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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman,

Appellants,

vs.

South Carolina Department of Health and Environmental Control,

Respondent.

APPELLANTS' REPLY TO AMICUS CURIAE BRIEF OF CONGAREE RIVERKEEPER, INC.

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November 29, 2016

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James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman ("Riparian Property Owners" or "Appellants") hereby respond to the Amicus Brief of the Congaree Riverkeeper, Inc. ("CRK").

ARGUMENT

I. The Harm is Significant

CRK's Introduction and Overview bolster and support both the significance of the issues at stake in this case, as well as the public importance in their resolution.[1] (Amicus Brief, pp. 2 - 13). CRK highlights a general problem with the Act that is applicable to both the permitting and registration programs: the amount of water allowed to be withdrawn, called the "safe yield," is determined using the mean annual daily flow, which is based on average flows over an extended period of time. (Amicus Brief, pp. 9-10). Flows during growing season are historically less than the mean annual daily flow. The result is that the safe yield will be greater than the actual amount of water flowing on some days, weeks and months. (Amicus Brief, pp. 11-12). These times of low flow coincide with the times of the year when water use is greatest, i.e., the growing season. (Id.)

Within this framework, one can discern the registration programs' serious threat to public trust resources, as well as riparian property: a permitted user must discontinue withdrawal if stream flow drops below minimum instream flow, yet a registered user can continue to withdrawal under these same circumstances. (Amicus Brief, p. 10, S.C. Code Ann. § 49-4-150).

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[1]Appellants agree with CRK's brief with respect to public interest standing; however, Appellants disagree that "actual or imminent interference" is relevant to addressing injury-in-fact under constitutional standing requirements. See Amicus Brief, p. 16. Instead, the injury derives from the Act itself, and specifically the registration provision, which directly and immediately harmed the Appellants' riparian property upon its passage.

Permittees must follow an elaborate plan any time the "flow at the point of the permitted withdrawal is less than or equal to the minimum instream flow." S.C. Code Ann. § 49-4-150. Registrants have no such limitations when flow falls below minimum instream flow and could deplete all of the water in a stream or river with no recourse, as long as that user does not "substantially" exceed the registered amount. (See Amicus Brief, p. 12).

Moreover, the Act has allows registrations existing as of January 1, 2011, to be "grandfathered," meaning that those registrations are not even limited by the weak and ineffectual "safe yield" requirements. S.C. Code Ann. § 49-4-35(B). Instead, the only quantitative limitation on the grandfathered registrations is either the "highest reported level" ever withdrawn or "the design capacity of the intake structure." Id. The Act's provision grandfathering existing registrations to even bypass the limitation of "safe yield," allow grandfathered registrants to withdraw vast amounts of water in perpetuity, even if that withdrawal takes every last drop of water from the river or stream. Id.

II. CRK's Taking Analysis is Short-Sighted and Deficient

A. Riparian Rights Are Distinct From Traditional Real Property Rights

CRK acknowledges Riparian Property Owners' distinct property rights. (Amicus Brief, p. 14). However CRK's assertion that taking of riparian property does not rise to the level of a regulatory taking because of the "parcel as a whole" rule is based on the premise that riparian property is not a distinct right, which is separate from the traditional bundle of rights attendant with private property. (Amicus Brief, p. 24). While significant case law exists defining constitutional prohibitions on takings in the context of ownership interests in real property, court have also consistently treated riparian property as a distinct and separate right apart from real

property. See Craig, Robin Kundis, "Defining Riparian Rights as 'Property' Through Takings Litigation: Is There A Property Right to Environmental Quality?" 42 Envtl. L. 115 (Winter 2012); Omelvany v. Jaggers, 20 S.C.L. (2 Hill) 634 (1835). Real property is a possessory right while riparian property is a usufructuary right. Whereas real property ownership is defined by a right to exclude others from that property, riparian ownership is defined by the right to access and use that water.

That riparian rights are their own distinct property, and are on their own the "parcel of the whole," is what gives rise to the taking. Indeed, not every property owner possesses these rights, only those who have a special and separate set of property rights: riparian rights.

Section 49-4-110(A) says that a "surface water withdrawal permit confers upon the permittee a right to withdraw and use surface water pursuant to the terms and conditions of the permit. The permit does not convey a property right in the water to the permittee." However, the Act excludes registrants from the category of persons who do not obtain property rights under the Act. In other words, by excluding registrants from the group who does not obtain property rights, the Act acknowledges that registrants to obtain property rights. The Act recognizes that, as CRK states, "While an owner of riparian land has no property interest in the water itself, it is undeniable that riparian owners posses a right to access and reasonably use the water within a river or stream." (Amicus Brief, p. 14). It is that reasonable use right that is taken from Riparian Owners and given to registrants, and it is injury to that right which confers standing on Appellants.

