THE STATE OF SOUTH CAROLINA
In The Supreme Court

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,.....Petitioners,

v.

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

MOTION TO DISMISS/STRIKE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 240 and 242 of the South Carolina Appellate Court Rules ("SCACR" or "Appellate Court Rules"), Respondents South Carolina Department of Health and Environmental Control ("DHEC") and Greenville Water, (collectively hereinafter referred to as "Respondents") hereby move this Court for an order dismissing or striking the Petition for Writ of Certiorari ("Petition") of Petitioners Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation (collectively hereinafter referred to as "Petitioners") on November 26, 2012. This motion should be granted because Petitioners' petition for rehearing to the Court of Appeals of its May 5, 2012 Order dismissing the appeal as moot was untimely, as it was not actually received by the Court of Appeals within the express time limit set forth in our Appellate Court Rules. As the timely filing of a petition for rehearing is a prerequisite to the filing

of a Petition for Writ of Certiorari to a decision of the Court of Appeals, Petitioners' have failed to faithfully comply with the Appellate Court Rules and this Court should dismiss or strike the Petition.

ARGUMENT

Rule 221(a), SCACR provides in pertinent part that "[p]etitions for rehearing must be **actually received** by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (Emphasis added). Unlike other rules requiring parties to an appeal to take action by *service* of a filing within a specified time period, *see e.g.* Rules 208, 210 and 211 SCACR (requiring "service" of a filing within a specific number of days), Rule 221(a) is explicit in its requirement that the petition for rehearing be "actually received ... no later than fifteen (15) days)" after the Court issues a decision finally deciding the appeal.

In this appeal, the Court of Appeals issued its Order dismissing the case as moot, on motion of Respondents, on May 25, 2012. **(App. 579).** Accordingly, any petition for rehearing of the Court of Appeal's Order under Rule 221, SCACR must have been "actually received" by the court on or before June 11, 2012. Petitioners' cover letter, transmitting and serving the petition for rehearing, as well as the petition itself are dated June 11, 2012. *See* Exhibit 1, June 11, 2012 Armstrong letter to Deputy Clerk Allen;[1] **(App. 580-99).** Further, Petitioners' Certificate of Service to the Court of Appeals is also dated June 11, 2012, and provides that service of the petition for rehearing was

[1] Petitioners failed to include these and other pertinent documents to this Motion in the Appendix filed with the Court. As these are documents contained in the file of the Court of Appeals and are pertinent to Respondents' Motion, Respondents contend they should have been included in the Appendix filed with the Court under Rule 242(e), and are therefore properly attached to this Motion.

accomplished by placing copies of the same in the mail on June 11.[2] *See* Exhibit 2, Certificate of Service. In fact, the Court of Appeals Clerk Office's date stamp clearly shows that Petitioners' petition for rehearing was received by the Court of Appeals *on June 13*, two days after the time had run for "actual recei[pt]" of the petition under the Appellate Court Rules. **(App. 580).**

In its return in opposition to the petition for rehearing, Respondents argued to the Court of Appeals, *inter alia*, that Petitioners' petition for rehearing was untimely for the reasons detailed above, and the failure of Petitioners to timely file its petition pursuant to the plain language of Rule 221(a) constituted independent grounds for the court to reject the petition.[3] *See* Exhibit 3, Respondents' Return to Petition for Rehearing at 1-3. In their reply, Petitioners address Respondents' timeliness argument and admit that the Court of Appeals did not actually receive a mailed or hand delivered copy of the petition for rehearing on its due date, June 11. *See* Exhibit 4, Petitioners' Reply in support of Petition for Rehearing at 1. Instead, Petitioners contend that they sent the petition for rehearing to the Court of Appeals via facsimile on June 11, and attached as proof of "actual recei[pt]" the fax cover sheet and successful transmission notice to the Court of Appeals' Clerks Office. *See Id.* at 1, Exhibit A. Petitioners further argued that they are justified in making this contention because "counsel for [Petitioners] conferred with at least two individuals in the Court[of Appeals]' Clerks Office, including Deputy Clerk V.

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[2] The Certificate of Service actually memorializes service of "Appellants' Response to Motion to Dismiss"; however, Respondents would contend that this is merely a scrivener's error whereby Petitioners failed to update a Certificate of Service used previously in this appeal and does not impact the Court's analysis.

[3] Petitioners also failed to include both Respondents' Return to their petition for rehearing and Petitioners' Reply in support of same, both of which are pertinent to this Motion and therefore properly attached hereto.

Claire Allen, and was informed that a petition may be 'actually received' for purposes of Rule 221(a) by fax as well as mail." *Id.* at 1.

Petitioners' argument is contrary to the plain language of Rule 221(a). Once more, the Rule provides that "[p]etitions for rehearing must be **actually received** by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." Rule 221(a). When interpreting a court rule, an appellate court applies the same rules of construction used in interpreting statutes. *State v. Brown,* 344 S.C. 302, 307, 543 S.E.2d 568, 570 (Ct. App. 2001). Thus, the language of a rule must be given its plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *Id.* Here, Rule 221(a) is clear that actual receipt, as opposed to merely service, is required. Petitioners admit that actual receipt is required; however, they rely upon an unapproved form of service for petitions for rehearing, *i.e.*, service by facsimile. Our Appellate Court Rules also set forth the manner in which documents and briefs may be filed with the Court: Rule 262, SCACR, provides that documents may be filed with the Court by hand delivery, *see* Rule 262(a)(1), by depositing same in the U.S. Mail, *see* Rule 262(a)(2), and finally by electronically transmitted facsimile, *see* Rule 262(a)(2).

However, Rule 262 sets forth an express caveat to the typical forms of filing documents with the Court. Rule 262(a) provides in pertinent part that "**[e]xcept for petitions for rehearing (Rule 221)** and motions for reinstatement (Rule 260), filing may be accomplished by ...." (emphasis added).[4] Thus, while other motions and memoranda may be filed with appellate courts via facsimile, so long as an original is also sent by U.S.

