

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-07-0069-CC

RECEIVED

MAR 01 2013

S.C. Supreme Court

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.

**JOINT RESPONSE OF RESPONDENTS DHEC AND
GREENVILLE WATER TO AMICUS CURIAE BRIEF OF
TROUT UNLIMITED**

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Reply
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INTRODUCTION

Pursuant to Rule 213 of the South Carolina Appellate Court Rules (“SCACR”), Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water System¹ (“Greenville Water”), (collectively hereinafter referred to as “Respondents”), submit the within Return in response to the Amicus Curiae brief (“Brief”) filed by Trout Unlimited, through its Mountain Bridge Chapter, in support of the Petition for Writ of Certiorari to the Court of Appeals (“Petition”) filed by Petitioners Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation (collectively hereinafter referred to as “Petitioners”) on November 26, 2012. Trout Unlimited ignores the actions of Petitioners in the contested case below, which significantly limited the scope of this appeal, and instead attempt to recreate the case at this stage into one of its choosing. Trout Unlimited also portray the Court of Appeals’ decision to dismiss this case as moot under a doomsday scenario that is divorced from reality and is intended only to confuse the Court into thinking that this appeal has broader implications on the practice of administrative law. Finally, Trout Unlimited attempts to interject issues and documents that were not before the lower court and are outside the scope of the limited issues before the Court in the Petition. In sum, the Brief offers no new or worthy argument for this Court’s consideration and generally restates the same erroneous arguments offered by Petitioners in an attempt to excuse their own actions and decisions which mooted this appeal.

¹ Subsequent to the initiation of this litigation, Respondent Greenville Water System changed its name to “Greenville Water”; therefore, Respondents will use this name for purposes of this Return and appeal.

BACKGROUND

This appeal relates to the permit issued by DHEC to Greenville Water to replace one of two aging raw water transmission main intake pipes attached to the reservoir created by the Table Rock Dam in Greenville County (“Reservoir”). The Reservoir and watershed provide water to Greenville, Pickens, Laurens, and Anderson County residents through two intake pipes constructed in the 1930’s. In order to ensure the continued provision of safe, clean drinking water to the serviced communities, Greenville Water proposed replacing one of the pipes with a new, larger (in diameter) pipe that would replace the current use of both pipes, while leaving one of the older pipes in place for redundancy in case of incident or failure (“pipe replacement project” or “Project”). **(App.pp.1-2; 13-16, 416-18).**

The pipe replacement project temporarily impacted, during construction, 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water, which required a Section 404 “Dredge and Fill” Permit from the Corps of Engineers. **(App.pp.13-14)**, DHEC Final Agency Decision; *see* 33 U.S.C.A. § 1344. Thus, under South Carolina Regulation 61-101.A.2, the project was also required to receive a Section 401 Water Quality Certification from DHEC assuring that the pipe replacement project complied with Section 401 of the federal Clean Water Act, 33 U.S.C.A. § 1341 (“401 Certification”). *See* 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.”). Greenville Water applied for and was issued the

requisite 401 Certification by DHEC and the Section 404 “Dredge and Fill” permit from the Corps. (App.p.2).

Thereafter, the Petitioners filed a request for a contested case hearing at the Administrative Law Court (“ALC”). (App.pp.26-39). Greenville Water moved to lift the automatic stay, which was granted by the ALC for good cause, allowing construction of the pipe replacement project to continue. (App.pp.75-83). While initially raising multiple legal and factual issues in its appeal to the ALC, Petitioners voluntarily limited their contested case challenge to the single legal issue of whether DHEC has the authority to impose minimum instream flows to the South Saluda River from the Reservoir as a condition of issuing its 401 Certification for the intake pipe replacement, and dismissed the remainder of their legal claims. (App.p.419), Armstrong Ltr. to Judge McLeod. Subsequently, Respondents filed a joint motion for summary judgment with the ALC. (App.pp.145-185). On October 1, 2010, counsel for Petitioners sent a second letter to the ALC reiterating that Petitioners had limited the issues on appeal to the single legal issue of whether DHEC has the authority to impose a minimum flow release for the Project.² Thereafter, Petitioners responded to Respondents’ motion for summary judgment, agreeing that there were no factual issues in dispute and filing their own cross-motion for summary judgment. (App.pp.186-235). Following a hearing, the ALC granted Respondents’ motion. (App.pp.1-7, 350-415). No motion for reconsideration was filed by Petitioners.

