (2005). "When water is stored in dams, diverted into canals, or withdrawn by pumps, the natural flow patterns of streams or levels of lakes may be altered dramatically." *Id.* 202.

The facts as presented by Appellants are critical for two reasons. First, they demonstrate the severe environmental degradation that has occurred and is occurring to the South Saluda River as a result of lack of adequate flows, and explains that such degradation can be remedied by imposition of flow conditions.

Second, the facts presented demonstrate that should this Court rule that DHEC has the authority to require flows as a condition of this 401 certification, then DHEC must require flow conditions because of the undisputed evidence that such flow requirements are necessary to protect water quality and existing uses. In other words, it is not discretionary for DHEC to put in place measures to protect water quality, and it must do so where, as here, the undisputed evidence is that minimum flow requirements are necessary to protect the existing uses (trout habitat, fishing, recreation).

IV. ISSUE ON APPEAL IS WHETHER DHEC DECISION WAS IN ERROR AND IT IS PROPERLY PRESERVED FOR REVIEW

The Respondents argue that because the ALC did not make specific findings relating to all of the evidence presented by the Appellants, those issues are not preserved.

Despite the fact that Respondents never disputed – and still do not dispute – any factual assertions, preservation of factual issues on summary judgment is of little import. The judicial function relative to fact-analysis on a motion for summary judgment is “limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue. A ‘finding of fact’ by the district court in a summary judgment proceeding thus constitutes only a finding that no genuine, material issue exists as to that fact; by the nature of summary judgment, it cannot be an indication that the trial court has weighed the evidence and found a fact in the traditional sense.” *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 240, 536 S.E.2d 86, 90 (Ct. App. 2000). See Rule 52(a), SCRCP (“Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion....”); *Mapleturn Utils. v. Foxcliff South Assocs.*, 673 N.E.2d 5, 10 (Ind. Ct. App. 1996) (explaining that “[w]here the trial court enters findings of fact and conclusions of law when ruling upon a motion for summary judgment, such findings and conclusions illuminate the court's rationale; however, they have no other purpose”) (cited in *Bowen*).

The ultimate issue in this case is whether DHEC erred in failing to include a condition on instream flow that would protect existing uses and water quality in the South Saluda River. The DHEC Board ruled that the agency does not have authority to impose flow requirements; thus, that authority became the central issue in the appeal to the ALC.

Respondents cite to a letter from counsel for Appellants in stating that the Appellants seek a declaratory ruling from the ALC and/or limited their ability to present

the facts relevant to this appeal. (Resp. Brief p. 419). Respondents are in error on both points. First, the proper place for a reviewing court to investigate and determine the proper issues on appeal is the pleadings. *McNeely v. S.C. Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972) (Generally, claims or defenses not presented *in the pleadings* will not be considered on appeal); *RIM Associates v. Blackwell*, 359 S.C. 170, 182-83, 597 S.E.2d 152, 159 (Ct. App. 2004). In their pleadings, Appellants specifically challenged the DHEC decision, asserting errors with the failure to require a minimum flow release. The Appellants framed the issue as whether “DHEC erred in not requiring a minimum flow release from the Table Rock Dam and Reservoir into the South Saluda River, as recommended by the South Carolina Department of Natural Resources” (Request for Contested Case Hearing, hereinafter “RCCH,” p. 5, ¶ H.); whether “DHEC erred in not applying and enforcing the antidegradation and upgrading policies set forth in Regulation 61-68” (RCCH, p. 6, ¶ K); whether “DHEC erred in not exercising its authority over the operation and management of the Table Rock Dam and Reservoir,” (RCCH p. 6, ¶ L.); and whether the “DHEC Board erred in concluding that it lacks authority to impose a minimum flow release to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 certification and construction in navigable waters permit, because under the [existing laws], DHEC has such authority” (RCCH, p. 7, ¶ N.).

In their Prehearing Statement, Appellants reiterated these same issues. (R. pp. 136-144).

In their Motion for Summary Judgment before the ALC, Appellants again argued

that minimum flows must be applied to this project to protect existing uses and water quality as part of the 401 water quality certification. (MSJ, R. p. 186-235).

It is clear from a review of the pleadings and other formal documents before the ALC, that the Appellants were not seeking a declaratory ruling, and did not abandon any factual claims related to the questions presented in the summary judgment motion.³ Those issues necessarily encompass DNR's opinions and recommendations, whether the anti-degradation policies were enforced and whether the DHEC decision was in error for failing to take measures to protect water quality.

While the Respondents attempt to argue that this is a declaratory judgement action, it is clear that the **issue within the context of this particular project is whether the DHEC decision is in violation of the water quality certification and water quality standards regulations and the anti-degradation policy by failing to include a condition that would protect water quality.**

Finally, the nature of this contested case appeal of a DHEC permitting decision necessarily places this issue under the Administrative Procedures Act ("APA"), not the Declaratory Judgement Act. Indeed, the APA and the general Declaratory Judgment Act ("DJA") serve different purposes. The DJA

expressly states that the Declaratory Judgment Act is "remedial." Its purpose is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." The APA is procedural in that it sets forth a uniform method by which parties may participate in administrative proceedings and seek review of an agency's action.

3

Even the single letter relied on by the Respondent states that the issue is whether "DHEC has the authority to impose a minimum flow release to the South Saluda River from the Table Rock Dam and Reservoir **as a condition of its 401 certification** . . ." (R.p. 416-418).

Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 126, 503 S.E.2d 752, 754 (Ct. App. 1998) (internal citations omitted). This case relates specifically to the agency's action – the 401 certification that is the subject of this appeal – and its failure to ensure protection of water quality as the result of that action. The issue in this case is preserved and properly before this Court.

V. THE OPINION SOUGHT WOULD NOT BE ADVISORY BECAUSE DHEC'S DUTY IS NOT DISCRETIONARY

The opinion sought by the Appellants is that DHEC does have authority to impose minimum flows as a condition of its 401 water quality certification of GWS' permit, and that this certification was issued in error by failing to include a minimum flow necessary. As indicated by the reports of DNR and Dave Hargett and the letter from FWS, minimum flows are *absolutely essential* to protecting water quality, trout habitat and other uses in the South Saluda River and DHEC therefore has no discretion in deciding whether to include such conditions. DHEC is **required** to protect water quality and existing uses to **ensure** that water quality will not be degraded.

Where it is established, and undisputed by Respondents, that minimum flows are essential to protect water quality in the South Saluda, DHEC has *no discretion* in deciding whether or not to impose flows – it is required to do so. Again, nowhere do Respondents disagree with or challenge any of the factual evidence presented by Appellants as it relates to water quality and the necessity of flows to protect it. Thus the facts are as presented by Appellants – water quality is impaired by inadequate flows, which would be remedied by a minimum flow requirement.

There are no South Carolina decisions interpreting whether DHEC has the

discretion to impose minimum flows when it is clearly established and undisputed that such flows are necessary to protect water quality and existing uses.⁴ Thus this Court must look to the plain language of the statute and regulations to make that determination.

DHEC's duty to protect existing water uses and the water quality necessary to protect those uses is not discretionary. "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 stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained . . .**" S.C. Code Ann. Regs. 61-68.D.1.b.

The existing uses of the South Saluda River downstream of the Table Rock Reservoir is "Trout-Put, Grow and Take," which means that the waters are suitable for supporting growth of stocked trout population and a balanced indigenous aquatic community of flora and fauna. S.C. Code Ann. Regs. 61-68.E.2(b). Numeric criteria for flow requirements are established and require DHEC to "consider conditions that are comparable to or more stringent than 7Q10⁵ where appropriate to protect classified and existing uses, such as **below dams** and in tidal situations." S.C. Code Ann. Regs. 61-

4

The Respondents' reliance on federal cases interpreting Section 401 of the Clean Water Act is misplaced. This Court must look to state statute and regulations to determine whether DHEC has authority to require minimum flows. If the Court rules that DHEC does have such authority, then flows are not discretionary if necessary to protect water quality under South Carolina law. And there is no dispute that flows conditions would do just that.

5

7Q10 "means that annual minimum seven day average flow rate that occurs with an average frequency 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. 61-62.B.2. In essence, it represents very low flow conditions.

68.C.4.a.(2) (emphasis added). This clear directive requires minimum flow conditions on the 401 certification based on the undisputed evidence that classified and existing uses in the South Saluda River are not being protected. The only discretion DHEC has is in determining exactly what those flow requirements should be. The relief sought, minimum flow requirements, can easily be incorporated into DHEC's certification of this project.

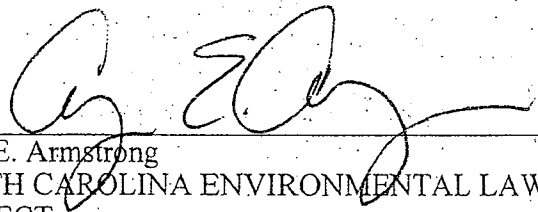
Appellants argued in their motion for summary judgment that flow requirements are mandatory when those requirements are necessary to protect water quality and existing uses. (R. pp. 186-235). The ALC first addressed only the threshold question of whether DHEC has the authority to impose such flow conditions. Finding and concluding, erroneously, that DHEC lacked that authority, there was no need for a ruling specifically on whether flows are mandatory.

If this Court rules that DHEC has the authority to impose minimum flows, then the only question remaining is what those flows would be because the undisputed evidence is that flows are necessary to protect water quality and the existing trout fishery and other uses.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Court reverse the Administrative Law Court's ruling that DHEC lacks authority to include a minimum flow release as a condition of the certification and permit, and remand the case to DHEC with instructions to include such a condition.

Respectfully submitted,



Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

December 5, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 09-ALJ-07-0226-CC

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

v.

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

MOTION TO DISMISS CASE AS MOOT

Pursuant to Rule 240 of the South Carolina Appellant Court Rules (SCACR), Respondents South Carolina Department of Health and Environmental Control ("DHEC") and Greenville Water System ("Greenville Water"), (collectively hereinafter referred to as "Respondents"), submit the within motion and accompanying memorandum in support of their joint motion to dismiss the above-captioned case as moot. In support of this motion, Respondents would show the Court as follows:

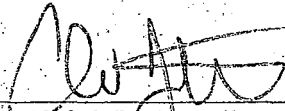
1. This case has been fully briefed. The Record on Appeal and Appellants' Final Briefs were filed with the Court on December 5, 2011. Greenville Water's Final Brief of the Respondent was filed with the Court on December 19, 2011, in which DHEC joined by December 22, 2011 letter to the Court.

2. Subsequent to the filing of this appeal and the above-referenced briefs, Greenville Water has completed construction of the replacement intake pipe at issue in this case and which required Certification from DHEC due to its temporary discharge of material in navigable waters in conjunction with the stream crossings and wetlands areas.
3. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation ("Final Approval") for the replacement pipe, signifying that the construction project is complete and the water system permitted under the permit is operational.
4. The issuance of the Final Approval by DHEC was not appealed.
5. Because the project construction is complete and the final operational approval for the completed project has been issued, there is nothing left for the Court to reverse, modify, amend or affirm by this appeal.
6. The matter is moot and should be dismissed as non-justiciable, as there exists no active case or controversy between the parties.

Therefore, for the reasons listed above, and as more fully articulated in the accompanying memorandum in support of Respondents' motion to dismiss, Respondents respectfully move that this case be dismissed as it is moot and not justiciable.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Randolph R. Lowell

Chad N. Johnston

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

rllowell@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

Eugene C. McCall, Jr.

