STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL)

James Jefferson Jowers, Sr., Andrew, J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman,) Case No. 2014-CP-06-322

Plaintiffs,

v.) ORDER

South Carolina Department of Health And Environmental Control,

Defendant.

This matter has come before this Court pursuant to cross-motions for summary judgment filed by the parties. This Court carefully considered the notions and memoranda filed by the parties prior to the hearing of the motions on November 17, 2015, in Charleston. Based upon the motions and memoranda and consideration of the argument at the hearing, this Court grants summary judgment to the Defendant South Carolina Department of Health and Environmental Control. The reasons for this ruling are discussed below.

Without any standing or case or controversy whatsoever, Plaintiffs challenge, under the Takings Clauses of the State and United States Constitutions and the Due Process Clause of the United States Constitution, those parts of the South Carolina Surface Water Withdrawal Act of 2010, S.C. Code Ann. § 49-4-10, *et seq*, permitting water withdrawals for agricultural purposes. They also claim a violation of the public trust. This suit presents just the sort of abstract and hypothetical questions that are beyond the jurisdiction of courts to review. As discussed below, summary judgment is granted to the Defendant South Carolina Department of Health and Environmental Control due to the lack of standing of the Plaintiffs, because the Act does not

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violate the provisions of the Constitution and case law at issue and for the other reasons set forth below. No genuine issue as to any material fact exists as to the defenses herein

BACKGROUND

Plaintiffs reside or own property along creeks or rivers in Bamberg, Greenville and Darlington Counties. Not one of them resides in or owns land in Barnwell County where this suit is filed. Response of Petitioners to DHEC's Interrogatories and Requests for Admission, pp.4 & 5, ¶10 and p.6, ¶2 . They do not allege any injury whatsoever tied to any withdrawals of water. In fact, Plaintiffs admit that no injury has occurred to their property, their use thereof or to themselves, and that they have not lost use of the waterways. Plaintiff's response to DHEC's discovery requests at p. 6, ¶4 (admission). Instead they complain about "theoretical[] possib[ilities]" (Complaint, ¶35), and allege loss of rights to challenge withdrawals by registered upstream users or the possibility of interference with their own rights to take or consume water even though such agricultural withdrawals have occurred. They claim "a loss of riparian property rights, violation of due process rights and violation of the public trust doctrine on the day the Act became effective (Plaintiff's response to discovery requests at page 4, ¶9 (Interrogatories)), " but they have no standing to make such claims when they have not been injured by a withdrawal.

Under the Act at issue, statutorily defined "registered surface water withdrawers" are required to register surface water withdrawals with the Department of Health and Environmental Control but are not required to obtain a permit. S.C. Code Ann. § 49-4-20(23) ("Registered surface water withdrawer" means a person who makes surface water withdrawals for agricultural uses at an agricultural facility that is filing a report pursuant to Section 49-4-50); §49-4-35(A) ("Registered surface water withdrawers must register their surface water use with the department on forms provided by the department . . . subject only to the reporting requirements of Section

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49-4-50. [Those] withdrawers are authorized to withdraw surface water up to their registered amount."); §49-4-35(C) ("a proposed registered surface water withdrawer must report its anticipated withdrawal quantity to the department for determination as to whether that quantity is within the safe yield for that water source at the time of the request. . . A proposed registered surface water withdrawer may not begin his proposed withdrawals until he notifies the department of his anticipated withdrawals and the department provides written notification to the proposed registered surface water withdrawer that authorizes him to proceed, if the anticipated withdrawals are within the safe yield at the time of the request."); §4-9-20(25)("Safe yield" means the amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses."). Therefore, registered users cannot withdraw more water for agricultural purposes than is within the safe yield amount.

Plaintiffs claim no injury under the above statute other than alleged loss of rights to challenge withdrawals that have not occurred. Therefore, they have no legal basis for asking relief from this Court from events that have not happened, and they have no constitutional or other interest that has been infringed.