² Petitioners’ October 1, 2010 letter was erroneously excluded from the record on appeal; however, on February 21, 2013, Respondents filed a Motion to Supplement the Appendix with the October 1 letter, which is currently pending before the Court.

Petitioners filed a notice of appeal with the Court of Appeals, and the appeal was fully briefed. (App.pp.269-270). During the pendency of the contested case before the ALC, and the appeal before the Court of Appeals, the construction of the replacement intake pipe was completed by Greenville Water. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation (“Final Approval”), signifying that the construction project was complete and the water system permitted under the permit was operational. At this point, the construction discharge ended. Petitioners did not request a final review conference of the DHEC Board for the Final Approval; therefore, it is considered final and unchallenged. Respondents filed a joint motion to dismiss the pending appeal at the Court of Appeals on the grounds of mootness. The Court agreed and dismissed the appeal without reaching the single, hypothetical issue raised by Petitioners. (App.pp.578-79). Consequently, the only issue currently pending before this Court in Petitioners’ petition for writ of certiorari (“Petition”) is whether the Court of Appeals erred in dismissing the appeal as moot. *See* Petition at 6 n.2 (Petitioners concede that the merits of the appeal were not addressed by the Court of Appeals and the issue of whether DHEC has the authority and is required to impose a flow regime on the pipe replacement project “is not an issue squarely before the Court.”). Because Trout Unlimited has chosen to file the Brief in support of the Petition, they, too, are limited to the single question of error assigned to the Court of Appeals.

ARGUMENT

As stated in Respondents’ motion to dismiss or strike the Brief, the posture of the appeal before this Court makes the consideration of the vast majority of the Brief

inappropriate under the Appellate Court Rules.³ Ordinarily, an amicus brief is premature until the issues on appeal have been framed by this Court in granting the petition for writ of certiorari. *See* Rule 213, SCACR (“The brief shall be limited to argument of the issues on appeal as presented by the parties....”). Trout Unlimited’s Brief goes far beyond the scope contemplated by Rule 213 and attempts to either revive issues abandoned by the Petitioners below, or interject new issues for consideration. In doing so, Trout Unlimited ignores or downplays the strategic decisions made in this case by Petitioners, ignores altogether clear holdings of the ALC which serve as a limitation on the issues in the appeal, and dramatizes a “sky is falling” representation of the effect of the Court of Appeals’ decision to dismiss the appeal as moot in order to exaggerate its consequences and assign a meaning far broader than reality permits. Notwithstanding, Respondents will address the issues raised by Trout Unlimited in turn.

I. THE ISSUE PRESENTED BY THE PARTIES IS LEGAL, NOT FACTUAL, AND TROUT UNLIMITED’S VERSION OF THE FACTS IS OF NO CONSEQUENCE.

Trout Unlimited begins its Brief by alleging the Court of Appeals committed reversible error in failing to consider or adopt the proposed “facts” of Trout Unlimited and Petitioners when it dismissed the appeal as moot. *See* Brief at 3-4 (“[T]he Court of Appeals did not analyze the facts of this case”). The “facts” presented by Trout

³ Additionally, this Court has held that exhibits to briefs filed with the Court are not permitted under the Appellate Court Rules where they attempt to put matters before the Court that were not considered by the lower court or tribunal in making its decision. *See*, Respondents’ Joint Motion to Dismiss or Strike the Amicus Brief of Trout Unlimited, Exhibit A, *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Entvl. Control et al.*, Case Tracking No. 2009-113526, Order dated April 19, 2010 (striking exhibits to a brief which were not before the lower court) (*citing Sanders v. Allis Chalmers Mfg. Co.*, 235 S.C. 259, 111 S.E.2d 201 (1959)). Because the exhibits to the Brief were not before the ALC, Respondents contend they are inappropriate for this Court’s consideration and review.

