

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

John D. McLeod, Administrative Law Judge

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Case No. 2009-AL-07-0226  
Appellate Case No. 2012-213483

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

vs.

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

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**BRIEF OF AMICUS CURIAE TROUT UNLIMITED,  
THROUGH ITS MOUNTAIN BRIDGE CHAPTER, IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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April 24, 2013

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By granting the petition and reversing the Court of Appeals, the Supreme Court can further the restoration of trout streams and rivers throughout South Carolina and prevent a serious disruption of the handling of administrative law cases.

Amicus curiae Trout Unlimited, through its Mountain Bridge Chapter, submits this brief to highlight the exceptional importance of the issues at stake in this case. The case is not moot because the relevant activity and impacts are not merely a temporary construction project but rather the extension of the life of Greenville Water System's Table Rock Reservoir for decades into the future. Moreover, because the Court of Appeals decision leaves unresolved the question of DHEC's obligation to protect the fragile coldwater trout habitat of the South Saluda by requiring minimum flows in its water quality certification for this activity, and because the decision will have serious unintended consequences for future cases involving the lifting of stays in permit challenges before the ALC, the Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals.

#### **Interests of Trout Unlimited and Its Mountain Bridge Chapter**

**Trout Unlimited.** Trout Unlimited is a national coldwater conservation organization founded more than fifty years ago and now supported by more than 147,000 volunteer members in approximately 377 chapters. From Maine to Hawaii and Alaska to Florida, the mission of Trout Unlimited is to conserve, protect, and restore North America's coldwater fisheries and their watersheds.

Trout Unlimited works to ensure that robust populations of native and wild coldwater fish once again thrive within their North American habitats, so that our children can enjoy healthy fisheries in their home waters. Trout Unlimited collaborates

with other conservation interests, local communities, and state and federal partners to protect, reconnect, restore, and sustain watersheds as coldwater habitat. Such efforts are crucial if North America's trout and salmon are to survive the host of threats facing them during the 21st century.

Over 50 years after its founding in 1959, no other conservation organization is as well placed as Trout Unlimited to make a difference for the nation's coldwater fisheries. From its beginning, Trout Unlimited has been guided by the principle that if we "take care of the fish, then the fishing will take care of itself." And that principle is grounded in science. "One of our most important objectives is to develop programs and recommendations based on the very best information and thinking available," said Trout Unlimited's first president, Dr. Casey E. Westell, Jr. "In all matters of trout management, we want to know that we are substantially correct, both morally and biologically." The Trout Unlimited website is [www.tu.org](http://www.tu.org).

**Mountain Bridge Chapter.** The Mountain Bridge Chapter of Trout Unlimited is made up of Trout Unlimited members and volunteers in the Greenville-Spartanburg-Anderson area of South Carolina. Founded in 1974, the Mountain Bridge Chapter is the original South Carolina chapter of Trout Unlimited. The Chapter's mission is: "To conserve, protect, and restore South Carolina's trout fisheries and their watersheds (and on a selective basis, those of western North Carolina) through chapter and member activities, advocacies and common goals." The Chapter works to "ensure that robust populations of native and wild coldwater fish continue to thrive within their original South Carolina range, so that our descendants can enjoy healthy fisheries in their home waters."

The Mountain Bridge Chapter currently has 520 members primarily living in the Upstate of South Carolina. At its outset, the Chapter helped with the effort to establish Jones Gap State Park and helped start the other two chapters of Trout Unlimited in South Carolina. Its website is [www.mbtu.org](http://www.mbtu.org).

Members of the Mountain Bridge Chapter fish in the South Saluda River. The Mountain Bridge Chapter has conducted a river clean up of the South Saluda and has adopted the section of Highway 11 that runs along the South Saluda for litter clean ups. The Mountain Bridge Chapter has supported the efforts to improve and restore the South Saluda as trout habitat.

This amicus brief is submitted by Trout Unlimited through its Mountain Bridge Chapter, hereinafter referred to as "Trout Unlimited."

