SOUTH CAROLINA WATER LAW

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In reviewing water law, several considerations must be identified at the outset to adequately appreciate the application of law. First, water law is not neatly contained in any one combined set of statutes that one can quickly and easily review. Rather, the law must be gleaned from a broad range of sources, including the constitutions of the United States and South Carolina, federal and state statutes, federal and state regulations, and the common law of this State. Second, both the federal government and the state of South Carolina exercise jurisdiction over water bodies that flow through and around South Carolina. In many instances the jurisdiction overlaps and is concurrent, but in other situations the jurisdiction is reposed in only one level of government. Third, the matter of ownership of water must be considered. In most situations, water is not subject to ownership; instead, water is common property, inuring to the benefit of the citizenry in general. Water, however, is subject to ownership under various circumstances and in most instances is available for reasonable use without actual ownership. Fourth, water is generally limited in value to anyone unless it is of adequate quantity and quality; therefore, the effects of laws relating to pollution control must be borne in mind. Finally, the very nature of water must be considered. Traditionally, water has been broken down into classifications, such as natural watercourses, ground water, and diffused surface water (runoff); however, water must be viewed, in reality, as part of the hydrologic cycle (see Chapter 3). Thus, consideration of a problem that superficially appears to be one of surface water may directly affect ground water. As water use and consumption continue to increase, this relationship will become increasingly important in water law.

This chapter will first summarize South Carolina's common law on water. Common law is "the body of law derived from judicial decisions rather than from statutes."[1] Different common-law schemes vary, depending on the characteristic of the water involved. Therefore, this chapter is organized by the different water types recognized by the courts – natural water courses, diffused surface water, ground water, navigable water, and tidelands. Thereafter, this chapter will summarize the state and federal statutory law that may or may not supercede the common law. Finally, outstanding water-law issues and needs will be briefly discussed.

NATURAL WATERCOURSES[2]

The basic law governing natural watercourses in South Carolina is the common-law riparian doctrine. The word "riparian" is derived from the Latin word "ripa" which means riverbank.[3] The basic principle of the riparian doctrine is that a person who owns land bounded or crossed by a natural watercourse has a property right to the access and use of the streamflow running through his/her property. A natural water course has been defined by the court as:

> A stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and it naturally discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of a tract of land occasioned by unusual freshets or other extraordinary causes.[4]

Overflow from the banks of a watercourse caused by flood or freshet is considered part of the watercourse if the water returns to the watercourse upon recession of the flood or freshet.[5]

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1 *Black's Law Dictionary* 113 (Bryan A. Garner ed., pocket ed., West 1996).

2 The parts of this chapter discussing the law of natural watercourses, ground water, diffused surface water, and tidelands were largely drawn from the State Water Law Chapter of the *S.C. Water Assessment*, SCWRC Report No. 140 (S.C. Dept. of Natural Resources, 1983), and Stephen A. Spitz, *South Carolina*, in 6 Waters and Water Rights, (Robert E. Beck ed. 2001).

3 Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. Ark. Little Rock L. Rev. 9, 11 (2002).

4 *Lawton v. South Bound R.R.*, 61 S.C. 548, 552-53, 39 S.E. 752, 753-754 (1901).

5 *Jones v. Seaboard Air Line R.R.*, 67 S.C. 181, 45 S.E. 188 (1903).

Nature and Extent of Riparian Rights

A riparian owner does not own the water itself but, rather, owns a property right to access and use the water flowing by the owner's property.[6] The riparian right to use water is automatically conveyed in the transfer of title to riparian land.[7] Whether water is used or not does not alter a riparian right, nor extinguish it.[8] Another means of obtaining riparian rights in South Carolina is for a downstream riparian owner to grant or release its riparian rights to an upstream user.[9]

The acquisition of rights to use water by prescription has been addressed in one early case, establishing that an adverse use of water for 20 years against successive owners of the servient soil is sufficient to establish a prescriptive right.[10] To successfully claim a prescriptive right, the water user must show continuous wrongful use, hostile to the rightful riparian owner, for 20 years. The only South Carolina case on the subject established a riparian right by prescription to an upstream riparian owner who diverted an entire water channel flowing from a creek for irrigation.[11] Although conceivable that a nonriparian landowner could acquire riparian rights by prescription, no case in South Carolina has addressed this scenario.

South Carolina common law has not addressed the extent to which riparian rights are attached to land. Riparian water rights can only be exercised upon riparian land.[12] A transfer of title to riparian land conveys the riparian water rights as well as the land. If a riparian owner subdivides a riparian parcel so that a portion is no longer contiguous to the watercourse, whether riparian rights attach to the severed portion depends on what test South Carolina chooses to adopt.[13] In a state recognizing the "source of title" doctrine, the severed land is never again entitled to riparian rights.[14] None of the southeastern states appear to have adopted this approach.[15] In a state recognizing the "unity of title" doctrine, land that was formerly part of a larger parcel abutting a watercourse retains its riparian right.[16]

A riparian landowner's ownership of the bed of a natural watercourse, as opposed to access and use of the water, was not raised as an issue until 1985. In *State v. Sloan Construction Company*,[17] Sloan Construction Company was the riparian owner of land alongside the Broad River in Union County. The Company was physically occupying the riverbed to mine sand in the riverbed. The State initiated a declaratory action seeking a ruling that the State held title to the river bed. The South Carolina Court of Appeals held that ownership of a freshwater river bed depends upon whether the riparian land was granted to a private property owner by the former English sovereign during Colonial rule.[18] If riparian land was granted by England, the English Rule that the grantee receives title to the center of the river applies, and those subsequent owners under that chain of title retain ownership of half the river bed.[19] If the riparian land was never granted by England, then the State has the presumption of title to the river bed.[20] This ruling does not affect a riparian landowner's use of water, and as a practical matter it has little effect on an average riparian owner unless he/she plans to make use of the riverbed.

Limitations upon Riparian Rights

The riparian doctrine not only defines who is entitled to use of water, but also the degree of use. In *Omelvany v. Jaggers*,[21] the South Carolina Supreme Court set forth a natural-flow theory of riparian rights:

> Every proprietor of lands on the banks of a river has naturally an equal right to the use of

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6 3 Kent, Comm. 353, 354 cited in *White v. Whitney Manufacturing Co.,* 60 S.C. 254, 266, 38 S.E. 456, 460 (1901).

7 William C. Moser, *Accommodating Interwatershed Transfer under the Riparian Doctrine* in *Legal and Administrative Systems for Water Allocation and Management: Options for Change*, 63, 69 (William R. Walker, Phyllis G. Bridgeman, William E. Cox & Margaret S. Hrezo eds., Virginia Water Resources Research Center, Virginia Polytechnic Institute & State University 1984).

8 *Id*.

9 *Id*.

10 *Jordan v. Lang*, 22 S.C. 159, 37 S.E. 69 (1885).

11 *Id*.

12 Moser, *supra* n. 7 at 72.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*. at 495-496.

18 *Id*.

19 *Id*. at 499.

20 20 S.C.L. (2 Hill) 634 (1835).

21 *Id.* at 640.

> the water which flows in the stream adjacent to his lands, as it was wont to flow . . . without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use of it while it passes along . . . Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw back the water upon the proprietors above, without a grant, or an uninterrupted possession of twenty years, which is evidence of it.[22]

The natural-flow theory emphasizes the right of a riparian to water flow in its natural condition, without pollution or reduction in quantity.[23] This theory was criticized amid increased industrial demands on water. In 1901, the court qualified the natural-flow theory with the reasonable-use theory. In *White v. Whitney Manufacturing Company*, the South Carolina Supreme Court quoted approvingly from an out-of-state case that "[e]ach proprietor is entitled to such use of the stream, so far as it is reasonable … and not inconsistent with a likewise reasonable use by the other proprietors of land on the same stream above and below."[24] The Court suggested that reasonable use may turn on any number of factors, including the width, depth and capacity of a stream, the volume of water, the state of improvement in manufacturing, as well as other relevant facts.[25] The question of whether a use is reasonable is a question of fact for the jury.

For a use to be unreasonable, it has long been the South Carolina rule that the use must cause "appreciable damage."[26] Thus, a lower riparian cannot obstruct the flow of water so as to back up the water onto the lands of an upper landowner, thereby damaging those lands.[27] When a downstream riparian does flood an upstream owner's property, injunctive relief has been granted.[28]

The extent of the right to use water, based upon the reasonable-use doctrine, has not been explored sufficiently in South Carolina decisions to provide a reliable basis for judging the merits of contemporary water use controversies.[29] Serious riparian litigation has been dormant in state courts since 1920;[30] however, several very general observations can be made concerning the extent of reasonable-use doctrine from the limited number of reported cases.

The majority of riparian actions in South Carolina involve private versus commercial users; half involve pollution. Domestic, agricultural, or irrigation uses have been accorded no special preference over other uses, there being no decisions in these areas.[31]

Apparently, the discharge of waste, mine tailings, or pollution is not considered unreasonable per se under the South Carolina decisions. In *United States v. 531.13 Acres of Land,*[32] the Fourth Circuit Court of Appeals quoted approvingly from an earlier state case on the subject:

> Owners of land on the banks of a stream are entitled to the reasonable use of a stream; that they can use the stream for their own purposes to a reasonable extent; that while it is true that a stream must not be polluted, still this does not mean that nothing can be put in the stream; but that nothing can be put therein that will deprive the landowners below to the reasonable use of the stream.[33]

Nonetheless, such uses have consistently been held unreasonable and subject to injunction.[34] Several cases, however, demonstrate the tendency of the court and bar to avoid reasonable-use determinations, relying instead on the more customary nuisance doctrines.[35] Taken as a whole, the South Carolina decisions involving pollution by upstream riparians indicate rather uniformly that juries find such use unreasonable.

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22 *Id*. at 640.

23 Larry O. Putt, *Allocation of Supplies Among Competing Off Stream Uses Within the Basin*, in *Legal and Administrative Systems for Water Allocation and Management: Options for Change*, 17, 27, (William R. Walker et al eds. Virginia Water Resources Research Center, Virginia Polytechnic Institute and State University, 1984).

24 *White v. Whitney Mfg. Co*., 60 S.C. 254, 38 S.E. 456, 457 (1901).

25 *Id*. at 457.

26 *Chalk v. McAlily*, 45 S.C.L. (11 Rich.) 153, 162 (1857).

27 *Johnson v. Williams*, 238 S.C. 623, 121 S.E.2d 223 (1961).

28 *Mack v. Edens*, 306 S.C. 433, 412 S.E.2d 431 (Ct.App. 1992) (holding that permanent flooding of the upstream riparian's land was a continuous trespass and warranted injunctive relief).

29 *See*, to same effect, Dewsnup et al., *A Summary-Digest of State Water Laws*, 667 (National Water Commission, 1973).

30 However, one recent federal decision explored the reasonable use doctrine of South Carolina, *United States v. 531.13 acres of Land*, 366 F.2d 915 (1966).

31 The case of *Jordan v. Lang*, 22 S.C. 159, 37 S.E. 69 (1885), did involve the use of waters for irrigating rice, the downstream riparian complaining of the quantity being used. The case was decided, however, on prescription rather than reasonable use.

32 *United States v. 531.13 Acres of Land*, 366 F.2d 915 (1966).

33 *Id*. at 919, citing *Duncan v. Union-Buffalo Mills Co.,* 110 S.C. 302, 96 S.E. 522, 524 (1917).

34 *E.g*. *Griffin v. National Light & Thorium Co.,* 79 S.C. 351, 60 S.E. 702 (1908); *Williams v. Haile Gold Mining Co*., 85 S.C. 1, 66 S.E. 117 (1910); *Mason v. Apalache Mills*, 81 S.C. 554, 62 S.E. 399 (1907); *Threat v. Brewer Mining Co*., 49 S.C. 95, 26 S.E. 970 (1897).

35 *Williams v. Haile Gold Mining Co*., 85 S.C. 1, 66 S.E. 117 (1910); *Threat v. Brewer Mining Co*., 49 S.C. 95, 26 S.E. 970 (1897).

Many of the cases in which quantity issues were in conflict, as in the right to detain and release water or to flood lands above or below, also found uses to be unreasonable. In *White v. Whitney Manufacturing Company,*[36] the detention of water by an upstream riparian for power generation was held unreasonable. The court, in *McMahon v. Walhalla Light and Power Company,*[37] held as a construction of law that downstream riparians are under no obligation to pond water in such a way as to put them to beneficial use as a condition of the rights afforded them under the reasonable use rule. In this case, the defendant constructed a dam above plaintiff's mill for the purpose of power generation. Water was detained and released but not diverted. The court rejected the argument that lower proprietors must use due care in the construction and operation of their mill before he/she can complain of a similar upstream use.[38] In a 1915 decision, the court held that a lower riparian who owned both banks of a nonnavigable stream was entitled to use a ford without interference from the detention and release of water from an upstream power dam.[39] The foregoing series of cases have been cited for the proposition that the doctrine of natural flow is still influential in issues of water quantity.[40]

Whether a watercourse is navigable or nonnavigable appears to have little, if any, bearing on the existence of riparian rights in South Carolina.[41] No cases seem to draw such a distinction; however, if the natural watercourse is deemed navigable it is subject to the State's navigational servitude to the mean or ordinary high-water lines. A navigational servitude means that the State holds the watercourse up to the mean high-water mark in public trust as a recreational resource and mode of travel for members of the public. The riparian owner adjacent to a navigable watercourse is not deprived of access or other riparian rights.[42]

No case clearly confirms the common-law limit of interbasin, or interwatershed, transfer. Absent such decision, interbasin transfers presumably would result in actionable violation of downstream riparian rights.[43]

Statutory Effect upon Riparian Common Law

Despite this uncertainty over interbasin transfer, the General Assembly of South Carolina has enacted several local acts, dealing with particular municipal water-supply problems, which purport to authorize the diversion of water from one watershed to be used and discharged into another watershed.[44] Generally the diversions are by nonriparians for use on nonriparian lands. Some of the acts specifically recognize the right of riparians to the water being diverted and inferentially allow suit to be brought against the diverting municipality or industry.[45] Others are silent as to the rights of riparians.[46]

In general, municipalities have planned or implemented interbasin transfers with little regard to the possible consequences. It is quite common and often most practical for a waterworks system to withdraw water from one watershed, process it, and distribute it to another watershed for use, treatment, and discharge.[47] No reported case has considered either the enactment and results of the above acts, nor any municipal interbasin transfer for water supply purposes. Whether interbasin transfer for public purposes constitutes a reasonable use, when such water is used on nonriparian lands, has not been determined.[48]

With the exception of certain statutes affecting ground water, as will be discussed later, few legislative enactments alter or tend to alter riparian doctrines in South Carolina. The South Carolina Surface Water Withdrawal and Reporting Act merely requires large water withdrawers to report the quantity withdrawn. The Act does not curtail or regulate actual water consumption.[49]

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36 *White v. Whitney Mfg. Co*., 60 S.C. 254, 38 S.E. 456 (1901).