[4] Rule 260, SCACR, dealing with dismissals and reinstatements of appeals, also uses the "actually received" language used in Rule 221.

Mail, Rule 262 treats petitions for rehearing and motions for reinstatement differently. *Cf. Trowell v. S.C. Dep't of Public Safety*, 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009) (reversing an agency decision that disallowed an appeal from a grievance hearing order as untimely, where the agency found the party had "actually received" notice of a order when it was faxed to his attorney, holding that facsimiles are not ordinarily used to accomplish notice of a decision by a department, agency, or court). Respectfully, the Clerk's Office of the Court of Appeals should not be permitted to waive the express rules, requirements and plain language of our Appellate Court Rules. To hold otherwise would create and perpetuate unnecessary confusion with the Bar. Strict construction is required here, and regardless of what Petitioners may or may not have been told, Rule 221(a) requires the actual receipt of a hard copy of a party's petition for rehearing within fifteen days of the judgment, *i.e.*, by 11:59 P.M. on June 11, 2012.

This Court has previously construed temporal restrictions contained in the appellate court and civil rules of procedure as jurisdictional. *See State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008); *see also S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009). In *Campbell*, the Court discussed the temporal restriction of Rule 29, SCRCP in the context of the general rule that a trial judge is without jurisdiction to consider a criminal matter once the term of court expires. 376 S.C. at 215, 656 S.E.2d at 373. The Court rejected the argument that the ten-day limitation implicated a court's subject matter jurisdiction, but affirmed that the ten-day limitation is jurisdictional, stating that the "lack of jurisdiction ... meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended." *Id.* at 216, 376 S.E.2d at 373. In construing *Campbell*, this Court also

found analogous the temporal restriction in a statute prescribing the period for motions for new trials. *See Holtzclaw*, 382 S.C. at 350, 675 S.E.2d at 759 (construing S.C. Code Ann. § 22-3-1000). This Court found that, where a municipal court acted outside of the prescribed temporal limitation, the court erred in the exercise of its jurisdiction. *Id.* at 351, 675 S.E.2d at 759-60. Thus, once the fifteen day period under Rule 221(a) had run, the Court of Appeals was without jurisdiction to act on a petition for rehearing. Because the petition received by the Court of Appeals was untimely, its denial of the petition for rehearing on grounds other than timeliness was an error in the exercise of its jurisdiction.

Further, the review of a timely petition for rehearing by the Court of Appeals is a condition precedent to filing a Petition for Writ of Certiorari under Rule 242, SCACR. Rule 242(c) provides that "[a] decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals."; *cf.* Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina 277 (2d ed. 2002) ("A petition for a writ of certiorari may not be filed until the decision of the Court of Appeals is final, **specifically, not until the petition for rehearing has been acted on by the Court of Appeals**.") (emphasis added) (citing Rule 226(c), later renumbered Rule 242); *Camp v. Springs Mtg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993) (holding issues not raised in petition for rehearing may not be considered by the Court on certiorari to the Court of Appeals); *see also* Rule 242(d)(1) (requiring a certification by counsel for petitioner that a petition for rehearing was made and finally rule upon by the Court of Appeals);[5] Rule 242(e)(4) (requiring the Appendix

[5] Petitioners' Petition contains the requisite Certification; however, Respondents contend that it is invalid, because Petitioners admit that the petition for rehearing was not filed

to include a copy of the petition for rehearing filed in the Court of Appeals). Thus, because Petitioners' petition for rehearing was untimely, this case was finally decided by the Court of Appeals' initial May 25, 2012 Order dismissing the appeal as moot. The Court of Appeals' subsequent Order denying Petitioners' petition for rehearing was an error in the exercise of its jurisdiction and, in effect, no petition for rehearing was filed, which prevents Petitioners from filing the within Petition. *See, e.g., Richardson v. Stewart*, 386 S.C. 282, 688 S.E.2d 124 (2010) (providing that a petition for writ of certiorari was denied by this Court because no petition for rehearing was filed in the Court of Appeals).

Conclusion

Based on the foregoing, this Court should dismiss or strike Petitioners' Petition for Writ of Certiorari to the Court Appeals. The petition for rehearing to the Court of Appeals was not "actually received" according to the plain language of the Appellate Court Rules and Petitioners' reliance on filing by facsimile should be construed to their detriment. Because the petition for rehearing was merely mailed to the Court and Respondents on June 11, and not received (and stamped in) until June 13, the petition for rehearing was untimely under Rule 221(a), and the Court of Appeals was without jurisdiction to act upon the petition. Consequently, this Court should hold that no petition for rehearing was timely filed by Petitioners, that this Court is, accordingly, without jurisdiction to pass on Petitioners' Petition, and that Respondents' motion to dismiss or strike the Petition is granted.

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pursuant to the plain language of the Appellate Court Rules, but instead by an oral waiver to those rules by the Clerk's office.

Respectfully submitted,

Randolph R. Lowell
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Attorney for Respondent
S.C. Department of Health and
Environmental Control

December 18, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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,.....Petitioners,

v.

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

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Motion to Dismiss or Strike** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
Michael G. Corley, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Stephen Hightower, Esquire
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Breanna M. Karns

Breanna M. Karns

This 18th day of December, 2012.