Ryan W. Trail

McCall Environmental, P.A.

Post Office Box 3027

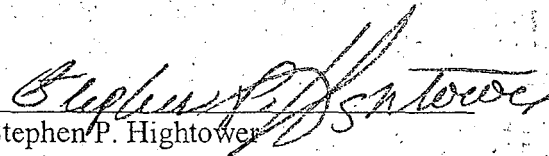
Greenville, South Carolina 29602-3027

gene@mccallenv.com

ryan@mccallenv.com

Attorneys for Respondent

Greenville Water



Stephen P. Hightower

Staff Attorney

S.C. Department of Health and

Environmental Control

2600 Bull Street

Columbia, South Carolina 29201

hightosp@dhec.sc.gov

Attorney for Respondent

S.C. Department of Health and

Environmental Control

March 1, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 09-ALJ-07-0226-CC

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

v.

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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CASE AS MOOT

Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water System¹ (“Greenville Water”), (collectively hereinafter referred to as “Respondents”), pursuant to Rule 240(c)(2), SCACR, submit the within memorandum in support of their joint motion to dismiss above-captioned case as moot. This case has been fully briefed² and is currently pending before the Court, awaiting assignment to the Court’s roster. For the reasons discussed herein, both the construction of the project at issue in the case is fully completed, and the final certification and permit authorizing its use has been issued; therefore,

¹ Subsequent to the initiation of this litigation, Respondent’s name has changed to “Greenville Water”; therefore, Respondent will use this name for purposes of this appeal.

² The Record on Appeal and Appellants’ Final Briefs were filed with the Court on December 5, 2011. Greenville Water’s Final Brief of the Respondent was filed with the Court on December 19, 2011, in which DHEC joined by December 22, 2011 letter to the Court.

Respondents respectfully submit that there is nothing left for the Court to modify or amend through this appeal. Accordingly, Respondents respectfully request that the Court dismiss this appeal as moot and non-justiciable.

FACTUAL AND PROCEDURAL BACKGROUND

Greenville Water completed construction of the Table Rock Dam and Reservoir ("Reservoir") in the mid to late 1920s, and since that time it has protected the surrounding watershed through donations of land for State Parks and grants of conservation easements. Due to Greenville Water's efforts, the watershed provides protection and habitat for hundreds of plant and animal species.

Today, the Reservoir and watershed provide drinking water to Greenville, Pickens, Laurens, and Anderson County residents through two 30-inch diameter Raw Water Transmission Mains ("RWTM"). (R.p. 1). RWTM #1 was constructed in 1930, and RWTM #2 was constructed in 1939. Id. These RWTMs are the conduit through which raw water originating in the Reservoir is "transmitted" to a treatment plant and then provided to the community. Thus, the RWTMs are used to take water from the Reservoir, and are not used for any discharge purposes.

On November 13, 1985, Greenville Water was issued an Interbasin Transfer Registration ("IBTR") pursuant to the South Carolina Interbasin Transfer Act and corresponding regulations. (R.p. 1). See S.C. Code Ann. §§ 49-21-10 et seq. (repealed Jan. 1, 2011); 27 S.C. Code Ann. Regs. 121-12 et seq. (repealed Jan. 1, 2011). The IBTR authorizes Greenville Water to withdraw up to thirty-two (32) million gallons of water per day ("MGD") from the Reservoir that may be transferred to another water basin. Greenville Water's IBTR expires on September 1, 2016. Id.

In order to ensure the continued provision of safe, clean drinking water to the community, Greenville Water proposed to replace RWTM #2, which was found to be aging and the most likely to be involved in an incident. In its place, and as a preventative maintenance measure to minimize future risks of incidents and protect the drinking water supply, Greenville Water proposed to install a 42-inch diameter pipe spanning approximately 7.8 miles ("Project"). (R.p. 2); see also (R.pp. 13-16, 416-418), DHEC Final Agency Decision; DHEC Notice of Dep't Decision. To that end, in 1999, a 42-inch diameter connection was installed at a pump station, with a second 42-inch diameter connection installed at the Reservoir in 2005. (R.p. 2). Greenville Water's replacement intake pipe connects these existing endpoints and ultimately transmits water to the treatment plant. Id. The remaining intake pipe (RWTM #1) will continue to be used daily to keep it in operational condition, but its primary purpose will be as a back-up to the replacement intake pipe to provide redundancy in case of an incident or failure. Id.

To that end, on January 29, 2008, Greenville Water submitted a "Joint Federal and State Application for Activities Affecting Waters of the United States" to the United States Army Corps of Engineers, Charleston District ("Corps") and DHEC (for a Section 401 Water Quality Certification). (R.p. 2). On March 28, 2008, Greenville Water submitted a "Permit Application for Construction in Navigable Waters" to the DHEC. Id. After review of the applications submitted by Greenville Water, subsequent filings and comments from the public, including Appellants, and other resource agencies, on February 11, 2009, DHEC issued the "Notice of Department Decision – Water Quality Certification and Construction in Navigable Waters Permit."³ (R.pp. 416-418). The Project's 7.8 mile route in mostly existing right-of-way had

³ Pursuant to law, one document serves as the Permit and Certification. See 25A S.C. Code Ann. Regs. 61-101.A.9 ("If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will

temporary impacts of 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water. (R.pp. 13-14), DHEC Final Agency Decision. The Certification and Permit contained eighteen (18) conditions, which addressed concerns raised by Appellants and others during the public comment period.⁴ (R.p. 2).

Appellants' case, currently pending before the Court, challenges the South Carolina Administrative Law Court's ("ALC") decision below. That action was commenced with the February 26, 2009, Request for Final Review Conference submitted by Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation⁵ (collectively hereinafter referred to as "Appellants" or "Upstate Forever") the DHEC Board ("Board") concerning the DHEC staff decision to issue the Section 401 Water Quality Certification ("Certification") and Construction in Navigable Waters Permit ("Permit"). (R.pp. 17-25), Request for Final Review. The Certification and Permit authorized Greenville Water to replace an aging water pipe. (R.pp. 416-418), DHEC Notice of Dep't Decision. A Final Review Conference was held on April 9, 2009. See (R.pp. 271-349). On May 8, 2009, the Board issued its Final Agency Decision, which upheld, without modification, the staff decision to issue the Certification and Permit. (R.13-16). Specifically, the Board held that Appellants' request for minimum flow requirements, public verification of water withdrawals, and stricter enforcement of the conditions of the Certification and Permit were without merit. Id.

consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit.").

⁴ The conditions include, among other things, protections for wildlife, water quality impacts (such as the imposition of best management practices), and the restoration of natural areas. (R.pp. 416-418). DHEC Notice of Dep't Decision. As the ALC found, these conditions adequately protected water quality from the Project's impacts. (R.p. 7), ALC Order at 7.

⁵ The Request for Final Review Conference was also joined by the Sierra Club and Save Our Saluda; however, those parties did not join the Request for Contested Case Hearing before the Administrative Law Court and are not parties to this appeal.

On June 5, 2009, Appellants filed a Request for Contested Case Hearing with the ALC pursuant to Sections 1-23-600(H) and 44-1-60(G) of the South Carolina Code. (R.pp. 26-39). Greenville Water filed, inter alia, a motion to dismiss Appellants' request. (R.pp. 40-74). Thereafter, Greenville Water submitted a motion to lift the automatic stay in the case, seeking to resume construction activities on the project during the pendency of the contested case. (R.pp. 75-83). A hearing was held before the ALC with respect to Greenville Water's motion on August 5, 2009, which the ALC granted in an order filed August 11, 2009. (R.pp. 11-12).

Greenville Water has since completed construction of the replacement intake pipe that required the Certification requirements due to its temporary discharge of material in navigable waters in conjunction with the stream crossings and wetlands areas. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation ("Final Approval"), signifying that the construction project is complete and the water system permitted under the permit is operational. A true and correct copy of same is attached as Exhibit A. As no request for final review was filed within the fifteen (15) days designated under Section 44-1-60 of the South Carolina Code, the permit decision is final and unchallenged.

ARGUMENT

I. THE WORK AND IMPACTS IN PROJECT AREAS TRIGGERING THE CERTIFICATION HAVE BEEN FULLY COMPLETED; THEREFORE, THE CASE IS MOOT AND NOT JUSTICIABLE.

The portions of the Project which required the Certification and which were challenged by Upstate Forever have been fully completed.⁶ Furthermore, the Project as a whole has been fully completed, as evidenced by the DHEC Final Approval, issued on February 1, 2012. See Ex. A. Consequently, this appeal is moot, as there exists no justiciable controversy between the

⁶ The only issue on appeal involved the Certification. The Appellants waived and abandoned any challenge to the Permit.

parties and this action does not meet one of the articulated exceptions to the doctrine of mootness.

“A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy.” Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996).

The concept of justiciability includes the doctrine of mootness. Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson, 331 S.C. 486, 489 S.E.2d 915). “A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

As described above, this Project involved the replacement of an existing intake pipe used to withdraw water from the Reservoir for use as drinking water for the surrounding Greenville, Pickens, Laurens, and Anderson counties. This Project was not a new withdrawal from the Reservoir. Additionally, this Project was not a request to withdraw more water from the Reservoir than Greenville Water does currently, or to modify the existing legal restriction on

withdrawals from the Reservoir found in the IBTR. Rather, Greenville Water's request here was merely to replace an aging intake pipe. (R.p. 2).

Nor did this Project relate to construction and/or alteration of the Reservoir. Instead, the basis for the replacement intake pipe's requirement of permitting and certification⁷ from both the Corps and DHEC was that, in the construction of the replacement intake pipe, there were **temporary** impacts to 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water. (R.pp. 13-14), DHEC Final Agency Decision. Because the regulated impacts from installation of the intake pipe now have concluded, there are no more on-going discharges of material into waters and therefore no longer a need for Certification.⁸ That construction has been fully completed, and the Certification has no more legal effect.

Further, because the portions of the Project implicating and requiring Certification requirements have ended, even taking Upstate Forever's allegation that DHEC has the authority to impose minimum instream flows as true, there exists no regulated project on which to attach Upstate Forever's request; therefore, there exists no case or controversy with respect to these parties, and this action is moot and non-justiciable. In other words, because the work has been completed, the Certification has no more force and effect and has been supplanted by the operating permit—which has not been appealed. This Court, consequently, is without jurisdiction to hear this action and the appeal should be dismissed.

⁷ See 23 S.C. Code Ann. Regs. 19-450 (providing that "a permit issued by the Department of Health and Environmental Control is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water"); see 33 U.S.C.A. §§ 1251 *et seq.*; 25A S.C. Code Ann. Regs. 61-101 (stating that "[a]ny applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department").

⁸ Significantly, the trigger for Certification is the construction of the actual pipeline in wetlands and navigable waters, not the withdrawal or discharge of water contained in the Reservoir.