37 *McMahon v. Walhalla Light & Power Co.*, 102 S.C. 57, 86 S.E. 194 (1915).

38 *Id*. at 59.

39 *Fewell v. Catawba Power Co*., 102 S.C. 452, 86 S.E. 947 (1915).

40 Busby, *The Beneficial Use of Water in South Carolina*, (South Carolina Soil Conservation Committee 1953). Busby views the *Fewell* decision as subjecting the use of an entire drainage system to one lower proprietor's right to ford a stream.

41 Dewsnup, *supra* n. 15, at 668. *But see* E. Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 S.C. L. Rev. 757, 760-762 (1969).

42 *Jones v. Seaboard Air Line Ry. Co*, 67 S.C. 181, 45 S.E. 188, 194 (1903) (the defendant railroad caused, in the construction of a bridge, the flooding of plaintiff's land. The court found that the plaintiff was entitled to access to the watercourse, saying that "the right which the plaintiff says the defendant invaded was not the right of navigation, or any other right which he held in common with the public, but the right to the unimpaired use of his land on the banks of the river. The fact that the stream was navigable does not affect the question.")

43 *See* C.E. Hill, *Limitation on Diversion from the Watershed: Riparian Roadblock to Beneficial Use*, 23 S.C. L. Rev. 63 (1971), for a full discussion of interbasin transfer in South Carolina.

44 A comprehensive list of these statutes is found in Hill, *Id*. at 59-60. Most of these acts have been removed from the *Code of Laws of South Carolina, 1976*, as local legislation.

45 *Id*. at 59. *See* S.C. Code Ann. § 70-471 (1962).

46 *See* S.C. Code Ann. § 70-491 (1962).

47 *See* Hill, *supra* n. 31. Hill, while deploring the effect of the common law limitation on interbasin transfer, attributes the rather indiscriminate transfer of water to the state's abundant supply and a "carefree cavorting" caused by plentiful water. *Id*. at 59.

48 *See* Hill, *supra* note 31, at 57-58.

49 DHEC is seeking amendments to the Surface Water Withdrawal and Reporting Act to incorporate the Interbasin Transfer Act so that all withdrawals of surface water over 3 million gallons per month would be permitted.

The Interbasin Transfer Act does authorize permitting for the transferring of water from one basin to another that exceeds one million gallons per day; however, this Act preserves the right of a riparian owner to recover damages for any material injury caused by transfers.

The State's pollution laws,[50] however, could exert substantial influence on a riparian's choice of remedies in a water-use controversy involving pollution caused by upstream proprietors. In addition to the regulatory activities of the State in setting the quantity and quality of discharges,[51] the pollution statute provides its remedies in addition to remedies afforded a riparian under the reasonable-use doctrine.[52] A riparian would have a cause of action based upon the "reasonableness" of a discharge, despite such discharge being permitted or otherwise not in violation of State water quality standards.

Additionally, several statutes limit or regulate the erection of dams or the backing up or overflowing of water dams.[53] Other provisions prohibit obstruction of navigable water bodies and require landowners to clean obstructions from streams.[54] The latter statutes have been wholly unenforced in recent times.

Beyond federal permitting requirements, the State regulates construction activities, although not water withdrawals, in the navigable water bodies and wetlands of South Carolina.[55] Occasionally, low flow discharge conditions are imposed upon permits for impoundments in navigable water bodies. No other State enactments appear to have regulated instream flows.

LAKES, PONDS, AND OCEANS

Interests attached to land contiguous to a lake, pond, or ocean are called littoral rights.[56] Although owners of land adjacent to ponds, lakes and oceans are often called riparian owners, the accurate term is "littoral." The extent of littoral rights in South Carolina has not been addressed, except for the right to construct a wharf upon submerged tidelands.[57] The general common law of littoral rights provides access to and use of water in a natural water body, but a landowner adjacent to an artificial lake or pond does not have littoral rights.[58] Water rights can be obtained to an artificial water body through prescription.[59]

DIFFUSED SURFACE WATER

Diffused surface water is treated entirely differently from natural watercourses. Diffused surface water is defined as "waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused from rains and melting snows…."[60] that would be sustained by the public generally.

The Common-Enemy Rule

Since 1893,[61] South Carolina has adhered to the common-enemy rule in dealing with diffused surface water. The application of the common-enemy rule to diffused surface water was reaffirmed by the court 6 years later in the case of *Baltzeger v. Carolina Midland Railroad Company*,[62] the leading case on the subject. The rule applies only to controversies involving diffused water, not to natural watercourses. Under the common-enemy rule, "surface water is regarded as a common enemy, and every landed proprietor has the right to take any measure necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor to his damage…."[63] The rule's application means that courts will not recognize any wrong in action taken to get rid of diffused water; thus, a property owner whose land is damaged by another property owner who diverts, detains or repulses diffused water cannot recover such damages.[64]

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50 Pollution Control Act, S.C. Code Ann. § 48-1-10, et seq. (1976).

51 NPDES Permits, 23 S.C. Code Ann. Regs. 61-9 (Supp. 2002); *See infra* n. 204.

52 S.C. Code Ann. § 48-1-240 (1987).

53 *See* S.C. Code Ann. §§ 49-11-10 and 49-11-20 (1987).

54 S.C. Code Ann. §§ 49-1-10, 20, 30, 40 (1987).

55 Permits for Construction in Navigable Waters, 23 S. C. Code Ann. Regs. 19-450, et seq. (Supp. 2002), requires permits for construction activities in the navigable waters of South Carolina below the mean or ordinary high-water lines of such waters. S.C. Code Ann. § 48-39-10, et seq. (Supp. 2002), as amended, requires permits for any construction or alteration in the saline waters and tidelands of the State. This permit replaces the above permit in the coastal area and is broader in its jurisdiction over wetlands, beaches and sand dunes. The Act also requires that a coastal management plan be drafted and submitted to the Governor and General Assembly.

56 *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 108, 552 S.E.2d 778, 785 (Ct. App. 2001).

57 *Id*.

58 Jan G. Laitos and Joseph P. Tomain, *Energy and Natural Resources Law in a Nutshell*, 356-357 (West, 1992).

59 *Id*.

60 *Lawton v. South Bound R.R. Co*, 61 S.C. 548, 552, 39 S.E. 752, 753 (1901).

61 *Edwards v. Charlotte*, *Columbia & Augusta R.R.*, 39 S.C. 472, 18 S.E. 58 (1893).

62 *Baltzeger v. Carolina Midland Ry.*, 54 S.C. 242, 32 S.E. 358 (1899).

63 *Id*. at 475.

64 *Rivenbark v. Atlantic Coast Line Ry. Co.*, 124 S.C. 136, 117 S.E. 206, 208 (1923).

Exceptions to the Rule

The application of a strict common-enemy rule to diffused-water controversies is extreme and often has been criticized.[65] The rule in South Carolina, however, has been modified to some extent by the recognition of two exceptions. One exception is that a landowner must not deal with his diffused surface water in a manner so as to constitute a nuisance. The court in *Baltzeger*[66] found that the right of a landowner to deal with diffused water "….is subject to the general law in regard to nuisances, if its accumulation has become a nuisance per se, as for example, whenever it has become dangerous at all times and under all circumstances to life, health or property."[67] The court further indicated that even if a nuisance per se was not established, recovery could be based upon private as opposed to public nuisance. This required a showing of special damage, different in kind and degree from damage.

In early cases against railroads where construction of railroad embankments caused flooding, plaintiffs invoking the nuisance exception were largely unsuccessful.[68] In recent cases involving flooding of water caused by poorly constructed storm drainage, courts seem more likely to allow the nuisance exception to be heard by a jury.[69]

Another exception to the common-enemy rule is that a landowner cannot collect diffused water into an artificial channel and cast it upon another's land in concentrated form.[70] The courts have modified the "concentrated form" exception so as to allow an upper landowner to cast water in concentrated form upon a lower landowner if the upper landowner possessed a contractual[71] or prescriptive right.[72]

In *Irwin v. Michelin Tire Corporation,*[73] the court seemingly modified the exception to reflect the reality of increasing development in the State. In *Irwin*, the lower riparian owner sought the court's adoption of the "New Jersey Rule," which imposes liability upon an upper proprietor if the upper proprietor installs an artificial drain that decreases natural absorption, seepage, and percolation of water on his property and increases the volume and rate of water flow onto the property of a lower proprietor, causing damage.[74] The rationale for adoption of the "New Jersey Rule" was that lower riparian owners needed greater protection in the face of rapid development in South Carolina.[75] The South Carolina Supreme Court rejected the "New Jersey Rule," stating such a rule would have a "traumatic effect upon the orderly development of our state."[76] Instead, the Court approved the use of the "Virginia Rule" as an adequate modernization of South Carolina common law, noting that it is more consistent with the State's common enemy rule.[77] The adopted "Virginia Rule" states that "where no greater surface-water drainage occurs than would normally result from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system."[78] Therefore, the court affirmed the lower court charge that "where no greater surface-water drainage occurs than would naturally result

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65 W.T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 83 (1971). See also *Williams v. Skipper*, 284 S.C. 261, 263 325 S.E.2d 577, 579 (Ct. App. 1985), where appellant urged court to overrule the common-enemy rule and replace with a "reasonable use rule" because: 1) the rule was adopted by mistake in South Carolina, 2) trend is toward a standard of reasonable use, and 3) exceptions to rule make application of the rule uncertain. The court declined to overrule the common-enemy rule.

66 *Baltzeger v. Carolina Midland Ry.*, 54 S.C. 242, 32 S.E. 358 (1899).

67 *Id*. at 247.

68 *See Rivenbark v. Atlantic Coast Line Ry. Co.*, 124 S.C. 136, 117 S.E. 206, 208 (1923) (railroad's drainage ditch within embankment became obstructed, causing flooding and destruction of plaintiff's vegetable garden, found not to constitute nuisance); *Banks v. Southern Ry*., 126 S.C. 241, 118 S.E. 923 (1923) (in claim that obstruction of surface water by railroad embankment created a public nuisance, plaintiff failed to show that flooding caused damage to plaintiff.). *But see Deason v. Southern Ry*., 142 S.C. 328, 140 S.E. 575 (1927) (the allegations that both a constructed railroad embankment and a filled ditch caused periodic overflowing of pond at every rain, and created mosquito infestation as pond dried, were sufficient to take to the jury the question of whether the railroad created a nuisance *per se* or a continuing private nuisance).

69 *See Suddeth v. Knight*, 280 S.C. 540, 314 S.E.2d 11 (Ct. App. 1984) (trial judge committed error in not submitting nuisance exception to jury, where evidence infers that developers' construction of inadequate drainage system caused water to back up on plaintiff's land, filling an old ditch with stagnant water for 6-10 months of the year and creating mosquito problem); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001) (plaintiff's claim that inadequate drainage system caused erosion, trash accumulation and potential health problem due to standing water caused continuing nuisance sufficient to withstand summary judgment).

70 *Branderberg v. Zeigler*, 62 S.C. 18, 39 S.E. 790 (1901); *Rivenbark v. Atlantic Coast Line Ry. Co.*, 124 S.C. 136, 117 S.E. 206, 208 (1923)*; Garmony v. Southern Ry*., 152 S.C. 205, 149 S.E. 765 (1929).

71 *Kirkland Distribg. Co. v. Seaboard Airline Ry*., 109 S.C. 331, 96 S.E. 122 (1918).

72 *Hays v. Hoffman*, 162 S.C. 284, 160 S.E. 852 (1931).

73 288 S.C. 221, 225 n. 2, 341 S.E. 2d 783, 785 n. 2 (1986).

74 *Id*. at 784.

75 *Id*.

76 *Id*.

77 *Id*.

78 *Id*. at n. 2, 785.

from the reasonable development of an upper landowner's property, liability will not be imposed merely due to the presence of an artificial drainage system."[79]

In the subsequent case of *Johnson v. Phillips*,[80] the South Carolina Supreme Court seemed to apply the "Virginia Rule" in reversing the lower court's decision finding that the facts did not fall into the concentrated-form exception. In *Johnson*, a dispute arose between adjacent landowners over the diversion of diffused surface water. The upper landowners brought an action against the lower landowners, claiming both a contract and prescriptive right to discharge water on the lower landowners' property. The lower landowners counterclaimed for unlawful discharge of surface water upon their land. In ruling on the lower landowner's counterclaim, the circuit court found in favor of the upper landowner, stating that the upper landowner had a right to discharge water onto the lower landowner's property. The South Carolina Court of Appeals reversed the circuit court, holding that it was proper under the facts and circumstances of that particular case to have a jury consider whether the upper landowner's increase of surface water drainage of 15 percent constituted the collection and discharge in a concentrated form onto the lower landowners' property. Although the court cited *Irwin* as an example of a recent case illustrating South Carolina's adherence to the classical formulation of the common-enemy rule, the court's decision appeared to follow the "Virginia Rule" pertaining to the "concentrated-form" exception. The court suggested that under the "concentrated-form" exception,[81] although an upper landowner is not liable for using an artificial-drainage system to divert diffused water in an amount no greater than reasonable development would cause, an upper proprietor is liable to a lower landowner for damage caused by a development that unreasonably increases the volume of water draining upon a lower property.