GROUNDS FOR JUDGMENT

I

PLAINTIFFS LACK STANDING

Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is

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called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State,. 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statutes give Plaintiffs standing and they do not satisfy the requirements for "constitutional standing" or under the public importance exception

A

Plaintiffs Fail to Meet Constitutional Requirements for Standing

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). The Plaintiffs in this action have no "injury in fact" that is "concrete and particularized" and "actual or imminent." More specifically, they have no injury at all. They admit that they, their property and their use thereof have not been injured by any agricultural water withdrawal, and that they have not lost use of the waterways. *Supra.* Instead, they allege "hypothetical claims," including an express claim for a "theoretically possible" problem. "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*, 346 S.C. 298, 302-03, 551 S.E.2d 588, 589-90 (Ct.App.2001)." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App.

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2006). Plaintiffs fail to meet those requirements.

They claim a loss of property rights to challenge a use under the law, but as discussed, *infra,* they have no property rights and have lost no right to challenge a loss as unreasonable. They claim a loss of public trust interest in the water, but they rely on cases applicable to tidal waters rather than fresh water. They have no public trust interest that has been violated as to the waters on which they border. Accordingly, Plaintiffs have no standing and have not brought a justiciable controversy to this Court.

They speculate about effects that the law will have, but those effects have not occurred "[A] 'prospective concern of future harm' is not sufficient to satisfy the *Lujan* test." *Commander Health Care Facilities*, 634 S.E.2d at 667. Plaintiffs' claim of "theoretically possible" future harm is insufficient just as it was for the Plaintiffs found to lack standing in *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 302-03, 551 S.E.2d 588, 590 (Ct. App. 2001):

> The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats. Although the League alleges its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical. . . . .The League relies on *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). In *Laidlaw*, the United States Supreme Court held certain environmental groups had standing to bring suit pursuant to the Clean Water Act against Laidlaw, a wastewater treatment facility. When Laidlaw discharged excessive pollutants into a river, Friends of the Earth (Friends) and other environmental groups filed an action seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. The Court found Friends demonstrated sufficient injury to establish standing, citing the testimonial evidence of various members of the groups who had already been adversely affected by the pollutants. Id. at 181–83. For instance, some members who lived along the river near the plant had to refrain from recreational activities such as fishing, hiking, camping, swimming, boating, and picnicking. One member also attested to decreased property values. However, *Laidlaw* is distinguishable from the instant case . . . . the League has shown only the potential for future harm, whereas Friends clearly demonstrated in *Laidlaw* that many of its members had already suffered harm. *See Laidlaw*, 528 U.S. at 181–82.

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Whereas the *Laidlaw* Plaintiffs were injured by actual discharge of pollutants, the instant Plaintiffs cite no actual or imminent injury from current water withdrawals. The instant Plaintiffs have only "conjectural and hypothetical claims" that are insufficient to give them standing.

B

No Public Importance Standing

> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341.

Currently, the issue of water withdrawals is not of such public importance as to warrant standing. The statute has been in effect for nearly five years since January 1, 2011, and DHEC is not informed that any other suits have been brought challenging the Act. Act No. 247, § 1 2010 S.C. Acts. When Plaintiffs do not complain of any actual or imminent water withdrawals affecting them and when other challenges have not been made to the law, "future guidance" is not needed. Plaintiffs do not present issues other than ones for the legislature to consider.

Plaintiffs refer to DHEC's statement in its Petition for Extraordinary Relief to the Supreme Court that the law is significant but fails to note that public interest for original jurisdiction is not the same as public importance for standing. As stated in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 71, 753 S.E.2d 846, 848 (2014):

> Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be

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> waived. Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies.

Carnival Corp. 753 S.E.2d 846 at 853. *Carnival* found a lack of public importance standing. Such importance is absent here, as well, for the reasons noted above.

II

THIS CASE PRESENTS NO JUSTICIABLE CONTROVERSY AND IS NOT RIPE FOR ADJUDICATION

> "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). *See also Hitter v. McLeod*, 274 S.C. 616, 266 S.E.2d 418 (1980). In determining a ripeness issue under the "case or controversy" requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir.1977) . . . *Thrifty Rent–A–Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F.Supp. 1083, 1085–86 (D.S.C.1991) (stating additionally that a "court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all").

Waters v. S. Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996); *see also James v. Anne's Inc.*, 701 S.E.2d 730, 732, 390 S.C. 188, 192-93 (2010). As in the quotation, *supra,* by the Supreme Court from District Judge Norton's Opinion in *Thrifty Rent–A–Car,* this "court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." The withdrawals that Plaintiffs claim may not occur at all or not in any way that might injure Plaintiffs. If such withdrawals do occur in the future, and Plaintiffs believe that they have been injured, they can

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attempt to bring their action then as did the *Laidlaw* Plaintiffs. They can attempt to seek temporary injunctive relief. Clearly, at this point, this case does not present a justiciable controversy that is ripe[1] for adjudication.

