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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE BARNWELL COUNTY 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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA COUNTY OF BARNWELL James Jefferson Jowers, Sr., Andrew, J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, v. South Carolina Department of Health And Environmental Control, Defendant.	)	IN THE COURT OF COMMON PLEAS Case No. 2014-CP-06-322 ORDER

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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

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.

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

> 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.*

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.

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

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)

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.

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.*

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

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.

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]

---

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 .

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

RMD 1/19

The Supreme Court of South Carolina

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

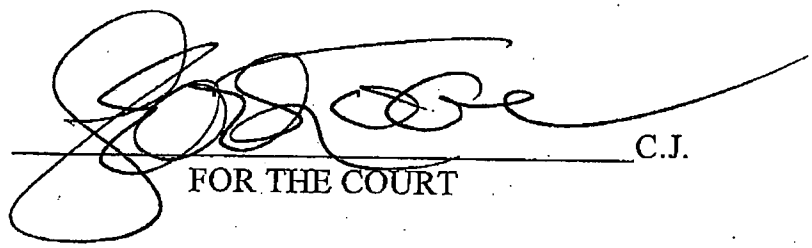
v.

South Carolina Department of Health and Environmental Control, Petitioner/Defendant.

Appellate Case No. 2015-000277

ORDER

The South Carolina Department of Health and Environmental Control petitions this Court for extraordinary relief, including removal and the exercise of original jurisdiction. Respondents join in the request that this Court exercise its authority to issue a writ to remove the case and accept it in our original jurisdiction. The petition is denied.



C.J.

FOR THE COURT

Columbia, South Carolina

April 9, 2015

cc:
Alan McCrory Wilson, Esquire
Robert D. Cook, Esquire
J. Emory Smith, Jr., Esquire
T. Parkin C. Hunter, Esquire
Michael Smoak Traynham, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

South Carolina Department of Health and Environmental Control,

Defendants.

Case No. 2014-CP-06-322

SUMMONS

(taking & due process claims)

FILED FOR RECORD
2014 SEP -4 AM 10:04
BRENDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at (if by mail) P.O. Box 1380, Pawleys Island, South Carolina, 29585, or (if by personal delivery) 430 Highmarket Street, Georgetown, SC 29440, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for the relief demanded in the Complaint.

Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
(843) 527-0078
Attorneys for the Plaintiffs

Georgetown, South Carolina

September 3, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELK)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

South Carolina Department of Health and Environmental Control,

Defendants.

Case No. 14-CP-06-322

COMPLAINT

(non-jury)

FILED FOR RECORD
2014 SEP -4 AM 10:04
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

The Plaintiffs, complaining of the Defendants, would respectfully show unto the Court:

THE PARTIES

1. The Plaintiffs are citizens of the State of South Carolina and property owners whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners.

2. James Jefferson Jowers, Sr., owns 40 acres of land located on Middleplace Road in Bamberg County between U.S. 301 and U.S. 321, identified on Bamberg Tax map as #0042-00-00-031. Mr. Jowers' property is bounded by the Little Salkehatchie River. He has owned the 40 acre tract, which he manages for timber, for four (4) years. He currently resides at 585 Brockstron Bridge Road, U.S. Highway 601 in Bamberg. Although Mr. Jowers manages the property for agricultural purposes, namely forestry, he does not need to withdrawal water from the Little Salkehatchie for those purposes. Mr. Jowers has recently observed that the Little

Salkehatchie has dried up, which has resulted in fish kills.

3. Andrew J. Anastos owns property at 1205 Goodwin Bridge Road in Travelers Rest, South Carolina. Mr. Anastos' property encompasses 90 acres with approximately 2,500 feet of frontage along the North Saluda River, and is identified on the Greenville Tax map as #0522020102201. Mr. Anastos currently makes use of the North Saluda for fishing, swimming and kayaking. As a riparian owner, he also uses water from the North Saluda to irrigate his plants, shrubs and flowers for personal use.

4. Ben Williamson lives at 1311 Oaklyn Road, Darlington, South Carolina, 29532. His property consists of 1,500 acres between Black Creek and Pocket Road on State Road 35 (South Charleston Road) in the eastern quadrant where State Road 35 crosses Black Creek. The property has been in his family since the mid-1760s and is bounded by Black Creek. In the past the property has been used for farming and forestry. Mr. Williamson currently uses the property as pasture and for beef cattle. Has a pumping station on Black Creek, but he currently does not need to utilize that pumping station in connection with his operations.

5. Melanie and Anthony Ruhlman own property along the North Saluda River in Greenville County, South Carolina. Reside on the property 301 Keeler Bridge Road, Marietta, South Carolina, 29661 lived there just over two years. Just over 5 acres, just under 500 feet of frontage on the North Saluda River. Garden; Do not use river for irrigation; Swim, tube, boat, kayak and canoe.

6. The Defendant is the South Carolina Department of Health and Environmental Control ("DHEC"). DHEC is the agency charged with the implementation and enforcement of the South Carolina Surface Water Withdrawal Act of 2010, S.C. Code Ann. § 49-4-10, et seq.

GENERAL ALLEGATIONS

7. Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id., Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913).

8. Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). All riparian owners located on a given waterway share the risks of low flow conditions equally. Thus, the nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners. Second, the State is entitled to restrict riparian withdrawals to the extent those withdrawals threaten established public trust uses of the river, namely navigation, commerce, and recreation. Third, the State is entitled to restrict riparian withdrawals if the State itself requires use of the water. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

9. Under the Public Trust Doctrine the State holds presumptive title to land below the high water mark in trust for the benefit of all the citizens of this State. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). "The

State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

10. "The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul.Envtl.L.J. 287 (1993)).

11. Under the public trust doctrine, the State is entitled to transfer trust assets to private parties in perpetuity in only two limited circumstances: First, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) ("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").

12. The Surface Water Withdrawal Act of 2010 represents a substantial reordering of private and public water rights in South Carolina. The Act establishes a permitting program whereby an applicant must adhere to the criteria set forth in Section 49-4-80. Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years. See S.C. Code Ann. § 49-4-100(B). But the Act allows riparian owners who are consuming water for agricultural uses to simply "register" their water use, rather than seek a permit. S.C. Code Ann. § 49-4-35. Only agricultural users of water are entitled to register their water use. Id. The Act does not restrict the amount of water than any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq.

13. The Plaintiffs are all riparian owners who make use of their riparian rights, but that do not presently qualify for a registration under the Act.

14. Once an agricultural user has registered its water use, or a non-agricultural user has received a permit, the Act deems water use by the registrant or permittee to be presumptively reasonable. S.C. Code Ann. § 49-4-110.

15. Once an agricultural user has registered its water use, the Act would allow the State of South Carolina to reduce the registered amount only if both of two conditions are met: 1) the registered user withdraws in excess of its registered amount, and 2) the State can prove that such withdrawals are harmful to the environment. S.C. Code Ann. § 49-4-35(E).

16. The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use without just compensation." The Fifth Amendment is applicable

to actions taken by the State of South Carolina pursuant to the Fourteenth Amendment to the U.S. Constitution.

17. Article I, Section 13(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13

FOR A FIRST CAUSE OF ACTION

(Taking Private Property for Private Use in Violation of the S.C. and U.S. Constitutions)

18. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 17 above.

19. Prior to the Act, all riparian owners on a given waterway had equal property rights in consuming that water. After the Act, agricultural users have far superior rights to all other types of riparian owners, including those who use water for domestic purposes, for industrial purposes, or for any other purposes.

20. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. After the Act, agricultural users are entitled to registration that entitles them to take a fixed amount of water in perpetuity.

21. Prior to the Act, all riparian owners could challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to take water. After the Act, downstream riparian owners cannot challenge upstream riparian owners' consumptive use as

28. Under the Fifth Amendment to the Constitution and Article 1, Section 13(A) of the South Carolina Constitution, the State must compensate riparian owners not entitled to registration for the loss of their riparian property rights to consume water.

FOR A THIRD CAUSE OF ACTION

(Violation of the Public Trust Doctrine)

29. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 28 above.

30. Under the public trust doctrine, the State is entitled to transfer or "dispose of" trust assets to private parties in perpetuity in only two limited circumstances: first, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

31. Courts have interpreted disposals broadly, to include State actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003).

32. Navigable waterways are public trust assets: "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. . . ." S.C. Const., art XIV, §4.

33. The provisions of the Surface Water Withdrawal Act effectively dispose of substantial interests in the State's navigable waterways to agricultural users.

34. Under the Act, the State cannot revoke, reduce, or modify registered uses of water unless the registered user withdraws in excess of the registered amount. In other words, the State

has lost complete control of registered amounts of water in perpetuity; the registered owner has complete control of whether or not the State can ever alter the registered amount.

35. It is theoretically possible that agricultural users could obtain registrations for all water in all state waterways, other than amounts required by the law to be dedicated to instream flows. This permanent disposal of a vast amount of State public trust assets violates the public trust doctrine.

FOR A FOURTH CAUSE OF ACTION

(Due Process Violation)

36. The Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 – 35.

37. The Fifth Amendment, which provides that private property may not be taken by the federal government without just compensation, is applicable to the states through the Fourteenth Amendment due process clause. See Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581 (1897); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., et al., 65 F.3d 1113 (4th Cir. 1995). The Fourteenth Amendment provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law." In Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court held that "compensation for private property taken for public use is an essential element of due process of law" and that due process "recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226, 236, 17 S.Ct. 581, 584 (1897).

38. A fundamental requirement of procedural due process is opportunity to be heard, and that opportunity must be granted at meaningful time and in meaningful manner. U.S.C.A. Const. Amends. 5, 14; see also Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

39. To the extent that the Surface Water Withdrawal Act takes private property for public use without compensation, a due process violation exists because there has been a denial of a right secured by the federal constitution.

40. The remedy for regulation that goes too far, under due process theory, is not just compensation but invalidation of regulation, and if authorized and appropriate, actual damages. U.S.C.A. Const.Amend. 5; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (there must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone").

WHEREFORE, Plaintiffs pray that this Court issue its order declaring that the offending sections of the Act be struck down as an unconstitutional taking under the South Carolina and United States Constitutions; declaring that the offending sections of the Act be invalidated for violating the Plaintiffs' due process rights; holding that the offending sections of the Act are in violation of the Public Trust Doctrine; restraining and enjoining the Defendant from issuing any further registrations to agricultural users; requiring the Defendant to compensate the Plaintiffs for taking their private property without just compensation; requiring the Defendant to pay the costs of this action; and granting such other and further relief as may be just and proper.

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Attorneys for the Plaintiffs

Georgetown, South Carolina

September 3, 2014

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.	)	**ANSWER**
	)	
South Carolina Department of Health and Environmental Control,	)	
	)	
Defendants.	)	
	)	

The Defendant South Carolina Department of Health and Environmental Control, answering the Complaint alleges the following:

FOR A FIRST DEFENSE

1. DHEC denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. DHEC admits Paragraph 1 on information and belief except that DHEC does not admit that Plaintiffs are "riparian owners" because the use of the term is a conclusion of law to which no response is necessary. To the extent that a response is needed to the allegation "riparian owners," DHEC craves reference to State law and denies that Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

3. DHEC admits Paragraph 2 on information and belief except for the last sentence of that Paragraph. The State denies the last sentence of that Paragraph to the extent that it refers to any part of the river other than the section 30 miles downstream from his property as

referenced in his affidavit, and DHEC is without sufficient knowledge or information now to admit or deny whether the fish kills, if any, are due to water levels, and therefore denies any such allegations.

4. DHEC admits paragraphs 3, 4 and 5 on information and belief, except that it denies any legal conclusions associated with the use of the term "riparian owner" in the last sentence of Paragraph 3 and denies that Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

5. DHEC admits Paragraph 6 except that the agency craves reference to the Surface Water Withdrawal Act for any duties or authority to implement and enforce that Act.

6. Paragraphs 7, 8, 9, 10 and 11 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any allegations in those paragraphs that are inconsistent with South Carolina law and denies that Plaintiffs have any legal rights that provide a basis for relief for them in this action.

7. As to Paragraph 12, the first sentence contains a conclusion of law to which no response is required. To the extent that, *arguendo,* a response is required to that sentence, and in response to the remainder of that Paragraph, DHEC craves reference to the Act and denies any allegations inconsistent with that law and other State law.

8. As to Paragraph 13, DHEC is without sufficient knowledge or information now to admit or deny that Plaintiffs do not now qualify for registration under the Act, and therefore , denies such allegations. The remainder of that sentence sets forth conclusions of law to which no response is necessary. To the extent that, *arguendo*, a response is needed to the allegations "riparian owners" and "riparian rights" DHEC craves reference to State law and denies that

Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

9. As to Paragraphs 14 and 15, DHEC craves reference to the Act and denies any allegations inconsistent with that law.

10. As to Paragraphs 16 and 17, DHEC craves reference to the cited Constitutional provisions for a complete statement of their contents. DEHC denies that Plaintiffs have been denied any rights that they claim under those provisions.

11. Paragraph 18 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

12. Paragraphs 19, 20, and 21 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations to the extent that they are inconsistent with the Act and other State law.

13. Paragraphs 22, 23 and 24 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations including denying any property rights that have been taken in violation of the State and United States Constitutions.

14. Paragraph 25 is a cumulative paragraph to which no response is necessary. To the extent that, arguendo, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

15. Paragraph 26 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations.

16. Paragraph 27 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any allegations in that paragraph that are inconsistent with the Act and denies that Plaintiffs have any riparian rights that are altered by the law.

17. Paragraph 28 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations.

18. Paragraph 29 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

19. Paragraphs 30, 31 and 32 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina.

20. Paragraphs 33, 34 and 35 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the Act or other State law.

21. Paragraph 36 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

22. Paragraphs 37 and 38 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina.

23. Paragraph 39 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies that the Act takes private property for public use and denies that a due process violation exists.

24. Paragraph 40 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina and expressly denies that the Act is invalid or that Plaintiffs are entitled to damages.

25. The Prayer for Relief sets forth conclusions of law to which no response is required. To the extent that a response is required, DHEC denies those allegations.

FOR A SECOND DEFENSE

26. Venue is improper in Barnwell County.

FOR A THIRD DEFENSE

27. Plaintiffs have alleged no case or controversy.

FOR A FOURTH DEFENSE

28. Plaintiffs have no standing.

FOR A FIFTH DEFENSE

29. This matter is not ripe for adjudication.

FOR A SIXTH DEFENSE

30. No taking or other constitutional violation has occurred.

FOR A SEVENTH DEFENSE

31. The Public Trust doctrine has not been violated.

FOR AN EIGHTH DEFENSE

32. The Surface Water Withdrawal, Permitting, Use, and Reporting Act is

constitutional. S.C. Code Ann. §49-10-10, *et seq.*

FOR A NINTH DEFENSE

33. Plaintiffs have failed to state facts sufficient to constitute a cause of action

FOR A TENTH DEFENSE

34. This Court lacks subject matter jurisdiction of this action.

WHEREFORE, having fully answered the Complaint, DHEC prays as follows:

1. That judgment for DHEC be entered as to the Complaint and that the relief sought by the Plaintiff be denied as to the State.

2. For such further relief as the Court deems just and proper.

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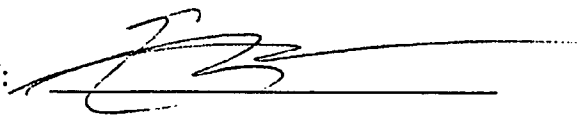
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BY: 

January 28, 2015

ATTORNEYS FOR DHEC

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.	)	MOTION TO DISMISS
	)	
South Carolina Department of Health And Environmental Control,	)	
	)	
Defendants.	)	
	)	

The Defendant South Carolina Department of Health and Environmental Control moves for the dismissal of the Complaint herein pursuant to Rules 12(b)(1), (3) and (6), SCRCP in that, for reasons set forth below, this Court lacks subject matter jurisdiction of this action, venue is improper and Plaintiffs have failed to state facts sufficient to constitute a cause of action:

1. Venue is improper in Barnwell County.
2. Plaintiffs have alleged no case or controversy.
3. Plaintiffs have no standing.
4. This matter is not ripe for adjudication.
5. No taking or other constitutional violation has occurred.
6. The Public Trust doctrine has not been violated.
7. The Surface Water Withdrawal, Permitting, Use, and Reporting Act is constitutional. S.C. Code Ann. §49-10-10, *et seq.*
8. Plaintiffs have failed to state facts sufficient to constitute a cause of action

For the foregoing reasons, the Defendant respectfully requests that this case be dismissed.

Respectfully submitted,

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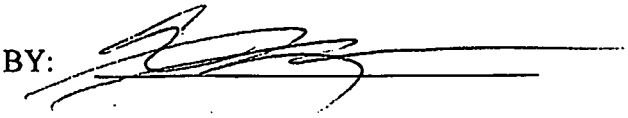
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November 13, 2014

ATTORNEYS FOR DHEC

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,	)	
	)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO TEMPORARY INJUNCTION
v.	)	
South Carolina Department of Health And Environmental Control,	)	
Defendants.	)	

Without any standing or case or controversy whatsoever, Plaintiffs challenge the Constitutionality of those parts of South Carolina's statute permitting water withdrawals for agricultural purposes under the Takings Clauses of the State and United States Constitutions and the Due Process Clause of the United States Constitution. 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. Plaintiff's Motion for a Temporary Injunction should be denied, and this case should be dismissed pursuant to the Department of Health and Environmental Control's Motion.

BACKGROUND

Plaintiffs challenge applicable parts of the Surface Water Withdrawal Act. S.C. Code Ann. §49-4-10, *et seq.* 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 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 are within the safe yield at the time of the request."); §4-9-20(25)("Safe yield" means the of water available for withdrawal from a particular surface water source in excess of the 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 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 is filed. The Complaint does not allege that any agricultural water withdrawals have been registered for Barnwell, their counties or upstream from them or that any withdrawal are pending. They do not allege any injury whatsoever tied to any such withdrawals. 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 they do not allege that such agricultural withdrawals have occurred.

ARGUMENT AS TO MOTION TO DISMISS

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 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 other requirements.

> 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 and instead 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 injury will be sustained. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*, 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 App. 2006). Plaintiffs fail to meet those requirements.

"[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 only claim "theoretically possible" future harm as did the Plaintiffs found to lack standing, as follows, 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.

Whereas the *Laidlaw* Plaintiffs were injured by actual discharge of pollutants, the instant cite no actual or imminent injury from current water withdrawals. The instant Plaintiffs have

"conjectural and hypothetical claims" that are insufficient to give them standing.

> Plaintiffs also fail to meet standards for "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. When Plaintiffs do not complain of any actual or imminent water withdrawals, "future guidance" is not needed. They do not present an issue other than one for the legislature to consider.

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). 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 and contingent events that may not occur as anticipated or may not occur at all." The that Plaintiffs claim may not occur at all or in any way that might injure Plaintiffs. If they do occur in the future and they believe that they have been injured, they can attempt to bring their action then as did the *Laidlaw* Plaintiffs. Clearly, at this point, this case does not present a justiciable controversy that is ripe for adjudication.

III

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.". Venue is improper in Barnwell County as this Complaint does not allege a controversy arising there. None of the parties live in or allege that they own property in that County, and no water withdrawal is alleged to be occurring there. The Complaint alleges no basis for venue in Barnwell.

IV

PLAINTIFFS ALLEGE NO PROPERTY INTEREST THAT HAS BEEN TAKEN NOR DO THEY ALLEGE ANY PRESENT OR THREATENED PUBLIC INTEREST IN STATE WATERWAYS

Plaintiffs claim takings of their "riparian property rights to consume water" They claim that this taking is either a taking for private purposes that is forbidden, a taking for public

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 and no public trust interest in the waterways that have been violated.

> 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)

Plaintiffs do not even allege that they own property along waterways that has been adversely impacted by upstream water withdrawals under the Surface Water Withdrawal Act. They have no property right that has been violated and no taking. They do not cite any case establishing a taking under similar circumstances nor does any South Carolina case recognize a property interest in the waters of the State. *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."); *see also, infra.*

Plaintiffs erroneously cite *Early v. South Carolina Public Service Authority*, 228 S.C. 408, 90 S.E. 2d 472, 479 (1955) in support of their claim of taking of their riparian rights by loss

rights of consumption of water, but *Early* involved a taking of land rather than water. In that the Plaintiffs' land was damaged by salt water intrusion from the Santee River which had more saline with diversion of much of its water flow to the Cooper River. The Court found that damage to the land was a taking. They also cite *Young v. Wiggins,* 240 S.C. 426, 126 S.E. 2d (1962), but that case also 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 and the land surrounding it unusable. In the instant care the Plaintiffs do not allege that their property has been damaged by water withdrawals.

Plaintiffs claim a violation of the public trust interest in the waterways, but they rely on authority applicable to 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. § 49-49-1-10 (Rev.1987) similarly provides: "All streams which have been rendered 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 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, 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.

Most certainly, the State has important interests to be preserved in nontidal waterways as well as tidal waters, but the degree of that interest need not be decided in this case because Plaintiffs do not allege an actual or imminent violation of any public interest in the waterways.

V

THE SURFACE WATER WITHDRAWAL ACT IS CONSTITUTIONAL BUT THIS ISSUE NEED NOT BE REACHED

Because Plaintiffs lack standing and because 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, the Defendant does note that, under *Rice Hope Plantation v. S. Carolina Pub. Serv. Auth.*, 59 S.E.2d at 144, *supra,*), the law is constitutional:

> 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.

VI

THIS COURT LACKS SUBJECT MATTER JURISDICTION AND PLAINTIFFS HAVE FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

Because Plaintiffs lack standing and 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)

ARGUMENT AS TO MOTION FOR TEMPORARY INJUNCTION

> The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Accordingly, the applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.,* 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

Compton v. S. Carolina Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

Plaintiffs fail the first of these requirements at the outset in that they have failed to allege facts sufficient to state a cause of action for an injunction for all of those reasons noted in the section in support of the Motion to Dismiss. Their affidavits do not overcome the shortcomings of the Complaint and do not allege any current or pending water withdrawal registrations that would affect their property. For these same reasons, Plaintiffs cannot show a likelihood of success on the merits. Because they allege no actual or imminent water withdrawal that affects

their property, they have not shown and cannot show that they will suffer immediate, irreparable harm. Further analysis of this Motion is unnecessary because the action should be dismissed,

CONCLUSION

For the foregoing reasons, the South Carolina Department of Health and Environmental Control respectfully requests that this case be dismissed.

Respectfully submitted,

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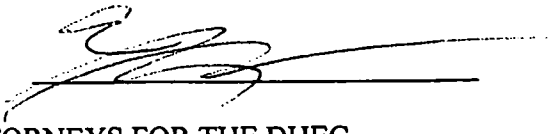
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BY: 

January 14, 2015

ATTORNEYS FOR THE DHEC

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman hereby move the Court for a preliminary injunction pursuant to SCRCP Rules 7 and 65. Specifically, the Plaintiffs would ask the Court to enjoin the Defendant South Carolina Department of Health and Environmental Control from issuing any water withdrawal registrations pursuant to Section 49-4-35 of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act, S.C. Code Ann. § 49-4-10, et seq., in order to maintain the *status quo* and prevent the irreparable harm identified in the Complaint.

For the foregoing reasons, the Plaintiffs respectfully request that this Court issue an Order enjoining the Defendant DHEC from issuing any water withdrawal registrations.

Respectfully submitted,

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November 21, 2014

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman moved this Court for a Preliminary Injunction on November 21, 2014. This Memorandum supports the Motion for Preliminary Injunction.

I. NATURE OF THE CASE

On September 4, 2014, the Plaintiffs filed the present action for taking riparian property rights[1] through the Surface Water Withdrawal Act's agricultural use registration program. The Plaintiffs now seek to enjoin the Defendant South Carolina Department of Health and Environmental Control from issuing any new registrations.

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[1]Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include, among other things, the right to consumptive use of the fresh water in navigable rivers. Id., Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913).

Since its passage in 2010, the Surface Water Withdrawal Act has been implemented by the Defendant. The Act establishes two mechanisms authorizing withdrawal of surface waters – a permitting system and a registration system. Significantly for this case, the Act allows riparian owners who are consuming water for agricultural uses to simply "register" their water use, rather than seek a permit. The Act does not restrict the amount of water than any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. This water appropriation to agricultural registrants constitutes an unconstitutional takings and violation of the public trust without due process from the riparian owners.

II. BACKGROUND

A. The Parties

The Defendant South Carolina Department of Health and Environmental Control ("DHEC"), is the agency charged with the implementation and enforcement of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, S.C. Code Ann. §§ 49-4-10 to 49-4-180 ("the Act"). The Act has a registration process for agricultural users to withdraw water, exempting those users from the permitting process that all other water users must undertake. The Defendant has issued at least five registrations under the Act. See Exhibit 1 (containing notices of registrations issued to Pebble Creek Enterprises, River Bluff Sod Farm, Turf Connections Sod Farm, SCDNR – Waddell Mariculture Center, and Walther Farms).[2] These registrations provide for a combined total of 467.7 million gallons of water per month to be withdrawn from surface waters in South Carolina. See id.

[2]These documents were produced by DHEC, some in response to a FOIA request. These five registrations, of which the Plaintiffs are aware, may not be the complete list of registrations issued under the act to date.

The Plaintiffs are citizens of South Carolina and property owners whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners. The Plaintiffs make use of their riparian rights for various purposes, and the waterways along the Plaintiffs' properties increase real property value and enjoyment of their land. Mr. Anastos has lived on his property on the North Saluda River since 1978, but grew up in the area and has enjoyed the river with his family for his whole life. See Exhibit 2, Anastos Affidavit. He and his family use the river for fishing, swimming, and kayaking, among other things. Id. Mr. Jowers has lived in Bamberg County for sixty-five years, enjoying the South Edisto and Little Slakehatchie Rivers. See Exhibit 3, Jowers Affidavit. Mr. Jowers's property is bounded by the Little Slakehatchie River, which he uses for fishing and recreation. Id. Mr. and Mrs. Ruhlman live on property bounded by the North Saluda River, and enjoy swimming, tubing, boating, kayaking and canoeing in the river. Mr. Williamson and his family have property on Black Creek, which has been in the family since the 1760s. See Exhibit 4, Williamson Affidavit. He and his family use Black Creek to paddle, fish and swim, and hold regular family picnics beside the creek. For all of the Plaintiffs, the waterways along their properties add value and enjoyment to the land. Thus, the Plaintiffs are all riparian owners who make use of their riparian rights, but that do not presently qualify for a registration under the Act.

B. Riparian Rights and the Public Trust Doctrine

Property interests are not created by the Constitution itself, "[r]ather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984) (internal quotation marks omitted). Property interests are defined

by the law creating it, existing rules and understandings, and background principles of nuisance and property law existing when the property was acquired. Thus, the term property refers to the rights inhering in the person's relationship to some thing, not the thing itself. Josh Eagle, Coastal Law, Wolters Kluwer174 (2011); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007).

In this case, the property at issue is the Plaintiffs' riparian rights. Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id.; Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); see also Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property).

Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). All riparian owners located on a given waterway share the risks of low flow conditions equally. Thus, the nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners. Second, the State is entitled to restrict riparian withdrawals to the extent those withdrawals threaten established public trust uses of the river, namely navigation, commerce, and recreation. Third, the State is entitled to restrict riparian withdrawals if the State itself requires use of the water. Rice Hope Plantation v.

S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

"All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. Const. art. XIV, § 4. Under the Public Trust Doctrine the State holds presumptive title to land below the high water mark in trust for the benefit of all the citizens of this State. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). "The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

"The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul.Envtl.L.J. 287 (1993)).

Under the public trust doctrine, the State is entitled to transfer trust assets to private parties in perpetuity in only two limited circumstances: First, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation;[3] second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) ("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").

C. The Surface Water Withdrawal Act of 2010

The Act represents a substantial reordering of private and public water rights in South Carolina. Under the Act, a "surface water withdrawer"[4] is generally required apply for a permit.

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[3] See, e.g., Clarke v. S. Carolina Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481, 486 (1935) (holding "that navigation, health betterment, flood control, and the reforestation of watersheds are public purposes" for which the state may constitutionally use public trust resources).

[4] "'Surface water withdrawer' means a 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." S.C. Code Ann. § 49-4-20 (28). "'Withdrawal' means to remove surface water from its natural course or location, or exercising physical control over surface water in its natural course or location, regardless of whether the water is returned to its waters of origin, consumed, transferred to another river basin, or discharged elsewhere." S.C. Code Ann. § 49-4-20 (29).

S.C. Code Ann. § 49-4-25.[5] The Act establishes a permitting program whereby an applicant provides detailed information about its proposed surface water withdrawals. S.C. Code Ann. § 49-4-80. In turn, DHEC must make a reasonableness determination for the proposed use, in consideration of enumerated criteria,[6] and make various other findings concerning the water supply, adequacy of flow, significance of withdrawal, etc. S.C. Code Ann. § 49-4-80. Additionally, if the public requests a hearing on the permit or if it is a new application, DHEC must conduct one. S.C. Code Ann. §§ 49-4-80 (K) (1), 49-4-90.

"Upon a determination by the department that, based upon its examination of the criteria

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[5] "Except as provided in Sections 49-4-30, 49-4-35, 49-4-40, and 49-4-45, all surface water withdrawals by a surface water withdrawer are unlawful unless made pursuant to a surface water withdrawal permit issued pursuant to this chapter." S.C. Code Ann. § 49-4-25.

[6]

> To determine whether an applicant's proposed use is reasonable, the department must consider the following criteria:(1) the minimum instream flow or minimum water level and the safe yield for the surface water source at the location of the proposed surface water withdrawal;(2) the anticipated effect of the applicant's proposed use on existing users of the same surface water source including, but not limited to, present agricultural, municipal, industrial, electrical generation, and instream users;(3) the reasonably foreseeable future need for the surface water including, but not limited to, reasonably foreseeable agricultural, municipal, industrial, electrical generation, and instream uses;(4) whether it is reasonably foreseeable that the applicant's proposed withdrawals would result in a significant, detrimental impact on navigation, fish and wildlife habitat, or recreation;(5) the applicant's reasonably foreseeable future water needs from that surface water;(6) the beneficial impact on the State and its political subdivisions from a proposed withdrawal;(7) the impact of applicable industry standards on the efficient use of water, if followed by the applicant;(8) the anticipated effect of the applicant's proposed use on the following if the permit is granted:(a) interstate and intrastate water use;(b) public health and welfare;(c) economic development and the economy of the State; and(d) applicable federal laws and interstate agreements and compacts; and(9) any other reasonable criteria that the department promulgates by regulation that it considers necessary to make a final determination.

S.C. Code Ann. § 49-4-80 (B).

in [S.C. Code Ann. § 49-4-80] (B), the applicant's use is reasonable, the department shall issue a permit to the applicant." S.C. Code Ann. § 49-4-80 (J). Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years. See S.C. Code Ann. § 49-4-100 (B). Once the permit issues, it may be revoked for any one of several listed reasons,[7] including any violation of the terms or certain changes in the natural conditions. S.C. Code Ann. § 49-4-120 (A). Permit holders are also subject to reporting requirements. S.C. Code Ann. § 49-4-50.

In contrast, the Act allows riparian owners who are consuming water for agricultural uses[8] to simply "register" their water use, rather than seek a permit. S.C. Code Ann. § 49-4-35.

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[7] The department may modify, suspend, or revoke a permit under the following conditions: (1) the permit holder withdraws water not authorized by his permit or fails to comply with the terms and conditions of his permit; (2) the permit holder obtains a permit by misrepresentation or fails to disclose a material fact in his application; (3) the permit holder ceases to withdraw water for a period of at least thirty-six consecutive months; or (4) a permanent change in natural conditions results in a permitted activity endangering human health or the environment.

S.C. Code Ann. § 49-4-120 (A).

[8] "Agricultural use" means:(a) plowing, tilling, or preparing the soil at an agricultural facility;(b) planting, growing, fertilizing, or harvesting crops, ornamental horticulture, floriculture, and turf grasses;(c) application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, livestock, animals, or poultry;(d) breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing livestock, hogs, aquatic animals, equines, chickens, turkeys, poultry, or other fowl normally raised for food, mules, cattle, sheep, goats, rabbits, or similar farm animals for commercial purposes;(e) producing and keeping honeybees, producing honeybee products, and honeybee processing facilities;(f) producing, processing, or packaging eggs or egg products;(g) manufacturing feed for poultry or livestock;(h) rotation of crops;(i) commercial aquaculture;(j) application of existing, changed, or new technology, practices, processes, or procedures to an agricultural use;(k) the operation of a roadside market; and(l) silviculture.

S.C. Code Ann. § 49-4-20 (3).

Only agricultural users of water are entitled to register their water use. See 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[9] that is filing a report pursuant to Section 49-4-50."). The Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq.

Once an agricultural user has registered its water use, its surface water withdrawals are "presumed to be reasonable," just like a permit holder, S.C. Code Ann. § 49-4-110 (B), even though a registered surface water withdrawer has not provided information and been found to be a reasonable user by DHEC pursuant to the permitting criteria listed Section 49-4-80. DHEC may only reduce the amount of water withdrawal for a registered surface water withdrawer if both of two conditions are met: 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the State can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E).[10]

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[9] "'Agriculture facility' means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, trees, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, or products which are used in commercial aquaculture." S.C. Code Ann. § 49-4-20 (2).

[10]

> 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.

S.C. Code Ann. § 49-4-35(E).

Although these two separate systems of permitting and registration exist under the Act, registered surface water withdrawers can apply for surface withdrawal permits. S.C. Code Ann. §§ 49-4-55, 49-4-35(F).

D. Unconstitutional Takings

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use without just compensation." The Fifth Amendment is applicable to actions taken by the State of South Carolina pursuant to the Fourteenth Amendment to the United States Constitution.

Article I, Section 13(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13.

III. ANALYSIS

"A preliminary injunction should issue only . . . upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).[11]

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[11] This state standard is substantively similar to the federal one, which is a balance-of-hardship test stated in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir.1977). Under this test a court must consider (1) the likelihood of irreparable harm to a plaintiff without an injunction, (2) the likelihood of harm to the defendant with an injunction, (3) the plaintiff's likelihood of success on the merits, and (4) the public interest. South Carolina state law, however, does not require any balancing of the equities, and has fewer factors than the federal test. See Poynter Invs.., 387 S.C. at 586-87, 694 S.E.2d at 17. Thus, to the extent that

A. Limited Scope of Preliminary Injunction

In this case, the Plaintiffs seek only to restrict defendant from issuing any new registrations pursuant to the Act, thus preserving the status quo. See Compton v. S. Carolina Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) ("The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it."). See also In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir.2003) ("The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.").

An injunction preserving the status quo will minimize irreparable harm by preventing the state from re-allocating the Plaintiffs' riparian rights to innumerable future registrants. See infra Part III. B. Furthermore, the preliminary injunction sought would improve judicial efficiencies in this case, allowing the court to contain damages caused by illegal takings to only the registrations already issued, while causing no harm to the Defendant. See S.C. R. Civ. P. 1 (requiring courts to construe the rules of civil procedure "to secure the just, speedy, and inexpensive determination of every action"). Denial of a preliminary injunction at this stage would be unjust given the private property rights at stake, the significant potential harm to the Plaintiffs, and lack of any harm to the Defendant.[12] Furthermore, a denial would increase

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federal case law is relied upon in this brief, it is only to provide further examples of concepts that appear in federal law but are similar or identical to the elements for a preliminary injunction under state law.

[12]Any agricultural users would not be prevented from water withdrawal because they could still seek a withdrawal permit pursuant to the Act. See supra Part II.B.

potential expenses of litigation needlessly. The narrow scope of the Plaintiffs' requested preliminary injunction is thus appropriately tailored to this case only to prevent the Defendant from issuing any new registrations.

B. Irreparable Harm

As alleged in the complaint, plaintiffs have suffered and continue to suffer irreparable harm through the taking without due process of their riparian water rights. Already, the Defendant has issued five registrations, which collectively allocate 467.7 million gallons per month of water. See Ex. 1. At this juncture, there is an immediate danger that the Defendant will issue new registrations to immeasurable upstream agricultural users, which would cause further permanent injury to the Plaintiffs. The Plaintiffs rely on the rivers and streams adjacent to their properties for continuing use and enjoyment. From Mr. Jowers's fishing to Mr. Williamson's family picnics involving swimming and paddling, each plaintiff makes use of his or her riparian ownership rights. The Defendant has, through the Act, taken the Plaintiffs' private property and transferred it to private agricultural users, and there is nothing in the Act which would prevent further unconstitutional takings, violations of the public trust doctrine, and due process violations.

Courts in cases similar to this one, where the Plaintiffs have suffered loss of property and may continue to suffer losses at the hands of the Defendant, have found irreparable harm to be present for the purpose of granting a preliminary injunction. See, e.g., Grosshuesch v. Cramer, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (reversing the trial court and issuing a preliminary injunction to preserve property taken by defendant); Palmetto Conservation Foundation v. Smith, 642 F.Supp.2d 518 (D.S.C. 2009) (upholding preliminary injunction against defendant in

Takings suit); AJG Holdings, LLC v. Dunn, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009) (upholding a preliminary injunction against defendants' commercial activity, which caused noise and traffic in the neighborhood, interfering with respondents' right to the use and enjoyment of their property and is sufficient to prove respondents suffered an irreparable harm); Fuller-Ahrens Partnership v. SC Dept. of Highways and Public Transp., 311 S.C. 177 (S.C. App. 1993) (affirming the grant of preliminary injunction against discharge into surface waters). See also United States v. S. Carolina, 720 F.3d 518, 525-26 (4th Cir. 2013) (recognizing that private parties may seek injunctive relief from state statutes allegedly preempted by federal law).

Navigable waterways, such as the rivers and streams at issue in this case, are public trust assets. McQueen, 354 S.C. at 149, 580 S.E.2d at 119. In addition to the individualized harms to the Plaintiffs in this case, there is irreparable harm to the public if these surface waters are not preserved for the use and enjoyment of all South Carolinians. The Defendant has disposed of, and may if not enjoined continue to dispose, public trust assets. Without an injunction, the Defendant could permanently allocate all of the water in all of the State's waterways to agricultural users (other than amounts that the Act requires for minimum instream flow). This would cause irreparable harm to the Plaintiffs (and other South Carolinians), harm that has no remedy outside the instant case. The registration process in the Act is especially dangerous because it leaves the State with little to no recourse or control over agricultural users once they have been registered. Registrations never expire, are presumed reasonable and the Act does not restrict the amount of water any one agricultural user can consume on a daily, annual, or total basis. S.C. Code. Ann. § 49-4-10, et seq.

Moreover, to reduce the registered amount or otherwise modify the registration: (1) an

agricultural user would have to withdraw "substantially more surface water than he is registered for or anticipates withdrawing"; and (2) DHEC must prove that the withdrawals "result in detrimental effects to the environment or human health." S.C. Code Ann. § 49-4-35(E). Therefore, registrants could deprive the Plaintiffs, other downstream riparian owners, and the public of water even in times of drought or when such usage results in fish kills or even permanent loss of a navigable waterway, as long as the withdrawal does not exceed the registered amount. Furthermore, registrants could consume water in excess of registered amounts, and the state would have no recourse without proof of detrimental effects to the environment or human health. In contrast, granting the instant preliminary injunction would cause no harm to the Defendant. DHEC simply would cease to issue new registrations. Any new agricultural users could still withdraw water, but would go through the permitting process like all other surface water users. S.C. Code Ann. § 49-4-55.

C. Likelihood of Success on the Merits

"When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Id. See also AJG Holdings, LLC v. Dunn, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009) ("The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right.") (citing Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct.App.2005)).

The Plaintiffs are likely to succeed on the merits of this case. Each of the Plaintiffs' claims is based upon well-established law coupled with facts that will be straightforward to prove. The merits of the Plaintiffs' claims are presented in turn below for the court's consideration.

1. Taking Private Property for Private Use in Violation of the S.C. and U.S. Constitutions

Article I, Section 13(A) of the South Carolina Constitution provides that **"private property shall not be taken for private use without the consent of the owner."** See Clemson Univ. v. First Provident Corp., 260 S.C. 640, 649, 197 S.E.2d 914, 918 (1973) (holding that "the attempted taking [to widen a drainage ditch on another's private property] is for private use and is prohibited under . . . the Constitution"); Beaudrot v. Murphy, 53 S.C. 118, 30 S.E. 825, 826 (1898) (holding that a statute which authorized private property to transfer to another private citizen was unconstitutional).

The alleged private-to-private transfer of property is also prohibited by the "public use" requirement in the Fifth Amendment to the United States Constitution. The fundamental purpose of the Fifth Amendment's prohibition of takings is to protect "individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'" Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002), (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960)). See also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law.")

"[T]he taking provision of the South Carolina Constitution does not require a landowner

to prove physical invasion of his property in order to recover. He will prevail if he simply establishes that his property has been damaged or that he has been deprived of the ordinary beneficial use and enjoyment of his property." Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1206 (4th Cir. 1986) (citing Spradley v. South Carolina State Highway Department, 256 S.C. 431, 434, 182 S.E.2d 735, 737 (1971); South Carolina State Highway Department v. Wilson, 254 S.C. 360, 366–67, 175 S.E.2d 391, 395 (1970); Gasque v. Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940); Parish v. Town of Yorkville, 96 S.C. 24, 25, 79 S.E. 635 (1913).)

In Young v. Wiggins, 240 S.C. 426, 126 S.E.2d 360 (1962), private property owners surrounding a lake challenged a governmental regulation that would enlarge the lake for the private agricultural use of one of the properties beside the lake, while submersing 250 acres of land. The court recognized that "the conservation of water and its distribution for purposes of irrigation may . . . be for a public use," but recognized that in this instance the use was private. Id. at 434, 126 S.E.2d at 364. Thus, it upheld the issuing of an injunction to prevent enlargement of the lake. Id. at 435, 126 S.E.2d at 365. ("As between individuals, no necessity, however great, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.") (internal quotation marks omitted). Similarly, in this case the government, in registering private agricultural users, is taking property rights owned by other private citizens and thus giving greater rights to those agricultural users. This reallocation of property rights is as follow:

1. Prior to the Act, all riparian owners on a given waterway had equal property rights

in the reasonable use of that water.[13] After the Act, agricultural users have far superior rights to all other types of riparian owners, including those who use water for recreational purposes, for domestic purposes, for industrial purposes, or for any other purposes.

2. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. After the Act, agricultural users are entitled to registrations that entitle them to take a fixed amount of water in perpetuity.

3. Prior to the Act, all riparian owners could challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use. After the Act, downstream riparian owners cannot challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use, because the Act deems registered water use to be presumptively reasonable.

Through these provisions, DHEC has taken property rights of riparian owners not entitled to registration and given that property to agricultural users eligible for registration. Thus, the Plaintiffs' case is meritorious and the instant motion for preliminary injunction should be granted.

2. Taking of Private Property for Public Use

Under the Fifth Amendment to the United States Constitution and Article 1, Section

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[13] See, e.g., White, 38 S.E. a 461 ("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 use, but whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment by the other.").

13(A) of the South Carolina Constitution, if the government takes private property for public use, it must compensate the owner. See Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law."). If the government takes private property for public use, the property owner may invoke the constitutional provision without resorting to enabling legislation. Smith v. Greenville, 229 S. C. 252, 262, 92 S. E. 2d 639, 644 (1956).

In this case there is no public use, as discussed *supra*. However, assuming *arguendo* that the reallocation of riparian property rights effected by the Act did not constitute a private-to-private transfer but, rather, could be supported by a valid "public use" argument, then the State must still compensate riparian owners not entitled to registration for the loss of their rights to consume water. See, e.g., Early v. S. Carolina Pub. Serv. Auth., 228 S.C. 392, 408, 90 S.E.2d 472, 479 (1955) (finding a taking where the government interfered with riparian rights through upstream salination of a waterway which abutted plaintiff's property, and awarding damages). To the extent the Defendant asserts that the registrations are a valid exercise of the state's police power, this argument also fails because the taking of riparian property rights must be compensated, even for a public use. See Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1205-06 (4th Cir. 1986) (holding that even a valid exercise of police power for public use must still be compensated if it is a taking pursuant to the South Carolina Constitution).

3. Violation of the Public Trust Doctrine

Under the public trust doctrine, the State is entitled to transfer or "dispose of" trust assets to private parties in perpetuity in only two limited circumstances: first, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a *de*

minimis impact on the public's ability to engage in established trust uses. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892). Courts have interpreted disposals broadly, to include State actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (finding that the state cannot allow for activity that will impair marine life, water quality or public access). Navigable waterways are public trust assets: "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. . . ." S.C. Const., art XIV, §4.

The provisions of the Surface Water Withdrawal Act effectively dispose of substantial interests in the State's navigable waterways to agricultural users. Under the Act, the State cannot revoke, reduce, or modify registered uses of water unless the registered user withdraws in excess of the registered amount and that excess withdrawal is detrimental to human health or the environment. In other words, the State has lost complete control of registered amounts of water in perpetuity; the registered owner has complete control over whether or not the State can ever alter the registered amount. This permanent disposal of a potentially vast amount of State public trust assets violates the public trust doctrine.

4. Due Process Violation

The Fifth Amendment, which provides that private property may not be taken by the federal government without just compensation, is applicable to the states through the Fourteenth Amendment due process clause. See Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226 (1897); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., et al., 65 F.3d 1113 (4th Cir. 1995). The Fourteenth Amendment provides in pertinent part that no State shall

"deprive any person of life, liberty, or property, without due process of law." In Daniels v. Williams, 474 U.S. 327 (1986), the Court held that "compensation for private property taken for public use is an essential element of due process of law" and that due process "recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226, 236 (1897). A fundamental requirement of procedural due process is opportunity to be heard, and that opportunity must be granted at meaningful time and in meaningful manner. U.S.C.A. Const. Amends. 5, 14; see also Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

To the extent that the Surface Water Withdrawal Act takes private property for public use without compensation, a due process violation exists because there has been a denial of a right secured by the federal constitution. The remedy for regulation that goes too far, under due process theory, is not just compensation but invalidation of regulation, and if authorized and appropriate, actual damages. U.S.C.A. Const.Amend. 5; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (warning that there must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone").

D. No Adequate Remedy at Law

In this case, there is no adequate remedy at law both because of the nature of the Plaintiffs' claims seeking equitable relief and the structure of the Act itself. As indicated in the complaint, the Plaintiffs ultimately seek declaratory and injunctive relief, in addition to monetary damages. Compl. ¶ 40. This is because monetary damages are inadequate at law for an intrusion on property rights. See Grosshuesch v. Cramer, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005); AJG

Holdings, LLC v. Dunn, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009).

Furthermore, the Act prevents plaintiffs from challenging the registrants' use of water. Plaintiffs are riparian owners, but do not presently qualify for registration under the Act. Their riparian rights of use are, under the Act, inferior to those who register because a registered use is presumptively reasonable. S.C. Code Ann. § 49-4-110. Thus, the Plaintiffs must challenge the Act itself, which provides no provision for them to assert the equal riparian ownership to which they are constitutionally entitled.

IV. CONCLUSION

In sum, the Plaintiffs have shown that the moving party that they will suffer irreparable harm if the injunction is not granted, that our case has a likelihood of success on the merits, and that there is no adequate remedy at law. Thus, the Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman request that this Court enter an Order granting partial preliminary injunction enjoining the Defendant from issuing any new registrations pursuant to the Act, effective immediately.

Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078
Fax: (843) 527-0540

Tim Moore
The Moore Firm, LLC
Post Office Box 160
319 Washington St.
Barnwell, SC 29812
Telephone: (803) 259 2021
Fax: (803) 259 0208

Attorneys for the Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman

Georgetown, South Carolina

December 30, 2014

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

PEBBLE CREEK ENTERPRISES, WAGNER, SC 29164
AGRICULTRAL REGISTRATION 02IR027 – AIKEN COUNTY

The South Carolina Department of Health and Environmental Control is providing this courtesy notice regarding a new surface water withdrawal registration for the Edisto River Basin. Pebble Creek Enterprises will withdraw surface water from Giddy Swamp Creek, a tributary of the North Edisto River in Orangeburg County, for the purpose of irrigating cropland. The Registration Application specifies the maximum anticipated volume of water needed in any single month as 4 million gallons per month (mgm). The safe yield for the withdrawal is calculated to be 190.3 mgm. The registered withdrawal of 4 mgm is well within the safe yield at the withdrawal point; therefore, the registration was issued in accordance with The Surface Water Withdrawal, Permitting, Use, and Reporting regulation (R.61-119). This notice is being provided for information only. If you have any questions, please contact Michael Bishop at (803)-898-3553 or bishopma@dhec.sc.gov.

Exhibit 1

2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

28 May 2014

Mr. Wilford T. Smith
Pebble Creek Enterprises
155 Pebble Creek Rd.
Wagner, SC 29164

RE: Pebble Creek Enterprises, Pebble Creek Rd, Wagner SC
Agricultural Registration 02IR027 - Aiken County

Dear Mr. Smith:

The Department has reviewed your application for a surface water withdrawal from Giddy Swamp Creek in the amount of 4 million gallons per month (mgm) up to a yearly maximum withdrawal 8 million gallons per year and have determined that the proposed withdrawal is within the safe yield of the source waterbody at the withdrawal point. The detailed safe yield analysis is available if you would like to have a copy. A copy of Agricultural Registration # 02IR027 is attached.

Also, please note the following -

1. Pebble Creek Enterprises must notify the Department of completion of construction of the intake structure allowed by this registration within thirty (30) days of completion of construction. If notification of completion of construction is not received by the Department by May 27, 2015 (one year from the date of this registration), authorization to construct and operate the proposed withdrawal in the Giddy Swamp Creek is revoked unless Pebble Creek Enterprises requests and the Department approves an extension of the time period. Notification or a request for a time extension is to be made to: Mr. Rob Devlin, Water Quantity Permitting Section-SCDHEC, 2600 Bull Street, Columbia, SC 29201

2. Pebble Creek Enterprises shall submit, on forms provided by the Department, a signed report of surface water withdrawn each month and source(s) of the water, not less than annually. Such reports shall be submitted by the 30th day of January for the preceding year.

Should you have any questions concerning this registration please contact Michael Bishop at (803) 898-3553 (office phone), (803) 898-2893 (fax), or by e-mail at bishopma@dhec.sc.gov.

Sincerely,

Robert Devlin, Manager
Water Quantity Permitting Section
Bureau of Water

Enc: SW Registration 02IR027
cc: Technical File (w/enc)
Regional Office (via pdf)

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

Bureau of Water
Surface Water Withdrawal Registration

A Surface Water Withdrawal Registration is hereby issued to:

Pebble Creek Enterprises – Wilford Smith
Pebble Creek Enterprises, Pebble Creek Rd
Wagner, SC 29164

This Registration allows Pebble Creek Enterprises to construct and operate an intake for the withdrawal of surface water from Giddy Swamp Creek for the purpose of agricultural irrigation as specified below:

Project name:	Pebble Creek Enterprises, Pebble Creek Rd
County:	Aiken
Project:	Surface Water Intake: Giddy Swamp Creek
Location Lat/Long:	33.690594,-81.30849
System Registration Number:	02IR027
Source Number:	02IR027S01
Maximum Monthly Withdrawal:	4 Million Gallons per Month
Maximum Yearly Withdrawal:	8 Million Gallons per Year
Issue Date:	May 28, 2014

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director.

Promoting and protecting the health of the public and the environment

RIVER BLUFF SOD FARM, SPRINGFIELD SC 29146
AGRICULTRAL REGISTRATION 38IR077 – ORANGEBURG COUNTY

The South Carolina Department of Health and Environmental Control is providing this courtesy notice regarding a new surface water withdrawal registration for the Edisto River Basin. River Bluff Sod Farm will withdraw surface water from Rocky Swamp Creek, a tributary of the South Edisto River in Orangeburg County, for the purpose of irrigating cropland. The Registration Application specifies the maximum anticipated volume of water needed in any single month as 13 million gallons per month (mgm). The safe yield for the withdrawal is calculated to be 395.4 mgm. The registered withdrawal of 13 mgm is well within the safe yield at the withdrawal point; therefore, the registration was issued in accordance with The Surface Water Withdrawal, Permitting, Use, and Reporting regulation (R.61-119). This notice is being provided for information only. If you have any questions, please contact Michael Bishop at (803)-898-3553 or bishopma@dhec.sc.gov.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

TURF CONNECTIONS SOD FARM, SPRINGFIELD SC 29146
AGRICULTRAL REGISTRATION 38IR078 – ORANGEBURG COUNTY

The South Carolina Department of Health and Environmental Control is providing this courtesy notice regarding a new surface water withdrawal registration for the Edisto River Basin. Turf Connections Sod Farm will withdraw surface water from Goodland Creek, a tributary of the South Edisto River in Orangeburg County, for the purpose of irrigating cropland. The registration application specifies the maximum anticipated volume of water needed in any single month as 15 million gallons per month (mgm). The safe yield for the withdrawal is calculated to be 818 mgm. The registered withdrawal of 15 mgm is well within the safe yield at the withdrawal point; therefore, the registration was issued in accordance with The Surface Water Withdrawal, Permitting, Use, and Reporting regulation (R.61-119). This notice is being provided for information only. If you have any questions, please contact Michael Bishop at (803)-898-3553 or bishopma@dhec.sc.gov.

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Bureau of Water
Surface Water Withdrawal Registration

A Surface Water Withdrawal Registration is herby issued to:

SCDNR – Waddell Mariculture Center
PO Box 809
Bluffton, SC 29910

This Registration allows the Waddell Mariculture Center to operate an intake for the withdrawal of surface water from the Colleton River for the purpose of aquaculture as specified below:

Project name:	SCDNR – Waddell Mariculture Center
County:	Beaufort
Project:	Surface Water Intake: Colleton River
System Registration:	07AQ002
Source Number:	07AQ002S01
Maximum Monthly Withdrawal:	35.7 Million Gallons per Month
Maximum Yearly Withdrawal:	428.4 Million Gallons per Year
Issue Date:	February 6, 2014

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone (803) 898-4189 • www.scdhec.gov

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

February 3, 2014

Mr. Jason Walther
52944 U.S. 131
Three Rivers, MI 49093

Re: Walther Farms - Windsor, S.C.
Modification to Agricultural Surface Water Withdrawal Registration 02IR025
South Edisto River
Aiken County, S.C.

Dear Mr. Walther:

Per your letter to the Department dated January 30, 2014, the Department has modified Agricultural Surface Water Withdrawal Registration No. 02IR025 to reduce the previous Maximum Monthly Withdrawal of 805 million gallons per month to a Maximum Monthly Withdrawal of 400 million gallons per month. The modified registration is enclosed.

Please note that Walther Farms shall submit, on forms provided by the Department, a certified report of surface water withdrawn each month and source(s) of the water, not less than annually. Such reports shall be submitted by the 30th day of January for the preceding year

Should you have any questions concerning this registration please contact Michael Bishop at (803) 898-3553 (office phone), (803) 898-2893 (fax), or by e-mail at bishopma@dhec.sc.gov.

Sincerely,

Rob Devlin, Manager
Water Quantity Permitting Section
Water Monitoring, Assessment and Protection Division
Bureau of Water

Enc: SW Registration 02IR025S01

cc: Technical File (w/enc)
Regional Office (via pdf)
Ms. Jessie King (via e-mail)

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

Bureau of Water
Surface Water Withdrawal Registration

A Surface Water Withdrawal Registration is herby issued to:

Walther Farms
Augusta Plantation, Oak Ridge Club Road
Windsor, SC 29856

This Registration allows Walther Farms to construct and operate an intake for the withdrawal of surface water from the South Fork Edisto River for the purpose of agricultural irrigation as specified below:

Project name:	Walther Farms - Windsor, South Carolina
County:	Aiken
Project:	Surface Water Intake: South Fork Edisto River
System Registration:	02IR025
Source Number:	02IR025S01
Maximum Monthly Withdrawal:	400 Million Gallons per Month
Maximum Yearly Withdrawal:	3200 Million Gallons per Year
Issue Date:	February 3, 2014

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF ANDREW J. ANASTOS**

PERSONALLY APPEARED before me Andrew J. Anastos, who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside at and own over ninety (90) acres of land at 1205 Goodwin Bridge Road, Travelers Rest, South Carolina.

3. I purchased my property on February 23, 1978.

4. My property is identified on Greenville Tax map as #0522020102201. (Attached as Exhibit A)

5. My property has approximately 2,500 feet of frontage along the North Saluda River.

6. My family and I use the River for fishing, swimming and kayaking; and to irrigate plants, shrubs and flowers for personal use.

7. Where it runs through my property, the North Saluda River is about 45-50 feet wide at its widest area and about 30 feet wide at its narrowest area.

8. I grew up in this area and my family and I have enjoyed the North Saluda River since I was young.

9. I remember how the North Saluda River was before the Poinsett Reservoir was built. It had small mouth bass and catfish, and was at least fifty percent larger than it is today.

Exhibit 2

Now those recreational fish species are completely gone, and only smaller species of fish live in the River.

10. I do not want to see the River further degraded or destroyed.

11. I do not want to lose more species of fish in the River.

12. I am also concerned about the whole state's water system being further degraded or destroyed.

13. I am familiar with the Surface Water Withdrawal Act of 2010.

14. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

15. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

16. I am aware that the Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

17. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount and the State can prove that such withdrawals are detrimental to the environment or human health.

18. I believe that the Act restricts or eliminates my property rights to enjoy and use the North Saluda River where it flows through my property.

19. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my ownership rights in the use of the North Saluda River.

20. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

21. The North Saluda River adds value to my property.

22. The partial or complete loss of flow of the North Saluda River through my property would diminish my property value.

Andrew J. Anastos

Andrew J. Anastos

SWORN TO before me this

12 day of November, 2014.

Melissa A Darton (SEAL)

Notary Public for South Carolina

My Commission Expires: October 2, 2017

Andrew J. Anastos



PIN / Tax Map #	0522020102201	Jurisdiction	1
Owner Name	Anastos Andrew J	Land Use	9171
Owner Name 2		Legal Description	NONE
Mailing Address	Po Box 477	Subdivision	
City	Marietta	Site Address Number	
State	SC	Site Address Street	OFF GOODWIN BRIDGE
Zip Code	29661	Sale Price	$0
In Care Of		Fair Market Value	$389,340
Previous Owner		Taxable Market Value	$389,340
Deed Date	2/23/1978	Taxes	$930.47
Deed Book	1074	Date Taxes Paid	NaN/NaN/NaN
Deed Page	136	Estimated Acres	92.2
Plat Book		Square Feet	1720
Plat Page	0	Number of Bedrooms	3
Tax District	371	Number of Bathrooms	2
Market Area	002074	Number of Half Baths	1

Disclaimer: This Map is not a LAND SURVEY and is for reference purposes only. Data contained in this map are prepared for the inventory of Real Property found within this jurisdiction, and are compiled from recorded deeds, plats, and other public records. Users of this map are hereby notified aforementioned public primary information sources should be consulted for verification of the information contained in this map. Greenville County assumes no legal responsibility for the information contained in this map.

Map Scale
1 inch = 799 feet
11/5/2014

Exhibit A

STATE OF SOUTH CAROLINA)) COUNTY OF BARNWELL)		IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF JAMES J. JOWERS, SR.**

PERSONALLY APPEARED before me James Jefferson Jowers, Sr., who being duly sworn

deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside at 585 Brockstron Bridge Road, U.S. Hwy. 601, Bamberg, SC 29003.

3. I own forty (40) acres of land on Middleplace Road in Bamberg County, South Carolina, between U.S. Hwy. 301 and U.S. Hwy. 321, which is a few miles away from where I live.

4. I purchased my forty acre tract approximately four years ago. Prior to that, I owned property on the South Edisto River and my son currently owns property on the South Edisto River.

5. I have lived in Bamberg County for sixty-five years and the water resources, in particular the South Edisto and the Little Slakehatchie Rivers, have contributed significantly to my love and appreciation for this part of the state.

6. Access to these water ways through property ownership has enhanced my quality of life.

7. My property is identified on Bamberg Tax map as #0042-00-00-031. (Map Attached as Exhibit A)

Exhibit 3

8. My property is bounded by the Little Salkehatchie River. The South Edisto River is about three miles upstream from my property.

9. I manage my property for timber, and use it for hunting, fishing, and recreation.

10. I visit my property several times a week.

11. I hunt deer when it is hunting season. I also fish when there is enough water in the River for fishing.

12. Currently the water level in the River is problematically low, but still flowing.

13. Right now the upstream farms do not need much water. However, during the times of year when crops are growing there is a great pull on the River.

14. I want to protect myself and other citizens from running out of water, because we all rely and depend upon our water resources.

15. I feel that wise management of our rivers is critical to me and all citizens of South Carolina because everybody has to have water.