While the court in *Branderberg v. Zeigler*[82] drew a distinction between casting water upon another's land and preventing the flow of diffused water upon one's own land, at least one other case suggests the application of the exception to a lower landowner who would dam the flow of diffused water and thus throw it back upon his upper neighbor.[83]

Statutory Effect upon Common Law of Diffused Surface Water

Municipalities, owing to their sovereign status, are governed by different principles. Whereas municipalities and other governmental agencies are immune from suit in many situations, the General Assembly has chosen to remove sovereign immunity with regard to drainage of diffused surface water. A general statute[84] authorizes the institution of a civil action against a municipality for actual damages sustained by causing surface water to be drained from public streets across private property. The statute requires the landowner to demand that the municipality provide proper drainage before such landowner may bring suit; moreover, the statute authorizes municipalities to condemn private property if the necessary drains cannot be maintained along or under the public street. In order for a municipality to be held liable, the municipality's actions must not be negligent, but rather an overt, intentional act that proximately caused the damages.[85]

GROUND WATER

Research has revealed no reported South Carolina cases setting forth any common-law rules concerning the ownership of ground water in South Carolina. In other states, early case law established the Absolute Ownership Rule, where a landowner was entitled to absolute ownership of percolating water from the ground.[86] As knowledge concerning the behavior of ground water increased, many states have replaced the Absolute Ownership Rule with a regulated form of riparianism, adopting for a reasonable-use rule for ground water.[87]

Instead of adopting any common-law riparian rule specifically relating to use of ground water, the South Carolina courts have approached ground water issues through common-law tort actions and the State Constitution. A South Carolina case has found diversion of ground water to be an unconstitutional taking.[88] In *South Carolina Department of Highways and Public Transportation v. Balcome*, the State highway department, during the construction of a freeway, diverted ground water

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[79] *Id.*

[80] 315 S.C. 407, 433 S.E. 2d 895 (Ct. App. 1993), *rev'd in part on other grounds, sub. nom. Smith v. Phillips*, 318 S.C. 452, 458 S.E. 2d 427 (1995).

[81] *Id.* at 898-899.

[82] *Branderberg v. Zeigler*, 62 S.C. 18, 39 S.E. 790 (1901).

[83] *See Slater v. Price*, 96 S.C. 245, 80 S.E. 372 (1913).

[84] S.C. Code Ann. § 5-31-450 (1976).

[85] *Hall v. City of Greenville*, 88 S.E. 2d 246 (1955); *Taleff v. City of Greer*, 284 S.C. 510, 327 S.E. 2d 363 (Ct. App. 1985).

[86] Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. Ark. Little Rock L. Rev. 9, 41 (2002).

[87] *Id.* at 44.

[88] *S.C. Dept. of Hwys. & Pub. Transp. v. Balcome*, 289 S.C. 243, 345 S.E.2d 762 (Ct.App. 1986).

that fed the plaintiff's pond.[89] As a result, the plaintiff's pond level permanently dropped 4 feet.[90] The highway department attempted to defend itself by introducing common-law principles governing the use of ground water.[91] The Court held that common-law theories were irrelevant in light of the State's constitutional prohibition against a public taking of private property without just compensation.[92]

In Federal District Court, a chemical plant's contamination of ground water under an adjacent property was held to be actionable under several theories.[93] The Court found that the chemical company engaged in an ultrahazardous activity, which warranted strict liability for damages to the plaintiff; negligently disposed of hazardous chemicals and failed to warn the plaintiff of contamination; trespassed upon plaintiff's property; and caused a nuisance.[94] The South Carolina Supreme Court has also heard and upheld a claim of trespass for ground-water contamination against a chemical company.[95] The court held that the plaintiff was entitled to recover all damages that were the natural, proximate cause of the trespass.

South Carolina has, by statute, imposed reasonable-use restrictions on ground-water use. Prompted by fears of water-level declines and saltwater intrusion in the coastal areas of the state, the South Carolina General Assembly enacted the Ground Water Use Act of 1969,[96] which was based upon a similar North Carolina statute.[97] In 2000, the Act was substantially overhauled.[98] This statute is more fully discussed later in this chapter.

NAVIGABLE WATER BODIES

The issue of whether a watercourse or water body is navigable affects private riparian and littoral rights by placing a concurrent public right of access to water, as well as determining ownership of submerged land. Although the South Carolina Constitution has established a public right in navigable water bodies, and state legislation has given some contours to what is considered navigable, the courts have been left to add more detail to the definition of navigability.

Public Servitude

The South Carolina Constitution declares that "all navigable waters within the limits of the State shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the General Assembly."[99] Further, a State statute defines navigability as "all streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts."[100] Thus, a common right or servitude in the public to freely use the navigable water bodies of South Carolina is well established. Such a servitude exists regardless of the ownership of the banks or bed of a navigable stream, whether public or private.[101] The public right of navigation, as well as the right of fishing in navigable water bodies,[102] is superior to any rights that might be possessed by the riparian owners.[103] What constitutes navigable water bodies is less clear, however.

At the turn of the 20th century, the court established that the extent of the servitude embraces not only that which is actually used but that which is susceptible to use for navigation in its ordinary state.[104] Navigable, though artificial, canals connected to, or improving navigation on, otherwise navigable water bodies may be impressed with the public servitude over those water bodies.[105]

The court has extensively reviewed the powers of the State to take, use, or modify the navigable water bodies of

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89 *Id*. at 763.

90 *Id*. at 764.

91 *Id*.

92 *Id*.

93 *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670 (D.S.C. 1992).

94 *Id*.

95 *Kelly v. Para-Chem Southern Inc*., 311 S.C. 223, 428 S.E.2d 703 (1993).

96 S.C. Code Ann. § 49-5-10 et seq. (Supp. 2002).

97 N.C. Gen. Stat. § 143-215.11.

98 *See* S.C. Act 366 (June 14, 2000) (available at http://www.scstatehouse.net/sess113_1999-2000/bills/3434.doc).

99 S.C. Const. Art. XIV, § 1.

100 S.C. Code Ann. § 49-1-10 (1976).

101 *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 126 S.C. 500, 528 59 S.E. 2d 132 (1950).

102 *Id*. at 524.

103 *See State ex rel. Lyon v. Columbia Water Power Co*., 82 S.C. 181, 63 S.E. 884 (1909).

104 *Id*. at 187.

105 *Id*. at 186-187.

South Carolina for public purposes:

> The waters of the ocean and its bays, and of public watercourses and lakes, so far as they lie within the jurisdiction of a state, are part of the public domain, and the state may authorize the diversion of such waters for any purpose it deems advantageous to the public, without providing compensation to riparian proprietors injuriously affected. Such diversion is not a taking of private property by eminent domain, but a disposition by the public of the public property.[106]

Obstruction of navigable waterways may be abated as a public or private nuisance.[107] The construction of a dam across a navigable waterway is not a nuisance *per se* if authorized by the legislature.[108] The legislature, while having the power to authorize the construction of an impoundment across a navigable stream by a private person, has no power to release that person from liability for damages created by a nuisance.[109] Whoever constructs a dam or bridge in or over a stream must exercise reasonable and prudent care and must consider the natural flow of the stream and its usual freshets and occasional "great floods."[110] The owner of a dam is required to exercise ordinary care in the operation and maintenance of the dam to avoid injury to those upstream and downstream.[111]

The powers of the State in the exercise of the navigation servitude coincide with those of the federal government, and although the rights and powers of the federal government with respect to waterways subject to interstate commerce are paramount, the powers of the State remain in full force and effect unless and until Congress acts upon the subject.[112] These powers exist regardless of ownership.

Definition of a Navigable Waterway

What constitutes a navigable waterway so as to raise a servitude or easement in the public in South Carolina has been an ongoing source of dispute.

State law provides that all streams that are capable or can be made capable of being navigated by "rafts of lumber or timber" by removal of accidental obstructions are navigable, as well as all navigable watercourses or cuts.[113] Although in a 1903 Federal decision the circuit court held this statute to be declarative of existing law,[114] it seems by no means clear what law the court considered it declarative of. Nonetheless, the statute, as the only legislative pronouncement on the subject, has been used by the State in determining the extent of public navigation for permit purposes.[115]

In the 1894 case of *Heyward v. Farmer's Mining Company,*[116] the court extensively reviewed the various doctrines determining which waterways may be considered navigable in fact, finding that a stream should have sufficient depth and width of water to float useful commerce;[117] that neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability;[118] that the test is navigable capacity and surroundings have no bearing on the question;[119] that if water is navigable for pleasure boating it is navigable;[120] and that the purpose of navigation is not a subject of inquiry, but the fact of the capacity of the water for use in navigation establishes navigability.[121] While both the "log raft" test under the statute and the navigation in-fact tests as pronounced by the court are somewhat subjective and are questions to be determined by the trier of fact, in practical application it would be difficult to distinguish between the tests.

Another line of cases, however, offers an additional test of which waterways are considered navigable based upon the individual declarations of navigability made by the legislature. Apparently, those streams that have been declared navigable by act of the General Assembly and made or kept navigable by expenditure of public moneys

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[106] *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E. 2d 132 (1950).

[107] S.C. Code Ann. § 49-1-10 (1976).

[108] *Free v. Parr Shoals Power Co*., 111 S.C. 192, 196, 97 S.E. 243, 244 (1918).

[109] *McDaniel v. Greenville-Carolina Power Co*., 95 S.C. 268, 273, 78 S.E. 980, 981 (1913).

[110] *Jones v. Seaboard Air Line R.R*., 67 S.C. 181, 45 S.E. 188, 195 (1903).

[111] *Key Sales Co. v. S.C. E & G Co*., 290 F. Supp. 8 (D.C.S.C. 1968).

[112] *Id*. at 527-528.

[113] S.C. Code Ann. § 49-1-10 (1976).

[114] *Manigault v. Ward*, 123 F. 707, 714 (1903), *aff'd*, 199 U.S. 473 (1905).

[115] *See* 23 S.C. Code Ann. Regs. 19-450 et. seq. (Supp. 2002).

[116] *Heyward v. Farmer's Mining Co*., 42 S.C. 138, 152, 19 S.E. 963 (1894).

[117] *Id*. at 150.

[118] *Id*. at 151.

[119] *Id*.

[120] *Id*. at 155.

[121] *Id*.

are recognized as navigable by the courts,[122] at least to the extent that they are viewed as public highways.[123] Whether such legislative declarations would find favor in contemporary litigation is not known.

In 1986, the South Carolina Supreme Court undertook to clarify the murky issue of the definition of navigable water bodies. In *State v. South Carolina Coastal Council*,[124] the Court determined that the Coastal Council could not issue a permit that would have allowed a landowner of old rice fields to close off access to the fields' canals. The Court determined that these canals could be navigated by pleasure boats. The Court went on to say that the true test for determining navigability is the capacity for valuable floatage, but valuable floatage is not necessarily limited to commercial floatage.[125] The Court found that the use of these waterways by the general public for boating, hunting and fishing is a legitimate and beneficial use and thus had the capacity for valuable floatage.[126] This case moves the doctrine of navigable servitude away from the mere commercial use of a waterway to one of capacity for general public use for boating, hunting and fishing.

In 1990, the Court of Appeals decided the case of *Hughes v. Nelson*, which held that an artificial canal that was connected to a navigable river and used for sport fishing by the general public was navigable water.[127] The Court noted that a navigable waterway need not be large[128] nor be a natural watercourse. When a canal is constructed to connect with a navigable river, the canal may be regarded as part of that river.[129]

In 1997, the Court of Appeals determined that an artificial interruption in an otherwise navigable stream did not convert what was once a navigable stream into a nonnavigable stream. In *State v. Head*, the court held that the presence of a dam between a lake and a stream did not render the water body nonnavigable. Thus, where a navigable body of water is lawfully or unlawfully impounded and the public has access upstream, a person may float the stream into a lake and use the lake for fishing and boating.

TIDELANDS

Ownership of Tidelands

The issue of tidelands ownership presents a most significant and difficult water-oriented area of litigation in South Carolina. The claim of the State to those lands lying between the mean high and mean low water lines on the coast, an area of perhaps a half million acres, has been hotly contested by coastal landowners. While public ownership of tidelands and submerged lands appears to have been a well-settled common-law doctrine, vast areas of the coast throughout the eighteenth century were cultivated for growing rice. Although rice cultivation ceased many years ago, the tidal areas are still considered valuable. Most tideland litigation surrounds the issue of whether the claimant has fee simple title to the tidelands in question.

The leading case in South Carolina is *Cape Romain Land Improvement Company v. Georgia-Carolina Canning Company*, a trespass action to determine whether the plaintiff or defendant had the right to harvest oysters on a large tract of land between the high and low water lines of tidal and navigable water bodies.[130] The court considered the question of public ownership of tidelands in the context of this proprietary claim to the oysters. The court stated that "the title to land below the high water mark on tidal navigable streams, under the well settled rule, is in the State not for purpose of sale, but to be held in trust for public purposes."[131] Any doubt as to the applicability of the rule has been eliminated by its subsequent reaffirmation.[132] In *Coburg v. Lesser*, the South Carolina Supreme Court extended the presumption of state ownership to include islands located within marshland.[133]

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[122] *State v. Thompson*, 2 Strob. 12 (S.C. 1847).

[123] *Carey v. Brooks*, 1 Hill 365 (S.C. 1833). See *State v. Cullum*, 2 Spears 581 (S.C. 1844); *State v. Hickson,* 5 Rich. 447 (S.C. 1852); *McDaniel v. Greenville-Carolina Power Co.,* 95 S.C. 268, 78 S.E. 980 (1913). From the mid-eighteenth to the mid-nineteenth century, dozens, if not hundreds, of declarations of navigability were made by the legislature.

[124] 289 S.C. 445, 346 S.E.2d 716 (1986).

[125] *Id*. at 449, 719.

[126] *Id*.

[127] 303 S.C. 102, 399 S.E.2d 24 (Ct.App. 1990).

[128] The Court stated that a "waterway need not accommodate the Carnival Cruise Lines or be able to float the Love Boat." *Id*. at 25.

[129] *Id*.

[130] *Cape Romain Land Imp. Co. v. Georgia-Carolina Canning Co*., 148 S.C. 428, 146 S.E. 434 (1928).

[131] *Id*. at 438.