III

PLAINTIFFS HAVE NO PROPERTY INTEREST THAT HAS BEEN TAKEN

Plaintiffs claim takings of their "riparian property rights to consume water" They claim a taking for private purposes that is forbidden, a taking for public purposes that must be compensated, or a violation of the public trust. Plaintiffs fail on all of these claims because they have no property rights under the law.

A

They Have No Property Interest To Establish a Takings or Substantive Due Process Claim

> The Takings Clause provides that private property shall not be taken for public use without just compensation. *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). Thus, parties claiming such violations must first show they have a legitimate property interest. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Snipes v. McAndrew*, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (1984) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972)).

Grimsley v. S. Carolina Law Enforcement Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012)

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1 Plaintiffs claim their case is ripe citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73 (1978), but, the finding of ripeness in *Duke* was tied to "present injury," "immediate injury" (Id at 82) and standing, both of which are lacking in the instant case. In *Duke,* " several of the 'immediate' adverse effects were found to harm appellees." *Id.*

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South Carolina law does not recognize a property interest in the waters of the State. The "public watercourses . . . so far as they lie within the jurisdiction of a state, are part of the public domain." *Rice Hope Plantation v. S. Carolina Pub. Serv. Auth.*, 216 S.C. 500, 528, 59 S.E.2d 132, 144 (1950), overruled in part on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)("an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay.' Emphasis added [in *Rice Hope*]."); *see also, infra.* Plaintiffs have no property right that has been violated and no taking. They do not own property along waterways that has been adversely impacted by upstream water withdrawals under the Surface Water Withdrawal Act. They have no property interest in the use of the waterways, and they admit that they have not lost use of the rivers abutting their property.

Plaintiffs misread several cases that they contend show that riparian interests are property rights. They cite *Omelvany v. Jaggers*, 20 S.C.L. 634, 638, 1835 WL 1419, at *3 (S.C.App.L & Eq. 1835), but that case makes clear that this issue was settled against Plaintiffs long ago. As stated therein, "the proprietor of each bank of a [non-tidal] stream is the proprietor of half the land covered by the stream, but there is no property in the water. . . . He has no property in the water itself, but a simple use of it while it passes along." (emphasis added) quoting 3 Kent's Com. 353; accord, *White v. Whitney Mfg. Co.*, 38 S.E. 456, 459 (S.C. 1901)(proprietor "has no property in the water itself" quoting 3 Kent, Comm. 353).[2] Therefore, Plaintiffs have no

2 Plaintiffs misread a non-controlling federal case as recognizing a property interest in water, but it does no such thing. *Mathewes v. Port Utilities Commission of Charleston*, S.C., 32 F.2d 913, 914 (D.C.S.C. 1929). That case merely enumerates municipal powers to include "acqui[sition of] lands, water, and riparian rights, wharves, buildings, rights of way, and any other property for the purpose and with the right of establishing, constructing, developing, improving, maintaining, and operating the port and terminal utilities . . ." It does not grant or recognize a property interest of municipalities in water.

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property interest in the State's waters.

"Determination of whether one has a constitutionally protected property right is a question of state law." *Garraghty v. Com. of Va., Dept. of Corrections*, 52 F.3d 1274, 1279 (C.A.4 (Va.),1995). Therefore, the Federal cases Plaintiffs cite are not controlling.[3]

Plaintiffs misread *State v. Head*, 330 S.C. 79, 86, 498 S.E. 2d 389, 392 (Ct. App. App. 1997) as recognizing riparian rights of ownership. *Head* states that "in the case of nontidal navigable streams, while the adjacent property owners hold title from their shoreline to the center of the stream bed, the public has an easement in use of the waterway." (emphasis added). *Id.* The remainder of the paragraph from which the quotation is taken and other authority make clear that the quotation is about ownership of the stream bed, not the waters in it.[4]

Plaintiffs also misunderstand *Lowe v. Ottaray Mills*, 77 S.E. 135, 137 (S.C. 1913). That case referred to trespass on the plaintiff's property due to a deposit in a stream, but the deposit remained on his land as well as his stream. It does not recognize a property interest in water.