Moreover, this appeal, as proffered to the Court, is the definition of a hypothetical: does DHEC have the authority to impose a minimum flow release as a condition of its 401 Certification (even when there is no release of flow by the Project)? The Appellants limited themselves to this single question before the ALC. (R.p. 3-4, 419). As presented, this issue does not even allege that DHEC erred in **not** imposing a minimum flow as a condition to Greenville Water's Certification on this replacement intake pipe. Consequently, Appellants are requesting the Court answer a purely hypothetical question that will have no bearing on this action. See In re: Treatment & Care of Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (stating that a contingent, hypothetical or abstract dispute does not constitute a justiciable controversy) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

Additionally, none of the three recognized exceptions to the doctrine of mootness are applicable to this action.⁹ Cf. Sloan v. Greenville County, 356 S.C. 531, 551-55, 590 S.E.2d 338, 349-51 (Ct. App. 2003) (finding an appeal moot due to the construction project's completion before further finding that an exception existed). First, this Court could take jurisdiction over this matter, despite mootness, if the issue raised is capable of repetition but evading review. Curtis, 345 at 568, 549 S.E.2d at 596. Here, DHEC does not have the authority to impose minimum flow requirements under a Certification for a project of this kind. See (R.p.

⁹ "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (2001); see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id.

6), ALC Order at 6. Under a 401 Certification, minimum flow conditions may be imposed if the project in question discharges into a water of the United States affecting water quality. Greenville Water's intake pipe replacement project did not affect existing flows or even result in any discharge to the Reservoir.¹⁰ Similarly, this Project did not involve the impoundment of water to create a reservoir or dam. See (R.p. 6), ALC Order at 6. Appellants have not appealed this finding; therefore, it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). Because a project of this type does not implicate DHEC's authority to impose minimum flow requirements, there is no issue here that would constitute a violation or could be repeated or evade the review of the Court. With the Project completed, there is no further action to be taken and thus the issue is not capable of repetition.

Second, this case does not present the Court with a question of imperative or manifest urgency to establish a rule for future conduct in matters of public interest. See Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) (discussing the public interest exception). The Project at issue in this case, and the 401 Certification under which it was undertaken, did not occupy the realm of public importance required to satisfy this exception. This pipe replacement did not in any way change the withdrawal limits in place for the Reservoir. (R.pp. 4-5), ALC Order at 4-5. Additionally, because minimum instream flows are not properly a part of a project of this type, there is no manifest urgency to decide an issue for

¹⁰ Contrary to the inaccurate claim put forward by Upstate Forever, the replacement intake pipe will not affect Greenville Water's withdrawal capacity limitation from the Reservoir. See App. Br. at 9. Greenville Water's allowable interbasin withdrawal capacity is expressly limited by its existing IBTR, which remains unaffected by Greenville Water's capital improvement project, and by the Reservoir's safe yield. (R.pp. 4-5), ALC Order at 4-5.

future guidance and public interest.¹¹ This completed water pipe replacement has no effect on future pipe replacements and certainly doesn't present an imperative or urgent need to establish a rule for future conduct, as such rules already exist.

Finally, this appeal does not present an issue that could affect future events or have collateral consequences for the parties. As the ALC found, flow requirements are outside the scope of DHEC's controlling regulations with respect to the instant Project's Certification; therefore, DHEC is without the authority to impose these requirements going forward. **(R.p. 6)**, ALC Order at 6. Moreover, as presented and **at best**, this appeal posits only a discretionary standard to be applied by DHEC and cannot be challenged by a court absent extraordinary circumstances. See Cole v. Manning, 240 S.C. 260, 267-68, 125 S.E.2d 621, 625 (1962) ("[C]ourts may not substitute judicial discretion for administrative discretion, and therefore as a general rule will not attempt to interfere with the exercise of discretionary power by a governmental agency...."). Without the possibility that Upstate Forever could force DHEC to impose instream flow requirements, the hypothetical presented by this appeal cannot affect future events. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Replacing this water pipe is separate and apart from flow requirements which may have collateral consequences for the parties. As such, this exception to the doctrine of mootness does not apply to the now-completed water pipe replacement in this case.

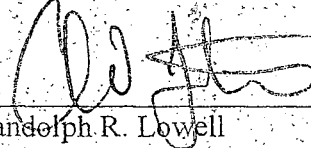
¹¹ If Appellants seek to change the law, then they should do so through the legislative process. Moreover, the General Assembly has chosen to address surface water withdrawals as they relate to minimum instream flows in a separate regulatory scheme.

CONCLUSION

The only issue in the appeal before this Court is DHEC's Certification and Permit authorizing Greenville Water to replace an aging water pipe. Greenville Water has now completed the water pipe replacement and thus the Certification and Permit is, likewise, completed. Further, DHEC has issued its Final Approval for the project, authorizing it to be placed into operation. There is nothing left for the Court to modify or amend with respect to this completed Project. Thus, there is not an active case or controversy and Appellants' case is moot. Moreover, none of the three recognized exceptions to the doctrine of mootness are present in this case. For these reasons, Respondents hereby respectfully move that this case be dismissed as it is moot and not justiciable.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Randolph R. Lowell

Chad N. Johnston

Willoughby & Hoefler, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

rlowell@willoughbyhoefler.com

cjohnston@willoughbyhoefler.com

Eugene C. McCall, Jr.

Ryan W. Trail

McCall Environmental, P.A.

Post Office Box 3027

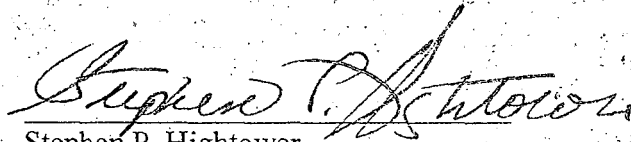
Greenville, South Carolina 29602-3027

gene@mccallenv.com

ryan@mccallenv.com

Attorneys for Respondent

Greenville Water



Stephen P. Hightower

Staff Attorney

**S.C. Department of Health and
Environmental Control**

2600 Bull Street

Columbia, South Carolina 29201

hightosp@dhec.sc.gov

Attorney for Respondent

S.C. Department of Health and

Environmental Control

March 1, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0226-CC

RECEIVED

MAR 26 2012

SC Court of Appeals

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.

APPELLANTS' RESPONSE TO
JOINT MOTION TO DISMISS

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

March 22, 2012

INTRODUCTION

Prior to construction of the pipeline project in dispute in this appeal, Greenville Water Systems ("GWS") withdrew drinking water from Table Rock Reservoir through two 30-inch diameter pipes. In the decision challenged here, DHEC authorizes GWS to construct a 42-inch diameter pipe while leaving one of the existing 30-inch pipes in place, greatly increasing water withdrawal capacity from the Reservoir. The Reservoir was formed by damming the South Saluda River, and GWS has direct control over both the water withdrawn and released from the Reservoir. GWS' management, specifically its failure to release adequate flows of water from the Reservoir, has had and continues to have a severe detrimental impact on the South Saluda River.

The South Saluda is of vital ecological significance and maintaining a minimum water level is necessary to its functionality. The South Saluda is managed by the S.C. Department of Natural Resources ("DNR") as a cold water trout fishery, and it is one of South Carolina's very few trout streams. (R. pp. 218-220, Report of SCDNR). It also provides habitat for numerous aquatic and land species, including over a dozen species of fish. (R. p. 218). When mountain streams are impounded or dammed like the South Saluda has been with the Table Rock Reservoir, there is less flow often resulting in a significantly warmer stream or river downstream. (R. pp. 218-220). The South Saluda River base flow (below TRR) is currently at a fraction of the historic flow and at a fraction of the potential flow. 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. *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 hold over and remain in the stream. *Id.*

Through the 401 Certification at issue in this appeal the United States Fish and Wildlife Service has expressed concerns to DHEC about the impacts of GWS's management of the dam and reservoir on the South Saluda River and its fisheries:

Table Rock Reservoir and the water distribution system was built in the 1930's, prior to any current State or Federal environmental regulation. Therefore, no minimum flow requirements have been in effect for this reservoir. The result is that the South Saluda River system has had a deficit of stream flow resulting in impacts to approximately 1 ½ miles of river . . . it is appropriate to require minimal stream flow in order to protect the resources and integrity of the ecology of the system downstream. Minimum flows are very important and integrated flow regimes are needed for both the North and South Saluda Rivers that are controlled by the Greenville Water System.

(R. pp. 214-217).

DNR has expressed similar concerns to DHEC in commenting on this Certification:

Dewatering 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.

(R. pp. 202-205).

GWS' management of the Reservoir and its withdrawals and releases from the Reservoir have had obvious and devastating impacts on the river, the river's trout fishery, other aquatic life, and public recreation (fishing, swimming, wading and paddling). (R. pp. 205-220).

Through this 401 Certification appeal, Upstate Forever, S.C. Native Plant Society and S.C. Wildlife Federation have asked this honorable Court for an Order concluding that DHEC has the authority and duty to require GWS to release minimum flows to protect the water quality of the South Saluda. Respondents seek dismissal of this important action through a motion relying on

strained legal interpretations and citing no supporting authority.

ARGUMENT

The Respondents assert that the Court should not hear this issue because DHEC's 401 Certification at issue in this appeal "has no more legal effect," because the pipeline at issue has been constructed and because DHEC has given approval to operate the system.¹ This argument is flawed because 1) the 401 Certification has "legal effect," both by virtue of this appeal and by the terms of the 401 Certification itself; 2) the Court has the ability to provide the relief sought, which is not foreclosed merely because construction is complete; and 3) it presumes that lifting the statutorily-authorized automatic stay could effectively moot an appeal and thus eliminate due process rights, as well as deprive this Court of its jurisdiction.

Further, even if the case were moot, it meets both the "public interest" and the "capable of repetition, yet evading review" mootness exceptions.

I. THIS CASE IS NOT MOOT

"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

¹Appellants note that the February 1, 2012 "Final Approval" referred to in Respondents' Motion is not in record, nor does Respondent offer the document for inclusion in the record. Moreover, it is unclear what, if any, relationship this document bears to the 401 Certification at issue in this case. The "final approval" does not reference the 401 Certification, and the 401 Certification makes no mention of the need to obtain a "final approval" to place into operation. Further, the final approval does not cite any authority for its issuance, and if the document possesses any legal significance, it is not evident from the face of the document nor Respondents' motion.

While Respondents cite Appellants' failure to appeal the final approval, there is again no indication that the final approval document would rise to the level of a contested case so that it could even be appealed. In confirmation of this fact, a review of South Carolina ALC cases reveals no instances where such a "final approval" document has been challenged.

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”).

A. The Court Can Grant Effectual Relief and a Cognizable Remedy

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 is unique in the very fact that completion of the disputed project in no way diminishes availability of the relief.

The Appellants seek relief from this Court in the form of an order remanding this 401 Certification decision with instructions to DHEC to place minimum instream flow conditions on the 401 Certification. The basis for this relief is found in S.C. Code Ann. Regs. 61-101. In reviewing 401 Certifications for compliance with 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) (emphasis added). 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.² S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). In this case, the South Saluda River is legally classified as “Trout-Put, Grow and Take” waters, which means the waters are suitable for supporting growth of trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b). The existing use of the South Saluda is for recreational trout fishing, among other recreational activities. Under this classification and the existing uses, the South Saluda is managed by the S.C. Department of Natural Resources (“DNR”) as stocked trout stream and is capable of supporting year round trout growth. DNR’s current strategy is to stock the river with trout as a replacement or surrogate for a wild population to provide recreational trout fishing. (R. pp. 218-220).