[132] *Rice Hope Plantation v. S.C. Public Service Authority*, 126 S.C. 500, 59 S.E.2d 132 (1950); *Lane v. McEachern,* 251 S.C. 272, 162 S.E. 2d 174 (1968); *State v. Hardee*, 259 S.C. 535, 193 S.E. 2d 297 (1972); *State v. Yelsen*, 265 S.C. 43, 216 S.E.2d 765 (1975); *Coburg v. Lesser*, 309 S.C. 252, 422 S.E.2d 96 (1992).

[133] 309 S.C. 252, 253 422 S.E. 2d 96, 97 (1992).

The *Cape Romain* decision does not stand for the proposition, however, that tidelands are not capable of private ownership. If a grant to such lands from the State, or the State's predecessors in title (the King of England or Lords Proprietors) can be produced and traced in a direct and unbroken chain to the claimant, private ownership can be made out.[134] A State grant can convey not only a private title to tidelands, but also its public trust title, releasing the State's right to the channel beds and other land beneath the tidewater.[135] Because virtually all of the coastal area of South Carolina was settled, and thus granted, prior to independence, most tidelands claimants can produce a royal or proprietory grant of some nature. The more recent tidelands cases involve the construction of such grants.

Because of the nature and public importance of tidelands, submerged lands, and lands beneath navigable water bodies, they are held by the State in trust, in a fiduciary rather than proprietary capacity.[136] Included in the category of tidelands, wetlands created by encroachment of navigable tidal water also are held by the State.[137] Grants purporting to convey such lands held in public trust are construed strictly in favor of the State and against the grantee.[138]

The State comes to court with a presumption of title, that it did not grant away public domain lands.[139] Therefore, the party arguing a transfer of title by grant bears the burden of proving his/her own good title.[140] The claimant must show that their predecessors in title acquired title from either the British crown or from the State since independence, and the grant's language was sufficient to convey the land below the high-water mark.[141] General words will convey lands only to the mean high-water line:

> Under well-settled rules of construction naming such boundaries ("inlet," "sound or creek") will convey land only to the high-water mark in the absence of specific language, either in the grant or upon a plat showing that it was intended to convey land below the high water mark.[142]

The location of the mean high-water line is a question of fact for jury determination.[143] As such, the method of determining and presenting evidence of this line to the trier of fact is often critical in tidelands litigation.

The law of tidelands takes into account erosion of land caused by tides and currents. Accretions by natural alluvial action to tidelands become the property of the tideland owner whose lands are added to.[144] For lands gradually submerged by water, the owner loses his/her right to the submerged land.[145] Even if at the time of grant to the property owner, the land was not submerged, yet rising tidewater subsequently submerged the highland, the owner cannot defeat the State's ownership of the tidelands.[146]

Access

The public's ownership of tidelands assures public use of those areas between the mean high-water and mean low-water lines, but it does not necessarily follow that the public has an unlimited right to cross highlands to gain access to these properties. The public has the right to access through areas that have been dedicated to the public or are owned by the State. Moreover, it is possible for the public to gain such access by prescription or dedication. Mere public use, however, even if longstanding, does not necessarily create a prescriptive right or an implied dedication.[147]

Only one case in South Carolina has addressed the right of access of an owner of land adjacent to tidelands to construct a wharf or pier over tidelands.[148] A littoral owner has the right of access from his/her land to the

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[134] *Lane v. McEachern,* 251 S.C. 272, 162 S.E. 2d 174 (1968).

[135] *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 105 fn. 6, 552 S.E. 2d 778, 783 n. 6 (Ct. App. 2001)

[136] See *Cape Romain Land Imp. Co. v. Georgia-Carolina Canning Co*., 148 S.C. 428, 146 S.E. 434 (1928); *Heyward v. Farmer's Mining Co.,* 42 S.C. 138, 19 S.E. 963 (1894); *State v. Pickney*, 22 S.C. 484 (1884); *State v. Pacific Guano Co*., 22 S.C. 50 (1884).

[137] *Coburg Dairy Inc. v. Lesser*, 318 S.C. 510, 458 S.E. 2d 547 (1995).

[138] *LowCountry Open Land Trust v. State,* 347 S.C. 96, 103, 552 S.E. 2d 778, 782 (Ct. App. 2001); *State v. Fain,* 273 S.C. 748, 259 S.E. 2d 606 (1979); *State v. Pacific Guano Co*., 22 S.C. 50, 86 (1884).

[139] *State v. Pacific Guano Co.,* 22 S.C. 50, 86 (1884).

[140] *Id*. at 74.

[141] *Lowcountry Open Land Trust v. State,* 347 S.C. 96, 103, 552 S.E. 2d 778, 782 (Ct. App. 2001).

[142] *State v. Yelsen*, 265 S.C. 43, 216 S.E. 2d 765 (1975).

[143] *State v. Yelsen*, 257 S.C. 401, 185 S.E. 2d 897 (1972).

[144] *Horry County v. Tilghman*, 283 S.C. 475, 478, 322 S.E. 2d 831, 833 (Ct. App. 1984), quoting *Horry County v. Woodward*, 318 S.E. 2d 584 (Ct. App. 1984).

[145] *Id. See also McQueen v. S.C. Coastal Council*, 354 S.C. 142, 580 S.E. 2d 116 (2003).

[146] *State v. Fain*, 273 S.C. 748, 259 S.E. 2d 606 (1979).

[147] *See State v. Beach Co*., 271 S.C. 425, 248 S.E. 2d 115 (1978).

[148] *Lowcountry Open Land Trust v. State,* 347 S.C. 96, 552 S.E. 2d 778 (Ct. App. 2001).

water, but this access does not include title in the soil below the high water mark.[149] To build a wharf or pier over tidelands owned by the state, the littoral owner must obtain a license from the State that allows such a structure to rest upon the ocean or channel bed.[150] Furthermore, if the tidelands are privately owned, the littoral owner must obtain the express consent of the fee-simple owner before the State will issue a permit.[151]

STATE STATUTORY AND ADMINISTRATIVE MECHANISMS AFFECTING WATER

South Carolina Water Resources Planning and Coordination Act

The South Carolina Water Resources Planning and Coordination Act charges the Department of Natural Resources (DNR) with the overall responsibility of recommending to the Governor and General Assembly a comprehensive water resources policy.[152] The act also requires DNR to advise and assist the Governor and General Assembly in developing policies and proposals to resolve special problems of water use facing the State.[153] DNR is given the power to review the actions and policies of other state agencies that possess water-resource responsibilities to ensure consistency with a comprehensive water policy of the State,[154] and recommend to the General Assembly any amendments to State law required to implement a State water policy.[155]

In assisting the implementation of a state water policy, DNR has the authority to conduct studies and enjoy full access to relevant records of other state departments and political subdivisions of the state.[156] DNR is also required to "encourage, assist and advise" regional and local governments in water planning and coordination of water-resource programs.[157]

South Carolina Surface Water Withdrawal and Reporting Act

The South Carolina Surface Water Withdrawal and Reporting Act was originally enacted in 1982, and revised in 2000.[158] The 2000 amendments relaxed the act's reporting requirements.[159] Surface water is defined as "all water, which is open to the atmosphere and subject to surface runoff which includes lakes, streams, ponds, and reservoirs."[160] A surface-water withdrawer is defined as "a public water system withdrawing surface water in excess of three million gallons during any one month and any other person withdrawing surface water in excess of three million gallons during any one month from a single intake or multiple intakes under common ownership within a one-mile radius from any one existing or proposed intake."[161]

Surface-water withdrawers are required to register their surface-water use with the South Carolina Department of Health and Environmental Control (DHEC) and file annual reports providing the quantity of water withdrawn.[162] A registered withdrawer must notify DHEC in writing within 30 days of constructing a new water intake, changing the method of measuring withdrawals, ceasing to withdraw water, abandoning an intake, or of a change in ownership.[163] Dewatering operations, emergency withdrawals, withdrawals for environmental remediation, withdrawals from a private pond supplied only by diffuse surface water, an Interbasin Transfer Act permittee, and withdrawals for wildlife habitat management are exempt from the Act.[164]

Willful violation of the Act is a misdemeanor, with a maximum fine of $1,000 per day for each violation.[165] Violation of the Act may also expose the violator to civil liability up to the same maximum penalty as a criminal misdemeanor.[166] DHEC may also seek an injunction to

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[149] *Id*. at 785. In contrast, a riparian owner adjacent to a nontidal navigable stream holds title from their shoreline to the center of the stream subject to a public easement for use of the waterway for navigational purposes. Thus, a riparian owner can construct a dock or pier so long as the dock does not impede or obstruct navigation. Citing *McDaniel v. Greenville-Carolina Power Co*., 95 S.C. 268, 272-273, 78 S.E. 980, 981 (1913).

[150] *Id*.

[151] *Id*.

[152] S.C. Code Ann. § 49-3-10 et seq. (Supp. 2002).

[153] S.C. Code Ann. § 49-3-40(a)(2) (Supp. 2002).

[154] S.C. Code Ann. § 49-3-40(a)(3) (Supp. 2002).

[155] S.C. Code Ann. § 49-3-40(a)(6) (Supp. 2002).

[156] S.C. Code Ann. § 49-3-40(b) (Supp. 2002).

[157] S.C. Code Ann. § 49-3-40(d) (Supp. 2002).

[158] S.C. Code Ann. § 49-3-40(d) (Supp. 2002).

[159] *See* S.C. Act 366 (June 14, 2000) (available at http://www.scstatehouse.net/sess113_1999-2000/bills/3434.doc).

[160] S.C. Code Ann. § 49-4-20(10) (Supp. 2002).

[161] S.C. Code Ann. § 49-4-20(11) (Supp. 2002).

[162] S.C. Code Ann. § 49-4-40 and 49-4-50 (Supp. 2002).

[163] S.C. Code Ann. § 49-4-70 (Supp. 2002).

[164] S.C. Code Ann. § 49-4-30 (Supp. 2002).

[165] S.C. Code Ann. § 49-4-80 (Supp. 2002).

[166] S.C. Code Ann. § 49-4-80(B) (Supp. 2002).

prevent violation of the act.[167]

Groundwater Use and Reporting Act

As stated previously, South Carolina has imposed reasonable-use restrictions on ground-water use through the Groundwater Use and Reporting Act.[168] The Act defines ground water as "water in the void spaces of geologic materials within the zone of saturation."[169] In comparison with other Southeastern states, the act defines ground water in a fairly narrow manner.[170]

The Act requires the DHEC to establish a ground-water management program.[171] In order to carry out this mandate, the Act requires all ground-water withdrawers to register their ground-water sources and report their ground-water use to DHEC.[172] DHEC must also establish, after required studies, a "capacity use area."[173]

A capacity use area is defined as any area where DHEC finds that the excessive withdrawal of ground water presents potential adverse effects to the natural resources or poses a threat to public health, safety or economic welfare or where conditions pose a significant threat to the long-term integrity of a ground-water source, including saltwater intrusion.[174] Either DHEC, local government authorities, other government agencies, or a ground-water withdrawer can initiate the capacity use designation process.[175]

After notice and public hearing of initiation of the capacity use area designation, DHEC must coordinate with affected governmental bodies and ground-water withdrawers to develop a ground-water management plan.[176] The plan is then approved by DHEC. Thereafter, ground-water withdrawers in the capacity use area must apply to DHEC for a permit, and DHEC must issue permits in accordance with the plan.[177] Currently, there are four capacity use areas established. The Waccamaw Capacity Use Area comprises Horry and Georgetown Counties.[178] The Low Country Capacity Use Area comprises Beaufort, Colleton, Hampton, and Jasper Counties.[179] The Trident Capacity Use Area comprises Charleston, Berkeley, and Dorchester Counties, and the Pee Dee Capacity Use Area comprises Darlington, Dillon, Florence, Marboro, Marion, and Williamsburg Counties.

Emergency withdrawals of ground water, withdrawal for nonconsumptive uses, withdrawal for wildlife habitat management, and withdrawal for a single-family residence or household for noncommercial use are exempted from the Act.[180] Aquifer storage and recovery wells are also exempt from the Act if the withdrawer already possesses a permit in accordance with the Underground Injection Control Regulations or the amount of water withdrawn does not exceed the amount of water injected.[181] Dewatering operations, replacement of an existing well, and wells constructed with an open hole in a crystalline bedrock aquifer in the Coastal Plain Ground-Water Management area are exempt from permitting and notification requirements.[182]

Dams and Reservoirs Safety Act

The Dams and Reservoirs Safety Act[183] is designed to reduce the risk of failure of dams, to prevent personal injury and property damage, and to authorize DHEC to certify and inspect dams.[184] While a dam or reservoir owner remains solely responsible for maintaining his/her dam or reservoir in safe condition, DHEC may, after appropriate investigation, order the owner to undertake

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[167] S.C. Code Ann. § 49-4-80(D) (Supp. 2002).

[168] S.C. Code Ann. § 49-5-10 et. seq. (Supp. 2002).

[169] S.C. Code Ann. § 49-5-30(10) (Supp. 2002).

[170] Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. Ark. Little Rock L. Rev. 9, 41, 84 (2002). For example, Georgia's Ground-water Act defines ground water as "water of underground streams, channels, artesian basins, reservoirs, lakes, and other water under the surface of the earth, whether public or private, natural or artificial, which is contained within, flows through, or borders upon this state or any portion thereof, including those portions of the Atlantic Ocean over which this state has jurisdiction." Ga. Code Ann. 12-5-92(6).

[171] S.C. Code Ann. § 49-5-40 (Supp. 2002).

[172] *Id.*

[173] S.C. Code Ann. § 49-5-60 (Supp. 2002).

[174] S.C. Code Ann. § 49-5-60(A) (Supp. 2002).

[175] *Id.*

[176] S.C. Code Ann. § 49-5-60(B) (Supp. 2002).

[177] S.C. Code Ann. § 49-5-60(B) and (C) (Supp. 2002).

[178] 27 S.C. Code Ann. Regs. 121-1 (1976).

[179] 27 S.C. Code Ann. Regs. 121-2 (1976).

[180] S.C. Code Ann. § 49-5-70(A) (Supp. 2002).