Unlimited are nothing more than a self-serving portrayal of the pipe replacement project and are wholly irrelevant to the single issue on appeal. Moreover, the “facts” Trout Unlimited alleges the Court of Appeals overlooked are contrary to the clear holding and findings of facts of the ALC, and have no foundation or support in the record. In the final Order, the ALC clearly provides that there are no issues of material fact with respect to the only question presented for adjudication: whether DHEC has the authority to impose minimum flow requirements in a 401 Certification issued for the replacement of the intake pipe. *See (App.p.4)*, ALC Order at 4 (“[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.**”) (emphasis added). In fact, Petitioners agreed with the ALC that there were no issues of material fact bearing on the legal issue presented in their claim. *See (App.p.186)*, Petitioners’ Cross Motion for Summary Judgment at 1 (“This motion is based on the pleadings and exhibits attached hereto, all of which show that there is no genuine issue of material fact”); *see also (App.p.419)*, Armstrong Ltr. to Judge McLeod (limiting Petitioners’ appeal to a single legal issue).

Further, Petitioners failed to challenge the ALC’s finding that it 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 either the Court of Appeals or 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 Hoefler 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)).

As a result, the ALC’s holding that the facts are not at issue here is the law of the case and Trout Unlimited’s attempt to recreate the facts in a light more favorable to Petitioners at this stage of the litigation is wholly inappropriate and categorically unpreserved for this Court’s review. *See ML-Lee Acquisition Fund, L.P., v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (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).

II. TROUT UNLIMITED AND PETITIONERS ARE WRONG ON THE MERITS.

The Brief’s real objective in re-writing the facts of the case is to present a hypothetical and fictional situation where the intake pipe replacement and the Reservoir dam are considered one and the same. However, that is a misrepresentation of this Project. What Trout Unlimited omits is that the Reservoir was created prior to federal Clean Water Act and prior to its requirement that States certify water quality compliance

for projects requiring a Corps of Engineers Section 404 dredge and fill permit. Again, the only reason this Project required a 401 Certification is **not** a continuing discharge into the waters of the United States, and has nothing to do with the withdrawal of water from the Reservoir through the new raw water transmission line, but instead the **temporary** fill required of Greenville Water to accomplish the physical pipe construction fill that has already and occurred and for which Greenville Water has already mitigated. Stated differently, the breadth of the 401 Certification review process is necessarily limited to the scope of the project requiring the Section 404 permit from the Corps. Trout Unlimited attempts to unilaterally broaden the scope of the Project on the back-end in order to subject Greenville Water to regulatory oversight that is not applicable to the Project.

Moreover, the State of South Carolina has made a conscious decision to regulate water *quantity*, *i.e.*, minimum instream flow regimes, through a regulatory scheme independent of its water *pollution* control regulations under the federal Clean Water Act. *See* S.C. Code Ann. §§ 49-4-10 *et seq.*, South Carolina Surface Water Withdrawal, Permitting, Use, and Reporting Act (“Act”), effective January 1, 2011. In fact, minimum flows are a component of the regulatory scheme for new surface water withdrawers⁴ and DHEC must consider the reasonableness of the minimum instream flows in its analysis of surface water withdrawal permits.⁵ S.C. Code Ann. § 49-4-80(B). Thus, the Reservoir

⁴ *See* Surface Water Withdrawal Act, S.C. Code Ann. §§ 49-4-10 *et seq.*

⁵ 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.

does not have a 401 Certification and minimum instream flows are regulated under a different permitting structure, *i.e.*, the Act. Plainly, Petitioners', and by extension Trout Unlimited's, real objective in this case is to circumvent this legislative and regulatory structure in order to have this Court force a new regulatory scheme on the permitting agency, DHEC, and attach minimum flow conditions to other, unrelated Greenville Water operations in the future.

In the Brief, Trout Unlimited relies heavily on foreign case law that is inapplicable to the facts in this case. Trout Unlimited first cites to the California District Court case of *Sequoia Forestkeeper v. U.S. Forest Service*, 2010 WL 5059621 (E.D. Cal. Dec. 3, 2010) *opinion modified on reconsideration*, 2011 WL 902120 (E.D. Cal. Mar. 15, 2011). While the subject matter of minimum bypass flows is tangentially related to the new regulatory scheme Trout Unlimited attempts to impose here, the similarities end there. The *Sequoia Forestkeeper* court was evaluating federal environmental standards as applied to federal land; therefore, it is of little import here. Specifically, the court found that the United States Forest Service had acted arbitrarily under the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. §§ 4321-4347, in reaching the conclusion that it did not have the authority to impose minimum bypass flows on the re-issuance of a permit to divert waters from a dammed creek within the boundaries of the Sequoia National Forest for private use.