16. I am concerned that if the River dried up, I would not have waterfront property, recreational use or water rights in the Little Salkehatchie River.

17. I have seen photos of fish kills (Attached as Exhibit B), which happened about 30 miles downstream from my property. I am concerned about that.

18. I would hate to see fish kills happen on my property.

19. I am familiar with the Surface Water Withdrawal Act of 2010.

20. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

21. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

22. I am aware that the Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

23. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or

withdrawer if the registered user withdraws substantially more surface water than its registered amount and the State can prove that such withdrawals are detrimental to the environment or human health.

24. I believe that the Act eliminates my property rights, specifically the right to protect my reasonable use of the Little Salkehatchie River where it flows through my property.

25. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my ownership rights in the use of the Little Salkehatchie River.

26. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

27. The Little Salkehatchie River adds value to my property.

28. The partial or complete loss of flow of the Little Salkehatchie River through my property would diminish my property value because it would no longer be waterfront property.

James Jefferson Jowers, Sr.

SWORN TO before me this

14th day of Nov., 2014.

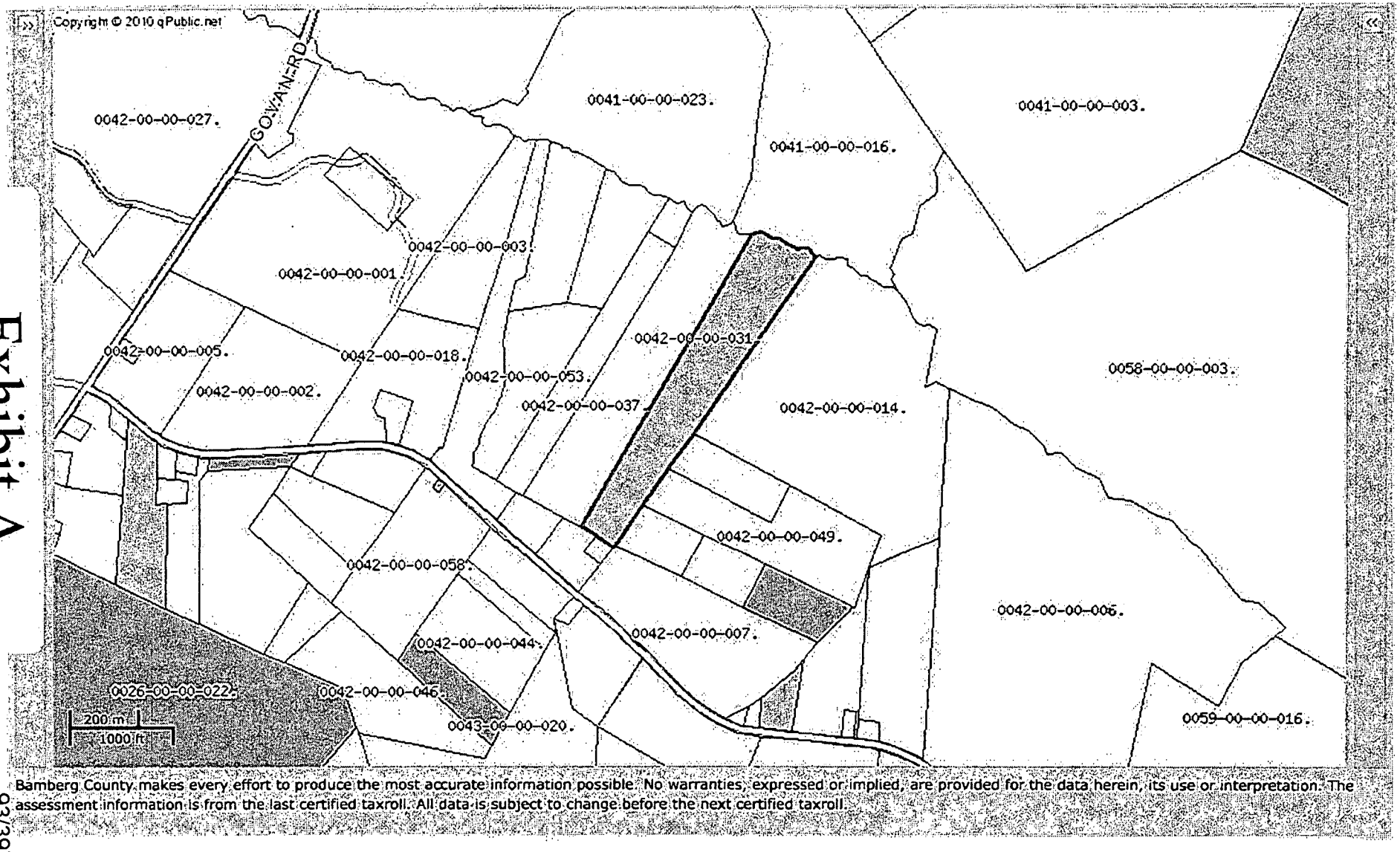
(SEAL)

Notary Public for South Carolina

ADAM C. NESS
Notary Public, State of South Carolina
My Commission Expires 7/1/2021

My Commission Expires:

Jowers Property



Bamberg County makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll.

Exhibit A

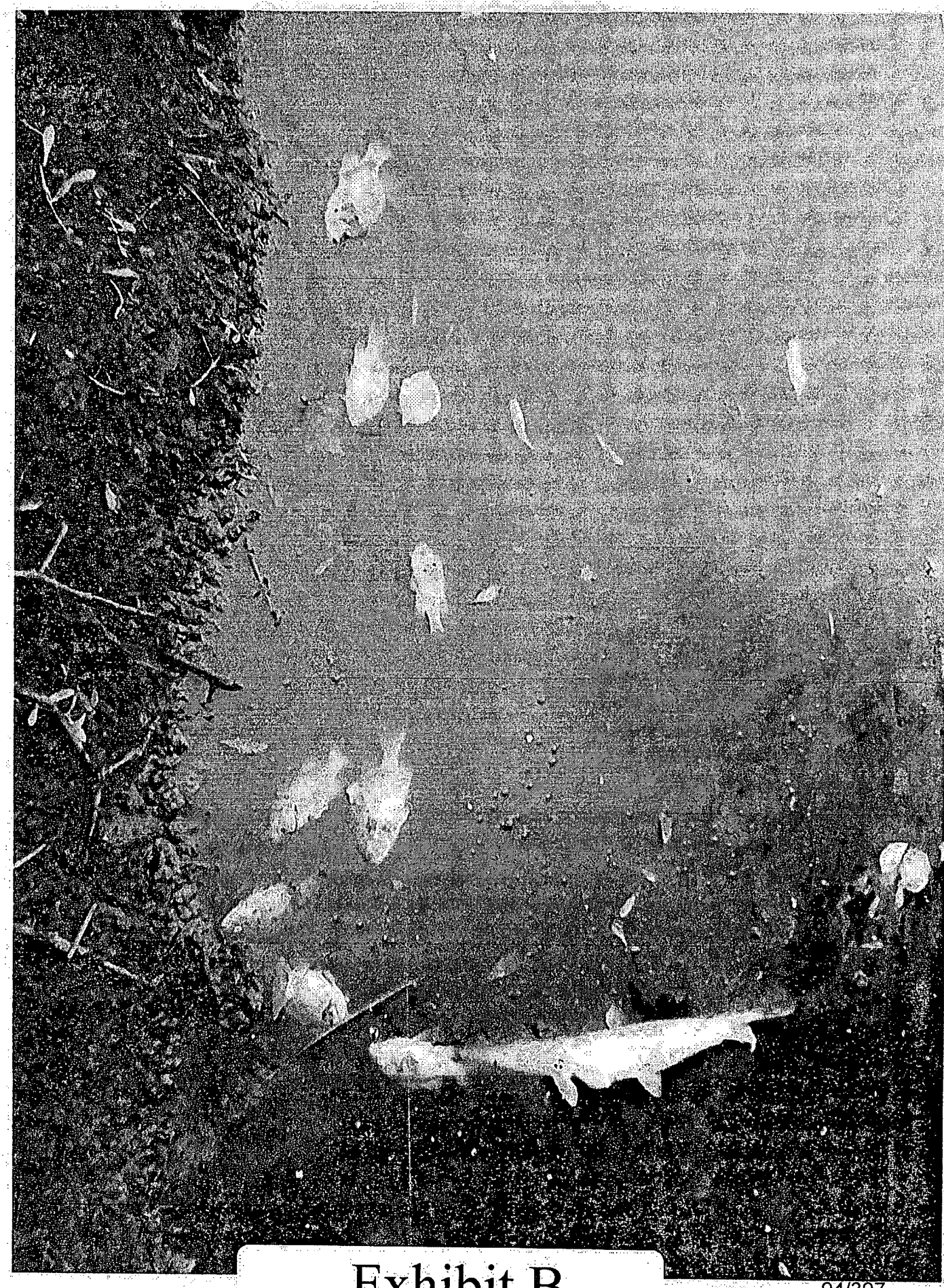
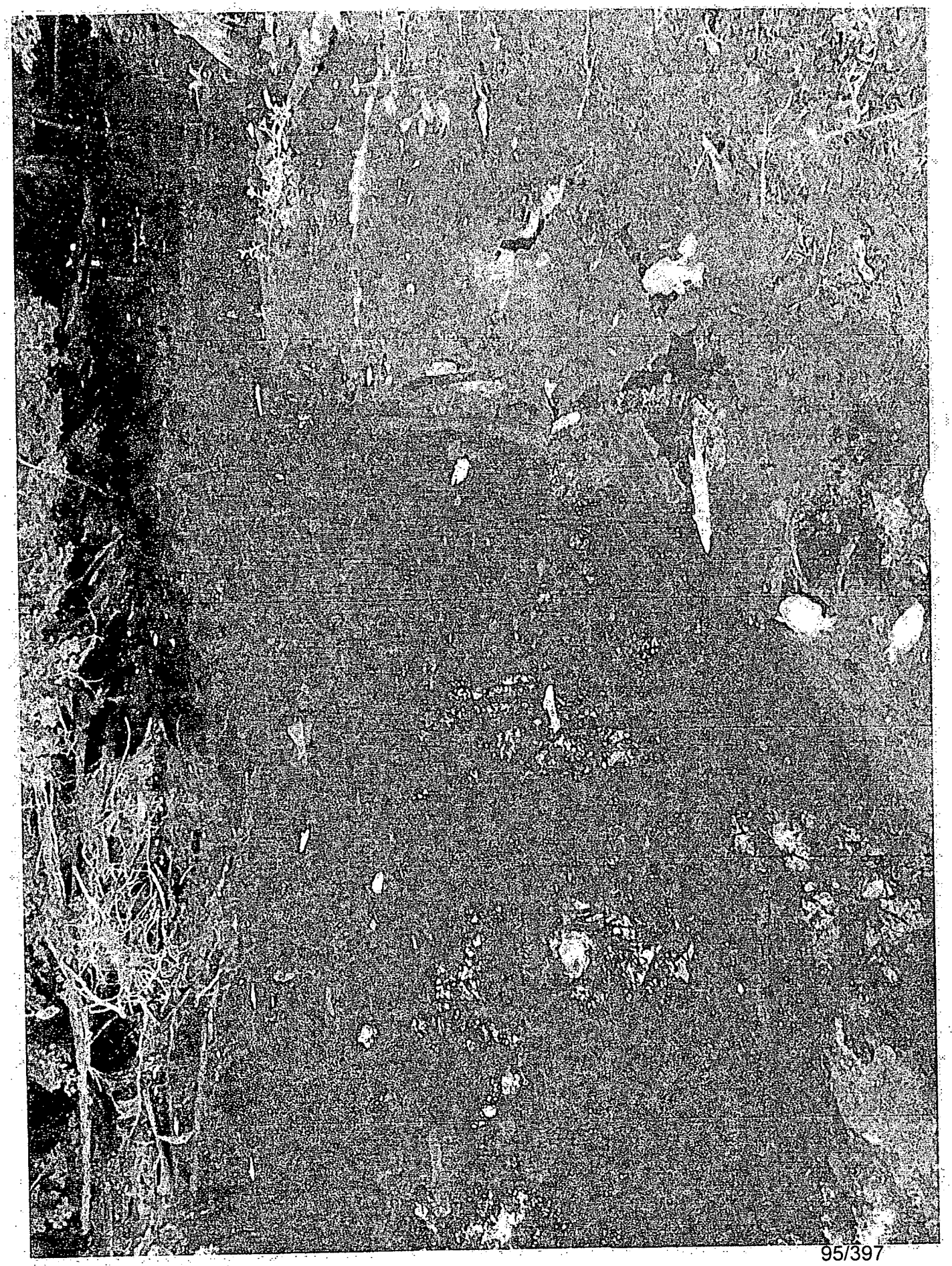


Exhibit B



STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF BEN WILLIAMSON**

PERSONALLY APPEARED before me Ben Williamson, who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside on property at 1311 Oaklyn Road, Darlington, South Carolina, 29532, which I own jointly with five other members of my family.

3. Our property consists of approximately 1,500 acres between Black Creek and Pocket Road on State Road 35 (South Charleston Road) in the eastern quadrant where State Road 35 crosses Black Creek.

4. Our property has been in the family since the mid-1760s.

5. Our property is bounded by Black Creek, which runs from the southwest to southeast boundary, making up the southern property line.

BW

6. I have lived on our property all of my life.

7. I use the property for farming, forestry, and raising beef cattle.

8. My extended family and I use Black Creek to paddle, fish, and swim. We have a regular family and community picnic ground by Black Creek that we use often. Almost everybody that comes to the picnics goes swimming too.

9. Black Creek has a tremendous following of people, in my community and all

Exhibit 4

along its course through Darlington and Florence Counties, who use and value it highly. Use of the Creek has been the subject of considerable controversy over the years, and my family has intently tried to guard and protect it.

10. My understanding of the history of Black Creek is as follows: In the 1790s, the SC Legislature had a big controversy over sawmills on Black Creek. In the early 1900s, Black Creek began to be used heavily for transportation and disposal of industrial waste. In 1941, citizens in Darlington and Florence counties formed Black Creek Protective Association, which was one of the first environmental organizations chartered in the state. In the late 1960s and early 1970s, several large fish kills occurred, moving hundreds of citizens to re-activate the Black Creek Protective Association and, with the help of the US EPA and the SC DHEC, to press successfully for revision of waste discharge permits, upgrading of the classification of Black Creek, and enforcement of regulations. In 1980, Black Creek Land Trust was formed for the purpose of influencing the use of land along Black Creek; it acquired several tracts of land and conservation easements, and generally raised the public's awareness of the value of this stream. The Black Creek Land Trust has recently consolidated with the Pee Dee Land Trust, an organization that I am a member of and support. In sum, my family has been involved in a substantial amount of political activity centered around the Creek for a couple hundred years.

11. Where it flows past our property, Black Creek is about 50 feet across and 10 feet deep. It is a substantial body of water, what most people would call a river.

12. Black Creek is unique because it is a swift-flowing coastal plains stream.

8W

13. Over the past 10 to 15 years I have noticed that Black Creek is a bit lower in water levels than it used to be. Flooding is also much less frequent. Black Creek used to flood on our property every year. Now it only floods once every 3 to 4 years.

14. I am familiar with the Surface Water Withdrawal Act of 2010.

15. I am aware that the Act allows agricultural users to register for water use without notifying downstream users. I am also aware that the Act does not provide any mechanism to allow me to participate in the registration process.

16. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

17. I am aware that registrations under the Act never expire.

18. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or human health.

19. I believe that the Act potentially restricts our property rights to enjoy and use Black Creek where it flows through our property.

20. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my riparian rights in the use of Black Creek.

21. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

22. Black Creek adds value to our property.

23. The partial or complete loss of flow of Black Creek by our property would diminish our property value.

Ben Williamson
Ben Williamson

SWORN TO before me this
25th day of November, 2014.

25 November 2014

Ann N. Williamson (SEAL)
Notary Public for South Carolina
My Commission Expires: November 16, 2021

STATE OF SOUTH CAROLINA)) COUNTY OF BARNWELL)		IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF MELANIE RUHLMAN**

PERSONALLY APPEARED before me Melanie Ruhlman who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. My husband and I own the property where we reside, at 301 Keeler Bridge Road, Marietta, South Carolina, 29661.

3. Our property consists of 5.26 acres, with approximately 480 feet of river frontage on the North Saluda River, a tributary of the Saluda River.

4. I have lived there for over two years with my spouse, Anthony Ruhlman, and our two children.

5. Our property is identified on Greenville County Tax Map #0511020102703. [Attached as Exhibit A]

6. Our property is unique because it is situated at shoals that were the site of Keeler Mill, a grist mill that burned in the mid 20th century. The home and mill were constructed circa 1880.

7. The North Saluda River's width and depth varies where it runs by my property, but it is approximately forty feet across averaging one to three to feet deep with deeper holes in places.

8. My family and I use the North Saluda River for recreation, paddling, boating, swimming, tubing, wading, and bird watching.

Exhibit 5

9. The North Saluda River is the primary reason that we moved to this property.

10. Loss of flow from the North Saluda River where it runs by our property would negatively affect our use and enjoyment of our property.

11. There are agricultural uses in floodplain areas upstream from our property, and there are withdrawals for agricultural uses there. I am concerned about withdrawals upstream, and the impact those withdrawals could have on our use and enjoyment of the North Saluda River where it flows by our home.

12. My concern for and interest in river protection extends beyond my private property. I serve as a volunteer on the Boards of Directors for both Save Our Saluda (SOS) and Friends of the Reedy River (FoRR), and am also a member of Upstate Forever (UF). These Greenville area organizations work to respond to environmental threats to the rivers in the Upstate of South Carolina.

13. I am familiar with the Surface Water Withdrawal Act of 2010.

14. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

15. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

16. I am aware that the Act does not restrict the amount of water that any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

17. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or human health.

18. I believe that the Act restricts or eliminates my property rights to enjoy and use the North Saluda River where it flows through my property.

19. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my property rights in the use of the North Saluda River.

20. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

21. The North Saluda River adds value to my property.

22. The partial or complete loss of flow of the North Saluda River through my property would diminish my property value.

Melanie Ruhlman

SWORN TO before me this

5th day of December, 2014.

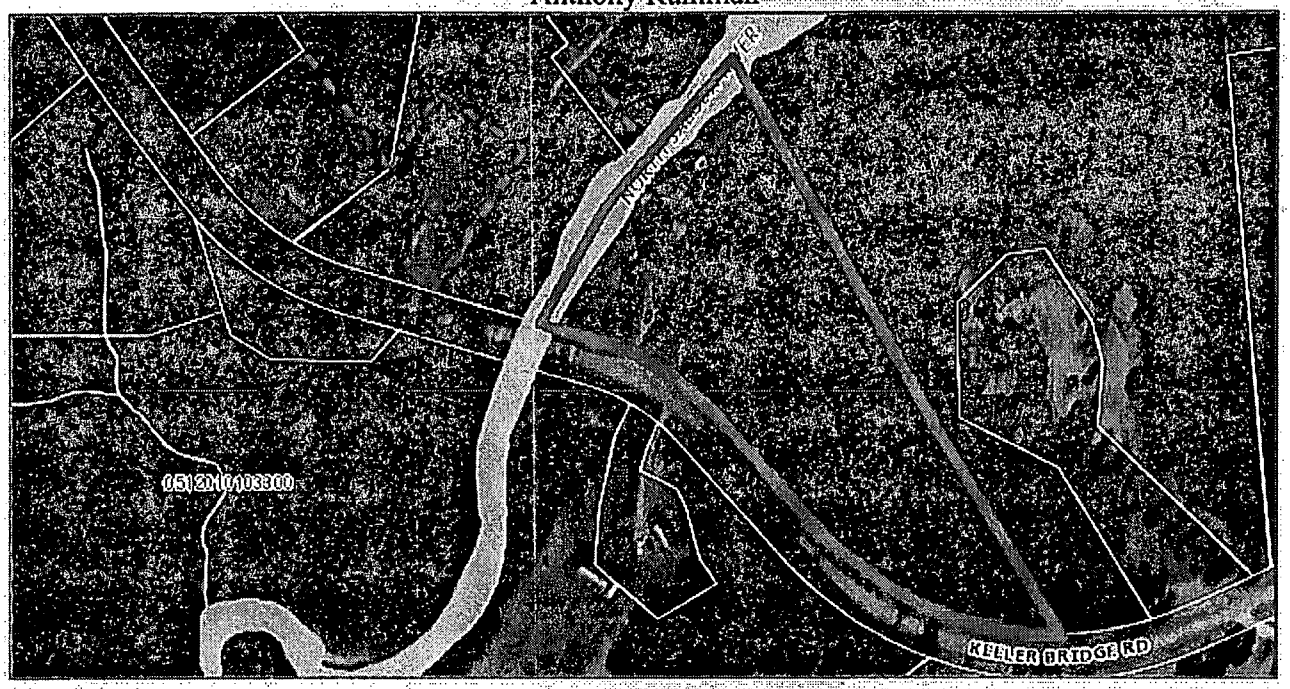
(SEAL)

Notary Public for South Carolina

My Commission Expires: 3/15/22

JEAN ALLISON WALKER
Notary Public, State of South Carolina
My Commission Expires 3/15/2022

Anthony Ruhlman



PIN / Tax Map #	0511020102703	Jurisdiction	1
Owner Name	Ruhlman Anthony R	Land Use	1100
Owner Name 2	Ruhlman Melanie B	Legal Description	NONE
Mailing Address	301 Keeler Bridge Rd	Subdivision	
City	Marietta	Site Address Number	301
State	SC	Site Address Street	KEELER BRIDGE
Zip Code	29661	Sale Price	$125,000
In Care Of		Fair Market Value	$111,830
Previous Owner	Sloan James P	Taxable Market Value	$111,830
Deed Date	1/27/2012	Taxes	$615.96
Deed Book	2400	Date Taxes Paid	NaN/NaN/NaN
Deed Page	1755	Estimated Acres	5.26
Plat Book	43-I	Square Feet	2330
Plat Page	62	Number of Bedrooms	4
Tax District	371	Number of Bathrooms	1
Market Area	001520	Number of Half Baths	1

Disclaimer: This Map is not a LAND SURVEY and is for reference purposes only. Data contained in this map are prepared for the inventory of Real Property found within this jurisdiction, and are compiled from recorded deeds, plats, and other public records. Users of this map are hereby notified aforementioned public primary information sources should be consulted for verification of the information contained in this map. Greenville County assumes no legal responsibility for the information contained in this map.

Map Scale
1 inch = 267 feet
11/5/2014

Exhibit A

THE STATE OF SOUTH CAROLINA
In the Supreme Court
In The Original Jurisdiction of the Supreme Court

REMOVAL REQUESTED FROM THE
Court of Common Pleas, Barnwell County
The Honorable R. Markley Dennis, Jr., Judge

Case No. 2014-CP-06-322

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

v.

South Carolina Department of Health and Environmental
Control,.....Petitioner /Defendant.

NOTICE OF
PETITION FOR EXTRAORDINARY RELIEF INCLUDING
REMOVAL AND ORIGINAL JURISDICTION

TO COUNSEL FOR RESPONDENTS / PLAINTIFFS:

Please take notice that, pursuant to Rule 245, SCACR, you have twenty days from the date of service to file the original and six copies of your return to the attached Petition for Extraordinary Relief.

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

[Signature block continues next page]

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(843) 723-0977 – fax
lreynolds@asrlawsc.com

BY: _____

February 13, 2015

ATTORNEYS FOR DHEC

THE STATE OF SOUTH CAROLINA
In the Supreme Court
In The Original Jurisdiction of the Supreme Court

REMOVAL REQUESTED FROM THE
Court of Common Pleas, Barnwell County
The Honorable R. Markley Dennis, Jr., Judge

Case No. 2014-CP-06-322

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

v.

South Carolina Department of Health and Environmental
Control,.....Petitioner /Defendant.

PETITION FOR EXTRAORDINARY RELIEF INCLUDING REMOVAL AND ORIGINAL JURISDICTION

Pursuant to Rule 245, SCACR, S.C. Code Ann §14-3-310 (1976) and S.C. Const. art. V §5, the South Carolina Department of Health and Environmental Control respectfully requests that the South Carolina Supreme Court award the extraordinary relief of removing this case from the Court of Common Pleas of Barnwell County to its original jurisdiction to address the challenge to the constitutionality of significant State legislation, the Surface Water Withdrawal Act (S.C. Code Ann. §49-4-10, *et seq.*), as well as consider the other defenses to this suit including lack of standing and a justiciable controversy. DHEC asks that this Court issue whichever extraordinary writ is necessary

to remove this case and that it either dismiss this case due to the above failures of standing and justiciable controversy, or uphold the constitutionality of the Act.

I

BACKGROUND

Plaintiffs challenge applicable parts of the Surface Water Withdrawal Act. S.C. Code Ann. §49-4-10, *et seq.* *See* Complaint, attached Addendum, p. 18. Under the Act, 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.[1] Registered users cannot withdraw more water for agricultural purposes than is within the safe yield amount as determined under the Act.[2]

Plaintiffs reside on 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. The Complaint does not allege that any agricultural water

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1 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 49-4-50. [Those] withdrawers are authorized to withdraw surface water up to their registered amount.").

2 §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.").

withdrawals have been registered for Barnwell County, Plaintiff's counties or upstream from them or that any withdrawal registrations are pending. Plaintiffs do not allege any injury whatsoever tied to any such withdrawals. 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 they do not allege that such agricultural withdrawals have occurred.

DHEC moved to dismiss the suit on grounds of lack of standing, lack of a justiciable controversy, improper venue and the other reasons set forth in the attached Motion. Addendum, *infra, p.* 13. The Honorable Markley Dennis heard argument concerning the motion in Charleston on January 15, 2015, after the case was re-assigned to him following the Honorable Doyet Early's recusal of himself. He denied the Motion at the hearing without hearing argument on any defenses other than lack of standing and improper venue. He believed that a record needed to be developed on standing and that a motion to dismiss was not the proper way to address venue. Judge Dennis also denied the Plaintiff's Motion for a Temporary Injunction. Since then, DHEC has filed the attached Answer preserving the defenses in its Motion to Dismiss and responding to the allegations in the Complaint. Addendum, *infra,* p. 16.

II

AUTHORITY OF THE COURT TO ASSUME ORIGINAL JURISDICTION

Under Rule 245, SCACR, the Court may assume original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist

why the original jurisdiction of the Supreme Court should be exercised...." *See also* S.C. Const. art. V, §§ 5 and 20 and §14-3-310 (1976); *see also Key v. Currie,* 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Certainly, the public interest is involved here, as discussed below, in resolving an important issue of State law quickly. This Court has previously exercised its authority in the original jurisdiction to remove cases already filed in the Circuit Court. *See, Joytime Distributors & Amusement Co., Inc. v. State,* 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999); *Ravenel v. Dekle,* 265 S.C. 364, 218 S.E. 2d 521 (1975). The Supreme Court has also issued writs of certiorari to review interlocutory municipal court rulings. *State v. Long*, 406 S.C. 511, 513, 753 S.E.2d 425, 426 (2014).

III

REASONS FOR TAKING ORIGINAL JURISDICTION IN THIS CASE

This case presents a constitutional issue regarding an important State law that should be decided quickly rather than leave this Act under an unwarranted cloud of litigation The constitutional issues are not meritorious, but they belong within this Court's original jurisdiction should the Court decide to reach them.

Although Plaintiffs lack standing and fail to present a justiciable controversy regarding the Act, this Petition should be granted because of the constitutional issues that are raised and the need to resolve this case expeditiously. Before reaching the constitutional issues this Court should address the threshold issues of lack of standing and justiciability. Such issues have been considered in original jurisdiction cases as a basis for dismissal. *See, Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C.

67, 71, 753 S.E.2d 846, 848 (2014)(dismissing due to lack of standing); *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013)(discussing standing concerns but ruling against the Petitioner on the constitutional challenge, instead). If, instead, the Court wants to address the merits of the constitutional claims, this case would be properly within its original jurisdiction and ready to be decided.

The standards of Rule 245 are met in that the public interest and other good reasons discussed above support this Court's removing this case and deciding it in its original jurisdiction. Although this case would almost certainly reach this Court on appeal if it remains in Circuit Court for a decision, having this Court address those issues now rather than later on appeal will provide certainty as to this law. The public interest and judicial economy will be served by early resolution of this suit. Because of the facial challenge to this law, it can be decided on legal grounds without the necessity of fact finding.

IV

GROUNDS FOR JUDGMENT FOR THE STATE

A

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 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 other requirements.

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 and instead 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. 2006). Plaintiffs fail to meet those requirements.

"[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 only claim "theoretically possible" future harm as did the Plaintiffs found to lack standing, as follows, 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.

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. Although they claim that the Act gives upstream agricultural users superior rights and they lost rights to challenge such withdrawals, these claims do not translate into injuries in the absence of an allegation that a water withdrawal is adversely impacting one of them. They do not make any such allegation of present actionable harm, and they claim a taking of property rights rather than procedural rights.

Plaintiffs also fail to meet standards for "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. Plaintiffs do not meet these standards for public importance standing because they do not complain of any actual or imminent water withdrawals. "[F]uture guidance" is not needed as to this facial challenge. Plaintiffs only present a policy question that is appropriate for the legislature to consider. Therefore, DHEC is asking this Court to take this case and make early disposition of it not because the constitutional issues are meritorious – they are not - but because the law, itself, is significant and the litigation should be concluded in an expeditious matter. As stated in *Carnival, supra:*

> 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 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.

B

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). 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 in any way that might injure Plaintiffs. If they do occur in the future and they believe that they have been injured, they can attempt to bring their action then as did the *Laidlaw* Plaintiffs. Clearly, at this point, this case does not present a justiciable controversy that is ripe for adjudication.

D

THE CONSTITUTIONAL ISSUE NEED NOT BE REACHED

Because Plaintiffs lack standing (*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, if the Court chooses to reach the issue, the law is constitutional as discussed below.

E

THE SURFACE WATER WITHDRAWAL ACT IS CONSTITUTIONAL

Under *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, the law is constitutional:

> [T]he 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.

Therefore, the General Assembly had the authority to provide for withdrawals from the State's surface waters as it has in the Surface Waters Withdrawal Act.

Moreover, Plaintiffs' fail in their claim of a taking of their "riparian property rights to consume water" They assert that this taking is either 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 and no public trust interest in the waterways that has been violated.

> 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).

Plaintiffs do not even allege that they own property along waterways that has been adversely impacted by upstream water withdrawals under the Surface Water Withdrawal Act. They have no property right that has been violated and no taking. They do not cite any case establishing a taking under similar circumstances nor does any South Carolina case recognize a property interest in the waters of the State. *Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., supra* ("'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."); see *also, infra.*

Plaintiffs erroneously cite *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. *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. They also cite *Young v. Wiggins,* 240 S.C. 426, 126 S.E. 2d 360 (1962), but that case also 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. In the instant case, the Plaintiffs do not allege that their property has been damaged by water withdrawals.

Plaintiffs claim a violation of the public trust interest in the waterways, but they rely on authority applicable to tidal waterways that 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.

Most certainly, the State has important interests to be preserved in nontidal waterways as well as tidal waters, but the degree of that interest need not be decided in this case because Plaintiffs do not allege an actual or imminent violation of any public interest in the waterways. They pose dire hypotheticals about significant water withdrawals, but they do not allege that any such withdrawals have occurred or are imminent.

Although Plaintiffs claim that their rights to challenge surface water withdrawals has been reduced under the Act, their takings claim is based on a denial of a purported property right, rather than a procedural right. They do not have a property right in a particular procedure, and they may never be impacted by a water withdrawal so as to attempt to challenge it. As stated in *Mississippi Forum on Children & Families v. Mississippi Dep't of Human Servs.*, 850 F. Supp. 2d 644, 649-50 (S.D. Miss. 2012):

> "An entitlement to nothing but procedure cannot be the basis for a property interest." *Shepard v. City of Batesville, Miss.*, 2007 WL 108288, at *8 (N.D.Miss. Jan. 8, 2007). Thus, courts have consistently held that where there is no property interest in the underlying decision, there is no protected property interest in the procedures which attend the decision. *See, e.g., Etere v. City of New York*, 381 Fed.Appx. 24, 25 (2d Cir.2010) (holding that where provisional employee had "no property interest in the employment, there [could] can be no property interest in the procedures that follow from the employment"); *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 793 (6th Cir.2005) (explaining that a party "cannot have a protected property interest in the procedure itself, whereby the contract was or ought to have been awarded"); *Anderson v. Kane*, 152 F.3d 923 (table), 1998 WL 416499, *4 (9th Cir.1998) (holding that probationary employees with no property interest in their subjective expectancy of tenure had no protected property interest in the procedures established for making decisions on promotion and tenure); *Shvartsman v. Apfel*, 138 F.3d 1196, 1199–1200 (7th Cir.1998) (rejecting contention that property right existed in procedures to contest

decision regarding entitlement where entitlement itself was not a protected property interest; doing so "would make the scope of the Due Process Clause virtually boundless"); *Garraghty v. Virginia Dep't of Corrections*, 52 F.3d 1274, 1285 (4th Cir.1995) (noting that state procedural requirements do not create a property interest in those procedures); *Mumford v. Godfried*, 52 F.3d 756, 759 (8th Cir.1995) (holding that "a contractual right to have certain procedures followed does not create a property interest in the procedures themselves"); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1463–1464 (11th Cir.1991) (noting that where there was no protected interest in privileges, there was no property interest in the standards for granting the privileges because "the process due and the constitutionally protected property interest are separate and distinct elements"); *Curtis Ambulance of Florida, Inc. v. Board of County Com'rs of Shawnee County, Kan.*, 811 F.2d 1371, 1377 (10th Cir.1987) (observing that "[c]ourts generally agree that no property interest exists in a procedure itself, without more"); *Scanlon v. Dept. of Mental Health*, 828 F.Supp. 421, 427 (S.D.Miss.1993) (stating it is "well-established that the mere existence of procedures ... does not in and of itself create a property right subject to federal due process requirements").

Plaintiffs' claims are a facial challenge to the law rather than an "as applied" challenge because they do not allege that their property has been adversely affected by a surface water withdrawal. In order to mount a facial challenge, they "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739 (1987)." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 543, 737 S.E.2d 830, 843 (2012). Plaintiffs fail in that challenge because they do not establish that the law is unconstitutional in all respects, or even as to themselves, which would be insufficient. For this reason as well as all of the other reasons set forth above, DHEC believes that Plaintiffs' constitutional claims are completely lacking in substantive merit as well as not being ripe for a decision.

CONCLUSION

DHEC respectfully requests that this Court grant this Petition and set a schedule for briefing the issues in this case. Although we believe that the Plaintiffs lack standing and have failed to allege a valid constitutional claim, the Supreme Court's taking this case and ruling on these issues would provide an earlier and final decision on the questions of this case regarding an important law of this State.

Respectfully submitted,

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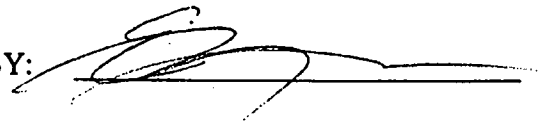
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February 13, 2015

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ADDENDUM TO PETITION FOR REMOVAL

JOWERS v. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELK)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

South Carolina Department of Health and Environmental Control,

Defendants.

Case No. 14-CP-06-322

COMPLAINT

(non-jury)

FILED FOR RECORD
2014 SEP -4 AM 10:05
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

The Plaintiffs, complaining of the Defendants, would respectfully show unto the Court:

THE PARTIES

1. The Plaintiffs are citizens of the State of South Carolina and property owners whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners.

2. James Jefferson Jowers, Sr., owns 40 acres of land located on Middleplace Road in Bamberg County between U.S. 301 and U.S. 321, identified on Bamberg Tax map as #0042-00-00-031. Mr. Jowers' property is bounded by the Little Salkehatchie River. He has owned the 40 acre tract, which he manages for timber, for four (4) years. He currently resides at 585 Brockstron Bridge Road, U.S. Highway 601 in Bamberg. Although Mr. Jowers manages the property for agricultural purposes, namely forestry, he does not need to withdrawal water from the Little Salkehatchie for those purposes. Mr. Jowers has recently observed that the Little

Salkehatchie has dried up, which has resulted in fish kills.

3. Andrew J. Anastos owns property at 1205 Goodwin Bridge Road in Travelers Rest, South Carolina. Mr. Anastos' property encompasses 90 acres with approximately 2,500 feet of frontage along the North Saluda River, and is identified on the Greenville Tax map as #0522020102201. Mr. Anastos currently makes use of the North Saluda for fishing, swimming and kayaking. As a riparian owner, he also uses water from the North Saluda to irrigate his plants, shrubs and flowers for personal use.

4. Ben Williamson lives at 1311 Oaklyn Road, Darlington, South Carolina, 29532. His property consists of 1,500 acres between Black Creek and Pocket Road on State Road 35 (South Charleston Road) in the eastern quadrant where State Road 35 crosses Black Creek. The property has been in his family since the mid-1760s and is bounded by Black Creek. In the past the property has been used for farming and forestry. Mr. Williamson currently uses the property as pasture and for beef cattle. Has a pumping station on Black Creek, but he currently does not need to utilize that pumping station in connection with his operations.

5. Melanie and Anthony Ruhlman own property along the North Saluda River in Greenville County, South Carolina. Reside on the property 301 Keeler Bridge Road, Marietta, South Carolina, 29661 lived there just over two years. Just over 5 acres, just under 500 feet of frontage on the North Saluda River. Garden; Do not use river for irrigation; Swim, tube, boat, kayak and canoe.

6. The Defendant is the South Carolina Department of Health and Environmental Control ("DHEC"). DHEC is the agency charged with the implementation and enforcement of the South Carolina Surface Water Withdrawal Act of 2010, S.C. Code Ann. § 49-4-10, et seq.

GENERAL ALLEGATIONS

7. Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id., Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913).

8. Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). All riparian owners located on a given waterway share the risks of low flow conditions equally. Thus, the nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners. Second, the State is entitled to restrict riparian withdrawals to the extent those withdrawals threaten established public trust uses of the river, namely navigation, commerce, and recreation. Third, the State is entitled to restrict riparian withdrawals if the State itself requires use of the water. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

9. Under the Public Trust Doctrine the State holds presumptive title to land below the high water mark in trust for the benefit of all the citizens of this State. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). "The

State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

10. "The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul.Envtl.L.J. 287 (1993)).

11. Under the public trust doctrine, the State is entitled to transfer trust assets to private parties in perpetuity in only two limited circumstances: First, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) ("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").

12. The Surface Water Withdrawal Act of 2010 represents a substantial reordering of private and public water rights in South Carolina. The Act establishes a permitting program whereby an applicant must adhere to the criteria set forth in Section 49-4-80. Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years. See S.C. Code Ann. § 49-4-100(B). But the Act allows riparian owners who are consuming water for agricultural uses to simply "register" their water use, rather than seek a permit. S.C. Code Ann. § 49-4-35. Only agricultural users of water are entitled to register their water use. Id. The Act does not restrict the amount of water than any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq.

13. The Plaintiffs are all riparian owners who make use of their riparian rights, but that do not presently qualify for a registration under the Act.

14. Once an agricultural user has registered its water use, or a non-agricultural user has received a permit, the Act deems water use by the registrant or permittee to be presumptively reasonable. S.C. Code Ann. § 49-4-110.

15. Once an agricultural user has registered its water use, the Act would allow the State of South Carolina to reduce the registered amount only if both of two conditions are met: 1) the registered user withdraws in excess of its registered amount, and 2) the State can prove that such withdrawals are harmful to the environment. S.C. Code Ann. § 49-4-35(E).

16. The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use without just compensation." The Fifth Amendment is applicable

to actions taken by the State of South Carolina pursuant to the Fourteenth Amendment to the U.S. Constitution.

17. Article I, Section 13(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13

FOR A FIRST CAUSE OF ACTION

(Taking Private Property for Private Use in Violation of the S.C. and U.S. Constitutions)

18. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 17 above.

19. Prior to the Act, all riparian owners on a given waterway had equal property rights in consuming that water. After the Act, agricultural users have far superior rights to all other types of riparian owners, including those who use water for domestic purposes, for industrial purposes, or for any other purposes.

20. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. After the Act, agricultural users are entitled to registration that entitles them to take a fixed amount of water in perpetuity.

21. Prior to the Act, all riparian owners could challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to take water. After the Act, downstream riparian owners cannot challenge upstream riparian owners' consumptive use as

unreasonably interfering with their rights to take water, because the Act deems registered water use to be presumptively reasonable.

22. Through these provisions, the State of South Carolina, in enacting the Surface Water Withdrawal Act, has taken riparian property rights of riparian owners not entitled to registration and given that property to agricultural users eligible for registration.

23. This kind of private-to-private transfer of property is prohibited by the "public use" requirement in the Fifth Amendment to the United States Constitution.

24. This kind of private-to-private transfer of property is prohibited by Article I, Section 13(A) of the South Carolina Constitution, which provides that "private property shall not be taken for private use without the consent of the owner."

FOR A SECOND CAUSE OF ACTION

(Regulatory Taking of Private Property)

25. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 24 above.

26. Assuming *arguendo* that the reallocation of riparian property rights effected by the Act did not constitute a private-to-private transfer but, rather, could be supported by a valid "public use" argument, then the State must compensate riparian owners not entitled to registration for the complete loss of their rights to consume water.

27. To illustrate how the Act has completely altered the common law riparian rights of riparian owners not entitled to registration, there is nothing in the statute that would prevent all water in all of the State's waterways from being permanently allocated to agricultural users (other than amounts that the Act requires for instream flow).

28. Under the Fifth Amendment to the Constitution and Article 1, Section 13(A) of the South Carolina Constitution, the State must compensate riparian owners not entitled to registration for the loss of their riparian property rights to consume water.

FOR A THIRD CAUSE OF ACTION

(Violation of the Public Trust Doctrine)

29. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 28 above.

30. Under the public trust doctrine, the State is entitled to transfer or "dispose of" trust assets to private parties in perpetuity in only two limited circumstances: first, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

31. Courts have interpreted disposals broadly, to include State actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003).

32. Navigable waterways are public trust assets: "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. . . ." S.C. Const., art XIV, §4.

33. The provisions of the Surface Water Withdrawal Act effectively dispose of substantial interests in the State's navigable waterways to agricultural users.

34. Under the Act, the State cannot revoke, reduce, or modify registered uses of water unless the registered user withdraws in excess of the registered amount. In other words, the State

has lost complete control of registered amounts of water in perpetuity; the registered owner has complete control of whether or not the State can ever alter the registered amount.

35. It is theoretically possible that agricultural users could obtain registrations for all water in all state waterways, other than amounts required by the law to be dedicated to instream flows. This permanent disposal of a vast amount of State public trust assets violates the public trust doctrine.

FOR A FOURTH CAUSE OF ACTION

(Due Process Violation)

36. The Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 – 35.

37. The Fifth Amendment, which provides that private property may not be taken by the federal government without just compensation, is applicable to the states through the Fourteenth Amendment due process clause. See Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581 (1897); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., et al., 65 F.3d 1113 (4th Cir. 1995). The Fourteenth Amendment provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law." In Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court held that "compensation for private property taken for public use is an essential element of due process of law" and that due process "recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." Chicago, B. & Q.R. v. City of Chicago, 166 U.S. 226, 236, 17 S.Ct. 581, 584 (1897).

38. A fundamental requirement of procedural due process is opportunity to be heard, and that opportunity must be granted at meaningful time and in meaningful manner. U.S.C.A. Const. Amends. 5, 14; see also Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

39. To the extent that the Surface Water Withdrawal Act takes private property for public use without compensation, a due process violation exists because there has been a denial of a right secured by the federal constitution.

40. The remedy for regulation that goes too far, under due process theory, is not just compensation but invalidation of regulation, and if authorized and appropriate, actual damages. U.S.C.A. Const.Amend. 5; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (there must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone").

WHEREFORE, Plaintiffs pray that this Court issue its order declaring that the offending sections of the Act be struck down as an unconstitutional taking under the South Carolina and United States Constitutions; declaring that the offending sections of the Act be invalidated for violating the Plaintiffs' due process rights; holding that the offending sections of the Act are in violation of the Public Trust Doctrine; restraining and enjoining the Defendant from issuing any further registrations to agricultural users; requiring the Defendant to compensate the Plaintiffs for taking their private property without just compensation; requiring the Defendant to pay the costs of this action; and granting such other and further relief as may be just and proper.

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Attorneys for the Plaintiffs

Georgetown, South Carolina

September 3, 2014

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.	)	MOTION TO DISMISS
	)	
South Carolina Department of Health And Environmental Control,	)	
	)	
Defendants.	)	
	)	

The Defendant South Carolina Department of Health and Environmental Control moves for the dismissal of the Complaint herein pursuant to Rules 12(b)(1), (3) and (6), SCRCP in that, for reasons set forth below, this Court lacks subject matter jurisdiction of this action, venue is improper and Plaintiffs have failed to state facts sufficient to constitute a cause of action:

1. Venue is improper in Barnwell County.
2. Plaintiffs have alleged no case or controversy.
3. Plaintiffs have no standing.
4. This matter is not ripe for adjudication.
5. No taking or other constitutional violation has occurred.
6. The Public Trust doctrine has not been violated.
7. The Surface Water Withdrawal, Permitting, Use, and Reporting Act is constitutional. S.C. Code Ann. §49-10-10, *et seq.*
8. Plaintiffs have failed to state facts sufficient to constitute a cause of action

For the foregoing reasons, the Defendant respectfully requests that this case be dismissed.

Respectfully submitted,

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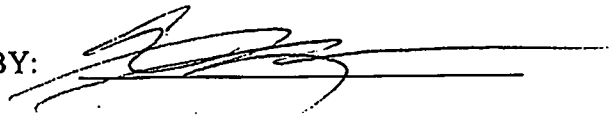
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BY: 

November 13, 2014

ATTORNEYS FOR DHEC

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.	)	**ANSWER**
	)	
South Carolina Department of Health and Environmental Control,	)	
	)	
Defendants.	)	
	)	

The Defendant South Carolina Department of Health and Environmental Control, answering the Complaint alleges the following:

FOR A FIRST DEFENSE

1. DHEC denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. DHEC admits Paragraph 1 on information and belief except that DHEC does not admit that Plaintiffs are "riparian owners" because the use of the term is a conclusion of law to which no response is necessary. To the extent that a response is needed to the allegation "riparian owners," DHEC craves reference to State law and denies that Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

3. DHEC admits Paragraph 2 on information and belief except for the last sentence of that Paragraph. The State denies the last sentence of that Paragraph to the extent that it refers to any part of the river other than the section 30 miles downstream from his property as

referenced in his affidavit, and DHEC is without sufficient knowledge or information now to admit or deny whether the fish kills, if any, are due to water levels, and therefore denies any such allegations.

4. DHEC admits paragraphs 3, 4 and 5 on information and belief, except that it denies any legal conclusions associated with the use of the term "riparian owner" in the last sentence of Paragraph 3 and denies that Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

5. DHEC admits Paragraph 6 except that the agency craves reference to the Surface Water Withdrawal Act for any duties or authority to implement and enforce that Act.

6. Paragraphs 7, 8, 9, 10 and 11 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any allegations in those paragraphs that are inconsistent with South Carolina law and denies that Plaintiffs have any legal rights that provide a basis for relief for them in this action.

7. As to Paragraph 12, the first sentence contains a conclusion of law to which no response is required. To the extent that, *arguendo,* a response is required to that sentence, and in response to the remainder of that Paragraph, DHEC craves reference to the Act and denies any allegations inconsistent with that law and other State law.

8. As to Paragraph 13, DHEC is without sufficient knowledge or information now to admit or deny that Plaintiffs do not now qualify for registration under the Act, and therefore , denies such allegations. The remainder of that sentence sets forth conclusions of law to which no response is necessary. To the extent that, *arguendo*, a response is needed to the allegations "riparian owners" and "riparian rights" DHEC craves reference to State law and denies that

Plaintiffs have any legal interests associated with the watercourses except such as they can prove under the law.

9. As to Paragraphs 14 and 15, DHEC craves reference to the Act and denies any allegations inconsistent with that law.

10. As to Paragraphs 16 and 17, DHEC craves reference to the cited Constitutional provisions for a complete statement of their contents. DEHC denies that Plaintiffs have been denied any rights that they claim under those provisions.

11. Paragraph 18 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

12. Paragraphs 19, 20, and 21 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations to the extent that they are inconsistent with the Act and other State law.

13. Paragraphs 22, 23 and 24 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations including denying any property rights that have been taken in violation of the State and United States Constitutions.

14. Paragraph 25 is a cumulative paragraph to which no response is necessary. To the extent that, arguendo, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

15. Paragraph 26 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations.

16. Paragraph 27 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any allegations in that paragraph that are inconsistent with the Act and denies that Plaintiffs have any riparian rights that are altered by the law.

17. Paragraph 28 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies those allegations.

18. Paragraph 29 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

19. Paragraphs 30, 31 and 32 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina.

20. Paragraphs 33, 34 and 35 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the Act or other State law.

21. Paragraph 36 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, DHEC incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

22. Paragraphs 37 and 38 set forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina.

23. Paragraph 39 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies that the Act takes private property for public use and denies that a due process violation exists.

24. Paragraph 40 sets forth conclusions of law to which no response is required. To the extent that, *arguendo*, responses are required, DHEC denies any such allegations that are inconsistent with the law applicable in the courts of South Carolina and expressly denies that the Act is invalid or that Plaintiffs are entitled to damages.

25. The Prayer for Relief sets forth conclusions of law to which no response is required. To the extent that a response is required, DHEC denies those allegations.

FOR A SECOND DEFENSE

26. Venue is improper in Barnwell County.

FOR A THIRD DEFENSE

27. Plaintiffs have alleged no case or controversy.

FOR A FOURTH DEFENSE

28. Plaintiffs have no standing.

FOR A FIFTH DEFENSE

29. This matter is not ripe for adjudication.

FOR A SIXTH DEFENSE

30. No taking or other constitutional violation has occurred.

FOR A SEVENTH DEFENSE

31. The Public Trust doctrine has not been violated.

FOR AN EIGHTH DEFENSE

32. The Surface Water Withdrawal, Permitting, Use, and Reporting Act is

constitutional. S.C. Code Ann. §49-10-10, *et seq.*

FOR A NINTH DEFENSE

33. Plaintiffs have failed to state facts sufficient to constitute a cause of action

FOR A TENTH DEFENSE

34. This Court lacks subject matter jurisdiction of this action.

WHEREFORE, having fully answered the Complaint, DHEC prays as follows:

1. That judgment for DHEC be entered as to the Complaint and that the relief sought by the Plaintiff be denied as to the State.

2. For such further relief as the Court deems just and proper.

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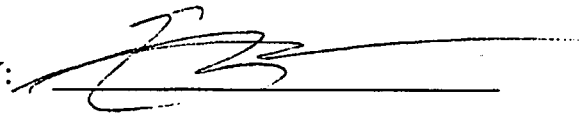
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BY: 

January 28, 2015

ATTORNEYS FOR DHEC

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
In The Original Jurisdiction

REMOVAL REQUESTED FROM THE
Court of Common Pleas, Barnwell County
Honorable R. Markley Dennis, Jr.

Case No. 09-ALC-07-0069-CC

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

Respondents/Plaintiffs,

vs.

South Carolina Department of Health and Environmental Control,

Petitioner/Defendant.

RETURN TO PETITION FOR EXTRAORDINARY RELIEF INCLUDING REMOVAL AND ORIGINAL JURISDICTION

The Respondents James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman submit this Return to the South Carolina Department of Health and Environmental Control's ("DHEC") Petition for Extraordinary Relief Including Removal and Original Jurisdiction. The Respondents join in DHEC's request that this Court exercise its authority to issue a writ to remove this case and accept it in the Court's Original Jurisdiction. The Respondents would show unto the Court that the Surface Water Withdrawal and Reporting Act of 2010 ("the Act"), S.C. Code Ann. § 49-4-10, et seq., and specifically the portions of the Act authorizing agricultural "registrations," violates the Article I, Section 13(A) of the South Carolina

Constitution, the Fifth and Fourteenth Amendments of the United States Constitution, and the Public Trust Doctrine. The Respondents oppose DHEC's request that this Court dismiss the action based on lack of standing or justiciability.

I. BACKGROUND

The Surface Water Act created a program that gives rights of consumptive water use to agricultural users, rights that are far superior to the previously-existing common law rights of riparian owners. Those water rights given to agricultural users necessarily detract from the usage rights of all other riparian owners in South Carolina. The Act's program takes these rights without due process, and replaces them with something inadequate to compensate those riparian owners for their loss of rights. Furthermore, through the Act's program, the State is allocating a public trust asset – navigable waters of the State – to private individuals with no benefit to the public.

A. Riparian Rights

Lands traversed or bounded by a natural watercourse are riparian property and have attached riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id., Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913). Under the common law, each riparian owner is entitled to take uncapped amounts of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive use such that it unreasonably interferes with a downstream riparian owners' right to consumptive use.[1] McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). Second, the State is entitled to restrict riparian withdrawals

[1]All riparian owners located on a given waterway share the risks of low flow conditions equally. Thus, the nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners.

to the extent those withdrawals threaten established public trust uses of the river, namely navigation, commerce, and recreation. Third, the State is entitled to restrict riparian withdrawals if the State itself requires use of the water. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

B. The Surface Water Act

The Act creates three classes of users: those consuming less than 3 million gallons; a permitting program for users over 3 million gallons; and a registration program applicable to "agricultural" users. Under the permitting program an applicant must adhere to the criteria set forth in Section 49-4-80. Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years and DHEC must make a determination that use is reasonable and the permit is of limited duration, which accounts for future changes in conditions. See S.C. Code Ann. § 49-4-100(B).

However, the Act allows agricultural uses to simply "register" their water use, rather than seek a permit. S.C. Code Ann. § 49-4-35. The Act does not restrict the amount of water than any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq. Once an agricultural user has registered its water use, the Act deems water use by the registrant to be presumptively reasonable. S.C. Code Ann. § 49-4-110.

The Act also provides for grandfathered registrations: "An existing registered surface water withdrawer already reporting its withdrawals to the department as of January 1, 2011, may maintain its withdrawals at its highest reported level or at the design capacity of the intake structure which will be permanent as of January 1, 2011, and is deemed to be registered with the department." S.C.

Code Ann. 49-4-35(B).[2] Thus, for a grandfathered registration, the measure of registered amount is the capacity of the diversion system, which might include substantial waste of water through, for example, poor irrigation equipment or methods.[3] Under the common law, waste is per se unreasonable, but the Act means that it can never be challenged (or eliminated), even by DHEC.

C. The Elimination of Riparian Rights

The Surface Water Withdrawal Act represents a substantial reordering of private and public water rights in South Carolina. Prior to the Act all riparians owners had the same rights to protect their consumptive use from unreasonable interference. But after the Act the Respondents/Plaintiffs and all other riparian owners that do not qualify for the registration program have inferior rights because they can no longer prevent an upstream agricultural user from unreasonably interfering with their consumptive use. The Respondents/Plaintiffs and other riparian owners lost the right to protect their property interest. Thus, the taking of riparian rights occurred the instant the Act was passed and signed into law.

Riparian rights are defined, named, specific property rights, similar to, for example, the right to exclude. See Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L. Ed. 2d 332 (1979) (recognizing that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"). If a landowner is legislatively

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[2]155 registrations have been grandfathered pursuant to Section 49-5-35(B), transferring many million of gallons per day of public trust assets to those agricultural users in perpetuity. Should the petition be granted, the Respondents/Plaintiffs will include information showing the number and amounts for grandfathered registrations obtained through the Freedom of Information Act.

[3]For grandfathered registrations there is also no requirement to ensure that the withdrawal amounts are within safe yield because those registrations are automatic upon passage of the Act.

deprived of his/her right to exclude, it does not matter whether a trespass has occurred. Similarly, in this case, the Act's deprivation of the Respondents/Plaintiffs right to protect their consumptive use means that it does not matter if an upstream user's consumption is unreasonably interfering with their consumptive use. The only tool available before passage of the Act to ensure the right to consume water was an unreasonable interference lawsuit. Once that tool is eliminated, the property right lost.

II. Basis for Hearing this Case in the Court's Original Jurisdiction

SCACR Rule 245 allows this Court to accept cases in its Original Jurisdiction if the public interest is involved. The Respondents/Plaintiffs agree with DHEC that this case involves an important issue of State law and thus, it is in the public's interest to resolve this case swiftly. (Petition, p. 4). DHEC characterizes this case solely as a transfer of public property, and asserts that Respondents'/Plaintiffs' rights are not infringed because no registrations are currently interfering with their consumptive rights. (Petition, pp. 10 -12). These arguments misconstrue the basis for this case.

Respondents/Plaintiffs assert that the Act both: 1) transfers public property in the form of transferring navigable waters to private individuals in a manner that impedes the public's use of an interest in those resources, and 2) transfers private property in the form of riparian rights to prevent unreasonable use which no longer exist with respect to agricultural users. Plantiffs further allege that their rights were taken, i.e., the injury occurred, the moment the Act was signed into law.

A. The Act Authorizes a Private to Private Transfer of Property

Article I, Section 13(A) of the South Carolina Constitution provides that "private property shall not be taken for private use without the consent of the owner." See Clemson Univ. v. First

Provident Corp., 260 S.C. 640, 649, 197 S.E.2d 914, 918 (1973) (holding that "the attempted taking [to widen a drainage ditch on another's private property] is for private use and is prohibited under . . . the Constitution"); Beaudrot v. Murphy, 53 S.C. 118, 30 S.E. 825, 826 (1898) (holding that a statute which authorized private property to transfer to another private citizen was unconstitutional). The alleged private-to-private transfer of property is also prohibited by the "public use" requirement in the Fifth Amendment to the United States Constitution. The fundamental purpose of the Fifth Amendment's prohibition of takings is to protect "individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'" Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002).

In Young v. Wiggins, 240 S.C. 426, 126 S.E.2d 360 (1962), private property owners surrounding a lake challenged a governmental regulation that would enlarge the lake for the private agricultural use of one of the properties beside the lake, while submersing 250 acres of land. The court recognized that "the conservation of water and its distribution for purposes of irrigation may . . . be for a public use," but recognized that in this instance the use was private. Id. at 434, 126 S.E.2d at 364. Thus, it upheld the issuing of an injunction to prevent enlargement of the lake. Id. at 435, 126 S.E.2d at 365. ("As between individuals, no necessity, however great, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.") (internal quotation marks omitted). Similarly, in this case the government is registering private agricultural users to take property rights owned by other private citizens.

Under the Act, agricultural users have far superior rights to all other types of riparian owners, including those who use water for recreational purposes, for domestic purposes, for industrial

purposes, or for any other purposes. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. Under the Act, agricultural users are entitled to registration that entitle them to take a fixed amount of water in perpetuity. That Act itself took away the riparian rights and replaced them with something inferior.

The only tool to ensure the right to consume water is an unreasonable interference lawsuit and that tool is now broken. The Act provides that all registered amounts are "presumptively reasonable." Thus, any usage challenge for a registered user's "unreasonable interference" pursuant to common law would be a difficult, if not impossible, task.

The Act represents such a fundamental change that it threatens the entirety of riparian owners rights, with the result that such a right may not be worth anything at all.

B. Violation of the Public Trust Doctrine

Setting aside for a moment Plaintiffs' assertion that the Act represents a private to private transfer, assuming *arguendo*, that we are speaking only of public property, i.e., lands below the mean high water mark, then a transfer of those public trust assets violates the public trust doctrine. DHEC appears to argue that only tidal lands are subject to the public trust. (Petition, p. 12). Respondents/Plaintiffs have not uncovered any legal support for this assertion. Instead, the S.C. Constitution provides that: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." without limitation. S.C. Const. art. XIV, § 4. Under the public trust doctrine, the State is entitled to transfer or "dispose of" trust assets to private parties in perpetuity in only two limited circumstances: first, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation; second, if the transfer has a de minimis impact on the public's ability to engage in established trust uses. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387

(1892).

Courts have interpreted disposals broadly, to include State actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (finding that the state cannot allow for activity that will impair marine life, water quality or public access). Under the Public Trust Doctrine the State holds presumptive title to land below the high water mark in trust for the benefit of all the citizens of this State. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). "The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

The provisions of the Surface Water Withdrawal Act effectively dispose of substantial interests in the State's navigable waterways to agricultural users. Under the Act, the State cannot revoke, reduce, or modify registered us of water unless the registered user withdraws in excess of the registered amount and that excess withdrawal is detrimental to human health or the environment. The State has transferred complete control of registered amounts of water in perpetuity to agricultural users. This permanent disposal of a vast amount of State public trust assets violates the public trust doctrine.

