



# South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

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a 501c3  
non-profit organization

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Re: River Neck to Kingsburg 16 Inch Gas Main Florence County, South Carolina  
P/N: SAC-2019-01427

Dear Corps and DHEC Staff,

The South Carolina Environmental Law Project (SCELP), on behalf of Blue Ridge Environmental Defense League, writes in opposition to the above-referenced application for a permit to install a 14.5-mile gas main pipeline. SCELP is a non-profit public interest law firm dedicated to the protection of South Carolina's environment and we submit this letter on behalf of Blue Ridge Environmental Defense League, a regional, non-profit, community-based organization founded on earth stewardship, environmental democracy, social justice, and community empowerment.

We appreciate the opportunity to comment on the Kingsburg 16 Inch Gas Main public notice of application for a permit under Section 404. This letter is intended to pertain to all forthcoming permitting processes for the project that are relevant to the subjects this letter addresses and is in addition to any separate comment letters this group may submit.

## I. PROJECT BACKGROUND

The proposed work consists of installing a 14.5 mile, 16 inch gas main by trench and backfill, widening portions of the Right of Way (ROW) easement by 10 feet, and the installation of a permanent roadway crossing of a tributary with a culvert to retain hydrological flow. In detail, the gas main will pass through twenty-seven (27) jurisdictional wetlands and two (2x) tributaries. The project seeks to temporarily impact 7.083 acres of wetlands with temporary clearing impacts for site preparation, 8.908 acres of wetlands with temporary excavation and backfill impacts for the installation of the gas main, 0.004 acres of tributaries with permanent fill impacts for the creation of a roadway crossing with associated

culvert, and 2.519 acres of wetlands with permanent clearing and conversion of land from forested wetlands to emergent wetlands. The applicant has proposed to mitigate for impacts to wetlands and/or waters of the United States by purchasing 12.7 mitigation credits from a third-party mitigation bank. As stated by the applicant, the project purpose is “to support the development of a gas main installation referred to as River Neck to Kingsburg 16” Gas Main.”

## **II. REQUEST FOR PUBLIC HEARING**

For the reasons set forth in detail throughout this comment letter, commenters hereby request a public hearing on this pipeline project. The Clean Water Act provides in its general policy section that “public participation in the development ... of any ... program established by the Administrator... under this chapter shall be provided for, encouraged, and assisted by the Administrator ...” 33 U.S.C. § 1251(e). Section 404 states: “[t]he Secretary may issue permits, after notice *and opportunity for public hearings* for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (emphasis added). Corps regulations further state: “[A]ny person may request, in writing,...that a public hearing be held....Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.” 33 C.F.R. § 327.4(b). “In case of doubt, a public hearing shall be held.” 33 C.F.R. § 327.4(c).

Approval of a massive gas pipeline through South Carolina without holding a public hearing would violate the Corps’ Clean Water Act mandate to involve the public and hold a public hearing. Indeed, there are substantial issues of significant consequence being raised by affected community members and the public at-large, and described below, demonstrating a valid interest in holding a public hearing. The Corps would violate the CWA’s clear mandate to involve the public and allow public hearings if it approves a massive pipeline without holding a public hearing related directly to the federal approval process for the CWA 404 permit.

Additionally, given the circumstances of the COVID-19 pandemic, and recent recommendations and orders from the Center for Disease Control, local public health departments, Governor McMaster, and other epidemiological experts recommending that sick, elderly and other vulnerable populations self-isolate, we request that any public hearing be scheduled only after confirmation that the risk of transmission has subsided. This is especially critical for individuals who are affected by the proposed project and are vulnerable or at high-risk for serious illness from COVID-19. The COVID-19 pandemic has led to office and school closures throughout the country. As a result, members of the public, as well as attorneys and support staff at organizations engaged in this project are forced to make necessary adjustments, including alternative childcare arrangements, to coordinate offsite preparation and timely filing of comments. In many cases, this has led to insufficient time for review and comment preparation on the 404 application and under the current deadlines. As such, the undersigned request that the Corps provide a 30-day extension on the deadline for comment.