However, contrary to the impression given by Trout Unlimited in its Brief, the *Sequoia Forestkeeper* Court's conclusion and holding does not speak to the appropriateness of such minimum bypass flows, but is instead rooted in the peculiarities of and requirements specific to NEPA. NEPA is a *procedural* statute which exists to

ensure a process is followed, but is not substantive in nature and does not mandate particular results. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989). “NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1153–54 (9th Cir. 2006), *abrogated on other grounds by Winter v. NRDC, Inc.*, 555 U.S. 7 (2008). Because the statute is procedural in nature, the reviewing court will set aside agency actions that are adopted “without observance of the procedure required by law.” *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 810 n. 27 (9th Cir. 2005). Thus, the *Sequoia Forestkeeper* Court’s holding with respect to minimum bypass flows was simply that the Forest Service erred in failing to observe the process and consider all of the issues, in arbitrarily concluding that it did not have the authority to impose the flow regime. *Sequoia Forestkeeper* at *21. In fact, the court expressly stated that “[a]lthough this Court finds that the USFS *could* have placed a minimum bypass flow or water meter condition on the Sellers’ SUP, this Court has no opinion as to whether it *should* have included such restrictions. *Id.* (emphasis in original). Here, there is no basis for DHEC to evaluate and require minimum instream flows on this pipe replacement project, similar to the procedural requirement found in NEPA. Consequently, *Sequoia Forestkeeper* does not inform this Court’s judgment with respect to whether the appeal is moot.

Similarly inapt in comparison to the issues at hand are two other cases cited by Trout Unlimited: *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090, 1106

(D. Colo. 2004),⁶ and *Pub. Util. Dist. No. 1 of Pend Oreille County v. State, Dep't of Ecology*, 51 P.3d 744, 759 (2002). *Pend Oreille County* relates to an entirely different kind of project than the pipe replacement project, wherein water was diverted from one body and discharged into two separate bodies of water, including the ultimate destination of a creek where a new hydroelectric powerhouse was proposed. There, the 401 Certification required by the Washington State Department of Ecology related directly to the continuing discharge of the water source into intrastate waters resulting from the Project, something that is not present in this pipe replacement project. *See Pend Oreille County*, 51 P.3d at 759 (“Generally, under § 401, any applicant for a federal license must obtain a state water quality certificate if the applicant's activities may result in discharge into intrastate waters. 33 U.S.C. 1341. The proposed Sullivan Creek project requires a license from the Federal Energy Regulatory Commission, and will result in discharge of diverted water back into Sullivan Creek. Accordingly, the project requires a § 401 state water quality certification.”). These cases are factually distinct and provide the Court with no guidance with respect to the limited legal issue before it in the Petition.

Tellingly, Trout Unlimited admits that the minimum instream flow conditions sought by Petitioners and Trout Unlimited do not relate to the temporary construction impacts triggering the 401 Certification in this case. *See* Brief at 10 (“While temporary construction impacts may trigger the 401 Certification process, DHEC’s delegated Clean Water Act authority allows it to impose conditions that go beyond the scope of the particular discharge that triggers the Section 401 certification requirement.”). In seeking conditions that go far beyond the Project scope, Trout Unlimited seeks to force DHEC

⁶ *Trout Unlimited* does not even involve a 401 Certification, but instead relates solely to federal laws not present here, applied to issues involving federal lands.

into taking an *ultra vires* action, as DHEC has no authority to impose minimum instream flow conditions on an intake pipe where there is no continuing discharge to a water of the United States. (App.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.”).

As discussed above, the sole discharge triggering the need for the Corps permit and DHEC Certification was the minor and temporary fill of wetlands and water impacts for the replacement of the intake pipe, which has already occurred, been mitigated, and completed. 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 continuing discharge and nothing onto which to impose minimum flow restrictions.⁷

“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),⁸ it is instructive to look to how the term “discharge” is utilized in the 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

⁷ The imposition of a minimum instream flow condition is a restriction or requirement on future, on-going discharges.

⁸ “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.

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 Petitioners and Trout Unlimited—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 pipe replacement project at issue here 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.