WILLOUGHBY & HOEFER, P.A.
ATTORNEYS & COUNSELORS AT LAW
930 RICHLAND STREET
P.O. BOX 8416
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ELIZABETHANN LOADHOLT FELDER
CHAD N. JOHNSTON
JOHN W. ROBERTS

*ALSO ADMITTED IN TX

December 18, 2012

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Upstate Forever v. S.C. Dep't of Health & Envtl. Control and Greenville Water,
Case No. 09-ALJ-07-0226-CC
Appellate Case No. 2012-213483

Dear Mr. Shearouse:

On behalf of the Respondents South Carolina Department of Health and Environmental Control and Greenville Water System (collectively Respondents) and pursuant to Rules 240 and 242 of the South Carolina Appellate Court Rules (SCACR), enclosed for filing please find an original and six copies of the joint **Motion to Dismiss or Strike** by Respondents of the above-captioned appeal on the ground that Petitioners' Motion for Reconsideration to the Court of Appeals of its Order dismissing the case as moot was untimely filed. Also enclosed is a check in the amount of $25.00 in payment of the motions filing fee. Please acknowledge receipt of this motion by file-stamping the additional copy of the motion and returning it to me via our courier.

Additionally, it is Respondents' interpretation of Rule 240(b), SCACR, that a Motion to Dismiss is one of two dispositive motions that stay the time limits for all pending matters pertaining to an appeal or petition, pending final resolution of the motion. Consequently, unless the Court directs Respondents otherwise, Respondents will proceed under the Court's previous interpretation of Rule 240(b). Respondents would request, however, that, should the pending Motion to Dismiss or Strike be denied, Respondents' time period for filing its Return to Petitioners' Petition for Writ of Certiorari would commence upon the date of service of the Court's order denying the motion to dismiss.

By copy of this letter, I am serving counsel of record, Amy E. Armstrong and Michael G. Corley, and enclose a Proof of Service to that effect. If you have any questions or need additional information, please contact me at your convenience. With best regards, I am

Respectfully,

WILLOUGHBY & HOEFER, P.A.

Chad N. Johnston

cc: Amy E. Armstrong, Esquire (via first-class mail)
Michael G. Corley, Esquire (via first-class mail)
Gene C. McCall, Jr., Esquire (via first-class mail)
Stephen P. Hightower, Esquire (via first-class mail)

The Supreme Court of South Carolina

Willoughby & Hoefer

12/18/2012

RECEIPT #66619

Case No:	2012-213483
Case Short Title:	Upstate Forever v. SCDHEC
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	20889
Check/Money Order Date:	12/18/2012
Comments:	

Linked

Exhibit 1

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit organization

Amy E. Armstrong
President

Michael G. Corley
Staff Attorney

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
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michael@scelp.org
Website: www.scelp.org

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.

June 11, 2012

Honorable V. Claire Allen
Deputy Clerk
S.C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: *Upstate Forever, et al. vs. SCDHEC and Greenville Water Systems*
ALJ Case No. 09-ALJ-07-0226-CC
Case # 2011186086

Dear Ms. Allen:

Enclosed for filing please find the original and ten copies of the Appellants Upstate Forever, South Carolina Native Plant Society and South Carolina Wildlife Federation's Petition for Rehearing *En Banc*, along with my certificate of service and filing fee.

Please return a clocked-in copy in the envelope provided.

Yours very truly,

Amy Armstrong

cc: Stephen Hightower, Esquire
Eugene C. McCall, Jr., Esquire
Randolph Lowell, Esquire

Exhibit 2

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 Systems, ... Respondents.

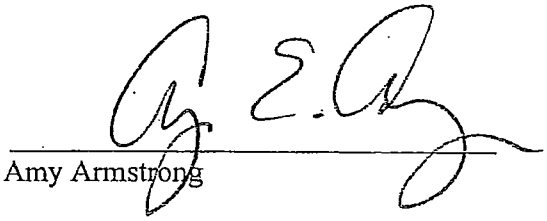
CERTIFICATE OF SERVICE

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

Eugene C. McCall, Jr., Esquire
McCall Environmental, PA
200 August Arbor Way, Suite B
Greenville, SC 29605

Stephen Hightower, Esquire
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201

Randolph R. Lowell, Esquire
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202



Amy Armstrong

Georgetown, South Carolina

June 11, 2012

Exhibit 3

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.

RETURN TO PETITION FOR REHEARING *EN BANC*

Pursuant to Rule 240(e) of the South Carolina Appellant Court Rules ("SCACR"), Respondents South Carolina Department of Health and Environmental Control ("DHEC") and Greenville Water, (collectively hereinafter referred to as "Respondents"), submit the within Return in opposition to the Petition for Rehearing *En Banc* ("Petition") filed by Appellants Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation (collectively hereinafter referred to as "Appellants") on June 11, 2012. For these and other reasons discussed herein, Respondents would show the Court as follows:

1. The Petition is untimely under Rule 221(a), SCACR and should be denied on that ground.
2. The South Carolina Appellate Court Rules do not provide for a "Petition for Rehearing *En Banc*".

3. The Petition fails to contend this Court's decision overlooked or misapprehended Appellants' arguments or the issues presented in the appeal and instead copies, often verbatim, Appellants' Response in Opposition to the Motion to Dismiss.

4. Notwithstanding, the Court was correct to find the appeal is moot and that it should be dismissed as non-justiciable, and was further correct to find that the public importance exception to the doctrine of mootness is inapplicable.

ARGUMENT

1. The Petition is untimely under Rule 221(a), SCACR and should be denied on that ground.

Rule 221(a), SCACR provides in pertinent part that "[p]etitions for rehearing must be **actually received** by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (Emphasis added). Unlike other rules requiring parties to an appeal to take action by *service* of a filing within a specified time period, see e.g. Rules 208, 210 and 211 SCACR (requiring "service" of a filing within a specific number of days), Rule 221(a) is explicit in its requirement that the petition for rehearing be "actually received ... no later than fifteen (15) days)" after the Court issues a decision finally deciding the appeal.