Appellants (and the Proposed Amicus, Trout Unlimited) assert that uses of the South Saluda are jeopardized by this project, that minimum instream flows are an appropriate and

²The 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, imposed a minimum instream flow regime as part of 401 Water Quality Certifications related to dams in the past. (R. p. 151, Respondents’ Joint Motion for Summary Judgment). Respondents simply assert that DHEC cannot impose those minimum instream flow conditions to Greenville Water Systems’ water quality certification because it is not a new dam.

Notably, the Respondents point to no statutory or regulatory support for this claim that DHEC has no authority to apply minimum flow requirements to GWS’ 401 water quality certification, and in fact, there is no statutory or regulatory support for this claim. 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 in Appellants’ Final Brief.

necessary condition to protect those uses, and that DHEC must therefore impose conditions on this 401 Certification. If the Court agrees that DHEC has the authority and duty to impose minimum flow conditions on Greenville Water Systems' 401 Certification in order to protect water quality as mandated under the law, the Appellants relief would be fully and completely accomplished. This Court's remedy would not require removal of the pipeline or otherwise jeopardize the project as constructed.

This case is therefore not moot because it is possible for the reviewing Court to grant effectual relief and provide a cognizable remedy. The issue is whether DHEC is required by law to place conditions on GWS' permit and certification requiring minimum flow releases in order to protect water quality. Should this Court rule that DHEC does have the authority and erred by failing to include minimum flow conditions in its certification, then the Court could remand the decision back to DHEC with instructions to place flows conditions necessary to protect water quality.

Only by ignoring the purpose and nature of the GWS project can one argue that this certification decision is moot. 401 Certifications typically impose conditions on projects, and DHEC has, in fact, imposed conditions on the 401 certification in this case. As Respondents admit, flow conditions can be imposed on 401 certifications of dam relicensing projects. (R. pp. 416-418). The controversy in this case can still (and easily) be remedied by the imposition of a minimum flow condition. The fact that effective relief can be granted conclusively shows that the case is not moot. *See Seabrook v. Knox*, 369 S.C. 191, 631 S.E.2d 907 (2006); *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

B. Completion of Construction Does Not Moot a 401 Certification

The Respondents attempt to sidestep the clear availability of effective relief by making the strained and illogical argument that the “certification has no more legal effect,” and that the certification is “supplanted by” DHEC’s approval to GWS that the pipeline is operable because the construction has been completed. (Resp. Brief p. 7). There is no legal support for Respondents’ apparent conclusion that the 401 Certification has vanished and is no longer a valid approval. Tellingly, GWS and DHEC point to no legal support for this conclusion.

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 statute 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 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 pipeline.

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996), was a National Environmental Policy Act (“NEPA”) 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 pipeline, but rather to maintenance of minimum stream flows released from the reservoir that the pipeline transfers 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.

Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000), was a NEPA and National Historic Preservation Act case in which the 9th Circuit held that a challenge to a HUD housing project could still be maintained, despite the fact that the housing project had been completed. The basis of the court’s ruling that the case was not moot was that the plaintiffs sought not the demolition of the housing project, but rather, compliance with regulatory requirements. The *Tyler* court concluded that a case is not moot “if changes can still be made to help alleviate any adverse effects.” *Id.* at 1137. In this case, a change can still be made to the decision on appeal to alleviate the adverse impacts on water quality caused by inadequate flows from the Reservoir which the pipeline withdraws from.

Nothing in those cases nor any other cases Petitioners are aware of support the Respondents’ arguments that an environmental certification or permit simply vanishes once the authorized activity is constructed.

i. If Certification Has No Legal Effect DHEC Would be Divested of Jurisdiction

If a 401 Certification no longer has any legal effect after the authorized construction is

complete, DHEC would effectively be divested of its jurisdiction and its ability to ensure continuing compliance with certification conditions. DHEC routinely places conditions on 401 Water Quality Certifications that survive well beyond the actual construction activity that necessitated the Certification, regularly imposing long-term monitoring requirements and other conditions related to continued maintenance and protection of water quality. In fact, DHEC has done so in this particular case. The very first condition imposed in DHEC's 401 certification of the GWS project provides that GWS must follow best management practices³ "on and off the project site during and *after construction*." (R. p. 416, condition #1). 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 401 Certification addresses how wetlands impacted by GWS's construction must be maintained in the future. GWS must replant vegetation in impacted wetlands and maintain the vegetation in such wetlands in an "uncleared or uncut state." (R. p. 417, condition #16). Clearly such condition imposes obligations on GWS beyond the period of construction. Under Respondents' argument, GWS would have no obligation to comply with these conditions and DHEC would have no authority to enforce them. This argument is in direct contradiction with the clear language of the 401 Certification itself.

The 401 Certification states that DHEC "reserves the right to impose additional conditions on this Certification/Permit to respond to unforeseen, specific problems that might

³DHEC's Best Management Practices ("BMP") handbook describes the goals of BMPs as erosion and sediment controls to 1) minimize the extent and duration of disturbed soil exposure; 2) protect off-site and downstream locations, drainage systems and natural waterways from impacts of erosion and sedimentation; 3) limit the exit velocities of the flow leaving the site to non-erosive or pre-development conditions; and 4) design and implement an on-going inspection and maintenance plan.

http://www.scdhec.gov/environment/ocrm/docs/BMP_Handbook/BMP_Handbook.pdf, page 2.

arise and to take any enforcement action necessary to ensure compliance with State standards.” (R. p. 417). Thus in issuing this Certification, DHEC clearly contemplated the potential need to add additional conditions, as well as the potential need to bring enforcement for compliance with the existing conditions. For example, if GWS failed to maintain the wetlands vegetation in an “uncleared and uncut state,” DHEC would have the authority under the 401 Certification to enforce that condition. The fact that DHEC retains the right to both impose additional conditions and to enforce existing conditions and state water quality standards indicates that the 401 Certification has “legal effect” beyond the completion of construction and indeed presently has “legal effect.”

ii. If Certification Had No Legal Effect Appellants Would be Denied Procedural Due Process Rights to Judicial Review

The requirements of procedural due process, which apply in a contested case or hearing which affects an individual's property or liberty interest, generally includes adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 484-85, 636 S.E.2d 598, 615 (2006); S.C. Constitution, art. 1, §22 (“No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... and he shall have in all such instances the right to judicial review”). Due Process guarantees notice, an opportunity to be heard in a meaningful way, and judicial review. *See Stono River Envtl. Protection Ass'n v. S.C. DHEC*, 305 S.C. 90, 406 S.E.2d 340 (1991). “[P]arties with an interest in certification are entitled to notice, an opportunity to be heard, and judicial review. *League of*

Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 427, 409 S.E.2d 378, 380 (1991) (overruled on other grounds by *Brown v. SCDHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002)). “To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process.” *Leventis v. S.C. DHEC*, 340 S.C. 118, 131-32, 530 S.E.2d 643, 650 (Ct. App. 2000).

In this case, if Appellants are denied judicial review after availing themselves at every opportunity of the procedural safeguards afforded them through the Administrative Procedures Act and the S.C. Constitution, they would effectively be denied their procedural due process rights to judicial review before this Court. Lifting of the automatic stay, which is a result that occurs with some regularity in the ALC, is not intended to act as a mechanism through which to deny judicial review and prejudice the challenging party, but that is exactly what the Respondents argue for here.

C. The Automatic Stay Envisions Construction Moving Forward in the Face of an Appeal

The Administrative Procedures Act (“APA”) provides for an automatic stay of DHEC decisions. S.C. Code Ann. §1-23-600(H)(2). The automatic stay prevents an activity from moving forward once a request for contested case hearing is filed in the Administrative Law Court. *Id.* The automatic stay acts to preserve procedural due process rights until judicial review is obtained. The automatic stay can be lifted by the ALC “for good cause shown or if no irreparable harm will occur.” S.C. Code Ann. § 1-23-600(H)(4). The APA envisions instances in which construction could move forward to completion, yet the contested case challenging a DHEC permit or certification decision would survive. This approach makes logical sense, and is consistent with case law concluding that completion of construction does not moot a challenge to

the permit or certification that authorized that construction. *See Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996); *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency* 435 F.3d 632, 636 (6th Cir. 2006).

In this case, the Appellants consented to lifting the automatic stay for the very reason that its challenge was not to the actual physical construction of the pipeline, but to the amount of flow released from the reservoir that the pipeline connects to. The Appellants now face severe adverse consequences – elimination of judicial review rights – as a result of this willingness to be cooperative and reasonable. If lifting the automatic stay to allow construction would result in a court rendering a contested case hearing moot, then no court should ever allow the automatic stay to be lifted. In actuality, the lifting 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, as has been the practice in federal courts.

D. Even if the 401 Certification “Has No Legal Effect” DHEC Has a Mandatory Duty to Require Minimum Flows

DHEC 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. 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).

These provisions give DHEC the authority to impose minimum flow requirements to GWS's operation of the Table Rock Dam *sua sponte* and absent a 401 Certification or other permit under review. The plain and clear language of these regulations vests the agency with ample and express authority to require a minimum flow release to the South Saluda River. And when "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." *City of Rock Hill v. S.C. DHEC*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Board of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987)).

Regulation 61-68 thus recognizes that water withdrawal may adversely affect existing and classified uses, in this case Trout-Put, Grow and Take waters, 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 uncontradicted evidence from the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service and Appellants' expert, Dr. David Hargett, is that a minimum flow release is necessary to protect the South Saluda's use as a trout fishery. Thus Regulation 61-68 mandates that DHEC impose conditions to protect these uses, regardless of whether there is a water quality certification. In this case, however, the Court need not reach that conclusion because there is a 401 Certification on which DHEC can mandate minimum flows.

II. EVEN IF THE COURT CONCLUDED THAT THIS CASE IS MOOT, WHICH IT IS NOT, EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY

In the civil context, there are three general exceptions under which an appellate court

can issue a ruling on an appeal on an otherwise moot controversy: (1) if the issue raised is capable of repetition but evading review; (2) if the question is one of imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest; and (3) if the trial court's decision may affect future events, or have collateral consequences for the parties. *McClam v. State*, 386 S.C. 49, 55(Ct. App. 2009). Appellants have shown that this case is not moot, but assuming *arguendo* that it is, this case satisfies at least two of these exceptions and is nevertheless appropriate for review.

Application of the public interest exception requires the question at issue to be (1) of "public importance," and (2) of "imperative and manifest urgency." See *Sloan v. Greenville County*, 361 S.C. 568, 570–71, 606 S.E.2d 464, 465–66 (2004).

Resolution of DHEC's authority to protect water quality in this State's rivers by imposing minimum instream flows is an issue of paramount public importance. This dispute arises in the context of DHEC's 401 Water Quality Certification review. That Certification review is the primary mechanism through which DHEC applies the water quality protections provided by South Carolina law. If the narrow interpretation of DHEC's authority adopted by the lower court stands, our State's ability to ensure the health of our public rivers by maintaining minimum water flows will be extremely diminished.

The greater public interest at stake in this appeal is evident in the facts of this case. The South Saluda River and its tributaries are used for fishing (including trout), swimming, boating, and other public recreation activities and as a source of irrigation for production of food crops. The South Saluda River, one of South Carolina's very few trout waters, is considered a jewel of the Blue Ridge Escarpment, an area that has been recognized as an ecosystem of global

significance.

