ALAN WILSON
ATTORNEY GENERAL

May 17, 2011

The Honorable Larry A. Martin
Senator, District No. 2
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

We received your letter requesting an opinion of this Office regarding any possible liability of the State. As background, you explained that DHEC has issued a permit for work to be done in South Saluda River. However, the permit was appealed, and a decision is currently pending in the Administrative Law Court. You mentioned that funding for the project is coming from a federal grant from the United States Department of Agriculture. Specifically, you asked "[i]f the General Assembly were to prohibit the completion of the project through a joint resolution similar to the one proposed in S.800, would the State be liable for the funding of the project?"

Law/Analysis

Applicable Law

Under the current South Carolina Code of Laws, the proposed activity for which a DHEC permit was issued would be appropriate. The "proposed activity consists of placing native rock cross vanes in the South Saluda River and installing erosion control measures in the floodplain of the rivers . . . . The purpose of the proposed activity is to improve fish habitat, especially trout, and increase public access to the river, while controlling erosion." However, if the joint resolution mentioned above is passed, a moratorium would be imposed on "permits for trout river cross vanes on the South Saluda River." It is well recognized that "[i]n this State, a joint resolution has historically been interpreted to have the same effect and force of law as an act." Op. S.C. Atty. Gen., July 20, 1983 (Op. No. 83-43). Therefore, proceeding with the proposed activity would conflict with the joint resolution. In U.S. v. Schooner Peggy, 1 Cranch 103, 110, 1801 WL 1069 (1801), the United States Supreme Court explained that the law in effect at the time of decision should be applied. The Court stated as follows:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But **if subsequent to the judgment and**

> **before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.** It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case **the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.**

U.S. v. Schooner Peggy, 1 Cranch 103, 110, 1801 WL 1069 (1801) (emphasis added). In summary, if S.800 is passed before the Administrative Law Court makes a decision on the pending appeal, then the new law, the joint resolution, must be applied by the court when making its decision.

The Fourth Circuit Court of Appeals has similarly explained:

> Usually, **when there is a change in the law while a case is pending, a court applies the law in effect at the time of the decision and not antecedent law**, unless so doing would result in manifest injustice or there is a statutory direction or legislative history to the contrary. See, Bradley v. Richmond School Board, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801). The statute amending § 3731 so as to give the government the right to appeal asserted in this case makes no provision as to whether it applies to orders granting a new trial entered before the effective date of the amendment, and we have not been referred to any legislative history, nor have we found any, bearing on the question. We therefore consider Nilson's claims of manifest injustice. . . .

Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 363 (4th Cir. 1985) (emphasis added).

Additionally, the United States Supreme Court held in Martin v. Hadix, 527 U.S. 343, 119 S.Ct. 1998 (1999) as follows:

> Had Congress intended § 803(d)(3) to apply to all fee orders entered after the effective date, even when those awards compensate for work performed before the effective date, it could have used language more obviously targeted to addressing the temporal reach of that section. It could have stated, for example, that "No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate."

> The conclusion that § 803(d) does not clearly express congressional intent that it apply retroactively is strengthened by comparing § 803(d) to the language that we suggested in Landgraf might qualify as a clear statement that a statute was to apply retroactively: "[T]he **new provisions shall apply to all proceedings pending on or commenced after the date of enactment.**" Id., at 260, 114 S.Ct. 1483 (internal quotation marks omitted). This provision, unlike the language of the PLRA, unambiguously addresses the temporal reach of the statute. With no such analogous language making explicit reference to the statute's temporal reach, it cannot be said that Congress has "expressly prescribed" § 803(d)'s temporal reach. Id., at 280, 114 S.Ct. 1483.

Hadix, 527 U.S. 343, 354-55 (emphasis added). In other words, the Administrative Law Court would likely be required to apply the new law, assuming S.800 is passed before a decision is made.

State's Liability & Due Process

Traditionally, under the doctrine of sovereign immunity, the State is not liable for performance of a government function unless it gives consent to be sued. In state court, the Tort Claims Act, *see,* S.C. Code Ann. § 15-78-10 *et. seq.*, provides an exception to the doctrine of sovereign immunity to a limited extent. As our Court of Appeals has explained,

> Although the General Assembly has created several exceptions to the doctrine of sovereign immunity and although it has been repeatedly called into question by our Supreme Court, the **sovereign immunity of the State from liability absent its consent is still the law of South Carolina**. See, Copeland v. Housing Authority of Spartanburg, S.C., 316 S.E.2d 408 (1984); Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E.2d 49 (1981). . . . Historically, the sovereign, as the author of the laws upon which its subjects sued, could not itself be the object of such a suit in its own courts. Id. at 416, 99 S.Ct. at 1186. South Carolina's unique relationship as sovereign to its citizens and those within its borders is the basis upon which it accords itself immunity.