In this appeal, the Court issued its Order dismissing the case as moot, on motion of Respondents, on May 25, 2012. Accordingly, any petition for rehearing of the Court's Order under Rule 221, SCACR must have been "actually received" by the Court on or before June 11, 2012. Appellants' cover letter, transmitting and serving the Petition, as well as the Petition itself are dated June 11, 2012. In fact, Appellants' Certificate of Service to the Court is also dated

June 11, 2012, and provides that service of the Petition was accomplished by placing copies of the same in the mail on June 11.[1]

This Court and the Supreme Court have previously construed temporal restrictions contained in the appellate court and civil rules of procedure as jurisdictional. See State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008); see also S.C. Dep't of Motor Vehicles v. Holtzclaw, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009). In Campbell, the Supreme Court discussed the temporal restriction of Rule 29, SCRCP in the context of the general rule that a trial judge is without jurisdiction to consider a criminal matter once the term of court expires. 376 S.C. at 215, 656 S.E.2d at 373. The Supreme Court rejected the argument that the ten-day limitation implicated a court's subject matter jurisdiction, but affirmed that the ten-day limitation is jurisdictional, stating that the "lack of jurisdiction ... meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended." Id. at 216, 376 S.E.2d at 373. In construing Campbell, this Court also found analogous the temporal restriction in a statute prescribing the period for motions for new trials. See Holtzclaw, 382 S.C. at 350, 675 S.E.2d at 759 (construing S.C. Code Ann. § 22-3-1000). This Court found that, where a municipal court acted outside of the prescribed temporal limitation, the court erred in the exercise of its jurisdiction. Id. at 351, 675 S.E.2d at 759-60.

Consequently, because the Petition was merely mailed to the Court and Respondents on June 11, but not received, the Petition is untimely under Rule 221(a), this Court does not have jurisdiction to act upon the Petition, and this Court should deny the Petition on that controlling ground.

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[1] The Certificate of Service actually memorializes service of "Appellants' Response to Motion to Dismiss"; however, Respondents would contend that this is merely a scrivener's error whereby Appellants failed to update a Certificate of Service used previously in this appeal and does not impact the Court's analysis.

2. **The South Carolina Appellate Court Rules do not provide for a "Petition for Rehearing *En Banc*".**

A "Petition for Rehearing *En Banc*" is not cognizable to an appellate court under the South Carolina Appellate Court Rules, and this Court should deny the Petition based on a failure to comply with the Appellate Court Rules. Rule 221 provides only for a Petition for Rehearing. Should the party filing a Petition for Rehearing under Rule 221 believe that the circumstances and issues contained in the appeal meet the limited criteria justifying an *en banc* audience of the Court, then "a **suggestion** for rehearing *en banc* ... shall be included in the petition for rehearing." Rule 219(b) (emphasis added). Here, instead of addressing this Court's standard in reviewing petition for rehearing, as will be discussed more thoroughly below, Appellants have effectively skipped this burden and instead focus their attention on why the present appeal involves a question of "exceptional importance" which would justify rehearing *en banc*. See Rule 19(a).[2] However, in order to successfully petition for rehearing, Appellants must first convince the Court that it overlooked or misapprehended their argument during its initial consideration. Kennedy v. South Carolina Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Only after that determination is made in favor of the party suggesting rehearing, will the Court consider whether rehearing *en banc* is warranted. By skipping this initial step, and instead re-arguing the merits of its positions as being "exceptionally important", Appellants have failed to meet Rule 221's standard of granting rehearing.

[2] Appellants do not contend that an *en banc* rehearing is necessary to maintain uniformity with prior precedent, see Rule 19(a)(1); therefore, this basis for *en banc* rehearing is irrelevant to the Court's consideration.

3. **The Petition fails to contend this Court's decision overlooked or misapprehended Appellants' arguments or the issues presented in the appeal and instead copies, often verbatim, Appellants' Response in Opposition to the Motion to Dismiss.**

Once the reader of the Petition gets past the parade of horribles and the patent recreation of the case that was dismissed by the Court, it is left with Appellants' attempt to convince the Court, for the second time, of the merits of its positions. Re-arguing its position to the Court, however, is not the purpose of a petition for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 ("The purpose of a petition for rehearing is not to ... have the case tried in the appellate court a second time.") (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999); Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)). Not only do the Appellants fail to meet their burden in suggesting areas that this Court overlooked or misapprehended in its Order dismissing the appeal as moot, a side-by-side comparison of the Petition and Appellants' Response in Opposition ("Response") to Respondents' Motion to Dismiss reveals that **the Petition is nothing more than a copy and paste, verbatim, of Appellants' previous arguments to this Court.** Compare Petition at 4, § I.A. to Response at 11, § I.C. (substantive arguments verbatim); compare Petition at 9, § II.A. to Response at 4, § I.A. (verbatim); compare Petition at 11, § II.B. to Response at 7, § I.B. (verbatim); compare Petition at 16, § II.B.i. to Response at 8, § I.B.i. (verbatim); compare Petition at 17, § II.B.ii. to Response at 10, § I.B.ii. (substantive arguments verbatim); compare Petition at 18, § II.C. to Response at 12, § I.D. (verbatim); Petition at 19, § III. to Response at 13, § II. (substantive arguments verbatim).

Continuing its theme of merely re-arguing issues already dismissed by the Court, what is noticeably absent from the Petition, just as it was absent from Appellants' Response, is an acknowledgment by Appellants of the choices it made in litigating this case, which led to this

Court's decision to dismiss the appeal. While Appellants would have this Court believe that they have been deprived of their full due process right[3] to judicial review, see Petition at 1, quite to the contrary, the positions taken by Appellants in **exercising their rights** in the appeal at the Administrative Law Court ("ALC"), specifically three strategic decisions made solely by and at Appellants' discretion during the course of this litigation, rendered this appeal moot: (1) first, Appellants did not oppose Greenville Water's motion to lift the automatic stay, which permitted Greenville Water to continue construction of this capital improvement project to replace and upgrade a water intake pipe;[4] (2) second, Appellants subsequently decided to limit their appeal before the ALC to a single, hypothetical issue, while abandoning the remaining substantive issues of their appeal; and (3) third, once construction on the replacement pipe project was complete, Appellants failed to appeal or otherwise challenge DHEC's issuance of the Final