3 *Mathewes v. Port Utilities Commission of Charleston*, S.C., 32 F.2d 913, 914 (D.C.S.C. 1929) merely enumerates municipal powers to include "acqui[sition of] lands, water, and riparian rights, wharves, buildings, rights of way, and any other property. . ." It does not recognize a property interest of municipalities in water.

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984), addressed whether trade secrets were property and did not address riparian interests at all.

Schroeder v. City of New York, 371 U.S. 208, 209 (1962)addressed only a property interest in land bordering a river ("[t]he property in question consisted of a house and three and one-half acres of land . . . .").

Casitas Mun. Water Dist. v. U.S., 543 F.3d 1276, 1288 (C.A.Fed.,2008), but in that case, property rights were conceded.

4 As follows, *Head,* 498 S.E.2d at 392-93, quotes cases that make clear that the statement was about stream bed ownership:

> *State ex rel. Columbia Bridge Co. v. City of Columbia*, 27 S.C. 137, 146, 3 S.E. 55, 58 (1887) ("It is true that this proprietary right to the center of such streams is subject to the right of the public to use such streams for transportation as a highway, where such

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Plaintiffs erroneously cited *Early v. South Carolina Public Service Authority*, 228 S.C. 392, 408, 90 S.E. 2d 472, 479 (1955) in support of their claim of taking of their riparian rights by loss of rights of consumption of water, but *Early* involved a taking of land rather than water. In that case, the plaintiffs' land was damaged by salt water intrusion from the Santee River, which had become more saline with diversion of much of its water flow to the Cooper River. The Court found that this damage to the land was a taking. Unlike *Early,* property damage has not occurred in the instant case.

Plaintiffs have also relied on other land damage cases that are inapplicable because their property is unharmed. *Young v. Wiggins,* 240 S.C. 426, 126 S.E. 2d 360 (1962), involved a condemnation of land for the purpose of flooding the area to create a lake. *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1202 (4th Cir. 1986), involved pollution damage to a lake constructed on the Plaintiff's property, which rendered the lake and the land surrounding it unusable.

As stated, under *Rice Hope Plantation v. S. Carolina Pub. Serv. Auth.*, 59 S.E.2d at 144, *supra*:

> 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.

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streams are in fact, though not technically, navigable, or may be made so by the removal of obstructions. But this right of easement in the public does not deprive the riparian proprietor of his title to the soil covered by the stream, as far as the center of the stream."). *See also McDaniel v. Greenville-Carolina Power Co.*, 95 S.C. 268, 78 S.E. 980 (1913). *Cf. State ex rel. McLeod v. Sloan Constr. Co.*, 284 S.C. 491, 328 S.E.2d 84 (Ct.App.1985) (private citizen owned to the middle of bed of Broad River, a nontidal navigable stream, as citizen could trace title to Crown grant made at time when South Carolina followed the English tidal test for state ownership of river beds). (emphasis added)

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Because Plaintiffs have no property interest in the State's waters, they have no takings or substantive due process claim. *Grimsley.*

B

The Act Does Not Deprive Plaintiffs of Any Rights

Because Plaintiffs lack standing and no taking has occurred (*see, supra*), the constitutionality of the Act need not be reached. "The Court will avoid, when possible, passing upon the constitutionality of an Act of the Legislature. *Sanders v. Anderson Cnty.,* 195 S.C. 171, 10 S.E.2d 364, 364 (1940); however, even if, *arguendo,* Plaintiffs had a property interest at stake, the Surface Water Withdrawal Act does not violate that interest or take it because it does not deprive them of any use of the water nor does it deprive them of any right that they had before the law was passed. In fact, it provides additional protections.

Plaintiffs' only claim of taking is that they are deprived of use of their property because they cannot challenge uses as unreasonable, and they fear fish kills, loss of flow and loss of use of the water. They cite no case that says that a taking can occur on the basis of a loss of procedural rights for events that have not occurred or due to possible future loss of use that has not occurred. Instead, the Supreme Court has said that it does "not recognize a distinction between 'taking' and 'damaging'. A deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a 'taking' as though the property was actually appropriated." *Spradley v. South Carolina State Highway Dept.,* 182 S.E.2d 735, 737, 256 S.C. 431, 434 (S.C. 1971). No such damage or deprivation of use and enjoyment has occurred in this case. Plaintiffs cite *Young v. Wiggins*, 240 S.C. 426, 126 S.E. 2d 360 (1962), but that case involved a condemnation of land for the purpose of flooding the area to create a lake. Plaintiffs land has not been condemned. Furthermore, Plaintiffs have not lost procedural rights.

