

State Water Planning Process Advisory Committee

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Columbia, South Carolina

Brief Overview of South Carolina Water Law

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Riparian Common Law

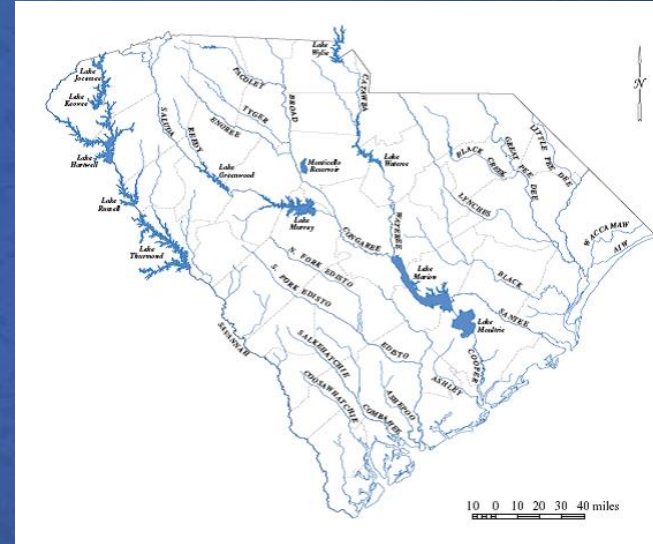
- Adopted by SC Supreme Court in *Omelvany v. Jagers*, 2 Hill 634 (1835), modified by *White v. Whitney Manufacturing Co.*, 38 S.E. 456 (S.C. 1901).
- Owners of property adjacent to natural water courses possess a right to use stream flow.
- This right of water use is co-equal to other riparian owners – no one has superior right of use over other riparians.
- No particular order of priority in types of water uses.
- Limitations on right of use:
 - Water can only be used on riparian land
 - Must be reasonable
 - Cannot obstruct or impede navigable waters
 - Right may be regulated by State exercise of police power
- Modified by S.C. Surface Water Permitting Act for riparian use over certain volume – regulated riparianism.

Common Law Concerning Groundwater

- Common law governing groundwater is nonexistent in SC.
- Likely that, should the question arise, SC courts would adopt a reasonable use standard analogous to Riparian common law.
 - Use of groundwater in manner that harms other users is unreasonable.
 - Lowering water table to substantial detriment of another = unreasonable use
 - Withdrawal of groundwater to the extent that a direct and substantial effect upon a surface water occurs that harms a Riparian owner = unreasonable use

Public Trust Doctrine

- Navigable waters (tidal and non-tidal) are held by the State in trust for the benefit of the public. See *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *State v. Pacific Guano Co.*, 22 S.C. 50 (1883); *State ex rel. Lyon v. Columbia Water Power Co.*, 63 S.E. 884 (1909); S.C. Const. art. I § 40 (1868); S.C. Const. art. XIV § 4 (1895).
- SC Supreme Court has articulated broad view of the Public Trust Doctrine:



“In South Carolina, the state owns the property below the high water mark of a navigable stream. This property is part of the Public Trust. ... The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally these things have included natural resources such as ... water (including waterborne activities such as navigation and fishing) Under this Doctrine, everyone has the inalienable right to ... drink safe water, to fish and sail, and recreate on ... navigable waters” *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397 (S.C. 1995).

Public Trust Doctrine

- The State cannot convey trust property unless that property will be used to promote public interests, nor can the State take action that substantially impairs the public's interest in trust property. *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397 (S.C. 1995).
- In *Kiawah Dev. Partners II v. S.C. Dept of Health & Env'tl. Control*, 766 S.E.2d 707 (S.C. 2014), Court turns to Doctrine to interpret Coastal Zone Management Act; explains that Doctrine intended to achieve a balance between environmental/public considerations and economic/private considerations. Also suggests that its test of "substantial impairment" may weigh too much in favor of private interests.
- Doctrine does not extend to groundwater.