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[3] Respondents would note that the issue of due process rights under Article I, § 22 of the South Carolina Constitution has never been, and is not, an issue in this case. The current appeal is the result of Appellants **exercising** their contested case rights as an interested party under the Administrative Procedures Act. See S.C. Code Ann. § 1-23-610(H); but see Petition at 17 (Appellants erroneously citing to S.C. Code Ann. § 1-23-380(A)). By contrast, Article I, § 22 rights are designed to ensure the right to review of an administrative agency decision where no other recourse exists—notwithstanding the additional requirement that a party present a cognizable liberty or property interest that has been affected, which Appellants cannot put forward here. See S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 392, 699 S.E.2d 146, 153 (2010) (confirming that Article I, § 22 due process rights require a showing that a liberty or property interest is implicated). Here, Appellants have exercised their administrative right to review at every level; however, due to its own actions, the appeal has been rendered moot. If a finding that an appeal was moot, and thus non-justiciable, would somehow deprive an appellant of its due process rights, no appeal could ever be dismissed as moot.

[4] One reason Appellants may have consented to the lifting of the automatic stay was a lack of confidence in opposing what even Appellants acknowledge in their brief as the "public service Greenville Water provides and its need to replace deteriorating infrastructure." Petition at 5; cf. Randolph R. Lowell, To Stay or Not to Stay Automatic Stays Before the Administrative Law Court in DHEC Matters, *SC Lawyer* at 20 (Sept. 2008) (showing that a project is in the public interest alone may be enough to satisfy the good cause standard and lift the automatic stay).

Approval to Place Into Operation ("Final Approval"), which effectively moved the project from a construction permit to an operational permit. Thus, this Court was correct and justified in dismissing Appellants' appeal as moot. Appellants have failed to identify any issue that the Court overlooked or misapprehended in dismissing the appeal, instead regurgitating arguments, verbatim, that this Court has already considered and dismissed; therefore, should the Court nevertheless exercise jurisdiction over this untimely Petition, it should deny Appellants' Petition on these grounds.

4. **Notwithstanding the above, the Court was correct to find the appeal is moot and that it should be dismissed as non-justiciable, and was further correct to find that the public interest exception to the doctrine of mootness is inapplicable.**

While Respondents do not intend on re-arguing the reasons this Court found to be controlling in dismissing the appeal as moot, they would like to take this opportunity to refute the meritless and concocted "doomsday" scenario advanced by Appellants in the Petition. As demonstrated above, Appellants own actions in the prosecution of this appeal, first in the contested case hearing before the ALC and then subsequently while the appeal was pending before this Court, rendered this appeal moot. Conveniently, and in an effort to convince the Court that it is doing something other than applying the present facts to longstanding law, Appellants disregard all but its initial decision to consent to the lifting of the automatic stay and disingenuously argue that the effect of this Court's decision will have far-reaching effects on the practice of administrative law. In doing so, Appellants ignore the true reasons this Court dismissed the appeal as moot, and, in a continuation of the arguments made in opposition to Respondents' motion, attempt to recreate its case at the appellate level.

a. Lifting of the automatic stay did not moot this appeal.

Contrary to Appellants' assertion, the ALC's decision to lift the automatic stay, which Appellants did not oppose, did not moot this appeal. Instead, subsequent to the lifting of the automatic stay, and upon its own initiative, counsel for Appellants voluntarily dismissed the merits of its appeal pending before the ALC. Appellants limited their appeal to a single question: "whether DHEC has the authority to impose a minimum flow release ... as a condition of its 401 certification and its construction in navigable waters permit ...." **(R.p. 419)**, Armstrong Ltr. to Judge McLeod. This remaining issue is the definition of a hypothetical question and, because the merits of DHEC's 401 Certification were voluntarily dismissed by Appellants, asks this Court for an advisory opinion. 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.[5] 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 dismissing the appeal as moot, this Court correctly held that it "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." See Order at 2 (citing Sloan v. Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008)). Further, once the Project construction was complete, Appellants failed to challenge the issuance of the Final Approval by DHEC, which signified that the water system

[5] In the Petition, Appellants attempt to assert that part of this issue is whether DHEC is required to impose minimum instream flows under these circumstances; however, as argued extensively in briefing and in support of Respondents' motion to dismiss, Appellants voluntarily limited the issues in this case to a single question before the Administrative Law Court, one that simply asked the question of whether DHEC has the authority; an inherently hypothetical question. Appellants cannot now change the arguments of the appeal, simply because their own actions have rendered this matter moot.

under the permit was operational and 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....").

Moreover, a decision that this appeal is moot does not deny Appellants a right to administrative review. To the contrary, Appellants have taken advantage of rights available to them at every level—Appellants were rebuffed at the DHEC Staff and Board level and then brought a contested case hearing on DHEC's decision, which upheld DHEC's decision in granting summary judgment in favor of Greenville Water. Of course, Appellants failed to avail themselves of a right to challenge the Final Approval operations permit, but that again was Appellants' choice. Clearly, had Appellants opposed the lifting of the automatic stay, good cause existed for the ALC to nevertheless lift the stay under S.C. Code Ann. § 1-23-600(H)(4). In fact, had Appellants not voluntarily dismissed all of the grounds for its contested case with the exception of a hypothetical question, **and** had they been successful at the ALC level, the lifting of the automatic stay would have been—as it is here—irrelevant, as "meaningful review" would have been achieved in the eyes of the Appellants. Appellants' argument is nonsensical, and amounts to nothing more than doomsday rhetoric geared at confusing the issues before the Court.

b. DHEC's authority to require minimum instream flows is, at most, discretionary, and is entirely inappropriate under the facts and circumstances for this pipe replacement project.