[181] S.C. Code Ann. § 49-5-70(C) (Supp. 2002).

[182] S.C. Code Ann. § 49-5-70(B) (Supp. 2002).

[183] S.C. Code Ann. § 49-11-10 et seq. (Supp. 2002).

[184] S.C. Code Ann. § 49-11-130 (Supp. 2002).

maintenance, alteration, repair or removal as necessary if dangerous to life or property.[185] Dams that are less than 25 feet in elevation or impound less than 55 acre-feet of water ordinarily are not regulated except where the dam has a hazard potential that may cause loss of life in the event of dam failure or improper reservoir operation.[186]

Navigable Waters Permit

Construction, dredging, filling, or alterations in State navigable waterways require a permit from DHEC.[187] The Department's permitting program is based upon statutes declaring a State navigational servitude and control of vacant State lands.[188] DHEC is designated as the coordinating agency for the program, assigned the duty of obtaining and reviewing comments from the public and interested State agencies, and issuing permits. Navigable waterways are defined as "those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats."[189] DHEC is responsible for determining navigability.[190] Lands and water bodies subject to a public navigational servitude are defined as "those lands below the mean high water line in tidally influenced areas, or below the ordinary high water mark of any nontidal navigable waterway of the state."[191]

A permit issued is considered revocable by the State.[192] For continuous operations such as marinas, permits are issued for a term of 10 years or longer and are renewable, provided that there has been no material adverse change in circumstances.[193] Issuance of a permit does not convey any property right in the land or water in which the permitted activity is located.[194] No permitted activity shall obstruct navigation or the flow of water unless specifically authorized, and the permittee shall not prevent the "full and free use by the public" of all navigable water bodies at or adjacent to the permitted area.[195]

DHEC must provide public notice of the receipt of a permit application,[196] allow other State agencies to review and comment on the application,[197] and, if any agency objects to issuance of the permit, follow a reconciliation process.[198] If DHEC determines that the proposed activity would be likely to create an adverse impact on navigable water bodies or other associated natural resources that is not so great as to require denial of a permit, and the applicant has taken all reasonable measures to prevent the adverse impact, the applicant may be requested to submit a plan creating or providing natural-resource benefits to compensate for the adverse impact.[199]

Any person with legal standing to contest DHEC's decision to grant or deny a permit may appeal the decision to the DHEC Board.[200] A final decision by the Board may be appealed to an Administrative Law Judge.[201]

Drainage

The Drainage or Levee Districts Act of 1911 provides a comprehensive scheme for the creation of drainage or levee districts to accomplish the legislative public-interest declarations that "the drainage of swamps, drainage of surface water from agricultural lands and the reclamation of tidal marshes shall be considered a public benefit and conducive to the public health, convenience, utility and welfare."[202]

The 1911 Act requires an extensive series of actions to establish a drainage district, including petitions to the Clerk of Court, boards of reviewers, public hearings, appeals, surveys, assessments of damage, appointment

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[185] S.C. Code Ann. § 49-11-170 (Supp. 2002).

[186] S.C. Code Ann. § 49-11-120(4)(a) (Supp. 2002).

[187] 23 S.C. Code Ann. Regs. 19-450(A) (Supp. 2002).

[188] S.C. Code Ann. § 49-1-10 (1976); S.C. Code Ann. § 1-11-70 (1986).

[189] 23 S.C. Code Ann. Regs. 19-450.2(C) (Supp. 2002).

[190] *Id.*

[191] 23 S.C. Code Ann. Regs. 19-450.2(D) (Supp. 2002).

[192] 23 S.C. Code Ann. Regs. 19-450.4(A)(1) (Supp. 2002).

[193] *Id.*

[194] 23 S.C. Code Ann. Regs. 19-450.4(A)(5) (Supp. 2002).

[195] 23 S.C. Code Ann. Regs. 19-450(4)(A)(7) (Supp. 2002).

[196] 23 S.C. Code Ann. Regs. 19-450.5 (Supp. 2002).

[197] 23 S.C. Code Ann. Regs. 19-450.6 (Supp. 2002).

[198] 23 S.C. Code Ann. Regs. 19-450.7 (Supp. 2002).

[199] 23 S.C. Code Ann. Regs. 19-450.9(B) (Supp. 2002).

[200] 23 S.C. Code Ann. Regs. 19-450.10 (Supp. 2002).

[201] *Id.*

[202] S.C. Code Ann. § 49-17-10 (1987).

of drainage commissioners, and construction of improvements. Basically, the Act taxes landowners who will benefit from the improvements in order to recover the cost of those improvements.

The Drainage Districts Act of 1920 seeks to accomplish goals similar to those in the 1911 Act; however, the 1920 Act pursues the goals in a slightly less cumbersome but more detailed fashion. Apparently, the legislature intended the two acts not to conflict with one another but, instead, to be complementary.

South Carolina Pollution Control Act

The South Carolina Pollution Control Act[203] is South Carolina's basic law with regard to control of air and water resources. It declares the public policy of the State to maintain reasonable standards of air and water purity, balancing the needs of public health and welfare with employment and industrial development.[204] The Act directs DHEC to adopt standards indicating polluted conditions in water and air.[205] Broad powers have been granted to DHEC in order to carry out the fundamental purposes of the Act, including: 1) holding of public hearings; 2) assessment of penalties; 3) making, revoking, or modifying orders to discontinue the discharge of various wastes into State water bodies; 4) institution of court proceedings to require compliance with the Act; 5) issuance, denial, ratification, and suspension of permits to discharge various wastes; and 6) implementation of the Federal Water Pollution Control Act in South Carolina.[206]

DHEC is authorized to prescribe standards for water quality considering the extent of floating and suspended solids, bacteriological organisms, oxygen levels, and other physical, chemical, or biological properties that are present and permitted in water.[207] The Act provides factors for DHEC to consider in developing classifications and standards for water.[208]

The Act imposes a permitting system for construction or alteration of sewage disposal facilities and creates classifications for all public wastewater treatment plants.[209] Any public wastewater treatment facility operating without a valid certificate or operating in a manner inconsistent with conditions of its permit is in violation of the Act.[210] If an undesirable level of pollution exists, DHEC must allow the permittee reasonable time to brings its operations into compliance.[211] If not corrected, DHEC must issue an order to cease and desist.[212] The operator is once again given the opportunity to abate the pollution prior to a final order to discontinue discharge of pollution,[213] and a public hearing may be held.[214] Any person may appeal an order to the Court of Common Pleas.[214] The Court renders judgment in equity, which also may be appealed.[216] The criminal penalty for violation is a fine of up to $25,000 per day, or imprisonment of up to two years, or both.[217] Civil penalties must not exceed $10,000 per day.[218]

DHEC is also authorized to issue emergency orders effective immediately, without the benefit of notice or a hearing, if the situation requires immediate action to protect public health or property.[219] A permittee receiving such order must comply but may apply for a hearing within 48 hours of the issuance of the order.[220]

Upon request of DHEC, the South Carolina Attorney General must seek an injunction or other court action in furtherance of the purpose of the Act.[221] The Act expressly preserves State common-law remedies to abate nuisances or pollution.[222] A determination by DHEC that a violation of the Act has occurred creates no presumption of law or

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[203] S.C. Code Ann. § 48-1-10 et seq. (1987).

[204] S.C. Code Ann. § 48-1-20 (1987).

[205] S.C. Code Ann. § 48-1-40 (1987).

[206] S.C. Code Ann. § 48-1-50 (1987).

[207] S.C. Code Ann. § 48-1-70 (1987).

[208] S.C. Code Ann. § 48-1-80 (1987).

[209] S.C. Code Ann. § 48-1-110(a) and (b) (Supp. 2002).

[210] *Id*. at (c).

[211] S.C. Code Ann. § 48-1-120 (1987).

[212] *Id*.

[213] S.C. Code Ann. § 48-1-130 (1987).

[214] S.C. Code Ann. § 48-1-50 (1987).

[215] S.C. Code Ann. § 48-1-200 (1987).

[216] *Id*.

[217] S.C. Code Ann. § 48-1-320 (1987).

[218] S.C. Code Ann. § 48-1-330 (1987).

[219] S.C. Code Ann. § 48-1-290 (1987).

[220] *Id*.

[221] S.C. Code Ann. § 48-1-210 (1987).

[222] S.C. Code Ann. § 48-1-240 (1987).

fact inuring to or for the benefit of anyone other than the State.[223]

State Safe Drinking Water Act

The State Safe Drinking Water Act[224] seeks to protect the quality of the State's drinking water supplies. The Act confers authority to DHEC to set standards for the design and construction of public water systems and the proper functioning of those systems.[225] Construction, expansion, or modification of public water facilities must be accomplished pursuant to a permit granted by DHEC.[226] Additionally, DHEC is authorized to investigate the system, collect water samples, and monitor operations. DHEC can enter the premises of a water system to carry out the provisions of the Act.[228]

If DHEC believes an imminent hazard exists that poses a serious, immediate threat to public health in a public water system, it can issue an emergency order without notice or hearing.[229]

The Act makes it unlawful for a person to violate the Act, the conditions of a permit, or any order of DHEC. Violators are subject to criminal penalties and injunction.[230]

Stormwater Management and Sediment Reduction Act

In 1991, the Legislature passed the Stormwater Management and Sediment Reduction Act.[231] The purpose of this Act was to replace the old county sediment control programs with a stronger, more uniform system.[232] The Act's provisions are administered by DHEC, which, in turn, may delegate their implementation to a local government. DHEC is responsible for developing regulations, minimum standards, guidelines, and criteria for carrying out provisions of the Act.[233] Under the Act, a stormwater-management and sediment-control plan must first be submitted, and a permit obtained, prior to conducting any soil-disturbing activity.[234] All land-disturbing activity must be done according to the submitted plan.[235]

The implementing agency has a statutory right to enter land on which land-disturbing activity is taking place to ensure compliance.[236] If the land disturbance is being done without the requisite stormwater-management and sediment-control plan, the implementing agency is authorized to issue a stop-work order.[237] Violators of the Act are subject to civil penalties in an amount determined by the implementing agency.[238] Additionally, the implementing agency may seek injunctive relief if it has reasonable cause to believe that any person is violating or is threatening to violate the requirements of the Act.[239]

South Carolina Drought Response Act

In 2000, the Legislature substantially revised the South Carolina Drought Response Act.[240] The purpose of the Act is to provide the State with a mechanism to effectively react to drought conditions. The Act applies to all of the water resources above and below ground with some exceptions.[241] It does not authorize any restriction

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[223] S.C. Code Ann. § 48-1-250 (1987).

[224] S.C. Code Ann. § 44-55-10 et seq. (2002).

[225] S.C. Code Ann. § 44-55-30 (2002).

[226] S.C. Code Ann. § 44-55-40 (2002).

[227] *Id.*

[228] *Id.*

[229] S.C. Code Ann. § 44-55-60 (2002).

[230] S.C. Code Ann. § 44-55-90 (2002).

[231] S.C. Code Ann. § 48-14-10 et seq. (Supp. 2002).

[232] County Sediment Control Programs, S.C. Code Ann. § 48-13-10 to § 48-13-60, (Supp. 2002) repealed by 1991 Act No. 51 § 3.

[233] S.C. Code Ann. § 48-14-50(C) (Supp. 2002).

[234] S.C. Code Ann. § 48-14-30(A) (Supp. 2002).

[235] *Id.*

[236] S.C. Code Ann. § 48-14-95 (Supp. 2002).

[237] *Id.* at (B).

[238] S.C. Code Ann. § 48-14-140(B) (Supp. 2002).

[239] S.C. Code Ann. § 48-14-150 (Supp. 2002).

[240] S.C. Code Ann. § 49-23-10 (Supp. 2002).

[241] S.C. Code Ann. § 49-23-40 (Supp. 2002).

in the use of water that is injected into aquifer storage and recovery facilities or water stored in managed watershed impoundments or water from a private pond that is fed only by surface water.[242]

Under the Act, the DNR is responsible for formulating and executing a Drought Mitigation Plan, monitoring drought conditions, making investigations to determine whether action is necessary, determining levels of drought after consultation with the Drought Response Committee, and establishing drought management areas.[243]

The DNR is responsible for coordinating the appropriate response to drought upon consultation with the Drought Response Committee.[244] The Committee is a two-tiered organization made up of a statewide committee composed of State agencies, and local committees within each Drought Management Area.[245] The Governor is responsible for appointing the Chairperson of the Drought Response Committee.[246]

On the basis of data collected by the DNR, the Committee determines whether or not an area of the state has reached any of four designated levels of drought: 1) incipient drought; 2) moderate drought; 3) severe drought; and 4) extreme drought.[247]

DNR is empowered to promulgate regulations to specify categories of nonessential water use.[248] Water used strictly for firefighting, health and medical purposes, minimum stream flow, minimum water levels in drinking-water supplies, and any water used to satisfy federal, state, or local public health and safety requirements is considered essential water use.[249] The Department may also promulgate regulations to provide for mandatory curtailment of nonessential water uses during periods of severe and extreme drought in affected drought-management areas.[250] Mandatory curtailment of nonessential water use becomes effective only after the Drought Response Committee determines the action to be reasonably necessary to ensure supplies of water in drought management areas.[251] On the local level, each water supplier is to enact an ordinance or plan to implement a drought response.[252]

Once a determination for curtailment has been issued, "any person adversely affected by mitigation or mandatory curtailment may within ten days submit information to the Department and obtain relief as appropriate." Further, a party affected by a declaration of the Drought Response Committee has the right to appeal that action to the Administrative Law Judge Division.[253] The appeal must be filed within five days of the declaration and operates as an immediate stay of the declaration of the Drought Response Committee.[254] The appeals process in essence eviscerates the authority of the Committee to trigger mandatory water mitigation or curtailment. There are provisions for the Governor to issue an emergency declaration to curtail water withdrawal or equitably allocate water if the Committee determines that the severity of conditions threatens public health and safety.[255] The Governor's emergency declaration is not affected by any appeal.

The Drought Response Committee met several times in 2002 during the fourth year of a severe drought; however, the Committee never issued a mandatory water curtailment declaration. Thus, there was no opportunity to know how well or how poorly the Act would stand up under urgent circumstances.