## **III. THE PROJECT DOES NOT COMPLY WITH SECTION 404 OF THE CLEAN WATER ACT**

The Clean Water Act has the sweeping goals to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and “to increase

the quality and quantity of the Nation’s wetlands,” *Id.* § 2317(a). The Act prohibits the discharge of soil or other materials into wetlands unless authorized by a permit issued by the Corps, 33 U.S.C. § 1344(a); 33 C.F.R. § 322.3; Parts 323, 325, and provides strict substantive limits on approving projects that degrade water quality or harm aquatic uses. The Corps must deny the permit because the proposed discharge does not comply with the CWA’s Section 404(b)(1) guidelines. The Clean Water Act limits the authority of the Corps to issue permits for the discharge of fill material into the waters of the United States.<sup>1</sup>

Specifically, Section 404(b)(1) of the CWA requires the Corps to apply guidelines established by the U.S. Environmental Protection Agency (“EPA”) to restore and maintain the integrity of aquatic ecosystems. 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230.1(a). The Corps’ regulations state that a permit will be denied if the proposed discharge would not comply with the 404(b)(1) guidelines. 33 C.F.R. § 323.6(a). Under these guidelines, “degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts.” 40 C.F.R. § 230.1(d). Discharging fill material in wetlands often destroys habitat and vegetation, degrades water quality, and diminishes wetlands’ capacity to store floodwater and shield upland areas from erosion. *Id.* § 230.41(b). “Fundamental to [the 404(b)(1)] Guidelines is the precept that...fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact.” *Id.* § 230.1(c). Discharging fill material into waters of the United States violates the Section 404(b)(1) guidelines when (1) there is a practicable alternative that would have less adverse effect on the aquatic ecosystem; (2) the proposed filling would significantly degrade the aquatic ecosystem; or (3) the proposed filling does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. *See Id.* § 230.12(a)(3)(i)–(iii); *see also Id.* § 230.10(a), (c), (d). If there remain unavoidable impacts, the Corps must decide what compensatory mitigation is required. *Id.* § 230.93(a)(1).

In applying the above criteria, the Corps must make detailed factual determinations as to the potential environmental effects of the proposed discharges. *See Id.* §§ 230.11, 230.12(b). Crucially, these factual determinations depend on not only a project’s direct effects on aquatic ecosystems, but also the cumulative effects of other discharges and secondary effects associated with the project. *See Id.* § 230.11(g), (h). Thus, while the Section 404(b)(1) guidelines apply only to the waters of the United States and coextensive aquatic ecosystems, *see Id.* § 230.3(b), the Corps must consider the environmental impacts from additional predictable developments, as well as those indirectly caused by a project. In making these factual determinations, the Corps must evaluate the duration and physical extent of any impacts as well as the possible loss of environmental values for different waters. *E.g., Id.* § 230.11.

There are several specific requirements under the Section 404(b)(1) guidelines that are particularly relevant here. First, the Corps may not issue a permit under Section 404 if there is any “practicable alternative” to the project with less impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). Second, no discharge can be permitted that jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act. *Id.* § 230.10(b)(3). Third, the Corps cannot issue the permit unless there is a demonstration that any discharge from

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<sup>1</sup> 33 U.S.C. § 1344(a), (b), (d); *id.* § 1362(7) (defining “navigable waters” as “waters of the United States”); 33 C.F.R. § 328.3(a)(1), (5), (6) (defining “waters of the United States” to include waters that may be used in interstate commerce, tributaries of such waters, and wetlands adjacent to those tributaries and waters).

the project “will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern,” or if any discharge will result in significant adverse effects to water quality. *Id.* § 230.10(c). Fourth, the Corps cannot allow discharges unless “appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d). Finally, the Corps must determine that the project is in the “public interest” by weighing all “relevant” considerations and balancing all probable impacts of the proposed action against its alleged benefits. 33 C.F.R. § 320.4(a). Moreover, the Corps must independently verify all the information in the application. 40 C.F.R. § 1506.5(a). Taken together, these guidelines require “that the unnecessary alteration or destruction of wetlands should be discouraged as contrary to the public interest.” 33 CFR § 320.4(b)(1).