The Petition continues to push a theory that this Court can effectuate relief in the form of requiring DHEC to impose minimum instream flows in a certification for a construction permit on this now-completed pipe replacement project. This argument continues Appellants' trend of ignoring its past actions in voluntarily dismissing the merits of the original contested case, which limited the appeal to a single issue and excludes the relief sought by Appellants from the scope

of the appeal before the Court.[6] As discussed in Greenville Water's Respondents Brief, as well as in the memoranda in support of Respondents' Joint Motion to Dismiss, there is a substantial difference between a "requirement" by law and "the authority to impose", and 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)).

Further, even if the issues presented in Appellants' original contested case were before this Court, which they are not, Appellants are simply wrong on the merits of the arguments they present. For the project at hand, the regulated activity which required 401 Certification under the Federal Clean Water Act 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, during the

[6] The ALC held 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)).

construction phase.[7] **(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."[8] **(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 a continuing effect, 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."). Moreover, 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.

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[7] This temporary impact required a federal permit resulting from the discharge of fill into navigable waters of the United States, pursuant to a Section 404—a "dredge and fill" permit—and issued by the Corps. 33 U.S.C.A. § 1344; 25A S.C. Code Ann. Regs. 61-101.A.2.

[8] 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.

c. The public interest exception to the mootness doctrine does not apply.[9]

As argued in the filed memoranda, this Project, and the 401 Certification under which it was undertaken, do not occupy the realm of public importance required to satisfy the public interest exception. The purpose of the Project was to replace an aging intake pipe and 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 Greenville Water's existing interbasin transfer of water. 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. Consequently, this Court was correct to find that the public importance exception does not apply to this appeal.

CONCLUSION

The Petition was untimely filed, and this Court should deny the Petition on that ground alone. Further, Appellants fail to meet their burden in identifying issues or arguments that this Court overlooked or misapprehended in dismissing the appeal as moot. Instead, Appellant

[9] In the Petition, Appellants try to resurrect an argument that the "capable of repetition yet evading review" exception to the doctrine of mootness is applicable to this case. As pointed out in Respondents' Reply in Support of the Joint Motion to Dismiss, Appellants did not argue that this exception had any applicability in the appeal. Further, this Court only ruled on the public importance exception, see Order at 2; therefore, Appellants' argument on this exception is unpreserved for this Court's review. See Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (holding that a party a party may not raise an issue or ground for the first time in a petition for rehearing) (citing Kennedy, 349 S.C. at 532, 564 S.E.2d at 322).

merely copy and pasted whole portions of their previous arguments to the Court in support of the Petition, which is clearly insufficient to meet their burden under this Court's standard for reviewing a petition for rehearing. Moreover, as has been argued extensively in briefing and memoranda to the Court, and as found by the Court in dismissing the appeal as moot, Appellants' own actions in the prosecution of this case rendered the single remaining issue hypothetical in nature, thus begging the Court for an advisory opinion. Finally, even allowing Appellants to recreate the appeal of their choosing at this appellate level, and as summarily found by both DHEC and the ALC, Appellants are simply and irrefutably wrong on the merits of their arguments. For these reasons, the Court should deny Appellants' Petition.

[SIGNATURE PAGE FOLLOWS]

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June 21, 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-07-00226-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.

PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the joint **Return** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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South Carolina Environmental Law Project
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Pawley's Island, SC 29585

Stephen Hightower, Esquire
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Breanna M. Karns
Breanna M. Karns

This 21st day of June, 2012.

Exhibit 4

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.

REPLY TO RETURN TO PETITION FOR REHEARING *EN BANC*

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July 2, 2012

The Appellants/Petitioners Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation hereby respond to the Respondents' joint Return to Petition for Rehearing *en banc* of the Order granting Respondents motion to dismiss dated May 25, 2012.

I. The Petition Was "Actually Received" by the Court of Appeals Pursuant to Rule 221(a) and Is Therefore Timely

Rule 221(a), SCACR states that, "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." As the Respondents correctly point out, in this case the Court issued its Order on May 25, 2012, and Appellants' Petition was due on or before June 11, 2012. Respondents are also correct in that the Petition was served on Respondents by mail dated June 11, 2012. However, counsel for Appellants conferred with at least two individuals in the Court's Clerks Office, including Deputy Clerk V. Claire Allen, and was informed that a petition may be "actually received" for purposes of Rule 221(a) by fax as well as mail. The fax cover sheet and successful transmission notice are attached as Exhibit A, evidencing the Court's actual reception of the Petition on June 11, 2012. Therefore, the Petition for Rehearing is timely and this Court has jurisdiction.

II. The Petition for Rehearing *En Banc* Is Appropriate.

Respondents argue that because Rule 221 provides only for a Petition for Rehearing, petitioning for a Rehearing *en banc* was inappropriate and did not comply with the Appellate Court Rules. Rule 219(b) SCACR is entitled "Hearing or **Rehearing of Cases** by the Court of Appeals **En Banc** and states that, "[i]f a suggestion for **rehearing *en banc*** is to be made, it **shall be included in the petition for rehearing**" (emphasis added). The Respondents complied with the unambiguous express terms of this Rule. Further, though the Appellants/Petitioners have

requested a rehearing *en banc*, the Court is not precluded from granting a rehearing before the panel only. Nothing in the Appellate Court Rules indicates that for an "*en banc*" petition, the Court is required to grant either a rehearing *en banc* or rehearing at all. Instead, including the *en banc* designation merely conveys that Appellants/Petitioners believe the issues raised by this case are of "exceptional importance" and warrant a rehearing beyond the judges in the initial panel.

Respondents also make a "chicken before the egg" argument that the contents of the petition must be in a specific order, namely setting forth the grounds for rehearing first, then setting forth the grounds for an *en banc* request. The rules are silent as to the proper order to present a petition for rehearing and petition for rehearing *en banc*. In practical terms, it is a distinction that makes no difference, and Respondents have not cited any authority to indicate that Appellants' Petition should not be considered on this basis. As evidenced in the Petition, the standard for rehearing before the panel has been met. The Appellants/Petitioners in this case assert that the Court overlooked the law on point, and as a result issued an opinion with far-reaching ramifications to administrative law, thus warranting the full Court's attention.