III. The Respondents/Plaintiffs Have Standing

After explaining the important issues at stake here, DHEC then asks this Court to dismiss this case based on a lack of standing and justiciability. DHEC's challenge to Respondents/Plaintiffs' standing fails for two reasons. The Respondents/Plaintiffs have alleged a sufficient factual basis for traditional constitutional standing, and this case meets the public importance exception to standing requirements.

A. Public Importance

"The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance." South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013). "Whether an issue of public importance exists necessitates a cautious balancing of . . . competing policy concerns underlying the issue of standing." ATC 380 S.C. at 198-200, 669 S.E.2d at 341 (2008) (quoting Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). "The key to public importance analysis is whether a resolution is needed for future guidance . . . [y]et the very nature" of the doctrine "resists a formulaic approach, as each case must turn on 'the competing policy concerns'" of standing. Id.

In Baird v. Charleston County, doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government action are of public importance. Id. at 531, 75. The relevance of illegal government action for public importance standing has been repeatedly emphasized by the Court. See e.g., South Carolina Public Interest

Foundation, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply"). Baird also found that the alleged illegal government action harmed a "profound public interest." Baird, 333 S.C. at 531, 511 S.E.2d at 75. There the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. Id. To determine the public interests at stake, the Court looked to the overall public policy embodied by the allegedly violated statute—the Hospital Bonds Act—and its stated purpose "to promote the public health and welfare." Id. The Court found that alleged illegal government action which implicated widely applicable public interests was sufficient to establish public importance standing.

A case that rises to the level of invoking this Court's jurisdiction, as requested by DHEC, involves a case of significant public interest. In this case, while Respondents/Plaintiffs have made sufficient allegations of actual and imminent harm to establish standing, they agree with DHEC that "because the law, itself, is significant," the public interest requires resolution of this case. Constitutional challenges to state law have been found to meet the significant public interest requirement for standing. See, e.g., Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741-42 (2007) (finding "Commissioners have standing to challenge the constitutionality of an Act which authorizes their removal from office" under public importance standing); Sloan v. Dep't of Transp., 365 S.C. 299, 304-05, 618 S.E.2d 876, 878-79 (2005) (holding that plaintiff had standing to bring his challenge despite the fact that his case was moot). Furthermore, the Respondents/Plaintiffs' challenge requires resolution for "future guidance" as to whether we will continue to recognize riparian rights or allow private property transfer in direct contradiction of our state constitution. See Baird v. Charleston Cnty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)

Thus, this case falls within the public importance exception to standing.

B. Constitutional Standing

The Supreme Court has provided a three-part test to establish standing under Article III of the Constitution:

> 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 v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006).

In this case, the Respondents/Plaintiffs waited until the Act went into effect, Defendant issued registrations pursuant to the Act, and registrants had authorization to withdraw water before bringing suit. The facts are sufficiently fleshed out, and the harm is certainly real, so that the Court may render a verdict. Respondents/Plaintiffs are not asking the Court to interpret the law without seeing how it applies, they are asking the Court to evaluate the law now that it is in effect and being used by DHEC. Respondents/Plaintiffs do not have to wait until an upstream registrant is unreasonably interfering with their consumptive use to bring suit. At least one of the Respondents/Plaintiffs is downstream from a registrant (See Exhibit I, Jowers Affidavit), and more registrations upstream from the Respondents/Plaintiffs are anticipated upon analysis of the 155 grandfathered registrations. Furthermore, the violation of the public trust doctrine has already happened where the defendants have given away waters that belong to the public for private gain. These injuries are real, concrete injuries that are ripe to be heard before this Court. Furthermore,

should the Court withhold consideration in this case, the amount of registrations and lost surface water could be disastrous. Now is the time to bring this case (and issue a preliminary injunction), before all of the state's waters are allocated away.

As to particularized injury, these Respondents/Plaintiffs are each suing for their own unique property rights as riparian owners. These Respondents/Plaintiffs are particularly and uniquely injured. Part of the nature of a takings claim is that it involves unique property, and the Respondents/Plaintiffs are each uniquely harmed by the loss of that property. The fact that Respondents/Plaintiffs seek to abolish an unconstitutional law, which would benefit the entire state, does not undermine standing. See National Parks Conservation Ass'n v. Norton, 324 F.3d 1229 (11th Cir. 2003) (Environmental organizations had standing to bring Fifth Amendment equal protection claim against National Park Service (NPS) relating to exclusive private use of structures off Key Biscayne, Florida; although in their complaint organizations sought to vindicate rights of public as whole, rather than those of their members specifically, affidavits of members who had visited national park in question and had their recreational and aesthetic enjoyment thereof impaired by lack of access to structures satisfied requirement of concrete and particularized harm).

DHEC misunderstands the nature of the injury at stake. DHEC repeatedly cites to "theoretically possible" language in the Complaint to deflect the injuries experienced by the Respondents. (Petition, p. 3, 6). First, DHEC takes the "theoretically possible" language out of context. The Respondents allege public trust violations and the full language states that: "It is theoretically possible that agricultural users could obtain registrations for all water in all state waterways, other than amounts required by the law to be dedicated to instream flows. This permanent disposal of a vast amount of State public trust assets violates the public trust doctrine."

The "theoretical possibility" is that every single drop of useable water could be given to agricultural users. This phrase taken out of context illustrates that DHEC misunderstands the injury at stake. The injury is not whether a withdrawal has already occurred preventing which interferes with their rights to consume water (Petition, p. 3, 6), rather the injury occurred the moment the Act was signed into law because the statute itself took away their riparian rights and replaced it with something inferior, without due process or compensation.

An injury may be "actual or threatened." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974). In this case, at least one Respondent/Plaintiff is downstream from registered users and is already experiencing lower water levels where the Little Salkehatchie River flows through his property[4] (See Exhibit I, Jowers Affdiavit); however, contrary to DHEC's assertion, whether there is an upstream registrant is irrelevant because the property right was taken upon passage of the Act. Upon passage, the State took Respondents/Plaintiffs (and all other riparian owners) rights to protect their property and replaced it with something inferior – the right to apply to DHEC for a permit. In other words, the injury is not just for each Respondent/Plaintiff the loss or threatened loss of water on his/her property, it is the loss of the right to challenge a use as unreasonable. The loss of the riparian right is an actual and concrete injury that forms the basis for Respondents'/Plaintiffs' due process claim. Thus, the injury to property and property rights is actual and imminent. Not conjectural or hypothetical, as also explained in the ripeness analysis.

As to the "fairly traceable" requirement, the injury of loss of riparian water rights is directly caused by the Act as administered by DHEC. There is no intervening cause at issue in this case.

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[4]Respondents/Plaintiffs expects that there are additional registrations that we are not yet aware of because the Act contains no reporting requirements for DHEC to disclose registrations to the public.

There is not even a long chain of causation to follow. Any argument that other types of water users cause or could potentially cause the same harm does not undercut standing for the harm caused by defendant. American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) (recognizing standing to sue hog farms for pollution of a waterway even though there were other sources of pollution along the river that similarly caused loss of enjoyment of the water for plaintiffs).

Redressibility is also met in this case. If the court finds the Act is unconstitutional, the court may strike it down in whole or part, which would revoke the registrations issued and allow the restoration of Respondents'/Plaintiffs' riparian water rights. Striking the Act as unconstitutional would also redress the lack of due process because it would restore the riparian system and Respondents/Plaintiffs would have the ability to challenge unreasonable uses by upstream agricultural users. Finally, if the court found this was a taking for public use, the appropriate redress would be fair compensation for the property.

IV. This Case is Justiciable

"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)."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." Waters v. S. Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 918 (1996). Thus, evaluating ripeness requires a consideration of the kind of legal claim that is being made, and whether that claim is sufficiently concrete so that the court may render a verdict.

Here, the Act is in effect. The rights of riparian owners are well established and acknowledged. The Court is fully capable of evaluating the law as it exists and determining its Constitutionality. The Respondents/Plaintiffs are currently experiencing a hardship because their rights have been taken. They should not have to wait any longer for resolution. The violation of the public trust doctrine has already happened where the defendants have given away substantial waters that are not in the public interest.

At this early stage it is clear that, at a minimum, Mr. Jowers is downstream from a registered user effecting his water use.

V. Request for Preliminary Injunction

The Respondents/Plaintiffs filed a motion for preliminary injunction, which was denied without argument on January 15, 2015. Exhibit I. The Respondents/Plaintiffs renew their request for injunctive relief, should this Court determine that it will exercise its Original Jurisdiction over this matter. The Respondents/Plaintiffs incorporate the arguments set forth in the attached Memorandum and Affidavits in support of their request for injunctive relief.

Respectfully submitted,

Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
FAX: (843) 527-0540
Attorneys for the Plaintiffs

Georgetown, South Carolina

March 5, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

South Carolina Department of Health and Environmental Control,

Defendant.

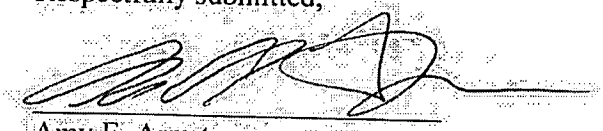
Case No. 14-CP-06-322

MOTION FOR SUMMARY JUDGMENT

The Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman hereby move the Court for summary judgment in their favor pursuant to SCRCP Rule 56. Specifically, the Plaintiffs would ask the Court to find the registration provisions of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act, S.C. Code Ann. § 49-4-10, et seq., to be unconstitutional.

For the foregoing reasons, the Plaintiffs respectfully request that this Court issue an Order enjoining the Defendant DHEC from issuing any water withdrawal registrations.

Respectfully submitted,



Amy E. Armstrong
Amelia A. Thompson
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Fax: (843) 527-0540

Tim Moore
The Moore Firm, LLC
Post Office Box 160
319 Washington St.
Barnwell, SC 29812
Telephone: (803) 259 2021
Fax: (803) 259 0208

Attorneys for the Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman

Georgetown, South Carolina
September 14, 2015

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF ANDREW J. ANASTOS**

PERSONALLY APPEARED before me Andrew J. Anastos, who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside at and own over ninety (90) acres of land at 1205 Goodwin Bridge Road, Travelers Rest, South Carolina.

3. I purchased my property on February 23, 1978.

4. My property is identified on Greenville Tax map as #0522020102201. (Attached as Exhibit A)

5. My property has approximately 2,500 feet of frontage along the North Saluda River.

6. My family and I use the River for fishing, swimming and kayaking; and to irrigate plants, shrubs and flowers for personal use.

7. Where it runs through my property, the North Saluda River is about 45-50 feet wide at its widest area and about 30 feet wide at its narrowest area.

8. I grew up in this area and my family and I have enjoyed the North Saluda River since I was young.

9. I remember how the North Saluda River was before the Poinsett Reservoir was built. It had small mouth bass and catfish, and was at least fifty percent larger than it is today.

Exhibit 2

Now those recreational fish species are completely gone, and only smaller species of fish live in the River.

10. I do not want to see the River further degraded or destroyed.

11. I do not want to lose more species of fish in the River.

12. I am also concerned about the whole state's water system being further degraded or destroyed.

13. I am familiar with the Surface Water Withdrawal Act of 2010.

14. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

15. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

16. I am aware that the Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

17. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount and the State can prove that such withdrawals are detrimental to the environment or human health.

18. I believe that the Act restricts or eliminates my property rights to enjoy and use the North Saluda River where it flows through my property.

19. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my ownership rights in the use of the North Saluda River.

20. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

21. The North Saluda River adds value to my property.

22. The partial or complete loss of flow of the North Saluda River through my property would diminish my property value.

Andrew J. Anastos

Andrew J. Anastos

SWORN TO before me this

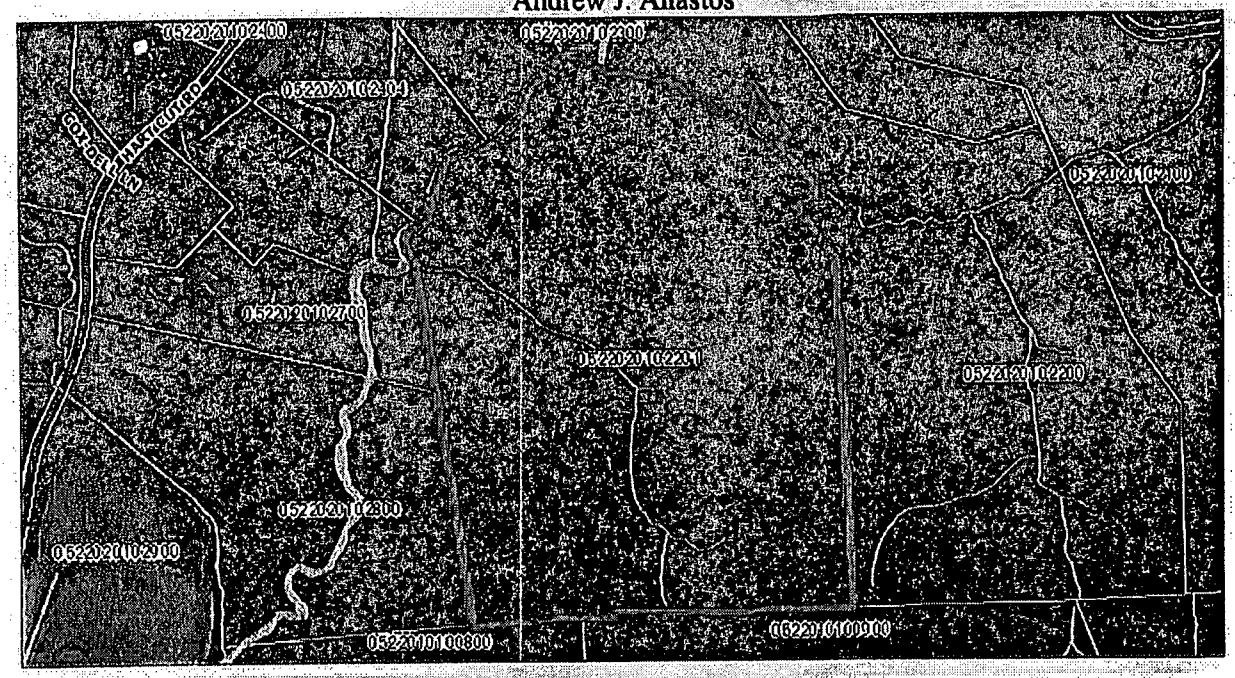
12 day of November, 2014.

Melba A Barton (SEAL)

Notary Public for South Carolina

My Commission Expires: October 2, 2017

Andrew J. Anastos



PIN / Tax Map #	0522020102201	Jurisdiction	1
Owner Name	Anastos Andrew J	Land Use	9171
Owner Name 2		Legal Description	NONE
Mailing Address	Po Box 477	Subdivision	
City	Marietta	Site Address Number	
State	SC	Site Address Street	OFF GOODWIN BRIDGE
Zip Code	29661	Sale Price	$0
In Care Of		Fair Market Value	$389,340
Previous Owner		Taxable Market Value	$389,340
Deed Date	2/23/1978	Taxes	$930.47
Deed Book	1074	Date Taxes Paid	NaN/NaN/NaN
Deed Page	136	Estimated Acres	92.2
Plat Book		Square Feet	1720
Plat Page	0	Number of Bedrooms	3
Tax District	371	Number of Bathrooms	2
Market Area	002074	Number of Half Baths	1

Disclaimer: This Map is not a LAND SURVEY and is for reference purposes only. Data contained in this map are prepared for the inventory of Real Property found within this jurisdiction, and are compiled from recorded deeds, plats, and other public records. Users of this map are hereby notified aforementioned public primary information sources should be consulted for verification of the information contained in this map. Greenville County assumes no legal responsibility for the information contained in this map.

Map Scale
1 Inch = 799 feet
11/5/2014

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF JAMES J. JOWERS, SR.**

PERSONALLY APPEARED before me James Jefferson Jowers, Sr., who being duly sworn

deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside at 585 Brockstron Bridge Road, U.S. Hwy. 601, Bamberg, SC 29003.

3. I own forty (40) acres of land on Middleplace Road in Bamberg County, South Carolina, between U.S. Hwy. 301 and U.S. Hwy. 321, which is a few miles away from where I live.

4. I purchased my forty acre tract approximately four years ago. Prior to that, I owned property on the South Edisto River and my son currently owns property on the South Edisto River.

5. I have lived in Bamberg County for sixty-five years and the water resources, in particular the South Edisto and the Little Slakehatchie Rivers, have contributed significantly to my love and appreciation for this part of the state.

6. Access to these water ways through property ownership has enhanced my quality of life.

7. My property is identified on Bamberg Tax map as #0042-00-00-031. (Map Attached as Exhibit A)

Exhibit 3

8. My property is bounded by the Little Salkehatchie River. The South Edisto River is about three miles upstream from my property.

9. I manage my property for timber, and use it for hunting, fishing, and recreation.

10. I visit my property several times a week.

11. I hunt deer when it is hunting season. I also fish when there is enough water in the River for fishing.

12. Currently the water level in the River is problematically low, but still flowing.

13. Right now the upstream farms do not need much water. However, during the times of year when crops are growing there is a great pull on the River.

14. I want to protect myself and other citizens from running out of water, because we all rely and depend upon our water resources.

15. I feel that wise management of our rivers is critical to me and all citizens of South Carolina because everybody has to have water.

16. I am concerned that if the River dried up, I would not have waterfront property, recreational use or water rights in the Little Salkehatchie River.

17. I have seen photos of fish kills (Attached as Exhibit B), which happened about 30 miles downstream from my property. I am concerned about that.

18. I would hate to see fish kills happen on my property.

19. I am familiar with the Surface Water Withdrawal Act of 2010.

20. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

21. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

22. I am aware that the Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

23. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or

withdrawer if the registered user withdraws substantially more surface water than its registered amount and the State can prove that such withdrawals are detrimental to the environment or human health.

24. I believe that the Act eliminates my property rights, specifically the right to protect my reasonable use of the Little Salkehatchie River where it flows through my property.

25. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my ownership rights in the use of the Little Salkehatchie River.

26. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

27. The Little Salkehatchie River adds value to my property.

28. The partial or complete loss of flow of the Little Salkehatchie River through my property would diminish my property value because it would no longer be waterfront property.

James Jefferson Jowers, Sr.

SWORN TO before me this

14th day of Nov., 2014.

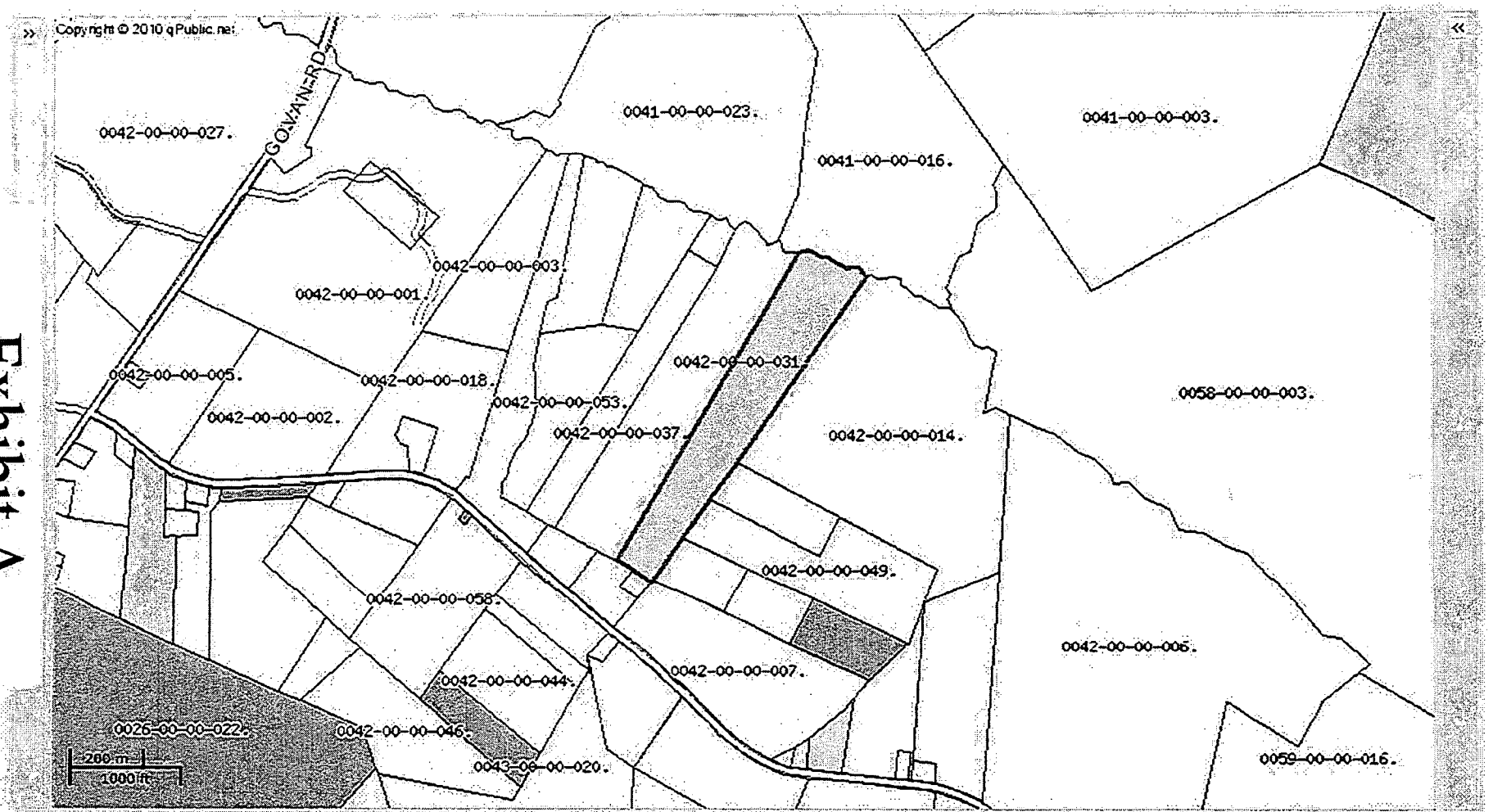
(SEAL)

Notary Public for South Carolina

ADAM C. NESS
Notary Public, State of South Carolina
My Commission Expires 7/1/2021

My Commission Expires:

Jowers Property



Bamberg County makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll.

Exhibit A

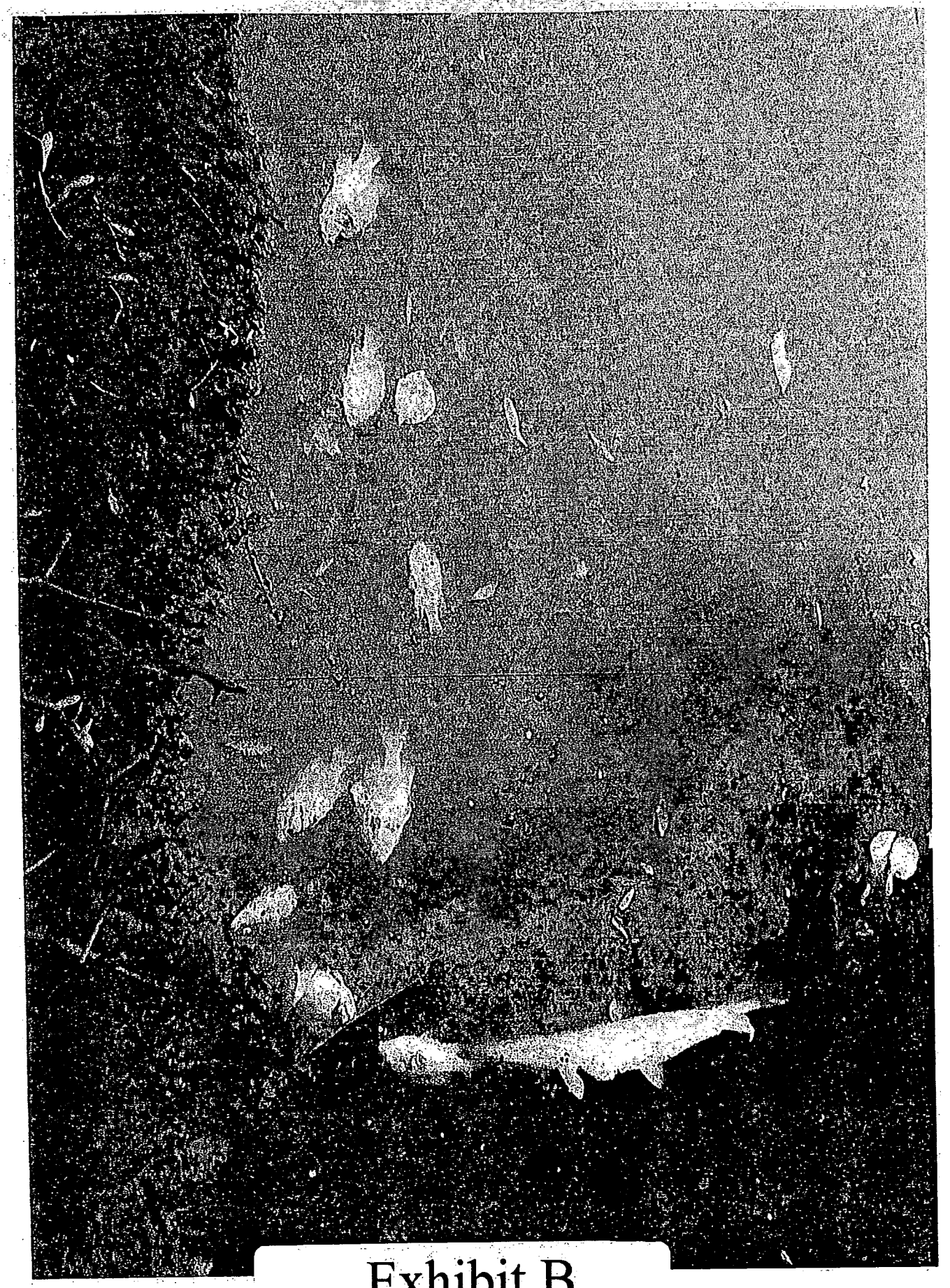
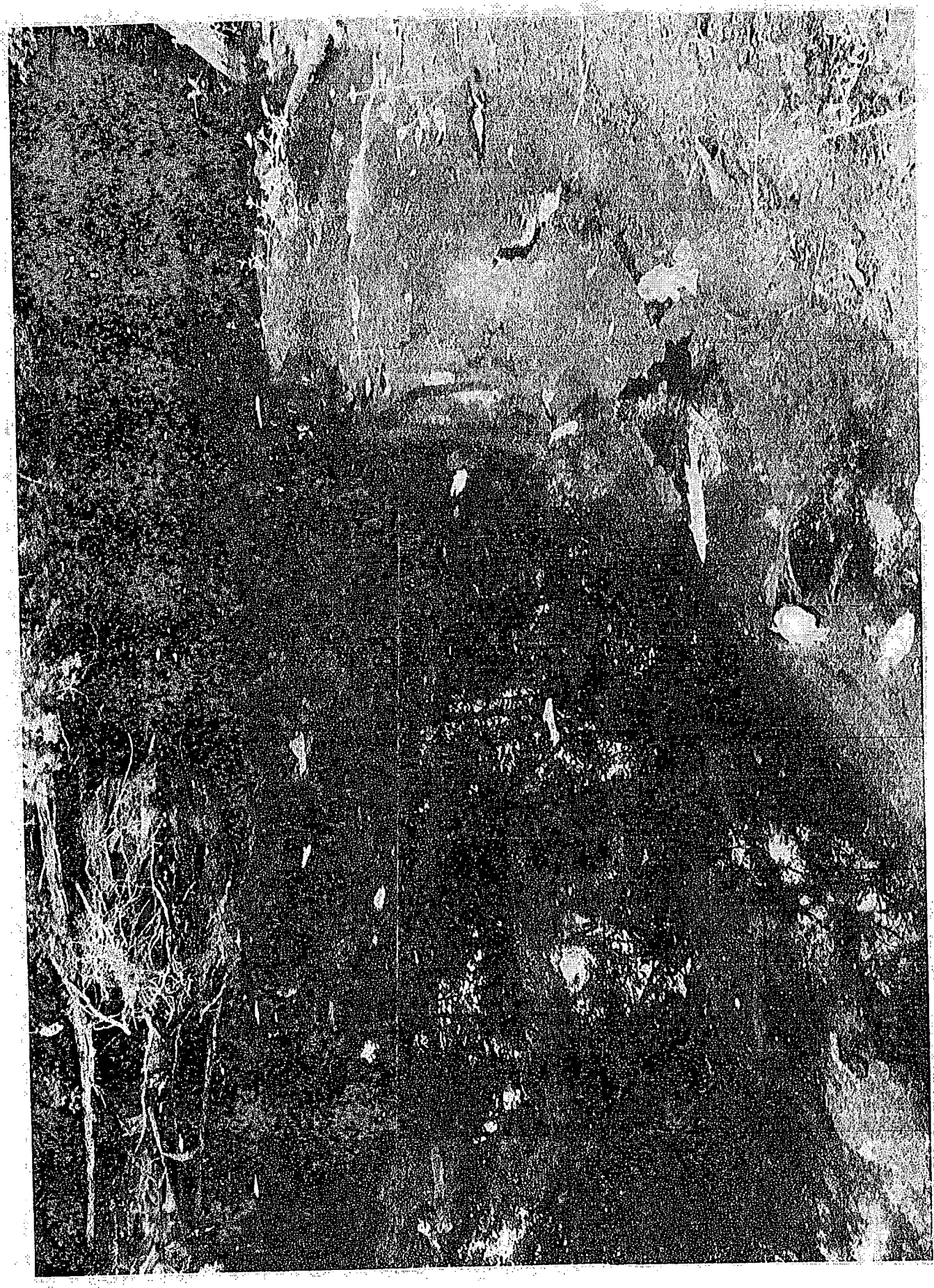


Exhibit B



STATE OF SOUTH CAROLINA)) COUNTY OF BARNWELL)		IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman; Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF BEN WILLIAMSON**

PERSONALLY APPEARED before me Ben Williamson, who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. I reside on property at 1311 Oaklyn Road, Darlington, South Carolina, 29532, which I own jointly with five other members of my family.

3. Our property consists of approximately 1,500 acres between Black Creek and Pocket Road on State Road 35 (South Charleston Road) in the eastern quadrant where State Road 35 crosses Black Creek.

4. Our property has been in the family since the mid-1760s.

5. Our property is bounded by Black Creek, which runs from the southwest to southeast boundary, making up the southern property line.

BW

6. I have lived on our property all of my life.

7. I use the property for farming, forestry, and raising beef cattle.

8. My extended family and I use Black Creek to paddle, fish, and swim. We have a regular family and community picnic ground by Black Creek that we use often. Almost everybody that comes to the picnics goes swimming too.

9. Black Creek has a tremendous following of people, in my community and all

Exhibit 4

along its course through Darlington and Florence Counties, who use and value it highly. Use of the Creek has been the subject of considerable controversy over the years, and my family has intently tried to guard and protect it.

10. My understanding of the history of Black Creek is as follows: In the 1790s, the SC Legislature had a big controversy over sawmills on Black Creek. In the early 1900s, Black Creek began to be used heavily for transportation and disposal of industrial waste. In 1941, citizens in Darlington and Florence counties formed Black Creek Protective Association, which was one of the first environmental organizations chartered in the state. In the late 1960s and early 1970s, several large fish kills occurred, moving hundreds of citizens to re-activate the Black Creek Protective Association and, with the help of the US EPA and the SC DHEC, to press successfully for revision of waste discharge permits, upgrading of the classification of Black Creek, and enforcement of regulations. In 1980, Black Creek Land Trust was formed for the purpose of influencing the use of land along Black Creek; it acquired several tracts of land and conservation easements, and generally raised the public's awareness of the value of this stream. The Black Creek Land Trust has recently consolidated with the Pee Dee Land Trust, an organization that I am a member of and support. In sum, my family has been involved in a substantial amount of political activity centered around the Creek for a couple hundred years.

11. Where it flows past our property, Black Creek is about 50 feet across and 10 feet deep. It is a substantial body of water, what most people would call a river.

12. Black Creek is unique because it is a swift-flowing coastal plains stream.

13. Over the past 10 to 15 years I have noticed that Black Creek is a bit lower in water levels than it used to be. Flooding is also much less frequent. Black Creek used to flood on our property every year. Now it only floods once every 3 to 4 years.

14. I am familiar with the Surface Water Withdrawal Act of 2010.

15. I am aware that the Act allows agricultural users to register for water use without notifying downstream users. I am also aware that the Act does not provide any mechanism to allow me to participate in the registration process.

16. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

17. I am aware that registrations under the Act never expire.

18. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or human health.

19. I believe that the Act potentially restricts our property rights to enjoy and use Black Creek where it flows through our property.

20. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my riparian rights in the use of Black Creek.

21. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

22. Black Creek adds value to our property.

23. The partial or complete loss of flow of Black Creek by our property would diminish our property value.

Ben Williamson
Ben Williamson

SWORN TO before me this 25 November 2014
25th day of November, 2014.
Ann N. Williamson (SEAL)
Notary Public for South Carolina
My Commission Expires: November 16, 2021

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **AFFIDAVIT OF MELANIE RUHLMAN**

PERSONALLY APPEARED before me Melanie Ruhlman who being duly sworn deposes and says:

1. I am a citizen of the State of South Carolina.

2. My husband and I own the property where we reside, at 301 Keeler Bridge Road, Marietta, South Carolina, 29661.

3. Our property consists of 5.26 acres, with approximately 480 feet of river frontage on the North Saluda River, a tributary of the Saluda River.

4. I have lived there for over two years with my spouse, Anthony Ruhlman, and our two children.

5. Our property is identified on Greenville County Tax Map #0511020102703. [Attached as Exhibit A]

6. Our property is unique because it is situated at shoals that were the site of Keeler Mill, a grist mill that burned in the mid 20th century. The home and mill were constructed circa 1880.

7. The North Saluda River's width and depth varies where it runs by my property, but it is approximately forty feet across averaging one to three to feet deep with deeper holes in places.

8. My family and I use the North Saluda River for recreation, paddling, boating, swimming, tubing, wading, and bird watching.

Exhibit 5

9. The North Saluda River is the primary reason that we moved to this property.

10. Loss of flow from the North Saluda River where it runs by our property would negatively affect our use and enjoyment of our property.

11. There are agricultural uses in floodplain areas upstream from our property, and there are withdrawals for agricultural uses there. I am concerned about withdrawals upstream, and the impact those withdrawals could have on our use and enjoyment of the North Saluda River where it flows by our home.

12. My concern for and interest in river protection extends beyond my private property. I serve as a volunteer on the Boards of Directors for both Save Our Saluda (SOS) and Friends of the Reedy River (FoRR), and am also a member of Upstate Forever (UF). These Greenville area organizations work to respond to environmental threats to the rivers in the Upstate of South Carolina.

13. I am familiar with the Surface Water Withdrawal Act of 2010.

14. I am aware that the Act allows agricultural users to register for water use without notifying downstream users.

15. I am aware that once a user is registered, the water use of that agricultural user is presumed to be reasonable.

16. I am aware that the Act does not restrict the amount of water that any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires.

17. I am aware that the South Carolina Department of Health and Environmental Control may only reduce the amount of water withdrawal for a registered surface water withdrawer if the registered user withdraws substantially more surface water than its registered amount, and the State can prove that such withdrawals are detrimental to the environment or human health.

18. I believe that the Act restricts or eliminates my property rights to enjoy and use the North Saluda River where it flows through my property.

19. Prior to the Act I was able to challenge upstream uses that unreasonably interfered with my property rights in the use of the North Saluda River.

20. I am aware that under the Act, however, my right to challenge any upstream registration, either before or after it is issued, has been eliminated because the registrations are issued in perpetuity, without public notice and are presumed reasonable.

21. The North Saluda River adds value to my property.

22. The partial or complete loss of flow of the North Saluda River through my property would diminish my property value.

Melanie Ruhlman

SWORN TO before me this

5th day of December, 2014.

(SEAL)

Notary Public for South Carolina

My Commission Expires: 3/15/22

JEAN ALLISON WALKER
Notary Public, State of South Carolina
My Commission Expires 3/15/2022

Anthony Ruhlman



PIN / Tax Map #	0511020102703	Jurisdiction	1
Owner Name	Ruhlman Anthony R	Land Use	1100
Owner Name 2	Ruhlman Melanie B	Legal Description	NONE
Mailing Address	301 Keeler Bridge Rd	Subdivision	
City	Marietta	Site Address Number	301
State	SC	Site Address Street	KEELER BRIDGE
Zip Code	29661	Sale Price	$125,000
In Care Of		Fair Market Value	$111,830
Previous Owner	Sloan James P	Taxable Market Value	$111,830
Deed Date	1/27/2012	Taxes	$615.96
Deed Book	2400	Date Taxes Paid	NaN/NaN/NaN
Deed Page	1755	Estimated Acres	5.26
Plat Book	43-I	Square Feet	2330
Plat Page	62	Number of Bedrooms	4
Tax District	371	Number of Bathrooms	1
Market Area	001520	Number of Half Baths	1

Disclaimer: This Map is not a LAND SURVEY and is for reference purposes only. Data contained in this map are prepared for the inventory of Real Property found within this jurisdiction, and are compiled from recorded deeds, plats, and other public records. Users of this map are hereby notified aforementioned public primary information sources should be consulted for verification of the information contained in this map. Greenville County assumes no legal responsibility for the information contained in this map.

Map Scale
1 Inch = 267 feet
11/5/2014

Exhibit A

Exhibit B

Name	Date of Registration / Approval	Intake ID #	System Permit #	Monthly Max ((gallons)	Yearly Max	Lat (degrees)	Long (degrees)	Riverbasin	Source Name
Walthers Farms	NEW: 2/3/2014	02IR025S01	02IR025	400	3200			South Fork Edisto	South Fork Edisto River
Waddell Mariculture Center	NEW: 2/6/2014	07AQ002S01	07AQ002	35.7	428.4	32.28888889	-80.81527778	Broad	Colleton River
Pebble Creek Enterprises	NEW: 5/28/2014	02IR027S01	02IR027	4	8	33.690594	-81.30849	North Fork Edisto	Giddy Swamp Creek
River Bluff Farms LLC	NEW: 5/28/2014		38IR077	13	104	33.4538	-81.215573	South Fork Edisto	Rocky Swamp Creek
Turf Connections Sod Farm-Springfield	NEW 8/26/2014		38IR078	15	180	33.483051	-81.251817	South Fork Edisto	Goodland Creek
Braxton Williams (Williams and Sons Farm	NEW 9/24/2014	38IR021S01	38IR021	24.016	61.2	33.393127	-81.127831	South Fork Edisto	
Braxton Williams (Williams and Sons Farm	NEW: 9/24/2014	38IR021S02	38IR021	17.572	50.207	33.393118	-81.127792	South Fork Edisto	
Maury furtick Farm	NEW: 04/2015	02IR028S01	02IR028	6	60	33.535604	-81.325736	South Fork Edisto	Dean Swamp Creek
Brown Farms	NEW:	38IR05S01	38IR015	4.193	12.193	33.420039	-81.164736	South Fork Edisto	
Brown Farms	NEW:	38IR05S02	38IR015	13.033	53.761	33.397518	-81.138873	South Fork Edisto	

Boland Farm	NEW:	38IR081S01	38IR081	8.5	85	33.50095	-81.317396	South Fork Edisto	
Boland Farm	NEW:	38IR081S02	38IR081	6	60	33.51253	-81.318055	South Fork Edisto	
Clayton Rawl Farms In	NEW:	32IR056S91	32IR056	40	480	33.9124	-81.315823	Congaree	
Palmetto Farms	NEW:	09IR035S01	09IR035	24.39	72.47	33.6684	-80.6537333	Lake Marion	
Watson Jerrold A & Sons		02IR011S09	02IR011	180	1020	33.8623391	-81.5997753	Saluda	
Mason'S Master Turf		02IR014S01	02IR014	0.0007	0.0007	33.445139	-81.91653	Mid Savannah	
Titan Farms (Aiken County)		02IR024S02	02IR024	25	125	33.731262	-81.71985	South Fork Edisto	
Chappell Farms		03IR002S02	031R002	40.736	122.2	32.985	-81.3327777	Broad	
Coosaw Farms		03IR004S01	03IR004	27.51	98.61	32.925	-81.25	Broad	
Sharp & Sharp Certified Seed		03IR006S01	03IR006	145	584	32.96638889	-81.3569444	Broad	
Sharp & Sharp Certified Seed		03IR006S02	03IR006	41	124	33.0075	-81.3530555	Broad	

Sharp & Sharp Certified Seed		03IR006S03	03IR006	18	36	32.99333333	-81.3497222	Broad	
Oswald J C O Farms		03IR010S01	03IR010	615.4	3261.7	32.98611111	-81.3138888	Broad	
Connelly Farms		03IR011S01	03IR011	90.8	158.84	33.0787191	-81.157207	Salkehatchie	
Connelly Farms		03IR011S02	03IR011	106.957	163.24	33.057738	-81.222482	Salkehatchie	
Connelly Farms		03IR011S03	03IR011	27.764	42	33.014979	-81.219606	Salkehatchie	
Twin Oaks Farm		04IR001S01	04IR001	3.2	12.8	34.689069	-82.507539	Saluda	
Stoneybrook		04IR002S01	04IR002	3	17.3	34.656439	-82.5135074	Saluda	
Shivers Trading and Operating Company		05IR005S01	05IR005	23.7	135	33.36388889	-81.1805555	South Fork Edisto	
Brubaker Farms Inc.		05IR007S01	05IR007	30	117	33.23888889	-81.216666	Salkehatchie	
Anilorac Farm		05IR011S01	05IR011	8	26	33.17222222	-81.0416666	Salkehatchie	
Phil Sandifer & Sons, LLC		05IR012S01	05IR012	50	133.2	33.38333333	-81.1666666	South Fork Edisto	

Gary Hege Farm		05IR023S01	05IR023	68.6	213.04	33.217134	-81.1576357	Salkehatchie	
Diem Aden Farm		05IR042S01	05IR042	16.868	45.321	33.1805329	-81.1529402	Salkehatchie	
Riddle Dairy Farm		05IR054S01	05IR054	22.7	153.3	33.33472222	-81.1416666	South Fork Edisto	
Danny Hege Farm Barnwell		06IR007S01	06IR007	41.3	137.6	33.208316	-81.267242	Salkehatchie	
Rob Bates Farm		06IR020S01	06IR020	20	90	33.445948	-81.350477	South Fork Edisto	
ZZ Real Estate LLC/Carolina Nurseries		08IR001S01	08IR001	181.93	1300	33.1575	-80.025	Cooper	
Gasque Farms Inc Cotton Lane Farm		09IR003S01	09IR003	6.481	19.444	33.47861111	-80.6125	Four Hole Swamp	
Gasque Farms Inc Cotton Lane Farm		09IR003S02	09IR003	30.12	73.333	33.49166667	-80.605	Four Hole Swamp	
Gasque Farms Inc Cotton Lane Farm		09IR003S03	09IR003	19.48	59.445	33.48333333	-80.6222222	Four Hole Swamp	
Calhoun Trading Co		09IR004S01	09IR004	3.5	6.081	33.6111111	-80.8361111	North Fork Edisto	
Calhoun Trading Co		09IR004S02	09IR004	14.7	20.132	33.625	-80.9375	North Fork Edisto	

Haigler Farms Inc.		09IR009S01	09IR009	55	158	33.47854	-80.66407	Four Hole Swamp	
Haigler Farms Inc.		09IR009S02	09IR009	28	86	33.478538	-80.664039	Four Hole Swamp	
Haigler Farms Inc.		09IR009S03	09IR009	36	104	33.499284	-80.681625	Four Hole Swamp	
Haigler Farms Inc.		09IR009S04	09IR009	28.35	75.8	33.495007	-80.780733	Four Hole Swamp	
Oak Lane Farm Halfway Swamp		09IR011S01	09IR011	39.102	107.53	33.66527778	-80.7611111	Lake Marion	
Yellow House Farms		10IR014S01	10IR014	4	14.6	32.660752	-80.2205021	Edisto	
Turf Connections		13IR008S01	13IR008	4	28			South Fork Edisto	
Turf Connections		13IR008S02	13IR008	4	12			South Fork Edisto	
Haley Farm		14IR016S01	14IR016	38	86	33.62777778	-80.1675	Black	
Haley Farm		14IR016S02	14IR016	15	50	33.64777778	-80.2044444	Black	
Haley Farm		14IR016S03	14IR016	15	50	33.65277778	-4.10842E-05	Black	

Haley Farm		14IR016S04	14IR016	15	50	33.63611111	-80.1838888	Black	
Haley Farm		14IR016S05	14IR016	15	54	33.62833333	-80.1516666	Black	
Haley Farm		14IR016S06	14IR016	1	5	33.64583333	-80.1605555	Black	
Haley Farm		14IR016S07	14IR016	5	16	33.63333333	-80.1602777	Black	
Haley Farm		14IR016S12	14IR016	2	6	33.63611111	-80.187777	Black	
Haley Farm		14IR016S13	14IR016	10	45	33.65361111	-80.2063888	Black	
Brunsons Whole Sale Nursery		14IR057S01	14IR057	1.776	10.332	33.8361665	-80.1910689	Black	
Brunsons Whole Sale Nursery		14IR057S02	14IR057	2.076	10.218	33.8361665	-80.1910689	Black	
Brunsons Whole Sale Nursery		14IR057S03	14IR057	1.854	9.876	33.8361665	-80.1910589	Black	
Brunsons Whole Sale Nursery		14IR057S04	14IR057	2.272	13.934	33.8361665	-80.1910689	Black	
Brunsons Whole Sale Nursery		14IR057S05	14IR057	1.147	7.363	33.8361665	-80.1910689	Black	

Brunsons Whole Sale Nursery		14IR057S06	14IR057	1.95	7.8	33.8361665	-80.1910689	Black	
Breland Farm		15IR002S01	15IR002	3	6	32.93055556	-80.8527777	Salkehatchie	
Williams Farms Partnership		15IR012S01	15IR012	30	158	33.04277778	-80.5513888	Salkehatchie	
Williams Farms Partnership		15IR012S02	15IR012	27	190	33.00305556	-80.57777777	Salkehatchie	
Williams Farms Partnership		15IR012S03	15IR012	27	195	32.59916667	-80.5980555	Edisto	
Williams Farms Partnership		15IR012S04	15IR012	27	170	33.0097222	-80.5797222	Salkehatchie	
Williams Farms Partnership		15IR012S05	15IR012	27	170	33.02972222	-80.5613888	Salkehatchie	
Sugar Hill Acres, LLC/Griggs Farm		16IR012S01	16IR012	3.258	9.774	34.46111111	-80.0138888	Middle PeeDee	
Sugar Hill Acres, LLC/Griggs Farm		16IR012S02	16IR012	1.629	4.887	34.42777778	-80.0138888	Middle PeeDee	
Dargan Farms Partnership		16IR015S01	16IR015	3	13.65	34.304281	-79.764224	Middle PeeDee	
Dargan Farms Partnership		16IR015S02	16IR015	3	13.875	34.302429	-79.701783	Middle PeeDee	

Rogers Brothers Farm		16IR016S01	16IR016	90.4	180.8	34.391823	-80.006321	Middle PeeDee	
Chapman Farm		16IR030S01	16IR030	8	14	34.45138889	-80.0138888	Middle PeeDee	
Chapman Farm		16IR030S02	16IR030	2.4	4.5	34.46194444	-80.0141666	Middle PeeDee	
Lawson Turf Farms		16IR041S01	16IR041	25.8	131	34.33305556	-79.9227777	Middle PeeDee	
Lawson Turf Farms		16IR041S02	16IR041	9.52	35.1			Middle PeeDee	
Lawson Turf Farms		16IR041S03	16IR041	7.62	34.62			Middle PeeDee	
Lawson Turf Farms		16IR041S04	16IR041	2.77	16.32			Middle PeeDee	
Carolina Plantation Rice/Coxe		16IR080S01	16IR080	60	140	34.393322	-79.839782	Middle PeeDee	
Holmes & Son Lewis Farm		19IR002S01	19IR002	16.13	16.13	33.76388889	-81.7819444	Stevens	
Holmes & Son Lewis Farm		19IR002S02	19IR002	32.592	32.592	33.7611111	-81.7819444	Stevens	
Titan Peach Farms		19IR004S01	19IR004	42	310	33.81944444	-81.7	South Fork Edisto	

Titan Peach Farms		19IR004S02	19IR004	44	265	33.83055556	-81.7472222	South Fork Edisto	
Titan Peach Farms		19IR004S03	19IR004	20	90			South Fork Edisto	
Titan Peach Farms		19IR004S04	19IR004	20	115			South Fork Edisto	
Titan Peach Farms		19IR004S05	19IR004	42	264			South Fork Edisto	
Titan Peach Farms		19IR004S06	19IR004	40	246			South Fork Edisto	
Titan Peach Farms		19IR004S07	19IR004	15	105			South Fork Edisto	
Titan Peach Farms		19IR004S08	19IR004	20	90			South Fork Edisto	
Titan Peach Farms		19IR004S09	19IR004	25	210			South Fork Edisto	
Titan Peach Farms		19IR004S10	19IR004	15	70			South Fork Edisto	
Titan Peach Farms		19IR004S11	19IR004	30	130			South Fork Edisto	
Titan Peach Farms		19IR004S12	19IR004	26	115			South Fork Edisto	Beaver Dam Branch

Titan Peach Farms		19IR004S13	19IR004	42	238			South Fork Edisto	Tributary to Long Branch
Titan Peach Farms		19IR004S14	19IR004	42	197			South Fork Edisto	Satcher Branch
Titan Peach Farms		19IR004S15	19IR004	15	80			South Fork Edisto	Tributary to Bog Branch
Titan Peach Farms		19IR004S16	19IR004	44	349			South Fork Edisto	Temples Creek
Smith W G III		19IR012S01	19IR012	4	8	33.77916667	-81.8541666	South Fork Editso	
Smith W G III		19IR012S02	19IR012	16	42	33.80833333	-81.8680555	South Fork Editso	
Smith W G III		19IR012S03	19IR012	12	26	33.7833333	-81.8477777	South Fork Editso	
Smith W G III		19IR012S04	19IR012	3.221	3.221	33.77555556	-81.8480555	South Fork Editso	
Gurosik Farm		19IR055S01	19IR055	5	23	33.623333	-81.9827777	Stevens	
Gurosik Farm		19IR055S02	19IR055	0.5	2.2	33.62	-81.9991666	Stevens	
Gurosik Farm		19IR055S03	19IR055	2.5	12.7	33.62666667	-81.9933333	Stevens	

Gurosik Farm		19IR055S04	19IR055	3	18	33.63111111	-81.9963888	Stevens	
Layman Wholesale Nursery		19IR074S01	19IR074	8	84				
Layman Wholesale Nursery		19IR074S02	19IR074	0.1	1.2				
Parsons Nursery		22IR034S01	22IR034	0.8	4.8	33.198872	-79.3902487	Santee	
Parsons Nursery		22IR034S02	22IR034	17.96	110.8	33.198872	-79.3902487	Santee	
Parsons Nursery		22IR034S04	22IR034	5.633	32.465			Santee	
Plantersville Turf Farms		22IR038S01	22IR038	16.52	53.8	33.5195167	-79.1751333	Lower PeeDee	
Plantersville Turf Farms		22IR038S02	22IR038	11.565	11.565	33.51875	-79.1856667	Lower PeeDee	
Fisher Brothers Farms		23IR002S01	23IR002	220	495	35.02805556	-82.235	Tyger	
Hyder Austin Farms Inc.		23IR007S01	23IR007	4.02	5.92	35.1444444	-82.2388888	Tyger/Broad	
Hyder Austin Farms Inc.		23IR007S02	23IR007	4.642	4.642	35.10277778	-82.3194444	Tyger/Broad	

Hyder Austin Farms Inc.		23IR007S03	23IR007	7.494	7.494	35.16472222	-82.2583333	Tyger/Broad	
Hyder Austin Farms Inc.		23IR007S04	23IR007	3.801	3.801	35.10444444	-82.3025	Tyger/Broad	
Fishers Orchard		23IR008S01	23IR008	8.146	21.723	34.93055556	-82.2527777	Enoree	
Beechwood Farm		23IR026S01	23IR026	12	65.5	35.05277778	-82.5361111	Saluda	
Coosaw Land LLC		25IR059S01	25IR059	16.3	57.2	32.93175	-81.20675	Broad	
Kingston Plantation/Ally Management		26IR021S01	26IR021	9.158	55.189	33.77027778	-78.7805555	Sampit River/Coastal	
Kingston Plantation/Ally Management		26IR021S02	26IR021	12.197	81.102	33.77	-78.7794444	Sampit River/Coastal	
Kingston Plantation/Ally Management		26IR021S03	26IR021	8.329	36.091	33.7686111	-78.7783333	Sampit River/Coastal	
Kingston Plantation/Ally Management		26IR021S04	26IR021	321	330.07	33.76805556	-78.7791666	Sampit River/Coastal	
Kingston Plantation/Ally Management		26IR021S05	26IR021	11.845	32.98	33.76777778	-78.7825	Sampit River/Coastal	
Kingston Plantation/Ally Management		26IR021S06	26IR021	3.985	21.562	33.76888889	-78.7813888	Sampit River/Coastal	

Sod Farm, The		26IR025S01	26IR025	2.064	11.459				
Belger Farms		28IR011S01	28IR011	16.744	42.714	34.131851	-80.57835	Wateree	
Belger Farms		28IR011S02	28IR011	4.446	11.34	34.264825	-80.530114	Wateree	
Belger Farms		28IR011S03	28IR011	91.3	181.43	34.485626	-80.364551	Lynches	
Tolson Farm		31IR008S01	31IR008	7	14	34.08055556	-80.1111111	Lynches	
Kyzer Farms		32IR004S01	32IR004	3	15	33.782063	-81.341112	North Fork Edisto	
Sease Clinton Farms		32IR005S01	32IR005	9.5	68.5	33.95833333	-81.2819444	Saluda	
Sease Clinton Farms		32IR005S02	32IR005	10.2	61.2	33.95833333	-81.3138888	Saluda	
Sease Clinton Farms		32IR005S03	32IR005	10	45.9	33.96388889	-81.3138888	Saluda	
Rawl & Sons Farm		32IR013S08	32IR013	19.268	107.87	33.8263114	-81.351539	North Fork Edisto	
Sease James R Farms Inc.		32IR021S01	32IR021	5.6	25.06	33.97166667	-81.3763888	Saluda	

Sease James R Farms Inc.		32IR021S02	32IR021	20.37	110.2	33.95916667	-81.3758333	Saluda	
Sease James R Farms Inc.		32IR021S03	32IR021	7.112	31.977	33.96861111	-81.3663888	Saluda	
Sease James R Farms Inc.		32IR021S04	32IR021	6.7	38.6	33.96083333	-2.10846E-05	Saluda	
Sease James R Farms Inc.		32IR021S06	32IR021	21.81	117.88			Saluda	
Duane Fink Farm		32IR050S01	32IR050	40	160	33°52'21.74"N	81°21'40.67"W	North Fork Edisto	
Atkinson Farms, LLC		33IR033S01	33IR033	8	22	34.1867778	-79.2432778	Little PeeDee	
Hinson Farm		34IR002S01	34IR002	11.484	27.324	34.58888889	-79.5972222	Middle PeeDee	
Hinson Farm		34IR002S02	34IR002	9.72	24.35	34.60555556	-79.5972222	Middle PeeDee	
Richard Rogers Farms		34IR003S01	34IR003	57.023	159.8	34.60555556	-79.725	Middle PeeDee	
O'Tuel Farm		34IR004S01	34IR004	69	276	34.68888889	-79.7388888	Middle PeeDee	
McDonald Farm		34IR007S01	34IR007	9.216	24.38	34.60833333	-79.4944444	Little PeeDee	

Overbridge Farm LLC		36IR002S01	36IR002	10.6	10.6				
Satterwhite Farms		36IR004S01	36IR004	3.996	24.876	34.332274	-81.754096	Saluda	
Mayer Farm		36IR009S01	36IR009	6.48	45.36	34.259041	-81.6826385	Saluda	
Mayer Farm		36IR009S02	36IR009	0	0	34.27833333	-81.6783333	Saluda	
Lewis Nursery and Farm		36IR010S01	36IR010	3	18.9			Tyger	
Bush River Farms		36IR035S01	36IR035	17	143	34.2875	-81.6958333	Saluda	
Leslea Farms		36IR037S02	36IR037	12.077	21.67	34.32222222	-81.675	Saluda	
Leslea Farms		36IR037S03	36IR037	3.796	5.092	34.31666667	-81.7208333	Saluda	
Holcombe Farm		37IR005S01	37IR005	0.5	1.659	34.92777778	-83.0194444	Seneca	
Head Lee Nursery		37IR011S02	37IR011	30	282	34.7197333	-83.0136	Seneca	
Merritt Bros Inc.		37IR017S01	37IR017	3	12	34.75305556	-82.5394444	Saluda	

Merritt Bros Inc.		37IR017S02	37IR017	7	28	34.74611111	-82.5369444	Saluda	
Merritt Bros Inc.		37IR017S03	37IR017	7	31	34.70138889	-82.5433333	Saluda	
Merritt Bros Inc.		37IR017S04	37IR017	0.6	2.4	34.70055556	-82.5447222	Saluda	
Calyx Farm		37IR058S01	37IR058	4	29	34.84361111	-83.0583333	Seneca	
Millwood Farm		38IR004S01	38IR004	94.5	521.5	33.56861111	-80.9480555	North Fork Edisto	
Millwood Farm		38IR004S02	38IR004	98.4	510.1	33.54694444	-80.9555555	North Fork Edisto	
Millwood Farm		38IR004S03	38IR004	78.6	332	33.55111111	-80.9563888	North Fork Edisto	
Bull Swamp Plantation		39IR014S01	38IR014	14.85	41626	33.64166667	-81.05	North Fork Edisto	
Bull Swamp Plantation		39IR014S02	38IR014	16	38	33.63333333	-81.0444444	North Fork Edisto	
Bull Swamp Plantation		39IR014S03	38IR014	12	24.132	33.62861111	-81.0441666	North Fork Edisto	
Backman Farms		38IR020S01	38IR020	60.48	289.91	33.43472222	-81.1888888	South Fork Edisto	

St Julian Plantation		38IR024S01	38IR024	20.366	50.245	33.41944444	-80.3527777	Lake Marion	
St Julian Plantation		38IR024S02	38IR024	7	11	33.40194444	-80.3541666	Lake Marion	
Springfield Grain Co Brown Kirby Sons		38IR026S01	38IR026	96	256	33.525	-81.2116666	South Fork Edisto	
Springfield Grain Co Brown Kirby Sons		38IR026S02	38IR026	114.048	367.49	33.525	-81.2311111	South Fork Edisto	
Springfield Grain Co Brown Kirby Sons		38IR026S03	38IR026	69.12	146.88	33.53527778	-81.2105555	South Fork Edisto	
Shady Grove Plantation & Nursery Inc		38IR040S01	38IR040	100.55	608.07	33.45555556	-80.8069444	Four Hole Swamp	
Gray Farm		38IR042S01	38IR042	7	48	33.42222222	-80.9777777	North Fork Edisto	
Wilshire Farms Inc.		38IR043S01	38IR043	9.6	58.4	33.44694444	-80.5519444	Four Hole Swamp	
Wilshire Farms Inc.		38IR043S02	38IR043	8.5	50.7	33.44694444	-80.5519444	Four Hole Swamp	
Springfield Farm		38IR066S01	38IR066	11	30	33.4819417	-81.2683778	South Fork Edisto	
Norway Farm		38IR067S01	38IR067	30	90	33.270401	-81.110675	Salkehatchie	

Southland Fisheries Corporation		40AQ018S02	40AQ018	9.2	40.56			Congaree	
Southland Fisheries Corporation		40AQ018S01	40AQ018	13.8	60.84	33.843491	-80.85265	Congaree	
Walker Farm		40IR001S01	40IR001	3	23.5	33.91666667	-80.8222222	Congaree	
Frick Farms		41IR010S01	41IR010	71	196	33.88638889	-81.5830555	Saluda	
Titan Farms		41IR014S01	41IR014	20	90			South Fork Edisto	
Titan Farms		41IR014S02	41IR014	35	140			South Fork Edisto	
Titan Farms		41IR014S03	41IR014	40	214			South Fork Edisto	
Titan Farms		41IR014S04	41IR014	15	40			South Fork Edisto	
Titan Farms		41IR014S05	41IR014	40	280			South Fork Edisto	
Titan Farms		41IR014S06	41IR014	20	95			South Fork Edisto	
Titan Farms		41IR014S07	41IR014	30	135			South Fork Edisto	