As a result of GWS' operation, the flow in the South Saluda is so low that it is a fraction of the historic flow and at a fraction of the potential flow. (R.pp. 218-220, DNR Report). The hatchery-supported (surrogate) trout fishery is taxed. *Id.* With the continued low flow conditions that exist in the South Saluda River, DNR may not be able to manage the surrogate trout fishery over the long term. *Id.* With lack of adequate flows DNR believes it is possible to have a total loss of the natural, remnant trout population which hold over and remain in the stream. There is a substantial and imperative public interest in resolving the issue of DHEC's authority to protect water levels in the South Saluda River and other rivers of our State.

The exception to the mootness doctrine for issues capable of repetition yet evading review applies when a challenged action is too short in duration to be fully litigated before its cessation or expiration. The Respondents' arguments in their motion to dismiss would create an entire class of cases that will evade review: that being, Administrative Law Court cases in which the automatic stay is lifted.

South Carolina's Administrative Procedures Act provides for an automatic stay of an agency decision to issue a new permit or license when a contested case hearing is requested. S.C. Code Ann. § 1-23-600(G)(2). Under certain circumstances, that automatic stay can be lifted, as it was here, and work authorized by the permit or license can begin during the pendency of the contested case. The Respondents arguments would essentially foreclose appeal of any permit or license for which the automatic stay is lifted.

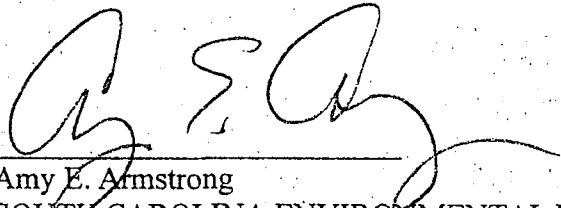
If construction of a project begins upon lifting of the automatic stay, in most cases the project would be completed before an appellate Court could render a decision on a contested

case appeal. In other words, if the project is completed while the contested case is being resolved in the ALC or while an appeal is pending before this Court, Respondent's position would be that the case is moot. By dismissing this case as moot, this Court would essentially foreclose appeal of contested cases in which the automatic stay is lifted, and deny due process rights of judicial review in the face of a clear and viable remedy.

CONCLUSION

For the reasons set forth above, Upstate Forever, the South Carolina Native Plant Society and the South Carolina Wildlife Federation respectfully request that this Court deny the Respondents' Joint Motion to Dismiss.

Respectfully submitted,



Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

March 22, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 09-ALJ-07-0226-CC

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

v.

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

REPLY IN SUPPORT OF MOTION TO DISMISS CASE AS MOOT

Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water System (“Greenville Water”), (collectively hereinafter referred to as “Respondents”), pursuant to Rule 240(f), SCACR, submit the within Reply in support of their joint motion to dismiss (Motion) the above-captioned case as moot, which was filed with the Court on March 2, 2012. Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation (collectively hereinafter referred to as “Appellants” or “Upstate Forever”) filed a response to the Motion (Return) on March 22, 2012. As even a cursory review of the record will reveal, the case that Appellants portray in their Return is not the case before this Court on appeal. Due to Appellants’ own decision to narrow the scope of the contested case below, the single issue before this Court on appeal is a hypothetical question that,

standing alone implicates this Court's justiciability requirements, but was further rendered moot upon the completion of the project giving rise to the permitted activity. For the reasons discussed herein and in its Joint Motion, Respondents respectfully assert that, because the construction of the project at issue in the case is fully completed and the final approval permit authorizing its use has been issued, there is nothing left for the Court to modify or amend through this appeal. Accordingly, Respondents respectfully request that the Court dismiss this appeal as moot and non-justiciable.

ARGUMENT

It is worth noting at the outset that the position and, indeed, predicament that Appellants find themselves in this case is of their own making. Now, when faced with the prospect of a finished project and a mooted appeal, Appellants are attempting to backtrack from two strategic decisions they made before the Administrative Law Court (ALC) in order to create and portray a fictionalized version of the case pending before this Court and prolong the appeal's life: (1) Appellants' decision to limit its contested case before the ALC to a single, hypothetical issue; and (2) Appellants' decision to consent to Greenville Water's motion to lift the automatic stay before the ALC. These two strategic decisions made below have resulted in Appellants' current position, and although the Return either ignores the resulting implications of the decisions or attempts to explain them away, Respondents respectfully contend they are controlling and should dictate the dismissal of the instant appeal.

- (A) **Appellants' arguments as to the merits of its appeal were abandoned before the ALC and the single issue preserved by Appellants renders this appeal moot.**

Upon its own initiative, in an April 14, 2010 letter to Administrative Law Judge McLeod, counsel for Appellants stated unequivocally that the Appellants had:

decided to **limit** [Upstate Forever's] appeal [of DHEC's administrative decision] to **the question** of whether DHEC has the **authority to impose a minimum flow release** to the South Saluda River from the Table Rock Dam and Reservoir as a condition of its 401 certification and its construction in navigable waters permit....

(R.p. 419), Armstrong Ltr. to Judge McLeod (emphasis added). According to the self-imposed limitation of the issues on appeal by Appellants, the ALC similarly contained its analysis to the single issue of "does DHEC have the authority to impose minimum instream flow requirements as a condition of the Certification at issue?" (R.p. 4), ALC Order at 4.¹ Notwithstanding this limitation, Appellants contend in the Return that "[t]his case is therefore not moot because it is possible for the reviewing Court to grant effectual relief and provide a cognizable remedy", Return at 6, which Appellants categorize as "an order remanding this 401 Certification decision with instructions to DHEC to place minimum instream flow conditions on the 401 Certification." Return at 4. However, this argument is contrary to Appellants' own actions, which served to limit the contested case to the single, hypothetical issue of DHEC's authority and dismissed the merits of their challenge to the actual restrictions it sought DHEC to impose on Greenville Water. Therefore, Appellants' request is beyond the scope of the appeal presented to this Court and is fundamentally at odds with the actions taken by Appellants below.

Appellants nevertheless continue the trend it set in its Appellants Brief of arguing over the merits of its original request for a contested case, which it voluntarily dismissed. Appellants also misrepresent the single issue on appeal in its Return. Compare Return at 6 ("The issue is

¹ The ALC further found that "[Appellants] have disputed none of [Greenville Water's] material facts. Because [Upstate Forever] limited their appeal to one legal question regarding DHEC's authority to impose minimum flow requirements as a condition of the Certification, **all factual claims that the parties may have previously been in disagreement over are no longer in question.**" (R.p.4), ALC Order at 4 (emphasis added). This finding was not appealed by Appellants and is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed factual ruling by a lower court is the law of the case) (citing In re: Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996)).

whether DHEC is required by law to place conditions on [Greenville Water's] permit and certification requiring minimum flow releases in order to protect water quality.") (emphasis added) and Return at 12 (Heading D.: "Even if the 401 Certification "Has No Legal Effect" DHEC Has a Mandatory Duty to Require Minimum Flows") (emphasis added) to App. Br. at vi, Statement of Issues on Appeal ("Did the ALJ Err in Concluding that the S.C. Department of Health and Environmental Control Does Not Have the Authority to Impose Stream Flow Conditions") (emphasis added). Respectfully, there is a substantial difference between a "requirement" by law and "the authority to impose." As discussed in Greenville Water's Respondent's Brief, the "authority to impose" does not equate to a "requirement" that DHEC do so. See Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963 (9th Cir. 2006) ("[S]tates *may* set minimum flow standards as part of section 401 certification requirements," but are not required to do so.) (emphasis in original); Colorado Wild, Inc. v. United States Forest Service, 122 F.Supp.2d 1190, 1193 (D. Colo. 2000) (CWA Section 401 does not mandate the imposition of minimum flow requirements); cf. Moore v. Waters, 148 S.C. 326, 146 S.E. 92 (1928) (establishing and distinguishing the clear difference between discretionary and mandatory authority, affirming the trial court's refusal of a writ of mandamus with respect to a discretionary decision); Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356, 360 (1936) (stating that "[t]he Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority") (citing Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936)).

Therefore, even assuming, arguendo, that this Court would answer the single issue presented to it in the affirmative—i.e., yes, DHEC has the authority to impose minimum instream flow requirements as a conditions of the Certification as issue—instilling the authority

in DHEC to do something merely provides it with the discretion under the appropriate circumstances, not the requirement, to do so.

Furthermore, DHEC, the regulatory agency, is clearly on record in this case as stating that the imposition of minimum instream flow requirements on Greenville Water is entirely inappropriate given the pipe replacement project at issue in this case.² It is for this reason, inter alia, that Respondents contend the current appeal non-justiciable, and amounts to nothing more than a request for an advisory opinion based on Appellants' voluntary dismissal of any meritorious issues it might have had related to DHEC's certification in this case. See Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996) ("A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character."); see also Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 577 n.6, 703 S.E.2d 197, 204 n.6 (2010) (vacating the order of a lower court where it addressed an issue that had not been raised to it, finding the analysis of the issue amounted to an advisory opinion); see also In re: Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions); Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

The scope of the project was the replacement of a water pipe. While it makes absolutely no sense to impose flow conditions on an intake water pipe for drinking water supply, as DHEC properly concluded, any flow conditions that could have been imposed would have necessarily been limited to the scope of the project. Once the project was completed, there was nothing left

² The merits of Appellants' continuing erroneous suggestion that the imposition of minimum instream flows is required under the Clean Water Act is discussed herein, infra, § (B).

on which to impose these restrictions.³ Upon issuance of the final approval, the operation of the intake pipe is governed by the operating permit (i.e., the approval). Resp. Br., Ex. A. The Appellants failed to challenge the issuance of the final approval, and thus the operation of the intake pipe may proceed unabated, leaving the “construction” phase behind.⁴

(B) Appellants misconstrue the 401 Certification issued by DHEC.

Appellants continue to argue against a project that is not before the Court and was not before DHEC or the ALC. See Resp. Br. at 17-19. Further, as they argue for unlimited and unbridled agency authority to impose conditions on any aspect of an applicant’s operations, Appellants consistently rely upon inapplicable cases involving hydropower facilities (e.g., dams) for which the project scope included the permitting of the operation of the facility and its ongoing, continuing discharge into a water of the United States. See, e.g., PUD No.1 of Jefferson

³ The situation in this case may or may not be true for other projects or other circumstances. Here, the 401 Certification was for the construction of an intake pipe. In these circumstances and in this case, a minimum flow regime for pipe construction is illogical and unwarranted, and any such condition would necessarily end when the construction was completed.

⁴ The Appellants attack on the final approval is without merit. They claim that the final approval does not include any reference for its issuance and the 401 Certification makes no mention of the need for a final approval. App. Return at 3 n.1. These claims follow on the theme of the Appellant’s failure to understand fundamental environmental permitting procedures and requirements in this State. First, the final approval specifically references the intake pipe construction project. Second, the construction of the intake pipe can only be placed into operation upon final approval of DHEC. This is a basic legal requirement for these types of projects. See 25 S.C. Code Ann. Regs. 61-58.K.1 (“Newly-constructed facilities shall not be placed into operation until written approval is issued by the Department....”). Further, it is difficult to comprehend how the Appellants can claim that a final approval cannot be challenged, given the broad authority to challenge any decision from DHEC. S.C. Code Ann. § 44-1-60(A) (“All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.”); Mason A. Summers and Randolph R. Lowell, *Department of Health and Environmental Control* in S.C. Administrative Practice and Procedure at 336 (2d ed. S.C. Bar 2008) (“Permitting decisions made by the DHEC staff regarding drinking water systems may be appealed in accordance with the standard procedures for filing such appeals.” (citing S.C. Code Ann. § 44-1-60)). Appellants’ failure to understand the applicable law and permitting procedure cannot be held against Greenville Water and DHEC.