For the reasons discussed below, the analysis contained in the information provided by the Corps from Dominion Energy’s permit application fail to demonstrate that the proposed filling would comply with the Section 404(b)(1) guidelines, or that the Project is in the public interest.

A. The Corps Must Choose the Least Damaging Practicable Alternative

The Corp’s must consider alternative pipeline routes and choose the least damaging practicable alternative. 40 C.F.R. § 230.10(a). The proposed 14.5-mile pipeline route through Florence County runs adjacent to sensitive ecological areas including the Pee Dee. The route also will impact twenty-seven (27) jurisdictional wetlands and two (2x) tributaries.

In light of the possible risks and hazards associated with construction and operation of a gas pipeline, including the known risks of pollution, explosions and fires, the Corps must evaluate a range of alternative routes including routes that do not run adjacent to sensitive ecological areas such as wetlands and other aquatic ecosystems, parks, and forest lands, and choose the route that will cause the least amount of damage to the environment. Indeed, a pipeline catastrophe in one of these sensitive aquatic areas would cause devastating, long-term impacts as evidenced by the numerous incidents Dominion Energy has already been involved in that are described in more detail below.

The process for undertaking this analysis is clearly set out in the Corps’ guidelines implementing the CWA. First, the Corps must define the project’s “overall project purpose.” *Id.* § 230.10(a)(2). Second, the Corps must determine whether a project is “water dependent.” *Id.* § 230.10(a)(3). If the project is not water dependent, the Corps is required to presume alternatives that do not destroy aquatic resources are available under CWA regulations “unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3); *see also id.* §§ 230.3(m), 230.41. If the presumption applies, “the applicant must then rebut the presumption by ‘clearly demonstrate[ing]’ that a practicable alternative is not available.” *Id.* In addition, when a discharge involves a “special aquatic site,” the Corps must presume that all practicable alternatives that do not involve a discharge into that site would have less adverse impact on the aquatic ecosystem, unless the applicant can clearly demonstrate otherwise. 40 C.F.R. § 230.10(a)(3). “Special aquatic sites” include sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle and pool complexes. *Id.* §§ 230.40–230.45. With a project that is 14.5 miles long, certainly there are feasible alternatives at the applicant’s disposal that would avoid or further

reduce the extent of the proposed wetland impacts. The “Public Notice” does not indicate that any analysis of routes that avoid aquatic ecosystems was completed. Thus, the Corps must evaluate that and other alternatives.

Dominion Energy must not only demonstrate that its project is preferable to alternative routes, but that its proposed method of construction at each wetland crossing is the least environmentally damaging. 40 C.F.R. § 230.10(a). In particular, the methods the company has chosen at each of its twenty-seven (27) jurisdictional wetlands and two (2x) tributary crossings will make a significant difference as to the extent of the impacts to waterways if the Project is approved. The information provided by Dominion Energy falls far short of demonstrating that it will be employing the most environmentally protective construction methods. For example, 33 CFR § 337.1(a) states that the public notice should “include sufficient information to provide a clear understanding of the nature of the activity,” and “the types of equipment and methods of dredging and conveyance proposed to be used;” yet, the notice fails to identify the equipment or construction method that Dominion Energy will use to cross the wetlands and tributaries (*i.e.*, open cut trenches, HDD, etc.). 33 CFR § 337.1(a)(2). This is critical in light of Dominion’s track record of construction pollution in South Carolina. *See* Section G, *infra* (discussing how Dominion has already been cited in South Carolina for construction sediment contaminating upstate drinking water).

The Public Notice does not describe any practical alternatives and the extent of possible damages for each of those alternatives. Indeed the information available to the public to date does not indicate the project will meet the Corps’ legal obligations to ensure the least damaging practicable alternative that avoids the destruction of wetlands. Moreover, there is no indication that the Corps considered non-pipeline alternatives and alternatives that do not involve discharge of dredged or fill material into waters of the United States. Such alternatives could include generation of equivalent quantities of cleaner non-fossil fuel-based fuels. The Corps must fulfill its duty to evaluate and choose the least damaging alternative to ensure that the adverse impacts of the pipeline’s construction and operation are avoided. The Corps also must verify information supplied by Dominion Energy in its evaluation of the proposed project impacts.