Interbasin Transfer of Water Act

The Interbasin Transfer of Water Act[256] requires any person to obtain a permit who withdraws, diverts, pumps, or directly causes the transfer of either 5 percent of the 7-day, 10-year low flow, or 1 million gallons or more a day, whichever is less, from one river basin for use and

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[242] *Id.*
[243] S.C. Code Ann. § 49-23-50 (Supp. 2002).
[244] S.C. Code Ann. § 49-23-60 (Supp. 2002).
[245] *Id.*
[246] *Id.*
[247] S.C. Code Ann. § 49-23-70 (Supp. 2002).
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] S.C. Code Ann. § 49-23-90(A) (Supp. 2002).
[253] S.C. Code Ann. § 49-23-70(D) (Supp. 2002).
[254] *Id.*
[255] S.C. Code Ann. § 49-23-80 (Supp. 2002).
[256] S.C. Code Ann. § 49-21-10 et seq. (Supp. 2002).

discharge into another river basin.[257] As the responsible agency, DHEC is empowered to grant, deny, or condition a permit for interbasin water transfer.[258] Upon application for a permit, DHEC's consideration must include current and projected stream uses of both the losing river basin and the receiving river basin, the water quality of the losing river basin, reasonably foreseeable water needs of the applicant, the beneficial impact of the transfer, whether the nature of the proposed water use is reasonable, the transfer's effect on water conservation, any alternative water supplies, the impact on interstate water use, and the availability of water for the losing stream to respond to drought.[259] DHEC is forbidden to issue a permit if the transfer will violate the water classification system or stream classification regulations or will adversely affect the public health and welfare.[260] The duration of the permit cannot exceed 20 years.[261]

DHEC may suspend, modify, or revoke a permit for good cause, provided that the permittee is given notice and an opportunity to be heard before the DHEC Board.[262] Following a decision by DHEC, the permittee may appeal that decision to the Administrative Law Judge Division.[263] An appeal of an Administrative Law Judge decision must be taken to the DHEC Board.[264]

Violators of the Act are subject to criminal penalties as well as an injunction.[265]

Any riparian owner or person with a legal right to use water who suffers material injury in the loss of water rights as a result of an interbasin transfer has a cause of action against the transferor. The injured person can recover all provable damages for loss of riparian rights, except against those transfers grandfathered in due to transfers existing in December 1984 or under license by the Federal Energy Regulatory Commission prior to December 1984.[266]

Soil and Water Conservation Districts Act

The purpose of the Soil and Water Conservation Districts Act is to conserve the soil and water resources, prevent soil erosion and flooding, prevent impairment of dams and reservoirs, maintain the navigability of rivers and harbors, provide water storage, and generally promote the health and safety of the public.[267] The goals of the Districts are carried out through the operation of the DNR Land, Water and Conservation Division, which includes the former Land Resources Conservation Commission, and through the local soil and water conservation districts.[268] The Act provides the authority to assist and coordinate local districts; coordinate the development of comprehensive conservation plans for State-owned lands; coordinate a statewide landscape inventory, flood-plain inventory, and soil-survey system; formulate guidelines to implement local landscape and beautification programs; and assist local government in flood-plain conservation, in erosion-control programs, and with conservation guidelines for land-use plans.[269]

The Act also provides a detailed procedure for creation of local soil and water conservation districts, including provisions for petitioning for the creation of such districts,[270] hearings on such petitions,[271] determination of need for the districts,[272] referendum on establishment,[273] and final establishment of the district.[274] The districts' powers include surveying and investigating soil erosion, flood damage, and preventative controls needed; demonstration projects; implementing preventative and control measures for flood prevention and water disposal; constructing and operating structures needed to carry out its duties; and developing comprehensive plans for soil and water conservation.[275] Local districts also are authorized to formulate local land-use regulations, which may be given the force and effect of law after proper

[257] S.C. Code Ann. § 49-21-20 (Supp. 2002).

[258] S.C. Code Ann. § 49-21-30 (Supp. 2002).

[259] S.C. Code Ann. § 49-21-30(C) (Supp. 2002). The above criteria are not exhaustive of the listed criteria set forth in the statute.

[260] *Id*. at (D).

[261] S.C. Code Ann. § 49-21-40(A) (Supp. 2002).

[262] S.C. Code Ann. § 49-21-40(B) (Supp. 2002).

[263] *Id*.

[264] *Id*.

[265] S.C. Code Ann. § 49-21-70 (Supp. 2002).

[266] S.C. Code Ann. § 49-21-30(g) and § 49-21-50(A)(2) (Supp. 2002).

[267] S.C. Code Ann. § 48-9-20 (1987).

[268] S.C. Code Ann. § 48-9-220 (1987).

[269] S.C. Code Ann. § 48-9-290 (Supp. 2002).

[270] S.C. Code Ann. § 48-9-510 (Supp. 2002).

[271] S.C. Code Ann. § 48-9-540 (Supp. 2002).

[272] S.C. Code Ann. § 48-9-560 (Supp. 2002).

[273] S.C. Code Ann. § 48-9-580 (Supp. 2002).

[274] S.C. Code Ann. § 48-9-600 (Supp. 2002).

[275] S.C. Code Ann. § 48-9-1270 (1987).

promulgation, including a local referendum on proposed regulations.[276]

Watershed Conservation Districts Act

The Watershed Conservation Districts Act[277] sets out a process for the creation of watershed conservation districts that are political subdivisions of the State. These districts may be created within one or more of the soil and water conservation districts to develop plans relating to erosion control, flooding, soil and water conservation, stormwater management, and/or water disposal.[278] The area of a district must be contiguous, lie within an established watershed, and be located within one or more soil and water conservation districts.[279] Districts are formed by filing a petition with the Board of Commissioners of the soil and water conservation district in which the proposed watershed district is located.[280] The commissioners must then hold a public hearing, and, upon a favorable recommendation, a referendum is held.[281] If approved by a majority of qualified electors residing in the proposed district, the district is established with an elected five-member board of directors.[282] The district residents are levied a tax for any improvements within the district made to further its mission.

South Carolina Coastal Conservation

Pursuant to State law regulating coastal tidelands and wetlands,[283] the Office of Ocean and Coastal Resource Management of DHEC possesses the authority to develop a comprehensive coastal management program and undertake the responsibility of enforcing that program.[284] The Division must inventory and designate areas of critical concern such as port areas, significant natural environmental areas, and recreational areas.[285] Persons who wish to use a critical area, or fill, remove, dredge, drain, or erect a structure in a critical area must first receive a permit from DHEC.[286] Emergency orders to protect public health and safety, hunting, trapping and fishing, discharge of treated effluent as permitted by law, and dredging harbor channels by the Corps of Engineers are exempt from the permitting requirement.[287]

Further, it must develop and implement a comprehensive beach erosion control policy and issue permits for erosion control structures.[288]

Violators of the Act are subject to criminal and civil penalties and injunction.[289]

The Act expressly states that it does not affect the status of the State's title to land below the mean high-water mark.[290] Furthermore, the Act provides a means for a person to claim an interest in tidelands, defined as all lands except beaches in the coastal zone between the mean high-water mark and mean low-water mark of navigable water bodies without regard to salinity.[291]

FEDERAL STATUTES

Neither the United States Constitution nor the laws enacted by Congress directly attempt to dictate water rights in South Carolina, but the effect of court interpretations and actual application of both the Constitution and various statutes play a significant role in water resources considerations in South Carolina. It is not the primary purpose of this chapter to review and propose modification in federal law; however, the multitude of federal provisions ranging from grants for sewer construction to impoundment of significant rivers for hydroelectric-power generation cannot be ignored. Federal activities may often carry implications beyond the intended purpose or scope of a particular action. For instance, the total dominion over the upper Savannah River by federal authorities seriously impacts the ability of individuals, industries, agriculture, and municipalities

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[276] S.C. Code Ann. § 48-9-1510 and 1520 (Supp. 2002).

[277] S.C. Code Ann. § 48-11-10 et seq. (Supp. 2002).

[278] S.C. Code Ann. § 48-11-20 (Supp. 2002).

[279] S.C. Code Ann. § 48-11-30 (Supp. 2002).

[280] S.C. Code Ann. § 48-11-40 (Supp. 2002).

[281] S.C. Code Ann. § 48-11-50 and § 48-11-60 (Supp. 2002).

[282] S.C. Code Ann. § 48-11-70 and § 48-11-100 (Supp. 2002).

[283] S.C. Code Ann. § 48-39-10 et seq. (Supp. 2002).

[284] S.C. Code Ann. § 48-39-80 (Supp. 2002).

[285] *Id*.

[286] S.C. Code Ann. § 48-39-130 (Supp. 2002).

[287] *Id*.

[288] S.C. Code Ann. § 48-39-120 (Supp. 2002).

[289] S.C. Code Ann. § 48-39-170 (Supp. 2002).

[290] S.C. Code Ann. § 48-39-190 (Supp. 2002).

[291] S.C. Code Ann. § 48-39-190 (Supp. 2002).

to draw upon the vast water supply in the Upper Savannah Region for future development and growth.

The federal government exercises numerous opportunities to involve itself in decision making regarding natural watercourses, primarily those water bodies affected by the Commerce Clause in the United States Constitution. To date, none of the three branches of federal government have sought to exercise control over ground water in any degree approaching involvement in watercourses. Recent decisions of the United States Supreme Court and a Federal District Court clearly state, however, that under appropriate circumstances, ground water may be covered by the Commerce Clause, providing the federal government a sufficient basis to regulate ground-water use.[292]

With the above in mind, no attempt will be made to identify each federal program or activity that affects water law and administration in South Carolina; rather, several federal programs will be briefly discussed that may have the greatest present impact on water-use decisions.

Federal Power Act

Enacted in 1920, the Federal Power Act provides a comprehensive federal scheme for the development of hydroelectric power.[293] Finding its power under the Commerce Clause of the U.S. Constitution, the Act preempts any state law or regulation that conflicts with its provisions.[294] The Act is administered by a five-member quasi-judicial body, the Federal Energy Regulatory Commission (FERC), whose members are appointed by the President with advice and consent from the Senate.[295] FERC is authorized to issue licenses for the operation of hydropower dams that 1) are located on a navigable waterway of the United States; 2) occupy Federal lands; 3) use surplus water or water power from a Federally-operated dam; or 4) are located on a water body over which Congress properly exercises Commerce Clause jurisdiction and the project affects interstate or foreign commerce.[296] Holding a FERC license is not a property right in the river on which the dam is located, because rivers are held in public trust.[297] Rather, the issuance of a license is considered a privilege. A FERC license can extend for a maximum term of fifty years.[298] Throughout the life of the license, the licensee must comply with its license terms, FERC regulations governing operations, and any applicable FERC orders.

In deciding whether to issue a hydropower license, FERC is mandated by the Federal Power Act to "equal consideration" of both economic and environmental values, including the necessity for hydropower generation, fish and wildlife habitat, visual resources, cultural resources, recreational opportunities, irrigation, water supply and flood control.[299] FERC must also make sure that the project under consideration: 1) is amenable to state comprehensive water plans;[300] 2) includes the means to protect or mitigate damage to fish and wildlife;[301] and 3) includes fishways as may be prescribed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.[302] Additionally, FERC requires an applicant to receive a water-quality certification under section 401 of the Clean Water Act. Any minimum streamflow conditions a state may place upon its 401 certification must be included in the FERC license.[303]

If an existing license has expired during its relicensing process, FERC is authorized to grant an annual license on the same terms as the original license.[304] An annual license is automatically renewable each year unless FERC takes action to do otherwise.[305]

The Federal Power Act explicitly states that "nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[306] The term "municipal" includes a state and its political subdivisions.[307] The term "other uses" is construed narrowly to mean rights of the same nature as those relating to irrigation and municipal

[292] *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

[293] 16 U.S.C. § 791 et seq. (2000).

[294] *See* 3 Pub. Nat. Resources L. § 21C:8 (2002).

[295] 16 U.S.C. § 792 (2000).

[296] 16 U.S.C. § 794(e) (2000).

[297] *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960).

[298] 16 U.S.C. § 799 (2000).

[299] 16 U.S.C. § 808 (2000).

[300] 16 U.S.C. § 803(a)(2)(a) (2000).

[301] 16 U.S.C. § 803(j) (2000).

[302] 16 U.S.C. § 811 (2000).

[303] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

[304] 18 C.F.R. § 16.18(b) (2002).

[305] *Id.*

[306] 16 U.S.C. § 821 (2000).

[307] *Id.*

purposes.[308] State regulation of all other uses not specified above is preempted by the Federal Power Act. State common law or statutory law pertaining to private proprietary rights to use, divert or distribute water are left intact.[309] FERC licensees are liable to riparian water users for any interference with their water rights under state law.[310]

FERC issued a new rule that revises its regulations concerning the licensing process. The revisions create a new licensing procedure, called the Integrated Licensing Process, that collapses two formerly sequential steps, the applicant's prefiling consultation and FERC's environmental review, into a combined step. The new process was optional for applicants until July 2005, after which it became the required process unless specific approval by FERC is granted to use a former procedure. The rulemaking took effect on October 23, 2002.

Federal Water Pollution Control Act

Congress enacted the Federal Water Pollution Control Act in 1972,[311] subject, in part, to the following goals and policies:

> The objective of this act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this act
>
> 1. it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
> 2. it is the national goal that wherever attainable, an interim goal of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides recreation in and on the water be achieved by July 1, 1983;
> 3. it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the administrator in the exercise of his authority under this act.
>
> * * *
>
> 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 act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water that have been established by any state. Federal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The Water Pollution Control Act, extensively amended by the Clean Water Act in 1977,[312] provides a comprehensive scheme to upgrade and protect the Nation's water. While a thorough understanding of all parts of the Act are necessary to realize the full impact of this law on activities in South Carolina, this assessment will restrict itself to briefly reviewing three important programs created by the act.

Section 401.[313] Section 401 is contained in Title IV of the Act. The section requires an applicant to obtain certification from the State-designated permitting agency before Federal licensing or permitting of an activity that, during construction or operation, may result in a discharge to navigable waters.[314] Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

a. individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.

b. Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.