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Prior to the passage of the Act, no limitations existed on withdrawals of water for agricultural or other purposes other than those existing at common law. Common law rights of use have been described as follows in *Lowe, supra,* 77 S.E. at 136:

> The courts in this state have held that the different owners of land, through which a stream flows, are entitled to the reasonable use of the stream; and that any injury to a lower owner incidental to the reasonable use of the stream by a higher owner gives no right of redress. *White v. Manufacturing Co.*, 60 S. C. 254, 38 S. E. 456; *Griffin v. Nat'l Light & Thorium Co.*, 79 S. C. 351, 60 S. E. 702. The opinions in these cases both quote with approval what was decided in *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102, wherein it was said: "As between different proprietors on the same stream, the right of each qualifies that of the other; and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circumstances of the case, the use of one is reasonable and consistent with the correspondent enjoyment by the other."

See also, White and *Omelvany, supra.* The Act does not restrict these rights.

In fact, the Act imposes limitations where none existed. Under the Act, registered users for agricultural purposes (more than three million gallons per month) cannot withdraw more water for agricultural purposes than is within the safe yield amount. S.C. Code Ann. §49-4-20(25), 35(C) and 50. Such limitations did not exist before. Although Plaintiffs contend that registered withdrawers have exceeded safe yields and that DHEC has not taken action against them, they have not shown that any such withdrawals were substantial and detrimental to health or the environment under §49-4-35. ("The department may modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water, if the registered surface water withdrawer withdraws substantially more surface water than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals result in detrimental effects to the environment or human health.").

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The Act does not cut off any rights of action that Plaintiffs have at common law or "erase judicial review." It contains no limitations on actions for injunctive relief. Although §49-4-110(B) does state that "[s]urface water withdrawals made by permitted or registered surface water withdrawers shall be presumed to be reasonable," such a presumption is rebuttable. *State Acc. Fund v. South Carolina Second Injury Fund*, 762 S.E.2d 19, 22, 409 S.C. 240, 246 (S.C.,2014)[5] Although the section also states that "[n]o private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained unless the plaintiff can show a violation of a valid permit or registration," this Court need not determine whether this provision would limit any common law damage action that Plaintiffs might have if injured because they have not been injured whatsoever by any agricultural water withdrawal.

Although Plaintiffs contend that the Act contains no provisions for notice to them or opportunity to be heard, they have no property interest requiring such procedures, nor did they have such procedures at common law. They had no recourse against a water withdrawer prior to the passage of the Act other than by bringing suit. They still have such rights of litigation when they believe they have been injured. Because they have not been injured, such rights of litigation do not extend to this case.

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5 A presumption is a "legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary 1304 (9th ed.2009). "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Id.*

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IV

PLAINTIFFS HAVE NOT BEEN DENIED PROCEDURAL DUE PROCESS

Plaintiffs jumble in some references to a loss of procedural due process, but their Complaint ties the claim to a loss of property rights, and they have no such rights nor have they identified any other rights entitling them to procedural due process. *See* Complaint, Fourth Cause of Action. "The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' " *State v. Dykes*, 744 S.E.2d 505, 509, 403 S.C. 499, 506 (2013); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)("Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.") ; *Kerry v. Din*, 135 S.Ct. 2128, 2132 (U.S.,2015)(plurality opinion) ("[N]o process is due if one is not deprived of "life, liberty, or property . . . ."); *Bundy v. Shirley*, 772 S.E.2d 163, 169, 412 S.C. 292, 303 (2015)("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution."). Plaintiffs are not deprived of a property right, as discussed above nor have they identified any "deeply rooted" liberty interest.