B. The proposed pipeline must avoid destruction of wetlands to the extent practicable.

Corps regulations require that the Corps, in evaluating a proposed project and issuing section 404 dredge and fill permits, avoid destruction of wetlands to the extent practicable. 33 C.F.R. § 320.4(r). As further guidance, the Corps’ 404(b)(1) guidelines that “[t]he discharge of dredged or fill material in wetlands is *likely* to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement.” 40 C.F.R. § 230.41(b) (emphasis added). The guidelines also state that a 404 permit should only be issued if the applicant takes “all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States.” 40 C.F.R. § 230.91(c)(2). Accordingly, the Corps must ensure that Dominion Energy avoids destruction of wetlands and tributaries and avoid any other adverse impacts to these sensitive aquatic ecosystems.

According to the applicant, the proposed Pipeline would pass through twenty-seven (27) jurisdictional wetlands and two (2x) tributaries and cause both temporary and permanent

impacts to these sensitive and critical ecosystems. The Corps must verify this information and evaluate the scope of impacts, both size and extent to determine whether there are permanent impacts along the proposed pipeline's route that have not yet been disclosed, whether conversion of forested and scrub shrub wetlands to emergent wetlands will result in a loss of wetland function and/or a change of use of the waterbody, which indeed constitute significant adverse impacts.

The project also proposes to convert forested wetlands to emergent wetlands. Although the Corps does not consider conversion of wetland type a permanent loss of waters of the United States even if that conversion results in the permanent loss of certain functions, this position does not allow the Corps to avoid evaluating the adverse impacts of wetland conversion, and resulting loss of wetland function. It is the commenters' position that any deforestation of wetlands or other conversion of wetlands is a loss of waters, and the Corps' policy effectively permits projects that will permanently deforest unlimited acreage of high-quality forested wetlands. Indeed, such impacts, including loss of certain wetland functions, must not go unanalyzed.

Further, as set forth above, because the proposed project is not "water dependent," the Corps must evaluate alternatives that do not impact these sensitive aquatic ecosystems and that seek to avoid wetland destruction all together. The Corps also must evaluate the cumulative impacts to wetlands along the full pipeline route, including the cumulative impacts of the permanent removal of wetlands along the pipeline route and right of way, and the conversion of high-quality forested wetlands and scrub shrub wetlands to emergent wetlands. The Corps must identify the cumulative loss of wetland function resulting from the proposed project at a site specific, watershed and regional scale.

C. The proposed project must not cause or contribute to degradation of the environment or water quality

The Corps must not permit the proposed project if it causes or contributes to degradation of the environment. 40 C.F.R. § 230.10. In addition to aquatic and wetland resources, the Corps must evaluate the project's impacts, during construction and operation, to other environmental values, including wildlife and air quality, among others. This analysis must include evaluation of whether the proposed project jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act. 40 C.F.R. § 230.10(b)(3), and the impacts of pollution which are a known risk associated with the construction and operation of gas pipelines. Here, the project admits that it will endanger the federally listed Red-cockaded woodpecker but fails to emphasize the devastation of such impacts; deforestation removes the trees these birds rely on and it would take decades for any new growth tree to mature to the level at which they become habitable for the woodpeckers. The project also admits that it could impact another federally-listed endangered species, Canby's Cowbane, but fails to mention that this herb is threatened due to exactly what is proposed here: the degradation and loss of the wetland habitat in which it grows.<sup>2</sup> In the case of both Canby's Cowbane and the red-cockaded woodpeckers, much is unknown about their habits and needs, but what is clear is that the threats that led to their species becoming federally-listed persist today. This project should not be allowed to proceed until a complete assessment of the proposed impacts to these federally listed

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<sup>2</sup> [https://explorer.natureserve.org/Taxon/ELEMENT\\_GLOBAL.2.139094/Oxypolis\\_canbyi](https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.139094/Oxypolis_canbyi)

species is completed and the project should be denied unless we can ensure their complete safety.

