

Surface Water Withdrawal, Permitting, Use, and Reporting Act: South Carolina Supreme Court Addresses Challenge to State Registration Provision



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The South Carolina Supreme Court (“Court”) addressed in a May 30th opinion a judicial challenge to the South Carolina Surface Water Withdrawal, Permitting, Use, and Reporting Act (“Act”). See *Jowers v. South Carolina Dept. of Health & Env’tl. Control*, No. 2016-000428, 2018 WL 2449220 (S.C. May 30, 2018).

The Court held that James Jefferson Jowers Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman, and Anthony Ruhlman (“Plaintiffs”) did not have legal authority to bring an action against the South Carolina (“State”) Department of Health and Environmental Control (“DHEC”).

The Act regulates surface water withdrawals in South Carolina. Surface water is considered all water that is wholly or partially within the State or within its jurisdiction that is open to the atmosphere and subject to surface runoff, including, but not limited to, lakes, streams, ponds, rivers, creeks, runs, springs, and reservoirs. The DHEC is charged with the implementation and enforcement of the Act. It establishes two mechanisms to regulate water withdrawals—i.e., a permitting system and a registration system.

The Act requires most surface water withdrawers to obtain a permit before withdrawing surface water. A permit applicant must provide DHEC detailed information about the proposed surface water withdrawal. Further, DHEC must provide the public with notice of the application within thirty days. If residents of the affected area request a hearing, DHEC must conduct one.

DHEC must issue a permit to the applicant if it determines that the proposed use is reasonable. Permits are issued for a period of at least twenty and no more than fifty years. After a permit is issued, surface water withdrawals made pursuant to the terms and conditions of the permit are presumed reasonable.

Agricultural users are treated differently under the Act. They simply register their surface water use with DHEC and are permitted to withdraw surface water up to the registered amount. If the users were reporting their consumption in 2010, the Act allows the user to maintain its withdrawals at its highest reported level or at the design capacity of the intake structure and the user is deemed registered. For users first reporting after 2010, the Act requires reporting of its anticipated withdrawal amount to DHEC for the state agency to determine whether the use is within the safe yield of the water source.

The Court found that registration had three important effects on the Plaintiff’s claims. First, unlike permits, which are issued for a term of years, registrations have no time limits. Second, the Act presumed

all registered amounts are reasonable. Third, the Act changes the elements for a private cause of action for damages by requiring plaintiffs to show a registered user is violating its registration.

The Plaintiffs own property along rivers or streams in Bamberg, Darlington, and Greenville counties. In September 2014, they jointly sued DHEC in Barnwell County, challenging the Act's registration system for agricultural users on United States and South Carolina constitutional grounds.

In order to be able to bring a lawsuit, however, the Court noted a party must have standing. Plaintiffs have standing to challenge legislation when they sustain, or are in immediate danger of sustaining, actual prejudice or injury from legislative action. Thus, the Plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. Further, the Plaintiffs must also have a ripe controversy. Ripeness is described in terms of what is not ripe, which is an issue that is contingent, hypothetical, or abstract.

The Plaintiffs in their challenge to the Act first argued that they suffered a riparian injury—i.e., an injury associated with special rights of property owners whose property borders a river or stream. Riparian property owners hold special rights allowing them to make reasonable use of the water adjacent to their property.

The right of reasonable use is subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore. The Constitution of South Carolina provides, "All navigable waters shall forever remain public highways free to the citizens of the State and the United States." Therefore, the State had an interest that could limit the right of reasonable use.

The public trust doctrine provides that the State cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. The Plaintiffs argued that the Act violated the public trust doctrine by disposing of the State's water to agricultural users. Specifically, the Plaintiffs argued that provisions in the Act allowed registered users to withdraw a fixed amount of water that would forever be deemed reasonable, preventing them from ever successfully challenging a registered agricultural use, regardless of how conditions may change in the future. The Plaintiff's further alleged that their rights were fundamentally altered the moment the Act was signed, and thus had an injury in fact sufficient to establish standing, which presented an actual controversy that is ripe for judicial determination.

The Court disagreed. It found nothing in the Act prevented the Plaintiffs from seeking an injunction against a riparian owner for unreasonable use. After the Act was signed, riparian owners could still challenge another riparian owner's use as unreasonable—including an agricultural user. Further, the Court found that a riparian owner could file a declaratory judgment action to protect his right of reasonable use. Additionally, the Court detailed that a private cause of action could still be brought under the Act.

Under the Act's provisions, a plaintiff must first show a violation of a permit requirement. However, once shown, they are entitled to bring a claim as before the Act. The Court found the ability to bring a suit—albeit after showing a violation—did not violate the Due Process Clause of the Constitution. In short, because the Act did not deprive the Plaintiffs of their riparian rights, they had no standing, and their claim for future injury was not ripe for determination.

As with the United States Constitution claims, the Court also found the public trust claim unpersuasive. The Plaintiffs did not allege any public trust asset had been lost as a result of withdrawal of surface water by an agricultural user. Typically, the Court noted, this would end the justiciability analysis. However, the Plaintiffs argued the State "lost complete control of registered amounts of water in perpetuity" and the "registered owner has complete control over whether or not the State can ever alter the registered amount." Therefore, the Plaintiffs argued that the State permanently transferred the property, and the Plaintiffs suffered an injury the moment the Act became law, despite the fact no public trust asset had yet been lost.

The Court again disagreed. It reasoned that because the claims depend on contingent, future harm, they are not justiciable. It also disagreed because the State stands ready and able to act to protect trust assets if and when necessary through: common law action to challenge the Act, a common law challenge to the reasonableness of the withdrawal, or through the Drought Response Act, which allows the State to protect its interest in navigable streams during droughts. It also reasoned that the State has a continued duty to protect the navigable interest of the streams. The Act did not change its ability to do so.

The Plaintiffs' novel challenge was also not justiciable because the theory depended on there being no changes in the law regarding surface water withdrawals in the future. However, in its oversight role, the State at any time could alter or amend the law to fix the injury the Plaintiffs hypothetically might suffer. Because their basis for future injury could change before the injury occurred, the Court found the Plaintiffs' claims nonjusticiable.

Further, the public trust doctrine's fundamental purpose requires the State to protect these resources if a situation ever arose in which public trust assets are actually being lost due to excessive surface water withdrawals. In this situation, the State would be forced to act and the doctrine provides it must prevail.

In summary, the Court found that the State retained an interest to defend its resources after the Act went in to effect and that the Plaintiffs had not yet suffered an injury for which they could bring an action against DHEC.

[A copy of the opinion](#) can be downloaded here.