Further, Trout Unlimited’s arguments regarding anti-degradation is unavailing and the citation to Regulation 61-68 here is a classic red herring. 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.” (**App.p.7**), ALC Order at 7. As a result, the anti-degradation provision of DHEC’s regulations is inapplicable to this Project. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 964 (9th Cir. 2006) (water withdrawal project was not subject to anti-degradation regulation). Additionally, Section 401 regulates water quality, while the regulation of water quantity is left to the states through other means, *i.e.*, the Act. *See* discussion, *supra* (regarding the surface water withdrawal act). The CWA expressly reserves to the states the power 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). As found by the ALC, and not appealed by Petitioners, “[i]nstream flows will not be decreased as a result of the Project.” (**App.p.4**), ALC Order at 4.⁹ In other words, there is no connection to or 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.

⁹ Petitioners did not appeal from this ruling; therefore, it is the law of the case. *See ML-Lee*, 327 S.C. at 241, 489 S.E.2d at 472 (unappealed ruling is law of the case).

III. LIFTING THE AUTOMATIC STAY DID NOT MOOT THIS APPEAL AND TROUT UNLIMITED'S ALLEGED ADVERSE POLICY IMPLICATIONS ARE BASELESS.

Trout Unlimited continues the parade of horrors advanced by Petitioners, adding nothing of substance to the discussion, in an effort to convince this Court that the Court of Appeals did something other than apply our State's longstanding concepts of justiciability to the facts before it. In doing so, the Brief ignores Petitioners' actions in voluntarily dismissing the merits of the contested case request and limiting the issues before the ALC to a single hypothetical question of "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" (**App.p.419**), Armstrong Ltr. to Judge McLeod. Instead, Trout Unlimited paints Petitioners in a cooperative light for their decision not to oppose the motion to lift the automatic stay, while putting forward a veiled warning that "[i]f the Court of Appeals decision stands, parties challenging an activity such as the construction project in this case *will be forced to oppose* the lifting of the automatic stay" See Brief at 12. The Court no doubt recognizes grandstanding when it sees it, but it is worth pointing out that this is a completely strained argument about the supposed far-reaching effects of the decision on the practice of administrative law and implies an inaccurate standard for the consideration of motions to lift the automatic stay.

Once a party moves the ALC to lift the automatic stay put in place under S.C. Code Ann. § 1-23-600(H)(2), the non-moving party makes an independent decision as to whether it is in their best interests to oppose, or not, the motion. However, contrary to the impression given by Trout Unlimited, the decision to oppose the motion, or to consent as was the case with Petitioners, does not end the inquiry by the ALC. In fact, it's not

even a factor or ground for the ALC to grant or deny the motion. In evaluating a request to lift the automatic stay, S.C. Code Ann. § 1-23-600(H)(4) provides that the ALC “shall lift the stay for [1] good cause shown[,] or [2] if no irreparable harm will occur....” See *Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Sewer Comm’n*, 367 S.C. 141, 625 S.E.2d 227 (Ct. App. 2006), *overruled on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007); see also *Heath Hill v. S.C. Dep’t of Health and Env’tl. Control*, Docket No. 08-ALJ-07-0183-CC (July 10, 2008) (Order Lifting Automatic Stay) (J. Matthews); *Heath Hill v. S.C. Dep’t of Health and Env’tl. Control*, Docket No. 08-ALJ-07-0534-CC (Sept. 3, 2009) (Order Lifting Automatic Stay) (J. Matthews).¹⁰ The ALC has further held that the use of the term “or” means that upon a finding of either “good cause” or “no irreparable harm”, the Court “must lift the stay”, see *Heath Hill*, Order, July 10, 2008 at 3, and that the movant “must meet only one of [the two] tests for lifting the stay”, see *Heath Hill*, Order, Sept. 3, 2009 at 3.

Thus, there is no such thing as a “consent lifting of the automatic stay,” just as opposition to lifting the stay is not an element or factor considered by the ALC in its determination of whether good cause exists. See Lowell, Randolph R., *To Stay or Not to Stay: Automatic Stays Before the Administrative Law Court in DHEC Matters*, South Carolina Lawyer, Sept. 2008, at 18 (“the burden of persuasion lies with the party seeking to lift the automatic stay, and will not shift ... [a]rguably, under the statutory language, the ALC must lift the stay upon a showing by the moving party that either of the two conditions is met. This implies that opposition is irrelevant; either the party meets the

¹⁰ S.C. Code Ann. § 1-23-600(H)(4) also provides that a hearing on a motion to lift the automatic stay must be held within thirty (30) days of the filing of the motion and that an order from the Court should issue within fifteen (15) business days of the hearing.