Moreover, the Corp's own guidelines state that "[n]o discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes ... to violations of any applicable State water quality standard." 40 C.F.R. § 230.10(b)(1). The proposed project will affect will pass through twenty-seven (27) jurisdictional wetlands and two (2x) tributaries. Construction and operation of the project will increase pollutant loads to these waterbodies. Accordingly, the Corps must evaluate whether discharges from the proposed project will violate state water quality standards and lead to degradation of these waterbodies. As described in detail below, Dominion Energy's South Tyger River pollution caused long-term adverse impacts on the entire river system and has been very costly and difficult to clean up.

D. The Corps must take all appropriate steps to minimize potential adverse impacts of the proposed project

In addition to determining whether there are fewer damaging alternatives routes or activities to the proposed pipeline project, the Corps also must take all appropriate steps to minimize the project's adverse impacts. 40 C.F.R. § 230.10. Based on the public notice, Dominion Energy intends to purchase 12.7 mitigation credits from a third-party mitigation bank; however, Dominion Energy must provide explanation of mitigation or avoidance of temporary and permanent impacts on the project's full acreage. In relevant part, 40 CFR § 230.94(b)(1) states, "For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program." The Public Notice does not provide this detail. The Corps must first evaluate the comprehensive environmental impacts of the proposed project and require avoidance and mitigation measures for all potential impacts and allow for public participation on the impacts and proposed avoidance and mitigation plans.

E. The Corps must independently verify all information provided by Dominion Energy

The Clean Water Act requires that the Corps independently evaluate and verify the information supplied by the applicant in determining whether to issue a section 404 permit. 40 C.F.R. § 1506.5(b). As such, the Corps must not take Dominion Energy's analysis of impacts and possible alternatives at face value. The Corps must independently determine the scope and extent of impacts to aquatic ecosystems and the environment and determine whether there are any other less damaging alternatives to the proposed pipeline. Similarly here, the Corps should commission an independent engineering analysis to verify Dominion Energy's information about the risks of disaster and its ability to respond to a worst-case discharge of construction sediment into waterways. It must also demonstrate to the public that it has completed this independent analysis to ensure meaningful public participation. 33 U.S.C. § 1344(a).

F. The project risks dangerous hazards that demonstrate the project is not in the public interest.

The Corps must deny the Section 404 permit because the Dominion Energy Project is not in the public interest. Pursuant to the Corps' regulations implementing the Clean Water Act, the "decision whether to issue a permit will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). The public interest review is intentionally broad and should include all relevant issues that could impact the environment, human health, and natural resources.

The Corps' regulation instructs: Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. 33 C.F.R. § 320.4(a)(1).

The Corps' regulations include a non-exhaustive list of factors that may be relevant for each individual project. 33 C.F.R. § 320.4(a)(1) states in part: All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. Consistent with the mandate that the Corps consider "all those factors that become relevant," this non-exhaustive list of factors includes issues beyond those related to the impacts of in-water work. *Id.* In other words, by requiring an analysis of "cumulative impacts" and by including a non-exhaustive, far-reaching list of factors, the Corps is clearly required to conduct a broad analysis of the public interest that captures all relevant impacts associated with the project and not just those that result directly from the permitted activities.

Here, in addition to admittedly affecting historic properties and habitats of Red cockaded woodpeckers and Canby's cowbane, Dominion Energy's safety record demonstrates that this project could pose serious risks to the environment and citizens. On November 15, 2019 at approximately 1:00 a.m., one of Dominion Energy's newly installed gas lines exploded at Pepper Pike<sup>3</sup> in Ohio. An investigation by the Public Utilities Commission of Ohio (PUCO) resulted in a report issued February 28, 2020, revealing that the cause of the explosion and resulting fire was Dominion Energy's "failure to follow established welding procedures, insufficient inspection and oversight at the construction site, and lack of procedures and training regarding auger boring, which led to the pipeline being subject to excessive strain." *Id.* In detail, the report states:

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<sup>3</sup> <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=19-2140&x=0&y=0>

Staff believes Dominion showed a **lack of institutional control at the construction project** located at Shaker Blvd. in Pepper Pike. **Poor construction practices, failure to follow established procedures, and a lack of oversight all contributed** to the weld failure and pipeline rupture. Staff further believes that the number of bad welds found at the site, **Dominion's previous enforcement history related to not following or enforcing procedures in the field, and poor documentation practices** show that failures similar to the pipeline rupture in Pepper Pike **may recur in the future** if the factors that contributed to the rupture are not addressed. . . . Finally, given the severity of the violations, Staff recommends that a forfeiture of \$2,500,000 be assessed pursuant to O.R.C. 4905.95(B)(1)(b) against Dominion Energy Ohio for failure to comply with Pipeline Safety Regulations requirements that caused or contributed to this incident. **This incident posed a serious danger to the public. Given the destruction that it caused and the location, if this had happened during a period of high traffic, instead of at 1:00am, the likelihood that someone would have been injured or killed would have been significantly higher.**

*Id.* In March of this year, Dominion Energy was forced to pay \$1.4 million in fines after violating numerous state and federal environmental laws after secretly and illegally dumping more than 27 million gallons of polluted coal ash water into Quantico Creek in Virginia.<sup>4</sup> Confronted with the discharge, Dominion Energy attempted to insisted the discharge was made in compliance with its Clean Water Act permit; however, an investigation showed that was not the case.

Dominion's violations are not just national, however. In 2018, Dominion was cited for failing to control sediment near a 55-mile pipeline it had built in the upstate of South Carolina.<sup>5</sup> Sediment washing off the pipeline's construction sites wound up in creeks that feed into the South Tyger River, where the Woodruff-Roebuck Public Water District has an intake pipe. The runoff from Dominion's construction also worked its way into the river and clogged the pipe, causing the Woodruff-Roebuck system to buy water from another utility for more than 10,000 customers south of Spartanburg.<sup>6</sup> Ultimately, a \$4,200 fine was issued by DHEC which Dominion Energy later stated had "minimal impact."<sup>7</sup> Here, City of Florence drinking water is produced a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline.

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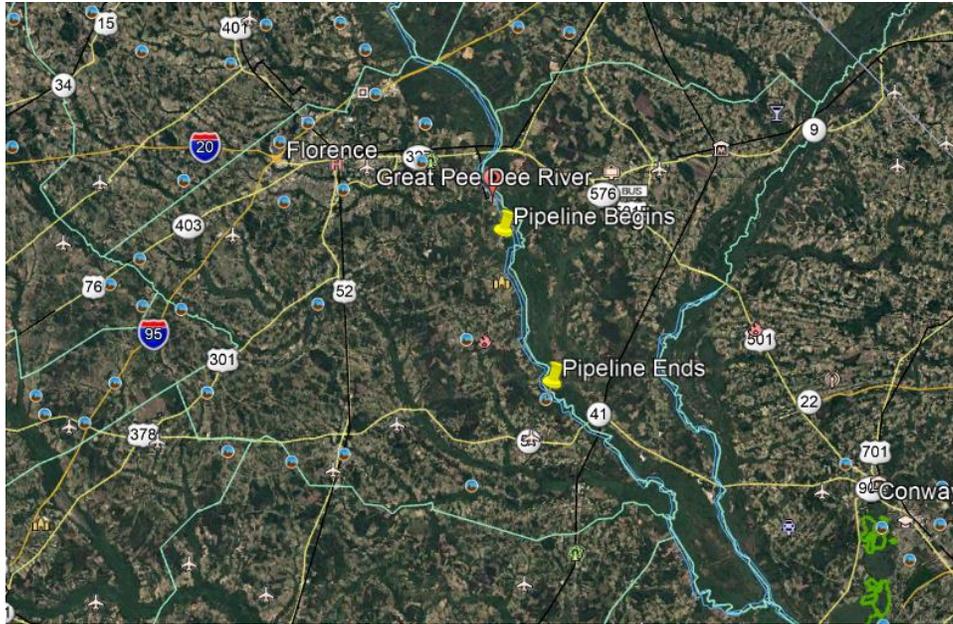
<sup>4</sup> <https://www.oag.state.va.us/media-center/news-releases/1657-march-13-2020-dominion-to-pay-1-4-million-for-alleged-violations-of-virginia-s-environmental-laws-and-regulations>; *see also*