B. Appellants Challenge the Registrations as Unconstitutional Taking, Not the Permitting Program

While CRK provides a thorough explanation of the vast differences between the permitting and registration programs, its takings analysis glosses over this most crucial aspect of the Appellants' takings claim: the difference between a permit and a registration under the Surface Water Act. The Appellants do not challenge the Act in its entirety, but only the provisions authorizing registrations. And Appellants have shown how registrations are unconstitutional in all applications because the Act: (1) presumes that any registered use is reasonable without requiring the registrant to comply with the permitting requirements, in particular the requirement to demonstrate that the use is reasonable;[2] (2) allow the registration to continue in perpetuity; (3) prevents the State from ever altering or diminishing the registered withdrawal amount, unless the registrant "substantially exceeds" the registered withdrawal amount *and* that withdrawal harms public health or the environment; and (4) eliminates Riparian Property Owners' ability to protect their riparian property rights. By eliminating Riparian Owners' ability to protect against unreasonable uses, the Act has effectively destroyed this entire right. "[W]hen courts have found a taking of water rights, it is generally because the government action has effectively destroyed the entire right." Craig, "Defining Riparian Rights as 'Property' Through Takings Litigation: Is There A Property Right to Environmental Quality?" 42 Envtl. L. 115, 125.

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[2]The statutory "reasonable use" standards found in § 49-4-80(B) mandate that the Department make a determination of reasonable use, which could theoretically address the common law riparian right to reasonable use.

CRK appears to misunderstand the nature of the Riparian Owners' claims by characterizing them as "suggesting that any legislative modification of the common law that impairs the value or utility of some pre-existing riparian rights results in a *per se* taking of that right." (Amicus Brief, p. 22). The Appellants are not asking this Court the strike down the entire Act, nor do they suggest that the entire Act is unconstitutional. Rather they assert that the Act's provisions deeming all registrants uses as "reasonable," exempting them from any permitting requirements, requiring DHEC to issue registrations disposing of public trust water in perpetuity without any notice, without utilizing any discretion or applying any protective criteria, and without the ability to modify those registrations except under very limited circumstances, violates the Public Trust Doctrine, the Takings Clause and the Due Process Clause. Such action is far from zoning restriction, as cited by the Congaree Riverkeeper (Amicus Brief, p. 22).

C. No Other Regulated Riparian System Contains Registration Process Exempt from Permitting

CRK states that it is unaware of an instance where a system of regulated riparianism has resulted in a taking, discussing the evolution of water law nationally. (Amicus Brief, pp. 21-22). While Riparian Property Owners agree with CRK that water law in SC and across the country is evolving, they are aware of no law that re-orders rights in the way that the registration system does. (Amicus, p. 20-21). Other states have implemented a system of "regulated riparianism[3]" whereby appropriative uses are subject to permitting requirements, and those uses are not granted

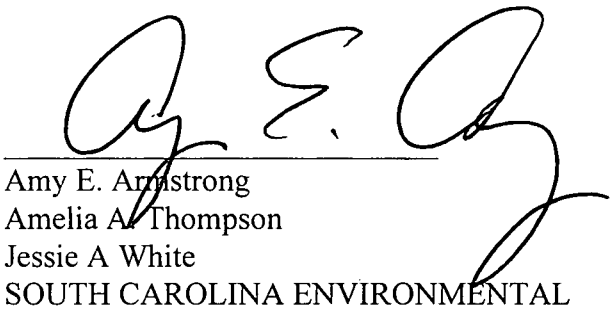
[3]"[T]he two words 'regulated' and 'riparianism' emphasize that the common law is being replaced by an administrative permit process, and that water is still being allocated using riparian principles of reasonable use, as opposed to rules based on priority in time or capture of the resource." Robert H. Abrams, "Water Law Transitions," 66 S.C.L. Rev. 597 (Spring 2015).

in perpetuity. The Surface Water Withdrawal Act contains these same elements of a permitting decision where a State agency exercises discretion, applying set criteria for determining whether or not to allow certain permitted uses.

But here the Act goes beyond the typical regulated riparian permits, and instead mandates that the State issue registrations in perpetuity without meeting any regulatory criteria and without the ability to decrease the withdrawal amount unless it both "substantially" exceeds the registered amount and harms human health or the environment. The Riparian Property Owners are aware of no other state that has passed a statute that has so fundamentally changed the nature and character of riparian rights, and in this way South Carolina's law itself is unprecedented. (Amicus Brief, p. 22).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Appellants' Opening and Reply Briefs, this Court should reverse the lower court's decision.



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Certificate of Counsel

The undersigned does hereby certify that this Reply Brief complies with SCRAP Rule 211(b).

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Appellants' Reply Brief to Amicus Curiae Brief of Congaree Riverkeeper, Inc., upon counsel for the Respondent by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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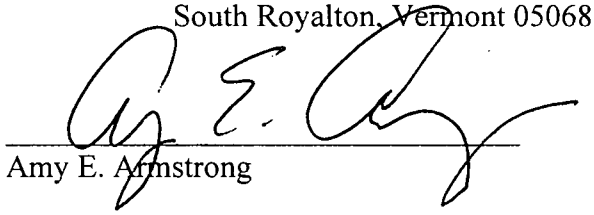

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