III. The Appellants/Petitioners Asserted that the Court Overlooked and Misapprehended its Arguments

Rule 221(a), SCACR requires petitioners to state "points supposed to have been overlooked or misapprehended by the court." In demonstrating that this Court "overlooked or misapprehended" the points in Petitioners'/Appellants' appeal, it is self-evident that those points must be discussed. An overlooked point must be re-emphasized and a misapprehended point re-explained. In this instance, the Order of the Court dismissing the appeal failed to address many

of Appellants'/Petitioners' arguments. The Court's reasoning behind dismissing the appeal is not provided in the Order, leaving Appellants/Petitioners to guess what considerations the Court had taken into account in making its decision. The Petition is consistent with Rule 221(a), and Respondents' third argument lacks both legal basis and common sense appeal.

First of all, it is difficult to determine exactly what action the Respondents would have the Court take in response to their third argument. The Respondents do not cite any authority suggesting that the Court should not consider arguments previously made to the Court or that those arguments are otherwise disallowed. Instead, the Respondents cite the Kennedy case for the proposition that "[t]he purpose of a petition for rehearing is not to . . . have the case tried in the appellate court a second time." Respondents' argument overlooks the fact that this case was not "tried in the appellate court" in the first place, because it was never heard. But more importantly, it overlooks the fact that the Kennedy case actually runs completely counter to the Respondents' position.

Contrary to the isolated statement cited by the Respondents, the issue in Kennedy was a petition for rehearing that presented "one significant argument not previously considered by the Court." Kennedy v. South Carolina Retirement System, 349 S.C. 531, 532 (2001). The South Carolina Supreme Court determined that this new argument could not be considered: "Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court . . . [, and] this Court should not consider appellants' previously unpresented evidence when deciding whether to grant the petition for rehearing." Id. If the Respondents are correct in faulting reliance on previously considered arguments, given that the Supreme Court clearly held in Kennedy that new arguments cannot be considered, the petition for rehearing has

been rendered obsolete. On the contrary, particularly where this Court dismissed Appellants' case in a short order without oral arguments, substantial reliance on previously submitted arguments is an inherent and necessary part of a petition for rehearing.[1]

The Respondents contend that "Appellants have failed to identify any issue that the Court overlooked or misapprehended in dismissing the appeal, instead regurgitating arguments." Joint Return, p. 7. Respondents are correct to the extent that a certain level of "regurgitation" of arguments was dictated by this Court's Order. The two-page Order by this Court flatly states the decision to dismiss this appeal as moot, without explanation of the factors which led the Court to reach such a decision. The Court's reasoning behind dismissing the appeal is not provided in the Order, leaving the Petitioner/Appellants to guess what considerations had been taken into account in making the Court's decision. Because of this, Petitioners/Appellants found it necessary to rehash previous arguments in an effort to clear up any misunderstandings it appeared the Court may have had. Appellants' Petition for Rehearing went much further than simple regurgitation, however, and the Court need look no further than the "Summary of Argument" section at the beginning of the Petition to discover as much. The thrust of Appellants' Petition for Rehearing is stated in that section as follows: "The panel **misapprehended** the effect of the 'automatic stay' provision in S.C. Code 1-23-600(H)(4), and **misapplied** the mootness doctrine." Petition, p. 1 (emphasis added). Expanding on this position, it is the Court's failure to address Appellants' arguments that forms the linchpin of

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[1]The Kennedy Court additionally emphasizes preserving issues for appellate review. 349 S.C. at 533. SCACR Rule 242(d) provides that only issues raised in the Petition for Rehearing can be raised in a Petition for Certiorari. Thus, the rules dictate that the Appellants must include all of the arguments believed to be meritorious, so that they will be preserved in the instance that a Petition for Certiorari is filed.

Appellants' Petition: "rather than undertaking [the relevant mootness] 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." Petition, p. 1.

Continuing into the body of the Petition, where it was evident in the Court's limited Order that the Court misunderstood an argument, Appellants attempted to clarify that argument. For instance, the Appellants note: "The Court misunderstands Appellants argument in stating that 'Appellants argue the Department has the discretion to establish any limitations on certification permits . . . '" Petition, p. 7. On the other hand, where the Court's order completely neglected an important argument, Appellants presented the argument again, in the hopes that it would be considered on rehearing. For instance, the Court paid lip service to the public importance exception to mootness, but did not mention the exception for issues capable of repetition but evading review, leading Appellants to believe that these arguments were overlooked and should be re-emphasized. The approach taken by the Appellants is entirely consistent with SCACR Rule 221(a)'s direction to raise "points supposed to have been overlooked or misapprehended by the court."

Finally, additionally militating against Respondents' argument is the fact that Petitioners have requested that this case be reheard *en banc*. Consequently, it was necessary to provide more background information than might otherwise be required for a petition for rehearing likely to be considered solely by the panel that decided this case.

IV. This Appeal Is Not Moot Because the Court Can Grant Effectual Relief.

Respondents continue to argue that Appellants rendered this case moot by deciding to limit their challenge to the single issue of DHEC's authority to require minimum stream flows.

See Joint Return, p. 8. While the Appellants did made a strategic decision to focus their efforts on the central issue of flows in the South Saluda River, that decision does not limit this appeal to a single hypothetical question. Respondents' argument is incorrect, first and foremost, because Petitioners/Appellants have alleged through the ALC proceedings that DHEC not only has the authority to require minimum flows, but also the mandatory duty to do so under the present circumstances. This mandatory duty arises because such flows are necessary to protect existing uses and the water quality necessary to support those uses.