### **ARGUMENT**

The Court should grant certiorari and hear this case for two reasons. First, the Court of Appeals did not analyze the facts of the case in its order, nor did it consider the arguments of amicus curiae Trout Unlimited, all of which demonstrate that the relevant activity in this case is not merely the replacement of a conduit but rather the extension of the useful life of GWS's entire water impoundment system, so that simply replacing the conduit in no way moots the issues in this case. Extending the life of the reservoir implicates the existing uses of the river on an ongoing basis and DHEC is required by South Carolina's anti-degradation regulations to protect those uses by ensuring adequate minimum flows.

Second, the policy implications of the Court of Appeals decision demand hearing and reversal in order to forestall an unacceptable unintended consequence of the decision:

litigants such as Petitioners in this case would no longer be able to consent to the lifting of automatic stays in ALC proceedings, lest they lose their right to appeal on mootness grounds. This result would be profoundly inefficient because it would unnecessarily delay important projects such as the one in this case from going forward and would unnecessarily burden the ALC system.

**I. The Court of Appeals Order Overlooked the Larger Significance of the Conduit Replacement in this Case.**

The order granting Respondents' Motion to Dismiss the case as moot does not analyze the facts of this case. By granting the Motion to Dismiss, the Court of Appeals accepted without analysis Respondents' premise that this case is about merely replacing a conduit and the only environmental impacts are the temporary impacts from the construction of the new pipe. However, that simply is not the case. As the authorities cited below demonstrate, replacing the conduit is an action to extend the life of the Table Rock Reservoir; as a result, DHEC's authority to impose conditions in its water quality certification is not limited—in scope or in time—to the temporary construction project.

The Greenville Water System takes the position that the certification allowing it to install a new main water pipe for the South Saluda Table Rock Reservoir has nothing to do with the existence and use of the dam and the reservoir. Both as a legal and a factual matter, this position is simply wrong.

The pipe in question is in reality the sole conduit transporting water from the reservoir for use by the Greenville Water System and its customers. Without this conduit, the reservoir and the dam serve no useful purpose. The original conduit, which has been an essential element of the Table Rock Reservoir, is old and worn out. In order

to extend the useful life of the Table Rock Reservoir and the dam that creates it, a new conduit must be installed. The need for the new conduit has never been questioned.

In other words, there are three critical parts to the Table Rock Reservoir; without any one of them, the Reservoir would not exist as a water source for the Greenville Water System. There must be a dam. There must be a reservoir behind the dam. And there must be a conduit to transport the water in the reservoir created by the dam. In the absence of any one of these three essential parts, the other two are useless to the Greenville Water System.

Without the pipe and the certification that allows it, there is no reason to dam the South Saluda River and to interfere with its normal flows. Indeed, since the original pipe is becoming obsolete and may at some point fail, the new pipe is essential and required for future withdrawals of water from the Table Rock Reservoir and the South Saluda River system.

Thus, when deciding whether to grant a 401 certification allowing the continued and future use of the water of the South Saluda through a new conduit that will transport water from the impoundment of the South Saluda headwaters, DHEC has the authority—and the responsibility—to consider the ongoing impacts of the dam and the reservoir on the water quality of the South Saluda and the other uses of the South Saluda, in addition to its use as a water source for the Greenville Water System.

Trout Unlimited, like the Petitioners, does not oppose the Table Rock Reservoir or suggest that it should be dismantled. Trout Unlimited recognizes the importance of the reservoir for the region's water supply and the Greenville Water System's customers, which is why the Petitioners consented to lifting the stay on construction of the

replacement conduit. The issue in this case—DHEC’s obligation to consider a minimum flow condition in its 401 certification—is not rendered moot by completion of the conduit replacement.

Moreover, there is no reason why DHEC cannot put in place reasonable conditions that allow for flows to protect and restore the health of the South Saluda, and there is no reason why the Greenville Water System—which obtains its water from three different reservoirs and has many unused opportunities for better water management, efficiency, operation, and conservation—cannot continue to operate the Table Rock Reservoir effectively while providing adequate flows for the health of the South Saluda. Reasonable conditions would take into account water supply needs, seasonal flows necessary to sustain aquatic life, temperature, drought, and other relevant factors.

