State Water Planning Process Advisory Committee

September 6, 2018
Columbia, South Carolina

Brief Overview of South Carolina Water Law

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Riparian Common Law

- 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
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
- 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).
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 & Envtl. 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.
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.
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.

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.
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.
## Requirements under Act for New Users

<table>
<thead>
<tr>
<th>Exemptions SC Code Ann. § 49-4-30</th>
<th>Agriculture</th>
<th>Non-Consumptive Uses</th>
<th>Consumptive Uses</th>
<th>Reservoir Owners/Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Less than 3mgm withdrawn</td>
<td>Same, plus: • Ponds fed by rainwater • Wildlife management • Instream dredging/mining.</td>
<td>Same.</td>
<td>Same, plus: • Hydropower exempt from permitting • Evaporation from reservoirs.</td>
<td></td>
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<tr>
<td>• Farm ponds • Emergency.</td>
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## Type of Approval

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<tbody>
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<td>No.</td>
<td>No.</td>
<td>Yes. SC Code Ann. § 49-4-80(K)</td>
<td>No.</td>
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### Surface Water Act Continued

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<td><strong>Criteria for Approval</strong></td>
<td>If requested amount within 80% of mean annual daily flow, approval required. SC Code Reg. 61-119(E)(3)(a)(ii)</td>
<td>Showing that withdrawal will result in no or minimal changes in water quantity. SC Code Ann. § 49-4-40(A)</td>
<td>Determination of reasonableness based upon enumerated criteria, incl. minimum flow. SC Code Ann. § 49-4-80</td>
<td>Any criteria not addressed in federal license or state certification. SC Code Ann. § 49-4-45(A)(2)</td>
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<td>Duration</td>
<td>Perpetuity. SC Code Ann. § 49-4-35</td>
<td>20-40 years. SC Code Ann. § 49-4-100(B)</td>
<td>20-40 years; up to 50 for public utilities.</td>
<td>20-40 years.</td>
</tr>
<tr>
<td>Remedy for harmed riparians</td>
<td>Withdrawal presumed reasonable. No action for damages unless registration violated. SC Code Ann. § 49-4-110(B)</td>
<td>Same but plaintiff must show permit violation.</td>
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The Water Efficiency and Conservation State Scorecard:
An Assessment of Laws
2017 State Scorecard
Full Report
December 2017
2017 Water Efficiency and Conservation State Scorecard

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

Figure 2 – Climate Resiliency State Scorecard Grades (2017)