Titan Farms		41IR014S08	41IR014	25	130			South Fork Edisto	
Titan Farms		41IR014S09	41IR014	25	125			South Fork Edisto	
Titan Farms		41IR014S10	41IR014	36	140			South Fork Edisto	
Gilberts Nursery		42IR026S01	42IR026	30	192	35.1825001	-81.9641666	Upper Broad	
Gilberts Nursery		42IR026S02	42IR026	19	150	35.18361111	-81.9661111	Upper Broad	
Gilberts Nursery		42IR026S03	42IR026	5	31.5	35.1825	-81.9641666	Upper Broad	
Gilberts Nursery		42IR026S04	42IR026	4	26.1	35.18083333	-81.965	Upper Broad	
Gilberts Nursery		42IR026S05	42IR026	1.8	8.47	35.18166667	-81.9666666	Upper Broad	
Black Crest Farms Mcleod W R Farms		43IR007S01	43IR007	33.67	126	33.83472222	-80.33444444	Black	
Black Crest Farms Mcleod W R Farms		43IR007S02	43IR007	33.942	90	33.81666667	-80.3955555	Black	
Black Crest Farms Mcleod W R Farms		43IR007S03	43IR007	35.1	175.5	33.85972222	-80.3769444	Black	

Triple J farrms		43IR011S01	43IR011	56.48	139.39	33.95844444	-80.5777777	Wateree	
SC Dept of Corr Waterr River Co		43IR054S01	43IR054	7	44	34.08944444	-80.5963888	Wateree	
SC Dept of Corr Waterr River Co		43IR054S02	43IR054	35	273	34.09722222	-80.6055555	Wateree	
SC Dept of Corr Waterr River Co		43IR054S03	43IR054	19.148	77.34	34.05416667	-80.5980555	Wateree	
SC Dept of Corr Waterr River Co		43IR054S04	43IR054	7.585	91.02	34.07083333	-80.6005555	Wateree	
SC Dept of Corr Waterr River Co		43IR054S05	43IR054	13.705	82.23	34.0927778	-80.5872222	Wateree	
SC Dept of Corr Waterr River Co		43IR054S06	43IR054	30.1	150.5	34.10694444	-80.6002777	Wateree	
SC Dept of Corr Waterr River Co		43IR054S07	43IR054	14.4	72	34.08777778	-80.5830555	Wateree	
SC Dept of Corr Waterr River Co		43IR054S08	43IR054	7.418	37.09	34/0525	-80.5938888	Wateree	
SC Dept of Corr Waterr River Co		43IR054S09	43IR054	7.418	37.09	34.06916667	-80.5938888	Wateree	
SC Dept of Corr Waterr River Co		43IR054S10	43IR054	6.21	30.16	34.09694444	-80.5858333	Wateree	

SC Dept of Corr Waterr River Co		43IR054S11	43IR054	10	50	34.07361111	-80.5927777	Wateree	
SC Dept of Corr Waterr River Co		43IR054S12	43IR054	3.6	21			Wateree	
SC Dept of Corr Waterr River Co		43IR054S13	43IR054	5.62	22.77			Wateree	
SC Dept of Corr Waterr River Co		43IR054S14	43IR054	1.7	3.9			Wateree	
SC Dept of Corr Waterr River Co		43IR054S15	43IR054	3.6	13.6			Wateree	
SC Dept of Corr Waterr River Co		43IR054S16	43IR054	0	0			Wateree	
SC Dept of Corr Waterr River Co		43IR054S17	43IR054	1.8	12			Wateree	
SC Dept of Corr Waterr River Co		43IR054S18	43IR054	1.8	9.6			Wateree	
SC Dept of Corr Waterr River Co		43IR054S19	43IR054	1.8	9.1			Wateree	
SC Dept of Corr Waterr River Co		43IR054S20	43IR054	6	22.1			Wateree	
Irwin McIntosh Farms, Inc.		45IR002S01	45IR002	4.81	7	33.74444444	-79.9555555	Black	

Peach Tree, The		46IR028S01	46IR028	3	9	35.0519412	-81.2605896	Upper Catawba	
			Totals (g):	6.63E+09	7E+10				
			(mg)	6227.839	68034				
			Grandfath	5616.435	63179				
			New Regi	611.404	4855.2				

Exhibit C

2013 Monthly Excess Withdrawals

USERID	SOURCEID	FACILITY	STATUS	VOL_MON	VOL_YEAR	jan	feb	mar	apr	may	jun	jul	aug	sep	Oct	nov	dec	total	Year
05IR005	05IR005S01	SHIVERS TRADING AND OPERATING COMPANY	A	23.7	135	0	0	0	10.1	16.2	33.2	34.2	35.1	36.3	0	0	0	165.1	2013
13IR008	13IR008S02	TURF CONNECTIONS	A	4	12	0	0	0	0	0	6	0	7	0	7	0	0	20	2013
13IR008	13IR008S01	TURF CONNECTIONS	A	4	28	0	0	4	4	4	6.9	6.9	6.9	6.9	6.9	6.9	0	53.4	2013
40AQ018	40AQ018S01	SOUTHLAND FISHERIES CORP	A	13.8	60.84	0.5	1.2	3.3	6.1	11.7	8	17.3	8.5	2.5	3	1.5	0	63.6	2013
22IR034	22IR034S04	PARSONS NURSERY	A	5.633	32.465	1.21	1.72	2.67	5.12	5.65	7.64	10.23	12.23	4.01	3.03	2.65	1.27	57.43	2013
19IR055	19IR055S02	GUROSIK FARM	A	0.5	2.2	0	0	0.2	0.5	0.6	0.5	0	0	0.1	0.2	0	0	2.1	2013
19IR074	19IR074S02	Layman Wholesale Nursery Inc	A	0.1	1.2	1.5	1	1.5	1	2.5	2.16	2.2	2.2	2.16	2.2	2.16	2.2	22.78	2013
43IR054	43IR054S18	SC DEPT OF CORR WATEREE RIV CO	A	1.8	9.6	0	0	5.1	5.1	5.1	0	0	5.1	5.1	5.1	0	0	30.6	2013
43IR054	43IR054S17	SC DEPT OF CORR WATEREE RIV CO	A	1.8	12	0	0	5.1	5.1	5.1	0	5.1	4.2	4.2	4.2	0	0	33	2013
43IR054	43IR054S19	SC DEPT OF CORR WATEREE RIV CO	A	1.8	9.1	0	0	3.2	3.2	0	3.2	3.2	3.2	0	0	0	0	16	2013

2014 Monthly Excess Withdrawals

USERID	SOURCEID	FACILITY	STATUS	VOL_MON	VOL_YEAR	jan	feb	mar	apr	may	jun	jul	aug	sep	Oct	nov	dec	total	Year
09IR003	09IR003S03	COTTON LANE FARMS	A	19.48	59.445	0	0	0	0	0	8.6	13	23.8	6.5	0	0	0	51.9	2014
41IR014	41IR014S09	TITAN FARMS	A	25	125	0	0	4	16	28	36	32	20	12	0	0	0	148	2014
16IR015	16IR015S02	DARGAN FARMS PARTNERSHIP	A	3	13.825	0	0	0.6	1.2	2.4	2.4	2.4	3.2	2.4	1.2	0	0	15.8	2014
16IR015	16IR015S01	DARGAN FARMS PARTNERSHIP	A	3	13.65	0	0	1.3	3	3.6	4.25	4.5	4.5	3.9	2.6	0	0	27.65	2014
31IR008	31IR008S01	Tolson Farms	A	7	14	0	0	0	0	3	6	10	6	0	0	0	0	25	2014
03IR006	03IR006S03	SHARP & SHARP CERTIFIED SEED	A	18	36	0	0	0	1	10	19	27	31	32	4	0	0	124	2014
19IR055	19IR055S02	GUROSIK FARM	A	0.5	2.2	0	0	0.2	0.5	0.6	0.5	0	0	0.1	0.2	0	0	2.1	2014
43IR054	43IR054S18	SC DEPT OF CORR WATEREE RIV CO	A	1.8	9.6	0	0	2.1	2.1	2.1	2.1	2.1	2.1	2.1	0	0	0	14.7	2014
43IR054	43IR054S17	SC DEPT OF CORR WATEREE RIV CO	A	1.8	12	0	0	6.3	6.3	6.3	6.3	6.3	6.3	6.3	0	0	0	44.1	2014
43IR054	43IR054S12	SC DEPT OF CORR WATEREE RIV CO	A	3.6	21	0	0	7.1	7.1	7.1	7.1	7.1	7.1	7.1	7.1	0	0	56.8	2014

2013 Yearly Excess Withdrawals

05IR005	05IR005S01	SHIVERS TRADING AND OPERATING COMPANY	A	135	165.1	2013
13IR008	13IR008S01	TURF CONNECTIONS	A	28	53.4	2013
13IR008	13IR008S02	TURF CONNECTIONS	A	12	20	2013
19IR074	19IR074S02	Layman Wholesale Nursery Inc	A	1.2	22.78	2013
22IR034	22IR034S04	PARSONS NURSERY	A	32.465	57.43	2013
36IR035	36IR035S01	BUSH RIVER FARMS	A	143	144	2013
40AQ018	40AQ018S01	SOUTHLAND FISHERIES CORP	A	60.84	63.6	2013
43IR054	43IR054S13	SC DEPT OF CORR WATEREE RIV CO	A	22.77	33	2013
43IR054	43IR054S17	SC DEPT OF CORR WATEREE RIV CO	A	12	33	2013
43IR054	43IR054S18	SC DEPT OF CORR WATEREE RIV CO	A	9.6	30.6	2013
43IR054	43IR054S19	SC DEPT OF CORR WATEREE RIV CO	A	9.1	16	2013

2014 Yearly Excess Withdrawals

03IR006	03IR006S03	SHARP & SHARP CERTIFIED SEED	A	36	124	2014
13IR008	13IR008S01	TURF CONNECTIONS	A	28	32	2014
16IR015	16IR015S01	DARGAN FARMS PARTNERSHIP	A	13.65	27.65	2014
16IR015	16IR015S02	DARGAN FARMS PARTNERSHIP	A	13.825	15.8	2014
19IR004	19IR004S13	TITAN PEACH FARMS	A	238	246	2014
31IR008	31IR008S01	Tolson Farms	A	14	25	2014
40AQ018	40AQ018S02	SOUTHLAND FISHERIES CORP	A	40.56	52	2014
41IR014	41IR014S03	TITAN FARMS	A	214	222	2014
41IR014	41IR014S09	TITAN FARMS	A	125	148	2014
41IR014	41IR014S10	TITAN FARMS	A	140	148	2014
43IR054	43IR054S12	SC DEPT OF CORR WATEREE RIV CO	A	21	56.8	2014
43IR054	43IR054S17	SC DEPT OF CORR WATEREE RIV CO	A	12	44.1	2014
43IR054	43IR054S18	SC DEPT OF CORR WATEREE RIV CO	A	9.6	14.7	2014

Exhibit D

CDM Smith

Technical Memorandum

To: - *South Carolina Department of Natural Resources (DNR)*
South Carolina Department of Health and Environmental Control (DHEC)

From: - *CDM Smith*

Date: - *January 2015*

Subject: - *Methodology for Unimpaired Flow Development*
Saluda River Basin, South Carolina (Prepared as part of the South Carolina Surface Water Quantity Modeling Program)

1.0 Background and Objectives for Unimpaired Flows

Unimpaired Flow (UIF) describes the natural hydrology of a river basin. UIFs quantify streamflows throughout a river basin in the absence of human intervention in the river channel, such as storage, withdrawals, discharges, and return flows. From this basis, modeling and decision making can be compared with pristine conditions. This memorandum explains the methods that will be employed to develop UIFs for South Carolina's Saluda River basin. It describes data needs, methods for filling data gaps, and issues specific to the Saluda River basin. Once developed, UIFs will be input to the Simplified Water Allocation Model (SWAM) to evaluate surface water hydrology and operations throughout the basin. The UIFs for the Saluda Basin will extend from 1925-2013.

UIFs will serve two purposes:

- UIFs will be the **fundamental input** to the model at headwater nodes and tributary nodes upstream of historic management activity, representing naturally occurring water in the riverways. Current and future management practices such as storage, withdrawals, and discharges will be superimposed on the UIFs.
- UIFs will provide a **comparative basis** for model results. The impacts of current and future management practices on flow throughout the river network can be compared to the natural conditions represented by the UIFs, and decisions about relative impacts can be well informed.

UIFs are defined as the addition and subtraction of management impacts on measured, impacted flows. UIFs will be calculated on a daily timestep using Equation 1:

Unimpaired Flow *= Measured Gage Flow + River Withdrawals + Reservoir Withdrawals – Reservoir Discharge – Return Flow + Reservoir Surface Evaporation – Reservoir Surface Precipitation + Upstream change in Reservoir Storage* **(Equation 1)**

Where reservoirs with large surface areas exist upstream of streamflow gages, UIFs will account for runoff that would have occurred on land that was submerged by reservoirs at the time of streamflow readings. Direct precipitation on the reservoir surface will be replaced by this estimate in Equation 1.

2.0 Overview of the Saluda Basin

The Saluda River basin covers 3,210 square miles, 10 percent of the land area of the State, lying within portions of the Blue Ridge, Piedmont and Coastal Plain physiographic provinces (**Figure 2-1**). The basin's major watercourse, the Saluda River, begins south of the North Carolina state line and flows southeast for 150 miles before joining the Broad River to form the Congaree River near Columbia (**Figure 2-2**). At this location, the 3,800 square mile Broad River basin (South Carolina portion only) empties into the Saluda River basin. Major tributaries to the Saluda River include the Reedy River, Rabon Creek, Little River, Bush River, and Little Saluda River. The Congaree River flows for 40 miles through the upper and middle portions of the Coastal Plain before joining with the Wateree River above Lake Marion in the Santee River Basin. Major tributaries to the Congaree River include Congaree Creek, Gills Creek, Cedar Creek, Big Beaver Creek and Toms Creek.

Eighteen active Unites States Geological Survey (USGS) gaging stations monitor streamflow in the basin, including six on the Saluda River, two on the Congaree, and 10 on tributary streams. The Saluda River station near Columbia (USGS 02169000) offers the longest period of record, beginning in 1925. Average annual streamflow in the Saluda River varies from 623 cubic feet per second (cfs) in the upper reach near Greenville to 2,762 cfs in the lower reach near Columbia. Streamflows in the Blue Ridge portion of the basin are supported by both base flow and relatively high rainfall and runoff. While streamflow in the upper Saluda River is well-sustained throughout the year, it is more variable in the Piedmont region because of hydropower facilities, lower precipitation, and baseflow.

Two small water-supply reservoirs, Table Rock Reservoir and Poinsett (North Saluda) Reservoir have affected streamflow in the upper Saluda River for the entire period of record. Since the 1930s, controlled releases from Lake Murray and Lake Greenwood have influenced lower Saluda River streamflows.

Chapter 5 of The South Carolina State Water Assessment (SCDNR, 2009) describes the basin's surface water and groundwater hydrology and hydrogeology, water development and use, and water quality. A summary is also provided in An Overview of the Eight Major River Basins of South Carolina (SCDNR, 2013).

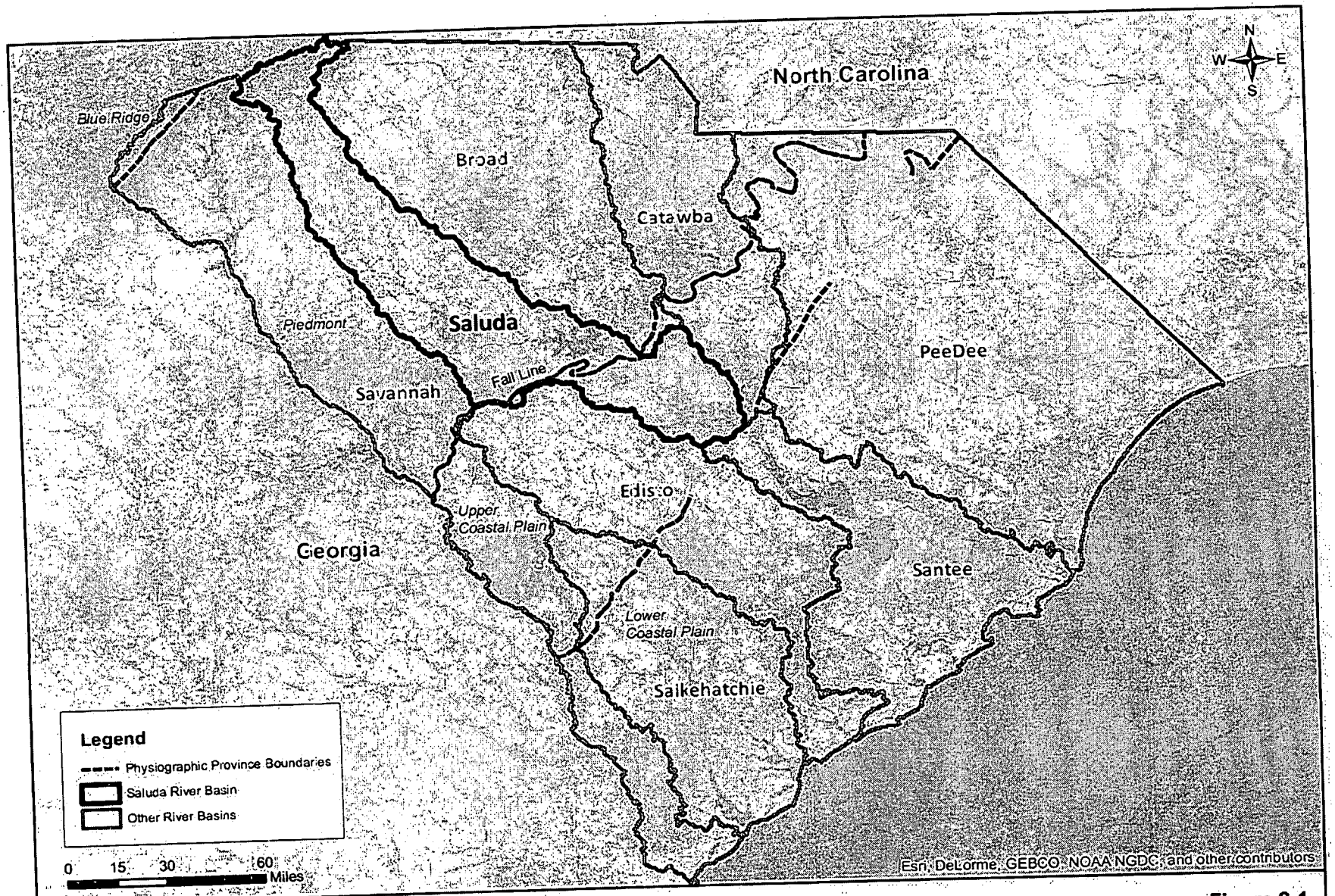
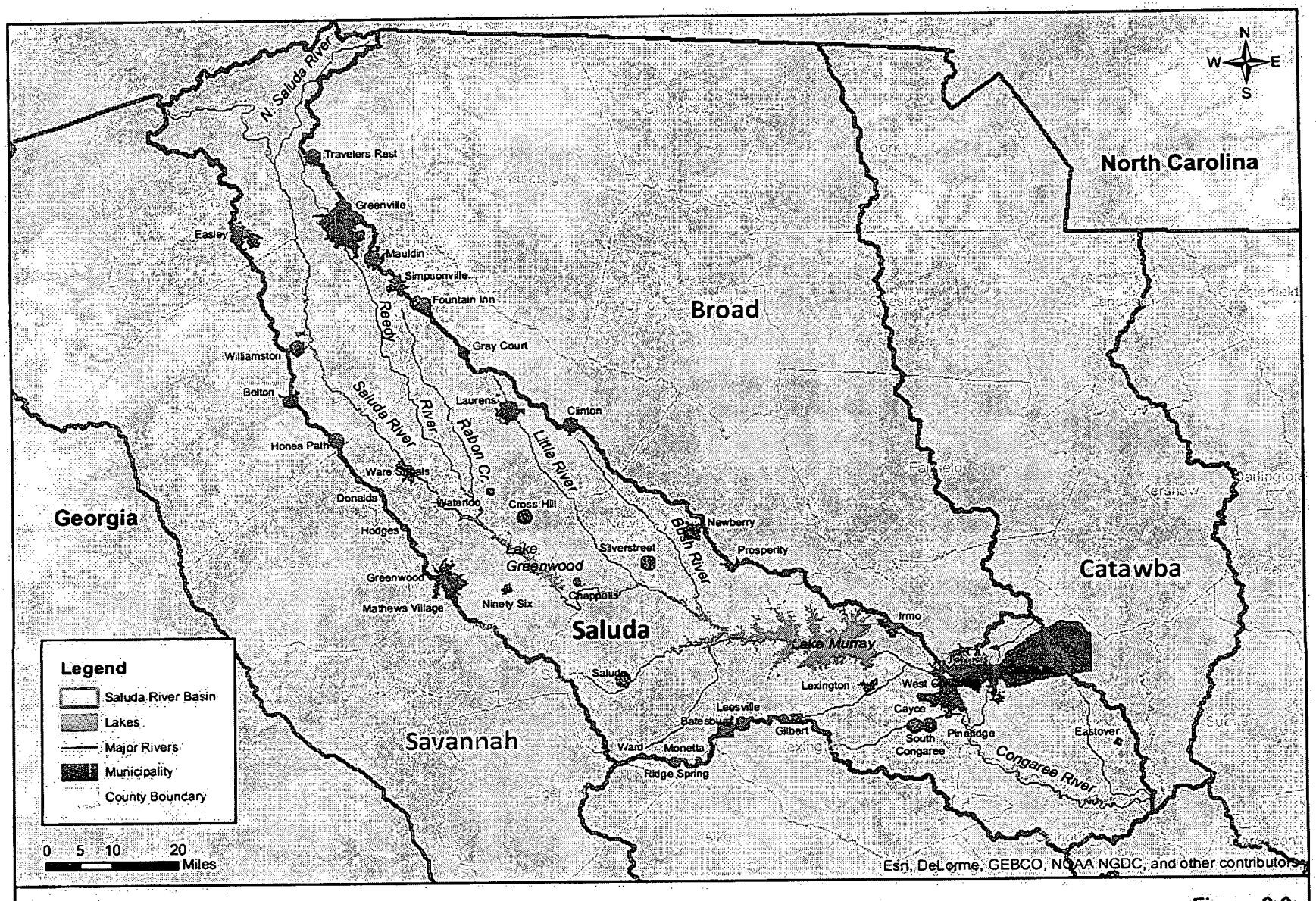


Figure 2-1
South Carolina's Saluda River Basin and Other Major River Basins

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Figure 2-2
Saluda River Basin

3.0 Water Users and Dischargers in the Saluda Basin

The South Carolina DHEC has provided information and data regarding current (active) and former (inactive) water users and dischargers throughout the state. Currently permitted or registered water users in the Saluda basin are listed in **Table 3-1**. Former users are listed in **Table 3-2**. Withdrawal locations of current and former water users are shown in **Figure 3-1** (municipal water supply, industrial and mining), **Figure 3-2** (thermoelectric power and hydropower), and **Figure 3-3** (golf courses and agriculture). All permitted or registered water users, regardless of their average daily withdrawal amount, are listed in the tables and shown on the figures. Individual withdrawals less than 100,000 gallons per day (gpd) will generally not be included in UIF calculations or in water quantity modeling; however, some aggregation of withdrawals that are less than 100,000 gpd on a particular reach may occur, and the combined amount included. In other instances, withdrawals that average less than 100,000 gpd annually, but are seasonally higher than 100,000 gpd may be included.

Current and former wastewater dischargers are listed in **Tables 3-3 and 3-4**, respectively, based on National Pollution Discharge Elimination System (NPDES) permit information. Discharge locations of current and former discharges are shown in **Figures 3-4 and 3-5**, respectively. Only active discharges that typically average over 100,000 gpd are listed in the tables and shown on Figure 3-4. Discharges that averaged less than 100,000 gpd will generally not be considered when performing UIF calculations, except when the cumulative discharge amount from facilities located on the same tributary or portion of the mainstem are deemed significant.

Table 3-1. Currently Permitted or Registered Water Users in the Saluda Basin

Map ID	User ID	Facility Name
Drinking Water Users (Figure 3-1)		
1	04WS005	BELTON-HONEA PATH WTP
2	23WS002	GREENVILE WATER L.B. STOVALL PLANT*
3	24WS001	WISE WATER TREATMENT PLANT*
4	30WS002	LAURENS WTP*
5	32WS004	CITY OF CAYCE WTP
6	32WS008	WEST COLUMBIA WTP
7	32WS052	CITY OF WEST COLUMBIA
8	36WS001	CITY OF NEWBERRY WTP
9	36WS002	NCWSA - LAKE MURRAY WTP
10	39WS001	EASLEY COMBINED UTILITIES - D.L. MOORE WTP
11	40WS002	CITY OF COLUMBIA - LAKE MURRAY WATER PLANT
12	40WS054	CITY OF COLUMBIA - CANAL WATER PLANT
13	41WS003	SCWSA - RAW WATER INTAKE

Table 3-1 (continued). Currently Permitted or Registered Water Users in the Saluda Basin

Map ID	User ID	Facility Name
Industrial & Mining Users (Figure 3-1)		
14	09IN001	DAK
15	32IN006	SHAW INDUSTRIES GROUP PLANT 8S
16	32IN051	CMC STEEL SOUTH CAROLINA
17	04MI001	VULCAN MATERIALS
18	32MI001	MARTIN MARIETTA MATERIALS - CAYCE QUARRY
Thermoelectric Users (Figure 3-2)		
1	04PT001	DUKE POWER LEE STEAM STATION
2	32PT001	SCE&G - MCMEEKIN STATION
Hydroelectric Users (Figure 3-2)		
3	04PH001	SALUDA RIVER - KENDALL, UPPER HYDRO
4	04PH002	SALUDA RIVER - KENDALL, LOWER HYDRO
5	23PH001	SALUDA RIVER - HOLIDAYS BRIDGE HYDRO
6	24PH001	SALUDA RIVER-BUZZARDS ROOST HYDRO
7	30PH001	SALUDA RIVER
8	32PH001	LAKE MURRAY-SALUDA HYDRO
9	40PH001	COLUMBIA CANAL (BROAD RIVER)
Agricultural Users (Figure 3-3)		
1	02IR011	WATSON JERROLD & SONS
2	04IR001	TWIN OAKS FARM
3	04IR002	STONEYBROOK
4	23IR026	BEECHWOOD FARM
5	32IR005	SEASE CLINTON FARMS*
6	32IR021	SEASE JAMES R FARMS INC*
7	36IR002	OVERBRIDGE FARM
8	36IR004	SATTERWHITE FARMS
9	36IR009	MAYER FARM*
10	36IR035	BUSH RIVER FARMS
11	36IR037	LESLEA FARMS*
12	37IR017	MERRITT BROS INC.*
13	40IR001	WALKER FARM
14	41IR014	TITAN FARMS*

Table 3-1 (continued). Currently Permitted or Registered Water Users in the Saluda Basin

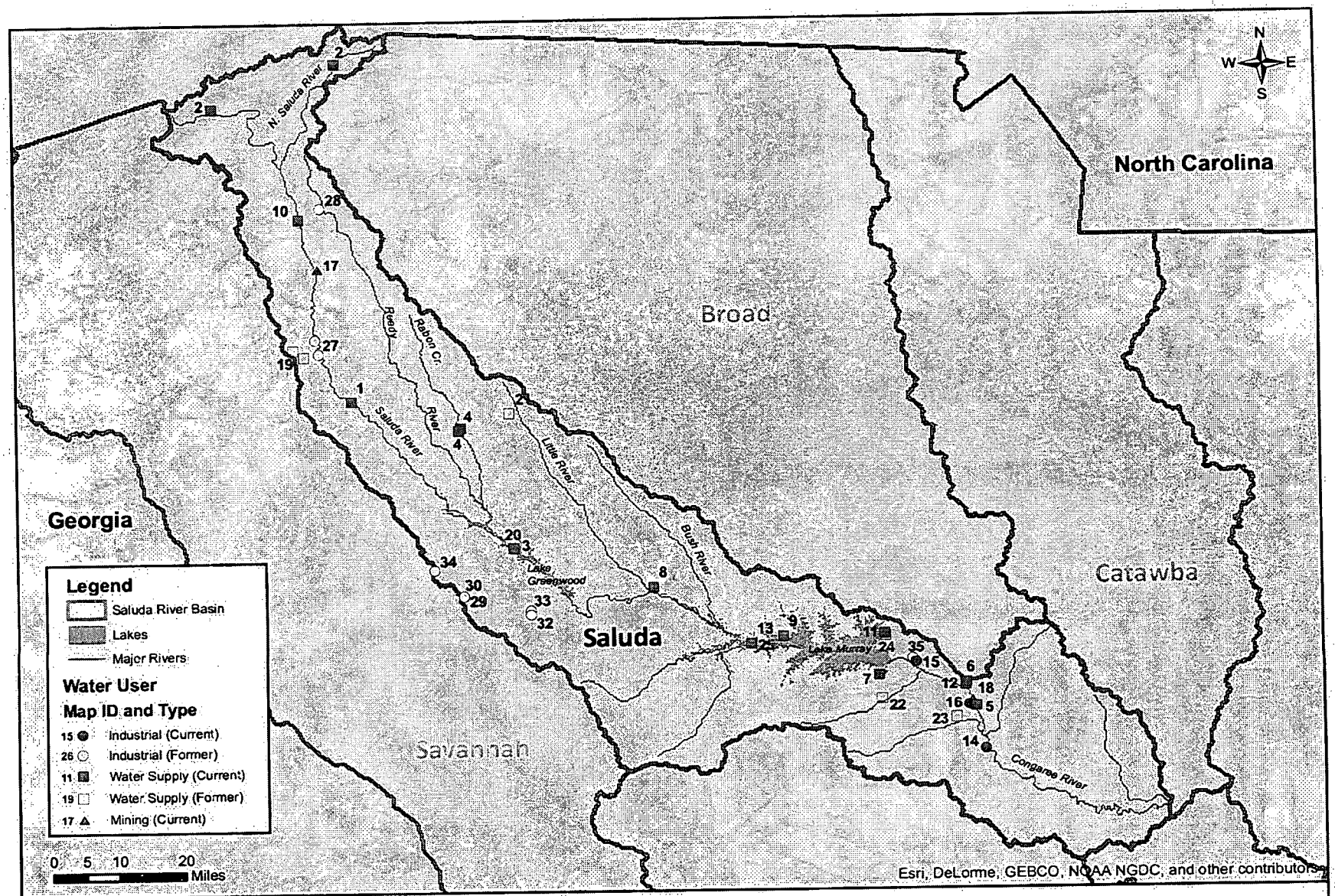
Map ID	User ID	Facility Name
		Golf Course Users (Figure 3-3)
15	23GC004	FURMAN UNIVERSITY GOLF CLUB*
16	23GC013	CLIFFS CLUB AT VALLEY
17	23GC014	THE PRESERVE AT VERDAE
18	32GC004	COUNTRY CLUB OF LEXINGTON
19	32GC007	GOLDEN HILLS GOLF & COUNTRY CLUB
20	32GC010	PONDEROSA COUNTRY CLUB
21	39GC002	ROLLING GREEN GOLF CLUB
22	39GC003	SMITHFIELDS COUNTRY CLUB
23	39GC006	THE ROCK AT JOCASSEE GC
24	40GC002	FOREST LAKE CLUB
25	40GC005	THE MEMBERS CLUB AT WILDEWOOD*

* Denotes multiple intake locations

Table 3-2. Formerly Permitted or Registered Water Users in the Saluda Basin

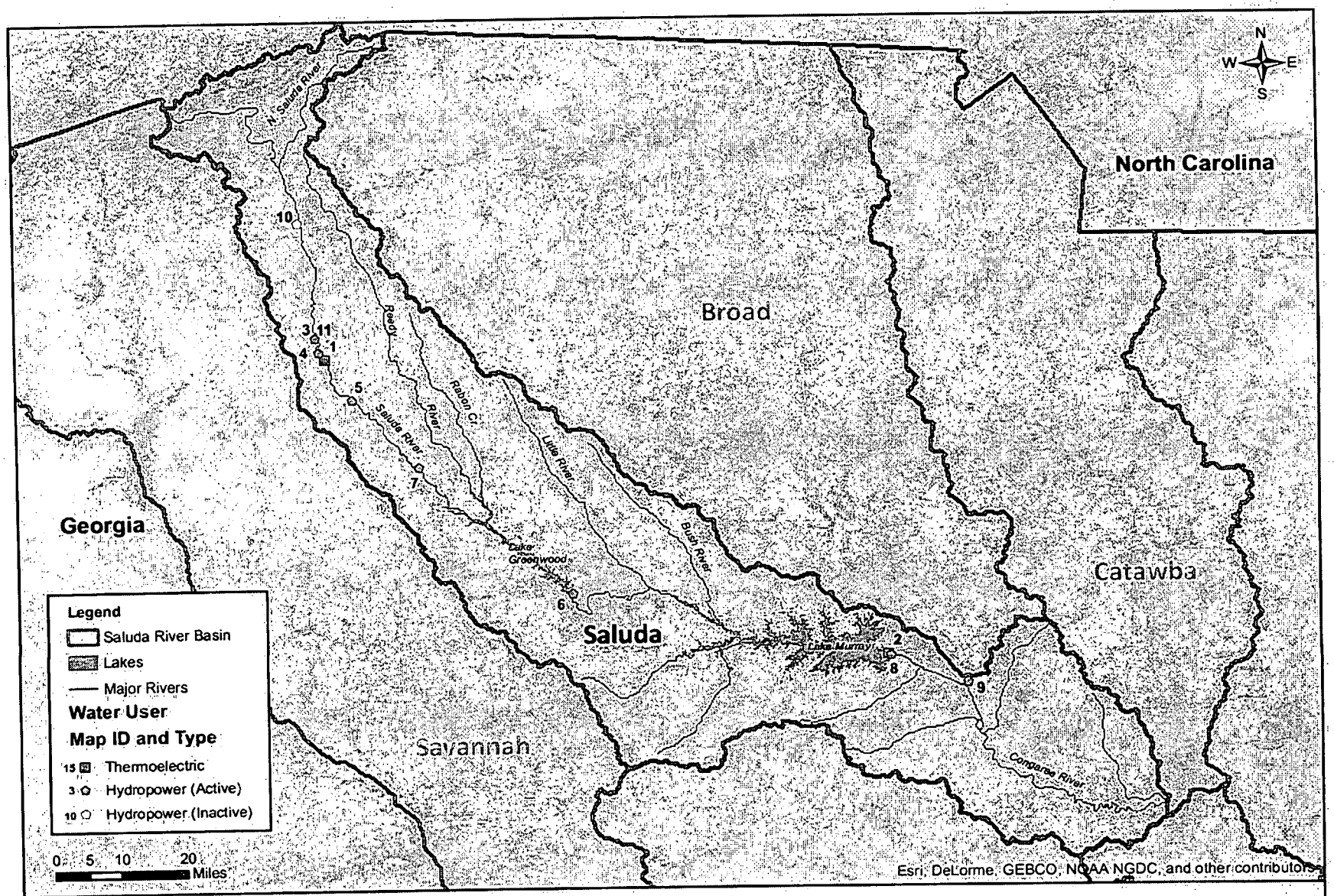
Map ID	User ID	Facility Name
		Drinking Water Users (Figure 3-1)
19	04WS011S01	WILLIAMSTON TOWN OF*
20	24WS001S03	GREENWOOD CPW
21	30WS002S01	LAURENS CPW
22	32WS001S01	LEXINGTON CITY OF
23	32WS004S01	CAYCE WATER PLANT
24	40WS004S01	LAKE MURRAY WATER PLANT
25	41WS003S01	SALUDA COUNTY WATER & SEWER
		Industrial & Mining Users (Figure 3-1)
26	04IN019S01	GERBER CHILDRENSWEAR INC*
27	04IN020S01	SOFT CARE APPAREL*
28	23IN033S01	US FINISHING
29	24IN003S01	GREENWOOD MILLS INC CHALMERS PLANT
30	24IN004S01	GREENWOOD MILLS INC DURST PLANT
31	24IN006S01	GREENWOOD MILLS INC SLOAN PLANT
32	24IN007S01	GREENWOOD MILLS INC ADAMS PLANT
33	24IN009S01	GREENWOOD MILLS INC NINETY SIX PLANT
34	24IN052S01	GREENWOOD MILLS INC HARRIS PLANT
35	32IN001S01	BC COMPONENTS INC
		Hydroelectric Users (Figure 3-2)
10	23PH002	SALUDA RIVER - SALUDA HYDRO
11	04PH004	SALUDA RIVER - PIEDMONT HYDRO

* Denotes multiple intake locations



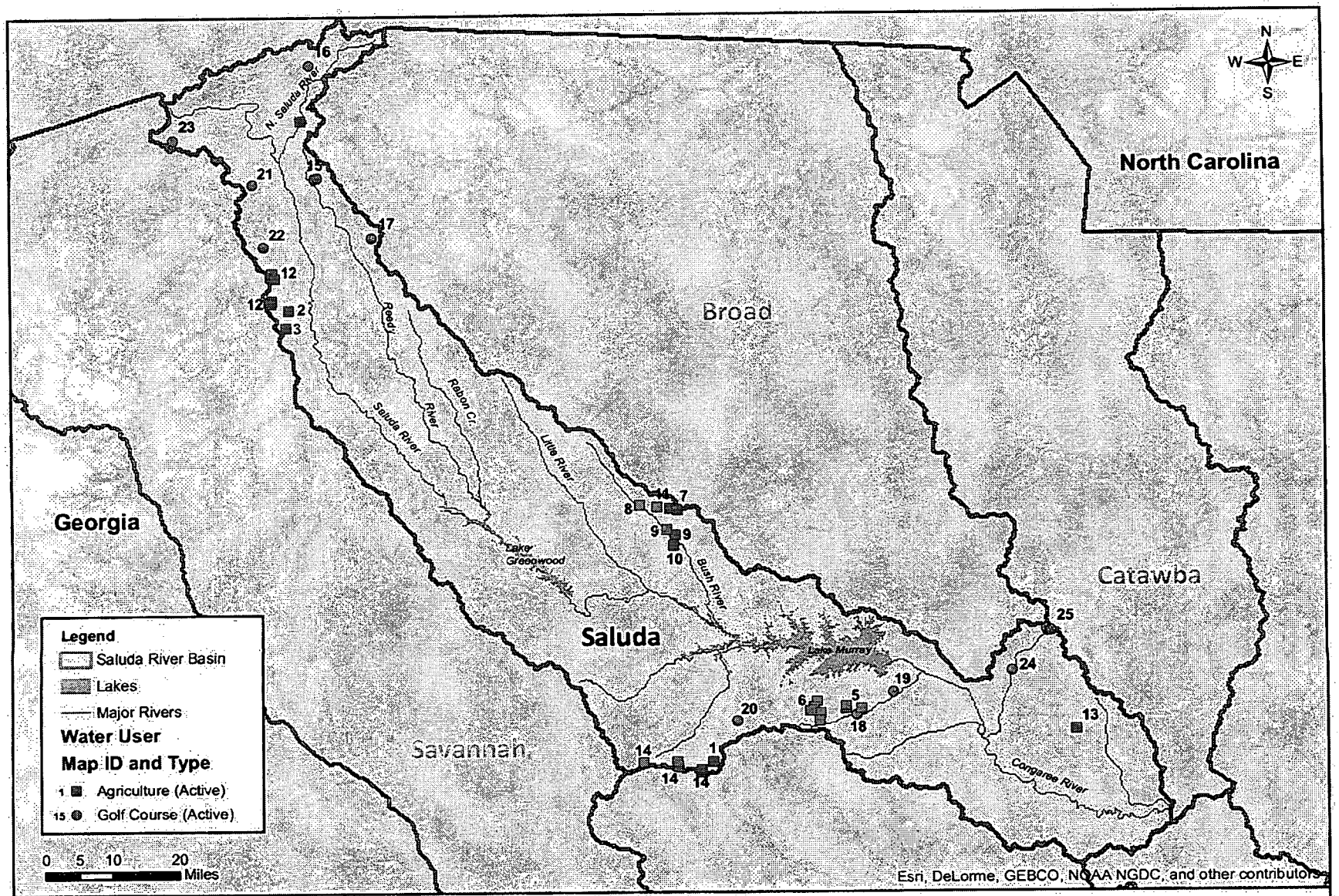
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Figure 3-1
Current and Former Municipal, Industrial, and Mining Surface Water Users



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Figure 3-2
Current and Former Thermoelectric and Hydroelectric Power Surface Water Users



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Figure 3-3
Current Agriculture and Golf Course Surface Water Users

Table 3-3. Currently Permitted NPDES Discharges in the Saluda Basin (Average Discharge ≥100,000 gpd)

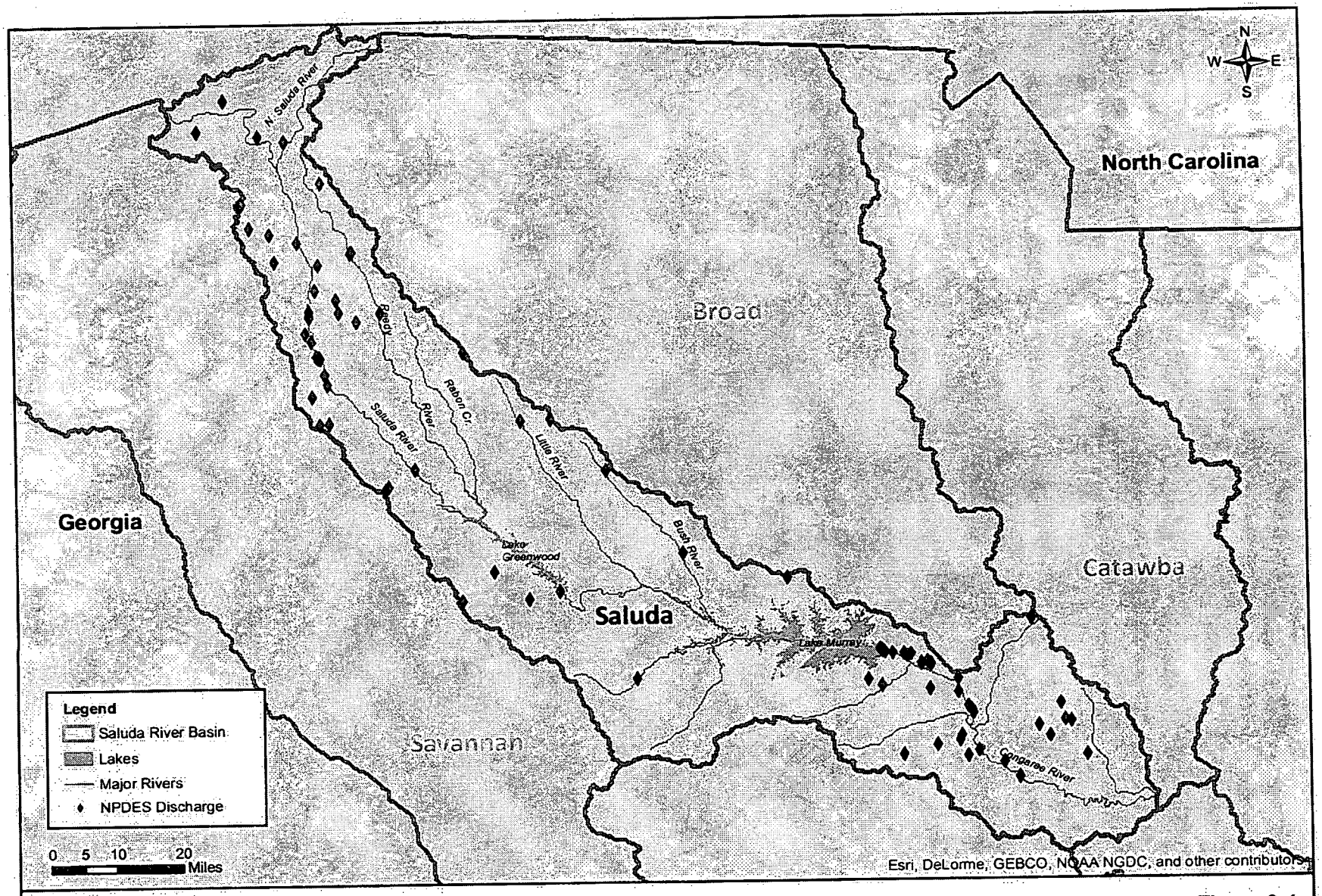
NPDES PIPE ID	Facility Name
SC0002046-004	SCE&G/MCMEEKIN STEAM STATION
SC0003191-01A	MILLIKEN/GAYLEY PLANT
SC0003191-T12	MILLIKEN/GAYLEY PLANT
SC0003191-T13	MILLIKEN/GAYLEY PLANT
SC0003191-T14	MILLIKEN/GAYLEY PLANT
SC0003191-T15	MILLIKEN/GAYLEY PLANT
SC0048356-002	CLENDENIN LUMBER COMPANY
SCG730263-000	MARTIN MARIETTA/CAYCE QUARRY
SCG730245-000	VULCAN CONST MAT/LAKESIDE
SC0033367-001	DEVRO INC/CORIA DIVISION
SC0001848-001	WESTINGHOUSE ELEC LLC/COLUMBIA
SC0045110-001	LEXINGTON CO/EDMUND LANDFILL
SC0001333-01D	EASTMAN CHEMICAL/SC OPERATIONS
SC0001333-01A	EASTMAN CHEMICAL/SC OPERATIONS
SC0001333-001	EASTMAN CHEMICAL/SC OPERATIONS
SC0001333-01F	EASTMAN CHEMICAL/SC OPERATIONS
SC0001333-01E	EASTMAN CHEMICAL/SC OPERATIONS
SC0001333-01G	EASTMAN CHEMICAL/SC OPERATIONS
SC0000701-001	SC AIR NATIONAL GUARD/MCENTIRE
SC0038865-001	EAST RICH CO PSD/GILLS CREEK
SC0020940-001	COLUMBIA/METRO PLANT
SC0026735-001	LEXINGTON/COVENTRY WOODS SD
SC0002062-001	COLUMBIA HYDROELECTRIC PROJECT
SC0027162-001	CWS/WATERGATE DEVELOPMENT
SC0022381-001	SALUDA, TOWN OF
SC0032743-001	BUSH RIVER UTILITIES
SC0035564-001	CWS/I-20 REGIONAL
SC0029475-001	WOODLAND HILLS WEST SD
SC0029483-001	ALPINE UTILITIES/STOOP CREEK
SC0003557-001	SHAW INDUSTRIES GROUP/COLUMBIA
SC0003557-003	SHAW INDUSTRIES GROUP/COLUMBIA
SC0003557-002	SHAW INDUSTRIES GROUP/COLUMBIA
SC0036137-001	CWS/FRIARSGATE SD
SC0002046-005	SCE&G/MCMEEKIN STEAM STATION
SC0002046-002	SCE&G/MCMEEKIN STEAM STATION
SC0002046-003	SCE&G/MCMEEKIN STEAM STATION

Table 3-3 (continued). Currently Permitted NPDES Discharges in the Saluda Basin (Average Discharge ≥100,000 gpd)

NPDES PIPE ID	Facility Name
SC0002071-005	SCE&G/SALUDA HYDRO STATION
SC0002071-008	SCE&G/SALUDA HYDRO STATION
SC0002046-001	SCE&G/MCMEEKIN STEAM STATION
SC0036048-001	NINETY SIX WWTF
SC0021709-001	GREENWOOD/WILSON CREEK WWTF
SC0024490-001	NEWBERRY/BUSH RIVER WWTF
SC0020214-001	WARE SHOALS/DAIRY STREET
SC0020702-001	LAURENS COMM OF PW/LAURENS
SC0048534-001	INGERSOLL RAND/G.W. RECOVERY SYS
SC0045896-002	BELTON/DUCWORTH (SALUDA)
SC0045896-003	BELTON/DUCWORTH (SALUDA)
SC0045896-001	BELTON/DUCWORTH (SALUDA)
SC0002291-001	DUKE ENERGY/LEE STEAM STATION
SC0002291-003	DUKE ENERGY/LEE STEAM STATION
SC0002291-002	DUKE ENERGY/LEE STEAM STATION
SC0002291-004	DUKE ENERGY/LEE STEAM STATION
SC0025194-001	WEST PELZER WWTF
SC0048470-001	WCRSA/PIEDMONT REGIONAL WWTP
SC0039853-001	EASLEY/MIDDLE BRANCH WWTP
SC0041211-001	WCRSA/MAULDIN ROAD
SC0023043-001	EASLEY/GEORGES CREEK LAGOON
SC0026883-001	WCRSA/MARIETTA WWTP
SC0003191-001	MILLIKEN/GAYLEY PLANT
SC0003191-T11	MILLIKEN/GAYLEY PLANT
SC0048356-001	CLENDENIN LUMBER COMPANY
SC0024147-001	CAYCE WWTF
SC0048429-001	AIR PRODUCTS & CHEMICALS, INC

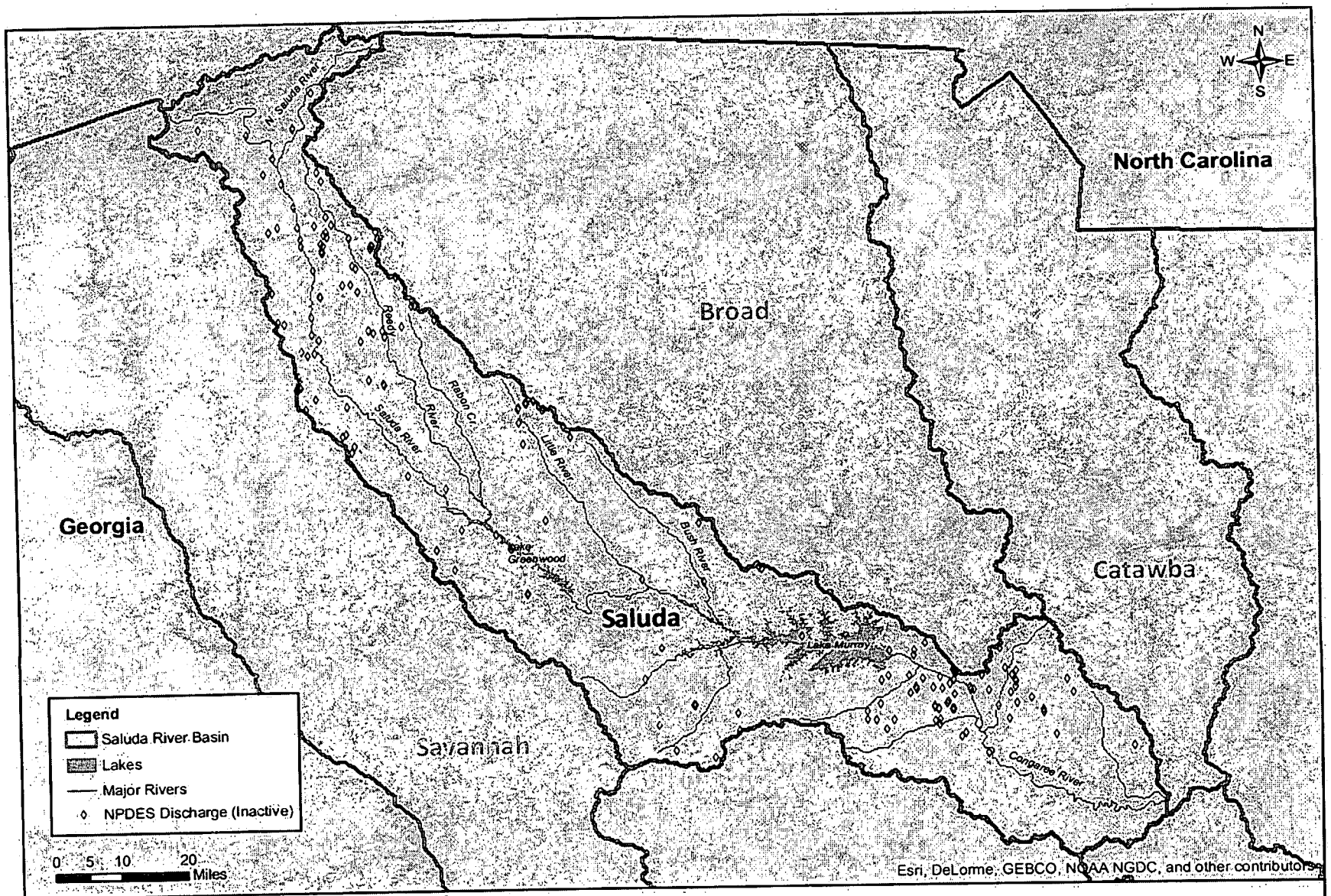
Table 3-4. Formerly Permitted NPDES Discharges in the Saluda Basin (Average Discharge ≥100,000 gpd)

NPDES PIPE ID	Facility Name
SC0001333-01C	EASTMAN CHEMICAL/SC OPERATIONS
SC0041432-001	EASTOVER/SOLOMON STREET WWTP
SC0031402-001	PINEY GROVE UTIL/LLOYDWOOD SD
SC0029122-001	GENTRY'S POULTRY CO, INC
SC0030911-001	STARLITE S/D
SC0023680-001	LEX. CO. JOINT/OLD BARNWELL RD
SC0040789-001	LEX. CO. JOINT/TWO NOTCH RD.
SC0004286-003	SQUARE D COMPANY
SC0040924-001	CAYCE, CITY OF WTP
SC0039225-001	SC FIRE ACADEMY
SC0025585-001	AMICK PROCESSING INC
SC0030945-001	VANARSDALE SD/MIDLANDS UTILITY
SC0043541-001	LEXINGTON/WHITEFORD SD WWTP
SC0003425-001	BC COMPONENTS INC
SC0002071-001	SCE&G/SALUDA HYDRO STATION
SC0002071-003	SCE&G/SALUDA HYDRO STATION
SC0002071-002	SCE&G/SALUDA HYDRO STATION
SC0003425-002	BC COMPONENTS INC
SC0040860-001	NEWBERRY CO W&SA/PLANT #1
SC0022730-001	INTERNATIONAL PAPER/SILVERSTRT
SC0020672-001	HONEA PATH/CHIQUOLA MILL
SC0040827-001	BELTON-HONEA PATH WATER AUTH
SC0020745-001	BELTON/DUCWORTH PLANT
SC0026123-001	EXXON/BELTON PIPELINE TERMINAL
SC0043010-001	SOUTHEASTERN BULK FUEL TERMINA
SC0025976-001	WILLIAMSTON/BIG CREEK EAST
SC0029343-001	SC DEPT CORR/PERRY CORR INST
SC0037460-001	WCRSA/LAKESIDE PLANT
SC0037451-001	WCRSA/PARKER PLANT
SC0034568-001	WCRSA/SALUDA RIVER PLANT



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Figure 3-4
Active NPDES Discharges



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Figure 3-5
Inactive NPDES Discharges

4.0 Overview of Methodology

4.1 UIF Process Diagram

Figure 4-1 illustrates the UIF development process. The process involves adding and subtracting known historical management practices from measured streamflow records. In doing so, the impacts of human intervention on the flow in the river can be removed from the historical flow records. Water is added to existing streamflow estimates to account for historic withdrawals and subtracted out to account for historic discharges, and the timing of flows is adjusted to account for impoundment of rivers.

The process can be described in four steps. Each is summarized below and presented in detail in **Section 5.**

Step 1: Data Collection. This step includes collection of available streamflow records, withdrawal records, discharge records, operational records at dams, impoundment features, etc. The duration of the longest available, reliable streamflow record determines the period of record for the basin. Records from other gages are extended to match this duration (described in **Section 5.4**).

Step 2: Unregulated Flow. Unregulated flows represent a progression in the development of UIFs. Unregulated flow refers to flow in which the timing of flow has not been altered by impoundment. The effects of storage differ from those of withdrawals and discharges because impoundment affects not only the volume of water available, but also the timing at which it flows downstream. For this reason, it is useful to compute unregulated flows first, in which just the timing of flow releases downstream is adjusted to what it would have been in an unimpounded state. UIFs can then be computed from these values, as the remainder of the UIF calculation focuses on flow volume. *It may be determined that a more practical approach to disaggregating reservoir impacts includes ALL impacts of the impoundments at once; volume and timing (reservoirs affect the timing of flow by holding water and releasing it according to various schedules, and also the volume of water in the basin, because water evaporates and collects differently on the reservoir surface than it would on a free-flowing stream). In this case, Unregulated Flows would include adjustment for timing of releases and changes in water volume due to the effects of impoundment evaporation, direct precipitation, withdrawals from the impoundment, and discharges to the impoundment. Determination of which method is more effective or reliable will be made during the Saluda basin Pilot Study.*

There is an important difference between the alteration to flow timing associated with impounding a river (corrected with unregulated flows), and the timing of flow due to its traverse through the river channel (hydraulic time lags). Currently, it is not expected that hydraulic time lags (also referred to as "travel time") will be necessary for these UIF data sets for the following reasons:

a. At a monthly timestep, the time lags would be inconsequential.
b. At a daily timestep, for long-term simulation, the key metric is frequency of various flow levels and water availability, which would be preserved over time even if shifted by several days.

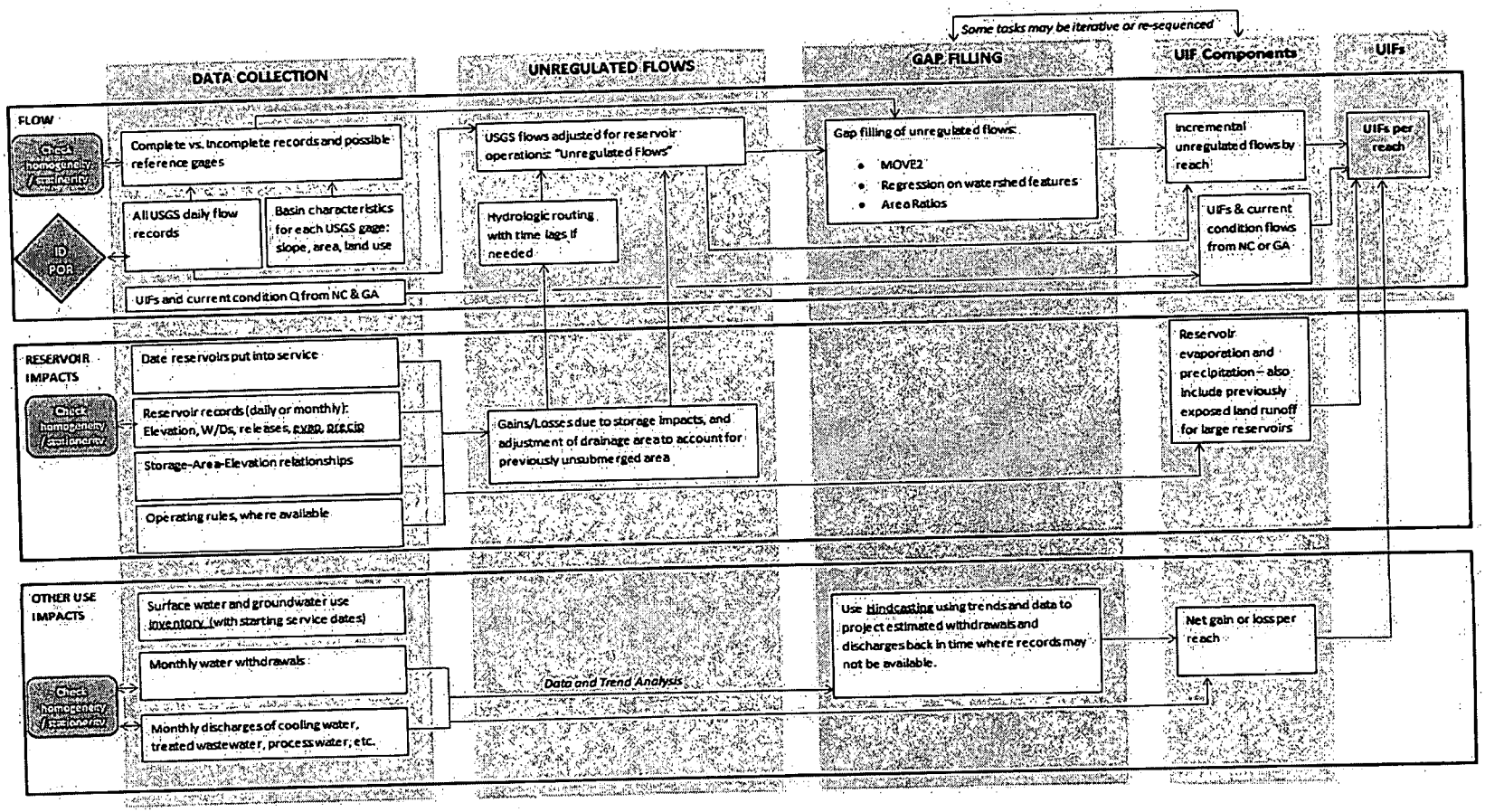


Figure 4-1. Unimpaired Flow Process Diagram

c. Accurate prediction of hydraulic time lags requires channel bathymetry and iterative hydraulic routing equations (HEC-RAS, for example).
d. For UIFs, the observed lags (albeit for impaired flows) are already resident within the USGS streamflow records, so the UIFs will have some of the lag already built in.