Courts analyzing similar situations have recognized the authority of the permitting agency to place conditions on installations, projects, permits, and certifications that extend the useful lives of reservoirs and that involve their essential parts. These courts recognize that such authorizations, including Section 401 certifications, are an appropriate mechanism for a regulatory agency to impose minimum flow conditions because the authorization of an integral component of a water diversion system implicates that system as a whole.

Facts, virtually identical to those in this case were analyzed in *Sequoia Forestkeeper v. U.S. Forest Service*, 2010 U.S. Dist. LEXIS 131381 (E.D. Cal. Dec. 3, 2010), *modified on reh’g on other grounds*, 2011 U.S. Dist. LEXIS 26447 (E.D. Cal. Mar. 14, 2011). In that case, the Forest Service re-issued a special use permit for an elevated pipe running across Forest Service land that diverted water from an 1890 dam to

a ranch. The Court held that the Forest Service had the authority to impose minimum flow conditions for the stream as part of its re-issuance of the special use permit for the pipe.

In *Sequoia Forestkeeper*, the special use permit was necessary for the pipe to exist (because the pipe runs across Forest Service land and cannot continue to do so without a permit), and in the case of the South Saluda, the Section 401 certification likewise is necessary for the pipe to exist (because the certification is required before the pipe may be constructed). In *Sequoia Forestkeeper*, as in the instant case, the continued operation of an impoundment depended upon a conduit, which in turn depended upon an agency authorization. Neither the *Sequoia Forestkeeper* pipe nor the Greenville Water System pipe can exist without the authorization in question; in both cases the pipe is a prerequisite for accessing the water stored by the dam. The *Sequoia Forestkeeper* court correctly reasoned that in authorizing the conduit, an agency could consider the effects of the impoundment that depended upon that conduit, and therefore could impose minimum flow conditions on the impoundment as a whole as part of the authorization.

The *Sequoia Forestkeeper* court's holding thus demonstrates that authorization of a water pipe—where it is essential to the operation and use of an impoundment—can validly be conditioned upon adequate flows to protect the stream impounded by the dam.

In addition, the court in *Sequoia Forestkeeper* recognized that the pipe itself was conceptually inseparable from the dam because both were integral parts of a single system for diverting water. The court referred to the pipe alone as the “diversion” (“water has flowed from Fay Creek to the Sellers' ranch through this diversion”), and also referred to the combined dam and pipe system as a single “water diversion structure.”

stating that “[t]he diversion ‘dams up the entire stream channel.’” *Id.* at \*4-5. The means of impounding water and the means of transporting it for use are but two components of a single system, and minimum flow conditions validly encompass that system as a whole.

In keeping with this reasoning, the court emphasized that a user’s preexisting water rights do not prevent an agency from exercising its authority to protect water quality and existing uses by conditioning its authorization for a conduit on minimum flow requirements. *Id.* at \*57 (citing *P.U.D. No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 720-21 (1994), for the principle that requiring minimum stream flows does not interfere with a state water allocation because such a condition neither “reflect[s] nor establish[es]” a water right).

Likewise, in *Trout Unlimited v. U.S. Dep’t of Agriculture*, 320 F. Supp. 2d 1090 (D. Colo. 2004), the court held that the Forest Service could impose minimum bypass flows as a condition on the renewal of a land use authorization required in order to continue operating a reservoir constructed in 1929. Like the certification in this case, which allows the installation of a replacement conduit, the authorization in *Trout Unlimited* was necessary for the reservoir to continue to be used. The court stated that flow conditions imposed upon this authorization “neither reflect nor establish a water right; rather, they merely address the nature of the use to which a water right might be put once the right is obtained from the State.” *Id.* at 1105-6 (citing *P.U.D. No. 1*, 511 U.S. at 721-21). Even though the easement itself did not involve the withdrawal or discharge of water, the court held that the agency validly could impose minimum flow requirements as a condition of the authorization.

