

South Carolina State Water Plan Symposium

*Bringing together the People, the Science and the Best
Practices for Sustainable Water Planning*

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South Carolina Water Law and Policy – History and Context

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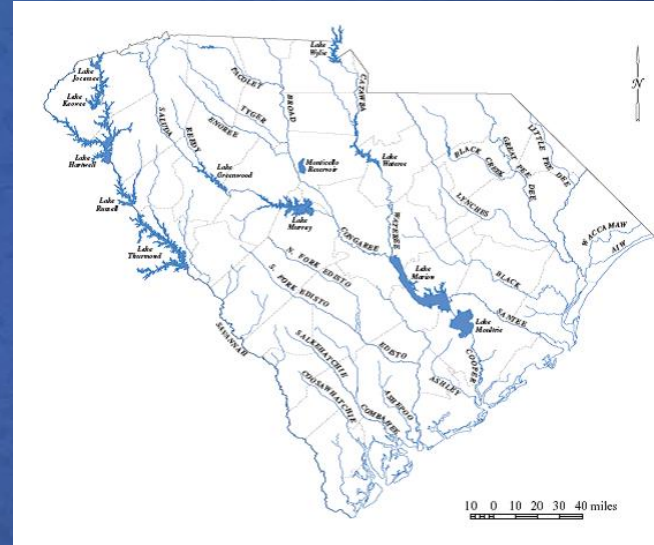
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Riparian Common Law

- Adopted by SC Supreme Court in *Omelvany v. Jaggars*, 2 Hill 634 (1835), modified by *White v. Whitney Manufacturing Co.*, 38 S.E. 456 (S.C. 1901).
- Owners of property adjacent to natural water courses possess a right to use stream flow.
- This right of water use is co-equal to other riparian owners – no one has superior right of use over other riparians.
- Limitations on right of use:
 - Water can only be used on riparian land
 - Must be reasonable
 - Cannot obstruct or impede navigable waters
 - Right may be regulated by State exercise of police power
- Modified by S.C. Surface Water Permitting Act – regulated riparianism.
- *Jowers v. S.C. Dept of Health & Env'tl Control* (2017) (under reconsideration): SC Supreme Court made clear that Surface Water Permitting Act does not deprive riparian owners of suing a surface water withdrawer for unreasonable use of water.

Public Trust Doctrine

- Navigable waters (tidal and non-tidal) are held by the State in trust for the benefit of the public. See *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *State v. Pacific Guano Co.*, 22 S.C. 50 (1883); *State ex rel. Lyon v. Columbia Water Power Co.*, 63 S.E. 884 (1909); S.C. Const. art. I § 40 (1868); S.C. Const. art. XIV § 4 (1895).
- SC Supreme Court has articulated broad view of the Public Trust Doctrine:



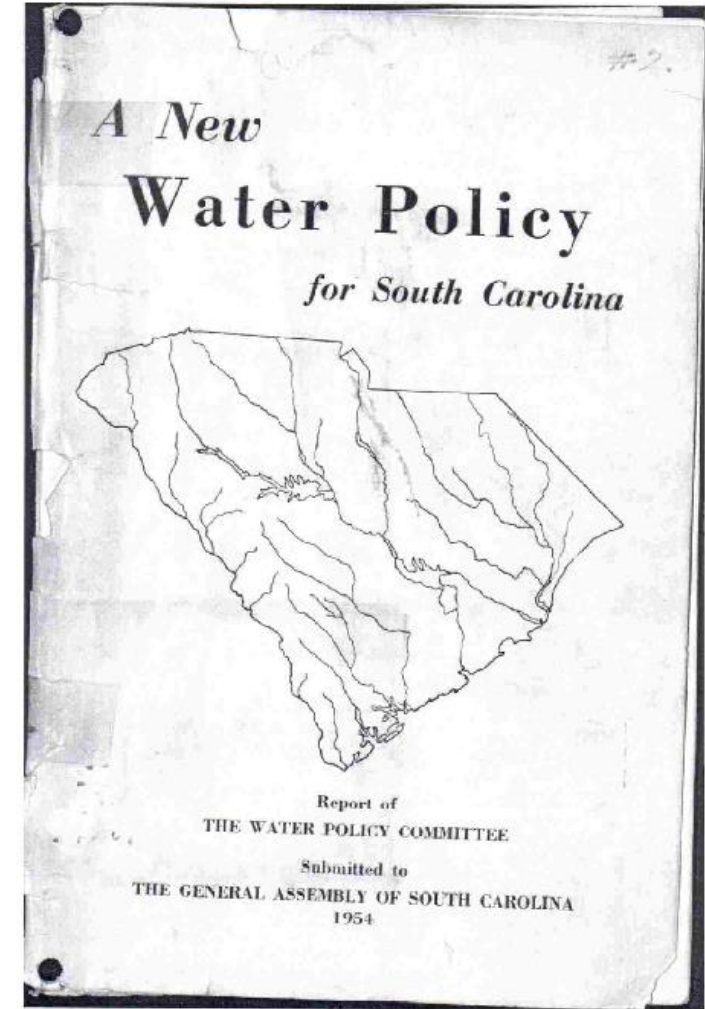
“In South Carolina, the state owns the property below the high water mark of a navigable stream. This property is part of the Public Trust. ... The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally these things have included natural resources such as ... water (including waterborne activities such as navigation and fishing) ... Under this Doctrine, everyone has the inalienable right to ... drink safe water, to fish and sail, and recreate on ... navigable waters ...”
Sierra Club v. Kiawah Resort Assocs., 456 S.E.2d 397 (S.C. 1995).

Public Trust Doctrine

- The State cannot convey trust property unless that property will be used to promote public interests, nor can the State take action that substantially impairs the public's interest in trust property. *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397 (S.C. 1995).
- In *Kiawah Dev. Partners II v. S.C. Dept of Health & Env'tl. Control*, 766 S.E.2d 707 (S.C. 2014), Court turns to Doctrine to interpret Coastal Zone Management Act; explains that Doctrine intended to achieve a balance between environmental/public considerations and economic/private considerations. Also suggests that its test of "substantial impairment" may weigh too much in favor of private interests.
- *Jowers v. S.C. Dept of Health & Env'tl Control*, (S.C. 2017): issue is whether Surface Water Permitting Act's agricultural registration provisions violates Public Trust Doctrine. SC Attorney General arguing that public trust does not attach to nontidal rivers.

Brief Historical Review

- SC's first water planning effort in 1954.
- Proposed policy sought to replace riparian common law with doctrine of prior appropriation. SC one of 9 states that considered adoption of prior appropriation.
- Lengthy contentious battle.
- Proposed legislation was ahead of its time in some ways.



Brief Historical Review

- **1969:** Upon urging of Governor McNair, legislature enacted law establishing Water Resource Commission with water policy and planning responsibilities.

NATURAL RESOURCES

Specific action can and should be taken by this Legislature to provide for the protection of our valuable natural resources. Initial work toward the development of a water policy for the State has been started by the Interagency Council on Water Resources, created last year by Executive Order. I recommend that the General Assembly follow the unanimous recommendation of the Council by creating a Water Resources Commission to carry on this work as a permanent agency, and to develop a plan for protection of our valuable water resources in the coming years.

In the meantime, we should be looking ahead toward the creation of a Natural Resources Commission which would then assume responsibility for water as well as soil conservation programs and other related activities now being carried on by separate boards and commissions including air and water pollution.

SC Water Resource Planning & Coordination Act: S.C. Code Ann. § 49-3-40 (1969)

- Act placed duty upon SCDNR to advise and assist Governor and Legislature with:
 - Establishing comprehensive water policy for State.
 - Establishing policies to resolve special problems of water resource use.
 - Reviewing the actions and policies of state agencies with water resource responsibilities to determine the consistency with the comprehensive water policy of the State and to recommend appropriate action where deemed necessary.
 - Recommending to the Legislature any changes of law required to implement water policy.