<https://files.constantcontact.com/bfcd0cef001/228a429a-f207-495f-b608-519ff30fa7d9.pdf>

<sup>5</sup> <https://abcnews4.com/news/local/south-carolina-fines-dominion-energy-for-polluting-drinking-water>

<sup>6</sup> <https://www.greenvilleonline.com/story/news/2018/05/25/dominion-energy-under-scrutiny-after-mud-clogs-water-system-near-utility-s-c-project/645320002/>

<sup>7</sup> <https://www.dominionenergy.com/library/domcom/media/community/environment/reports-performance/water-cdp-2018.pdf?la=en&modified=20191021165021>



Considering Dominion Energy’s construction practices and procedures and its history of damaging South Carolina’s water supply, the applicant must prove more assurance to the public than a bare assurance that “Stormwater best management practices will be implemented during construction activities to minimize sedimentation.” The public needs specific information about the risks posed to its historic sites, Red cockaded woodpeckers and Canby's cowbane. The Corps must deny this permit until the public receives the appropriate assurances that Florence’s water supply will not suffer the damage Dominion Energy caused in the upstate and that Dominion will not be able to leave the environment and its precious habitats scarred.

G. Dominion Energy’s Compensatory Mitigation is Inadequate.

As described more fully below, Dominion Energy and the Corps have provided minimal information about their plan to provide for mitigation or compensation of any of these wetland losses. The Corps must also include monitoring as part of its compensation and mitigation plans to determine the rate of restoration and additional measures if mitigation or compensation should fail. 40 CFR § 230.94(b)(1) states:

For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact

location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.

*Id.* (emphasis added).

Here, enough information is not provided to enable the public to provide meaningful comment on the proposed mitigation. The plan does not mention location and does not say whether this plan includes adequate compensation for the conversion of 1.5 acres of forested to emergent wetlands, yet simply states, “The applicant has proposed to mitigate for impacts to wetlands and/or waters of the United States by purchasing 12.7 mitigation credits from a third party mitigation bank.”

According to the Section 404(b)(1) guidelines, “[t]he fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by...permits.” 40 C.F.R. § 230.92(a)(1). Thus, the Corps “*must* determine the compensatory mitigation to be required in a...permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.” *Id.* (emphasis added). Compensatory mitigation may include restoration, enhancement, establishment, and preservation of aquatic ecosystems. *Id.* § 230.93(a)(2). In general, it should take place within the same watershed where unavoidable impacts occur. *See Id.* § 230.93(c)(1).

Indeed, the Corps cannot issue this permit with such significant information lacking from the application and without any opportunity for the public to comment on it. As such, the Corps and applicant must fully develop the plan and provide an opportunity for public to comment prior to issuing a 404 permit.

#### H. The cumulative impacts of this project have not been analyzed

The Corps must also evaluate the probable impacts, including cumulative impacts, of the project on the public interest and weigh any perceived benefits against reasonably foreseeable detriments. See 33 CFR § 320.4(a). Because wetlands constitute a productive and valuable public resource, their unnecessary alteration or destruction “should be discouraged as contrary to the public interest.” 33 CFR § 320.4(b). Similarly, DHEC’s 401 Water Quality Certification program requires that the agency consider all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

- (a) Whether the activity is water dependent and the intended purpose of the activity;
- (b) Whether there are feasible alternatives to the activity;
- (c) All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
  - (1) Impact on existing and classified water uses;
  - (2) Physical, chemical, and biological impacts, including cumulative impacts;
  - (3) the effect on circulation patterns and water movement;
- (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar

activities of the applicant and others. S.C. Code Regs. R. 61-101(F)(3)(c).