The same logic was followed by the Court in *P.U.D. No. 1 of Pend Oreille County v. State Dep't of Ecology*, 51 P.3d 744 (Wash. 2002) (“P.U.D. II”). There, a power utility was applying for permission to change the point of diversion of waters to which it already possessed water rights. The court held that the state certifying agency and review board could, in certifying under Section 401, impose conditions requiring a minimum flow of water in a creek, regardless of the applicant’s existing water rights in that creek. *Id.* at 764.

The key fact is that the minimum stream flow requirement was imposed for a change in the *location of water diversion, not for any change in the amount of water withdrawn*. The utility’s 1907 right to divert 110 cubic feet of water per second was unchanged by the proposed relocation. In other words, a certification for a change in the means by which water was withdrawn – but not for any alteration in the amount of water withdrawn – could be conditioned upon the user maintaining minimum flows in the river.

This point is important in the South Saluda case, because the Greenville Water System emphasizes that it does not propose to withdraw any additional amounts of water from the Table Rock Reservoir by way of its new conduit. But the same was true in *P.U.D. II*; there, the location of the water diversion did not affect the amount of water the utility had a right to withdraw. As with the South Saluda, this change was integral to the operation of the entire system of water withdrawal and use, even though the amount of water withdrawn would not change, and the court found minimum flow conditions to be authorized under Section 401.

Moreover, in the South Saluda case, without a new pipe or conduit, at some point the Greenville Water System would not be able to withdraw any water at all from the

Table Rock Reservoir. The certification for the new pipe enables the withdrawal of large amounts of water from the South Saluda for decades into the future, and it is only reasonable that the certification authorizing the means for such withdrawals would include conditions protecting the water quality of the South Saluda into the future.

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. Instead, DHEC has the authority and obligation to look to the "activity as a whole" in imposing conditions that are necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law—including requiring minimum flows to protect existing and designated uses. *P.U.D. No. 1*, 511 U.S. at 711-12. Moreover, South Carolina's own water quality certification regulations require DHEC to consider all potential water quality impacts, direct *and* indirect, of a proposed project. S.C. Code Regs. 61-101(F)(3).

Because DHEC possesses this authority to impose minimum flow requirements, it is required to do so by South Carolina's water quality regulations: "Existing water uses and the level of water quality necessary to protect these existing uses *shall* be maintained and protected . . . . The *stream flows necessary to protect classified and existing uses* and the water quality supporting these uses *shall* be maintained . . . ." S.C. Code Regs. 61-68.D.1 (emphasis added).

Thus, the issue in this case is neither theoretical nor moot: do South Carolina's water quality regulations require DHEC to consider protecting the stream flows necessary to support the trout waters affected by the impoundment system in this case? Nothing

about the completion of the conduit replacement negates the Court's ability to decide that question and to require DHEC to consider adding minimum flow conditions to the 401 certification. *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.").

In numerous cases, courts have held – contrary to the ruling of the Court of Appeals here – that completion of a construction project does not moot environmental challenges, including 401 challenges. *See City of Olmstead Falls v. U.S. Env'tl Prot. Agency*, 435 F.3d 632 (6th Cir. 2006); *Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996). *See also Ware v. U.S. Fed. Highway Admin.*, 255 F. App'x 838, 839 (5th Cir. 2007) ("despite the fact that construction is complete, appellants ultimately seek relief from noise brought on by the highway... [C]ompletion of construction does not undermine the benefits of further noise mitigation measures . . . that could be added based on a new, FAHA-compliant noise analysis"); *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (challenge to EIS not moot where towers and transmission line had been in place since 1978: "were the Court to find the EIS inadequate, or the decision to build along Route D-1 arbitrary and capricious, the agency would have to correct the decision-making process"); *Pa. Env'tl Council v. Barilett*, 454 F.2d 613, 625-26 (3d Cir. 1971) (holding that completion of a road project did not moot a claim because "[i]f we found that a violation of the federal statutes relating to the protection of the environment had taken place, the fact that the road was complete would not necessarily preclude the possibility of an equitable decree making

right some part of the wrong”); *Buck Mountain Cmty. Org. v. TVA*, 629 F.Supp. 2d 785, 791 (M.D. Tenn. 2009) (case was not moot because the court could fashion effective relief for NEPA violations despite completion of transmission line).