County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) (hereinafter PUD No. 1); App. Br. at 14-16. Simply put, this is not a new dam project, or even a re-licensing of one, but rather a pipe replacement project to upgrade the existing facilities of Greenville Water and better serve the general public that relies upon it for safe and reliable drinking water. See (R.p. 14), DHEC Final Agency Decision at 2 (stating that "the scope of this project is the construction of a raw water transmission main for the transmission of raw water from the Table Rock Reservoir, and not the impounding of water to create the reservoir, which was dammed more than seventy (70) years ago.").

In arguing that minimum instream flow conditions are a proper by-product of this project, Appellants continue to misrepresent the federal Clean Water Act and its applicability, and specifically misrepresent the Section 401 Water Quality Certification program, process, and limitations. As discussed thoroughly in the Respondent's Brief, see Resp. Br. at 20-32, a Water Quality Certification assures that a project complies with Section 401 of the federal Clean Water Act, 33 U.S.C.A. § 1341. It is mandated for any project requiring a **federal** license or permit and which may result in any discharge into navigable waters, including, for example, the discharge of fill pursuant to a Section 404 wetlands "dredge and fill" permit issued by the Corps. 33 U.S.C.A. § 1344; 25A S.C. Code Ann. Regs. 61-101.A.2.

For the project at hand, the regulated activity is the replacement of the intake pipe, which had temporary impacts on 0.332 acres of waters of the State and 0.2451 acres of waters of the United States. **(R.pp. 13-14)**. The only discharge associated with the Project—the fill associated with the actual construction of the replacement pipe—has already occurred, been mitigated and is now complete. **There is no continuing and on-going discharge**, and it is

undisputed that “[i]nstream flows will not be decreased as a result of the Project.”⁵ (R.p. 4), ALC Order at 4. In other words, there is no connection to or even “incidental effect” on downstream water quality from the intake pipe replacement. Absent this relationship, there is no authority for DHEC to impose water usage or water quantity restrictions through a 401 Certification for this Project. To hold otherwise, as held by both the DHEC Board and the ALC, would be an arbitrary and capricious exercise of DHEC’s 401 Certification authority. See (R.p. 14), DHEC Final Agency Decision at 2 (“[C]onditioning the certification ... with a minimal flow requirement from the dam would exceed [DHEC’s] authority and would be arbitrary and capricious.”); (R.p. 6), ALC Order at 6 (“Because the project at issue does not involve the reservoir, conditioning the certification and permit with a minimal flow requirement from the dam would exceed DHEC’s authority and would be arbitrary and capricious.”). Further, having waived and abandoned any challenge to the **permitted** discharge, Upstate Forever instead now challenges the operations of Greenville Water related to the Reservoir. However, applying the appropriate scope of review to the activity and Project at issue in this case, (i.e., the intake pipe replacement), as DHEC staff, the DHEC Board, and the ALC similarly concluded: there is no other discharge.⁶

Consequently, Appellants are misguided on several levels. First, having limited their appeal below, the only preserved issue for the court is a hypothetical question that asks this Court for an advisory opinion. Second, even if Appellants were successful in re-creating the

⁵ The lack of a continuing and on-going discharge further serves to distinguish federal cases cited by the Appellants that involve a challenge to a federal Section 404 permit, as discharges under Section 404 for the fill of a wetland, even when completed, are generally deemed to be of a continuing nature. That is not the situation here, where the sole issue is the authority of DHEC to impose minimum flow conditions on a pipe replacement project.

⁶ The Appellants argument about on-going obligations under the 401 Certification is a red herring. Those conditions all relate to mitigating for the impact that occurred for the actual construction itself, such as ensuring that the grass in the disturbed areas grows back.

state of its current appeal before this Court, Appellants are fundamentally wrong as a matter of law on the issue asserted. Third and finally, based on Appellants' acquiescence to the automatic stay of the activities in this appeal,⁷ the minimal discharge giving rise to the requirement of obtaining a 401 Certification has already been completed.

(C) Appellants consented to the lifting of the automatic stay by the ALC.

As Appellants readily admit, see Return at 12, they consented to the lifting of the automatic stay in order to allow the physical construction of the replacement pipeline. Furthermore, as discussed above, Appellants voluntarily dismissed their challenge of the merits of DHEC's instream flow decision, leaving only a contingent, hypothetical and abstract question for the ALC's contested case. Respondents note that Appellants' decision to limit its contested case appeal to this single issue occurred after it decided to consent to Greenville Water's motion to lift the automatic stay. Therefore, any foreclosure of judicial review rights, as asserted by Appellants, see Return at 12, is of its own making. It was Appellants' strategic decisions with the completion of the project that have ultimately rendered this appeal moot.

(D) Appellants' appeal is moot, and none of the exceptions to the mootness doctrine apply.

As argued extensively in the Motion,⁸ the portions of the Project which required the Certification and which were challenged by Appellants have been fully completed.⁹ Furthermore, the Project as a whole has been fully completed, as evidenced by the DHEC Final

⁷ See discussion, infra, § (C).

⁸ Respondents do not intend to rehash the arguments made in the Motion as to why Appellants' appeal is moot. Accordingly, Respondents expressly incorporate by reference those arguments herein.

⁹ The only issue on appeal involved the Certification. The Appellants waived and abandoned any challenge to the Construction in Navigable Waters Permit.

Approval, issued on February 1, 2012. See Motion, Ex. A. Consequently, this appeal is moot, as there exists no justiciable controversy between the parties and this action does not meet one of the articulated exceptions to the doctrine of mootness. Moreover, this appeal, as proffered to the Court, is the definition of a hypothetical: does DHEC have the authority to impose a minimum flow release as a condition of its 401 Certification (even when there is no release of flow by the Project)? As presented, this issue does not even allege that DHEC erred in **not** imposing a minimum flow as a condition to Greenville Water's Certification on this replacement intake pipe. Consequently, Appellants are requesting the Court answer a purely hypothetical question that will have no bearing on this action. See In re: Treatment & Care of Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (stating that a contingent, hypothetical or abstract dispute does not constitute a justiciable controversy) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). In its Return, Appellants do nothing to dispel the justiciability concerns raised by Respondents, and further fail to articulate how the appeal qualifies under one of the recognized exceptions to the mootness doctrine.¹⁰

Appellants' lone argument in its Return is that this Court should invoke the public interest exception to mootness because the issue is one of public importance and of imperative and manifest urgency. Return at 14. The Project at issue in this case, and the 401 Certification under which it was undertaken, do not occupy the realm of public importance required to satisfy this exception. This Project was not a request to withdraw more water from the Reservoir than

¹⁰ In fact, Appellants appear to concede that two of the exceptions do not apply: (1) capable of repetition yet evading review; and (2) affecting future events or having collateral consequences. While Appellants continue rely upon their own strategic mistake to allege that this case, and others like it could evade review where the automatic stay is lifted, Appellants wholly fail to argue that the current project is "capable of repetition." See App. Return at 14-16. Moreover, Appellants fail to argue that dismissal of the instant appeal would affect future events or have collateral consequences for the parties. Consequently, these two exceptions can be dismissed out of hand.

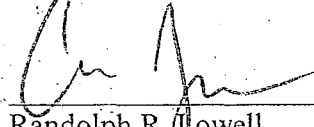
Greenville Water does currently, or to modify the existing legal restriction on withdrawals from the Reservoir found in Greenville Water's existing interbasin transfer of water (IBTR). Rather, Greenville Water's request here was merely to replace an aging intake pipe. (R.p. 2). As the ALC, found, this pipe replacement project did not in any way change the withdrawal limits in place for the Reservoir. (R.pp. 4-5), ALC Order at 4-5. Appellants did not appeal from this holding; therefore, it is the law of the case. See ML-Lee Acquisition Fund, 327 S.C. at 241, 489 S.E.2d at 472 (holding that an unappealed factual ruling by a lower court is the law of the case) (citing In re: Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996)). Additionally, because minimum instream flows are not properly a part of a project of this type, there is no manifest urgency to decide an issue for future guidance and public interest. As a result, this completed water pipe replacement project has no effect on future pipe replacements and certainly does not present an imperative or urgent need to establish a rule for future conduct, as such rules already exist.

CONCLUSION

The only issue in the appeal before this Court is DHEC's 401 Certification authorizing Greenville Water to replace an aging water pipe. Greenville Water has now completed the water pipe replacement and thus the Certification and Permit is, likewise, completed. Further, DHEC has issued its Final Approval for the project, authorizing it to be placed into operation, which the Appellants have not challenged. There is nothing left for the Court to modify or amend with respect to this completed Project. Thus, there is not an active case or controversy and Appellants' case is moot. Moreover, none of the three recognized exceptions to the doctrine of mootness are present in this case. For these reasons, Respondents hereby respectfully move that this case be dismissed as it is moot and not justiciable.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Randolph R. Lowell

Chad N. Johnston

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

rlowell@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

Eugene C. McCall, Jr.

Ryan W. Trail

McCall Environmental, P.A.

Post Office Box 3027

Greenville, South Carolina 29602-3027

gene@mccallenv.com

ryan@mccallenv.com

Attorneys for Respondent

Greenville Water



Stephen P. Hightower

Staff Attorney

S.C. Department of Health and

Environmental Control

2600 Bull Street

Columbia, South Carolina 29201

hightosp@dhec.sc.gov

Attorney for Respondent

S.C. Department of Health and

Environmental Control

April 9, 2012

Dayid D. Armstrong
P.O. Box 10855
Greenville, SC 29603

Breanna M. Karns

Breanna M. Karns

This 9th day of April, 2012.

The South Carolina Court of Appeals

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

v.

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

The Honorable John D. McLeod
Administrative Law Court
Trial Court Case No. 2009-AL-07-00226

ORDER

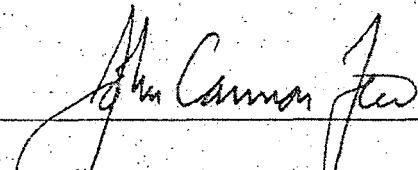
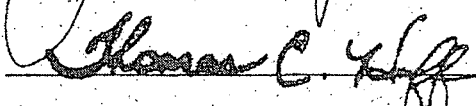
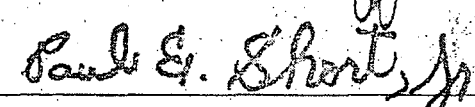
Appellants appeal an order from the administrative law court (the ALC) affirming the decision of the Board of the Department of Health and Environmental (the Department) and granting Respondents' motion for summary judgment. Respondents have filed a motion to dismiss this appeal as moot because no justiciable controversy exists due to the completion of the project. Additionally, Respondents argue Appellants' sole issue on appeal, whether the Department has the authority to impose minimum stream flow requirements as a condition of its water quality certification permits, is a purely hypothetical question that does not fall within any of the mootness exceptions. However, Appellants argue this appeal is not moot because this court can provide effectual relief and a cognizable remedy. In support, Appellants argue the Department has the discretion to establish any limitations on certification permits, the ability to modify the conditions of the certification, and the authority to mandate protections for navigable waterways in South Carolina. Moreover, Appellants asserts that even if

this court determines the appeal is moot, the public importance exception applies because the consequences of a low flow stream are of global significance.