Section 49-3-50 Matters to be considered by DNR in exercising responsibilities:

- In exercising its responsibilities under this chapter, the department shall take into consideration the need for:
 - (a) Adequate supplies of surface and groundwaters of suitable quality for domestic, municipal, agricultural, and industrial uses.
 - (b) Water quality facilities and controls to assure water of suitable quality for all purposes.
 - (c) Water navigation for recreational and commercial needs.
 - (d) Hydroelectric power.
 - (e) Flood damage control or prevention measures including zoning to protect people, property, and productive lands from flood losses.
 - (f) Land stabilization measures.
 - (g) Drainage measures, including salinity control.
 - (h) Watershed protection and management measures.
 - (i) Outdoor recreational and fish and wildlife opportunities.
 - (j) Any other means by which development of water and related land resources can contribute to economic growth and development, the long-term preservation of water resources, and the general well-being of all the people of the State.

SC Groundwater Use and Reporting Act

- Enacted in 1969, amended in 1990, 1993, 2000. Modeled after NC law. S.C. Code Ann. § 49-5-10 et seq.
- Requires all groundwater users withdrawing more than 3 million gallons during any one month to report amount withdrawn.
- Exempt from Act: emergency withdrawals, nonconsumptive uses, wildlife habitat management, individual residential use.
- Authorizes DHEC to establish groundwater capacity use areas where excessive withdrawals pose adverse threats or effects to natural resources, integrity of aquifer, or public health.
- Capacity Use Areas require development of management plan.
- All withdrawers within Capacity Use Area using over 3 million gallons during any month required to obtain permit. Limited exemptions exist.
- In making permitting decision, regulations give DHEC authority to consider groundwater withdrawal's effect on surface water flows. SC Code Regs. 61-113(F)(1)(h).
- Designated counties outside of Capacity Use Areas required to give notice of well construction or increased capacity.

Brief Historical Overview

- **1980-1981:** Drought conditions emerge and worsen. Governor Riley takes on water policy.
- **1982:** Governor Riley and his water law committee called for drought response plan, regulation of surface water withdrawals, and adoption of minimum instream flows.
- **1982:** Passage of Surface Water Reporting Act.
- **1985:** Passage of Interbasin Transfer Act and Drought Response Act.

Surface Water Reporting Act

- Water Resources Commission estimated water usage which showed alarming increases in water use as population increased in South Carolina. Developing a sound water policy for the State would be difficult without taking the first step of gaining transparency in actual water usage. Drought conditions in the State, emerging in 1980 and worsening through 1981, seemed to have created some momentum for laying the groundwork for legislation requiring surface water reporting.
- The Act required any water user diverting or withdrawing 100,000 gallons or more of water on any one day to report the amounts withdrawn.

SC Drought Response Act, S.C. Code Ann. § 49-23-10 et seq.

- Requires State monitoring and response to drought conditions.
- Authorizes State to impose mandatory curtailment of nonessential water uses during severe or extreme drought.
- Counties and cities implement drought response ordinances applicable to nonessential water uses.
- Nonessential water uses defined as any use not deemed to be essential.
- Essential water uses: firefighting, health and safety, food production, drinking water.
- During severe or extreme drought, Governor may declare drought emergency and curtail any water use.