SC Water Resource Planning & Coordination Act: S.C. Code Ann. § 49-3-40 (1969)

- Act placed duty upon SCDNR to advise and assist Governor and Legislature with:
 - Establishing comprehensive water policy for State.
 - Establishing policies to resolve special problems of water resource use.
 - Reviewing the actions and policies of state agencies with water resource responsibilities to determine the consistency with the comprehensive water policy of the State and to recommend appropriate action where deemed necessary.
 - Recommending to the Legislature any changes of law required to implement water policy.

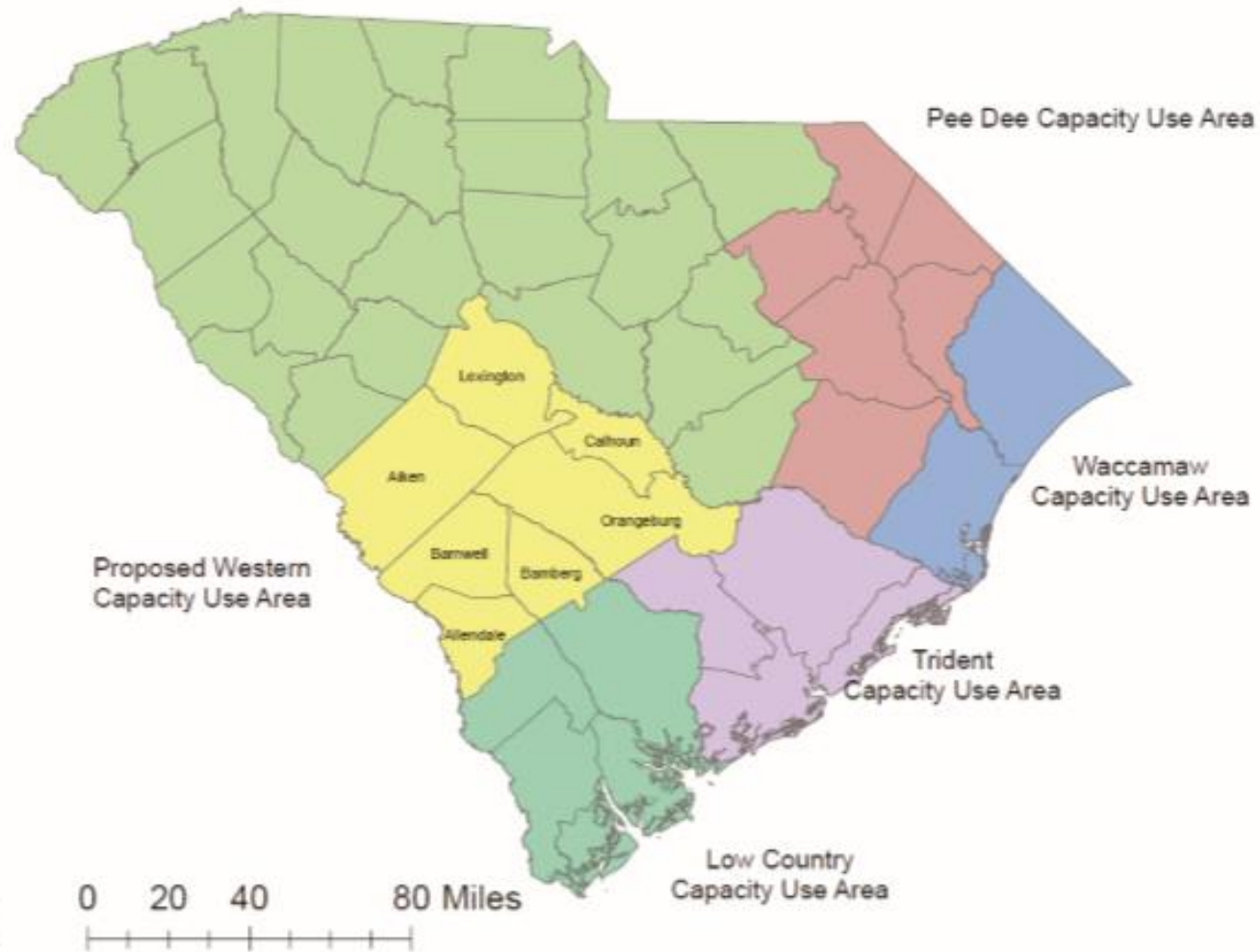
Section 49-3-50 Matters to be considered by DNR in exercising responsibilities:

- In exercising its responsibilities under this chapter, the department shall take into consideration the need for:
 - (a) Adequate supplies of surface and groundwaters of suitable quality for domestic, municipal, agricultural, and industrial uses.
 - (b) Water quality facilities and controls to assure water of suitable quality for all purposes.
 - (c) Water navigation for recreational and commercial needs.
 - (d) Hydroelectric power.
 - (e) Flood damage control or prevention measures including zoning to protect people, property, and productive lands from flood losses.
 - (f) Land stabilization measures.
 - (g) Drainage measures, including salinity control.
 - (h) Watershed protection and management measures.
 - (i) Outdoor recreational and fish and wildlife opportunities.
 - (j) Any other means by which development of water and related land resources can contribute to economic growth and development, the long-term preservation of water resources, and the general well-being of all the people of the State.

SC Groundwater Use and Reporting Act

- Enacted in 1969, amended in 1990, 1993, 2000. Modeled after NC law. S.C. Code Ann. § 49-5-10 et seq.
- Requires all groundwater users withdrawing more than 3 million gallons during any one month to report amount withdrawn.
- Exempt from Act: emergency withdrawals, nonconsumptive uses, wildlife habitat management, individual residential use.
- Authorizes DHEC to establish groundwater capacity use areas where excessive withdrawals pose adverse threats or effects to natural resources, integrity of aquifer, or public health.
- Capacity Use Areas require development of management plan.
- All withdrawers within Capacity Use Area using over 3 million gallons during any month required to obtain permit. Limited exemptions exist.
- In making permitting decision, regulations give DHEC authority to consider groundwater withdrawal's effect on surface water flows. SC Code Regs. 61-113(F)(1)(h).
- Designated counties outside of Capacity Use Areas required to give notice of well construction or increased capacity.

South Carolina Proposed Western Capacity Use Area



SC Drought Response Act, S.C. Code Ann. § 49-23-10 et seq.

- Requires State monitoring and response to drought conditions.
- Authorizes State to impose mandatory curtailment of nonessential water uses during severe or extreme drought.
- Counties and cities implement drought response ordinances applicable to nonessential water uses.
- Nonessential water uses defined as any use not deemed to be essential.
- Essential water uses: firefighting, health and safety, food production, drinking water.
- During severe or extreme drought, Governor may declare drought emergency and curtail any water use.

S.C. Surface Water Withdrawal, Permitting, Use & Reporting Act

Requirements under Act for New Users	Agriculture	Non-Consumptive Uses	Consumptive Uses	Reservoir Owners/ Operations
Exemptions SC Code Ann. § 49-4-30	<ul style="list-style-type: none"> Less than 3mgm withdrawn Farm ponds Emergency. 	Same, plus: <ul style="list-style-type: none"> Ponds fed by rainwater Wildlife management Instream dredging/mining. 	Same.	Same, plus: <ul style="list-style-type: none"> Hydropower exempt from permitting Evaporation from reservoirs.
Type of Approval	Registration. SC Code Ann. § 49-4-35	Permit. SC Code Ann. § 49-4-40	Permit. SC Code Ann. § 49-4-70	Permit. SC Code Ann. § 49-4-45
Public Notice?	No.	No.	Yes. SC Code Ann. § 49-4-80(K)	No.