Generally, this Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). "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). "This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* at 567-68, 549 S.E.2d at 596. However, the public importance exception to mootness permits a court to consider moot issues if "the issue . . . present[s] a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) (citation and quotation marks omitted).

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. Moreover, because we dismiss this appeal, we need not address Trout Unlimited's motion to file an amicus curiae brief.

IT IS SO ORDERED.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Amy E. Armstrong, Esquire
Eugene C. McCall, Jr., Esquire
Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Stephen Philip Hightower, Esquire
David D. Armstrong, Esquire
Frank S. Holleman III, Esquire
Nicholas S. Torrey, Esquire

FILED

5/25/12 

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07--CC

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 REHEARING *EN BANC*

RECEIVED

JUN 13 2012

SC Court of Appeals

Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Appellants

Georgetown, South Carolina

June 11, 2012

000580

Pursuant to SCACR Rule 219, SCACR Rule 221(a), SCACR Rule 240(i), and S.C. Code § 14-8-90(a)(1) the Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation respectfully petition this Court for a rehearing *en banc* of the Order granting Respondents motion to dismiss dated May 25, 2012.

Summary of Argument

The panel's decision to dismiss this case will have far-reaching and unintended consequences. In rejecting the Appellants case without hearing arguments, the Court has effectively declared that an activity requiring a S.C. Department of Health and Environmental Control ("DHEC") permit and certification can proceed in the face of an administrative challenge and thereby operate to render a case moot prior to obtaining the judicial review guaranteed by Article I, Section 22 of the S.C. Constitution. The Court deprived the Appellants of their due process right to judicial review of this administrative decision, while simultaneously converting the "automatic stay" provision of the Administrative Procedures Act into a mechanism to moot contested case hearings of agency licensing and permitting decisions. The Opinion creates a standard whereby a motion to lift the automatic stay should never be granted (and discourages parties from consenting to lift a stay) because it would render a case moot, take away the court's jurisdiction to hear a contested case, and deprive citizens of due process rights.

The panel misapprehended the effect of the "automatic stay" provision in S.C. Code § 1-23-600(H)(4), and misapplied the mootness doctrine. In reaching its decision, the relevant inquiry on a motion to dismiss on grounds of mootness is *whether relief can be granted* by the reviewing court. But rather than undertaking this analysis, the court summarily dismissed the appeal providing scant analysis or explanation of how it arrived at its conclusion that it could not

grant relief in the form of a remand to DHEC.

The Opinion contradicts established standards for assessing mootness, as well as case law holding that an administrative appeal is not moot despite the permitted activity being completed.

Background

This case is an appeal of a DHEC decision to issue a 401 Water Quality Certification and Navigable Waters Permit to Greenville Water¹ authorizing the construction of 7.8 mile long, 42 inch raw main water line. The water line connects the Table Rock Reservoir ("TRR") in Pickens County to its end at the Greenville Water treatment plant in Greenville County. The TRR is owned and operated by Greenville Water.

The South Saluda River, which originates at the base of TRR, 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 recreation 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. (Rr. pp. 218-220). The South Saluda River is classified as "Trout Put Grow Take" waters under DHEC's water classification regulations, R. 61-69, indicating that it is suitable for management as stocked trout stream and is capable of supporting year round trout growth. DNR stocks the river with trout to provide recreational trout fishing. *Id.*

The South Saluda and its resources are presently experiencing significant adverse impacts due to the low flows in connection with the volume of water Greenville Water releases

¹Since this contested case was filed, Greenville Water Systems has changed its name to "Greenville Water." Appellants will thus refer to the Respondent as Greenville Water or "GW" throughout this petition.

from the TRR. The wild population of trout is already so reduced due to low flows and warmer water that it is necessary to stock to maintain a fishery. 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 hold over and remain in the stream. *Id.* These problems are a direct result of GW'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% per cent of the time over the course of five years —that is, for one out of every three days, there was not enough water in the river for fish, much less trout, to survive. (R. pp. 221-229). The result of this low flow is that one-third (1/3) of the time, the flow in the South Saluda was insufficient to support the existing and designated uses.

DNR has expressed that:

Dewatering 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.

(R. pp. 203).

I. Request for Rehearing *En Banc*

Rule 221(c) and Rule 240(i) provide that the appellate court may entertain petitions for rehearing on a motion or petition if the "action of the court on the motion or petition has the

effect of dismissing or finally deciding a party's appeal." The decision of this Court on the Respondents' motion to dismiss has the effect of dismissing and finally deciding the Appellant's appeal. Thus, when a hearing was never conducted in this case, a petition for rehearing is nonetheless proper given the effect of the court's decision.

Rehearing *en banc* "ordinarily will not be ordered' except upon the listed grounds." *Williamson v. Middleton*, 681 S.E.2d 867 (2009). SCACR Rule 219 lists the grounds for the Court to hear a case *en banc*: when (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a question of exceptional importance. This Court has granted rehearing *en banc* in prior cases, and reversed or modified the decision of the panel. *See, e.g., Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 590 S.E.2d 479 (2003); *State v. Dudley*, 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003) *aff'd as modified*, 364 S.C. 578, 614 S.E.2d 623 (2005).

The Appellants submit that the order dismissing the appeal, and the merits of this appeal, involve two questions of exceptional importance. The first question is whether a case is mooted and a court loses jurisdiction of an appeal of an administrative agency decision if the automatic stay of S.C. Code Ann. § 1-23-600(H)(4) is lifted. The second question is whether DHEC has the authority and duty to require Greenville Water Systems ("GWS") to release minimum flows from the Table Rock Reservoir into the South Saluda River.

A. Lifting the Automatic Stay Envisions Construction Moving Forward in the Face of an Appeal

The S.C. Administrative Procedures Act ("APA") provides for an automatic stay of DHEC decisions. S.C. Code Ann. § 1-23-600(H)(2). The automatic stay prevents an activity

from moving forward once a request for contested case hearing is filed in the Administrative Law Court. *Id.* The Administrative Law Court can lift the automatic stay “for good cause shown or if no irreparable harm will occur.” S.C. Code Ann. § 1-23-600(H)(4). The APA envisions instances in which construction could move forward to completion, yet the contested case challenging a DHEC permit or certification decision would survive. This approach makes logical sense, and is consistent with case law concluding that completion of construction does not moot a challenge to the permit or certification that authorized that construction.² *See Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996); *City of Olmsted Falls, Ohio v. U.S. Environmental Protection Agency* 435 F.3d 632, 636 (6th Cir. 2006).

A relevant inquiry necessarily includes whether the ALC can grant meaningful relief if the stay is lifted. Administrative Law Judges do grant, and parties do consent to, a partial or complete lifting of the automatic stay in instances where the relief sought can still be accomplished, despite completion or partial completion 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.

In this case GW filed a motion to lift the automatic stay. The Appellants consented to the lifting of the automatic stay because of the public service that GW provides and its need to replace deteriorating infrastructure. (R. pp. 99-111). The consent was expressly made on the

²Section II.B. below provides a thorough discussion of cases in which courts have held that completion of construction of a permitted activity does not render an appeal of that permit moot.

basis that the appeal would remain viable because if Appellants prevailed, DHEC would have to place minimum instream flow requirements on GWS' permit and certification.

The Appellants now face severe adverse consequences – elimination of judicial review rights – as a result of this willingness to be cooperative and reasonable. If lifting the automatic stay to allow construction would result in a court rendering a contested case hearing moot, then no court should ever allow the automatic stay to be lifted. In actuality, the lifting 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, as has been the practice in federal courts.

The Court's Opinion has potentially far-reaching and drastic impacts because it severely limits the jurisdiction of the Administrative Law Court, as well as the appellate courts, and contravenes the intent and purpose of lifting the automatic stay. The Order both punishes parties for agreeing to a complete or partial lifting of the stay for projects in the public interest and signals that any motion to lift the automatic stay must be vigorously opposed, lest a case become moot and that party be deprived of administrative and/or judicial review.

The Order dismissing this appeal on the grounds that the permitted activity has been completed is a significant departure from administrative practice and procedure and case law (Section II.B, below), and will severely restrict the ability of the ALC, this Court and the S.C. Supreme Court to provide relief in administrative appeals.

**B. DHEC Has the Authority and Mandate to Require TRR to Release
Minimum Flows of Water from the TRR to the South Saluda**

As discussed thoroughly in Appellants' brief (and the amicus brief of Trout Unlimited which was similarly summarily rejected) the South Saluda River is severely threatened both in terms of water quality and recreational uses because of insufficient flows in the River. (App. Brief, pp. 3-10). The Appellants have asserted in this case that DHEC has a mandatory duty to protect classified and existing water uses, and that its permitting decision in this case fails to do so by not requiring minimum instream flow releases from the TRR into the South Saluda River. The question of the extent of DHEC's regulatory authority and its compliance with the mandates of the Pollution Control Act and its regulations for the protection of water quality is of exceptional importance. In addition, the South Saluda and its trout fishery are recognized for their exceptional importance by state and federal resources agencies, the S.C. Department of Natural Resources and the U.S. Fish & Wildlife Service. (R. pp. 202-217)

The Court misunderstands Appellants argument in stating that "Appellants argue the Department has the discretion to establish any limitations on certification permits ..." While generally, the Department does have the discretionary authority to impose conditions and limitations on its water quality certifications, *see* S.C. Code Ann. Reg. 61-101(A)(5); *see also* 33 U.S.C. § 1341(d), the inquiry in this case goes also to whether the Department is required to act when conditions are necessary to protect existing water uses and the water quality necessary to protect those uses. (App. Brief, p. 21 ("Regulation 61-68 mandates that DHEC impose conditions that protect uses ..."); App. Reply Brief, p. 2 ("Regulations require DHEC to impose flow conditions when necessary to protect water quality.")). Specifically, DHEC has the 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. S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). The anti-degradation policy requires 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 and 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, [therefore t]he stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained . . .” S.C. Code Ann. Reg. 61-68.D.1. (emphasis added).

Appellants direct the Court to the report of the S.C. Department of Natural Resources indicating that the South Saluda is imperiled because of GWS’ failure to release adequate volumes of water into the river. (R. pp. 218-220). When the State’s natural resource agency has forcefully advocated for the State’s regulatory agency to exercise its authority to ensure protections for unique and limited State resources, the natural resource agency’s perspective and opinions shed light on the significance of the issues at stake. Appellants submit that this question of DHEC’s authority and responsibilities is an exceptional question, particularly in light of the severe adverse consequences on the South Saluda resulting from GW’s failure to release adequate flows and DHEC’s complacency in allowing it to do so.

II. The Opinion Erroneously Applies the Test for Mootness

“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”).

A. Effectual Relief and a Cognizable Remedy Are Available

The Court’s Opinion is premised on a finding that no effectual relief or cognizable remedy could be provided by a favorable ruling. The relief sought in this case is unique in the very fact that completion of the disputed project in no way diminishes availability of the relief. The Appellants seek from this Court relief in the form of an order remanding this 401 Certification decision under appeal to the Administrative Law Court with instructions to remand the decision to DHEC to place minimum instream flow conditions on the 401 Certification. The basis for this relief is found in S.C. Code Ann. Regs. 61-68 and 61-101, as discussed above and at length in Appellants Brief at pages 17-24. In reviewing 401 Certifications for compliance with 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) (emphasis added).