If special circumstances warrant rough estimation of hydraulic time lags, flow-based lag equations from USGS could be considered. Note that time lags associated specifically with return flows, e.g. via groundwater, are able to be simulated in SWAM.

*Steps 3 and 4 are presented sequentially in **Figure 4-1**, but may be conducted in either order, and possibly with iteration. It may be preferable to compute UIFs to the greatest extent possible and then fill data gaps using trends observed in documentable UIFs, or it may be preferable to first fill gaps in historic data and then compute uninterrupted UIFs. These decisions will be made on a case-by-case basis, and will likely depend primarily on data availability (see additional detail in **Step 3: Gap Filling**, below).*

Step 3: Gap Filling. As stated under Step 1, the period of record for the basin will begin with the first date that any USGS gage began recording streamflow. All other records will be synthetically extended back to this date if measurements are not available. Likewise, measurement gaps will be filled in synthetically. Two types of synthetic data will be developed: unregulated flow (or in certain cases as noted above, UIFs themselves if these are computed first and then extended/filled), and historic withdrawals and discharges. Hydrologic flows, either unregulated or unimpaired, will be computed using one of a variety of alternative statistical approaches described in **Section 5.4**. Historical management practices, such as withdrawals and discharges, will be filled in to the greatest extent possible with anecdotal information from relevant utilities, supplemented with statistical hindcasting based largely on population.

Where practical, gap filling of the hydrologic flow should occur after UIFs are developed as fully as they can be. This will help preserve the statistical integrity of natural hydrologic relationships. However, the approach is illustrated as flexible for two reasons:

- **Regional Consistency:** It appears that Georgia may have applied some level of gap filling on unregulated flows prior to developing unimpaired flows (see Figure 4-1 of *REVIEW DRAFT: Synopsis of Surface Water Availability Assessment, Georgia Statewide Water Management Plan, Section 4, March 2010*), and we will be using those data sets for the Savannah River Basin.

- **Case-by-Case Decisions:** For basins in which UIFs will be newly developed as part of this study, some flexibility may be important because the timing of when gap filling can be most effective may depend on the type of data sets being filled.

Unregulated flows correct flow measurements for the *timing* of flow, as affected by impoundment and scheduled releases of water downstream. As such, there may be needs to fill in gaps in these

datasets prior to fully developing the UIFs, which add the impacts of *volume* to water management (withdrawals, discharges, evaporation, etc.).

Also, there may be some operational flows that require hind-casting to characterize their impacts over time. It may be beneficial to do this prior to developing the UIFs. In other cases, it may simply be advantageous to extend USGS records synthetically if they can be shown to correlate well with other data so that UIFs can be developed from data sets that are as comprehensive as possible. Not all of the reasons for these decisions are foreseeable at this time, and some will be case-by-case decisions made in collaboration with DNR/DHEC.

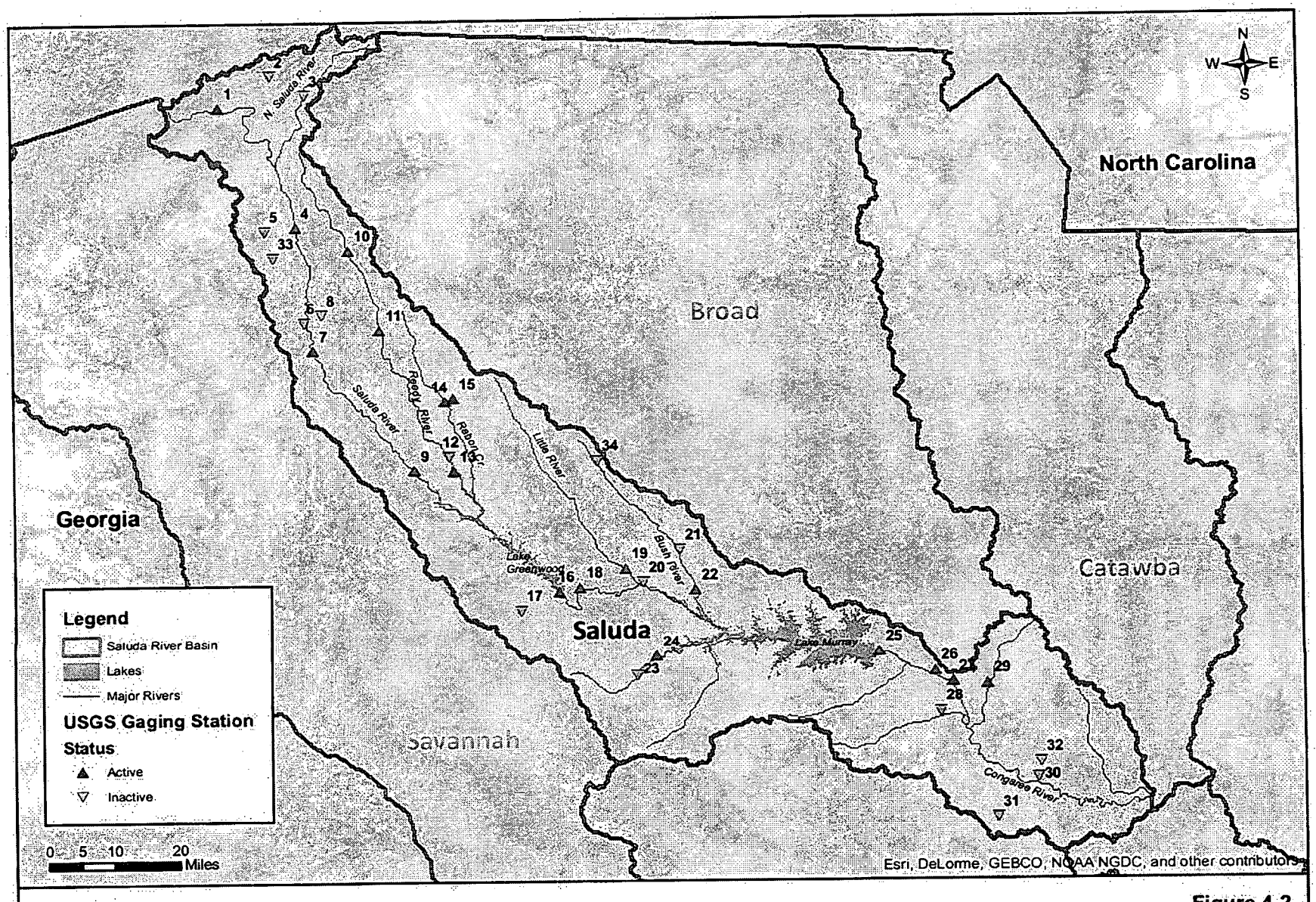
For the pure hydrologic timeseries, however, the project team will endeavor to compute UIFs to the greatest extent possible and then fill in gaps *in the UIFs* using statistical techniques. The flexible approach outlined above facilitates the filling in of some operational gaps and gaps in unregulated flows along the way if the project team (collectively with DNR/DHEC) deems it to be necessary or advantageous to create the most comprehensive datasets with which to compute the UIFs.

Step 4 – Unimpaired Flow Calculation: UIFs will be computed following Equation 1. Additionally, where reservoirs with large surface areas exist upstream of streamflow gages, UIFs will account for runoff that would have occurred on land that was submerged by reservoirs at the time of streamflow readings. Direct precipitation on the reservoir surface will be replaced by this estimate in Equation 1.

4.2 Locations of UIFs

UIFs will be computed at two types of locations throughout the basin:

- Any site where a USGS gage station has recorded streamflow measurements will have calculated UIFs (See **Figure 4-2**). This is because the USGS records provide a necessary "footing" with which to begin the calculation per Equation 1. It will allow model development to proceed with UIFs at upstream sites as input, and at downstream sites for comparative use, or as input of incremental hydrologic flows:
  - Where a gage is located upstream of historical management activity, it will be included in the model as direct input.
  - Where a gage is located on a tributary downstream of a management activity, the management activity will be removed in the calculations and, if necessary, the record can be scaled according to drainage area to estimate an upstream boundary condition UIF for that tributary.
  - Where a gage is located downstream of a management activity on a river mainstem, it will available for comparative purposes, and also used to calibrate reach gains and losses (see Section 4.3 below) or explicit incremental unimpaired flows. Simulated flow at these locations will be computed by the model itself based on upstream UIFs and subsequent river management.



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Figure 4-2
Active and Inactive USGS Streamflow Gaging Stations

- Any tributary that will be explicitly included in the model will require input of unimpaired headwater boundary flow (Sections 4 and 8 of the November 2014 South Carolina Surface Water Quantity Models Modeling Plan discuss explicit and implicit tributaries). If USGS gage data is unavailable for an explicitly modeled tributary, a synthetic UIF will be developed using reference gages and statistical methods discussed in **Section 5.4**.

4.3 Gains and Losses Between UIF Nodes

UIFs will be computed for each USGS streamgage in the basin but, as discussed, not all UIFs will be used for model input. UIFs will be used for model inputs at headwater locations, and available in the river network to compare against computed flows as they are affected by storage, withdrawals, and discharges, and to use for model calibration.

During the subsequent model development and calibration process (after the UIFs are input into the model as headwater inputs), there will be reaches in which hydrologic gains or losses are computed. Gains or losses can be simulated in SWAM in one of two ways. As a first option, the gain/loss function available in SWAM for each tributary object could be used and parameterized according to user-specified percent increases (or decreases) per unit length of stream reach. Alternatively, a timeseries calculated in a similar way to the UIFs themselves (using the difference between two UIFs, and simulated as an inflow or withdrawal) could be specified in SWAM using separate tributary or user objects. Note that for losing streams, the modeled losses would not return elsewhere in the model network, and would be assumed to be lost from the river system.

While it is not expected that losing streams are prevalent in the Saluda Basin, it is understood that they are present elsewhere in the state (the Edisto Basin, for example), and so a general methodology for losses is discussed here. If a downstream gage indicates lower flow than an upstream gage (both unimpaired), this would indicate that the reach in between loses water to the ground, and the REACH GAIN/LOSS function in SWAM would be calibrated accordingly. Alternatively, the difference between the daily flows could be added as a withdrawal from the river using a user object (and not returned elsewhere).

Another possibility that may arise is that an upstream flood may not result in downstream flow immediately (due to travel time). In a normally gaining river, simply subtracting the higher upstream flow from the lower downstream flow that hasn't received the flood waters yet could result in negative values. This is unlikely in the Saluda Basin because it is well populated with USGS gages, so the distance between UIF data sets will not be so significant that a localized flood would not be observed until the next day at the downstream gage. However, if this is observed, we will apply discretionary correction factors or time shifts to reduce the impact of the perceived time lag and help ensure that the reach does not lose water simply because of the hydraulic routing of floods.

5.0 Unimpaired Flow Methodology

The UIF methodology follows the diagram previously shown in Figure 4-1. In addition to discussion of the period of record, each block (from left to right) is discussed in detail below.

5.1 Period of Record

While UIF estimates will begin in 1925, many local streamgages began operation in the 1980s and 1990s. The records for all gages that started tracking flow after 1925 will be extended using gap filling techniques. Although much of the UIFs will thus be based on estimated flows, the value of a lengthy record, even if approximate, is that DNR, DHEC, and other users can evaluate results over a large range of hydrologic and climate conditions. **Figure 5-1** depicts the length and timing of records available for all USGS gages in the Saluda basin. **Table 5-1** lists each gage.

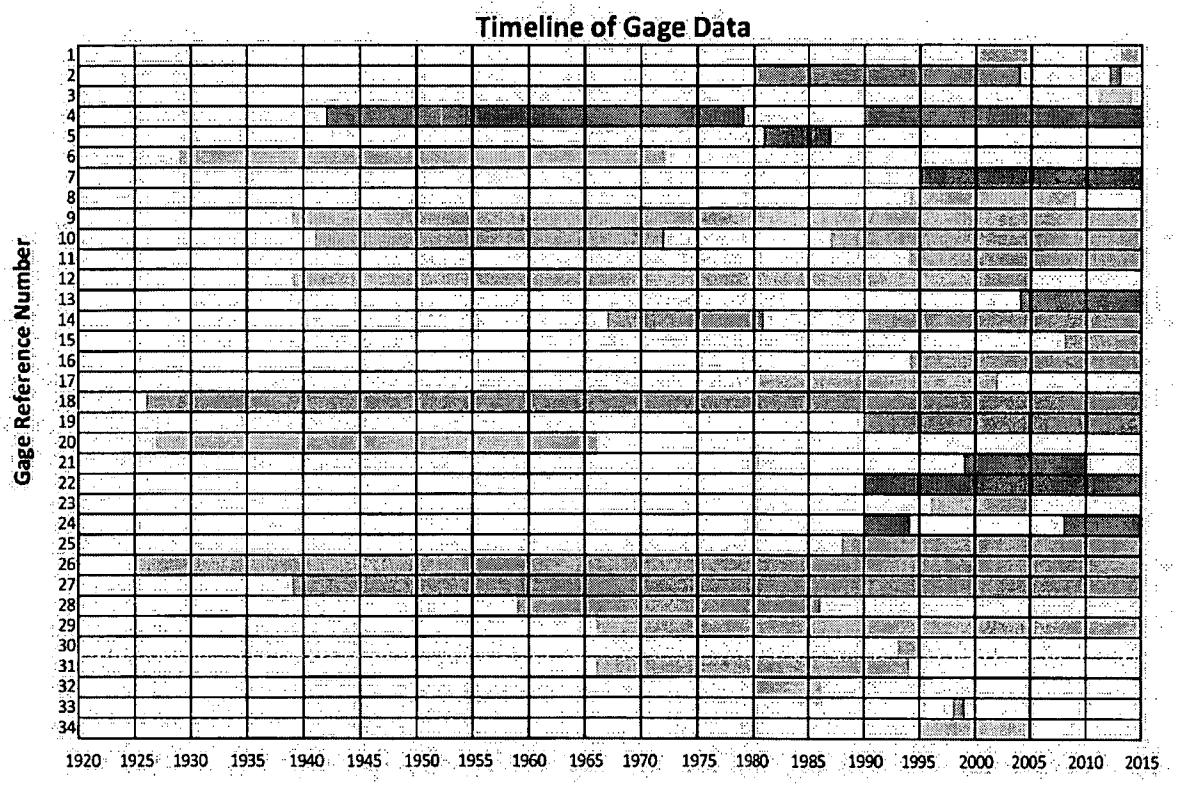


Figure 5-1. Period of record for USGS gages in the Saluda Basin

Table 5-1. USGS gages in the Saluda Basin

USGS Number	Description	Period of Record						Gage ID
		From:	To:	From:	To:	From:	To:	
02162290	SOUTH SALUDA RIVER NEAR CLEVELAND	Feb-2000	Sep-2005	Nov-2013	Jan-2014			1
02162350	MIDDLE SALUDA RIVER NEAR CLEVELAND	Oct-1980	Sep-2003	Jul-2012	Oct-2013			2
021623975	NORTH SALUDA RIVER ABOVE SLATER	Jan-2011	Jan-2013					3
02162500	SALUDA RIVER NEAR GREENVILLE	Jan-1942	Sep-1978	Feb-1990	Aug-2014			4
02162525	HAMILTON CREEK (RD 135) NR EASLEY	Jan-1981	Sep-1986					5
02163000	SALUDA RIVER NEAR PELZER	Oct-1929	Sep-1971					6
02163001	SALUDA RIVER NEAR WILLIAMSTON	Apr-1995	Aug-2014					7
021630967	GROVE CREEK NEAR PIEDMONT	Jul-1994	Nov-2008					8
02163500	SALUDA RIVER NEAR WARE SHOALS	Mar-1939	Aug-2014					9
02164000	REEDY RIVER NEAR GREENVILLE	Nov-1941	Sep-1971	Jun-1987	Aug-2014			10
02164110	REEDY RIVER ABOVE FORK SHOALS	Sep-1993	Aug-2014					11
02165000	REEDY RIVER NEAR WARE SHOALS	Apr-1939	Sep-2004					12
021650905	REEDY RIVER NEAR WATERLOO	Nov-2004	Aug-2014					13
02165200	SOUTH RABON CREEK NEAR GRAY COURT	Jan-1967	Sep-1981	May-1990	Aug-2014			14
021652801	NORTH RABON CREEK NEAR HICKORY TAVERN	Aug-2008	Aug-2014					15
02166501	LAKE GREENWOOD TAILRACE NR CHAPPELLS	Nov-1994	Apr-1995	Oct-1996	Aug-2014			16
02166970	NINETY-SIX CREEK NR NINETY-SIX	Oct-1980	Sep-2001					17
02167000	SALUDA RIVER AT CHAPPELLS	Oct-1926	Aug-2014					18
02167450	LITTLE RIVER NR SILVERSTREET	Mar-1990	Aug-2014					19
02167500	SALUDA RIVER NEAR SILVERSTREET	Jan-1927	Sep-1965					20
02167563	BUSH RIVER AT NEWBERRY	Mar-1999	Jun-2009					21
02167582	BUSH RIVER NR PROSPERITY	Feb-1990	Aug-2014					22
021677037	LITTLE SALUDA RIVER AT SALUDA	Oct-1996	Sep-2001	Nov-2001	May-2002	Oct-2002	Sep-2004	23
02167705	LITTLE SALUDA RIVER NEAR SALUDA	Mar-1990	Jul-1993	Jul-2008	Jan-2009	Apr-2009	Aug-2014	24
02168504	SALUDA RIVER BELOW LK MURRAY DAM NR COLUMBIA	Oct-1988	Aug-2014					25

USGS Number	Description	Period of Record						Gage ID
		From:	To:	From:	To:	From:	To:	
02169000	SALUDA RIVER NEAR COLUMBIA	Aug-1925	Aug-2014					26
02169500	CONGAREE RIVER AT COLUMBIA	Oct-1939	Aug-2014					27
02169550	CONGAREE CREEK AT CAYCE	Oct-1959	Sep-1980					28
02169570	GILLS CREEK AT COLUMBIA	Oct-1966	Aug-2014					29
02169625	CONGAREE RIVER AT CONGAREE NP NEAR GADSDEN	May-1993	Sep-1994					30
02169630	BIG BEAVER CREEK NEAR ST. MATTHEWS	Jul-1966	Sep-1993					31
02169670	CEDAR CREEK BELOW MYERS CREEK NR HOPKINS	Nov-1980	Sep-1985					32
02162700	MIDDLE BRANCH NEAR EASLEY	May-1998	Sep-1998					33
02167557	BUSH RIVER AT JOANNA	June-1995	Sep-2005					34

5.2 Data Needs and Collection

Data needs, discussion of how the data will be used, and potential sources of the data are presented in **Table 5-2**. The majority of data needed are historic records. The categories of data needed include flow, reservoir impacts, and other use impacts. These categories partially overlap. Additional information that needs to be collected as part of developing the SWAM model may also be used to assist with gap filling. Each main category is briefly discussed below.

Flow: All available records of streamflow in the basin need to be gathered, whether they are complete or not. Incomplete records will be filled using the gap filling techniques discussed in **Section 5.4**. The gap filling technique includes correlation with other stream gage records, precipitation data, and evaporation data, which may include gages from outside the basin. As UIF estimates are being prepared across South Carolina, flow data will be gathered from stations statewide to determine the nearest gages from which to correlate flows.

Reservoir Impacts: Reservoir levels and/or discharges are needed to estimate unregulated flows. A mass balance is performed to convert changes in reservoir storage to an unregulated flow in the stream. This calculation is discussed in **Section 5.3**. Reservoir operating rules and records may be used to assist with gap filling.

Other Use Impacts: Other impacts include water users, water dischargers, and groundwater withdrawals. Current and historical water users and dischargers are listed in **Section 3**. While daily withdrawal and discharge data would be ideal, such data is unlikely to be available in most cases. Monthly data should be available for most, but the period of record for such data is limited as such data was not required to be maintained before 2000. Water users and dischargers will be contacted

Table 5-2. Data Needs

Data Category	Data	Use(s)	Potential Sources	Comments
Flow	USGS Stream gage Records	UIFs for every available gage	USGS	Provides opportunity to calculate incremental flows between gages.
	Unimpaired Flow Estimates, Broad River	Direct UIF input	CDM Smith	Broad River is tributary to Saluda basin
	North Carolina Unimpaired Flow Estimates		North Carolina	For Broad River basin: USGS gage records near the state line should capture current managed flow conditions from NC. Records may require updating through 2013.
	Slope, contributing area, and land use for each USGS gage	Correlation for flow estimation	USGS, GIS	USGS provides contributing area, GIS tools and data used to determine slope and land use.
Flow and Reservoir Impacts	Historic Precipitation (Daily)	Reservoir surface precipitation, correlation for flow estimation	US Historical Climatology Network (USHCN)	30 South Carolina sites.
	Historic Pan Evaporation (Monthly)	Reservoir surface evaporation, correlation for flow estimation	DNR	13 sites with data from 1948
Reservoir Impacts	Historic Air Temperature (Daily or Monthly)	Extend evaporation records using temperature as independent variable	National Climatic Data Center (NCDC)	
	Reservoir Operations and Levels	Compute change in volume to develop unregulated flows	Dam operators, Federal Energy Regulatory Commission (FERC) Licenses, USACE, etc.	Includes date reservoir put in service
	Reservoir Storage-Area-Elevation Curves	Compute area for direct rainfall and evaporation and convert changes in reservoir level to volume		
	Spillway Rating Curves	Compute volume spilled to develop unregulated flows		
	Reservoir Operating Rules	Compute undocumented historic releases or other changes in reservoir storage		Includes FERC licenses for hydroelectric dams
Other Use Impacts	Historical M&I Water Withdrawals	Compute net gain or loss per reach	DHEC databases, Records and anecdotal information from individual users/ permittees	Overlap with UIF data collection and development, but useful in confirming models' ability to recreate historic flows as measured by USGS stream gages.
	Historic Ag Water Withdrawals			
	Historic Industrial / Energy Water Withdrawals			
	Historic Discharges			
	Historic Groundwater Use			
	Historic Interbasin Transfers		DNR/DHEC	
	Historic Population	Estimate historical withdrawals absent data	US Census	Surrogate for actual withdrawal data

Data Category	Data	Use(s)	Potential Sources	Comments
Potential Use for Gap Filling	Instream Flow Requirements	Estimate historical reservoir releases	DNR/DHEC	All data gathered as part of model development, but may be utilized for gap filling of UIFs
	Drought Management Requirements	Estimate changes in water user withdrawals given hydrologic conditions		
	Contingency Plan Requirements			
	Spatially distributed acreage of crop types	Estimate historical agricultural water demand and return flows		

by phone to collect additional information on historic usage/discharge patterns to extend the records. Details on the information that will be requested are presented in **Attachment A**.

5.3 Unregulated Flow Estimation

Unregulated flows are flows with the timing impacts from reservoirs removed. Unregulated flows are estimated by computing stream flow from changes in reservoir storage. All components affecting change in storage in a reservoir considered in this study are shown as a mass balance in **Figure 5-2**. The components that represent regulated flow are indicated in orange while other components that represent volume components of the reservoir mass balance are shown in gray. Other losses from a reservoir not shown in Figure 5-2 include dam seepage and ground infiltration. While these data may not be available for the reservoirs in the Saluda basin, available rate estimates can be included in the mass balance.

Equation 2 derives the change in storage from the mass balance of only the regulated flow components in **Figure 5-2**:

$$Change\ in\ Storage = Stream\ Inflow - Spills\ or\ Releases \quad \textbf{(Equation 2)}$$

The change in reservoir storage will be derived from historic reservoir level records as shown below:

$$Change\ in\ Storage = (Reservoir\ Level_{(n)} - Reservoir\ Level_{(n-1)}) * Reservoir\ Area \quad \textbf{(Equation 3)}$$

where n represents the time step. Reservoir area will be derived from reservoir level records using Storage-Area-Elevation relationship curves. Using the two above equations to solve for stream inflow (i.e. unregulated flow) produces the following equation:

$$Stream\ Inflow = (Reservoir\ Level_{(n)} - Reservoir\ Level_{(n-1)})\ Reservoir\ Area + Spills\ or\ Releases = Unregulated\ Flow \quad \textbf{(Equation 4)}$$

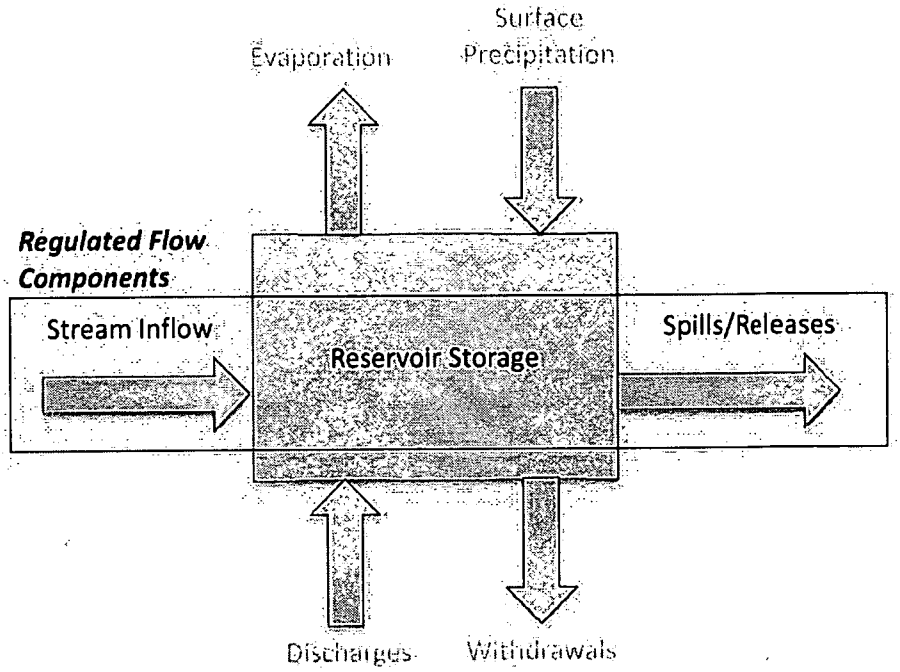


Figure 5-2. Reservoir Mass Balance

It may be determined that a more practical approach to disaggregating reservoir impacts includes all impacts of the reservoir impoundments at once; volume and timing. In this case, the Unregulated Flows would include adjustment for the timing of releases and the changes in water volume due to the effects of impoundment evaporation, direct precipitation, withdrawals from the impoundment, and discharges to the impoundment. Determination of which method is more effective or reliable will be made during the Saluda basin Pilot Study.

5.4 Gap Filling Techniques

As stated in **Section 4**, the period of record for the basin will begin with the first date that any USGS gage began recording streamflow. Hydrologic records will be extended, filled, or created for sites in the model that meet one or more of the following criteria:

- Sites with USGS gages that began recording after the earliest start date in the basin
- Sites with USGS gages that have gaps in their records
- Ungaged tributaries that will be modeled explicitly in SWAM (Sections 4 and 8 of the November 2014 *South Carolina Surface Water Quantity Models Modeling Plan* discuss explicit and implicit tributaries)

As noted, some of the gap filling and record extension techniques may be applied to Unregulated Flows, and in other cases these may be applied to Unimpaired Flows. Decisions will be largely

driven by available data, and efforts to avoid accumulation of uncertainty if possible. Additionally, management practices that have been recorded (withdrawals, discharges, etc.) will likely require record extension using hindcasting approaches. The various techniques to fill in data gaps are described below in **Sections 5.4.1** through **5.4.5**. Decisions on which method to use will be made on a case-by-case basis, based on available data, confidence in the data, and the nature of the incomplete data. In some cases, it may be best to combine methods, or apply more than one for validation purposes.

5.4.1 Streamflow Transposition by Area Ratios *(For extension, gap filling, or full synthesis of historical flows in ungaged or partially gaged basins)*

Where good correlation exists between overlapping periods of streamflow records, or where hydrologic and physical features (drainage area, land use, slope) of an ungaged or incompletely gaged basin correlate well with a nearby gaged reference basin, the correlated reference gage will be used to generate a new synthetic timeseries of flows, or to fill gaps in an existing dataset. Basin area ratios will be applied, and possibly adjusted by correction factors from empirical observations of overlapping periods of record, or literature values related to the magnitude of difference in the area (which may have more of an influence on daily flows than on monthly flows). Reference gages will selected based on proximity to the ungaged or incompletely gaged basin, as well as similarities (to the greatest extent practical based on data availability) in drainage basin land use, size, and slope.

5.4.2 MOVE.2 Technique *(For basins with partial streamflow records)*

Periods of missing streamflow data can be filled based on flow in nearby measured streams using the Maintenance of Variance Extension (MOVE.2) technique (Hirsch, 1982)[1] MOVE.2 is a statistical flow record extension technique that fills missing data in a streamflow record (y) based on flow in a nearby reference stream gage (x) while preserving the statistics in basin *y*. The method has been employed in other U.S. statewide water plans, such as for the Oklahoma Comprehensive Water Plan 2011 Update. The technique shown in the equation below uses the mean (m) and standard deviation (s) of the two streams (the index 'i' is the daily timestep).

$$y_i = m_y + \frac{s_y}{s_x} \cdot (x_i - m_x) \qquad \textbf{(Equation 5)}$$

The selection of an appropriate reference gage will be an important aspect of applying MOVE.2. It is preferred that only nearby reference gages be used for any given basin. Additionally, reference basins will be selected so that basin size, land use, and slope match the characteristics of the basin whose record is to be extended as closely and as practically as possible, based in large part on data

[1] R.M. Hirsch, 1982: *A Comparison of Four Streamflow Record Extension Techniques*. Water Resources Research, Volume 18, Issue 4, pages 1081–1088, August 1982.

availability. Any overlapping data will be checked for reasonable correlation before final selection of reference gages.

Also, if statistics for the reference basin differ substantially between the periods for which the basin with data gaps has data and is missing data, a determination will be made as to whether to apply statistics for the entire record or just periods over which the statistics are relatively stable, and which include the gaps to fill.

5.4.3 Regression on Overlapping Flow Periods, Precipitation, Temperature, and Watershed Features *(for basins with partial records)*

In some cases, area transposition is not robust enough to cover the full range of hydrologic conditions in a basin, especially on a daily basis. In these cases, regression equations can be developed based on overlapping periods of streamflow record with a longer reference gage, provided there is good correlation between the two. Features such as basin size, level of development, and basin slope may be useful as additional predictive variables for streamflow. It is unlikely that precipitation or temperature will be highly correlated with streamflow on a daily basis, but these records can also be checked for correlation and included in multivariate regression analysis if statistically valid correlation can be demonstrated.

5.4.4 Historical Operating Logs: (For basins with substantial monthly operating logs at reservoirs)

Where sufficient operational data are available at reservoirs, water balance calculations can provide reliable estimates of net hydrologic flow into or out of a reservoir. Required data include monthly spills, releases/withdrawals, and changes in water surface elevation or storage. If those data are available, the water balance equation for each timestep (Equation 6) can be solved for net hydrologic inflow (Equation 7).

*Change in Storage = **Stream Inflow** – Withdrawals – Spills – Releases – Evaporation + Surface Precipitation* **(Equation 6)**

***Stream Inflow** = Change in Storage + Withdrawals + Spills + Releases + Evaporation – Surface Precipitation* **(Equation 7)**

5.4.5 Hindcasting Historical Operations *(For basins with undocumented operations that affect streamflow)*

This method refers to the operational components of UIFs, as opposed to the hydrologic components discussed above. Currently, the project team is contacting water users throughout the Saluda basin to augment historical information on operating practices (withdrawals, discharges, impoundment management, etc.) that may not be recorded in databases extending back as far as the USGS gage records. Based on information collected (some of which is likely to be anecdotal), historical undocumented operations can be estimated using start dates, trend analysis for

hindcasting, relationships to population, etc. These synthetic operating records can then be used in UIF calculation.

5.5 Unimpaired Flow Calculations

Once unregulated flows are developed and data gaps are filled, UIFs can be developed by removing the impacts of changes in volume. This includes evaporation and precipitation impacts due to reservoirs and withdrawals and/or discharges from water users along a river reach along a reservoir. Evaporation is a loss from the reservoir that will become a gain to the calculated UIF while precipitation that falls directly over the reservoir is a gain that will become a loss to the UIF. These two components may be combined as net evaporation. For larger reservoirs it will also be necessary to account for runoff that would have occurred on land that is now submerged as a gain to the UIFs. Discharges and withdrawals come from one or more of the water users and dischargers listed in **Section 3**.

Using unregulated flow as a variable, UIFs will be computed using the following general equation:

UIF = Measured Gage Flow + River Withdrawals - River Discharges - Irrigation Return Flow – Septic/Other Return Flow + Unregulated Flow + (Reservoir Evaporation - Reservoir Surface Precipitation) × Reservoir Area + Reservoir Withdrawals + Submerged Surface Runoff

(Equation 8)

Note that reservoir area will be derived from the reservoir level records using the reservoir Storage-Area-Elevation relationship curves.

UIFs will be developed for every stream gage and every major tributary and/or tributary that has managed flows. These particular tributaries will be modeled explicitly. If gage data is not available for such tributaries, synthetic UIFs will be developed to represent these reaches. Smaller tributaries without a gage and without managed flows will be modeled implicitly and do not require development of synthetic UIFs.

Rather than compute UIFs for individual additive reaches from upstream to downstream (a process by which error can accumulate), CDM Smith will compute UIFs for the entire upstream area of each gage, and subtract upstream UIFs to determine incremental UIFs between gages. This avoids accumulation or error or uncertainty by adding calculated UIFs together into a network.

UIFs for basins that originate in North Carolina (Broad, Catawba, and Pee Dee) have already been developed, or will be developed as part of ongoing surface water modeling studies in North Carolina. CDM Smith will obtain these calculations as boundary condition inputs for the relevant South Carolina models. However, while this will provide a basis for comparing managed flows to natural flows, it may be more practical for future planning to also include managed flows from North Carolina as optional model boundary conditions. The reason is because flows entering South Carolina are based on operating practices regulated by North Carolina, and/or by interstate

agreements, neither of which can be controlled by South Carolina. It is recommended that the managed flows from North Carolina be established as the default boundary conditions.

Similarly, for the Savannah River Basin which is shared with Georgia, UIFs have already been developed for the entire basin as part of statewide planning work in Georgia. CDM Smith will obtain the UIFs for both the Georgia and South Carolina portions of the basin as model input (Georgia is currently updating these to 2013). Additionally, CDM Smith will include managed flows from the Georgia tributaries for the same reasons that the calculations will include managed flows from North Carolina. South Carolina may not have influence over these flows, and for future planning, it will be important to combine natural flows in South Carolina with managed flows originating in Georgia.

A subsequent report will be issued with the completed UIF datasets to help explain how they were computed, and what assumptions were made. This report will include:

- Data sources
- Specific gap filling measures and where they were applied (and why)
- Examples of each step in the process of computing different types of UIFs, including direct computations from data, operational gap filling, and hydrologic record extension/filling techniques.

6.0 Issues Specific to the Saluda Basin

6.1 Historic Hydropower Operations

There are two hydroelectric power stations in the Saluda basin that no longer operate: Saluda Hydro on the Saluda River (User ID 23PH002), and Piedmont Hydro on the Saluda River (User ID 04PH004). For the inactive Saluda Hydro site, records exist from 1983-1997. For the inactive Piedmont Hydro site, records exist from 1984-1996, but between 1984 and 1992, reported values do not indicate any flow volume. Collecting or developing missing data from these stations for development of UIFs may be difficult, and may require judgment and collaboration with DNR and DHEC.

6.2 Need for Broad River UIFs

Figure 2-1 shows that the Broad River is a major tributary of the Saluda River, as delineated by DHEC. At the confluence, these two rivers join to form the Congaree River in Columbia, and the Congaree is included in the delineation of the Saluda basin. Therefore, UIFs for Broad River will also be needed to complete Saluda UIFs.

UIFs for Broad River include UIFs and managed flows from the portion of the basin in North Carolina, which will be collected as part of the data collection exercise for the Saluda basin. UIFs for the Broad River will be based on managed flows in North Carolina, representing a boundary condition at the state line over which South Carolina has limited influence, but which most faithfully

represents the water available within the South Carolina borders. As necessary, the flow dataset will be updated to 2013.

In South Carolina, UIFs for the Broad River were developed for Duke Energy by DTA in 2007. The methodology is described in *Broad River Basin Hydrology Report* by DTA, 2007. The flow dataset extends through 2006, and as part of the UIF development for South Carolina, it will be updated through 2013.

6.3 Groundwater

Registered and permitted (both active and inactive) groundwater withdrawal locations are shown in **Figure 6-1**. Between 2002 and 2013, total reported groundwater withdrawals for municipal, industrial, mining, golf course, and agricultural purposes in the Saluda basin averaged between 7 and 12.8 mgd. The majority of the groundwater withdrawals occur south of the Fall Line, in the Upper Coastal Plain.

Groundwater withdrawals may lower streamflow to a point that they potentially influence UIF estimates in a significant manner if the following conditions are met:

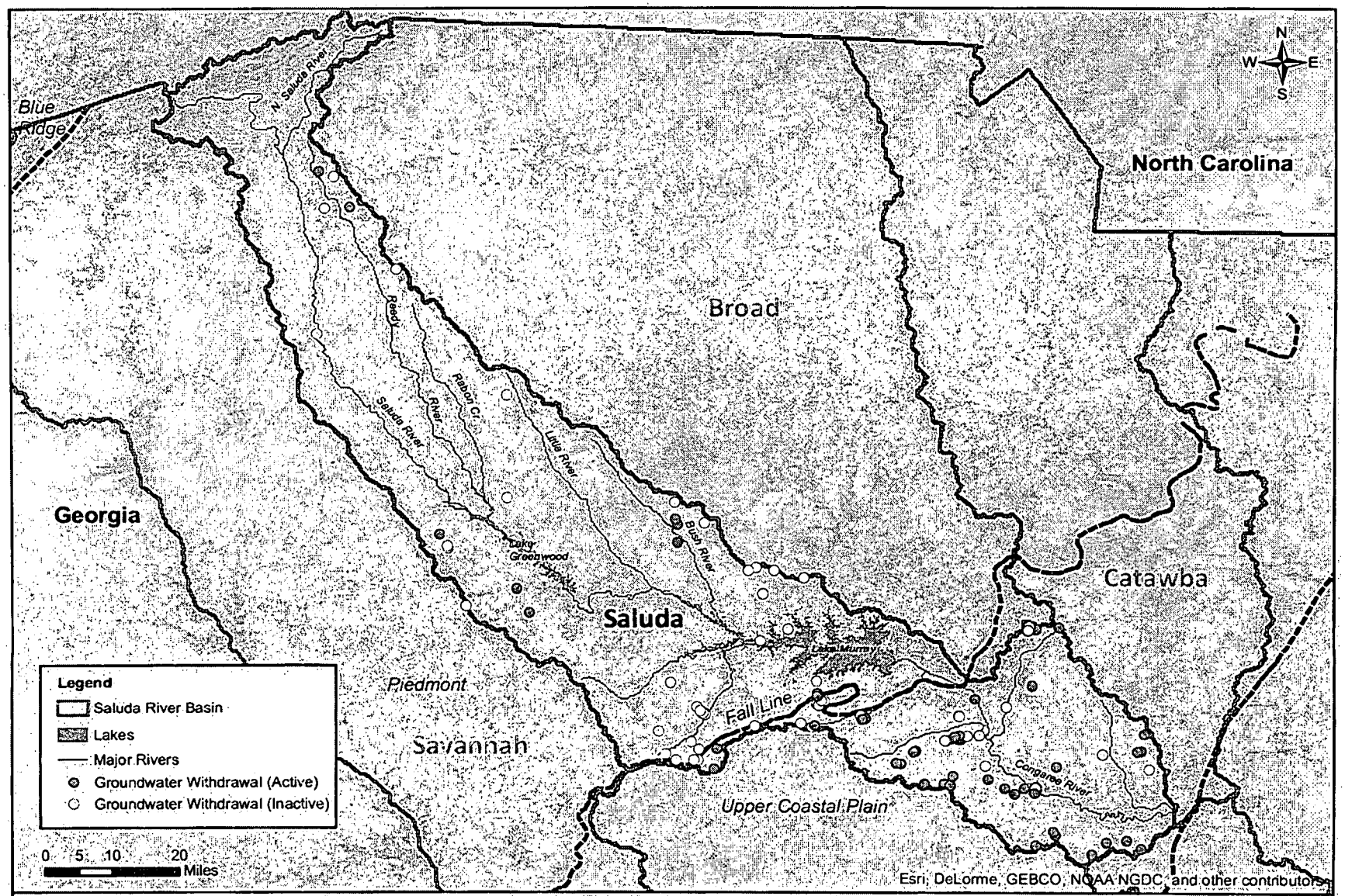
- The withdrawal occurs in an aquifer that contributes baseflow to a stream via direct groundwater discharge.
- The withdrawals are greater than 100,000 gpd.
- A significant portion of the withdrawal is not returned to the stream as a wastewater discharge or to the surficial aquifer via onsite wastewater treatment systems (septic tanks). For example, groundwater withdrawals for irrigation of golf courses or agriculture are expected to be mostly lost to evapotranspiration. Very little is returned to the stream via direct or indirect runoff.

In most instances within the Saluda basin, registered and permitted groundwater withdrawals will likely not meet these conditions, and can therefore be ignored when calculating UIFs; however, each groundwater withdrawal will be reviewed for consideration.

The combined net amount of groundwater withdrawals from private wells (individual wells not permitted or registered) that is not returned to the surficial aquifer system via onsite wastewater systems is not expected to significantly lower stream baseflow in any area of the basin, such that consideration of these withdrawals is necessary in calculating UIFs.

6.4 Agriculture

Registered agriculture surface withdrawal locations in the Saluda basin were shown in **Figure 3-3**. Of the 14 registered agricultural surface water users, only 5 had total reported water withdrawals greater than 100,000 gpd over the last 5 years (2009-2013). As seen on the figure, the agricultural



CDM Smith

Figure 6-1
Active and Inactive Groundwater Withdrawal Locations

withdrawals mostly concentrated in four areas. Although the individual withdrawals are below 100,000 gpd, the combined amount of these concentrated withdrawals may merit inclusion in calculating UIFs.

7.0 Validation of UIFs

Independent checks on final calculated unimpaired flows will occur as part of the surface water model calibration and validation task. Basin-specific surface water allocation models constructed using SWAM will include all the same major withdrawals, return flows, storage reservoirs, and tributaries used to calculate the UIFs described above. In contrast to the UIF calculations, however, SWAM will include spatially continuous flow balance calculations that originate with UIF inputs upstream and incorporate the impacts of reach gains/losses and management activity, rather than calculations for specific downstream nodes.

Flow regimes are constructed in the model from the top of a simulated reach to the bottom based on headwater flows, tributary inputs, and calibrated reach gains or losses. Unimpaired flows are used directly in the models in upstream headwater locations, or areas that are not affected by upstream management activity. However, as the stream network develops and management activity is simulated, UIFs at downstream nodes are *not* used directly as inputs to the models, but will be available for comparative purposes to managed flows. Downstream gaged flows, which include existing development and flow impairment, will be used as calibration targets in the modeling.

Reach gains or losses and ungaged tributary flows will serve as the primary calibration parameters. Following calibration, UIFs at downstream nodes can be easily extracted from SWAM by "turning off" upstream water uses and storage and simulating historical periods. The resulting modeled downstream flows essentially represent simulated unimpaired flows for the given historical period. These downstream flows, calculated by removing upstream water users and storage in the model, can be used to confirm and validate the previously calculated UIFs – That is, we will check the comparability between a UIF at a downstream node (calculated per the procedures outlined in previous sections) and the simulated Unimpaired Flow at that location by removing the management objects from the calibrated model. When upstream management activity is removed from the model, the resulting flow at a given node *should* match the calculated UIF for that node. The model and downstream UIF calculations, therefore, can corroborate each other.

It is likely that the SWAM calibration period will not extend as far as the UIF calculation period. The SWAM models will be calibrated using only periods well supported by data and where there is high confidence in the model input data. These periods may or may not exactly coincide with the full UIF calculation periods. Model development (programming and data entry) and calibration are two separate tasks, and it is not possible to predetermine the model calibration periods until all available data has been collected and reviewed. However, once calibrated, "baseline" historical models will be constructed with simulation periods that match the UIF periods (1925-2013).

ATTACHMENT A

Telephone Questionnaires for Water Users To Supplement Information on Historical Flow Management

Script for Water Supply (WS) Water User

Contact the water user, following the suggested script below.

Hello, my name is _____ with CDM Smith. As you may be aware, South Carolina DNR and DHEC have begun a two-year project to conduct surface water availability assessment modeling for each of the State's eight major river basins. CDM Smith has partnered with DNR and DHEC to assist with this process.

One of our first responsibilities is to characterize the natural hydrologic conditions in each basin, and we'll do this by blending historic streamflow measurements with historic records of water usage. I'm calling you today to solicit your help in confirming our understanding of the history of your water source(s) and operation, and to collect additional data that may be useful to characterize and quantify your utility's historical water use. You may have recently received a letter from DHEC indicating that we would be contacting you. This should only take about 5 to 10 minutes of your time.

You will hear more about the project in the coming months. DNR is in the process of procuring a facilitator to help engage stakeholders in each basin. The facilitator will be organizing meetings to provide additional information regarding the water quantity modeling and subsequent phases of the state water planning effort.

Do you mind if I ask you a few questions about your utilities water withdrawals, both current and historical, or is there someone else that I should speak with?

As I mentioned, one of the first steps in the process is the development of naturalized flows, which are basically estimates of past river flows without any man-made influences such as withdrawals discharges, and dams. These are based in-part on historical records of withdrawal and discharges.

You have provided DHEC with monthly withdrawal data dating from _____ to _____.

- *Did your utility withdraw surface water prior to _____?*
- **[if Yes]** *Do you have data quantifying the withdrawal amounts prior to _____, or if not, can you provide estimated average monthly or annual water use prior to _____?*
- *Has your water source(s) ever changed?*
- *Have multiple sources ever been used?*
- **[Only if multiple sources are used]** *What are your priorities/rules for withdrawing water if multiple sources are used?*

- *Do you have offline storage reservoirs (*not tanks*)? If yes, is storage/area/elevation data available?*

- *Do you have interconnections with other systems?*

- *Do you purchase water from or sell water to other utilities? Have you historically purchased or sold water (but no longer do so)?*

- **[Only if they do not have a Drought Contingency Plan]** *Have you prepared a Drought Contingency Plan and have you used it?*

- **[If they have a Drought Contingency Plan]** *Have you had to use your Drought Contingency Plan in the past?*

- **[If they have an NPDES permit]** *We have your reported NPDES discharge amounts for your utility dating from _____ to _____. Do you have any records of discharge prior to _____?* **[May not need to ask this depending on the situation. Also, we may need to contact some on the wastewater side of their utility, instead].**

- **[For some utilities which also operate WWTPs, their wastewater is stored in holding ponds when the stream's flow and assimilative capacity are low. Water may be withdrawn from the stream but not returned as wastewater while instream flow remains low. This is a "controlled discharge". Ask them the following question:]** *Does your WWTP ever use controlled discharges?*

- **[Only if they have an interbasin transfer permit]** *Can you describe your interbasin transfer* (e.g. is it a constant transfer, or used only in emergency such as through an interconnection to another utility?*) Do you have records quantifying your historical interbasin transfers?*

Thank you very much for your time. To follow-up, I am going to e-mail to you a memorandum documenting my understanding of the information we have discussed today and listing any additional data needs. If you could review the letter, provide corrections or clarifications, and include any additional withdrawal or other data we discussed within the next 30 days, I would appreciate it. I can be reached by phone at _____ or e-mail at _____.

I have your e-mail address as _____. **[Or if we don't have their e-mail address, ask for it]**

Thanks again for your time.

Script for Golf Course (GC) Water User

Contact the water user, following the suggested script below.

Hello, my name is _____ with CDM Smith. As you may be aware, South Carolina DNR and DHEC have begun a two-year project to conduct surface water availability assessment modeling for each of the State's eight major river basins. CDM Smith has partnered with DNR and DHEC to assist with this process.

One of our first responsibilities is to characterize the natural hydrologic conditions in each basin, and we'll do this by blending historic streamflow measurements with historic records of water usage. I'm calling you today to solicit your help in confirming our understanding of the history of your water source(s) and operation, and to collect additional data that may be useful to characterize and quantify your utility's historical water use. You may have recently received a letter from DHEC indicating that we would be contacting you. This should only take about 5 to 10 minutes of your time.

You will hear more about the project in the coming months. DNR is in the process of procuring a facilitator to help engage stakeholders in each basin. The facilitator will be organizing meetings to provide additional information regarding the water quantity modeling and subsequent phases of the state water planning effort.

Do you mind if I ask you a few questions about your water withdrawals, both current and historical, or is there someone else that I should speak with?

As I mentioned, one of the first steps in the process is the development of naturalized flows, which are basically estimates of past river flows without any man-made influences such as withdrawals discharges, and dams. These are based in-part on historical records of withdrawal and discharges.

You have provided DHEC with monthly withdrawal data dating from _____ to _____.

- *Did your golf course withdraw surface water prior to _____?*
- **[if Yes]** *Do you have data quantifying the withdrawal amounts prior to _____, or if not, can you provide estimated average monthly water use prior to _____?* **[Many golf courses may only irrigate April-October]**
- *Has your water source(s) ever changed?* **[Make sure you develop an understanding of groundwater use vs. surface water use, if both have been used. Often, they may pump groundwater to a pond, then withdraw from the pond to irrigate – which is not considered surface water use.**
- *Have multiple surface water sources ever been used?* **[Not likely]**

Thank you very much for your time. To follow-up, I am going to e-mail to you a memorandum documenting my understanding of the information we have discussed today and listing any additional data needs. If you could review the letter, provide corrections or clarifications, and

include any additional withdrawal or other data we discussed within the next 30 days, I would appreciate it. I can be reached by phone at _____ or e-mail at _____.

I have your e-mail address as _____. **[Or if we don't have their e-mail address, ask for it]**

Thanks again for your time.

Script for Industrial (IN) and Mining (MI) Water User

Contact the water user, following the suggested script below.

Hello, my name is _____ with CDM Smith. As you may be aware, South Carolina DNR and DHEC have begun a two-year project to conduct surface water availability assessment modeling for each of the State's eight major river basins. CDM Smith has partnered with DNR and DHEC to assist with this process.

One of our first responsibilities is to characterize the natural hydrologic conditions in each basin, and we'll do this by blending historic streamflow measurements with historic records of water usage. I'm calling you today to solicit your help in confirming our understanding of the history of your water source(s) and operation, and to collect additional data that may be useful to characterize and quantify your utility's historical water use. You may have recently received a letter from DHEC indicating that we would be contacting you. This should only take about 5 to 10 minutes of your time.

You will hear more about the project in the coming months. DNR is in the process of procuring a facilitator to help engage stakeholders in each basin. The facilitator will be organizing meetings to provide additional information regarding the water quantity modeling and subsequent phases of the state water planning effort.

Do you mind if I ask you a few questions about your utilities water withdrawals, both current and historical, or is there someone else that I should speak with?

As I mentioned, one of the first steps in the process is the development of naturalized flows, which are basically estimates of past river flows without any man-made influences such as withdrawals discharges, and dams. These are based in-part on historical records of withdrawal and discharges.

You have provided DHEC with monthly withdrawal data dating from _____ to _____.

- *Did your plant withdraw surface water prior to _____?*
- **[if Yes]** *Do you have data quantifying the withdrawal amounts prior to _____, or if not, can you provide estimated average monthly or annual water use prior to _____?*
- *Has your water source(s) ever changed?*
- *Have multiple sources ever been used?*
- *Do you have offline storage reservoirs (not tanks)? If yes, is storage/area/elevation data available?*
- *Do you have interconnections with other systems?*

- *Do you also purchase water from a nearby utility? Have you historically purchased or water (but no longer do so)?*

- **[If they have an NPDES permit]** *We have your reported NPDES discharge amounts for your utility dating from _____ to _____. Do you have any records of discharge prior to _____?* **[May not need to ask this depending on the situation.]**

- **[Only if they have an interbasin transfer permit]** *Can you describe your interbasin transfer* (e.g. is it a constant transfer, or used only in emergency such as through an interconnection a utility?*) Do you have records quantifying your historical interbasin transfers?*

Thank you very much for your time. To follow-up, I am going to e-mail to you a memorandum documenting my understanding of the information we have discussed today and listing any additional data needs. If you could review the letter, provide corrections or clarifications, and include any additional withdrawal or other data we discussed within the next 30 days, I would appreciate it. I can be reached by phone at _____ or e-mail at _____.

I have your e-mail address as _____. **[Or if we don't have their e-mail address, ask for it]**

Thanks again for your time.

Script for Power/Thermal (PT) and Nuclear (PN) Water User

Hello, my name is _____ with CDM Smith. As you may be aware, South Carolina DNR and DHEC have begun a two-year project to conduct surface water availability assessment modeling for each of the State's eight major river basins. CDM Smith has partnered with DNR and DHEC to assist with this process.

One of our first responsibilities is to characterize the natural hydrologic conditions in each basin, and we'll do this by blending historic streamflow measurements with historic records of water usage. I'm calling you today to solicit your help in confirming our understanding of the history of your water source(s) and operation, and to collect additional data that may be useful to characterize and quantify your utility's historical water use. You may have recently received a letter from DHEC indicating that we would be contacting you. This should only take about 5 to 10 minutes of your time.

You will hear more about the project in the coming months. DNR is in the process of procuring a facilitator to help engage stakeholders in each basin. The facilitator will be organizing meetings to provide additional information regarding the water quantity modeling and subsequent phases of the state water planning effort. Do you mind if I ask you a few questions about your facilities water withdrawals, both current and historical, or is there someone else that I should speak with?

As I mentioned, one of the first steps in the process is the development of naturalized flows, which are basically estimates of past river flows without any man-made influences such as withdrawals discharges, and dams. These are based in-part on historical records of withdrawal and discharges.

You have provided DHEC with monthly withdrawal data dating from _____ to _____.

- *Did your facility withdraw surface water prior to _____?*
- **[if Yes]** *Do you have data quantifying the withdrawal amounts prior to _____, or if not, can you provide estimated average monthly or annual water use prior to _____?*
- *We have your reported NPDES discharge amounts for your utility dating from _____ to _____. Do you have any records of discharge prior to _____?*

Thank you very much for your time. To follow-up, I am going to e-mail to you a memorandum documenting my understanding of the information we have discussed today and listing any additional data needs. If you could review the letter, provide corrections or clarifications, and include any additional withdrawal or other data we discussed within the next 30 days, I would appreciate it. I can be reached by phone at _____ or e-mail at _____.

I have your e-mail address as _____. **[Or if we don't have their e-mail address, ask for it]**

Thanks again for your time.

Exhibit E

CDM Smith

Memorandum

To: *South Carolina Department of Natural Resources (DNR)*
South Carolina Department of Health and Environmental Control (DHEC)

From: *CDM Smith*

Date: *March 2015*

Subject: *Saluda River Basin SWAM Model Framework*

This memorandum presents the SWAM model framework for the Saluda River Basin (Figure 1). Additional tables and maps are provided to help understand how the tributaries, water users, and discharges are being represented in the SWAM modeling environment. The figure, tables and map attachments include:

Figure 1 **Saluda River Basin SWAM Model Framework**

Table 1 **Permitted and registered water users included in the Saluda Basin model framework.**

Table 2 **NPDES discharges included in the Saluda Basin model framework.**

Table 3 **Interbasin transfers included in the Saluda Basin model framework.**

Map 1 **Overview Map**
This map consolidates and presents all active permitted and registered water users; significant discharge locations, including those outside of the Saluda basin which represent the export of water withdrawn from the Saluda basin; USGS stream gage locations; and tributaries (the "higher order tributaries" are not represented explicitly in the model, but their contributions to flow are included in the flows of larger, modeled tributaries). Significant discharge locations generally include NPDES discharges that average over 3 million gallons per month.

Map 2 **Model Tributaries and USGS Gages**
This map presents the Saluda River Basin hydrography including the mainstem of the Saluda and Congaree Rivers, major branches, primary tributaries, secondary tributaries, and higher order tributaries. The contributions of many of the secondary and higher order tributaries are accounted for in the aggregate flow in the larger

tributaries that are modeled explicitly. Both active and inactive USGS streamflow gages are displayed.

Map 3 **Surface Water Users**
This map presents the location of permitted surface water users.

Map 4 **Agricultural Users**
This map presents the location of registered agriculture surface water users with withdrawals that exceed 3 million gallons per month.

Map 5 **All Discharge Points**
This map presents the location of all significant NPDES discharge locations, including those outside of the Saluda basin which represent the export of water withdrawn from the Saluda basin. Significant discharge locations generally include NPDES discharges that average over 3 million gallons per month.

Map 6 **User and Associated Discharged**
This map presents the location of all significant NPDES discharge locations and their associated water withdrawal location.

This framework was developed in collaboration with South Carolina DNR and DHEC during discussions coinciding with progress meetings in December 2014 and January 2015. The proposed framework is submitted with the understanding that it is malleable – that is, we may find that additional tributaries are warranted as explicit model objects (to support simulation of future withdrawals or discharges) rather than implicit flow additions, or that further simplifications are possible without compromising model utility. One of the primary purposes of this pilot study is to experiment with tradeoffs associated with detail and functionality.

The guiding principles in determining what elements of the Saluda River Basin to simulate explicitly were:

1. Begin with a simple representation, with the understanding that it is easier to add additional details in the future than to remove unnecessary detail to make the model more efficient.

2. Any tributary with current uses (permitted or registered withdrawals or significant discharge) will be represented explicitly. This includes most primary tributaries to the Saluda and its major branches, and some secondary tributaries.

3. Generally, tributaries that are unused are not included explicitly, but the hydrologic contributions from these tributaries is embedded in the unimpaired flows (or reach gains) in downstream locations. As unimpaired flows (UIFs) are developed throughout the Saluda,

some additional tributaries may be added explicitly if warranted as candidates to support future use (or these can be easily added at any time in the future as permit applications are received).

SWAM includes built-in flexibility for two key functions relevant to the South Carolina models, and some experimentation with these options will be necessary before recommending an approach that is best suited to the anticipated needs and uses of these models. Additionally, decisions on specific methodologies may be site-specific within a basin, and may vary between basins, based on prevailing anticipated needs for planning and/or permitting. The two key areas with which we will experiment within the current proposed framework in the pilot model include:

- ***Incremental Flows***: Hydrologic inflow in between UIF inputs or uses (model nodes) can be added in two ways, as explained in a previous memorandum dated January 2015 ("Options for Adding User Nodes in a SWAM Network"). They can be added with an embedded methodology in which incremental flow gains or losses can be added proportionally by river mile in relation to the upstream headwater UIF. Alternatively, they can be added as aggregated tributaries (calculated, for example, as the difference between upstream and downstream UIFs) just upstream of the downstream end of a reach. The methods have both advantages and disadvantages. For example, the embedded method of linearly proportional flow increase/decrease will adjust automatically with the addition of new nodes in the future, but requires calibration to long-term trends. On the other hand, adding incremental flows with calculated aggregate tributary flow would be more accurate on a day-to-day basis in the model, but would require manual re-distribution if new nodes are added in the future.
- ***Discharge:*** Water and wastewater discharges can be simulated two ways in SWAM. First, they can be associated with a water withdrawal object, each of which may specify five points of discharge anywhere in the river network. These discharges are not represented with visual model objects, but are identified within the dialogue box for the associated withdrawal object. Alternatively, discharges can be specified with explicit model objects (the Tributary object, modified visually to represent either a natural stream tributary or a controlled discharge, each of which will have identical functionality). Again, there are advantages and disadvantages with both methods. Associating discharges with withdrawals helps to automatically maintain a reasonable water balance because discharges are specified as seasonally-variable percentage of the withdrawal. However, it may be more difficult to test a maximum discharge permit level using this approach. Alternatively, using a tributary object to specify outflows allows for more precise representation of discharge variability, but does not automatically preserve the water balance (the user will need to adjust withdrawals to match simulated discharge). This second approach is also appropriate for interbasin transfers, in which source water resides in another basin but is discharged in the basin in the model.