Further, the regulations explicitly state that certification **will** be denied if: (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; or (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality. S.C. Code Regs. 61-101.F.5. The EPA and Corps have acknowledged “peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.” 80 Fed. Reg. at 37,055.

In applying the above criteria, the Corps must make detailed factual determinations as to the potential environmental effects of the proposed discharges. *See Id.* §§ 230.11, 230.12(b). Crucially, these factual determinations depend on not only a project’s direct effects on aquatic ecosystems, but also the cumulative effects of other discharges and secondary effects associated with the project. *See Id.* § 230.11(g), (h). Thus, while the Section 404(b)(1) guidelines apply only to the waters of the United States and coextensive aquatic ecosystems, *see Id.* § 230.3(b), the Corps must consider the environmental impacts from additional predictable developments, as well as those indirectly caused by a project. In making these factual determinations, the Corps must evaluate the duration and physical extent of any impacts as well as the possible loss of environmental values for different waters. *E.g., Id.* § 230.11.

Here, the amount of fill and excavation proposed may appear slight in terms of total acreage, but the overall impacts that will follow from the loss of critical headwater stream habitat are significant. Moreover, this project will cross habitat that supports a number of valuable wildlife species and will cause impacts to that wildlife. The notice admits that the Red cockaded woodpeckers (*Picoides borealis*) and Canby's cowbane (*Tiedemannia canbyi*) may be affected but does not include any specific information about the actual loss of habitat over this 14.5-mile stretch. Many of the species that utilize streams for habitat are unable to easily relocate and would be subjected to increased threat without access to these waters. Headwater streams serve a particularly critical role in the health and vitality of an ecosystem, including providing nutrient production and exchange; refuge habitat from predators; spawning and rearing habitat; and migratory corridors.<sup>8</sup>

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<sup>8</sup> *See generally* Myer, Judy L., *et al.*, “The Contribution of Headwater Streams to Biodiversity in River Networks,” *Journal of the American Water Resources Association*, Vol. 43, No. 1 (Feb. 2007) (“[Headwater streams] offer an enormous array of habitats for microbial, plant, and animal life, but their small size also makes them especially sensitive to disruption. The streams are integral to the maintenance of biological diversity in the river network...[T]he strong biological linkages between these upstream habitats and downstream ecosystems enhance and maintain species diversity downstream. The diversity of life in headwater streams (intermittent, first and second order) contributes to the biodiversity of a river system and its riparian network. [These] small streams differ widely in physical, chemical, and biotic attributes, thus providing habitats for a range of unique species. Headwater species include permanent residents as well as migrants that travel to headwaters at particular seasons or life stages. Movement by migrants links headwaters with downstream and terrestrial ecosystems, as do exports such as emerging and drifting insects...Degradation of headwater habitats and loss of their connections to larger streams have negative consequences not only for inhabitants of small streams but also for the diversity of downstream and riparian ecosystems. In many respects and locales, the biological integrity of entire river networks may be greatly dependent on the individual and cumulative impacts occurring in the many small streams that constitute their

#### IV. CONCLUSION

The applicant has not met its burden on demonstrating why this proposal meets both the Corps' and DHEC's guidelines to warrant approval. For the foregoing reasons, the Corps should deny Dominion Energy's Section 404 permit application. Should the Corps decide to approve the permits, it must first provide substantial additional analyses, including detailed factual determinations about the full extent of direct, indirect, cumulative, and secondary impacts from the Dominion Energy Project. Because critical pieces of this analysis are missing from the Public Notice, as described above, the Corps should allow additional public comment on that supplementary material once it is provided to the public, as required under its regulations. Correspondingly, we urge the Corps of Engineers and DHEC to extend the public comment period, schedule a hearing for public comment on the above-referenced permit when the public can attend and ultimately deny the above-referenced application or, at a minimum, require applicant modify its application to reduce or eliminate aquatic impacts to the fullest extent possible. We request notification of any action or decision related to this project, preferably via email to [lauren@scelp.org](mailto:lauren@scelp.org).

Thank you for your consideration of these important issues.

Sincerely,



Lauren Megill Milton