Respondents also improperly interpret and rely upon a one-paragraph letter written by the Appellants to the Court on April 14, 2010. Although the letter does state that the Appellants are limiting their appeal to the question of DHEC's authority, Respondents have taken this sentence out of context and given it a meaning which was neither intended nor supported by the remainder of the letter or the pleadings. The clear intent of the letter was to inform the Court that the Petitioners/Appellants would no longer be pursuing their claims related to wetland issues, which had previously been the second component of this challenge. (R. pp. 26-39, Request for Contested Case Hearing filed in the ALC). Petitioners/Appellants clearly indicate in the letter that they are withdrawing only the grounds "**not related to**" the issue of DHEC's authority. (R.419, Armstrong Ltr. to Judge McLeod (emphasis added)). It is clear when looking at the letter in its entirety that Petitioners/Appellans were not limiting their appeal to an abstract question, and that the one line the Respondents continue to rely on does not possess the significance they attempt to assign it. Instead, Petitioners/Appellants were withdrawing arguments related to the wetlands in order to focus on the more important issue, the dire state of the South Saluda River as a result of GWS' insufficient water releases from Table Rock Reservoir.

Regardless of the content of the letter, issues are not preserved based on the content of informal correspondence with a court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding in order to preserve an issue for appeal, it must be raised to and ruled on by trial court). Instead, Petitioners/Appellants preserved these issues for appeal in their Cross Motion for Summary Judgment ("MSJ") filed in the Administrative Law Court. As Respondents acknowledge, Appellants argued that DHEC has the authority to establish water limitations on this project pursuant to Regulation 61-101. (MSJ at R.193) ("The Water Quality Certification Regulations give DHEC the authority to establish '*any limitation, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards* and compliance with other requirements of these regulations or other appropriate requirements of State law' on an applicant's water quality certification.") (emphasis in original). Crucially, after setting forth DHEC's authority, Appellants' MSJ goes on to assert that not only does DHEC have the authority to place conditions on GWS' license, they are mandated to do so in this instance to protect existing uses and water quality in the South Saluda River, South Carolina's only trout stream. (MSJ at R.194) ("The regulations continue that '*existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The stream flows necessary to protect classified and existing uses and the water quality supporting these uses shall be maintained consistent with riparian rights to reasonable use of water*'") (emphasis in original).

Petitioners/Appellants continue to elaborate on their arguments by setting forth the considerations that must go into establishing minimum flow requirements. (MSJ at R. 196). It is clear by taking even a cursory glance at Petitioner's Cross Motion for Summary Judgment,

which, unlike the letter relied on by Respondents, is a document to which the court should look for issues of preservation, that Petitioners/Appellants have preserved their arguments at every opportunity and have not limited themselves to the narrow question Respondents set forth to the Court.

Respondents also point out that Petitioners/Appellants agreed to lift the automatic stay put in place with the contested case hearing, which allowed completion of the water pipe. Once again this is a technically true statement by the Respondents made out of context. As Petitioners/Appellants pointed out in their Petition, parties regularly consent to lift the automatic stay when relief can still be granted post-completion. In this instance, Petitioners/Appellants are not objecting to the pipe itself, but to the quantity of water reaching the South Saluda River, therefore completion of the pipe would not moot their objections. With this in mind, Petitioners/Appellants attempted to be cooperative by consenting to lift the automatic stay with the understanding that, in the event Petitioners/Appellants prevailed, DHEC could place minimum instream flow requirements on GWS' permit and certification. Petition, p. 5, 6. Respondents would apparently have had Petitioners/Appellants oppose the stay, though there was no practical or legal reason for doing so.

Lastly, Respondents point to Petitioners'/Appellants' failure to object to the issuance of DHEC's Final Approval to Place Into Operation ("Final Approval") as a basis for this appeal being moot. The Final Approval by DHEC is essentially a document indicating the project has been completed pursuant to the DHEC permit and is ready to operate. 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' filings. While Respondents cite Petitioners'/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.

Furthermore, appealing the Final Approval would not have furthered Petitioners'/Appellants' objectives. The Petitioners/Appellants are concerned with the lack of water quantity and poor water quality in the South Saluda River, which are a direct result of GWS' operation of the dam and pipeline that are connected to the dam. In order to receive relief on these claims, it was necessary for Petitioners/Appellants to appeal the decision that took these considerations into account – the 401 Certification that requires application of Regulations 61-68, 61-69 and 61-101.

Respectfully submitted,

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July 2, 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

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

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Reply to Return to Petition for Rehearing *En Banc* counsel for the Respondents GWS and DHEC by placing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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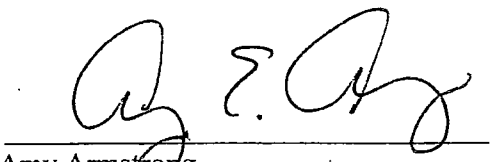

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Pawleys Island, SC 29585

FAX COVER SHEET

DATE: June 11, 2012

TO: Jenny Abbott Kitchings
Clerk of Court

FROM: Amy Armstrong

PAGES: 26 (including this page)

Our FAX #: (843) 527-0540 ---------- Our voice phone #: (843) 527-0078

MESSAGE:

Ms. Kitchings,

Attached is the Appellants' Petition for Rehearing in Case No. 09-ALC-07--CC. I have also deposited copies of this Petition in the U.S. Mail

Thank you,

Amy

Exhibit A

MEMORY TRANSMISSION REPORT

TIME : 06-11-'12 14:03
FAX NO.1 : 8435270540
NAME : scelp

FILE NO. : 972
DATE : 06.11 13:58
TO : 18037341839
DOCUMENT PAGES : 23
START TIME : 06.11 13:59
END TIME : 06.11 14:03
PAGES SENT : 23
STATUS : OK

*** SUCCESSFUL TX NOTICE ***

South Carolina Environmental Law Project

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