Plaintiffs' Return, at page 4, states that "DHEC has issued registrations to withdraw water upstream from all but one of the Plaintiffs' riparian properties . . . without any personal or public notice, in violation of the Due Process Clauses of the state and federal constitutions," but they have had no injury as a result of that action nor do they request that the registrations be set aside. They have, as noted, not identified any protected liberty interest of which they have been deprived by this action. Therefore, any purported procedural due process claim of Plaintiffs

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must be denied.

V

PLAINTIFFS HAVE NO CLAIM BASED UPON A PUBLIC TRUST INTEREST IN STATE WATERWAYS

Plaintiffs claim a violation of the public trust interest in the waterways, but they rely on authority addressing tidal waterways which are not the subject of this suit. "Under the public trust doctrine, the State holds presumptive title to tidal land below the high water mark to be held in trust for the benefit of all people of South Carolina." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). *Estate of Tenney v. S. Carolina Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011). As more fully explained *in State v. Head*, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997):

> [T]he South Carolina Constitution provides: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed ... unless the same be authorized by the General Assembly." S.C. Const. art. XIV, § 4. See also S.C. Const. art. XIV, § 1. Moreover, S.C.Code Ann. § 49-1-10 (Rev.1987) similarly provides: "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 are hereby declared navigable streams and such streams shall be common highways and forever free...." These constitutional and statutory provisions expressly sanction the preexisting common-law rights of the public in navigable watercourses. *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884 (1909). The state holds tidal navigable watercourses subject to a public trust, and the state's ownership of public trust resources is generally not alienable: "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892), quoted in *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995). *See also State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972). It appears, however, that in the case of nontidal navigable streams, while the adjacent property owners hold title from their shoreline to the center of the stream bed, the public has an easement in use of the waterway.

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Plaintiffs rely on precedent directed to tidal waterways that are not at issue in this case. Most certainly, the State has important interests in nontidal waterways as well as tidal waters, but the degree of that interest should not be decided in this case when Plaintiffs have not lost use of the waterways, and their property has not been injured due to any withdrawal of water under the statute.

VI

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR COMPENSATION AND ANY SUCH CLAIM WOULD BE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs include a claim in their prayer for relief in the Complaint that the Defendant be required to compensate the Plaintiffs for "taking their private property without just compensation." As noted above, Plaintiffs have acknowledged that they and their property have not been injured or damaged by withdrawals of water for agricultural purposes. Although their response to Defendant's Interrogatory 7 states that "[t]he legal injury occurred the date the . . . Act was passed, the injury being the loss of property rights and due process rights for riparian property owners, as well as violation of the public trust doctrine," this alleged loss does not come within their prayer for compensation for "taking their private property without just compensation." Moreover, they have not been deprived of any opportunity to raise their alleged rights because they have not been affected by any water withdrawals pursuant to the Act. Therefore, Plaintiffs have no cause of action for compensation. [6]

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6 DHEC moved to amend its Answer to include a statute of limitations defense that to the extent that Plaintiffs have stated any claim for compensation, any claims arising more than three years before this action was filed on September 4, 2014, would be barred by the statute of limitations. S.C. Code Ann. §15-3-530. This Court need not reach that motion because it is granting DHEC summary judgment for the other reasons noted .

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VII

VENUE IS IMPROPER

Under S.C. Code Ann. § 15-77-50, "[t]he circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies . . . affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise." The Complaint alleges no basis for venue in Barnwell County as this Complaint does not allege a controversy arising there. None of the parties live in or own property in that County, and no water withdrawal is alleged to be occurring there. In fact, their decision to bring their suit in a county from which they are completely disconnected underscores their lack of injury to support standing. Nevertheless, this Court need not dismiss this case on the basis of this ground because it is otherwise subject to judgment for the Defendant and has been heard in Charleston County without objection from the parties.

CONCLUSION

Because this case does not present a justiciable controversy, this Court lacks subject matter jurisdiction of this action. Rule 12(b)(1). For these reasons and the other failures noted herein, Plaintiffs have failed to state facts sufficient to constitute a cause of action. Rule 12(b)(6).

For all of the foregoing reasons, IT IS ORDERED THAT the Motion for Summary Judgment of the South Carolina Department of Health and Environmental Control be granted

and that the Motion for Summary Judgment of the Plaintiffs be denied.

AND IT IS SO ORDERED.

January 4, 2016
Charleston, South Carolina

R. MARKLEY DENNIS, JR.
Circuit Court Judge

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