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[308] *First Iowa Hydro-Electric Co-Op v. FERC*, 328 U.S. 152 (1946).

[309] *U.S. v. Twin City Power Co*., 215 F.2d 592 (4th Cir. 1954).

[310] South Carolina common law recognizes a cause of action against a dam owner for damages to upstream or downstream property caused by construction of the dam. *See McDaniel v. Greenville-Carolina Power Co*., 95 S.C. 268, 78 S.E. 890 (1913); *McMahon v. Walhalla Light & Power Co*., 102 S.C. 57, 86 S.E. 194 (1915). Claims against dam operators subsequent to the enactment of the FPA involve takings challenges. *See infra* n.

[311] 33 U.S.C. § 1251 et seq. (2000).

[312] P.L. 95-217.

[313] 33 U.S.C. § 1431 (2000).

[314] 33 U.S.C. § 1341(a)(1) (2000).

c. permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, et seq. dealing with permits and licenses.[315]

"Navigable waters" is defined as "waters of the United States."[316] Sections 1311 through 1313 and sections 1316 and 1317 state applicable standards and provide for enforcement under the act, including effluent limitations. The 401 certification can be seen as an important attempt on the part of Congress to comply with its own declaration of policy in placing primary responsibility with the states to prevent, reduce, and eliminate pollution.

Further, because the Section 401 certification is a state program conducted pursuant to state as well as Federal authority, the State of South Carolina has included a requirement for 401 certification in State permits, issued by DHEC, for various activities in State navigable water bodies.[317]

Section 402.[318] Section 402 creates the "National Pollutant Discharge Elimination System" (NPDES) which requires a permit for the point-source discharge of pollutants into the waters of the United States. "Pollutant" is defined broadly and includes all discharges of municipal, industrial, and agricultural waste. Point sources are discrete conveyances such as pipes or man-made ditches, and typically involve publicly owned wastewater treatment facilities, industrial dischargers, and urban runoff.[319] Individual homes that are connected to a municipal system, use a septic system, or do not have a surface discharge do not need an NPDES permit; however, industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface water.[320]

The NPDES program is one of the primary tools for maintaining water quality. In South Carolina, the program is implemented by DHEC, pursuant to the broad authority granted to the Department under the Act.[321] Even though the NPDES program is administered by the State, the U.S. Environmental Protection Agency retains various oversight and approval authorities for procedures and standards in the program.

Section 404.[322] Section 404 prohibits the discharge of dredged or fill material into the navigable waterways of the United States without first obtaining a permit. This Federal program is the joint responsibility of the Secretary of the Army, administered through the Army Corps of Engineers, and the Administrator of the U.S. Environmental Protection Agency.[323] The Corps issues permits, and the EPA develops guidelines for issuing the permits.[324] Applicants for a Section 404 permit must also receive a Section 401 water quality certification from the State.[325] States may obtain approval from the EPA to administer the Section 404 permitting program.[326]

The Corps of Engineers has defined "navigable waters" to include intrastate water bodies, "the use, degradation or destruction of which could affect interstate or foreign commerce."[327] In 1986, the Corps attempted to clarify its jurisdiction over isolated intrastate water bodies by stating, in what is referred to as the "Migratory Bird Rule," that Section 404(a) jurisdiction extends to intrastate water bodies that, among other things, provide habitat to migratory birds.[328] This Rule has served to protect wetlands, particularly isolated wetlands, from destruction.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[329] the U.S. Supreme Court held that the Corps' exercise of jurisdiction over isolated wetlands exceeded the statutory grant of authority to the Corps under section 404.[330] The Corps denied the Solid Waste Agency of Northern Cook County (SWANCC) a 404 permit to fill an abandoned quarry that, over time, had evolved into a series of permanent and seasonal ponds. The ponds attracted a large migratory bird population. The Corps asserted its jurisdiction over the quarry pursuant to its Migratory Bird Rule and denied SWANCC a 404 permit. The Court struck down the Migratory Bird Rule.

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[315] 25A S.C. Code Ann. Regs. 61-101(a)(2) (Supp. 2002).

[316] 33 U.S.C. § 1362(7) (2000).

[317] 23 S.C. Code Ann. Regs. 19-450(16) (Supp. 2002).

[318] 33 U.S.C. § 1342 (2000).

[319] EPA, Office of Wastewater Management, *Water Permitting 101*, p. 5. <http://www.epa.gov/npdes/pubs/101pape.pdf> (accessed Sept. 11, 2003).

[320] *Id*.

[321] 33 U.S.C. § 1342(b) (2000).

[322] 33 U.S.C. § 1344 (2002).

[323] 33 U.S.C. § 1344(d) (2002).

[324] 40 C.F.R. § § 230.1 – 230.80 (2002).

[325] 33 U.S.C. § 1341 (2002).

[326] 33 U.S.C. § 1344(g) (2002).

[327] 33 C.F.R. § 328.3(a)(3) (2002).

[328] 15 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

[329] 531 U.S. 159 (2001).

[330] *Id*. at 173-174.

The Court's ruling has left the protection of nonnavigable, intrastate, isolated wetlands solely to state governments.[331] Jurisdiction over this type of water can only be asserted if its degradation could adversely affect navigable water bodies of the United States.[332] The Corps' jurisdiction over navigable water bodies, interstate water bodies, and tributaries of navigable or interstate water bodies remains unaffected for Section 404 purposes.

PROBLEMS AND NEEDS RELATED TO WATER LAW

Uncertainty in Riparian Law

The single greatest problem in riparian water law in South Carolina is uncertainty as to the law itself, primarily common law, which leads to uncertainty and questionable security of rights to use water. Three issues seem to present the most consistent source of concern: (1) insecurity of a riparian right; (2) limitations on where water may be used; and (3) inadequate protection of the resource and public interest in the resource.

Insecurity of Riparian Rights. A riparian owner has a right to a reasonable use of water as it flows by his land. There is no guarantee of a specific amount, however, even if the use is reasonable; moreover, there is no protection based upon the date reasonable use commenced. Water use over a long period of time can later be found unreasonable if a newer use is seen as more reasonable.[333] If any competing uses change, then the "calculus of reasonableness" can change.[334] In essence, the reality is "that courts cannot deliver a decision, even as between the litigants themselves, which will be good for more than the day on which it was given."[335] Such insecurity is an obstacle to private investment in water development.[336]

A civil action is the sole mechanism for enforcing and maintaining a riparian right. Given that South Carolina courts have not heard any significant riparian litigation since 1920, how it would be applied to a contemporary water use conflict is, at best, speculative. The difference in theories under the riparian doctrine, natural flow and reasonable use, is so substantial as to permit total consumption of a stream in one case and spread the use of water so thinly between so many riparians that no beneficial use can be made in another.

The riparian right is a right held commonly—the right of each riparian is coequal. New water users compete on equal footing with older users. In practice, all reasonable uses of water are permitted, regardless of the amount of water consumed and the date the use started, with reasonableness being measured either by the lack of damage to others, or by the significance of the damage versus the significance of the use. The various potential reasonable uses defy any quantitative determination as to where, when, under what circumstances, and how much water each riparian is entitled to use or how much will remain available for use. Theoretically, all reasonable uses of water are threatened with physical uncertainty equally, both as to time and amount, and users would suffer a shortage proportionally. While such an equality of right has an appealing and democratic sound, an equal share of an insufficient supply does not damage all users equally and, of course, does not allocate or devote remaining supplies to the highest and best uses.

As for certainty of tenure of water rights, the riparian right is acquired by land ownership and not lost by nonuse. The acquisition and continued maintenance of a right is, therefore, certain, but a particular use of the right is always subject to future determinations of its reasonableness in view of later needs for the water, and even if the use is reasonable the right gives no guarantee of a certain quality of water as others with equal rights later demand a share. What is considered reasonable also varies with supply conditions, such that what is reasonable in good water years may become unreasonable in times of drought.

Water rights acquired by subscription are no more secure than water rights acquired by ownership of riparian land. Further, prescriptive rights are extremely difficult to establish under the riparian reasonable-use theory, as they only come into existence when unreasonable harm is done to other riparian rights. Not only must an injury be sustained but it must be of a continuous nature, not merely during unusually dry years. The chances are small that a riparian would suffer harm in silence for a 20-year period.

Water use is increasing, as is the cost to obtain water. Providing a more secure and stable form of water right would benefit all water-using sectors of the economy and, of course, is a keystone in any state water policy.

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[331] C. Victor Pyle, III, Student Author, *Isolated Wetlands Jurisprudence Post SWANCC and Resulting Federal and State Attempts to Fill the Void*, 11 S.E. Env. L. J. 91, 92 (2002).

[332] *Id*. at 95.

[333] Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. Ark. Little Rock L. Rev. 9, 16 (2002).

[334] *Id*.

[335] *Id*.

[336] *Id*.

Limitations on Water Use. Perhaps the most prominent criticism of riparian law is the limitation, or outright illegality, of water use on nonriparian lands by nonriparians. A corresponding limitation is the requirement that the use must be within the watershed or the stream from which the water was taken. These territorial limitations are founded on several concepts, such as reserving water for the sole use of the owner on the basis of an alleged real-property right or as a protection against diminishing the quantity of water for downstream users.

Use by nonriparians or by riparians beyond the watershed of origin or by interbasin transfer exists and is common in South Carolina despite riparian law. Above the Fall Line, many municipal water-supply systems transfer water from one watershed to serve customers in another watershed. Along the coast, much of the population now is served through interbasin transfers by public water systems: 1) Beaufort County and parts of Jasper County from the Savannah River; 2) the city of Charleston from the Edisto River; and 3) the city of Georgetown and parts of Horry County from the Great Pee Dee River. Interbasin transfer of water for industrial and agricultural use is not widespread at present.

The frequency of interbasin transfer by municipal suppliers is based on simple expediency, for few cities lie wholly within one watershed. Further, limiting distribution of publicly supplied water to a single watershed would not be practical in most cases. The limited number of cases against municipal suppliers by injured riparians in the past has produced little knowledge or concern about the watershed limitation.

Because court cases in this State have not clarified the problem, it must be assumed that the territorial limitations inherent in the riparian law remain in effect. The requirement that water be used only in the watershed of origin, from a water-development standpoint, is an excessively burdensome limitation and one that would lead to absurd results if it became a mandatory provision of State water policy. Interbasin transfer should not be viewed as inherently good or bad but should be judged on the merits of each proposed transfer.

Protection of the Resource for Public Interests. The ultimate public interest in any system of water law is to discourage waste and foster the best possible use of the resource. Beyond the interest in providing security to beneficial private uses, a public interest exists in the protection of the resource in general. Such public interests include the maintenance of minimum streamflow for protection of water quality, fishery resources, navigation, recreation, and aesthetics. The riparian system does not provide protection to these public interests, because riparian rights are a common-property system. Under a common-property scheme, it is up to all the co-owners to decide if, how, and when to use their water right.[337] The problem with a common-property scheme is that when the use reaches capacity, a "tragedy of the commons" results.[338] Water users, exercising their own private interests, appropriate their share of water to the point of exhaustion.[339]

Because riparian rights apply to private use, lawsuits are brought in the nature of individual property actions. The adversary process rivets the court's attention to the particular parcel of land in dispute and is based on particular individual damages. This method of enforcement is not designed to reach conclusions regarding social policy and the public interest. The practical policy implication of riparian law is that water must be used without damage to others as opposed to a public policy that water be used wisely and beneficially.

No riparian-law mechanism is available to protect minimum streamflow, that is, to establish a base flow for planning and regulatory purposes beyond which water consumption will be discouraged in the public interest. Unlike some western states where all water in streams is allocated to an active use, South Carolina is in an advantageous position to protect minimum streamflows and still provide for continued development.

To address these problems, about half of the eastern states have moved towards a permit system to replace common-law riparian rights.[340] This new system, sometimes called "regulated riparianism," attempts a transition from a common property system to that of a public-property system.[341] Under a regulated riparian system, a water user must obtain a permit from the state in order to withdraw water. The water rights of users are determined by the permit instead of the riparian doctrine.[342] Even so, the criterion of reasonable use is applied by the state in deciding whether to approve a permit.[343] The major difference, however, in applying the reasonable-use standard under a permitting system is that the reasonable use of water is decided prior

[337] Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. Ark. Little Rock L. Rev. 9, 16 (2002).

[338] *Id.*

[339] *Id.*

[340] *Id.* at 31. Those states that have adopted comprehensive permit systems are Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, North Carolina, New York, Virginia, and Wisconsin. States that have adopted a regulated riparian system to ground water, but not surface water, are Arizona, Illinois, Indiana, and South Carolina.

[341] *Id.*

[342] *Id.* at 35.

[343] *Id.*

to actual water consumption; whereas under a traditional riparian approach the determination of reasonable use occurs after the use has begun and litigation over such use is underway.[344] Additionally, states judge reasonable use in a broader context, including public-policy considerations.[345]

Potential for Increased Takings Litigation

In the past, South Carolina courts have adjudicated few takings challenges from riparian owners.[346] All of these early cases involved damage incurred by a riparian owner from a hydroelectric-power plant. And in every case, the plaintiffs opted for a takings claim simply to avoid the sovereign immunity from tort claims that existed prior to 1985.[347] As South Carolina adopted statutes regulating water use, the legislature pointedly left riparian rights intact, which explains why the State has not seen a rash of regulatory takings claims. As private development increases, however, the State's water resources will be under pressure. The need for greater conservation and regulation of water in South Carolina may lead to legislation that limits the scope of riparian rights. Consequently, South Carolina may encounter takings challenges to any increased regulation of water use.[348]

Nationally, water law is seen as a likely battlefield for takings cases.[349] Recent riparian takings cases in other states arose from legislation or government action that limited or eliminated riparian rights.[350] Only two states, California and Oklahoma, have struck down legislation limiting riparian rights; and of these two, only Oklahoma based its decision on a takings theory.[351] Both of these states operate under the prior appropriation doctrine, which confers a vested water right upon users. South Carolina's riparian law does not give any user a vested right. Additionally, the State's navigational servitude is superior to an individual riparian right. Thus, the area where increased takings challenges may be a possibility is ground-water regulation.