## **II. Because the Court of Appeals Order Would Produce Economic and Judicial Inefficiencies, Certiorari Is Appropriate.**

The order granting Respondents’ Motion to Dismiss will have significant adverse policy implications, and as a result it warrants consideration by the Supreme Court. If 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 imposed in contested cases pursuant to the Administrative Procedures Act (“APA”), S.C. Code Ann. § 1-23-600(H)(2), lest they be deprived on mootness grounds of their due process right to judicial review under the South Carolina Constitution, Art. 1, § 22.

Thus, rather than consenting to lifting the automatic stay and allowing important construction projects to move forward efficiently, as Petitioners did in this case, litigants challenging permits would have no choice but to oppose the lifting of the stay in a hearing pursuant to S.C. Code Ann. § 1-23-600(H)(4). This situation would burden the ALC process significantly because these parties would be forced to contest the lifting of an automatic stay rather than consenting and thus avoiding an adversarial hearing on the lifting of the stay. Moreover, such a situation would create significant economic inefficiencies because the party challenging a permitted activity would be disincentivized from consenting to that activity proceeding.

Here, Petitioners do not oppose the construction of the conduit, and they consented to lifting the stay for that reason. Petitioners have explained that they did so because there is nothing about completion of the conduit construction project that should

affect the Court's ability to decide the question of whether DHEC was required to impose minimum flow conditions as part of its 401 certification. That certification is still enforceable and by its own terms requires compliance after the construction is completed.

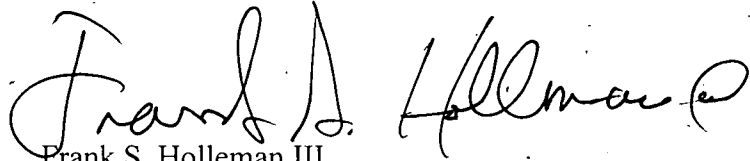
Petitioners also have explained that even if the completion of construction rendered this case moot, which it does not, two distinct exceptions would apply. First, the issues in this case are of public importance and of imperative and manifest urgency, *see Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (S.C. 1947) ("questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest."). Second, the issues in this case are capable of repetition yet evading review, *see Byrd v. Irmo High Sch.*, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (S.C. 1996). The Court of Appeals decision discussed only the first of these exceptions. It did not mention, let alone analyze the applicability of the second exception. Yet the Court of Appeals decision has created the potential for numerous similar permit and license challenges to be rendered moot by the lifting of an automatic stay, since many such permitted projects would be completed before the Court of Appeals could render a decision on the appeal of a contested case—despite the fact that forward-looking permit conditions could still be modified after the project was complete. The Court of Appeals decision ignored this issue and it must be addressed.

### **Conclusion**

Granting the petition and reversing the Court of Appeals will protect trout streams and other South Carolina waters by establishing DHEC's authority to put in place conditions requiring minimum flows when issuing certifications or permits for essential

parts of dams and impoundments. The flows in dammed rivers and streams determine the existence and vitality of our fisheries and enhance the quality of life for all in South Carolina.

Respectfully submitted, this the 24 day of April, 2013.



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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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John D. McLeod, Administrative Law Judge

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Case No. 2009-AL-07-0226  
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Upstate Forever, South Carolina Native Plant Society, and South Carolina  
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**PROOF OF SERVICE**

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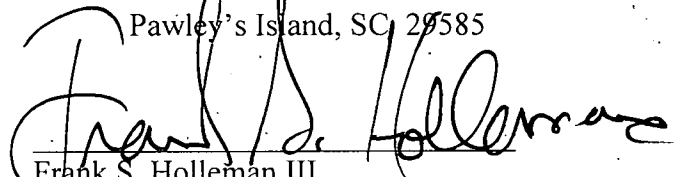
I hereby certify that on this date I served the Brief of Amicus Curiae Trout  
Unlimited, Through Its Mountain Bridge Chapter upon all parties by placing copies of  
same in the United States mail, first class postage prepaid, addressed as follows:

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