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.³ S.C. Code Ann. Reg. 61-101(A)(5) (emphasis added). In this case, the existing water uses of the impacted water body, the South Saluda River, are legally classified as “Trout-Put, Grow and Take” waters, which means the waters are suitable for supporting growth of trout populations and a balanced indigenous aquatic community of fauna and flora. S.C. Code Ann. Regs. 61-68.E.2(b)

Appellants (and the Proposed Amicus, Trout Unlimited) argue that uses of the South Saluda are jeopardized by this project, that DHEC must therefore impose conditions on this 401 Certification to protect those uses, and that minimum instream flows are an appropriate and necessary condition for that purpose. If the Court agreed that DHEC had the authority and duty to impose minimum flow conditions on Greenville Water’s 401 Certification in order to protect water quality as mandated under the law, the Appellants relief would be fully and completely accomplished. This Court’s relief would not require removal of the pipeline or otherwise

³The 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, imposed a minimum instream flow regime as part of 401 Water Quality Certifications in the past. (R. p. 151). Respondents simply assert that DHEC cannot impose those minimum instream flow conditions to Greenville Water Systems’ water quality certification.

Notably, the Respondents point to no statutory or regulatory support for this claim that DHEC has no authority to apply minimum flow requirements to GWS’ 401 water quality certification, and in fact, there is no statutory or regulatory support for this claim. 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 in Appellants Final Brief.

jeopardize the project as constructed.

This case is therefore not moot because it is possible for the reviewing court to grant effectual relief and provide a cognizable remedy. The issue is whether DHEC is required by law to place conditions on GW's permit and certification requiring minimum flow releases in order to protect water quality. Should this Court rule that DHEC does have the authority and erred by failing to include minimum flow conditions in its certification, then the Court could remand the decision back to DHEC with instructions to place flows conditions necessary to protect water quality.

Only by ignoring the purpose and nature of the GW project can one argue that this certification decision is moot. 401 Certifications typically impose conditions on projects, and DHEC, in fact, imposed conditions on the 401 certification in this case. As Respondents admit, flow conditions can be imposed on 401 certifications of dam relicensing projects. (R. pp. 416-418). The controversy in this case can still (and easily) be remedied by the imposition of a minimum flow condition. The fact that effective relief can be granted conclusively shows that the case is not moot. *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006); *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

B. Completion of Construction Does Not Moot a 401 Certification

The Respondents attempt to sidestep the clear availability of effective relief by making the strained and illogical argument that the "certification has no more legal effect," and that the certification is "supplanted by" DHEC's approval to GW that the pipeline is operable because the construction has been completed. (Resp. Brief p. 7). There is no legal support for GW's apparent conclusion that the 401 Certification has vanished and is no longer a valid approval,

despite the pendency of this appeal. Neither the Court, nor GW and DHEC, point to any legal support for this conclusion.

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 statute 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 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 pipeline.

Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996), was a National Environmental Policy Act (“NEPA”) 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 pipeline,

but rather to maintenance of minimum stream flows released from the reservoir that pipeline transfers 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.

Nothing in those cases nor any other cases Appellants are aware of support the Respondents' arguments that a permit or certification simply vanishes once the permitted activity is constructed.

i. If Certification Has No Legal Effect DHEC Would be Divested of Jurisdiction

If a 401 Certification no longer has any legal effect after the authorized construction is complete, DHEC would effectively be divested of its jurisdiction and its ability to ensure continuing compliance with certification conditions. DHEC routinely places conditions on 401 Water Quality Certifications that survive well beyond the actual construction activity that necessitated the Certification, regularly imposing long-term monitoring requirements and other conditions related to continued maintenance and protection of water quality. In fact, DHEC has done so in this particular case.

The very first condition imposed in DHEC's 401 certification of the GWS project provides that GWS must follow best management practices "on and off the project site DURING AND AFTER CONSTRUCTION." (R. pp. 416-418). 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 GW Certification addresses how wetlands impacted by GWS's construction must be maintained in the future. GW must maintain the vegetation in such

wetlands in an "uncleared or uncut state." (R. pp. 416-418). Clearly such condition imposes obligations on GWS beyond the period of construction. Under GW's argument, they would have no obligation to comply with these conditions and DHEC would have no authority to enforce them. Respondent's brief focuses on the fact that the pipe has already been constructed – an activity that Appellants consented to – and which was never in dispute, rather than the relief which is sought by the Appellants.

**ii. If Certification Has No Legal Effect Appellants Would be Denied
Procedural Due Process Rights to Judicial Review**

This contested case was initiated when the Appellants filed a request for a hearing before the Administrative Law Court pursuant to S.C. Code Ann. § 44-1-60(E). The ALC issued an order granting summary judgment in favor of the Respondents. The Administrative Procedures Act provides that a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380(A). The Appellants then filed a notice of appeal in this court pursuant to this provision.

The requirements of procedural due process are deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, and generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 484-85, 636 S.E.2d 598, 615 (2006); S.C. Constitution, art. 1, §22. Due Process guarantees notice, an opportunity to be heard in a

meaningful way, and judicial review. *See Stono River Envtl. Protection Ass'n v. S.C. DHEC*, 305 S.C. 90, 406 S.E.2d 340 (1991). "To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process." *Leventis v. S.C. DHEC*, 340 S.C. 118, 131-32, 530 S.E.2d 643, 650 (Ct. App. 2000).

In this case, if Appellants were denied judicial review after availing themselves at every opportunity of the procedural safeguards afforded them through the Administrative Procedures Act and the S.C. Constitution, they would effectively be denied their procedural due process rights to judicial review.

C. Even if the 401 Certification "Has No Legal Effect" DHEC Has a Mandatory Duty to Require Minimum Flows

DHEC 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. 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).

These provisions give DHEC the authority to impose minimum flow requirements to GW's operation of the Table Rock Dam *sua sponte* and absent a 401 Certification or other

permit under review. The plain and clear language of these regulations vests the agency with ample and express authority to require a minimum flow release to the South Saluda River. And when “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.” *City of Rock Hill v. S.C. DHEC*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citing *City of Columbia v. Board of Health and Env'tl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987)).

Regulation 61-68 thus recognizes that water withdrawal may adversely affect existing and classified uses, in this case Trout-Put, Grow and Take waters, 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 uncontradicted evidence from the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service and Dr. David Hargett is that a minimum flow release is necessary to protect the South Saluda's use as a trout fishery. Thus Regulation 61-68 mandates that DHEC impose conditions to protect these uses, regardless of whether there is a water quality certification.

III. EVEN IF THE COURT CONCLUDED THAT THIS CASE IS MOOT, WHICH IT IS NOT, EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY

There are three exceptions to the mootness doctrine. *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009), *reh'g denied* (Jan. 7, 2009). First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *Id.* “Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” *Id.* at 535 (citing *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). Application of the

public interest exception requires the question at issue to be (1) of “public importance,” and (2) of “imperative and manifest urgency.” See *Sloan v. Greenville County*, 361 S.C. 568, 570–71, 606 S.E.2d 464, 465–66 (2004). Third, “if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596; accord *Sloan*, 365 S.C. at 303, 618 S.E.2d at 878.

Appellants have shown that this case is not moot, but assuming *arguendo* that it is, both the public interest exception and the capable of repetition but evading review exception certainly apply.

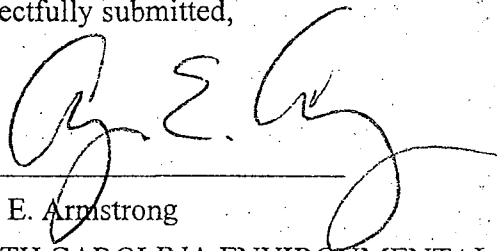
The South Saluda River and its tributaries are used for fishing (including trout), swimming, boating, and other public recreation activities and as a source of irrigation for production of food crops. The South Saluda River, one of South Carolina’s very few trout waters, is considered a jewel of the Blue Ridge Escarpment, an area that has been recognized as an ecosystem of global significance.

As a result of GW’s operation, the flow in the South Saluda is so low that it is a fraction of the historic flow and at a fraction of the potential flow. (R. pp. 218-220, DNR Report). The hatchery-supported (surrogate) trout fishery is taxed. *Id.* With the continued low flow conditions that exist in the South Saluda River, DNR may not be able to manage the surrogate trout fishery over the long term. *Id.* With lack of adequate flows DNR believes it is possible to have a total loss of the natural, remnant trout population which hold over and remain in the stream. *Id.* If the flow is any lower that it is now, there could be serious adverse impacts to the trout populations. *Id.* The report of DNR clearly demonstrates the significant public

resource that is at stake in this case. Moreover, there is a substantial public interest in resolving the issues of DHEC's authority and responsibilities in protecting water quality and existing uses of this State.

The extent of DHEC's authority, and the duties and requirements imposed on it, are frequent questions arising in contested cases challenging DHEC permitting decisions. *See, e.g., Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond*, Case No. 09-ALC-07-0069-CC; *Kiawah Development Partners, II v. SCDHEC & SCCCL*, ____ S.C. ____, 2011 WL 5840326; *Deerfield Plantation Phase IIB v. SCDHEC & Deertrack Golf, Inc.*, Case No. 08-ALC-07-0221-CC. If a contested case can become moot by operation of lifting the automatic stay, as has occurred under this Court's ruling, then future cases involving questions of DHEC's authority will similarly evade review. The Court could review this case on the basis that questions surrounding DHEC's authority and mandates are capable of repetition, but could evade review if and when a stay is lifted and the activity completed prior to judicial review.

Respectfully submitted,



Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380

Pawleys Island, SC 29585

Office address: 430 Highmarket Street

Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellants

Georgetown, South Carolina

June 11, 2012



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 23, 2012

Ms. Amy Elizabeth Armstrong
PO Box 1380
Pawleys Island SC 29585

Re: Upstate Forever v. SCDHEC
Appellate Case No. 2011-186086

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Chad Nicholas Johnston
Frank S. Holleman, III
Stephen Philip Hightower
Eugene C. McCall, Jr.
David D. Armstrong
Randolph Russell Lowell

RECEIVED

OCT 25 2012

000600

The South Carolina Court of Appeals

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

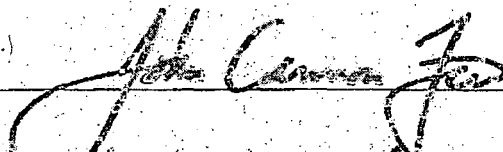
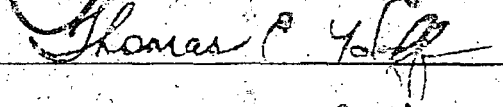
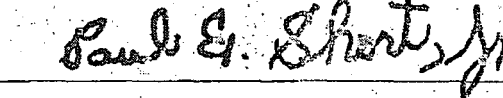
v.

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

Appellate Case No. 2011-186086

ORDER

Appellants filed a petition for rehearing of the dismissal of this appeal and Trout Unlimited filed a motion to file an *amicus curiae* brief in support of Appellants' petition for rehearing. Trout Unlimited's motion is denied. Additionally, after careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

10/23/12 AS

000601

cc:

Chad Nicholas Johnston

Frank S. Holleman, III

Stephen Philip Hightower

Eugene C. McCall, Jr.

Amy Elizabeth Armstrong

David D. Armstrong

Randolph Russell Lowell

Jana E. Shealy