The pilot model of the Saluda Basin provides an excellent experimental framework in which to test the various ways of simulating flows and discharges so that the balance of model functionality and

detail can be customized specifically for use in South Carolina. The proposed model framework is a starting point based on discussions with DNR and DHEC, and on CDM Smith's initial estimate of an appropriate framework for planning and permitting in South Carolina. It will likely evolve as the pilot model is developed.

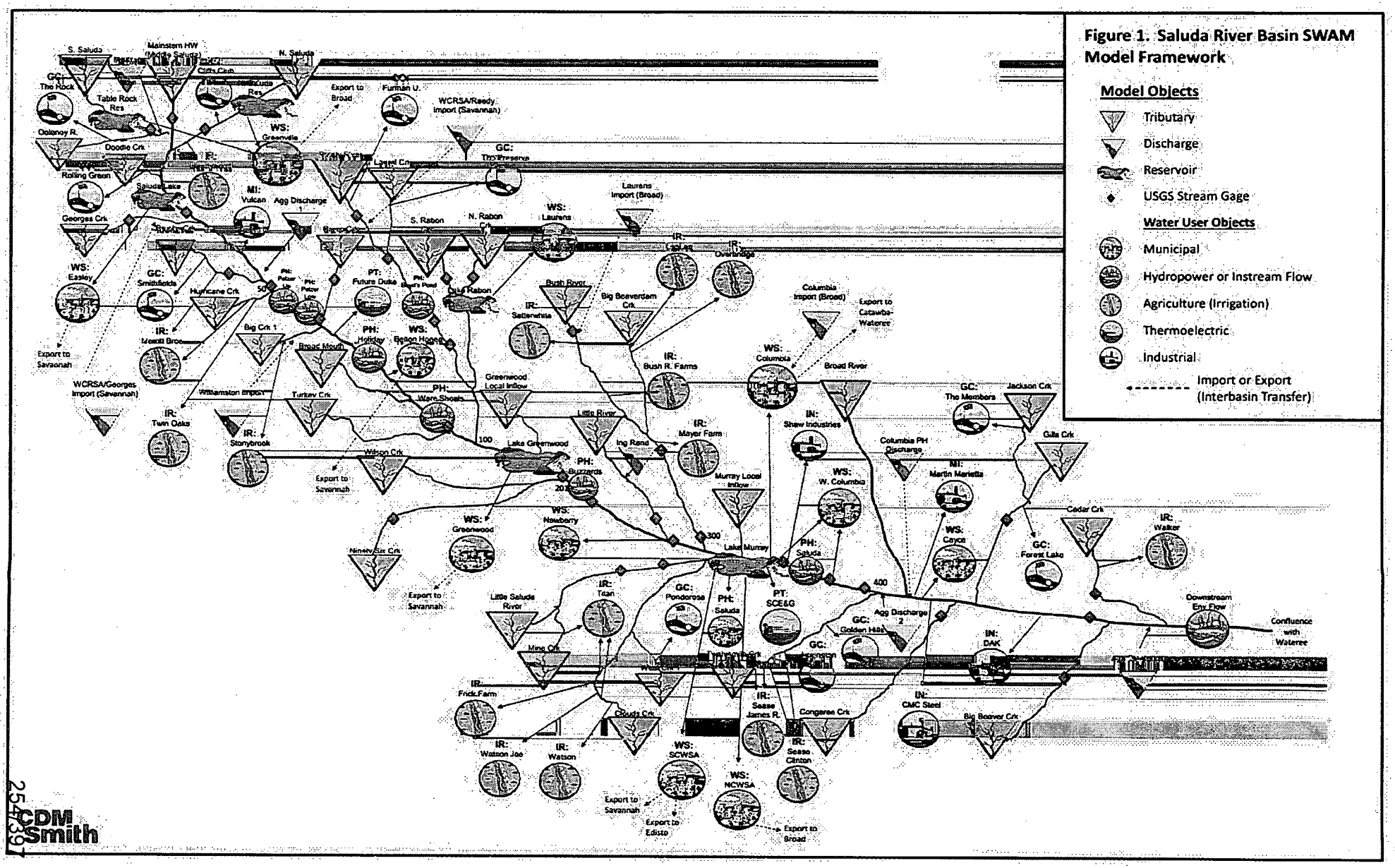

Figure 1. Saluda River Basin SWAM Model Framework
Model Objects
Tributary
Discharge
Reservoir
USGS Stream Gage
Water User Objects
Municipal
Hydropower or Instream Flow
Agriculture (Irrigation)
Thermoelectric
Industrial
Import or Export (Interbasin Transfer)
S. Saluda
Mainstem HW
N. Saluda
GC: The Rock
Table Rock Res
Oolenoy R.
Doodle Crk
Rolling Green
Saluda Lake
Georges Crk
WS: Easley
GC: Smithfields
Hurricane Crk
Big Crk 1
Export to Savannah
WCRSA/Georges Import (Savannah)
IR: Twin Oaks
IR: Stonybrook
Turkey Crk
Williamston Import
Broad Mouth
PH: Holiday
WS: Belton Honea
PH: Ware Shoals
Watson Crk
Export to Savannah
Ninety Six Crk
WS: Greenwood
Export to Savannah
Export to Broad
Furman U.
WCRSA/Reedy Import (Savannah)
WS: Greenville
GC: The Preserve
Laurel Crk
MI: Vulcan
Agg Discharge 1
S. Raben
N. Raben
WS: Laurens
Laurens Import (Broad)
IR: Overbridge
PT: Future Duke
PH: Bush River
Big Beaverdam Crk
IR: Settlemeyer
Columbia Import (Broad)
Export to Catawba-Wateree
WS: Columbia
Broad River
IR: Bush R. Farms
Greenwood Local Inflow
Little River
Ing Rand
IR: Mayor Farm
Murray Local Inflow
Lake Greenwood
PH: Buzzards
Lake Murray
WS: Newberry
WS: W. Columbia
PH: Saluda
Columbia PH Discharge
MI: Martin Marietta
GC: The Members
Jackson Crk
IN: Shaw Industries
Gills Crk
Cedar Crk
IR: Walker
WS: Cayce
GC: Forest Lake
Agg Discharge 2
Downstream Env Flow
Confluence with Wateree
GC: Golden Hills
GC: Ponderosa
PH: Saluda
PT: SCE&G
IN: DAK
Little Saluda River
Ming Crk
IR: Titan
IR: Frick Farm
Crouds Crk
IR: Watson Joe
IR: Watson
IR: Seasa James R.
Congaree Crk
IR: Seasa Clinton
IN: CMC Steel
Big Beaver Crk
WS: SCWSA
WS: NCWSA
Export to Savannah
Export to Edisto
Export to Broad
CDM Smith
254739

Table 1. Permitted and registered water users included in the Saluda Basin model framework.

ID	Type	Facility Name	Withdrawal Tributary	Model Object ID
02IR011S09	IR	WATSON JERROLD & SONS	Clouds Creek	IR: Watson
04IR001S01	IR	TWIN OAKS FARM	Hurricane Creek	IR: Twin Oaks
04IR002S01	IR	STONEYBROOK	Big Creek	IR: Stoneybrook
04MI001S01	MI	VULCAN MATERIALS	Saluda River	MI: Vulcan
04PH001S01	PH	PELZER - UPPER HYDRO	Saluda River	PH: Pelzer Upper
04PH002S01	PH	PELZER - LOWER HYDRO	Saluda River	PH: Pelzer Lower
NA	PT	FUTURE DUKE ENERGY NATURAL GAS PLANT[1]	Saluda River	PT: Future Duke
04WS005S01	WS	BELTON-HONEA PATH WTP	Saluda River	WS: Belton Honea
09IN001S01	IN	DAK (EASTMAN CHEMICAL/SC OPERATIONS)	Congaree River	IN: DAK
23GC004S01	GC	FURMAN UNIVERSITY GOLF CLUB	Reedy River	GC: Furman U
23GC004S02	GC	FURMAN UNIVERSITY GOLF CLUB	Reedy River	GC: Furman U
23GC013S01	GC	CLIFFS CLUB AT VALLEY	Beaverdam Creek/Terry Creek	GC: Cliffs Club
23GC014S01	GC	THE PRESERVE AT VERDAE	Laurel Creek	GC: The Preserve
23IR026S01	IR	BEECHWOOD FARM	North Saluda River	IR: Beechwood
23PH001S01	PH	HOLIDAY BRIDGE HYDRO	Saluda River	PH: Holiday
23WS002S01	WS	GREENVILLE WATER L.B. STOVALL PLANT	North Saluda River	WS: Greenville
23WS002S02	WS	GREENVILLE WATER L.B. STOVALL PLANT	South Saluda River	WS: Greenville
23WS002S03	WS	GREENVILLE WATER L.B. STOVALL PLANT	South Saluda River	WS: Greenville
24PH001S01	PH	BUZZARDS ROOST HYDRO (NORTHBROOK)	Saluda River/Lake Greenwood	PH: Buzzards
24PH001S02	PH	SALUDA HYDRO (NORTHBROOK)	Saluda Lake	Saluda Lake
24WS001S01	WS	CITY OF GREENWOOD (WISE PLANT)	Saluda River/Lake Greenwood	WS: Greenwood
24WS001S02	WS	CITY OF GREENWOOD (WISE PLANT)	Saluda River/Lake Greenwood	WS: Greenwood
30PH002S01	PH	WARE SHOALS HYDRO	Saluda River	PH: Ware
30PH002S01	PH	BOYD'S MILL HYDRO (NORTHBROOK)	Boyd's Mill Pond	PH: Boyd's Mill
30WS002S02	WS	LAURENS WTP	Rabon Creek	WS: Laurens
30WS002S03	WS	LAURENS WTP	Rabon Creek	WS: Laurens
32GC004S01	GC	COUNTRY CLUB OF LEXINGTON	Twelvemile Creek	GC: Lexington
32GC007S01	GC	GOLDEN HILLS GOLF & COUNTRY CLUB	Twelvemile Creek	GC: Golden Hills
32GC010S01	GC	PONDEROSA COUNTRY CLUB	Gin Branch	GC: Ponderosa
32IN006S01	IN	SHAW INDUSTRIES GROUP PLANT 8S	Saluda River	IN: Shaw
32IN051S01	IN	CMC STEEL SOUTH CAROLINA	Congaree River	IN: CMC Steel
32IR005S01	IR	SEASE CLINTON FARMS	Twelvemile Creek	IR: Sease Clinton
32IR005S02	IR	SEASE CLINTON FARMS	Twelvemile Creek	IR: Sease Clinton
32IR005S03	IR	SEASE CLINTON FARMS	Twelvemile Creek	IR: Sease Clinton
32IR021S01	IR	SEASE JAMES R FARMS INC	Twelvemile Creek	IR: Sease James
32IR021S02	IR	SEASE JAMES R FARMS INC	Twelvemile Creek	IR: Sease James
32IR021S03	IR	SEASE JAMES R FARMS INC	Twelvemile Creek	IR: Sease James
32IR021S04	IR	SEASE JAMES R FARMS INC	Twelvemile Creek	IR: Sease James
32IR021S06	IR	SEASE JAMES R FARMS INC	Twelvemile Creek	IR: Sease James
32MI001S01	MI	MARTIN MARIETTA MATERIALS - CAYCE QUARRY	Congaree River	MI: Martin Marietta
32PH001S01	PH	SALUDA HYDRO	Saluda River/Lake Murray	PH: Saluda
32PT001S01	PT	SCE&G - MCMEEKIN STATION	Saluda River/Lake Murray	PT: SCE&G
32WS004S02	WS	CITY OF CAYCE WTP	Congaree River	WS: Cayce
32WS008S01	WS	WEST COLUMBIA WTP	Saluda River	WS: West Columbia
32WS052S01	WS	WEST COLUMBIA WTP	Saluda River/Lake Murray	WS: West Columbia
36IR002S01	IR	OVERBIRDGE FARM LLC	Big Beaverdam Creek	IR: Overbridge
36IR004S01	IR	SATTERWHITE FARMS	Bush River	IR: Satterwhite
36IR009S01	IR	MAYER FARM	Bush River	IR: Mayer
36IR009S02	IR	MAYER FARM	Bush River	IR: Mayer
36IR035S01	IR	BUSH RIVER FARMS	Bush River	IR: Bush R. Farms
36IR037S02	IR	LESLEA FARMS	Big Beaverdam Creek	IR: LesLea
36IR037S03	IR	LESLEA FARMS	Bush River	IR: LesLea
36WS001S01	WS	CITY OF NEWBERRY WTP	Saluda River	WS: Newberry
36WS002S01	WS	NCWSA - LAKE MURRAY WTP	Saluda River/Lake Murray	WS: NCWSA
37IR017S01	IR	MERRITT BROS INC	Brushy Creek	IR: Merritt Bros
37IR017S02	IR	MERRITT BROS INC	Little Brushy Creek	IR: Merritt Bros
37IR017S03	IR	MERRITT BROS INC	Hurricane Creek	IR: Merritt Bros
37IR017S04	IR	MERRITT BROS INC	Hurricane Creek	IR: Merritt Bros
39GC002S01	GC	ROLLING GREEN GOLF CLUB	Doddies Creek	GC: Rolling Green
39GC003S01	GC	SMITHFIELDS COUNTRY CLUB	Middle Branch/Brushy Creek	GC: Smithfields
39GC006S01	GC	THE ROCK AT JOCASSEE GC	South Saluda River	GC: The Rock
39WS001S01	WS	EASLEY COMBINED UTILITIES - D.L. MOORE WTP	Saluda River	WS: Easley
40GC002S01	GC	FOREST LAKE CLUB	Gills Creek	GC: Forest Lake
40GC005S03	GC	THE MEMBERS CLUB AT WILDEWOOD	Jackson Creek	GC: The Members
40GC005S05	GC	THE MEMBERS CLUB AT WILDEWOOD	Jackson Creek	GC: The Members
40GC005S06	GC	THE MEMBERS CLUB AT WILDEWOOD	Jackson Creek	GC: The Members
40IR001S01	IR	WALKER FARM	Cedar Creek	IR: Walker
40PH001S01	PH	COLUMBIA HYDRO	Congaree River	PH: Columbia
40WS002S02	WS	CITY OF COLUMBIA - LAKE MURRAY WATER PLANT	Saluda River/Lake Murray	WS: Columbia
40WS054S01	WS	CITY OF COLUMBIA - CANAL WATER PLANT	Saluda River/Broad River	WS: Columbia
41IR014S01	IR	TITAN FARMS	Peters Creek	IR: Titan
41IR014S03	IR	TITAN FARMS	Peters Creek	IR: Titan
41IR014S04	IR	TITAN FARMS	Clouds Creek	IR: Titan
41IR014S08	IR	TITAN FARMS	Dry Creek	IR: Titan
41IR010s03	IR	FRICK FARM	Clouds Creek	IR: Frick
41WS003S01	WS	SCWSA - RAW WATER INTAKE	Saluda River/Lake Murray	WS: SCWSA

[1] *The Duke Power Lee Steam Station came off-line in late 2014. A Duke Energy Natural Gas Plant may come online near the former steam station and a model objec. hos been included to represent this future facility.*

Blue and gray shading represents water users with multiple permitted withdrawal locations. These are represented by one model object.

Table 2. NPDES discharges included in the Saluda Basin model framework.

NPDES Pipe ID	Facility Name	Discharge Tributary	Associated Water Permit	Model Object ID
SCG730245-000	VULCAN CONST MAT/LAKESIDE	Saluda River	04MI001	MI: Vulcan
SC0002291-001	DUKE ENERGY/LEE STEAM STATION	Saluda River	04PT001	PT: Lee Steam Sta
SC0002291-002	DUKE ENERGY/LEE STEAM STATION	Saluda River	04PT001	PT: Lee Steam Sta
SC0002291-003	DUKE ENERGY/LEE STEAM STATION	Saluda River	04PT001	PT: Lee Steam Sta
SC0002291-004	DUKE ENERGY/LEE STEAM STATION	Saluda River	04PT001	PT: Lee Steam Sta
SC0020214-001	WARE SHOALS/DAIRY STREET	Saluda River	04WS005	WS: Belton Honea
SC0045896-001	BELTON/DUCWORTH (SALUDA)	Saluda River	04WS005	WS: Belton Honea
SC0045896-002	BELTON/DUCWORTH (SALUDA)	Broad Mouth Creek	04WS005	WS: Belton Honea
SC0045896-003	BELTON/DUCWORTH (SALUDA)	Broad Mouth Creek	04WS005	WS: Belton Honea
SC0001333-001	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0001333-01A	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0001333-01D	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0001333-01E	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0001333-01F	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0001333-01G	EASTMAN CHEMICAL/SC OPERATIONS	Congaree River	09IN001	IN: DAK
SC0026883-001	WCRSA/MARIETTA WWTP	North Saluda River	23WS002	WS: Greenville
SC0041211-001	WCRSA/MAULDIN ROAD	Reedy River	23WS002	WS: Greenville
SC0021709-001	GREENWOOD/WILSON CREEK WWTF	Wilson Creek	24WS001	WS: Greenwood
SC0036048-001	NINETY SIX WWTF	Ninety Six Creek	24WS001	WS: Greenwood
SC0042706-001	NINETY SIX CPW (PIER 96) WWTP	Ninety Six Creek	24WS001	WS: Greenwood
SC0020702-001	LAURENS COMM OF PW/LAURENS	Little River	30WS002	WS: Laurens
SC0003557-001	SHAW INDUSTRIES GROUP/COLUMBIA	Congaree River	32IN006	IN: Shaw Industries
SC0003557-002	SHAW INDUSTRIES GROUP/COLUMBIA	Kinley Creek/Congaree River	32IN006	IN: Shaw Industries
SC0003557-003	SHAW INDUSTRIES GROUP/COLUMBIA	Congaree River	32IN006	IN: Shaw Industries
SCG730263-000	MARTIN MARIETTA/CAYCE QUARRY	Congaree River	32MI001	MI: Martin Marietta
SC0002046-001	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0002046-002	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0002046-003	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0002046-004	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0002046-005	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0002046-02A	SCE&G/MCMEEKIN STEAM STATION	Saluda River	32PT001	PT: SCE&G
SC0024147-001	CAYCE WWTF	Congaree River	32WS004	WS: Cayce
SC0022381-001	SALUDA, TOWN OF	Little Saluda River	36WS001	WS: Newberry
SC0024490-001	NEWBERRY/BUSH RIVER WWTF	Bush River	36WS001	WS: Newberry
SC0023043-001	EASLEY/GEORGES CREEK LAGOON	Georges Creek	39WS001	WS: Easley
SC0039853-001	EASLEY/MIDDLE BRANCH WWTP	Middle Branch/Big Brushy Creek	39WS001	WS: Easley
SC0020940-001	COLUMBIA/METRO PLANT	Congaree River	40WS002	WS: Columbia
SC0029483-001	ALPINE UTILITIES/STOOP CREEK	Saluda River	40WS002	WS: Columbia
SC0038865-001	EAST RICH CO PSD/GILLS CREEK	Congaree River	40WS002	WS: Columbia
SC0001848-001	WESTINGHOUSE ELEC LLC/COLUMBIA	Congaree River	*none*	Agg Discharge 3
SC0002071-005	SCE&G/SALUDA HYDRO STATION	Saluda River	*none*	PT: SCG&E
SC0002071-008	SCE&G/SALUDA HYDRO STATION	Saluda River	*none*	PH: Saluda
SC0003191-001	MILLIKEN/GAYLEY PLANT	South Saluda River	*none*	Milliken
SC0003191-T11	MILLIKEN/GAYLEY PLANT	South Saluda River	*none*	Milliken
SC0026735-001	LEXINGTON/COVENTRY WOODS SD	Twelvemile Creek	*none*	Agg Discharge 2
SC0027162-001	CWS/WATERGATE DEVELOPMENT	Fourteenmile Creek	*none*	Agg Discharge 2
SC0029475-001	WOODLAND HILLS WEST SD	Saluda River	*none*	Agg Discharge 2
SC0032743-001	BUSH RIVER UTILITIES	Saluda River	*none*	Agg Discharge 2
SC0033367-001	DEVRO INC/CORIA DIVISION	Congaree River	*none*	Agg Discharge 3
SC0035564-001	CWS/I-20 REGIONAL	Saluda River	*none*	Agg Discharge 2
SC0036137-001	CWS/FRIARSGATE SD	Saluda River	*none*	Agg Discharge 2
SC0045110-001	LEXINGTON CO/EDMUND LANDFILL	Bear Creek/Second Creek/ First Creek/Congaree Creek	*none*	Agg Discharge 3
SC0048429-001	AIR PRODUCTS & CHEMICALS, INC	Saluda River or Grove Creek	*none*	Agg Discharge 1
SC0048470-001	WCRSA/PIEDMONT REGIONAL WWTP	Saluda River	*none*	Agg Discharge 1
SC0048534-001	INGERSOLL RAND/G.W. RECOVERY SYS	North Creek/Little River	*none*	Ing Rand

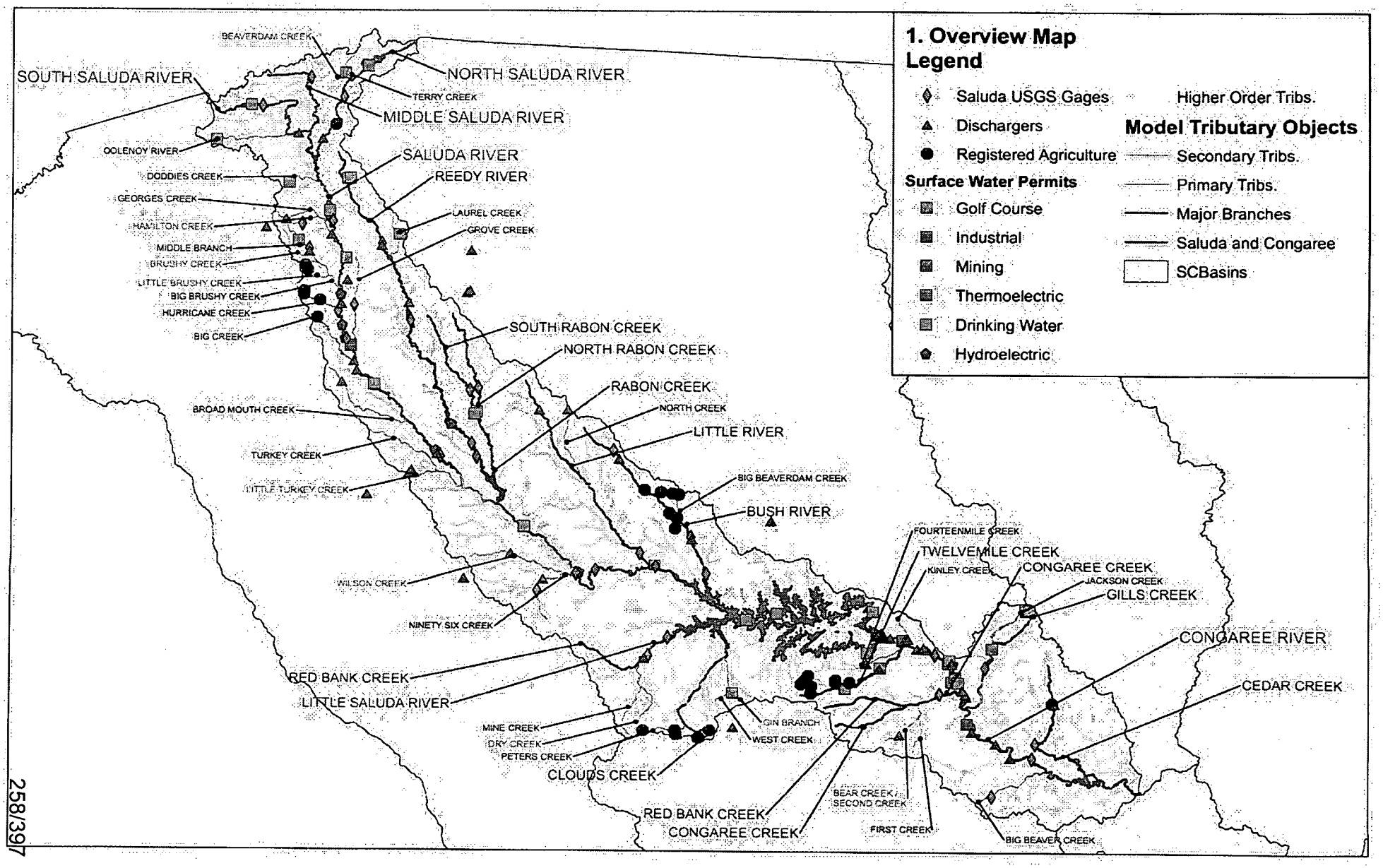
Gray shading represents discharges represented by a Discharge object. All other discharges can be associated with a water permit, and will be represented in the associated Water User object.

Table 3. Interbasin transfers included in the Saluda Basin model framework.

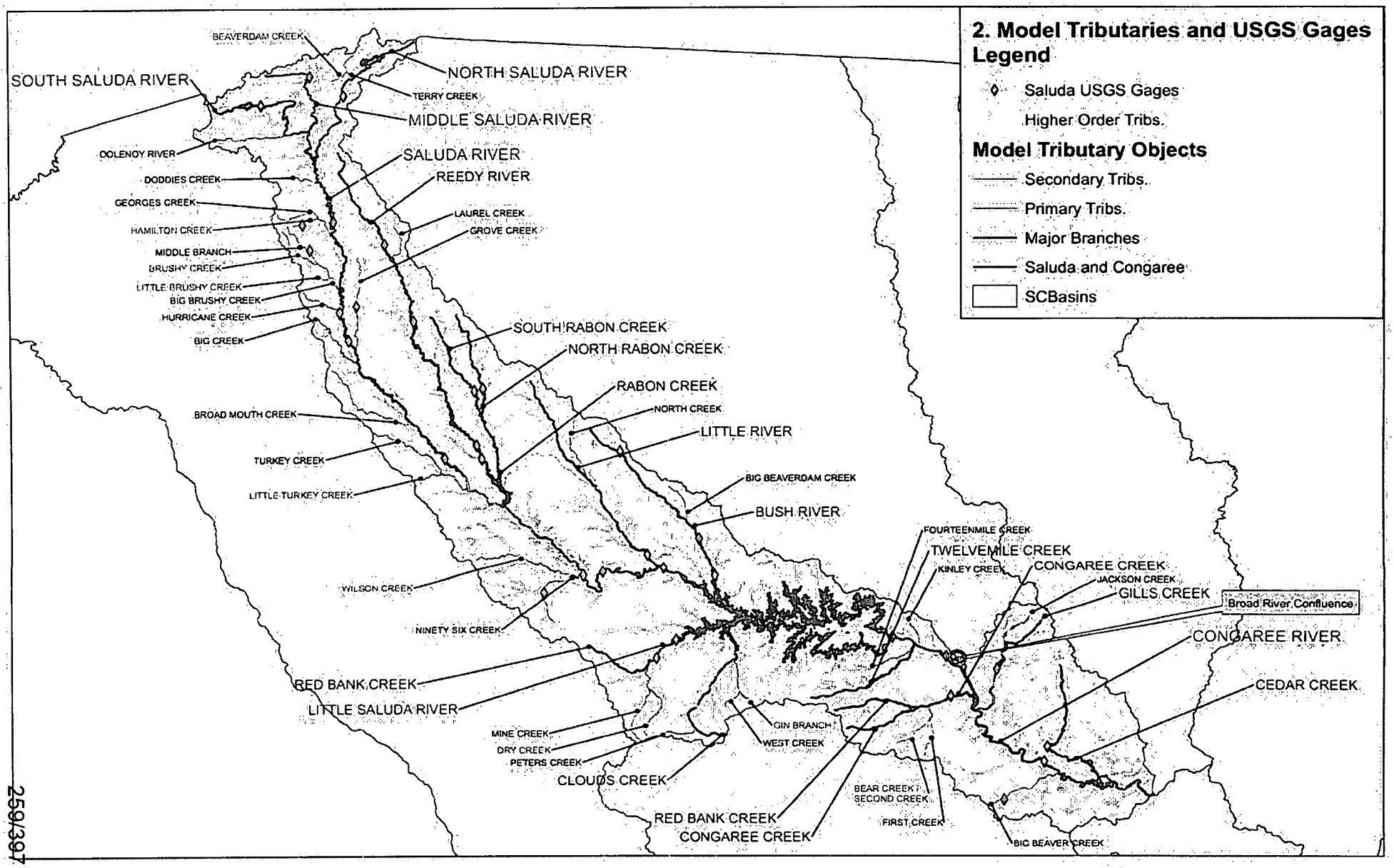
NPDES Pipe ID	NPDES Facility Name	Associated Water Permit ID	Associated Water Permit Facility Name	Intake Basin	Discharge Basin	Location of Discharge In Saluda Basin	Model Object ID
SC0020940-001	COLUMBIA/METRO PLANT	40WS054	CITY OF COLUMBIA - CANAL WATER PLANT	Broad	Saluda	Congaree River	WS: Columbia
NA	NA	40WS054	CITY OF COLUMBIA - CANAL WATER PLANT	Saluda	Catawba-Wateree	--	WS: Columbia
SC0022403-001	DUE WEST WWTF	04WS005	BELTON-HONEA PATH WTP	Saluda	Savannah	--	WS: Belton Honea
SC0022870-001	GREENWOOD/WEST ALEXANDER WWTF	24WS001	CITY OF GREENWOOD (WISE PLANT)	Saluda	Savannah	--	WS: Greenwood
SC0023035-001	EASLEY/GOLDEN CREEK LAGOON	39WS001	EASLEY COMBINED UTILITIES - D.L. MOORE WTP	Saluda	Savannah	--	WS: Easley
SC0024261-001	WCRSA/LOWER REEDY RIVER PLANT	23WS007	GREENVILLE WATER SYSTEM ADKINS TREATMENT PLANT	Savannah	Saluda	Reedy River	WCRSA/Reedy Import
SC0024465-001	BATESBURG-LEESVILLE WWTF	41WS003	SCWSA - RAW WATER INTAKE	Saluda	Edisto	--	WS: SCWSA
SC0024457-001	AIKEN PSA/HORSE CREEK WWTF[1]	41WS003	SCWSA - RAW WATER INTAKE	Saluda	Savannah	--	WS: SCWSA
SC0037974-001	LAURENS CO W&S/CLINTON-JOANNA	30WS001	CITY OF CLINTON WTP	Broad	Saluda	Bush River	Laurens Import
SC0040002-002	WCRSA/DURBIN CREEK	23WS002	GREENVILE WATER L.B. STOVALL PLANT	Saluda	Broad	--	WS: Greenville
SC0040002-001	WCRSA/DURBIN CREEK	23WS002	GREENVILE WATER L.B. STOVALL PLANT	Saluda	Broad	--	WS: Greenville
SC0040525-001	WCRSA/GILDER CREEK	23WS002	GREENVILE WATER L.B. STOVALL PLANT	Saluda	Broad	--	WS: Greenville
SC0046841-001	WILLIAMSTON/BIG CRK EAST WWTP	04WS006	ANDERSON REGIONAL JWS	Savannah	Saluda	Saluda River	Williamston Import
SC0047309-001	WCRSA/GEORGES CREEK	23WS007	GREENVILLE WATER SYSTEM ADKINS TREATMENT PLANT	Savannah	Saluda	Saluda River	WCRSA/Georges Import
SC0048313-001	NCW&SA/CANNONS CREEK WWTP[1]	36WS002	NCWSA - LAKE MURRAY WTP	Saluda	Broad	--	WS: NCWSA

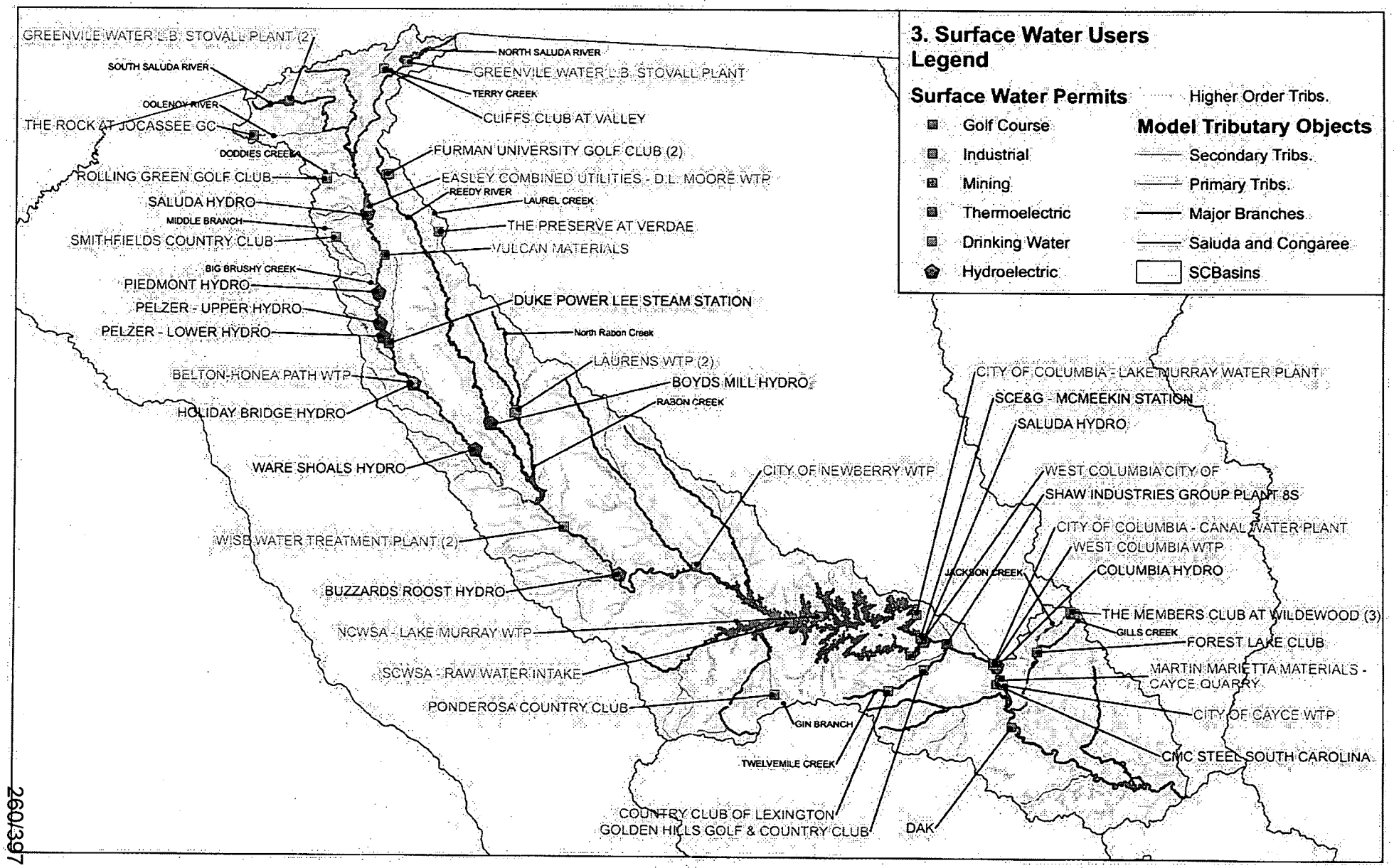
Gray shading represents Saluda Basin discharges that are imports from either the Broad or the Savannah basins. All others are exports from the Saluda Basin.

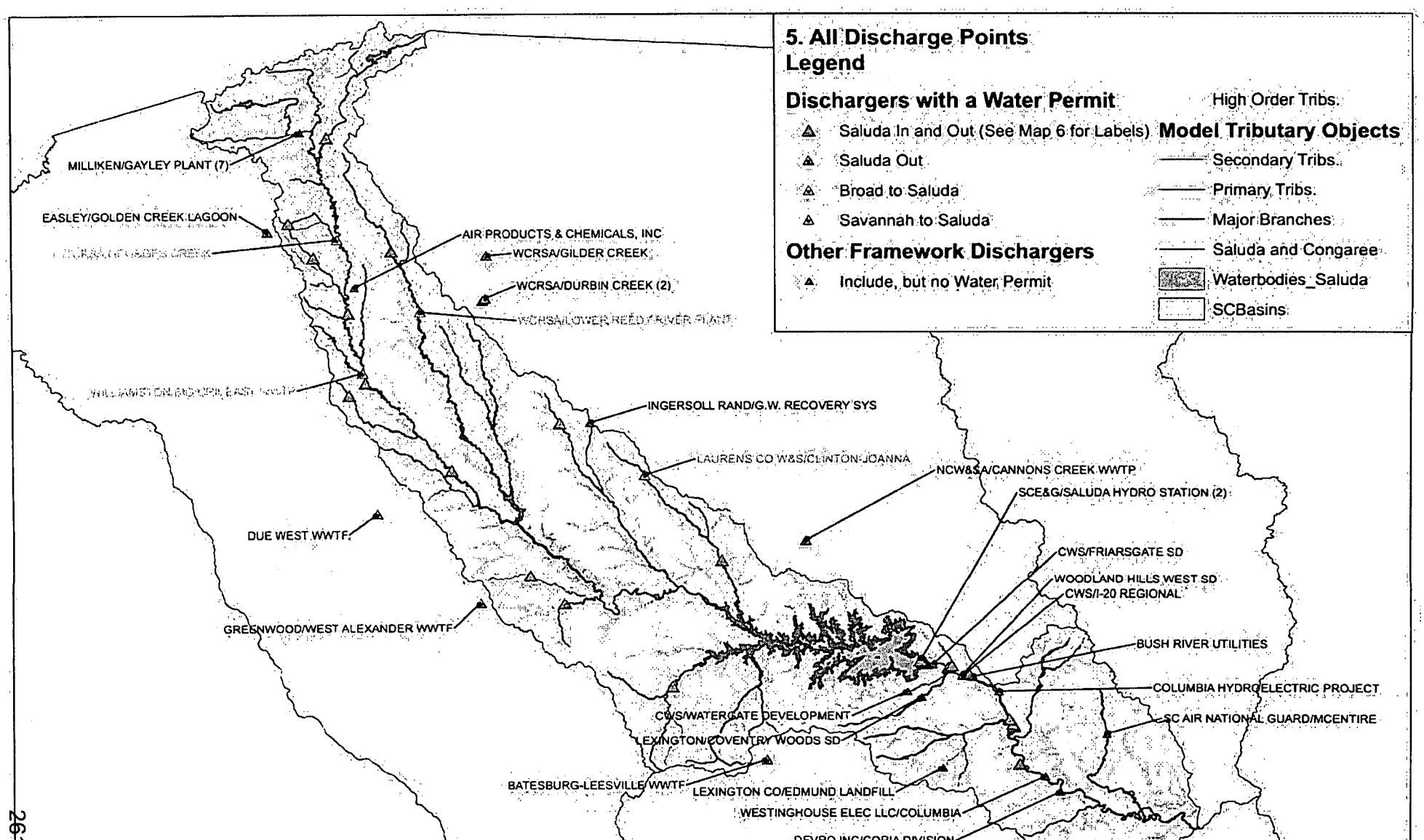
[1] *Water purchased from the City of Newberry by SCWSA and NCWSA is also discharged at this facility through IBT 3610001.*


1. Overview Map
Legend
Saluda USGS Gages
Dischargers
Registered Agriculture
Surface Water Permits
Golf Course
Industrial
Mining
Thermoelectric
Drinking Water
Hydroelectric
Higher Order Tribs.
Model Tributary Objects
Secondary Tribs.
Primary Tribs.
Major Branches
Saluda and Congaree
SCBasins
BEAVERDAM CREEK
SOUTH SALUDA RIVER
NORTH SALUDA RIVER
TERRY CREEK
MIDDLE SALUDA RIVER
OOLENOY RIVER
SALUDA RIVER
DODDIES CREEK
REEDY RIVER
GEORGES CREEK
LAUREL CREEK
HAMILTON CREEK
GROVE CREEK
MIDDLE BRANCH
BRUSHY CREEK
LITTLE BRUSHY CREEK
BIG BRUSHY CREEK
HURRICANE CREEK
BIG CREEK
SOUTH RABON CREEK
NORTH RABON CREEK
RABON CREEK
BROAD MOUTH CREEK
NORTH CREEK
LITTLE RIVER
TURKEY CREEK
LITTLE TURKEY CREEK
BIG BEAVERDAM CREEK
BUSH RIVER
FOURTEENMILE CREEK
TWELVEMILE CREEK
KINLEY CREEK
CONGAREE CREEK
JACKSON CREEK
GILLS CREEK
WILSON CREEK
NINETY SIX CREEK
CONGAREE RIVER
CEDAR CREEK
RED BANK CREEK
LITTLE SALUDA RIVER
GIN BRANCH
MINE CREEK
WEST CREEK
DRY CREEK
PETERS CREEK
CLOUDS CREEK
BEAR CREEK / SECOND CREEK
RED BANK CREEK
CONGAREE CREEK
FIRST CREEK
BIG BEAVER CREEK

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2. Model Tributaries and USGS Gages
Legend
Saluda USGS Gages
Higher Order Tribs.
Model Tributary Objects
Secondary Tribs.
Primary Tribs.
Major Branches
Saluda and Congaree
SCBasins
BEAVERDAM CREEK
SOUTH SALUDA RIVER
NORTH SALUDA RIVER
TERRY CREEK
MIDDLE SALUDA RIVER
SALUDA RIVER
COLENOY RIVER
DODDIES CREEK
REEDY RIVER
GEORGES CREEK
LAUREL CREEK
HAMILTON CREEK
GROVE CREEK
MIDDLE BRANCH
BRUSHY CREEK
LITTLE BRUSHY CREEK
BIG BRUSHY CREEK
HURRICANE CREEK
BIG CREEK
SOUTH RABON CREEK
NORTH RABON CREEK
RABON CREEK
NORTH CREEK
BROAD MOUTH CREEK
LITTLE RIVER
TURKEY CREEK
BIG BEAVERDAM CREEK
LITTLE TURKEY CREEK
BUSH RIVER
FOURTEENMILE CREEK
TWELVEMILE CREEK
KINLEY CREEK
CONGAREE CREEK
JACKSON CREEK
GILLS CREEK
Broad River Confluence
WILSON CREEK
CONGAREE RIVER
NINETY SIX CREEK
CEDAR CREEK
RED BANK CREEK
LITTLE SALUDA RIVER
GIN BRANCH
MINE CREEK
WEST CREEK
DRY CREEK
PETERS CREEK
CLOUDS CREEK
BEAR CREEK / SECOND CREEK
RED BANK CREEK
FIRST CREEK
CONGAREE CREEK
BIG BEAVER CREEK


3. Surface Water Users
Legend
Surface Water Permits
Golf Course
Industrial
Mining
Thermoelectric
Drinking Water
Hydroelectric
Higher Order Tribs.
Model Tributary Objects
Secondary Tribs.
Primary Tribs.
Major Branches
Saluda and Congaree
SCBasins
GREENVILLE WATER L.B. STOVALL PLANT (2)
SOUTH SALUDA RIVER
OOLENOY RIVER
THE ROCK AT JOCASSEE GC
DODDIES CREEK
ROLLING GREEN GOLF CLUB
SALUDA HYDRO
MIDDLE BRANCH
SMITHFIELDS COUNTRY CLUB
BIG BRUSHY CREEK
PIEDMONT HYDRO
PELZER - UPPER HYDRO
PELZER - LOWER HYDRO
BELTON-HONEA PATH WTP
HOLIDAY BRIDGE HYDRO
WARE SHOALS HYDRO
WISE WATER TREATMENT PLANT (2)
BUZZARDS ROOST HYDRO
NCWSA - LAKE MURRAY WTP
SCWSA - RAW WATER INTAKE
PONDEROSA COUNTRY CLUB
COUNTRY CLUB OF LEXINGTON
GOLDEN HILLS GOLF & COUNTRY CLUB
NORTH SALUDA RIVER
GREENVILE WATER L.B. STOVALL PLANT
TERRY CREEK
CLIFFS CLUB AT VALLEY
FURMAN UNIVERSITY GOLF CLUB (2)
EASLEY COMBINED UTILITIES - D.L. MOORE WTP
REEDY RIVER
LAUREL CREEK
THE PRESERVE AT VERDAE
VULCAN MATERIALS
DUKE POWER LEE STEAM STATION
North Rabon Creek
LAURENS WTP (2)
BOYDS MILL HYDRO
RABON CREEK
CITY OF NEWBERRY WTP
GIN BRANCH
TWELVEMILE CREEK
DAK
CITY OF COLUMBIA - LAKE MURRAY WATER PLANT
SCE&G - MCMEEKIN STATION
SALUDA HYDRO
WEST COLUMBIA CITY OF
SHAW INDUSTRIES GROUP PLANT 8S
CITY OF COLUMBIA - CANAL WATER PLANT
WEST COLUMBIA WTP
JACKSON CREEK
COLUMBIA HYDRO
THE MEMBERS CLUB AT WILDEWOOD (3)
GILLS CREEK
FOREST LAKE CLUB
MARTIN MARIETTA MATERIALS - CAYCE QUARRY
CITY OF CAYCE WTP
CMC STEEL SOUTH CAROLINA


5. All Discharge Points
Legend
Dischargers with a Water Permit
Saluda In and Out (See Map 6 for Labels)
Saluda Out
Broad to Saluda
Savannah to Saluda
Other Framework Dischargers
Include, but no Water Permit
High Order Tribs.
Model Tributary Objects
Secondary Tribs.
Primary Tribs.
Major Branches
Saluda and Congaree
Waterbodies_Saluda
SCBasins
MILLIKEN/GAYLEY PLANT (7)
EASLEY/GOLDEN CREEK LAGOON
AIR PRODUCTS & CHEMICALS, INC
WCRSA/GILDER CREEK
WCRSA/DURBIN CREEK (2)
INGERSOLL RAND/G.W. RECOVERY SYS
LAURENS CO W&S/CLINTON-JOANNA
NCW&SA/CANNONS CREEK WWTP
SCE&G/SALUDA HYDRO STATION (2)
DUE WEST WWTF
CWS/FRIARSGATE SD
WOODLAND HILLS WEST SD
CWS/I-20 REGIONAL
GREENWOOD/WEST ALEXANDER WWTF
BUSH RIVER UTILITIES
COLUMBIA HYDROELECTRIC PROJECT
CWS/WATERGATE DEVELOPMENT
SC AIR NATIONAL GUARD/MCENTIRE
LEXINGTON/COVENTRY WOODS SD
BATESBURG-LEESVILLE WWTF
LEXINGTON CO/EDMUND LANDFILL
WESTINGHOUSE ELEC LLC/COLUMBIA
DEVRO INC/CORIA DIVISION

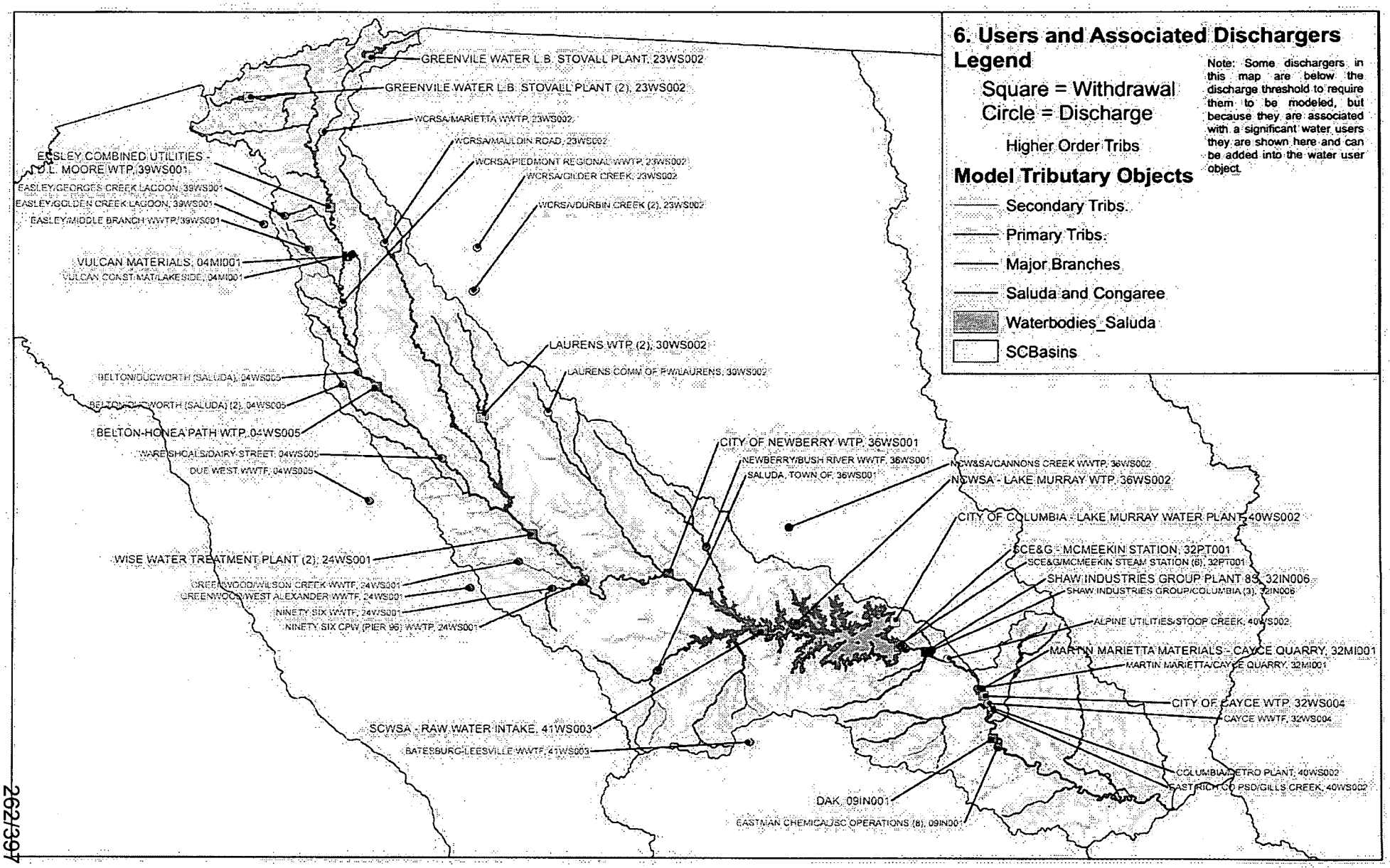

6. Users and Associated Dischargers
Legend
Square = Withdrawal
Circle = Discharge
Higher Order Tribs
Model Tributary Objects
Secondary Tribs.
Primary Tribs.
Major Branches
Saluda and Congaree
Waterbodies_Saluda
SCBasins
Note: Some dischargers in this map are below the discharge threshold to require them to be modeled, but because they are associated with a significant water users they are shown here and can be added into the water user object.
GREENVILE WATER L.B. STOVALL PLANT, 23WS002
GREENVILE WATER L.B. STOVALL PLANT (2), 23WS002
WCRSA/MARIETTA WWTP, 23WS002
WCRSA/MAULDIN ROAD, 23WS002
WCRSA/PIEDMONT REGIONAL WWTP, 23WS002
WCRSA/GILDER CREEK, 23WS002
WCRSA/DURBIN CREEK (2), 23WS002
EASLEY COMBINED UTILITIES - D.L. MOORE WTP, 39WS001
EASLEY/GEORGES CREEK LAGOON, 39WS001
EASLEY/GOLDEN CREEK LAGOON, 39WS001
EASLEY/MIDDLE BRANCH WWTP, 39WS001
VULCAN MATERIALS, 04MI001
VULCAN CONST MAT/LAKESIDE, 04MI001
LAURENS WTP (2), 30WS002
LAURENS COMM OF PW/LAURENS, 30WS002
BELTON/DUCWORTH (SALUDA), 04WS005
BELTON/DUCWORTH (SALUDA) (2), 04WS005
BELTON-HONEA PATH WTP, 04WS005
WARESHOALS/DAIRY STREET, 04WS005
DUE WEST WWTF, 04WS005
CITY OF NEWBERRY WTP, 36WS001
NEWBERRY/BUSH RIVER WWTF, 36WS001
SALUDA, TOWN OF, 36WS001
NCWSA/CANNONS CREEK WWTP, 36WS002
NCWSA - LAKE MURRAY WTP, 36WS002
CITY OF COLUMBIA - LAKE MURRAY WATER PLANT, 40WS002
WISE WATER TREATMENT PLANT (2), 24WS001
GREENWOOD/WILSON CREEK WWTF, 24WS001
GREENWOOD/WEST ALEXANDER WWTF, 24WS001
NINETY SIX WWTF, 24WS001
NINETY SIX CPW (PIER 96) WWTP, 24WS001
SCE&G - MCMEEKIN STATION, 32PT001
SCE&G/MCMEEKIN STEAM STATION (8), 32PT001
SHAW INDUSTRIES GROUP PLANT 85, 32IN006
SHAW INDUSTRIES GROUP/COLUMBIA (3), 32IN006
ALPINE UTILITIES/STOOP CREEK, 40WS002
MARTIN MARIETTA MATERIALS - CAYCE QUARRY, 32MI001
MARTIN MARIETTA/CAYCE QUARRY, 32MI001
CITY OF CAYCE WTP, 32WS004
CAYCE WWTF, 32WS004
SCWSA - RAW WATER INTAKE, 41WS003
BATESBURG-LEESVILLE WWTF, 41WS003
COLUMBIA/METRO PLANT, 40WS002
EAST RICH CO PSD/GILLS CREEK, 40WS002
DAK, 09IN001
EASTMAN CHEMICAL/SC OPERATIONS (8), 09IN001

Exhibit F

Agricultural Surface Water Withdrawal Registrations

D H E C

PROMOTE PROTECT PROSPER

South Carolina Department of Health and Environmental Control

January 7, 2014

Background

- The South Carolina Governor's Water Law Review Committee January 2004 report recommended the state establish a surface water withdrawal permitting program
- At that time, there was no limit on the amount of surface water that could be withdrawn (except Inter-Basin Transfers)
- A multi-year stakeholder process was used to develop the legislation, including representatives from industry, agriculture, water supply, and environmental organizations

Background

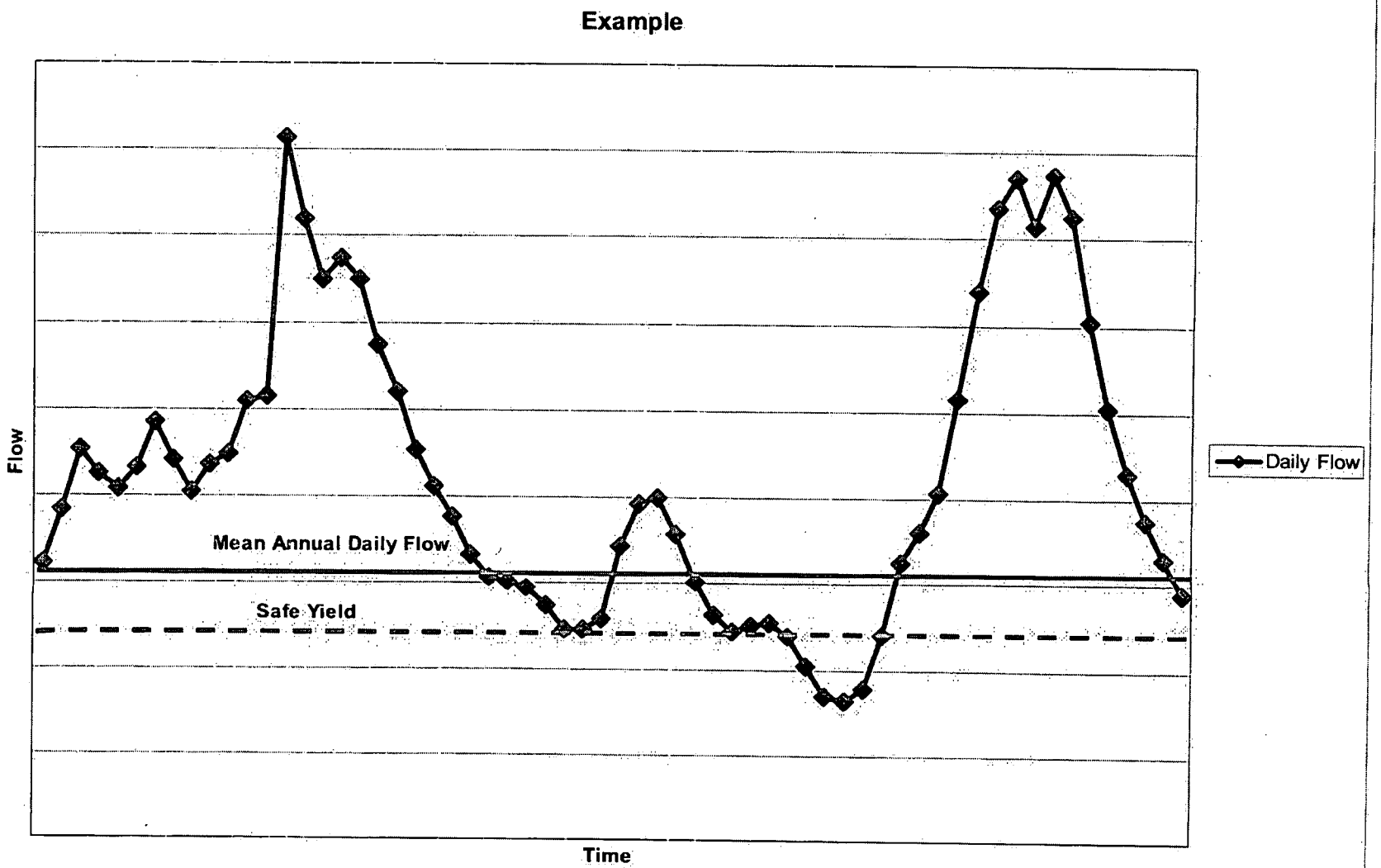
- The Surface Water Withdrawal, Permitting, Use, and Reporting Act (Chapter 49, Title 4) was passed by the SC Legislature in 2010 and became effective on January 1, 2011
- The regulation (R.61-119) implementing the Act became effective June 2012
- Must withdraw more than 3 million gallons in any month (one inch of water per week applied for a month on 28 acres)
- Existing users were issued initial permits or agricultural registrations
- New permits or registrations (after June 2012) must follow the process in the regulation

Agricultural Withdrawal Registrations

- Walther Farms, the first agricultural registration under the new regulation, submitted a notice of proposed registration to the Department for 805 million gallons per month (28.8 million gallons per day) on February 11, 2013
- The Department conducted the safe yield analysis at the withdrawal point as required by law and regulation

Safe Yield Analysis

- R.61-119 states: …the safe yield is calculated as the difference between the mean annual daily flow (MADF) and twenty (20) percent of the mean annual daily flow at the withdrawal point…


Example
Flow
Time
Mean Annual Daily Flow
Safe Yield
Daily Flow

Safe Yield Analysis

- The USGS gauging station in the South Fork of the Edisto River (near Denmark) was used as the reference station – 70 years of flow records
- For Walther Farms, the MADF is 241 million gallons per day (mgd), and subtracting 20% of the MADF (48.2 mgd) means the **safe yield at this point in the river is 192.8 mgd**
- Walther Farms registered for 26.8 mgd, which is about 13.9% of the safe yield

Safe Yield Analysis

- Even adjusting for other agricultural withdrawals in the basin and water suppliers, the proposed registration was less than 20% of the safe yield

- The law and regulation state that if the anticipated withdrawal quantity is within the safe yield, the withdrawal will be considered registered with department, so Walther Farms was mailed a copy of their registration on March 21, 2013

Registered Withdrawers

- The law and regulation state registered surface water withdrawers are subject to reporting but not permitting requirements
- The law has a specific public notice process for issuing a permit to withdraw, but no such process for agricultural registrations
- The department has no discretion in issuing an agricultural withdrawal if it is within the safe yield
- Therefore, no public notice or public input process for agricultural registrations exists

Agricultural Exemptions

- Agriculture is often exempted from regulatory requirements, such as stormwater construction permits and certain Corps of Engineers 404 permits
- DHEC did send Walther Farms a letter stating that Best Management Practices should be utilized during construction of their water intake to protect the water quality of the river

Second Registration Request

- On November 5, 2013, the department received a second registration from Walther Farms to withdraw surface water from the South Fork of the Edisto River in Barnwell County (about 3 miles downstream of their current registration)
- The maximum amount requested is about 14 mgd
- This registration is under review

Things to Consider

- The registered amount is the most water to be needed in any month, so actual withdrawals will likely be less (given the amount of rainfall and other factors)

- If an agricultural operation were to: a) exceed their registered withdrawal, and b) result in detrimental effects to the environment or human health, the department may modify, suspend, or revoke a registration

End of Presentation

Exhibit G

ALAN WILSON
ATTORNEY GENERAL

August 14, 2015

Amy E. Armstrong, Esquire
Amelia A. Thompson, Esquire
Jessie A. White, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

Re: Jowers v. SCDHEC 2014-CP-06-688 – Supplemental Admissions Responses

Dear Counsel:

Subject to all objections and conditions set forth in DHEC's July 29, 2015, Responses to Plaintiffs' Requests for Admissions including those objections as to Requests 6 and 7, DHEC submits the following supplemental responses to your Admissions Requests 6 and 7 below:

6. At no point during the registration process pursuant to the Act does DHEC find or require any public use of water by potential registered users.