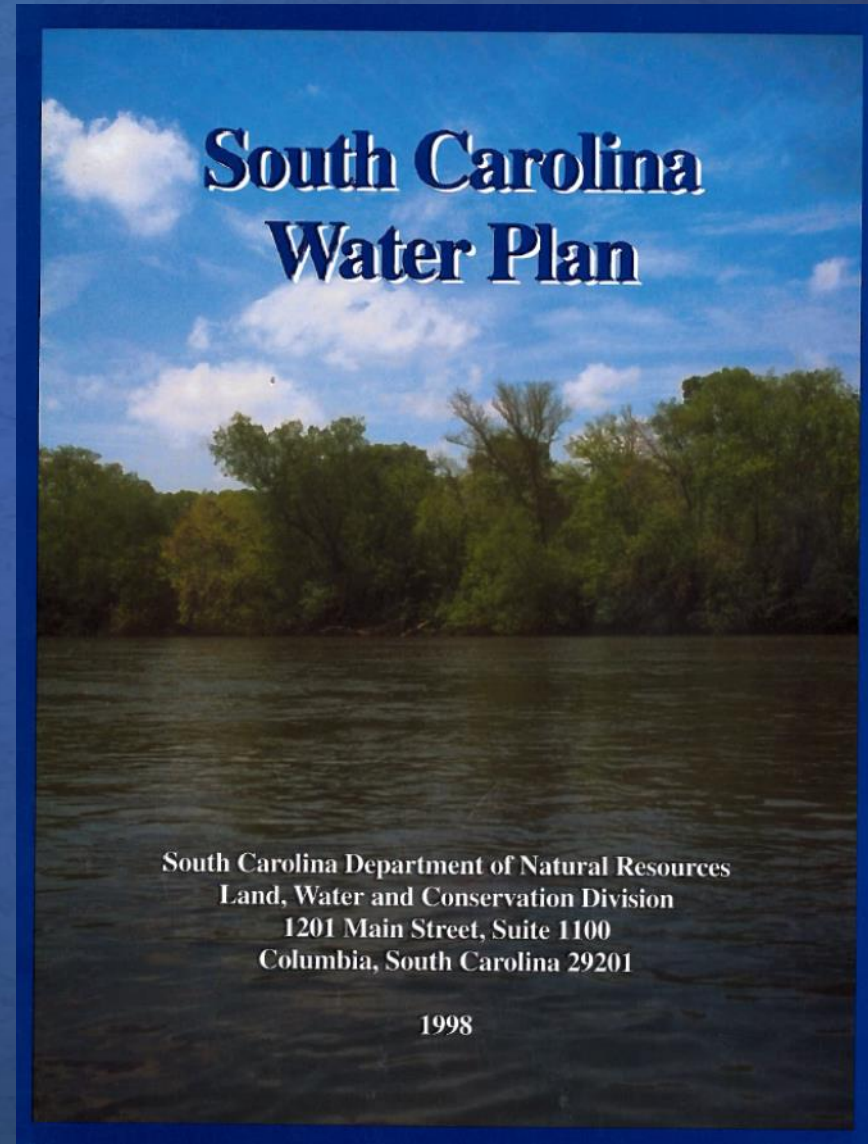
Interbasin Transfer Act, formerly at S.C. Code Ann. § 49-21-10 et seq.

- Required permit for withdrawal of surface water from one river basin and discharged into another river basin.
- Permit consideration must include consideration of certain factors, including stream flow, reasonableness, conservation.
- Downstream riparian owners retained right to sue if harmed by interbasin transfer.
- Merged into Surface Water Permitting Act.

1998: SCDNR publishes first State Water Plan.

Recommendations included:

- Establishing minimum water flows/levels for both surface water and groundwater
- Improving water table management by farmers
- Creating off-stream reservoirs to store water
- Providing drought response guidelines



Brief Historical Overview

- **1998-2002:** SC experiences worst drought on record.
- **2003:** At the request of SCDNR, Governor Sanford appoints water law committee to recommend ways to improve water resource management.
- **2004:** Report recommended development of minimum instream flows, enactment of permitting scheme for surface water withdrawals, intervenor status for State to protect public interests when private water rights litigated.