burden or it does not, and the burden of production never shifts.”). Trout Unlimited’s concocted “doomsday” scenario is meritless, misrepresents the standard applied to a motion to lift the automatic stay, and shortchanges the independent determinations undertaken by the ALC when moved to lift the stay. *See United States v. Hillary*, 106 F.3d 1170, 1173 (4th Cir. 1997) (“The short answer to this short parade of horrors is that we decide cases one at a time.”). Similarly, each motion to lift the automatic stay is evaluated independently by the ALC based on the merits before it under the standard of good cause shown or no irreparable harm. This was done here by the ALC, and the Court of Appeals’ determination of no justiciable controversy will not have a chilling impact on this process.

IV. EXCEPTIONS TO THE DOCTRINE OF MOOTNESS ARE UNPRESERVED FOR THIS COURT’S REVIEW.

Trout Unlimited also attempts to revive two unpreserved arguments regarding exceptions to the doctrine of mootness which were abandoned by Petitioners in their Petition to this Court.

In its joint Motion to Dismiss to the Court of Appeals, Respondents argued that this appeal is moot and that none of the three recognized exceptions¹¹ to the doctrine of mootness apply. *See (App.pp.543-45)*, Motion to Dismiss. In their Return to the Motion

¹¹ “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 v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); *see also Byrd v. Irmo High Sch.*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996) (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.*

to Dismiss, Petitioners argued that, should the Court of Appeals find the appeal moot, two of the exceptions have applicability to this appeal: (1) the public interest exception to the doctrine of mootness, because the issue was one of public importance and of imperative and manifest urgency; and (2) the capable of repetition yet evading review exception, based on the faulty and conclusory argument that the lifting of the automatic stay would automatically render appeals moot. *See (App.pp.14-16)*, Return to Motion to Dismiss. The Court of Appeals found that the public interest exception to the doctrine of mootness was inapplicable to this appeal, but did not mention or otherwise rule on the other two exceptions. *See (App.pp.579)*, Order of Dismissal dated May 25, 2012 at 2 (“Furthermore, we find the public importance exception does not apply to this appeal.”).

In their petition for rehearing to the Court of Appeals, Petitioners again argued that either of the two exceptions to the doctrine of mootness were applicable to this case. *See (App.pp.596-97)*, Petition for Rehearing at 19-20. The Court of Appeals summarily denied the petition for rehearing without addressing Petitioners’ arguments on the exceptions. *See (App.pp.601-2)*, Order Denying Petition for Rehearing, dated October 23, 2012 at 1. Notwithstanding, Petitioners do not raise *any* of the exceptions to the doctrine of mootness in their Petition to this Court. Consequently, Petitioners have abandoned previously-made arguments that exceptions to the doctrine of mootness have any applicability to this case. *See Jones v. Leagan*, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.”) (citing Rule 208(b)(1)(D), SCACR; *Jinks v. Richland County*, 355 S.C. 341, 344 n. 3, 585 S.E.2d 281, 283 n. 3 (2003)).

In its Brief, Trout Unlimited attempts to revive the “public importance” and “imperative and manifest urgency” arguments for Petitioners, despite the fact that those arguments were abandoned in the Petition. Accordingly, all three of the recognized exceptions to the doctrine of mootness are unpreserved for this Court’s consideration and Trout Unlimited’s arguments to the contrary should be disregarded by the Court.

Notwithstanding the fact that the exceptions to the doctrine of mootness are unpreserved for review, and on the merits of the exceptions, this Project, and the 401 Certification under which it was undertaken, is not an issue that is capable of repetition yet evading review. Here, DHEC does not have the authority to impose minimum flow requirements under a 401 Certification for a project of this kind. *See (App.p.6)*, ALC Order at 6. Under a 401 Certification, minimum flow conditions may be imposed if the project in question continually 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.¹² It would be highly unusual and atypical to even consider imposing a flow regime on a project that does not involve flows. Similarly, this Project did not involve the impoundment of water to create a reservoir or dam. *See (App.p.6)*, ALC Order at 6. 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

¹² Again, contrary to the unsubstantiated claim put forward by Petitioners, *see (App.pp.435)*, 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. *(App.pp.4-5)*, ALC Order at 4-5. Moreover, the forthcoming surface water withdrawal permit that replaces the IBTR will similarly include a withdrawal capacity limitation. *See S.C. Code Ann. § 49-4-70; see also, discussion supra.*

Court. With the Project completed, no further discharges occur and there is no further action to be taken and thus the issue is not capable of repetition.