RESPONSE: Legal Conclusion Objection, *supra*. DHEC also objects to this request on the grounds of vagueness and lack of clarity, including, in particular, the phrase "find or require any public use of water." Subject to these objections and to the extent, *arguendo*, that the question refers to any inquiry or finding made during the registration process into the use of any withdrawn water for a "public use" as such phrase is used in U.S. Supreme Court takings cases, no such inquiry or finding is required by the Act.

7. Registrations do not promote the navigation of waterways.

RESPONSE: Legal Conclusion Objection, *supra*. DHEC also objects to this request on the grounds of vagueness and lack of clarity, including, in particular the phrase "promot[ing] navigation." Subject to these objections and to the extent, *arguendo*, that the question refers to any inquiry or finding made during the registration process into the impact of a given withdrawal on navigability, the Department does require a navigability

Sincerely,

J. Emory Smith, Jr.
Deputy Solicitor General, Counsel for Defendant DHEC

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL.	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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I. NATURE OF THE CASE

A. Procedural Posture

On September 4, 2014, the Plaintiffs filed the present action for lack of due process, violation of the public trust doctrine, and the taking of riparian property rights through the Surface Water Withdrawal Act's agricultural use registration program. S.C. Code Ann. § 49-4-35. On November 13, 2014, the Defendant filed a motion to dismiss. On November 21, 2014, the Plaintiffs filed a motion for preliminary injunction. Both motions were heard and denied at a hearing on January 15, 2015. On January 28, 2015, the Defendant answered the complaint. On February 13, 2015, the Defendant filed a petition for extraordinary relief including removal and original jurisdiction in the South Carolina Supreme Court. That petition was denied on April 9, 2015, and discovery proceeded thereafter. The Plaintiffs now move the court for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

B. Substantive Posture

The Plaintiffs, James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, are bringing a facial challenge to the constitutionality of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, S.C. Code Ann. §§ 49-4-10 to 49-4-180 ("the Act"). The Plaintiffs are citizens of South Carolina and property owners, whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners.[1] Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913). Since South

[1] Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id.; Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); see also Mathewes v. Port Utilities

Carolina became a state, state law has recognized that owners of riparian property possess a suite of separate and distinct "riparian rights" that are appurtenant to the riparian land. Id. Among these riparian property rights is the right to consumptive use of water, subject to limitations, from the adjacent watercourse. Id.

The Plaintiffs make use of their riparian rights for various purposes, and these rights increase the Plaintiffs' real property values and enjoyment of their lands. (Ex. A, Plaintiffs' Affidavits.)[2] Yet, the Act and DHEC's implementation of the Act have effectively stripped them of their riparian rights. The elimination of this right decreases their property values and is entirely inconsistent with the common law property rights they possessed when they acquired their land. As discussed in more detail below, the Act has eliminated existing riparian rights to consumptive use of water in two ways. First, the Act has made it difficult, and in some cases impossible, for the Plaintiffs to protect their right to consumptive use. The Act has effectively made the prior common law property right into a right without a remedy by severely limiting the Plaintiffs' recourse in the event that registered surface water withdrawers violate their rights. By analogy, if the legislature eliminated all landowners' rights to bring trespass cases, land ownership without the right to exclude would be unrecognizable. It matters not whether a trespass has actually occurred, the loss of the right to bring an action for trespass is the elimination of that right. Similarly, in this case, the loss of the right to protect their consumptive use is an elimination of a property right, making riparian ownership unrecognizable. Second, in making the agricultural

---

Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property).

[2] These affidavits are copies, provided for the court's convenience, of the affidavits originally supplied in support of Plaintiffs' Motion for Preliminary Injunction as Exhibits 2-5.

registrations permanent in duration, the Act has dramatically altered the Plaintiffs' prior common law rights to access all of the water in the watercourse. The Act relegates riparian owners who are ineligible for registration to a second-class status as compared to their pre-Act status, vis a vis water flows.

The Defendant, South Carolina Department of Health and Environmental Control ("DHEC"), is the agency charged with the implementation and enforcement of the Act. The Act establishes two mechanisms authorizing withdrawal of surface waters – a permitting system and a registration system. Significantly for this case, the Act allows riparian owners who are consuming water for agricultural uses to simply "register" their water use, rather than seek a permit. The Act does not restrict the amount of water that any one agricultural user can consume on a daily, annual, or total basis and the registration never expires.

The Act does not require notice, either to the public or to adjacent riparian owners. The Act also does not provide any opportunity for objection from adjacent owners when those registrations would unreasonably interfere with adjacent owners' riparian rights. In adopting and implementing the Act, the state of South Carolina has unconstitutionally taken the riparian owners' water rights and given them to others for their private use. By issuing registrations, and thus taking riparian rights, without notifying the plaintiffs, who hold property rights in adjacent rivers, the state has violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. It is also a violation of the Due Process Clause to issue such registrations without notice or opportunity for a meaningful hearing for the public. Finally, in establishing and granting agricultural registrations, the state has violated the Public Trust Doctrine, which prohibits the state from permanently divesting itself of public trust property, including water.

Thus, the state violated, and continues to violate, the Constitution both: 1) upon passage of the Act, and 2) upon the issuance of registrations pursuant to the Act.

II. STATEMENT OF FACTS

A. Registered Surface Water Withdrawers

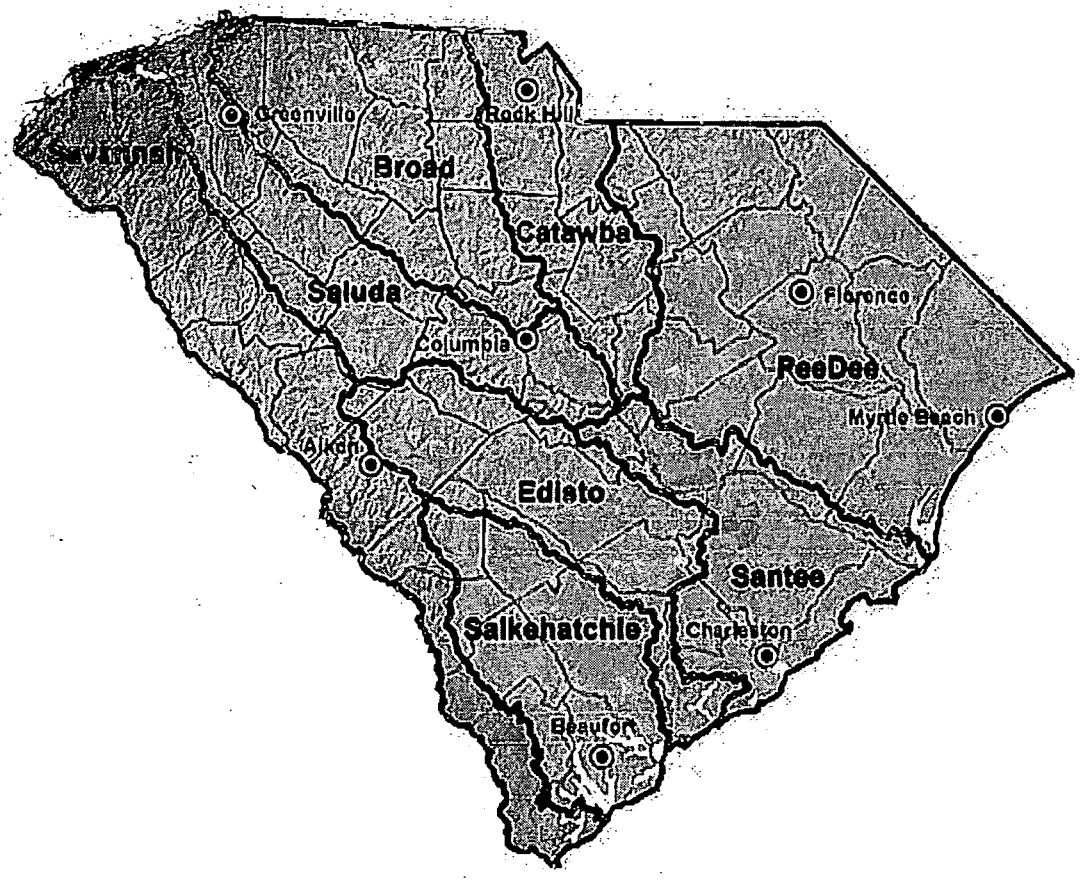
There are 231 total surface water withdrawal registrations, which are collectively registered to withdraw 6.2 trillion gallons per month and 68 trillion gallons per year from South Carolina's surface waters for agricultural use. (Ex. B, Permit Information Spreadsheet.)[3]

In 2013 and 2014, several registered surface water withdrawers exceeded their registered withdrawal amounts. (Ex. C, Excess Withdrawal Tables (DHEC's listings of withdrawals in excess of registered amounts, measured in millions of gallons of water)). In 2013, seven withdrawers pulling water from ten locations exceeded their monthly registered amounts. One withdrawer exceeded its registration every month of the year. (Id.) Similarly, as to annual maximum withdrawals in 2013, seven registered users withdrawing from eleven sources exceeded their annual maximum withdrawals according to DHEC. (Id.) Layman Wholesale Nursery Inc. registered to withdraw 1.2 million gallons over the course of the year, and in 2013 it withdrew 22.78 million gallons of water, nineteen times its registered cap for annual withdrawals. (Id.) Again in 2014, seven withdrawers pulling water from ten locations exceeded their monthly registered amounts. (Id.) Also in 2014, as to annual maximum withdrawals in 2013, eight registered users withdrawing from thirteen sources exceeded their annual maximum withdrawals according to DHEC. (Id.)

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[3] The spreadsheet attached as Exhibit B is a compilation of permit information provided to the Plaintiffs by DHEC in response to discovery.

DHEC divides South Carolina into eight major river basins or watersheds: Broad, Catawba, Edisto, Pee Dee, Salkehatchie, Saluda, Santee, and Savannah. Watershed Map, available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/watershedmap/ (last visited Sept. 3, 2015). There are registered surface water withdrawers in all eight major



river basins. (Ex. B.) As discussed below, the Plaintiffs' riparian properties are located in the Pee Dee, Salkehatchie and Saluda River Basins.

B. Plaintiffs' Riparian Ownership

Mr. Jowers has lived in Bamberg County for sixty-five years, enjoying the South Edisto and Little Salkehatchie Rivers. (Ex. A, Jowers Affidavit.) Mr. Jowers's property is bounded by the Little Salkehatchie River, which he uses for fishing and recreation. (Id.) Mr. Jowers stated in his Affidavit: "Currently the water level in the River is problematically low, but still flowing. Right now the upstream farms do not need much water. However, during the times of year when crops are growing there is a great pull on the River. I want to protect myself and other citizens from running out of water, because we all rely and depend upon our water resources." (Id. at ¶¶ 12-14.) Mr. Jowers also expressed concern about fish kills, which happened only about thirty miles downstream from his property. (Id.) Mr. Jowers would hate to see that happen where he lives because one of the uses he makes of the River is for fishing. (Id.)

Mr. Jowers resides in the Edisto River Basin Watershed and his riparian property is in the Salkehatchie River Basin Watershed.[4] At least two registered surface water withdrawers are upstream from his property, Riddle Dairy Farm and Gary Hege Farm. (Ex. B.) These two withdrawers are registered to use 91.3 million gallons per month and 366.34 million gallons per year of water, collectively. (Id.) DHEC's data also indicates that there are at least fifteen[5] registered surface water withdrawers in the Salkehatchie River Basin, some of which have

---

[4] The Little Salkehatchie River is in the Salkehatchie River Watershed. See "Salkehatchie River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/SalkehatchieWatershed/ (last visited Aug. 10, 2015).

[5] In the Broad: Waddell mariculture Center, Chappell Farms, Coosaw Farms, Sharp & Sharp Certified Seed, Oswald JCO Farms, and Coosaw Land LLC. In the Salkehatchie: Connelly Farms, Brubaker Farms Inc., Anilorac Farm, Gary Hege Farm, Diem Aden Farm, Danny Hege Farm Barnwell, Breland Farm, Williams Farms Partnership, and Norway Farm.

multiple registrations. (Id.) Collectively, these agricultural users are registered to withdraw over 1.5 billion gallons per month and over 6.5 billion gallons per year from the surface waters in the Salkehatchie River Basin. (Id.)

Mr. Anastos has lived on his property on the North Saluda River since 1978, which has approximately 2,500 feet of frontage along the River. (Ex. A, Anastos Affidavit.) Mr. Anastos grew up in the area and has enjoyed the River with his family his whole life. (Id.) He and his family use the river for fishing, swimming, kayaking, and irrigation. (Id.) In his Affidavit, Mr. Anastos stated: "I remember how the North Saluda River was before the Poinsett Reservoir was built. It had small mouth bass and catfish, and was at least fifty percent larger than it is today. Now those recreational fish species are completely gone, and only smaller species of fish live in the River. I do not want to see the River further degraded or destroyed. I do not want to lose more species of fish in the River. I am also concerned about the whole state's water system being further degraded or destroyed." (Id. at ¶¶ 9-12.)

Mr. Anastos's riparian property, as well as that of Mr. and Mrs. Ruhlman discussed below, is in the Saluda River Basin.[6] The Saluda River Basin has at least nineteen[7] registered surface water withdrawers, some of which have multiple withdrawal points. (Ex. B; Ex. D,

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[6] The North Saluda River is in the Saluda River Basin Watershed. See "Saluda River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/SaludaWatershed/ (last visited Aug. 10, 2015).

[7] In the Congaree: Clayton Rawl Farms, Southland Fisheries Corporation, and Walker Farm. In Lake Marion: Palmetto Farms, Oak Lane Farm Halfway Swamp, and St Julian Plantation. In the Saluda: Leslea Farms, Merritt Bros Inc., Overbridge Farm LLC, Frick Farms, Watson Jerrold A & Sons, Twin Oaks Farm, Stoneybrook, Beechwood Farm, Sease Clinton Farms, Sease James R Farms Inc., Satterwhite Farms, Mayer Farm and Bush River Farms.

Saluda Unimpaired Flow Report, at 6-7; Ex. E, Saluda Model Framework, at 5, 9, 12.)[8] These agricultural users are registered to withdraw over 650 million gallons per month and over 2.9 billion gallons per year, collectively, from the basin. (Ex. B.) It appears that at this time no registered surface water withdrawers are upstream from Mr. Anastos, but at least one is upstream from Mr. and Mrs. Ruhlman, Beechwood Farm. (Ex. B.) It is registered to use 12 million gallons per month and 65.5 million gallons per year. (Id.)

Mr. and Mrs. Ruhlman live on property bounded by the North Saluda River, and enjoy swimming, tubing, boating, kayaking and canoeing in the River. (Ex. A, Ruhlman Affidavit.) Their property has approximately 480 feet of river frontage, and is situated at shoals that were the site of Keeler Mill, a grist mill constructed with the home around 1880, although the mill burned down in the mid-twentieth century. (Id.) Despite this rich history, it was the North Saluda River itself which formed the primary reason for the Ruhlman's move to that property. (Id.) The Ruhlmans are concerned about upstream uses, including agricultural uses, withdrawing water and interfering with their use and enjoyment of the North Saluda River. (Id.) Mrs. Ruhlman is also involved in a few Greenville area organizations which "work to respond to environmental threats to the rivers in the Upstate of South Carolina." (Id. at ¶12.)

Mr. Williamson and his family have property on Black Creek, which has been in the family since the 1760s. They use Black Creek to paddle, fish and swim, and hold regular family

---

[8] CDM Smith, a private company hired by the South Carolina Department of Natural Resources ("DNR") and DHEC to collect and analyse surface water data, created the documents marked as Exhibit D and Exhibit E. Unfortunately, at this time such data collection, reporting and mapping has not been completed for the Salkehatchie or Pee Dee River Basins. When those materials are available, they will be added to the DNR website, http://www.dnr.sc.gov/water/waterplan/surfacewater.html, under the "River Basins" link.

picnics beside the creek. (Ex. A, Williamson Affidavit.) Mr. Williamson's family has been working to protect Black Creek through political activities for a couple hundred years. (Id.) The Creek is a swift-flowing coastal plains stream, which makes it unique. (Id.) Mr. Williamson testified that: "Over the past 10 to 15 years I have noticed that Black Creek is a bit lower in water levels than it used to be. Flooding is also much less frequent. Black Creek used to flood on our property every year. Now it only floods once every 3 to 4 years." (Id. at ¶ 13.)

At least seven registered surface water withdrawers in that basin are upstream from his property, registered to use over 337 million gallons per month and over one billion gallons per year of water.[9] (Ex. B.) Mr. Williamson's property is part of the Pee Dee River Basin Watershed.[10] There are at least nineteen[11] registered surface water withdrawers in the Pee Dee River Basin, most of which have multiple registrations. (Ex. B.) These agricultural users are

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[9] Specifically, these users are: Sugar Hill Acres, LLC/Griggs Farm, Rogers Brothers Farm, Chapman Farm, Lawson Turf Farms, Carolina Plantation Rice/Coxe, Richard Rogers Farm, and O'Tuel Farm.

[10] Black Creek is in the Pee Dee River Basin Watershed. "Pee Dee River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/PeeDeeWatershed/ (last visited Aug. 10, 2015).

[11] The agricultural users in the Pee Dee Basin which could be ascertained from DHEC's data are as follows: In the Black River Basin are Haley Farm, Brunsons Whole Sale Nursery, Black Crest Farms/McLeod WR Farms, and Irwin McIntosh Farms, Inc. In the Little Pee Dee are Atkinson Farms LLC and McDonald Farm. In the Middle Pee Dee are Sugar Hill Acres, LLC/Griggs Farm, Dargan Farms Partnership, Rogers Brothers Farm, Chapman Farm, Lawson Turf Farms, Carolina Plantation Rice/Coxe, Hinson Farm, O'Tuel Farm, and Richard Rogers Farm. On the Lower Pee Dee is Plantersville Turf Farms. In the Coastal Frontage is Kingston Plantation/Ally Management. In the Lyches are Belger Farms (for one of its withdrawal points) and Tolson Farm.

registered to withdraw over 1.1 billion gallons per month and over 2.7 billion gallons per year from the Pee Dee Basin. (Id.)

III. ANALYSIS

A. Standard of Review

Summary judgment is appropriate pursuant to Rule 56 of the South Carolina Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Major v. City of Hartsville, 410 S.C. 1, 4, 763 S.E.2d 348, 350 (2014). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, "an adverse party may not rest upon the mere allegations or denials in its pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." S.C. R. Civ. P. 56(e).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). Thus, summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the

entry of summary judgment. Anderson, 477 U.S. at 247-48. The evidence must also be such that a reasonable jury could return a verdict for the non-moving party. Id. at 248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125.

B. Legal Landscape

1. Riparian Rights

Property interests are not created by the Constitution itself, "[r]ather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984) (internal quotation marks omitted). An owner is someone who possesses the right to use and enjoy what she owns, to exclude others from using her property; and to alienate her property as she chooses. The contours of these rights vary by state and by type of property; in all cases, however, **rights are only as good as the law's willingness or capacity to enforce them against interference by other people.** Thus, the term property refers to the rights inhering in the person's relationship to some thing, not the thing itself. Josh Eagle, Coastal Law, Wolters Kluwer174 (2011); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007).

In this case, the property at issue is the Plaintiffs' riparian right to consume water.[12] Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835).[13] Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id.; Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); see also Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property).

Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive use such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). All riparian owners located on a given waterway share the risks of low flow conditions equally. Thus, the core nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners. Second, the state is entitled to restrict riparian withdrawals to the extent those withdrawals threaten established public trust

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[12] The right to consume water is a separate right within the suite of riparian property owner rights. Eagle, Coastal Law, at 278 (listing riparian rights as to "access adjacent public waterway," "wharf out," accretions, and both consumptive use and non-consumptive use of water). This common law right has been eliminated by the Act and replaced with something inferior. Furthermore, the Act could, by allowing registrants the right to drastically lower flows, also impact the Plaintiffs' other riparian rights, such as the right to enjoy the surface of the adjacent watercourse.

[13] English common law in the colonial era also recognized the riparian right to consume water.

uses of the river, namely navigation, commerce, and recreation. Third, the state is entitled to restrict riparian withdrawals if the state itself requires use of the water. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds, McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

2. *The Surface Water Withdrawal Act of 2010*

The Act substantially reorders private and public water rights in South Carolina. Under the Act, a "surface water withdrawer"[14] is generally required to apply for a permit. S.C. Code Ann. § 49-4-25.[15] The Act establishes a permitting program whereby an applicant provides detailed information about its proposed surface water withdrawals. S.C. Code Ann. § 49-4-80. In turn, DHEC must make a reasonableness determination for the proposed use, in consideration of enumerated criteria,[16] and make various other findings concerning the water supply, adequacy

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[14] "'Surface water withdrawer' means a 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." S.C. Code Ann. § 49-4-20 (28). "'Withdrawal' means to remove surface water from its natural course or location, or exercising physical control over surface water in its natural course or location, regardless of whether the water is returned to its waters of origin, consumed, transferred to another river basin, or discharged elsewhere." S.C. Code Ann. § 49-4-20 (29).

[15] "Except as provided in Sections 49-4-30, 49-4-35, 49-4-40, and 49-4-45, all surface water withdrawals by a surface water withdrawer are unlawful unless made pursuant to a surface water withdrawal permit issued pursuant to this chapter." S.C. Code Ann. § 49-4-25.

[16]

> To determine whether an applicant's proposed use is reasonable, the department must consider the following criteria:(1) the minimum instream flow or minimum water level and the safe yield for the surface water source at the location of the proposed surface water withdrawal;(2) the anticipated effect of the applicant's proposed use on existing users of the same surface water source including, but not limited to, present agricultural, municipal, industrial, electrical generation, and instream users;(3) the reasonably foreseeable future need for the surface water including, but not limited to,

of flow, significance of withdrawal, etc. S.C. Code Ann. § 49-4-80. Additionally, if the public requests a hearing on the permit or if it is a new application, DHEC must conduct one. S.C. Code Ann. §§ 49-4-80 (K) (1), 49-4-90.

"Upon a determination by the department that, based upon its examination of the criteria in [S.C. Code Ann. § 49-4-80] (B), the applicant's use is reasonable, the department shall issue a permit to the applicant." S.C. Code Ann. § 49-4-80 (J). Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years. See S.C. Code Ann. § 49-4-100 (B). Once the permit issues, it may be revoked for any one of several listed reasons,[17] including any

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> reasonably foreseeable agricultural, municipal, industrial, electrical generation, and instream uses;(4) whether it is reasonably foreseeable that the applicant's proposed withdrawals would result in a significant, detrimental impact on navigation, fish and wildlife habitat, or recreation;(5) the applicant's reasonably foreseeable future water needs from that surface water;(6) the beneficial impact on the State and its political subdivisions from a proposed withdrawal;(7) the impact of applicable industry standards on the efficient use of water, if followed by the applicant;(8) the anticipated effect of the applicant's proposed use on the following if the permit is granted:(a) interstate and intrastate water use;(b) public health and welfare;(c) economic development and the economy of the State; and(d) applicable federal laws and interstate agreements and compacts; and(9) any other reasonable criteria that the department promulgates by regulation that it considers necessary to make a final determination.

S.C. Code Ann. § 49-4-80 (B).

[17]

> The department may modify, suspend, or revoke a permit under the following conditions: (1) the permit holder withdraws water not authorized by his permit or fails to comply with the terms and conditions of his permit; (2) the permit holder obtains a permit by misrepresentation or fails to disclose a material fact in his application; (3) the permit holder ceases to withdraw water for a period of at least thirty-six consecutive months; or (4) a permanent change in natural conditions results in a permitted activity endangering human health or the environment.

S.C. Code Ann. § 49-4-120 (A).

violation of the terms or certain changes in the natural conditions. S.C. Code Ann. § 49-4-120 (A). Permit holders are also subject to reporting requirements. S.C. Code Ann. § 49-4-50.

In contrast, the Act contains a registration process for agricultural users[18] to withdraw water, exempting those users from the permitting process that all other water users must undertake. S.C. Code Ann. §§ 49-4-35, 49-4-50. Only agricultural users of water are entitled to register their water use. See 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[19] that is filing a report pursuant to Section 49-4-50."). The Act provides for an even more abbreviated approval process for existing surface water withdrawers. S.C. Code Ann. § 49-4-35(B) ("An existing registered surface water withdrawer already reporting its

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[18] "Agricultural use" means:(a) plowing, tilling, or preparing the soil at an agricultural facility;(b) planting, growing, fertilizing, or harvesting crops, ornamental horticulture, floriculture, and turf grasses;(c) application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, livestock, animals, or poultry;(d) breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing livestock, hogs, aquatic animals, equines, chickens, turkeys, poultry, or other fowl normally raised for food, mules, cattle, sheep, goats, rabbits, or similar farm animals for commercial purposes;(e) producing and keeping honeybees, producing honeybee products, and honeybee processing facilities;(f) producing, processing, or packaging eggs or egg products;(g) manufacturing feed for poultry or livestock;(h) rotation of crops;(i) commercial aquaculture;(j) application of existing, changed, or new technology, practices, processes, or procedures to an agricultural use;(k) the operation of a roadside market; and(l) silviculture.

S.C. Code Ann. § 49-4-20 (3).

[19] "'Agriculture facility' means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, trees, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, or products which are used in commercial aquaculture." S.C. Code Ann. § 49-4-20 (2).

withdrawals to the department as of January 1, 2011, may maintain its withdrawals at its highest reported level or at the design capacity of the intake structure which will be permanent as of January 1, 2011, and is deemed to be registered with the department."). The Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq.

Once an agricultural user has registered its water use, its surface water withdrawals are "presumed to be reasonable," S.C. Code Ann. § 49-4-110 (B), even though a registered surface water withdrawer has not provided information and been found to be a reasonable user by DHEC pursuant to the permitting criteria listed in Section 49-4-80. DHEC may only reduce the amount of water withdrawal for a registered surface water withdrawer if both of two conditions are met: 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E).[20] To date, several registered surface water withdrawers have exceeded their monthly and/or yearly allowances repeatedly. DHEC has done nothing more than maintain that information. (Ex. C, Excess Withdrawal Tables.) Furthermore, the Act does not provide any remedy to riparian owners when a registered user exceeds its registered amount.

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[20] 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.

S.C. Code Ann. § 49-4-35(E).

Although these two separate systems of permitting and registration exist under the Act, registered surface water withdrawers can apply for surface withdrawal permits. S.C. Code Ann. §§ 49-4-55, 49-4-35(F).

C. Due Process Violation

The Fourteenth Amendment provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14. A fundamental requirement of procedural due process is an opportunity to be heard, and that opportunity must be granted at a meaningful time and in a meaningful manner. U.S.C.A. Const. Amends. 5, 14. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review," Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds. See also Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

1. Inadequate Notice

In Leventis v. South Carolina Dep't of Health & Envtl. Control, the South Carolina Court of Appeals heard arguments from the Sierra Club that DHEC "violated its due process rights by entering into an *ex parte* stipulated agreement with Laidlaw," thereby circumventing the regulatory procedures for permit issuance and review. 340 S.C. 118, 131, 530 S.E.2d 643, 650 (Ct. App. 2000). The court stated: (1)"Due process is flexible and calls for such procedural protections as the particular situation demands," (quoting Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)); and (2) "The requirements of due process include notice, an opportunity to be heard in a

meaningful way, and judicial review," (quoting Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds). Although the Court of Appeals ultimately upheld the issued permit, it did limit its findings to the specific facts of the case because it was concerned with DHEC's circumvention of the Sierra Club's due process rights. The court stated:

> Although DHEC issued the final permit to Laidlaw after completing the procedures required for permit issuance, including issuing a draft permit, giving public notice, affording an opportunity for public comment, and preparing responses to oral and written comments received, DHEC then effectively circumvented the permitting procedures by modifying the final permit through ex parte negotiations with Laidlaw.

Leventis, at 135, 530 S.E.2d at 652.

The Act "has a specific public notice process for issuing a permit to withdraw, but no such process for agricultural registrations." (Ex. F, Agricultural Registrations Powerpoint, 9). Thus, pursuant to the Act, where there is no public notice to afford public comment, the registration process circumvents due process. See Supra, Section III.B.2. In Leventis, the court determined due process was not violated because of other procedural measures that had taken place. In this case, none of these other measures exist for review. In sum, no public notice is not adequate public notice.

In addition to the complete lack of public notice in this case, there is also no personal notice to riparian owners who are downstream from or adjacent to the registered surface water withdrawers. The issuance of registrations is an action "in which [the Plaintiffs] may be deprived of property rights and hence notice and hearing must measure up to the standards of due

process." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In Schroeder v. City of New York, 371 U.S. 208 (1962), a property owner received no notice of condemnation proceedings that affected some of her property. The City did post signs on trees and publish notice in the mail, but the court found these types of notices, which were not seen by the property owner, to be insufficient.

> The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Schroeder v. City of New York, 371 U.S. 208 (1962) (quoting Mullane, 339 U.S. at 318.)

Personal notice to riparian owners is thus also required in this case because the owners' property rights are affected or may be affected by the issuance of registrations. Mullane, 339 U.S. at 313. As already stated, DHEC gives no notice of any kind regarding registrations. Thus, no notice also fails to meet the personal notice required to riparian property owners pursuant to the Due Process Clause.

2. No Meaningful Opportunity to be Heard

The right to a hearing, including the right to introduce evidence[21] and confront witnesses,

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[21] In Brown v. South Carolina State Bd. Of Educ., appellant's teaching certificate was revoked based on cancellation of NTE scores. 301 S.C. 326, 391 S.E.2d 866 (1990). Although many aspects of the revocation were deemed a violation of procedural due process rights, the Court commented specifically that the "hearing appellants was granted did not comport with procedural due process since the Board did not disclose any evidence substantiating cancellation of the NTE scores in order to allow the appellant the opportunity to contest the allegations against her." 301 S.C. 326, 329, 391 S.E.2d 866, 868 (1990).

has also been denied the Plaintiffs in this case, constituting a further violation of their due process rights. The Supreme Court has consistently held "that some form of hearing is required before an individual is *finally* deprived of a property interest." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); see also Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 868 (1990) (determining that a regulation was "unconstitutional because it does not provide for notice and an opportunity to be heard when the State deprives a teacher of his or her teaching certificate"). The challenged statute or regulation must, on its face, provide opportunity for a hearing before the plaintiffs' rights are affected. See Brown, 301 S.C. at 329, 391 S.E.2d at 868.[22]

In this case, there is no hearing procedure whatsoever to challenge the issuance of registrations pursuant to the Act. See Supra, Section III.B.2. The reason that there is no availability for public notice or input is that DHEC "has no discretion in issuing an agricultural withdrawal if it is within the safe yield." (Ex. F, at 9). Because DHEC has no discretion, any hearing or input from the public would be meaningless. (Id.) Thus, the Act is also facially unconstitutional for lack of adequate opportunity for the public or adjoining riparian owners to be heard. See Mathews, 424 U.S. at 333; Brown, 301 S.C. at 329, 391 S.E.2d at 868.

3. Lack of Judicial Review

Perhaps the most blatant facial violation of due process in the Act is that it erases judicial review for riparian owners. As discussed above, a riparian owner is able to challenge upstream

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[22] In Brown, the appellant was granted a hearing as a favor, however the Court determined that type of hearing would not save the regulation from constitutional attack under the Due Process Clause. See also Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915).

consumptive use under the common law by showing that it "unreasonably" interferes with a downstream riparian owner's right to consumptive use. Supra Section III.B. See also McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). However, the Act erases a riparian owner's common law challenge through the courts, and thus any meaningful judicial review, by making registered withdrawal uses both permanent and presumptively "reasonable." Supra Section III.B. See also S.C. Code Ann. § 49-4-110 (B). Furthermore, riparian owners have no right to challenge the registered withdrawals or reduce them under the Act. Only DHEC may do so, and then only if: 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E). Thus, the Act has eliminated the common law cause of action for riparian owners to challenge unreasonable uses. For this reason, the Act denies judicial review for riparian owners in violation of the Due Process Clause.

D. Unconstitutional Takings

Article I, Section 13(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13. See also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law.") Plaintiffs have uncovered no public purpose or benefit in taking private property rights and giving them to other private individuals. See, e.g., Jean H. Toal, *Edens: The Prime Obstacle to a Redevelopment of*

South Carolina Water Law, 23 S.C. L. Rv. 63, 64 (1971) ("South Carolina has a very narrow view of what constitutes a public use for which the eminent domain power can be constitutionally invoked."). Although takings analysis generally focuses on whether a direct appropriation or regulatory taking has occurred on the part of the government which would grant private property owners the right to compensation,[23] this case involves the more direct outright prohibition against the government taking private property for private use.[24]

Article I, Section 13(A) of the South Carolina Constitution provides that **"private property shall not be taken for private use without the consent of the owner."** See Clemson Univ. v. First Provident Corp., 260 S.C. 640, 649, 197 S.E.2d 914, 918 (1973) (holding that "the attempted taking [to widen a drainage ditch on another's private property] is for private use and

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[23] See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992) (discussing direct appropriation and regulatory takings).

[24] DHEC does not require any showing of public use or make any finding related to public use as part of its registration process. (Ex. G, DHEC's Supplemental Admissions.) Thus it appears from all available information, and the Plaintiffs assert, that there is no public use for the taking in this case. However, should the court find that the taking is for public use, the Plaintiffs preserve their right to argue that they are entitled to compensation. See, e.g., Early v. S. Carolina Pub. Serv. Auth., 228 S.C. 392, 408, 90 S.E.2d 472, 479 (1955) (finding a taking where the government interfered with riparian rights through upstream salination of a waterway which abutted plaintiff's property, and awarding damages). Under the Fifth Amendment to the United States Constitution and Article 1, Section 13(A) of the South Carolina Constitution, if the government takes private property for public use, it must compensate the owner. See Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) If the government takes private property for public use, the property owner may invoke the constitutional provision without resorting to enabling legislation. Smith v. Greenville, 229 S. C. 252, 262, 92 S. E. 2d 639, 644 (1956). To the extent the Defendant asserts that the registrations are a valid exercise of the state's police power, this argument also fails to deprive property owners of their right to compensation. See Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1205-06 (4th Cir. 1986) (holding that even a valid exercise of police power for public use must still be compensated if it is a taking pursuant to the South Carolina Constitution). Public use of the water is not a requirement for registrations pursuant to the Act or DHEC. (Ex. C.)

is prohibited under . . . the Constitution"); Beaudrot v. Murphy, 53 S.C. 118, 30 S.E. 825, 826 (1898) (holding that a statute which authorized private property to transfer to another private citizen was unconstitutional). A private to private taking cannot be compensated, but must be struck down as unconstitutional. See, e.g., Boyd v. Winnsboro Granite Co., 66 S.C. 433 (1903) (holding that a railroad no longer had the right to use condemnation proceedings to take property because of the South Carolina Constitution's prohibition against the taking of private property for private use without the consent of the owner).

The private-to-private transfer of property is also prohibited by the "public use" requirement in the Fifth Amendment to the United States Constitution. The fundamental purpose of the Fifth Amendment's prohibition of takings is to protect "individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'" Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002), (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960)). See also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law.")

"[T]he taking provision of the South Carolina Constitution does not require a landowner to prove physical invasion of his property in order to recover. He will prevail if he simply establishes that his property has been damaged or that he has **been deprived of the ordinary beneficial use and enjoyment of his property**." Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1206 (4th Cir. 1986) (emphasis added) (citing Spradley v. South Carolina State Highway Department, 256 S.C. 431, 434, 182 S.E.2d 735, 737 (1971); South Carolina State Highway Department v. Wilson, 254 S.C. 360, 366–67, 175 S.E.2d 391, 395 (1970); Gasque v.

Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940); Parish v. Town of Yorkville, 96 S.C. 24, 25, 79 S.E. 635 (1913).) In this case, the Plaintiffs have been deprived of the ordinary use and enjoyment of their properties because they can no longer protect their riparian property rights by challenging others' uses as unreasonable, and they fear fish kills, further loss of water flow, and inability to make use of the water. (Ex. A.)

In Young v. Wiggins, 240 S.C. 426, 126 S.E.2d 360 (1962), private property owners surrounding a lake challenged a governmental regulation that would enlarge the lake for the private agricultural use of one of the properties beside the lake, while submersing 250 acres of land. The court recognized that "the conservation of water and its distribution for purposes of irrigation may . . . be for a public use," but recognized that in this instance the use was private. Id. at 434, 126 S.E.2d at 364. Thus, it upheld the issuance of an injunction to prevent enlargement of the lake. Id. at 435, 126 S.E.2d at 365. ("As between individuals, no necessity, however great, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.") (internal quotation marks omitted). Similarly, in this case the government is registering private agricultural users to take the riparian property rights owned by other private citizens.

Prior to the Act, all riparian owners on a given waterway had equal property rights in the reasonable use of that water.[25] After the Act, the Plaintiffs lost this correlative right while agricultural users were given far superior rights to all other types of riparian owners, including

[25] See, e.g., White, 38 S.E. a 461 ("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 use, but whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment by the other.").

those who use water for recreational purposes, for domestic purposes, for industrial purposes, or for any other purposes. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. After the Act, agricultural users are entitled to register to take a fixed amount of water in perpetuity. Prior to the Act, all riparian owners could challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use. After the Act, downstream riparian owners cannot challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use, because the Act deems registered water use to be presumptively reasonable.

Rights are only as good as the law's capacity to enforce them against interference by others. Eagle, Coastal Law, at 174. In giving permanent rights that are presumed reasonable, the Plaintiffs' ability to enforce their rights against interference by agricultural users is severely diminished. DHEC has taken property rights of riparian owners not entitled to registration and given that property to agricultural users eligible for registration. Thus, the Act enables the taking of private property for private use through its registration process, and that registration process violates the South Carolina and United States Constitutions.

E. Violation of the Public Trust Doctrine

Navigable waterways are public trust assets: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. Const. art. XIV, § 4. Under the Public Trust Doctrine the state holds presumptive title to the water and land below the high water mark in trust for the benefit of all the citizens of South Carolina. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E.

686 (1889); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). The State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul.Envtl.L.J. 287 (1993)). The navigable waters at issue in this case are public trust assets.

Under the Public Trust Doctrine, the state is entitled to transfer trust assets, such as navigable waterways, to private parties in perpetuity in only two limited circumstances: First, if the transfer is in furtherance of trust purposes, e.g., helps to promote navigation;[26] second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois

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[26] See, e.g., Clarke v. S. Carolina Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481, 486 (1935) (holding "that navigation, health betterment, flood control, and the reforestation of watersheds are public purposes" for which the state may constitutionally use public trust resources).

Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) (**"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") (emphasis added). Courts have interpreted disposals broadly, to include state actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (finding that the state cannot allow for activity that will impair marine life, water quality or public access).

The provisions of the Surface Water Withdrawal Act effectively dispose of substantial, permanent rights in South Carolina's navigable waterways to agricultural users. DHEC has no discretion in issuing registrations to agricultural users, which is why no due process is afforded as explained above. (See Ex. F ("The department has no discretion in issuing an agricultural withdrawal [registration] if it is within the safe yield")). Under the Act, the state cannot revoke, reduce, or modify registered uses of water unless the registered user withdraws in excess of the registered amount and that excess withdrawal is detrimental to human health or the environment. In other words, the state has lost complete control of registered amounts of water in perpetuity; the registered owner has complete control over whether or not the state can ever alter the registered amount. Supra, Section III.B. As discussed above, there is no public use, and thus no public interest, in so disposing of these public trust assets. See Supra fn. 23.

This permanent disposal of a vast amount of South Carolina's public trust assets violates the public trust doctrine because the registration process allows "activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen, 354 S.C. at

149, 580 S.E.2d at119-20. The public interest in surface waters includes their use and enjoyment, such as fishing, swimming, boating, paddling or otherwise recreating. See Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995). The surface waters impacted by the Act are all surface waters in the state, every creek, pond, river and lake. Registrations have been issued statewide in every water basin, without the state fully studying the existing uses and water qualities in those various systems. The public is losing billions of gallons of water every month to private agricultural users, which are presumed reasonable, are issued without notice and which amounts to substantial impairment of public trust assets. Furthermore, the even greater loss of surface waters allowed pursuant to the Act is a facial violation of the public trust doctrine which also constitutes substantial impairment of public trust assets.

F. Standing

South Carolina courts recognize three types of standing: statutory standing, constitutional standing, and public importance standing. ATC Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). In this case, both public importance standing and constitutional standing requirements are met by the Plaintiffs.

1. Public Importance

"The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance." South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013). "Whether an issue of public importance exists necessitates a cautious balancing of . . . competing policy concerns underlying the issue of standing." ATC, 380 S.C. at 198-200, 669 S.E.2d at 341 (quoting Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). "The key to public

importance analysis is whether a resolution is needed for future guidance . . . [y]et the very nature" of the doctrine "resists a formulaic approach, as each case must turn on 'the competing policy concerns'" of standing. Id.

In Baird v. Charleston County, doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government action are of public importance. Id. at 531, 75. The relevance of illegal government action for public importance standing has been repeatedly emphasized by the Supreme Court. See e.g., South Carolina Public Interest Foundation, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply").

Baird also found that the alleged illegal government action harmed a "profound public interest." 333 S.C. at 531, 511 S.E.2d at 75. In that case, the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. Id. To determine the public interests at stake, the Court looked to the overall public policy embodied by the allegedly violated statute—the Hospital Bonds Act—and its stated purpose "to promote the public health and welfare." Id. The Court found that the alleged illegal government action implicating widely applicable public interests was sufficient to establish public importance standing.

In this case, Plaintiffs agree with DHEC that "because the law, itself, is significant," the public interest requires resolution of this case. DHEC's Petition for Extraordinary Relief, at 8. Constitutional challenges to state law have been found to meet the significant public interest requirement for standing. See, e.g., Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642

S.E.2d 740, 741-42 (2007) (finding "Commissioners have standing to challenge the constitutionality of an Act which authorizes their removal from office" under public importance standing); Sloan v. Dep't of Transp., 365 S.C. 299, 304-05, 618 S.E.2d 876, 878-79 (2005) (holding that plaintiff had standing to bring his challenge despite the fact that his case was moot). Furthermore, the Plaintiffs' challenge requires resolution for "future guidance" as to whether South Carolina will continue to recognize riparian rights or allow private-to-private property transfers in direct contradiction of our state constitution. See Baird v. Charleston Cnty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Thus, this case falls within the public importance exception to standing.

2. Constitutional Standing

The U.S. Supreme Court has provided a three-part test to establish standing under Article III of the Constitution:

> 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 v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006). The South Carolina Supreme Court has adopted this test. Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 328, 649 S.E.2d 31, 32 (2007); Sea Pines Ass'n for the Prot. Of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 550 S.E.2d 287 (2001).

As alleged in the complaint, plaintiffs have suffered and continue to suffer injury through the taking without due process of their riparian property rights.

Already, the Defendant has issued 231 registrations, which collectively authorize the withdrawal of 6.2 billion gallons per month, and 68 billion gallons per year of surface water. (Ex. B.) The Plaintiffs rely on the rivers and streams adjacent to their properties for continuing use and enjoyment. From Mr. Jowers's fishing to Mr. Williamson's family picnics, each plaintiff makes use of his or her riparian ownership rights. The Defendant has, through the Act, taken the Plaintiffs' private property and transferred it to private agricultural users.

Navigable waterways, such as the rivers and streams at issue in this case, are public trust assets. McQueen, 354 S.C. at 149, 580 S.E.2d at 119. In addition to the individualized harms to the Plaintiffs in this case, there is harm to the public if these surface waters are not preserved for the use and enjoyment of all South Carolinians. The Defendant has disposed of, and may continue to dispose of, these public trust assets. DHEC could permanently allocate all of the water in all of the state's waterways to agricultural users (other than amounts that the Act requires for minimum instream flow). Indeed, DHEC has no discretion in issuing registrations, thus it will continue to allocate water as long as agricultural users continue to apply for registrations.

The registration process thus causes a great amount of harm to the public. By allocating away surface water, which is a public trust resource, to private agricultural users, the Act is causing and will cause the loss of public uses. The public uses of surface water include the ability to navigate on the water, fish, swim, boat, and recreate. (Ex. A.) This will cause further harm to the Plaintiffs (and other South Carolinians), harm that has no remedy outside the instant case.

The registration process in the Act is especially dangerous because it leaves the state with little to no recourse or control over agricultural users once they have been registered. Registrations never expire, are presumed reasonable and the Act does not restrict the amount of water any one agricultural user can consume on a daily, annual, or total basis. S.C. Code. Ann. § 49-4-10, et seq.

Moreover, to reduce the registered amount or otherwise modify the registration: (1) an agricultural user would have to withdraw "substantially more[27] surface water than he is registered for or anticipates withdrawing"; and (2) DHEC must prove that the withdrawals "result in detrimental effects to the environment or human health." S.C. Code Ann. § 49-4-35(E). Therefore, the Act allows registrants to deprive the Plaintiffs, other downstream riparian owners, and the public of water even in times of drought or when such usage results in fish kills or even permanent loss of a navigable waterway, as long as the withdrawal does not exceed the registered amount.

In this case, the Plaintiffs waited until the Act went into effect, defendant issued registrations pursuant to the Act, and registrants began withdrawing water before bringing suit. The facts are sufficiently fleshed out, and the harm is certainly real, so that the court may render a verdict. The Plaintiffs are not asking the court to interpret the law without seeing how it applies, but are asking the court to evaluate the law now that it is in effect and being implemented by DHEC. The Plaintiffs do not have to wait until they cannot make any consumptive use of water to bring suit. Most of the Plaintiffs are downstream from registered surface water withdrawers, all of the Plaintiffs are within the same watersheds as registered surface water withdrawers, and DHEC continues to issue more registrations under the Act as they are requested. Furthermore,

[27] "Substantially more" is not a term defined in the Act.

the violation of the public trust doctrine has already happened where DHEC has given away public waters for private gain. These injuries are real, concrete injuries that are ripe to be heard before this court. Furthermore, should the court withhold consideration in this case, the amount of registrations and lost surface water could be disastrous. Now is the time to resolve this issue, before all of the state's waters are allocated away.

As to particularized injury, these plaintiffs are each suing for their own unique property rights as riparian owners. These plaintiffs are particularly and uniquely injured. Part of the nature of a takings claim is that it involves unique property, and the plaintiffs are each uniquely harmed by the loss of that property. The fact that plaintiffs seek to abolish an unconstitutional law, which would benefit the entire state, does not undermine standing. See National Parks Conservation Ass'n v. Norton, 324 F.3d 1229 (11th Cir. 2003) (Environmental organizations had standing to bring Fifth Amendment equal protection claim against National Park Service (NPS) relating to exclusive private use of structures off Key Biscayne, Florida; although in their complaint organizations sought to vindicate rights of public as whole, rather than those of their members specifically, affidavits of members who had visited national park in question and had their recreational and aesthetic enjoyment thereof impaired by lack of access to structures satisfied requirement of concrete and particularized harm).

An injury may be "actual or threatened." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974). In this case, the injury is not just for each plaintiff the loss or threatened loss of water on his/her property, it is the loss of the right to challenge a use as unreasonable. That right was lost the moment the Act was signed into law, and is an actual and concrete injury that forms the basis for the Plaintiffs' due process claim. Thus, the injury to property and property rights is actual and imminent, not conjectural or hypothetical.

The injury of loss of riparian water rights is directly caused by the Act as administered by DHEC. There is no intervening cause at issue in this case. There is not even a long chain of causation to follow. Any argument that other types of water users cause or could potentially cause the same harm does not undercut standing for the harm caused by the Defendant. American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) (recognizing standing to sue hog farms for pollution of a waterway even though there were other sources of pollution along the river that similarly caused loss of enjoyment of the water for plaintiffs).

Redressibility is also met in this case. If the Court finds the Act is unconstitutional, the court may strike it down in whole or part, which would revoke the registrations issued and allow the restoration of plaintiffs' riparian water rights. Striking the Act as unconstitutional would also redress the lack of due process because it would restore the riparian system and plaintiffs would have the ability to challenge unreasonable uses by upstream agricultural users.

Therefore, the Plaintiffs have demonstrated the elements of constitutional standing, as well as public importance standing.

IV. CONCLUSION

In sum, the Act is unconstitutional as a matter of law because it violates due process rights, the takings clause, and the public trust doctrine, for both riparian owners and the people of South Carolina. Thus, the Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman request that this Court enter an Order

granting summary judgment in their favor and striking down the registration provisions of the Act as unconstitutional, effective immediately.

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Georgetown, South Carolina
September 14, 2015

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,	)	DHEC'S RETURN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
v.	)	
South Carolina Department of Health And Environmental Control,	)	
Defendants.	)	

DHEC opposes Plaintiffs' Motion for Summary Judgment because it does not overcome their lack of standing, their unripe claims, and their failure to show any constitutional right that been infringed. Most of these problems were addressed in DHEC's Memorandum in Support of its Motion for Summary Judgment, but the following additional points confirm that Plaintiffs are not entitled to summary judgment.[1]

I

PLAINTIFFS HAVE NO STANDING, THEY HAVE NOT PRESENTED A JUSTICIABLE CONTROVERSY, AND THEIR CLAIMS ARE NOT RIPE

A

No Public Importance Standing

"The key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Plaintiffs refer to DHEC's statement in its Petition for Extraordinary Relief that the law is

1 DHEC incorporates by reference the exhibits attached to its Motion for Summary Judgment, and the arguments in its Memorandum in support of that motion.

significant but fail 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 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. As noted in the State's earlier memorandum, 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.

B

Plaintiffs Do Not Meet Constitutional Requirements for Standing

The Plaintiffs in this action have no "injury in fact" that is "concrete and particularized" and "actual or imminent." *ATC S, supra.* In fact, 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. Their Motion does not overcome these failures. They speculate about effects that the law will have, but those effects have not occurred They claim a loss of property rights to challenge a use under the law, but as discussed, *infra,* they have not 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 not standing and have not brought a justiciable controversy to this Court.

C

This Case Does Not Present a Justiciable Controversy That Is Ripe for Adjudication

As discussed in DHEC's Memorandum in Support of its Motion for Summary Judgment, this case does not present a justiciable controversy that is ripe for adjudication. *Waters v. S. Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996). 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." *Id,* quoting, *Thrifty Rent–A–Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F.Supp. 1083, 1085–86 (D.S.C.1991) Plaintiffs have not been injured and may never be harmed.

II

PLAINTIFFS HAVE NO RIPARIAN RIGHTS THAT HAVE BEEN INFRINGED

A

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

Plaintiffs misread several cases that they contend show that riparian interests are property rights. To the contrary, those cases show that riparian rights do not include property rights. As noted in the DHEC's Memorandum in its own Motion for Summary Judgment, a property interest is required for takings or due process claim. *Grimsley v. S. Carolina Law Enforcement Div.*, 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012).

Plaintiffs have no property rights in the water. 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-

[non-tidal] stream is the proprietor of half the land covered by the stream, but there is no in the water. . . . He has no property in the water itself, but a simple use of it while it passes (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] The more recent case of *Rice Hope Plantation v. South Carolina Public Service Authority*, 59 S.E.2d 132, 144, 216 S.C. 500, 529 (1950) said that the watercourses "are part of the public domain." Therefore, Plaintiffs have no property interest in the State's waters. Because Plaintiffs have no property interest in the water, they have no takings claim. *Grimsley.*

B

The Act Does Not Deprive Plaintiffs of Any Rights

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

---

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.

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.

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.

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 for agricultural purposes than is within the safe yield amount. S.C. Code Ann. §49-4-20(25), 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.").

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-§49-4-110(B) does state that "[s]urface water withdrawals made by permitted or registered 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)[3] 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 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

3 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.*

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.

IV

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

As noted in their opening Memorandum, 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); *State v. Head*, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997). 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 and their property has not been injured due to any withdrawal of water under the statute.

CONCLUSION

For the foregoing reasons, the South Carolina Department of Health and Environmental Control respectfully requests that the Plaintiffs' Motion for Summary Judgment be denied. Plainiffs have no standing, they have presented no justiciable controversy, their claims are not

they have no rights that have been infringed, and they have not claim based upon a public trust interest in waterways.

Respectfully submitted,

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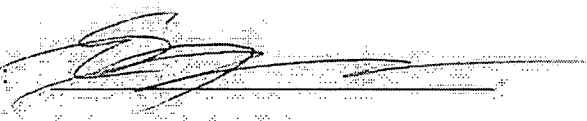
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October 12, 2015

ATTORNEYS FOR DHEC

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control ("DHEC"), Defendant.	)	Case No. 14-CP-06-322 **PLAINTIFF'S REPLY TO DEFENDANT'S RETURN TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman reply in opposition to DHEC's Return to Plaintiff's Motion for Summary Judgment. The plaintiffs are entitled to summary judgment, since they have standing to bring this suit, there is no genuine dispute as to material facts, and the plaintiffs' claims are meritorious on the law. See Anderson v. Liberty Lobby, Inc., 477, U.S. 242, 247 (1986); Major v. City of Hartsville, 410 S.C. 1, 4, 763 S.E.2d 348, 350 (2014). This case is now ripe for review.

I. THE PLAINTIFFS HAVE STANDING AND HAVE PRESENTED A RIPE AND JUSTICIABLE CONTROVERSY

A. The Plaintiffs Meet the Standard for the Public Importance Exception to Standing

South Carolina courts "recognize an exception to the requirement that a plaintiff possess standing where an issue is of such public importance as to require its resolution for future guidance." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 79, 753 S.E.2d 846, 850 (S.C. 2014) (citing Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642

S.E.2d 740, 741 (2007)). As the court noted in Carnival Corp., the public interest exception is "concerned with whether a case is of such public importance that the requirement of standing should be waived." Id. at 80. In that case, the South Carolina Supreme Court held that despite granting original jurisdiction under the "public interest" standard of SCACR Rule 245, the public interest was not so important as to waive general standing requirements.

The plaintiffs in Carnival Corp. were concerned with preemption and applicability issues of local zoning ordinances to a cruise ship and sought liability under tort claims. The injury alleged was "traffic congestion, pollution, noises, and obstructed views" from the cruise ship docking in one town. In holding that the public importance exception to standing did not apply, the court stated that

> Fundamentally, the issues in this case are whether zoning ordinances are preempted by federal and state law, the applicability of zoning ordinances to a cruise ship, and tort liability for a public and private nuisance cause of action. **The case presents no issue of the constitutionality or legality of government action.** Additionally, the claims asserted by Plaintiffs could be brought by other parties who can show the required injury. Therefore, we find the public importance exception inapplicable here.

Carnival Corp., 407 S.C. 67, 80-81 (emphasis added).

In contrast, the plaintiffs in this case **have** presented the issue of the constitutionality or legality of government action, both by challenging the statute and challenging DHEC's enforcement of the statute as violating the state and federal constitutions. In addition, the Act drastically affects all citizens of the State of South Carolina because it disposes of public trust assets, not just a small group of residents in one area. DHEC has issued registrations to withdraw water from every river basin in the state. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 5). Since

DHEC began issuing the registrations, private agricultural operations exempt from the Act's general permitting process have registered to withdraw 68 billion gallons of surface water per year. (Id. at 4.) DHEC cannot use the limited holding from Carnival Corp. – that the public importance exception to standing is different from the Rule 245 standard for original jurisdiction in the Supreme Court – to retreat from its prior statement that this case "presents a constitutional issue regarding an important state law." (Def.'s Petition for Extraordinary Relief 4).

B. The Plaintiffs Also Meet the Constitutional Standard for Standing

Constitutional standing requirements are met when three elements are satisfied:

> The irreducible constitutional minimum of standing has three components: 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 . . . traceable to the challenged action of the defendant, and not . . . the 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.

Smiley, 374 S.C. 326, 329 (internal citations omitted).

The plaintiffs here have suffered several distinct injuries-in-fact. Furthermore, the plaintiffs have satisfied causation and redressibility, where all alleged injuries stem from the registration process in the Act, and may be redressed by striking the process as unconstitutional.[1]

1. Injury to Riparian Property

Riparian owners are afforded the right to use water as long as it is reasonable and

[1] All of the plaintiffs injuries shall be redressed if this court finds that the registration process is unconstitutional and strikes that process from the Act, or in the alternative invalidates the entire Act as unconstitutional.

consistent with the correspondent enjoyment of other citizens. Lowe v. Ottaray Mills, 77 S.E. 135, 137 (S.C. 1913). At common law, citizens were able to seek injunctive relief and/or damages for unreasonable water use. See Mason v. Apalache Mills, 62 S.E. 399, 401 (S.C. 1908). DHEC claims that the Act and DHEC's ensuing regulation do not cut off these common law rights, claiming that the Act does not place limits on actions for injunctive relief. (Def.'s Return 6). However, the Act mandates that "[s]urface water withdrawals made by permitted or registered water withdrawers shall be presumed to be reasonable." S.C. Code Ann. § 49-4-110(B). It does not matter that this presumption may be rebuttable; the fact that a presumption has been created completely alters the way in which riparian owners in this state are able to assert their rights.

DHEC misapprehends the nature of riparian property rights when it claims that the plaintiffs have no property interest in the water itself, and hence no standing. (Def.'s Return 7). The plaintiffs are, by law, also beneficiaries of the state's waters. Moreover, riparian ownership grants the owner of property specific rights to water that are not shared in the same fashion amongst all citizens. The violation of an individual's property rights is a particularized injury that is actionable in court. See, e.g., Hodel v. Irving, 481 U.S. 704, 711, 107 S. Ct. 2076, 2080, 95 L. Ed. 2d 668 (1987) ("We are satisfied that the necessary case or controversy exists in this case. Section 207 has deprived appellees of the fractional [property] interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution.").[2]

[2] See also Already, LLC v. Nike, Inc., 133 S. Ct. 721, 730, 184 L. Ed. 2d 553 (2013) (recognizing that infringement of property rights, if asserted in the complaint, would have been actionable); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 50, 130 S. Ct. 2743, 2752, 177 L. Ed. 2d 461 (2010) (holding that the injury of inability to sell intellectual property rights was sufficient to confer standing); ; Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917) (holding that a white vendor hand standing to attack a zoning ordinance which prohibited the sale of his property to any persons of color); Mackey v. Nationwide Ins.

2. Due Process Injuries

The Fourteenth Amendment provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14. Procedural due process rights generally require "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Olson v. S.C. Dep't of Envtl. Control, 376 S.C. 57, 69 (Ct.App.2008) (citing Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235 (2007). While the requirements are not technical and no specific form of procedure is required, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." S.C. Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 246 (1997).

As a result, judicial review as guaranteed by the Due Process Clause is not afforded to riparian property owners, the plaintiffs. Id.

Due process rights have been lost by the plaintiffs as riparian owners. The Act provides no public notice, no comment period, and no ability to challenge the registrations. (Def.'s Return 5 (citing S.C. Code Ann. §§ 49-4-20(25) and (50)). Once granted, these registrations are presumed reasonable. Since the registrations are presumptively reasonable under the Act, the common law remedy of challenging unreasonable uses has been effectively removed. (Pls.' Mem. in Supp. of Mot. for Summ. J. 21) (citing S.C. Code Ann. 49-4-110(B)). DHEC only has discretion to reduce the amount of water withdrawal when 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that

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Companies, 724 F.2d 419, 426 (4th Cir. 1984); Station WBT v. Poulnot, 46 F.2d 671, 675 (E.D.S.C. 1931) ("We are constrained to hold therefore that the plaintiff's property rights are directly affected by the tax in question, and it has a standing in a court of equity to protect its rights."); Ex parte Nimmer, 212 S.C. 311, 319, 47 S.E.2d 716, 719 (1948) (recognizing injury to property rights as a basis for standing).

such withdrawals are "detrimental" to the environment or human health. See S.C. Code Ann. § 49-4-35(E). There is no review procedure under the statute and its vague mandates, no hearing procedure, and no judicial review. The Act provides **absolutely no procedural rights** to the plaintiffs as riparian owners. DHEC has thus conceded that the Act and its enforcement of the Act do not comply with due process requirements.