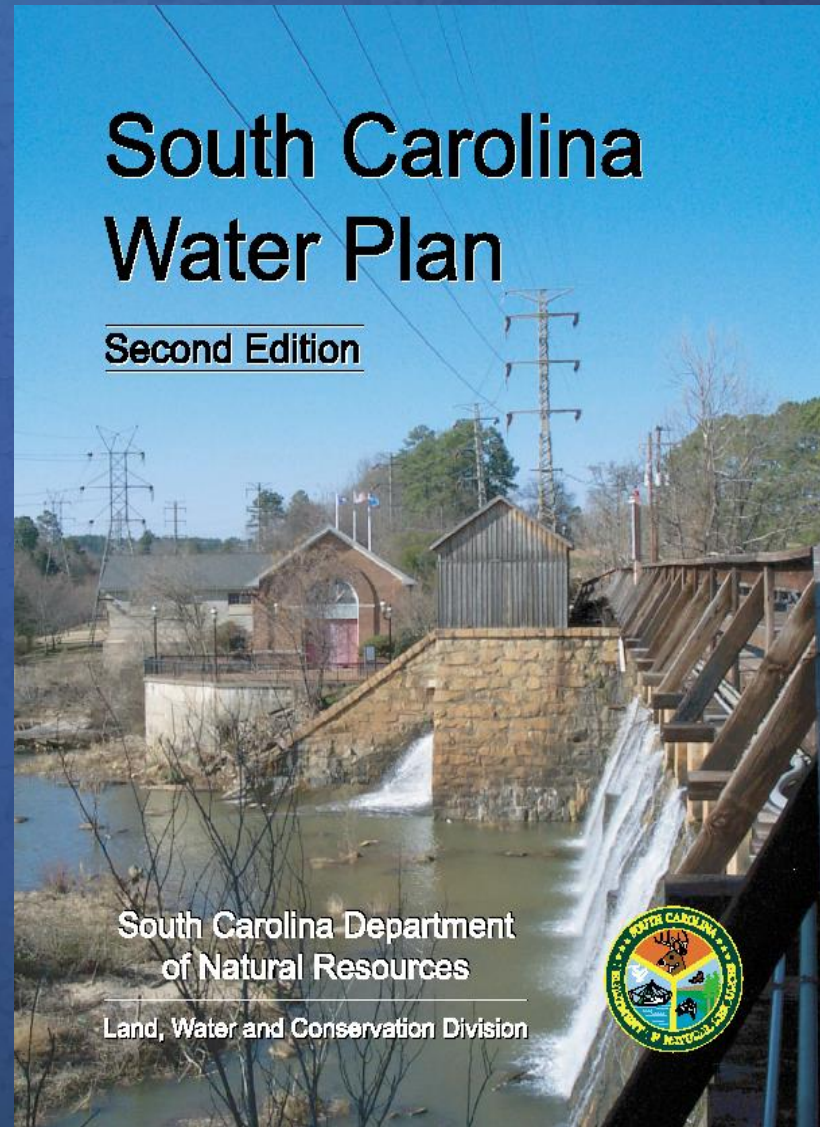
Water Law Report January 2004

“When the well is dry, we learn the worth of water”
Benjamin Franklin

2004: Second Edition of State Water Plan published in response to lessons learned from drought of 1998-2002.

Recommendations included:

- Establish River Basin plans
- Regulate surface water withdrawals
- Work toward negotiated interstate compacts with GA and SC
- Improve water conservation and efficiency
- Promotion of efficient irrigation technologies
- Treated wastewater should be used for golf courses, other turf-oriented land uses



Long Effort to Adopt Surface Water Withdrawal Permitting

- 2006: Bill based on Model Riparian Code was swiftly killed
- 2007-2008: Impasse over minimum instream flows
- 2009-2010: Compromise bill forged and passed

SC Story Reflects Common Water Management Themes

- Water policy slow to change, reactive. Drought is big motivator. Takes political leadership.
- Common law replaced/overlaid with statutory law.
- Fragmented water management: groundwater and surface water under separate regulatory schemes; both state and federal law govern water resources.
- Technological innovation in water sector slowly occurring: more data; movement from exclusive focus on supply enhancement to include demand management (efficient use, conservation); advanced data collection and analysis.