Second, the Project clearly does not occupy the realm of public importance required to satisfy the public interest exception. *See Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (discussing 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.¹³ As the ALC found, this pipe replacement project did not change the withdrawal limits in place for the Reservoir. (**App.pp.4-5**), ALC Order at 4-5. Petitioners did not appeal from this holding; therefore, it is the law of the case. *See ML-Lee*, 327 S.C. at 241, 489 S.E.2d at 472 (holding that an unappealed ruling is law of the case). 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, the Court of Appeals was correct to find that the public importance exception does not apply to this appeal.

Finally, this appeal does not present an issue that could affect future events or have collateral consequences for the parties, nor have the Petitioners argued that it would. As the ALC found, flow requirements are outside the scope of DHEC's controlling regulations with respect to the instant Project's 401 Certification; therefore, DHEC is without the authority to impose these requirements going forward. (**App.p.6**), ALC Order at 6. Projects are evaluated by DHEC on a case by case basis, and simply because

¹³ There is a separate permitting process that now governs the expansion or increase in capacity for a water withdrawer. Surface Water Withdrawal Act, S.C. Code Ann. § 49-4-80.

flow regimes are entirely inappropriate for the Project at issue, the Court's decision will not affect DHEC's ability to require flow regimes when appropriate to projects that do have continuing discharges.

V. THE IMPORTANCE OF NATURAL RESOURCES DOES NOT IMPACT OR INFORM THE COURT'S JUDGMENT ON THE SINGLE LEGAL ISSUE BEFORE IT.

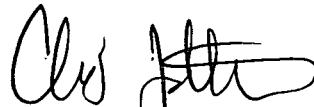
Trout Unlimited spends nine full pages, *see* Brief at 14-23, discussing the importance of the region's natural resources and natural trout habitats which, presumably, although it is not completely clear, would be benefited if this Court creates a new regulatory scheme and imperative for DHEC to impose on Greenville Water. Respondents do not dispute the background, or even the importance, of the issues which Trout Unlimited, and other organizations like it, support and champion. Indeed, Greenville Water has a long history as a good steward of these environmental and natural resources on behalf of its constituents. Notwithstanding, the Brief's recitation of these factors has nothing to do, whatsoever, with the single legal issue decided by the Court of Appeals and pending before this Court. The Court is bound by the standards of justiciability not to address hypothetical or academic questions where no case or controversy exists between the parties. *See Curtis* 345 S.C. at 567, 549 S.E.2d at 596 (2001) (citing *Jackson*, 331 S.C. 486, 489 S.E.2d 915) (holding that an appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy). Simply put, Trout Unlimited's goals, while laudable, have nothing to do with the justiciability questions pending before the Court.

CONCLUSION

The Brief adds nothing meaningful to this Court's consideration of the limited issue pending before it. Accordingly, the Court should reject Trout Unlimited's

erroneous and extra-record arguments and should affirm the conclusions reached by both the ALC and the Court of Appeals in this case.

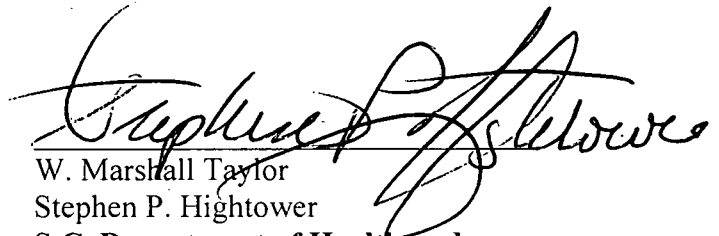
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March 1, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED

MAR - 1 2013

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

S.C. Supreme Court

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

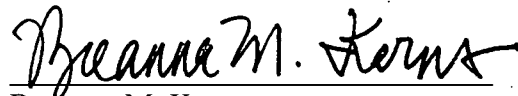
This is to certify that I, an employee of the law offices of Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of the **Return to the Amicus Brief of Trout Unlimited** by placing same in the care and custody of the United States Postal Service with first class postage affixed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

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This 1st day of March, 2013.