The Act also grants the plaintiffs no procedural rights as beneficiaries of the public trust in surface water. Failing to provide any method of public notice or comment for registrations allows the transfer, without any say from the public whose assets are being transferred. These transfers are to private citizens for private purposes. While the Public Trust Doctrine is not unlimited, see supra Part I, Section B, citizens are entitled to notice and the right to be heard at a meaningful time and manner when their rights are implicated by a government action. Because there is no opportunity to be heard before registrations are issued by DHEC, the Act does not comply with the minimum due process to which the plaintiffs and the people of South Carolina are entitled.[3]

DHEC, in its administration of the Act, has not allowed any opportunity for the public to be heard with regards to hundreds of surface water withdrawal permits for agricultural facilities only requiring registration. Yet DHEC asserts that the "plaintiffs have not lost procedural rights." (Def.'s Return 5). In Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), the issue was whether an informal procedure "provided an effective way of allowing a

[3] There is already a procedure for permitting for non-exempt water withdrawers under the Act. See S.C. Code Ann. § 49-4-80. This procedure includes a public notice and comment period, as well as judicial review. See S.C. Code Ann. § 49-4-80(K)(1). The procedure under the Act for non-exempt withdrawers is in line with other DHEC permitting processes. There is no reason DHEC should be incapable of the same in the context of agricultural facilities withdrawing surface water.

meaningful opportunity to be heard," or if a trial-type hearing with evidentiary presentations and witnesses was required. See Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 569 (Ct.App.1998), rev'd on other grounds, Brown v. S.C. Dep't of Envtl. Control, 348 S.C. 507 (S.C. 2002). In contrast, this Act clearly provides no procedural due process rights for the plaintiffs and the public, because none exist under the Act and the Act actually interferes with the protection of riparian rights at common law. Id. at 571; see also infra Part III, Section B.

3. Aesthetic and Recreational Injury

Aesthetic and recreational interests, apart from the plaintiffs' ownership rights, also provide a basis for standing in this case, which DHEC fails to address. A plaintiff alleging aesthetic and recreational harm in environmental litigation has standing regardless of a private ownership interest. Smiley v. S.C. Dep't of Envtl. Control, 374 S.C. 326, 328 (2007). The U.S. Supreme Court has stated that "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000) (citing Sierra Club v. Morton, 405 U.S. 727, 735, 92 S. Ct. 1361 (1972); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001). South Carolina jurisprudence has followed the Supreme Court's interpretation of standing in environmental cases. See Smiley, 374 S.C. 326, 333. In Smiley, the South Carolina Supreme Court held that Plaintiff had standing to bring suit when he recreated and viewed nature on the beach on a near-daily basis and there was an imminent injury of interference with these activities due to permitted beach scraping which had not yet but would soon occur. Smiley, 374 S.C. at 331-332. By comparison, the riparian owners in the present case view, use, or recreate on the waters being removed from the public trust virtually every day.

While the injury has not already occurred, it need only be imminent for an injury to give rise to standing. See Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 69-70 (1978). Combined, the registered agricultural facilities upstream from the plaintiffs may withdraw over 1.43 billion gallons per year. If not addressed now, the injury of the rivers and streams drying up due to unreasonable surface water withdrawals is bound to occur because DHEC will continue to issue registrations. It is not necessary to wait until the water is too low to have any use in order to find an injury sufficient for standing purposes. DHEC has effectively conceded that these injuries are sufficient for standing purposes by not addressing aesthetic and recreational injuries in its Return or Memorandum in Support of Summary Judgment.

4. Public Trust Injury

Article XIV, Section 4 of the South Carolina Constitution provides that "All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. Const. art. XIV, § 4. A public trust in resources beyond navigable waters has been recognized by the South Carolina Supreme Court. See Sierra Club v. Kiawah Resorts Ass'n, 456 S.E.2d 397, 402 ("The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils).").

The scope and nature of property rights are determined by the state and protected by the state. The fact that these property rights can revert back to the state does not invalidate their existence.[4] Surface water is simply one of many resources that the state holds in trust for all

[4] By example, when real property was last in the possession of an owner in fee simple, and that person dies intestate without any heirs who could claim the property through succession, the property returns to the state through escheat. S.C. Code Ann. §§ 27-19-10, et seq. (2015).

citizens, because certain resources are too valuable to be owned by one person. See Sierra Club, 456 S.E.2d 397, 402.

With the passage of the Act, the state has lost control to manage the public trust in water as its trustee. The transfer of resources is permanent, and DHEC can only later decrease a water allotment in a registration when 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E). These terms are vague, and not adequately defined by law or regulation. Thus, the Act violates the Public Trust Doctrine by disposing of public trust resources in perpetuity. Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) (**"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") (emphasis added).

Hence, the citizens of this state, including plaintiffs which enjoy this public trust resource, are injured by the state's disposal of that resource held by the state as trustee for the citizens as beneficiaries. The Public Trust Doctrine creates a trust, which evokes a fiduciary relationship between the trustee, which is the state, and the beneficiaries, which are the people of South Carolina. Since the state has a fiduciary duty to the beneficiaries, its "citizens may enforce the state's fiduciary obligations." See e.g., Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1486 (2013) (citing Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal.Rptr.3d 588). This injury to public trust resources that the

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The same is true when citizens of the state have a property interest as beneficiaries of the public trust.

plaintiffs enjoy gives rise to standing where the plaintiffs are beneficiaries that may bring suit enforce the state's fiduciary obligations.

5. Causation and Redressability Are Both Met by the Plaintiffs and Conceded by DHEC

If the water registrations continue to be issued, especially without any sort of mechanism with which to challenge the governmental action or inaction, there will be dire effects for the plaintiffs before the court. The rivers abutting their homes will shrink, as will their property values and aesthetic and recreational appreciation of their properties. (Jowers Aff. 2-3 ("Currently, the water level in the River is problematically low, but still flowing. . . . I believe that the Act eliminates my property rights, specifically the right to protect my reasonable use of the Little Salkehatchie River where it flows through my property."); Ruhlman Aff. 2 ("The North Saluda River is the primary reason that we moved to this property. . . . I believe that the Act restricts or eliminates my property rights to enjoy and use the North Saluda River where it flows through my property.")). This will lead to a loss of recreational value, as well as aesthetic value due to fish kills proven to occur when water levels reach a certain low point (Jowers Aff. 2 ("I have seen photos of fish kills . . ., which happened about 30 miles downstream from my property. I am concerned about that."); Anastos Aff. 1-2 ("I remember how the North Saluda River was before the Poinsett Reservoir was built. It had small mouth bass and catfish, and was at least fifty percent larger than it is today.")).

The plaintiffs meet the standards for both causation and redressability. The plaintiffs' injuries are caused by the unconstitutional registration process in the Act and the issuance of

registrations pursuant to the Act.[5] Furthermore, redressability is met in this case, because this court may strike down the Act as unconstitutional in whole or part, which would fully remedy the plaintiffs' injuries (Pls.' Mem. in Supp. of Mtn. for Summ. J. 34). DHEC fails to argue, and thus essentially concedes, that the plaintiffs meet the standards for causation and redressability. As a result, the plaintiffs meet all the requirements for constitutional standing if the court finds that the plaintiffs have shown any of the injuries listed above.

C. This Case Presents a Justiciable Controversy That is Ripe for Adjudication

This case is ripe for review and an appropriately justiciable controversy, given the types of legal claim in this case.[6] The Act has already caused actual harm, and will cause further harm if DHEC continues to issue agricultural registrations. This case is a facial challenge with an accompanying actual injury that recurs while the statute is still in effect. The Act was passed in 2010 and went into effect in 2011, when DHEC began implementing it. Since then, DHEC has issued 231 total surface water withdrawal registrations, registered for the extraction of 6.2 billion gallons per month and 68 billion gallons per year (Pls.' Mem. in Supp. of Mtn. for Summ. J. 4). Plaintiffs are not required to pursue the now-invalidated common law cause of action for reasonable use of water by riparian owners. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012 (1992). In Lucas, the plaintiff brought his takings action based on deprivations due to the pre-1990 and post-1990 constraints of the Beachfront Management Act. The post-1990 Act

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[5] There is no intervening cause for the plaintiffs' injuries, however even if those were at issue, mere mention of other harms to the waterway does not eliminate causation (Pls.' Mem. in Supp. of Mtn. for Summ. J. 34 (citing Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003)).

[6] These include constitutional takings, due process, and public trust claims arising from both the injury to private property rights as riparian owners and injury to the waters held by the state as a public trust.

created a "special permit" that did not exist before and could potentially allow the plaintiff to gainfully use his property, but the court held that "it would not accord with sound process to insist that Lucas pursue the late-created 'special permit' procedure before his takings claim can be considered ripe." Id. Similarly, the plaintiffs in this case do not need to first bring common law causes of action based on riparian rights for the underlying takings, due process, and public trust claims to be ripe. Id.; see also Duke Power Co., 438 U.S. 59, 69-70.

II. THE PLAINTIFFS HAVE RIPARIAN RIGHTS THAT HAVE BEEN INFRINGED

A. The Plaintiffs Have Property Interests to Establish a Takings Claim

At common law, riparian owners are afforded a bundle of rights exclusive to them as a class and separate from other sorts of property owners. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 12.) These include the right to consumptive use of the fresh water in navigable rivers, restricted by a reasonable use requirement that one owner's use does not unreasonable interfere with downstream riparian use, protection of public trust resources, and the state's own use. Id. Even with these restrictions, riparian owners have rights that a non-riparian owner would not have, though a non-riparian owner has the right to travel on navigable waters. (Id.) DHEC's claim that the plaintiffs in this case have no private **right** to water (in contrast with possession or ownership) as a result of their status as riparian owners confuses and misconstrues the operation of property rights. (Def.'s Return 3.) The plaintiffs own riparian property downstream from private agricultural users of water and the property interests associated therein. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 7-9.) The Act has given these agricultural users a private and superior right to water, while leaving other riparian owners with inferior rights. (Id. at 16.)

DHEC relies upon Grimsley v. S. Carolina Law Enforcement Div. in an attempt to discredit the plaintiffs' property interests. (Def.'s Return 3.) However, Grimsley merely

recognized that a takings claim required a recognized property interest under state law. Grimsley v. S. Carolina Law Enforcement Div., 396 S.C. 276, 285, 721 S.E.2d 423, 428 (S.C. 2012). This fact is not in dispute. Riparian owner rights are a type of property rights, and those are precisely the rights that have been taken pursuant to the Act. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 11-13, 21-25.) Thus, the plaintiffs have property interests to establish their takings claims.

B. The Act Deprives the Plaintiffs of Rights

Article I, Section XIII(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor the public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13; see also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005). By issuing indefinite registrations for massive water withdrawals to private agricultural facilities, DHEC has and continues to conduct private takings of property for private use.[7]

The Act takes private property rights that were previously safeguarded by the state and transfers them to other owners, namely large, private agricultural operations. The Act and DHEC's enforcement of the Act deprive the plaintiffs of rights they once had to protect their water use as riparian owners against those who would otherwise use upstream water unreasonably. Before the Act was passed and DHEC began issuing registrations, riparian owners were able to sue each other to enjoin unreasonable usage of shared water resources. See Lowe v.

[7] Even if DHEC tries to claim now that these registrations are for public use, despite its admission that DHEC does not require any showing of public use as part of its registration process, the plaintiffs are still entitled to compensation under the South Carolina Constitution and the Fifth Amendment of the United States Constitution. See Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005).

Ottaray Mills, 77 S.E. 135, 137 (S.C. 1913). When this was not the case, the aggrieved owner could take the other riparian owner to court and enforce her rights. Id. There was no presumption that one use of water was superior to another, as is the case now. Id. Now private citizens cannot safeguard their own private interests in reasonable consumptive use of rivers and streams.

The presumption of reasonableness associated with agricultural registrations defeats the ability for potential plaintiffs to prosecute violations of their rights at common law. DHEC contends that the Act does nothing to interfere with remedies at common law, but ignores the nullifying effect the presumption of reasonableness has on such litigation. Instead, DHEC cites two cases that are not pertinent to the issues in this case. In Spradley v. South Carolina State Highway Dept., the plaintiff alleged a taking based upon damage to her property, but the "sole issue" in the case before the South Carolina Supreme Court was whether the trial judge was correct in sending the issue of causation to the jury. Spradley v. South Carolina State Highway Dept., 256 S.C. 431, 435 (S.C. 1971) ("The sole issue to be here determined is whether or not the trial judge should have directed the verdict in favor of the appellant. . . . if more than one reasonable inference can be drawn from the evidence or if the inferences to be drawn therefrom are in doubt, the case was properly submitted to the jury."). State Acc. Fund v. South Carolina Second Injury Fund has nothing to do with the law of takings, or whether the creation of a rebuttable presumption is a taking. The case merely recognizes the existence of a rebuttable presumption as such. State Acc. Fund v. South Carolina Second Injury Fund, 409 S.C. 240, 246, 247 (S.C. 2014). The Act unconstitutionally takes away riparian property rights, due process rights, and public trust property; it does not merely create a rebuttable presumption.

III. THE PLAINTIFFS HAVE A CLAIM BASED UPON A PUBLIC TRUST INTEREST IN STATE WATERWAYS

There is no legal support for DHEC's suggestion that non-tidal navigable waterways are not public trust assets, and thus plaintiffs have no public trust claim. (Def.'s Return 7). The Public Trust Doctrine encompasses more than just tidal waterways, including, for example, "the inalienable right to breathe clean air; to drink safe water; to fish and sail; and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128-29 (1995). Surface waters, including fresh water navigable waterways, are part of the public trust.

For non-tidal navigable waters, riparian landowners hold title from their shoreline to the center of the stream bed, and the public has an easement for use of the waterway because the surface water is held in the public trust. See State v. Head, 330 S.C. 79 (1997) (citing S.C. Const. art. XIV, § 4). The Public Trust Doctrine extends to surface waters, and the consumptive and recreational usage of those waters. See Sierra Club, 456 S.E.2d 397, 402 (S.C. 1995) (internal citation omitted). In enforcing the public trust in surface waters, "[t]he State . . . cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003). By diverting trust property disproportionally to private interests, DHEC has breached the trust held at common law to benefit all citizens of South Carolina. As trust assets, the state has a fiduciary duty to its citizens to preserve water resources for the public. See Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1486 (2013).

Public trust assets can only be transferred to private parties when the transfer is (1) in furtherance of a public purpose, or (2) when there is only a *de minimis* impact on public uses (Pls.' Mem. in Supp. of Mot. for Summ. J. 26) (citing Sierra Club, 318 S.C. 119, 128 (internal citation omitted)). DHEC never claims that the registration process in the Act is either in

furtherance of a public purpose or that it results in only a *de minimus* impact on public uses. Thus, both of these points are effectively conceded by DHEC as well.

The Act does not require demonstration of public use or any public use finding before registrations are issued. (Pls.' Mem. in Supp. of Mot. for Summ. J. 22, n. 24). The transfers of public trust surface water at issue here is to private agricultural users. Thus, there is no public purpose that the registration process furthers.

The registered water withdrawals for private agricultural users are so large that they can not be construed as having a *de minimis* impact on public uses. The 231 surface water withdrawal registrations combined are collectively registered to withdraw 6.2 billion gallons per month and 68 billion gallons per year from South Carolina's surface waters for private agricultural use. (Pls.' Mem. in Supp. of Mot. for Summ. J. 4).[8] As such, neither of the two conditions by which the state can dispose of public trust property have been met, and DHEC makes no argument to the contrary.

The Act, and DHEC's enforcement of the Act, puts waters that are meant to be fairly used amongst all South Carolinians into the hands of private agricultural interests. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 27). Agricultural facilities are able to withdraw the amount listed in the registrations indefinitely, while DHEC has practically no power to revoke these registrations. See S.C. Code Ann. § 49-4-35(E). In fact, even when registered agricultural users violate the terms of the registrations by exceeding the withdrawal limits, DHEC has failed to enforce those terms of the registrations. (Pls.' Mem. in Supp. of Mtn. for Summ. J. 4.) The registration process thus violates the Public Trust Doctrine, by which the state must ensure fair use of water and not

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[8] The Memorandum in Support of Summary Judgment incorrectly referred to the unit of measurement as trillions, but the correct unit of measurement is billions, as it is correctly reflected in Exhibit B to the plaintiffs' motion.

permit activity which "substantially impairs" public access to water. (Id. at 27.) The state has lost control of a public trust resource instead of guarding it, in trust, for the people, which violates the Public Trust Doctrine.

CONCLUSION

For all of these reasons, the plaintiffs hereby respectfully request that the court grant their motion for summary judgment.

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Georgetown, South Carolina
October 26, 2015

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,	)	
	)	DHEC's
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
South Carolina Department of Health And Environmental Control,	)	
	)	
Defendants.	)	
	)	

The Defendant Department of Health and Environmental Control hereby moves for summary judgment pursuant to Rule 56, SCRCP, in that the pleadings and any exhibits now or hereinafter submitted, show that there is no genuine issue as to any material fact as to the defenses herein and that the moving party is entitled to judgment as a matter of law. The grounds for this motion include, but are not limited to, the lack of standing of the Plaintiffs and that the statute challenged in this suit, the South Carolina Surface Water Withdrawal Act of 2010, S.C. Code Ann. § 49-4-10, *et seq,* does not violate the provisions of the Constitution at issue. *See* DHEC's Memorandum in Support of Motion for Summary Judgment submitted herewith. DHEC reserves the right to rely on any exhibits filed by other parties to this case. Attached in support of this Motion are the State's Interrogatories and Requests for Admission and Plaintiff's Responses thereto [attachments omitted].

Respectfully submitted,

ALAN WILSON
Attorney General
[Signature block continues next page]

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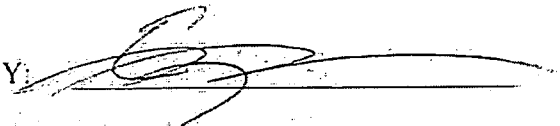
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BY: 

ATTORNEYS FOR DHEC

September 14, 2015

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF BARNWELL

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Petitioners, vs. South Carolina Department of Health and Environmental Control, Respondent.	Case No. 14-CP-06-322 **PETITIONERS' RESPONSES TO RESPONDENT'S INTERROGATORIES, REQUEST FOR PRODUCTION AND REQUESTS FOR ADMISSION**

TO: RESPONDENT AND ITS ATTORNEYS

The Plaintiffs hereby respond to Respondent's discovery requests as follows:

INTERROGATORIES

1. **Give the names and addresses of persons known to Plaintiffs or counsel to be witnesses concerning the facts of the case and indicated whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.**

ANSWER:

James Jefferson Jowers, Sr.
585 Broxton Bridge Road
U.S. Hwy. 601
Bamberg, SC 29003

Andrew J. Anastos
1205 Goodwin Bridge Road
Travelers Rest, South Carolina

Ben Williamson
1311 Oaklyn Road
Darlington, South Carolina, 29532

Melanie and Anthony Ruhlman
301 Keeler Bridge Road
Marietta, South Carolina, 29661

Written statements have been taken for each witness in the form of Affidavits which have already been provided to counsel. Plaintiff Melanie Ruhlman has also authored three documents that reference or pertain to the facts of this case.

2. **Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in this case.**

ANSWER:

Publically available plats or maps of properties of the Petitioners which show that they are riparian owners. These have already been provided to counsel with the aforementioned affidavits.

3. **List the names and addresses of any expert witnesses whom Plaintiffs propose to use as a witness at the trial of the case and for each such expert, please state in detail:**

A. The expert's qualifications to testify.

B. A description of the subject matter on which each such expert is expected to testify.

C. Identification of the documents on which each such expert is expected to rely and testify.

D. A detailed summary of the opinions and conclusions of each such expert.

E. A summary of the grounds for each such opinion and conclusion.

ANSWER:

Plaintiffs do not propose to call any expert witnesses at this time, but reserve the right to amend these responses.

4. **Identify any expert retained or specially employed by Plaintiffs in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial.**

ANSWER:

Plaintiffs have not retained or employed any expert in anticipation of litigation or preparation for trial.

5. **For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.**

ANSWER:

Each of the Plaintiffs has personal knowledge surrounding their ownership of riparian properties in South Carolina, including the size, location and nature of those properties, as well as the acquisition date of those properties. This information is included in the Plaintiffs' Affidavits and accompanying exhibits which are in the Defendant's possession. Plaintiff Melanie Ruhlman has also made written statements, which are attached.

6. **Please identify any witnesses that Plaintiffs expect to testify at trial.**

ANSWER:

Plaintiffs anticipate that this case will be decided on summary judgment without live testimony; however, should live testimony at a trial become necessary, Plaintiffs would call James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, and one or more 30(b)(6) witnesses from DHEC.

7. **Describe with particularity, including dates, any injury to your property, your use thereof or to you due to any withdrawal of water for agricultural purposes from any stream or river flowing past property that you own.**

ANSWER:

Injury as defined by Defendant in its interrogatories, has not occurred to the Plaintiffs' property. The legal injury occurred the date the Surface Water Withdrawal 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.

8. **Describe how you or your family members use the river or stream flowing past your property.**

ANSWER:

See the above-referenced affidavits.

9. **Describe any alleged loss of use of the river or stream flowing past your property that you attribute to the matters at issue in this lawsuit, set forth why you believe that matters set forth in this lawsuit have contributed to that alleged loss of use, set forth the dates and locations of such alleged loss of use, and identify any witnesses that can verify that alleged loss of use.**

ANSWER:

The loss of riparian property rights, violation of due process rights and violation of the public trust doctrine occurred the day that the Surface Water Withdrawal Act became effective, January 1, 2011.

10. **Identify any property that you own in Barnwell County.**

ANSWER:

The Plaintiffs do not own property in Barnwell County.

REQUEST FOR PRODUCTION

1. **All documents identified or described in response to the Defendant's Interrogatories or on which Plaintiffs have relied in making that response except those previously produced.**

ANSWER:

All documents are attached, except those which have previously been provided to the Defendant along with the Plaintiffs' Motion for Preliminary Injunction.

REQUESTS FOR ADMISSION

1. **Admit that you, your property and your use thereof have not have not have been injured due to any withdrawal of water for agricultural purposes occurring on a river or stream flowing past property that you own.**

ANSWER:

Admitted.

2. **Admit that you do not own any property in Barnwell County.**

ANSWER:

Admitted.

3. **Admit that you have not been injured due to any withdrawal of water for agricultural purposes occurring in Barnwell County or upstream from that County.**

ANSWER:

Admitted.

Amelia A. Thompson
Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
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Attorneys for the Petitioners

Georgetown, South Carolina

June 29, 2015

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.	)	**INTERROGATORIES**
	)	
South Carolina Department of Health and Environmental Control,	)	
	)	
Defendants.	)	
	)	

TO THE COUNSEL FOR THE ABOVE NAMED PLAINTIFFS:

Subject to and without waiving any of the South Carolina Department of Health and Environmental Control's s defenses in its answer to the Complaint, you are hereby served with the following interrogatories of DHEC, pursuant to Rule 33, SCRCP, to be fully answered by the Plaintiffs within thirty days in writing and under oath. These Interrogatories are deemed continuing in nature so as to require supplementation of the answers as additional information becomes known to Plaintiffs or Plaintiff's counsel.

DEFINITIONS

1. (A) "Describe" when used with respect to a statement or communication means to identify the person making the statement or communication, the date it was made, the person or persons to whom the statement or communication was made along with who witnessed such statements or communications, the content of the statement or communication and the place where it was made.

(B) "Describe" when used in connection with an act means to provide the identity of the actor, the specific nature and detail of the act, the date and place of the act and the identities of the persons present.

2. "Document" means every writing or record of every type and description that is or has been in Plaintiffs' possession, control or custody or of which Plaintiffs have knowledge, including, but not limited to, correspondence, memoranda, audio or video tapes, computer disks and compact disks, stenographic or handwritten notes, studies, publications, books, pamphlets, pictures, drawings and photographs, films, microfilms, voice recordings, maps, reports, surveys, minutes or statistical graphs, plots or computations and other documents as identified in Rule 34 of the South Carolina Rules of Civil Procedure.

3. (A) "Identify" with respect to a person means to provide the name, home address, business address, telephone number, and a description of each such person's connection with the events in question.

(B) "Identify" with respect to any document means to provide the title and date of each such document, the name and address of the party or parties responsible for the preparation of each such document, the name and address of the party who requested or required the preparation or on whose behalf it was prepared, the name and address of the recipient or recipients of each such document, the present location of any and all copies of each such document, and the names and addresses of any and all persons who have custody or control of each such document or copies thereof. In lieu of identifying such documents, Plaintiffs may produce along with the answers to this discovery a legible copy of the documents Plaintiffs are asked to identify, indicating the discovery response to which Plaintiffs are responding with the document.

(C) "Identify" when used with respect to an organization (e.g., corporation, partnership, association, etc.) means to state the name of such organization, the type of such organization, the activities in which the organization engages, the webpage of such organization, if any, and the address and telephone number of the organization's principal place of business.

4. The words "injury" or "injured" refer to actual physical injury, economic injury, or actual loss of use of waterways for any alleged beneficial purpose and the water therein and not to any claimed loss of alleged legal rights.

5. "Person" means any natural person, corporation, partnership, proprietorship, association, organization, or other entity or group of persons.

6. The words "you" or "your" refer to the Plaintiffs and their respective agents and representatives, and any other person or persons acting for or on behalf of Plaintiffs.

7. In construing these discovery requests, the singular shall include the plural and vice versa. Any pronoun shall include reference to the masculine, feminine and neuter gender. The use of a verb in any tense shall be construed as the use of the verb in all tenses as is necessary to bring within the scope of a discovery request all responses appropriate to the applicable verb tense.

8. "And" and "or" shall be construed both disjunctively and conjunctively.

INSTRUCTIONS

1. These requests should be interpreted so to apply only to non-privileged discovery material except as set forth in the following instruction. Therefore, to the extent a privilege is claimed with regard to any discovery request, Plaintiffs should respond with non-privileged information responsive to such request.

2. All objections to any discovery request on the ground of any claim or privilege or otherwise shall be specifically identified in accordance with Rule 26(b)(5) of the South Carolina Rules of Civil Procedure.

3. Where an individual discovery request calls for an answer that involves several subparts, each answer should be clearly delineated so to ensure reference to the appropriate subpart to which the answer is responsive.

4. In the event that any document or thing called for in any of these requests has been destroyed, lost, discarded or otherwise disposed of, identify as completely as possible, each such document or thing, including without limitation, the following information: date of disposal, place and manner of disposal, reason for disposal, person authorizing the disposal and persons disposing of the document or thing.

5. If any of these discovery requests cannot be answered in full, please answer to the fullest extent possible, explaining why Plaintiffs cannot answer the remainder, and stating any information or knowledge which Plaintiffs have concerning the unanswered portion of the discovery request.

6. Separate responses should be provided for each Plaintiff if their responses differ from each other including, in particular, Interrogatories 7, 8 and 9.

INTERROGATORIES

[*See* instruction 6, *supra*]

1. Give the names and addresses of persons known to Plaintiffs or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in this case.

3. List the names and addresses of any expert witnesses whom Plaintiffs propose to use as a witness at the trial of the case and for each such expert, please state in detail:

A. The expert's qualifications to testify.

B. A description of the subject matter on which each such expert is expected to testify.

C. Identification of the documents on which each such expert is expected to rely and testify.

D. A detailed summary of the opinions and conclusions of each such expert.

E. A summary of the grounds for each such opinion and conclusion.

4. Identify any expert retained or specially employed by Plaintiffs in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.

6. Please identify any witnesses that Plaintiffs expect to testify at trial.

7. Describe with particularity, including dates, any injury to your property, your use thereof or to you due to any withdrawal of water for agricultural purposes from any stream or river flowing past property that you own. *See* definition of injury, *supra.*

8. Describe how you or your family members use the river or stream flowing past your property.

9. Describe any alleged loss of use of the river or stream flowing past your property that you attribute to the matters at issue in this lawsuit, set forth why you believe that matters set forth in this lawsuit have contributed to that alleged loss of use, set forth the dates and locations of such alleged loss of use, and identify any witnesses that can verify that alleged loss of use..

10. Identify any property that you own in Barnwell County.

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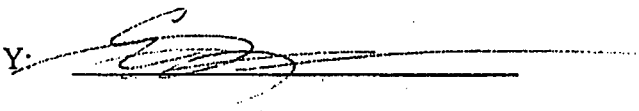
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BY: 

May 29, 2015

ATTORNEYS FOR DHEC

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.	)	**REQUESTS FOR ADMISSION**
	)	
South Carolina Department of Health and Environmental Control,	)	
	)	
Defendants.	)	
	)	

Pursuant to Rule 36, SCRCP, the Defendant South Carolina Department of Health and Environmental Control, requests that Plaintiffs admit or specifically deny in compliance with that rule, each of the following Requests for Admission in accordance with the following directions:

DEFINITIONS AND INSTRUCTIONS

1. The words "you" or "your" refer to the Plaintiffs and their respective agents and representatives, and any other person or persons acting for or on behalf of Plaintiffs.

2. The words "injury" or "injured" refer to actual physical injury, economic injury, or actual loss of use of waterways for any alleged beneficial purpose and the water therein and not to any claimed loss of alleged legal rights.

2. These Requests for Admission, with respect to the subjects about which they inquire, require Plaintiffs to provide all information available to them and their employees, agents, consultants, representatives, and, unless privileged, attorneys.

3. These Requests are continuing in character, thus requiring you to serve supplemental answers within a reasonable time after obtaining further or different information concerning any Request.

4. If, in responding to these Requests, you perceive any ambiguity in a Request, definition, or instruction, your response must set forth the matter deemed ambiguous and the construction used in responding.

5. If the responses to these Requests differ for individual Plaintiffs, separate responses for each of them should be set forth.

REQUESTS FOR ADMISSION

1. Admit that you, your property and your use thereof have not have been injured due to any withdrawal of water for agricultural purposes occurring on a river or stream flowing past property that you own.

2. Admit that you do not own any property in Barnwell County.

3. Admit that you have not been injured due to any withdrawal of water for agricultural purposes occurring in Barnwell County or upstream from that County.

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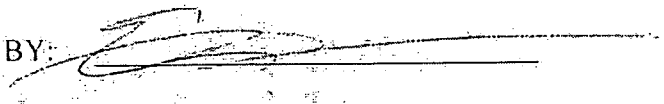
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BY: 

May 29, 2015

ATTORNEYS FOR DHEC

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,	)	DHEC's
	)	MEMORANDUM IN SUPPORT OF
v.	)	SUMMARY JUDGMENT
	)	
South Carolina Department of Health And Environmental Control,	)	
	)	
Defendants.	)	

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 should be 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 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 is filed. Response of Petitioner's 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. 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 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 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 are within the safe yield at the time of the request."); §4-9-20(25)("Safe yield" means the of water available for withdrawal from a particular surface water source in excess of the 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 not happened and they have no constitutional or other interest that has been infringed.

ARGUMENT

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 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

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. 2006). Plaintiffs fail to meet those requirements.

"[A] 'prospective concern of future harm' is not sufficient to satisfy the *Lujan* test." *Commander Health Care Facilities*, 634 S.E.2d at 667. As noted above, Plaintiffs allege loss of rights to challenge withdrawals by registered upstream users or the possibility of interference their own rights to take or consume water even though they do not allege that such agricultural withdrawals have occurred. They claim "a loss of riparian property rights, violation of due rights and violation of the public trust doctrine on the day the Act became effective." Plaintiff's

Response at page 4, ¶9. These assertions do not satisfy standing requirements. The rights are not lost because Plaintiffs have no basis for invoking them now in that their property is not by any water withdrawal.

Plaintiffs only claim "theoretically possible" future harm as did the Plaintiffs found to lack standing, as follows, 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.

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.

Plaintiffs also fail to meet standards for "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 upon a party when an issue is of such public importance as to require its 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.

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). 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

and contingent events that may not occur as anticipated or may not occur at all." The that Plaintiffs claim may not occur at all or in any way that might injure Plaintiffs. If they do occur in the future and they believe that they have been injured, they can 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 for adjudication.

III

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." Venue is improper 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. The Complaint alleges no basis for venue in Barnwell.

IV

PLAINTIFFS HAVE NO PROPERTY INTEREST THAT HAS BEEN TAKEN NOR DO THEY HAVE ANY CLAIM BASED UPON A PUBLIC TRUST INTEREST IN STATE WATERWAYS

Plaintiffs claim takings of their "riparian property rights to consume water" They claim that this taking is either a taking for private purposes that is forbidden, a taking for public 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 and no public trust interest in the waterways that has been violated.

> 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)

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."); *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 even if they did, they admit that they have not lost use of the rivers abutting their property. Plaintiffs erroneously have 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 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 also rely 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. 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. § 49-49-1-10 (Rev.1987) similarly provides: "All streams which have been rendered 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 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, 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.

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 or and their property has not been injured due to any withdrawal of water under the statute.

V

THE SURFACE WATER WITHDRAWAL ACT IS CONSTITUTIONAL BUT THIS ISSUE NEED NOT BE REACHED

Because Plaintiffs lack standing and because 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, the Defendant does note that, under *Rice Hope Plantation v. S. Carolina Pub. Serv. Auth.*, 59 S.E.2d at 144, *supra,* the law is constitutional:

> 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.

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 As noted above, Plaintiffs have acknowledged that they and their property have not been injured 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 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 affected by any water withdrawals pursuant to the Act. Therefore, Plaintiffs have no cause of action for compensation. To the extent that, *arguendo,* Plaintiffs have stated any claim for compensation, any claims arising more than three years before this action was filed on 4, 2014, would be barred by the statute of limitations[1]. S.C. Code Ann. §15-3-530[2].

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1 DHEC has moved to amend its Answer to include the statute of limitations defense.

2 Section 15-3-530 provides, in part, as follows:

> [w]ithin three years: . . .
> (3) an action for trespass upon or damage to real property;
> (4) an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property;
> (5) an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545 . . . .

VII

THIS COURT LACKS SUBJECT MATTER JURISDICTION AND PLAINTIFFS HAVE FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

Because Plaintiffs lack standing and 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).

CONCLUSION

For the foregoing reasons, the South Carolina Department of Health and Environmental Control respectfully requests that it be granted summary judgment in this case.

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BY: _____

September 14, 2015 ATTORNEYS FOR DHEC

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)))	IN THE COURT OF COMMON PLEAS
James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman, Plaintiffs, vs. South Carolina Department of Health and Environmental Control, Defendant.	)	Case No. 14-CP-06-322 **RESPONSE TO DHEC'S MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman respond to the South Carolina Department of Health and Environmental Control's ("DHEC") Motion for Summary Judgment as follows:

Every argument, aside from venue, in DHEC's memorandum is based upon the faulty premise that riparian rights are not property rights. (DHEC Mem. 3-12.) DHEC offers no alternate theory for what types of rights the Plaintiffs possess in their riparian property, and ignores the common law treatment of riparian ownership. All of DHEC's arguments begin with that faulty premise, and thus result in inaccurate conclusions of law.

Riparian rights are property. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984); Schroeder v. City of New York, 371 U.S. 208 (1962); Omelvany v. Jaggers, 1835 WL 1419 (May 1835); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("Although [the riparian property owner's] right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient.");

Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007). More specifically, riparian rights are a special type of property rights which attach only to properties which abut or encompass a surface water of the state, such as a stream or a river. Riparian property is more valuable than non-riparian property because of the special rights of use that attach to it. Riparian rights include:

- The right to access the adjacent public waterway;
- The right to wharf out (build a wharf, pier, or similar structure) to connect the upland with a navigable channel;
- The right to accretions;
- The right to non-consumptive use of the water, for example, the diversion of water to generate power for a mill; and,
- The right to consume water (mainly relevant for properties bordering freshwater waterways.)

Josh Eagle, Coastal Law, Wolters Kluwer 278 (2011). With that faulty premise dispelled, and these textbook principles of riparian rights in mind, we turn to address each of DHEC's arguments more specifically.

I. The Plaintiffs have standing to bring this lawsuit.

A. The Plaintiffs have actionable injuries, stemming from both the Act itself and DHEC's issuance of registrations pursuant to the Act, which are sufficiently concrete and particularized to establish Constitutional standing.

The violation of an individual's property rights is a particularized injury that is actionable in court. See, e.g., Hodel v. Irving, 481 U.S. 704, 711, 107 S. Ct. 2076, 2080, 95 L. Ed. 2d 668 (1987) ("We are satisfied that the necessary case or controversy exists in this case. Section 207

has deprived appellees of the fractional [property] interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution.").[1]

The Plaintiffs have suffered and continue to suffer injury through the taking without due process of their riparian property rights in two ways. First, the Plaintiffs were injured immediately upon passage of the Act because the Act took their riparian rights and replaced them with something far inferior such that their rights are no longer recognizable. Second, the Defendant has issued registrations authorizing the withdrawal of billions of gallons of surface water, pursuant to the Act, which is a public trust resource. The Plaintiffs rely on the rivers and streams adjacent to their properties for continuing use and enjoyment. From Mr. Jowers's fishing to Mr. Williamson's family picnics, each plaintiff makes use of his or her riparian ownership rights. The Defendant has, through the Act, taken the Plaintiffs' private property and transferred it to private agricultural users. Furthermore, DHEC continues to issue registrations, resulting in a continuing injury to the Plaintiffs.

In addition to the individualized harms to the Plaintiffs' property in this case, there is harm to the public because the surface water is an asset of the State, protected by the Public Trust Doctrine. McQueen, 354 S.C. at 149, 580 S.E.2d at 119. The Defendant has disposed of,

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[1] See also Already, LLC v. Nike, Inc., 133 S. Ct. 721, 730, 184 L. Ed. 2d 553 (2013) (recognizing that infringement of property rights, if asserted in the complaint, would have been actionable); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 50, 130 S. Ct. 2743, 2752, 177 L. Ed. 2d 461 (2010) (holding that the injury of inability to sell intellectual property rights was sufficient to confer standing); ; Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917) (holding that a white vendor hand standing to attack a zoning ordinance which prohibited the sale of his property to any persons of color); Mackey v. Nationwide Ins. Companies, 724 F.2d 419, 426 (4th Cir. 1984); Station WBT v. Poulnot, 46 F.2d 671, 675 (E.D.S.C. 1931) ("We are constrained to hold therefore that the plaintiff's property rights are directly affected by the tax in question, and it has a standing in a court of equity to protect its rights."); Ex parte Nimmer, 212 S.C. 311, 319, 47 S.E.2d 716, 719 (1948) (recognizing injury to property rights as a basis for standing).

and may continue to dispose of, public trust assets. Thus, injuries to the public have already and are continuing to occur pursuant to the Act.

Additionally, the loss of a procedural due process right is a sufficient allegation to confer standing. Doe v. Virginia Dep't of State Police, 713 F.3d 745, 755 (4th Cir. 2013) cert. denied, 134 S. Ct. 1538, 188 L. Ed. 2d 556 (2014) ("[The Plaintiff's] alleged injury to her right to procedural due process is thus in no way hypothetical, and it is sufficiently concrete for a . . . court to address it."). The Plaintiffs have also suffered injury in the loss of their due process rights. DHEC has issued registrations to withdraw water upstream from all but one of the Plaintiffs' riparian properties. This was done without any personal or public notice, in violation of the Due Process Clauses of the state and federal constitutions.

B. This case meets the public importance exception to standing because future guidance is needed as to the state's responsibility to protect the public trust and the state has lost control of a public trust resource.

"The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance." South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013).

DHEC argues that the public importance exception is not met because the Act "has been in effect for nearly five years" and there are not any other pending lawsuits. These facts, however, do not go to the question of whether this challenge as to the Act's constitutionality is of public importance. See e.g., South Carolina Public Interest Foundation, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply"). This case, which challenges the disposal of all of

the surface water in the state through an Act which is facially unconstitutional and unconstitutional as implemented by DHEC, is of great public importance. The Act requires DHEC to give public trust assets to private individuals and the state exercises no discretion in doing so. Future guidance, as to whether this registration process is constitutional, is certainly needed. Thus, this case falls within the public importance exception to standing.

DHEC also asserts that the issues presented are for the legislature and not the courts. (DHEC Mem. 6.) To the contrary, "as Chief Justice John Marshall famously stated, '[I]t is emphatically the province and duty of the judicial department to say what the law is.' Marbury v. Madison, 5 U.S. 137, 138, 1 Cranch 137, 2 L.Ed. 60 (1803). This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws." Abbeville Cnty. Sch. Dist. v. State, 410 S.C. 619, 632, 767 S.E.2d 157, 163-64 (2014), reh'g denied (Jan. 23, 2015). While the legislature has the ability to change this law and conform it to the constitution, it has failed to do so. Thus, this court must step in and correct this injustice.

II. This case is ripe for review because it is sufficiently concrete for the Court to render a verdict.

Evaluating ripeness requires consideration of the kind of legal claim that is being made, and whether that claim is sufficiently concrete so that the court may render a verdict. Lucas v. S.C. Coastal Council, 505 US 1003 (1992). For example, in Duke Power Co. v. Carolina Envtl. Study Group, the Plaintiffs—an environmental organization, a labor union, and a number of individuals who lived near a planned nuclear power plant—challenged the Price-Anderson Act's limitation on liability for nuclear accidents as constituting "arbitrary governmental action adversely affecting their property rights" in violation of the due process clause of the Fifth

Amendment and as being an "instrument of taking" without any assurance of just compensation in the event of a nuclear accident. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 69-70 (1978). The Court determined that the case was ripe for adjudication, stating: "[t]o the extent that 'issues of ripeness involve, at least in part, the existence of a live Case or Controversy,' the fact that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested satisfies this requirement." Id. at 62. In that case, the potential for a nuclear accident, rather than an actual nuclear accident, did not prevent the Court from determining that the case was ripe for adjudication. Instead, the Court concluded,

> The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. However, delayed resolution of these issues would foreclose any relief from the present injury suffered by the appellees—relief that would be forthcoming if they were to prevail in their various challenged to the Act. . . . In short, all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity vel non of the Price-Anderson Act. Since we are persuaded that '**we will be in no better position later than we are now**' to decide this question, we hole that it is presently ripe for adjudication.

Id. at 82. (quoting Regional Rail Reorganization Act Cases, 419 U.S., at 143-45) (emphasis added).

Similarly, this Court is capable of resolving the facial constitutionality of the Act today, and the passage of time would not aid in the Court's deliberations. The Plaintiffs have waited until the Act went into effect, DHEC issued registrations pursuant to the Act, and registrants began withdrawing water before bringing suit. The facts are sufficiently fleshed out, and the harm is certainly real, so that the court may render a verdict. The Plaintiffs are not asking the

court to interpret the law without seeing how it applies, but are asking the court to evaluate the law now that it is in effect and being implemented by DHEC. The Plaintiffs do not have to wait until they cannot make any consumptive use of water to bring suit. Most of the Plaintiffs are downstream from registered surface water withdrawers, all of the Plaintiffs are within the same watersheds as registered surface water withdrawers. Furthermore, DHEC continues to issue more registrations under the Act as they are requested, and has no ability to deny those registrations.

Should the court withhold consideration of this case, the amount of lost surface water due to registered withdrawals could be disastrous. As was the case in Duke Power, if the Court does not provide relief by striking down the unconstitutional registration process in the Act, the surface waters of the state could be allocated away forever, which would "foreclose any relief from the present injury suffered." Id. at 82. Now is the time to resolve this issue, before all of the state's waters are allocated away. (Ex. A, Edisto Basin Responses.)[2]

III. The Plaintiffs' case is not lost for a lack of proper venue.

A. Venue is proper in Barnwell County.

For most cases, venue is proper in the county where the Defendant resides. S.C. Code § 15-7-30. The reason behind having the Defendant's location set as the venue is so that the Plaintiffs cannot bring the Defendant into court across the state from where it is located. In this case, however, the Defendant is a statewide agency which does not reside in merely one county, but operates in every county in South Carolina. Thus, according to S.C. Code Ann. §15-77-50, venue is appropriate concerning "all questions, actions and controversies . . . affecting boards, commissions and agencies of this state . . . in the circuit where such question, action or

[2] This document was created by DHEC after the close of discovery. Counsel for the Plaintiffs were provided a copy on September 18, 2015, after the filing deadline for summary judgment.

controversy shall arise." See also Harrison v. South Carolina Tax Commission, 261 S.C. 302, 306, 199 S.E.2d 763, 764 (1973) (concluding that §15-77-50 fixes the venue of actions against state agencies). This case is a facial challenge to the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, which is in force and operating unconstitutionally everywhere in the state. There are surface waters which are being depleted in violation of the public trust doctrine and other constitutional provisions in every county in the state. Thus, any county is appropriate according to the venue statute.

DHEC argues that venue in Barnwell County is improper because the complaint does not allege a controversy in Barnwell County or that a water withdrawal occurs there. (DHEC Mem. 7.) However, as DHEC is aware, there are properties in Barnwell County which are part of the challenged controversy over the Act and the state water resources at stake in this case. One registered agricultural user is located in Barnwell: Chappel Farms. Chappel Farms' Intake ID # is 03IR002S02, System Permit # is 03IR002. Its monthly maximum withdrawal is 4.736 million gallons and its yearly maximum withdrawal is 122.203 million gallons. Additionally, Danny Hege Farm Barnwell has its extraction point within Barnwell County. Its Intake ID # is 06IR007S01, its System Permit # is 06IR007, it monthly maximum withdrawal is 41.3 million gallons, and its yearly maximum withdrawal is 137.6 million gallons. Thus, the Defendant, which produced this information during the course of discovery, is issuing registrations pursuant to the Act in Barnwell County.

B. Improper venue would not be an appropriate basis for granting summary judgment to DHEC.

Should this Court decide, however, that venue is inappropriate in Barnwell County, the remedy would be to transfer the case. S.C. Code Ann. § 15-7-100. See also Augusta Power Co.

v. Savannah River Elec. Co., 152 S.C. 295, 149 S.E. 924, 925 (1929) (transferring a takings case to county where property was located); Stuckey v. D.W. Alderman & Sons Co., 107 S.C. 426, 93 S.E. 126, 127 (1917) (transferring a takings case back to where it was originally filed because that is where the property at issue was located). DHEC does not cite to any case, and the Plaintiffs have not seen any case, that granted a motion for summary judgment on the basis of improper venue. Should the court find that another venue would be appropriate, the correct course of action would be to transfer the case.

For example, in Whetstone, the Defendant, a state agency, appealed the lower court's decision and contended that § 15-77-50 required dismissal of the plaintiff's actions—involving a car accident—for lack of jurisdiction. Whetstone v. S. Carolina Dep't of Highways & Pub. Transp., 272 S.C. 324, 329, 252 S.E.2d 35, 38 (1979). The Court determined that because the case was brought in a county other than that in which the accident actually occurred, venue was improper. Id. However, the court "has authority to change venue to the proper county under § 15-7-100(1), and upon a proper showing, it becomes the court's imperative duty to do so." Id. Thus, the case was transferred and not dismissed. Similarly, in this case, if venue is not proper in Barnwell County, the Court should exercise its power pursuant to S.C. Code § 15-7-100(1), and transfer this case to another county.

IV. The Plaintiffs' property has been taken and given to other private owners in violation of the state and federal constitutions.

DHEC attempts to use the Public Trust Doctrine as a basis for claiming that the Plaintiffs "have no property rights." (DHEC Mem. 7.) DHEC confuses the two rights at issue in this case: 1) riparian property rights; and 2) public trust resources. Both consumptive use rights and rights to recreate on South Carolina's waterways are at stake.

As explained in the Plaintiffs' memorandum on summary judgment and reiterated above, riparian rights are property rights that are recognized in South Carolina. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). Furthermore, "[a]ll property rights . . . are rooted in certain 'expectations' about the sanctity of one's right of ownership." U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 60, 97 S. Ct. 1505, 1537, 52 L. Ed. 2d 92 (1977). Indeed, DHEC block quotes a case that recognizes the riparian rights of ownership. (DHEC Mem. 9-10 (quoting State v. Head, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997)). Thus, belied by their own case citations, DHEC's assertion that the Plaintiffs have no property rights is plainly false.

V. The Public Trust Doctrine has been violated by the Act, and that claim is properly brought before this Court by the Plaintiffs.

The navigable waters at issue in this case are public trust assets. See McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)). As such, the State must maintain control of these public trust resources for the good of the people of South Carolina. Sierra Club, 318 S.C. at 128, 456 S.E.2d at 402. The Act, however, takes away the State's control over the use of surface waters. Pursuant to the Act, DHEC has no discretion in issuing registrations, they never expire, and they cannot be challenged as unreasonable. Therefore, the Act violates the Public Trust Doctrine and is unconstitutional. S.C. Const. art. XIV, § 4. The Plaintiffs meet the requirements for constitutional standing as well as the public importance exception to standing, therefore their claims, including for violation of the Public Trust Doctrine, are properly before this Court.

VI. The statute of limitations defense is not properly before this Court, and the

Plaintiffs reserve the right to brief this defense should it become necessary.

This case was filed on September 4, 2014. DHEC has actively participated in this case since that time, filing a motion to dismiss on November 13, 2014, an Answer on January 28, 2015, and a petition with the Supreme Court on February 13, 2015. DHEC has served discovery requests and responded to the Plaintiffs' discovery requests this summer. Yet, during all of that time, DHEC did not argue any statute of limitations defense or seek to add such a defense to its answer. Less than a month ago, on September 14, 2015, the deadline for the parties to file their motions for summary judgment, DHEC sought to amend its pleadings to include a statute of limitations defense. The Plaintiffs do not consent. This addition to the answer would be prejudicial to the Plaintiffs because of its late timing and inapplicability to this case. Discovery has already been completed and motions for summary judgment have been filed. Furthermore, DHEC has known, since the filing of the complaint, what the Plaintiffs' claims were. The Plaintiffs have prepared their litigation strategy, including the preparation of its then-completed motion for summary judgment, relying upon the Complaint and the Answer in this case. Therefore, the timing of DHEC's addition of a new defense is prejudicial to the Plaintiffs, and DHEC's motion to amend should not be allowed.[3]

CONCLUSION

For all of the above reasons, the Plaintiffs ask the Court to deny the Defendant's motion for summary judgment and the Defendant's motion to amend its answer, and to enter summary judgment in favor of the Plaintiffs.

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[3] Should the court grant DHEC's pending motion to amend its answer, the Plaintiffs reserve the right to brief this new defense.

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Responses to Questions Received at the Edisto Basin Surface Water Availability Meeting on June 18, 2015

1. How is safe yield defined?

   The definition per the statute, 49-4-10(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.*

   Regulation 61-119 states:

   ii. *The safe yield at the point of withdrawal will be evaluated as follows.*

   (A) For withdrawals in a stream segment not influenced by a licensed or otherwise flow controlled impoundment, the safe yield is calculated as the difference between the mean annual daily flow and twenty (20) percent of mean annual daily flow at the withdrawal point, taking into consideration natural and artificial replenishment of the surface water and affected downstream withdrawals.

   The term "safe yield" has historically been used to determine how much water is available for withdrawal and/or release from a reservoir. The term safe yield has also been applied to groundwater systems. The term "safe yield", in the case of flowing surface water, may be easier thought of as "legally available water." The term legally available water is being used by the consulting firm CDM Smith in the surface water basin models currently being developed. The amount of water that is available for withdrawal is the key phrase in the statutory definition of safe yield.

2. Is safe yield supposed to protect the aquatic ecosystems?

   Safe yield is the legally available water for withdrawal as discussed above.

3. How was the safe yield formula determined (not formula, how devised)?

   The safe yield definition was provided in the Statute. The more specific language on how to calculate the safe yield in R.61-119 was developed during the regulation promulgation process by a stakeholder group representing: public water systems, conservation groups, energy production, industry, chamber of commerce, and agriculture.

Exhibit A

4. Who devised the safe yield formula?

   See above.

5. What data was used in determining the present safe yield formula?

   No specific data is cited as the definition (formula) is a general calculation applying to all surface waters.

6. What validation exists to confirm that this formula is protective?

   As discussed above, the definition of safe yield outlines the amount of water available for withdrawal under typical/average conditions and other parts of the statute address ecological flows or responses to low-flow conditions. Specifically, the Surface Water Withdrawal Act defers authority to the SC Drought Response Act when under drought and low flow conditions.

7. Was safe yield reviewed by experts?

   The draft regulation was published for public notice and comment. Comments were received and addressed, and the revised regulation then taken before the DHEC Board for a public hearing. The regulation was approved by the Board and sent to the Legislature for review and approval. The regulation was approved by the Legislature.

8. If I am a legitimate farming operation can I apply for the whole safe yield?

   Yes

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,	)	DHEC'S REPLY TO PLAINTIFFS' RETURN TO DHEC'S MOTION FOR SUMMARY JUDGMENT
v.	)	
South Carolina Department of Health And Environmental Control,	)	
Defendants.	)	

Plaintiffs' Return raises no new arguments that have not already been addressed in DHEC's Return to their Motion for Summary Judgment or in DHEC's Memorandum in Support of its own Motion for Summary Judgment. Nevertheless, their arguments are addressed below in the Order in which they make them. Plaintiffs' case fails because they have no standing and no riparian property rights.

I

PLAINTIFFS HAVE NO RIPARIAN PROPERTY RIGHTS

None of the cases that Plaintiffs cite recognize a property interest in water. They misread or misunderstand all of them. Plaintiffs cite several South Carolina cases to support their claim, but those decisions, instead, make clear that they have no property interest in the water. *Omelvany v. Jaggers*, 20 S.C.L. 634, 638, 1835 WL 1419, at *3 (S.C.App.L & Eq. 1835)("the proprietor of each bank of a [non-tidal] stream . . .has no property in the water itself, but a simple use of it while it passes along." (emphasis added)); *White v. Whitney Mfg. Co.*, 38 S.E. 456, 459

(S.C. 1901)(proprietor "has no property in the water itself" *See also Rice Hope Plantation v. South Carolina Public Service Authority*, 59 S.E.2d 132, 144, 216 S.C. 500, 529 (1950) (watercourses "are part of the public domain.").[1]

Plaintiffs misread DHEC's block quote of *State v. Head*, 330 S.C. 79, 86, 498 S.E. 2d 389, 392 (Ct. App. App. 1997) as recognizing riparian rights of ownership, and wrongly assert that DHEC's contention that they have no property rights is "plainly false." Contrary to their assertion, the quote 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.[2] As stated in *Omelvany v. Jaggers*, *supra,* "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)

"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

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1 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.

2 As follows, *Head* 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 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).

(C.A.4 (Va.),1995). Therefore, the Federal cases Plaintiffs cite are not controlling.[3] Accordingly, Plaintiffs have no property interest in the State's waters. Because Plaintiffs have no property interest in the water, they have no takings or denial of due process claim. *Grimsley v. S. Carolina Law Enforcement Div.*, 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012).

II

PLAINTIFFS HAVE NO STANDING

Plaintiffs claim standing based upon an alleged taking of their riparian rights, but as discussed above, they have no such property right to give them standing. Plaintiffs have admitted 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). They attempt to muddle this admission somewhat by claiming injury by the authorization of water withdrawals in their Return, but they cannot deny the lack of injury that they have admitted as it "conclusively established." Rule 36(b), SCRCP(A matter admitted under this rule is conclusively established unless the court, on motion permits the admission to be withdrawn or amended."). They claim a harm to the public from the loss of public trust assets, but they rely on tidelands precedent rather than case law as to non-tidal waterways. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). ("Under the public trust doctrine, the State holds presumptive title to tidal land below the high water mark to

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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.

be held in trust for the benefit of all people of South Carolina."). Plaintiffs claim a loss of a procedural due process right, but 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. They cite *Doe v. Virginia Dept. of State Police*, 713 F.3d 745, 755 (2013), but it involved a "concrete" injury to a due process right ("reclassifying [Doe] as a sexually violent offender and making her reclassification publicly available in the Registry without affording her a procedure by which to challenge these actions.").

As for public importance standing, Plaintiffs attempt to go back to *Marbury v. Madison*, 5 U.S. 137, 138 (1803) for support, but it was not a case in which standing was at issue. The instant case, instead, involves an issue for the legislature to consider because Plaintiffs have no standing of any kind to give the courts the authority to address their questions. As stated in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846, 853, 407 S.C. 67, 81 (2014):

> In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the "judicial power." S.C. Const. art. V, § 1. Accordingly, courts are limited to resolving cases and the powers inherent in that function. Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.

"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). Plaintiffs fail to meet those requirements.

III

THE CASE IS NOT RIPE

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. (" several of the 'immediate' adverse effects were found to harm appellees." *Id*). "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." *James v. Anne's Inc.*, 701 S.E.2d 730, 732, 390 S.C. 188, 192-93 (2010), quoting *Pee Dee Elec. Coop. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Plaintiffs have alleged just such a "contingent, hypothetical and abstract dispute." The water withdrawals about which they hypothesize have not occurred and may never happen. Plaintiffs have no injury now. Therefore, their claims are not ripe. Should future withdrawals harm their use of a waterway, they could seek judicial relief at that time.

IV

VENUE IS IMPROPER

Plaintiffs offer no valid reason why venue is appropriate in Barnwell County or any reason why they chose that county rather than one of their own. 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. They attempt to prop up venue by pointing to water withdrawal permits in Barnwell County, but they are not affected by those withdrawals and do not contend that they are harmful.

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." No such question is presented in the instant complaint as to Barnwell County, and Plaintiffs have no standing to raise any issues regarding any water withdrawals in that County. They brought suit in the wrong county under §15-77-50. Rule12(B)(3), SCRCP. Although Plaintiffs contend that this Court may transfer this case to another county (citing *Whetstone v. South Carolina Dept. of Highways and Public Transp.*, 272 S.C. 324 (S.C., 1979)), they have not made such a motion or identified such a county. Accordingly, this Court should consider granting judgment to the Defendant because they have not made a "proper showing" under *Whetstone*, 252 S.E.2d at 38 ("A court which may be without proper venue to try a cause on its merits, nevertheless, has authority to change venue to the proper county under s 15-7-100(1), and upon a proper showing, it becomes the court's imperative duty to do so.").

V

PLAINTIFFS HAVE NO PROPERTY INTEREST OR PUBLIC TRUST INTEREST THAT HAS BEEN TAKEN

Because Plaintiffs have no property interest in the waterways, they have had not suffered a taking. *Grimsley, supra,* 721 S.E. 2d at 427. ("The Takings Clause provides that private property shall not be taken for public use without just compensation. . . . 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.") Their clearly erroneous reliance on and misreading of *State v. Head* is explained above. That case addressed ownership of river bottoms not the waters in the rivers.

In fact, even if Plaintiffs did have a property interest, they have had no injury to such an

interest as admitted in their responses to DHEC's Request for Admission and discussed above. Furthermore, as discussed in DHEC's Return to Plaintiffs' Motion for Summary Judgment, the Surface Water Withdrawal Act does not deprive them of any use of the water or any right that they had before the law was passed. In fact, it provides additional protections.

Plaintiffs 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 non-tidal waters on which they border. 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 or and their property has not been injured due to any withdrawal of water under the statute.

VI

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.

Their 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 must be denied.

VII

THE STATUTE OF LIMITATIONS BARS ANY COMPENSATION CLAIM OF PLAINTIFFS BUT THEY HAVE NOT SUPPORTED SUCH A CLAIM

To the extent that, *arguendo*, Plaintiffs had 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); however, Plaintiffs have not asserted any compensation claim in their Motion for Summary Judgment which only requests an injunction. Therefore, the claim for compensation in the Prayer for Relief in their Complaint should be denied, and , the statute of limitation defense need not be reached in this motion.

Although the statute of limitations defense need not be reached on the merits, the Motion to Amend DHEC's answer should be allowed. Leave to amend should be freely given under these circumstances because justice so requires. Rule 15(a), SCRCP. The basis for amending is Plaintiff's discovery responses which contended that they loss rights when the Surface Water Withdrawal Act became effective, January 1, 2011, more than three years before this suit was filed. Answer to Item 9, Page 4 of Plaintiff's Response to DHEC's Interrogatories (Attached to DHEC's Motion for Summary Judgment). Those discovery responses were served this summer. Accordingly, DHEC's Motion to Amend its Answer is not belated. Additionally, Plaintiffs state they would be prejudiced by allowing this amendment but provide no evidence of how they are prejudiced. Plaintiffs ask for leave to brief the statute of limitations defense if the Motion to Amend is granted, but they could have briefed the issue in their Return to DHEC's Motion for Summary Judgment and chose not to do so. Moreover, although the State's Motion to Amend should be granted, the merits of the statute of limitations issue need not be addressed at this time as noted above because Plaintiffs have not asserted a compensation claim in their Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, the South Carolina Department of Health and Environmental Control respectfully requests that its Motion for Summary Judgment be granted. Plaintiffs have no standing, they have presented no justiciable controversy, their claims are not ripe, they have no rights that have been infringed, and they have no claim based upon a public trust interest in waterways.

Respectfully submitted,

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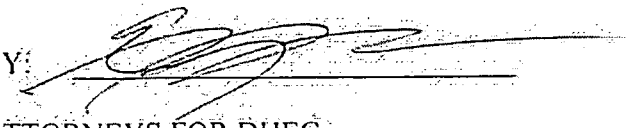
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