Surface Water Act Continued

Requirements under Act for New Users	Agriculture	Non-Consumptive Uses	Consumptive Uses	Reservoir Owners/Operations
Criteria for Approval	If requested amount within 80% of mean annual daily flow, approval required. SC Code Reg. 61-119(E)(3)(a)(ii)	Showing that withdrawal will result in no or minimal changes in water quantity. SC Code Ann. § 49-4-40(A)	Determination of reasonableness based upon enumerated criteria, incl. minimum flow. SC Code Ann. § 49-4-80 Special rules for defining min. flows apply to withdrawals on river segments influenced by reservoir. SC Code Ann. § 49-4-150(A)(3)	Any criteria not addressed in federal license or state certification. SC Code Ann. § 49-4-45(A)(2)

Surface Water Act Continued

Requirements under Act for New Users	Agriculture	Non-Consumptive Uses	Consumptive Uses	Reservoir Owners/Operations
Limited Once River Falls Below Min. Flow?	No. SC Code Ann. § 49-4-35(C)	No. SC Code Ann. § 49-4-40(A)	Yes. SC Code Ann. § 49-4-80(F) & § 49-4-150(b) SC Code Regs 61-119(E)(4)	No limitation for withdrawals from reservoir. SC Code Regs 61-119(E)(3)(a)(i)(C)(3)
Duration	Perpetuity. SC Code Ann. § 49-4-35	20-40 years. SC Code Ann. § 49-4-100(B)	20-40 years; up to 50 for public utilities.	20-40 years.
Remedy for harmed riparians	Withdrawal presumed reasonable. No action for damages unless registration violated. SC Code Ann. § 49-4-110(B)	Same but plaintiff must show permit violation.	Same but plaintiff must show permit violation.	Same but plaintiff must show permit violation.

The Water Efficiency and Conservation State Scorecard:

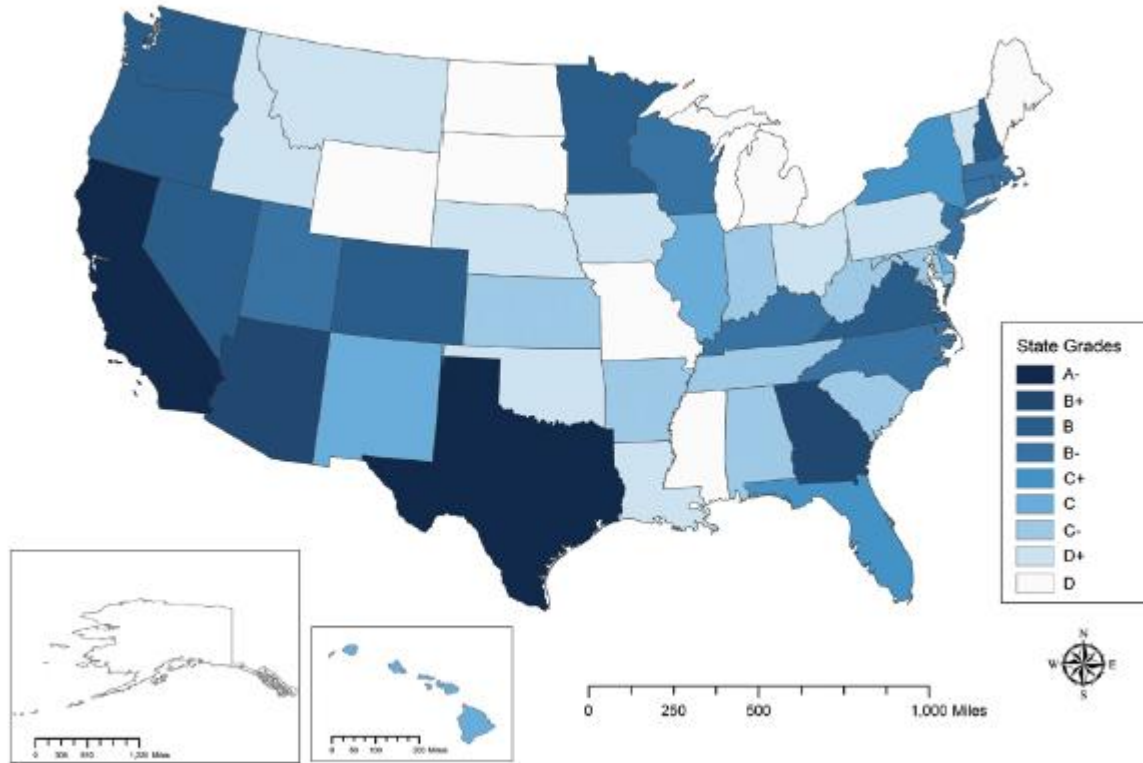


An Assessment of Laws



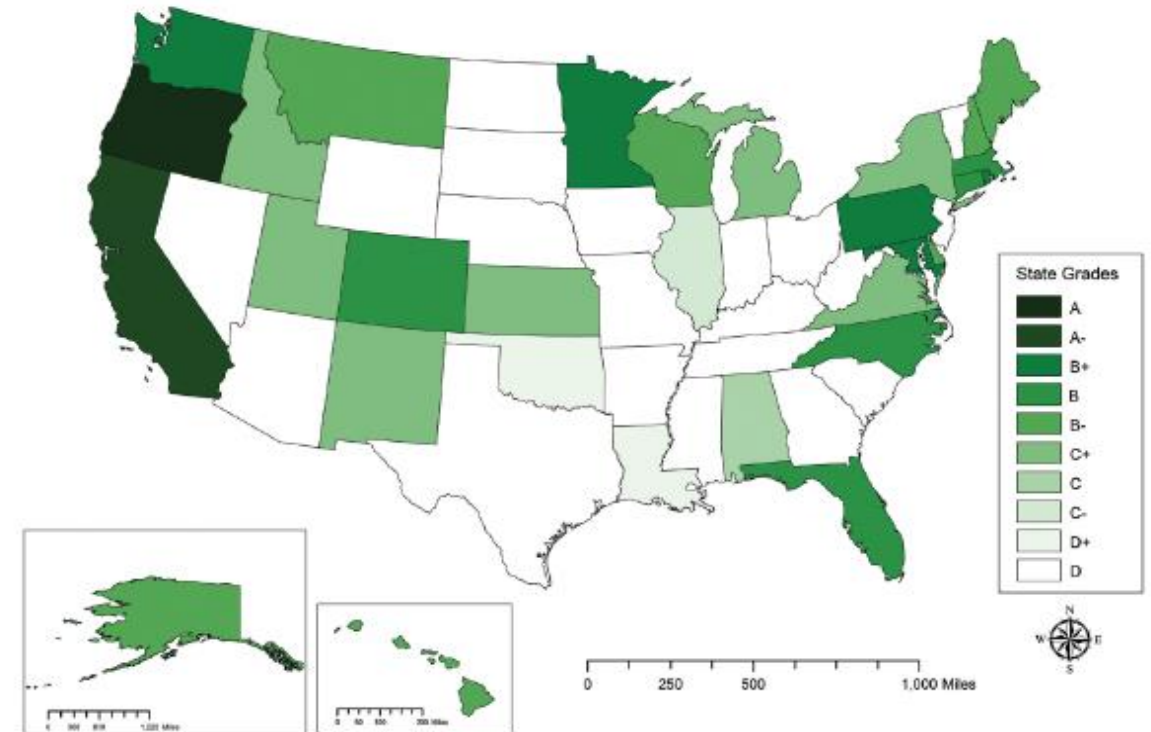
2017 Water Efficiency and Conservation State Scorecard

Figure 1 – Water Efficiency and Conservation State Scorecard Grades (2017)



The Water Efficiency and Conservation State Scorecard: An Assessment of Laws

Figure 2 – Climate Resiliency State Scorecard Grades (2017)



The Water Efficiency and Conservation State Scorecard: An Assessment of Laws