Applying takings jurisprudence to water resources raises difficult ambiguities because takings cases have traditionally dealt with real property instead of water use.[352] Questions over whether a regulation constitutes a physical taking of all legal rights to water use, and whether restricting water use deprives an owner of all economically beneficial use of water, will prove to be novel issues facing courts.[353] If South Carolina chooses to alter riparian rights, care should be employed to avoid takings challenges.

FERC Relicensing of Hydroelectric-Power Dams in South Carolina

In South Carolina, 25 hydroelectric-power projects are licensed by FERC. These plants are located on the Santee, Saluda, Broad, Wateree, Little, Savannah, Pacolet, Enoree, and Rocky Rivers, as well as Bad Creek, Lawsons Fork Creek, and Conecross Creek.[354] As noted earlier, FERC hydropower licenses are granted for a term no longer than fifty years.[355] For those licenses granted prior to the enactment of Federal environmental laws such as the National Environmental Policy Act (NEPA),[356] the Clean Water Act (CWA),[357] and the Endangered Species Act (ESA),[358] the relicensing experience will take on new complexity. Furthermore, the Federal Power Act was amended in 1986 to require FERC to

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[344] *Id*.

[345] *Id*.

[346] *McDaniel v. Greenville-Carolina Power Co.,* 95 S.C. 268, 78 S.E. 980 (1913); *Werts v. Greenwood County*, 205 S.C. 258, 31 S.E. 2d 451 (1944); *Webb v. Greenwood County*, 229 S.C. 267, 92 S.E. 2d 688 (1956); *Rice Hope Plantation v. S.C. Public Service Authority*, 216 S.C. 500, 59 S.E. 2d 132 (1950).

[347] The S.C. Supreme Court abolished the doctrine of sovereign immunity, subject to limitations, in *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985).

[348] Recently, the S.C. Supreme Court has wrestled with a takings challenge of tidelands regulation in *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 580 S.E. 2d 116 (2003) (no taking where land reverted to navigable tidelands because State holds water below high water mark held in public trust).

[349] Barton H. Thompson, Jr., *Takings and Water Rights* in *Water Law: Trends, Policies and Practice*, 43, 43 (Kathleen Marion Carr & James D. Crammond, eds. American Bar Association, 1995).

[350] *Id*. at 45. *See R.W. Docks & Slips v. State*, 244 Wis. 2d 497, 628 N.W. 2d 781 (Wis. 2001) (DNR denied dredging permit to construct boat slips); *Stupak-Thrall v. U.S.,* 89 F. 3d 1269 (6th Cir. 1996) (U.S. Forest Service regulations governing national forest restricted motor boats on lake); *Peterman v. State Dept. of Natural Resources*, 446 Mich. 177, 521 N.W. 2d 499 (Mich. 1994) (DNR constructed boat launch and jetties which caused erosion of property owner's beachfront); *Franco-American Charolaise*, *Ltd. v. Oklahoma Water Resources Bd.,* 1990 OK 44, 855 P.2d 568 (Okl. 1990) (statute limiting riparian owner to domestic use and declaring all other water in stream to be public subject to appropriation without compensation); *Belvedere Dev. Corp. v. Div. Of Admin., State Dept. of Transp.,* 476 So.2d 649 (Fla. 1985) (condemnation that attempted to reserve riparian rights to condemnee to avoid compensation).

[351] *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 599 P. 2d 656 (1979*); Franco-American Charolaise, Ltd. V. Oklahoma Water Resources Bd*., 855 P. 2d 568 (Okla. 1990).

[352] Thompson, *supra* n. 346 at 48.

[353] *Id*.

[354] Federal Energy Regulatory Commission, *Complete List of Issued Licenses* (available at http://www.ferc.gov/industries/hydropower.asp).

[355] 16 U.S.C. § 799 (2000).

[356] Enacted in 1969.

[357] Enacted in 1972, and amended in 1977.

[358] Enacted in 1973.

consider environmental impacts on equal footing with economic needs.[359] In South Carolina, three of the top hydropower licenses have expired or will expire by the year 2010, triggering an extensive relicensing process. Santee Cooper's license to operate its dam on the Santee River expired in 2006.[360] South Carolina Electric & Gas Company's license to operate its dam on the Saluda River will expire in 2010.[361] Duke Energy Corporation's license to operate its dam on the Catawba-Wateree expired in 2008.[362] In North Carolina, the Alcoa license[363] and Progress Energy license[364] to operate dams on the Yadkin-Pee Dee River expired in 2008. Revisions to this license will impact the Pee Dee in South Carolina.

The Duke, Alcoa, and Progress Energy dams were originally licensed prior to the enactment of NEPA, ESA, and CWA. Thus, in order to receive a new license, these plants must comply with Federal environmental law. Additionally, all five relicensings are subject to environmental conditions recommended by State and Federal natural resource agencies as approved by FERC, any fishway prescribed by the U.S. Department of Interior and/or the U.S. Department of Commerce, and water-quality certification by the South Carolina Department of Health and Environmental Control.[365] Relicensing proceedings for these projects will "create a significant window of opportunity for the State of South Carolina … to seek new license conditions that will reduce adverse environmental impacts of dams on these four major river systems."[366]

Interstate Water Allocation

The Yadkin-Pee Dee River, flowing from North Carolina into South Carolina, and the Savannah River, whose centerline serves as the boundary between Georgia and South Carolina, are at risk for larger consumptive use by North Carolina and Georgia. South Carolina's neighboring states are developing at a more rapid pace than South Carolina. In Georgia, the city of Atlanta's demand for water is increasing each year at an estimated rate of 16 million gallons a day.[367] To meet its future needs, the city is exploring additional sources for public drinking and wastewater.[368] As for North Carolina, FERC hydropower licenses granted to Alcoa and Progress Energy control the streamflow of the Pee Dee River, which provides almost a third of South Carolina's freshwater needs.[369] South Carolina's economic base of tourism and manufacturing rely on an adequate water supply. Preservation and conservation of South Carolina's water resources is critical not only to existing business but also to future growth. Water allocation between South Carolina and its neighbor states is critical to protection of the State's water resources. There are three ways to allocate the waters of interstate rivers – interstate compacts, litigation in the U.S. Supreme Court, and congressional apportionment.

Congress is authorized to allocate water through its power to regulate interstate commerce. The first recognition of this authority came in *Arizona v. California*, where the U.S. Supreme Court held that Congress had imposed a "statutory apportionment" of the Colorado River among Arizona, California, and Nevada.[370] Since 1963, when *Arizona v. California* was decided, Congress has allocated interstate water on only one other occasion. In 1990, it apportioned the waters of the Truckee and Carson Rivers and Lake Tahoe among California and Nevada.[371] Congressional apportionment is not likely to occur often owing to Congress' reluctance to force a resolution upon states.[372] And states are not comfortable with leaving their destinies in the hands of Congress.

Interstate compacts are the most favored and most adaptable means of water allocation.[373] Compacts are negotiated agreements between states that are adopted

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[359] Electric Consumer Protection Act of 1986, Pub. L. No. 99-495, § 3, 100 Stat. 1243 (codified in 16 U.S.C. §§ 792-828(c) (2000).

[360] Santee Cooper license was issued on Apr. 2, 1926, and amended in 1927 and 1933 (1 F.P.C. 78). A new license was granted in 1979 (7 F.E.R.C. P 61, 148).

[361] Lexington Water Power Company was issued a license on Aug. 5, 1927 (Lexington Water Power Co., Eighth Annual Report of the Federal Power Act, 1928, pp. 64, 70 (1928). The license was transferred to SCE&G in 1943 (3 F.P.C. 1007), and amended in 1967 (38 F.P.C. 1235). A new license was issued in 1984 (27 F.E.R.C. P 61,332), and amended in 1988 (44 F.E.R.C. P 62,289).

[362] Duke license issued on Sept. 17, 1958 (20 F.P.C. 360).

[363] Carolina Aluminum Company license issued on May 19, 1958 (19 F.P.C. 704) and amended in 1968 (39 F.P.C. 397).

[364] Carolina Power & Light (now Progress Energy) license issued on May 19, 1958 (19 F.P.C. 704).

[365] Mullen Taylor, Student Author, Hydropower Relicensing in South Carolina, 11 S.E. ENVR. L. J. 41, 43 (2002).

[366] *Id*.

[367] Charles Seabrook, *Atlanta Comes Up Dry in Bid for More Water* <http://www.accessatlanta.com/ajc/metro/0502/26water.html> (May 25, 2002).

[368] *See* Chuck Crumbo, *Courts Could Divide Water*, *The Sun News*, July 28, 2002, <http://www.myrtlebeachonline.com/mld/sunnews/2002/07/28/news/ htm_> (July 28, 2002); Seabrook, *supra* n. 364.

[369] Crumbo, *supra* n. 365.

[370] 373 U.S. 546 (1963).

[371] Jerome C. Muys, *Approaches and Considerations for Allocation of Interstate Waters*, in *Water Law: Trends, Policies and Practice*, 311, 312 (Kathleen Marion Carr & James D. Crammond, eds. American Bar Association, 1995).

[372] Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. Ark. Little Rock L. Rev. 155, 158 (2002).

[373] Muys, *supra* n. 368 at 313.

legislatively by each state and by Congress.[374] Thus, the enabling legislation of an interstate compact becomes Federal law. There are currently 18 water compacts in existence, primarily in the western region of the United States. Modern interstate water compacts establish a permanent agency to implement the compact's functions and objectives. Although states can delegate power to these interstate agencies, states have historically been unwilling to delegate any significant authority in the compact's enabling statute for fear of losing control of the agency.[375] Ironically, by not delegating enough state power, states are more exposed to the prospect that their water problems will be subject to Federal programs that may preempt state authority to resolve water issues.[376] Disputes arising from enforcement of interstate compacts are heard by the U.S. Supreme Court; however, the Court will not exercise discretion to relieve a state from an obligation imposed by a compact.[377] Instead, the Court limits itself to determining whether a breach of the compact occurred and what the appropriate remedy for the breach will be.[378]

The U.S. Supreme Court has original jurisdiction over interstate disputes. Consequently, states battling over water allocation may invoke the Court's jurisdiction to adjudicate the dispute. The U.S. Supreme Court exercises its original jurisdiction cautiously, requiring that a state seeking such jurisdiction show that the water dispute is "of serious magnitude" and its assertion is supported by "clear and convincing evidence."[379] If the Court does decide to hear the case, the principle it applies is the equitable-apportionment doctrine. The basic principle of equitable apportionment is not governed by how state law determines private water rights.[380] Interstate disputes are resolved on the basis of equality of right of states as equal sovereigns;[381] however, equality of right does not require that each state receive an equal division of water from an interstate watercourse. The analysis is very fact specific and flexible, focusing on balancing benefits and harms.

Under equitable apportionment, the Court may consider a state's common law on water rights, but other factors may prove to be more despositive. These factors include the "priority of appropriation, physical and climatic conditions, the consumptive use of water, character and rate of return flows, extent of established uses, availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas."[382] Another factor recognized is water conservation in each state.[383] Because of the extreme complexity of the legal, factual, and policy considerations involved in equitable apportionment, the Court encourages resolution through a negotiated interstate compact between the states rather than adjudication.[384]

In the Court's most recent equitable-apportionment cases,[385] *Colorado v. New Mexico I* and *Colorado v. New Mexico II*, the Court seemingly raised the evidentiary standard of "clear and convincing" evidence.[386] The Court emphasized that a state seeking diversion of water must show that actual inefficiencies exist in present use or that future benefits of a proposed use are highly probable.[387] Proposed uses where the benefits are speculative will not meet the Court's burden.[388] The Court also signaled movement toward imposing greater conservation and planning responsibilities on states, which it saw as a way to reduce uncertainties that have plagued equitable apportionment.[389] In a subsequent case, *Nebraska v. Wyoming*, the Court added that a state may show environmental damage to fish and wildlife to support its showing of injury.[390]

The Court's new stringency in evidence requirements of harm will probably result in a reduction in equitable

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[374] Abrams, *supra* n. 369 at 157.

[375] Muys, *supra* n. 368 at 314.

[376] *Id*.

[377] Abrams, *supra* n. 369 at 157.

[378] *Id*.

[379] *Id*., citing *Colorado v. New Mexico*, 459 U.S. 176, 188 n. 13 (1982).

[380] *Connecticut v. Massachusetts*, 282 U.S. 660, 670-671 (1931).

[381] *Id*.

[382] *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

[383] *Colorado v. New Mexico*, 459 U.S. 176, 188 n. 13 (1982).

[384] *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945).

[385] *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Colorado v. New Mexico*, 459 U.S. 176 (1981).

[386] George William Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 Nat. Resources J. 565, 578 (1989).

[387] A. Dan Tarlock, *Law of Water Rights & Resources*, 10:19 (2003).

[388] *Id*.

[389] *Id*.

[390] *Nebraska v. Wyoming*, 515 U.S. 1, 12-13 (1995). This case dealt with enforcement of a previous decree, not an original equitable apportionment claim.

apportionment cases, simply because states cannot afford to wait until such actual or highly probable injury has occurred before taking action.[391] Because the U.S. Supreme Court now requires such a high standard, states may seek recourse in other ways. Interstate compacts have taken on a more attractive light.[392] Interest in development of water markets is attracting more attention.[393] Alternative litigation strategies used by other states include challenging water diversions based on violation of the National Environmental Policy Act and other Federal environmental statutes.[394]

A more discouraging message in *Colorado v. New Mexico* appears to be that a state slower to develop or is conservation minded may be the loser in equitable apportionment; a state may be forced to engage in a race to use as much water as possible, as quickly as possible, in order to lay claim to water before other states do.[395] Strategies for these slower developing states, such as South Carolina, include using water-quality standards as a means of challenging other states' diversions,[396] and in the context of FERC hydropower licensing and other Federal licenses, using the 401 water-quality certification to protect instream flows. A state may also be able to protect its water by setting instream-flow requirements for all its rivers, which could create a foundation to block exportation of water to another state.

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[391] Sherk, *supra* n. 383 at 578.

[392] *Id*. at 581.

[393] *Id*.

[394] *Id*.

[395] Abrams, *supra* n. 369 at 168.

[396] *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).