Newberry v. Georgia Dept. of Industry and Trade, 283 S.C. 312, 315-16, 322 S.E.2d 212 (1984) (emphasis added).

When the State has consented to suit in its own courts, the following rule is generally applicable:

> **When a State consents to be sued or waives its governmental immunity, it occupies the same position as any other litigant,** and a plaintiff has the same right that he would have to sue an ordinary person. The State in such circumstances is not entitled to special privileges. 81 C.J.S., States, § 215, p. 1310 and cases cited; State v. Stanolind Oil & Gas Co., Tex.Civ.App., 190 S.W.2d 510; Com. v. Bowman, 267 Ky. 50, 100 S.W.2d 801; Murrain v. Wilson Line, Inc., 270 App.Div. 372, 59 N.Y.S. 750, affirmed 296 N.Y. 845, 72 N.E.2d 29, reargument denied 296 N.Y. 995, 73 N.E.2d 572.

Lyon & Sons v. North Carolina State Bd. Of Educ., 238 N.C. 24, 27-28, 76 S.E.2d 553 (1953) (emphasis added).

In Federal Court, where a suit is alleged, *e.g.*, constitutional violations, the state itself cannot be sued pursuant to 42 U.S.C. § 1983 (violation of constitutional rights) by virtue of the Eleventh Amendment. Alabama v. Pugh, 438 U.S. 781, 782 (1978). However, an exception to the state's immunity under the Eleventh Amendment permits officers of the state to be sued for violations of the Constitution and federal law. Ex Parte Young, 209 U.S. 123 (1908). Moreover, the state's sovereign immunity or immunity statutes cannot shield the state's officers from liability pursuant to 42 U.S.C. § 1983. Martinez v. California, 444 U.S. 277.

> It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts. We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' " of the United States. The answer to that inquiry disposes of this case.

Martinez v. California, 444 U.S. 277, 284 (1985).

If the State, by virtue of the joint resolution (S. 800), in effect "revoked" a permit already granted, there could be constitutional considerations under the federal and state due process clauses. We recently addressed the possible due process considerations for a retroactive adverse effect upon an issued permit only as follows:

> [T]here are constitutional implications under the Due Process Clause with respect to applying § 49-4-150 to current IBT permit and registration holders. **While there is no right of "ownership" to the State's rivers and streams, and the State's navigable streams belong to the public**, *see* State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1998) (citing S.C. Const. Art. XIV, § 4), **the existing IBT permit bestows upon the permit holder a right of beneficial use. Courts have generally held such a right of beneficial use to be a vested right of property.** As was stated in one case,
>
> > [t]he rule of law which has been adopted in this State is the "reasonable user" rule. MacArtor v. Graylyn, *supra*, 187 A.2d at 419 (1963). This rule acknowledges that a property right in the use of groundwater does exist on behalf of the owner of the overlying real estate. The right, however, is only a right to use water and is not an ownership of the water itself. 78 AM. JUR.2d, *Waters* § 156. To this extent, therefore, it is a usufructuary right as the County argues. However, simply because the right is only a right of use does not make the property interest in the right less tangible. See 63 AM.JUR.2d, *Property* § 42. Moreover, **governmental regulation of use does not abrogate the rights of the user, buy**

> **only controls or limits the exercise of the interest by the owner.** See, 63 AM.JUR.2d *Property* § 44. **A landowner, therefore, does have a recognizable property interest in the usufructuary rights to groundwater lying below his property.**

Artesian Water Co. v. The Government of New Castle, 1983 WL 17986 (1983). And, in Enterprise Irr. Dist. v. Willis, 284 N.W. 326, 329 (Neb. 1939), the Court concluded that ". . . an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right . . . ."; 78 Am.Jur.2d, *Waters*, § 5 [a water right, even though usufructuary, may be a property right]. *See also*, former S.C. Code Ann. Section 49-21-40(B) (Interbasin Transfer Act, now repealed.) ["The department may modify, suspend or revoke any water transfer permit, including authority to transfer water pursuant to Section 49-21-50, *for good cause* . . . ."]

Thus, we believe the intent of the Legislature was not to apply newly enacted § 49-4-150 to existing interbasin transfer permits and registrations. Such retroactive treatment is inconsistent with the provisions of the Act, discussed above, and with general rules of statutory construction. Further, there are constitutional implications regarding such retroactive application.

Op. S.C. Atty. Gen., April 18, 2011. Here, a court might well find that the DHEC permit is some form of a property interest to the permit holders. The joint resolution would effectively remove the permit's validity, causing the proposed activities to cease. While the State would not necessarily be a party to the lawsuit, the State may ultimately assume responsibility for the funding of the project. Because the DHEC permit is unable to be issued because of the joint resolution, federal funding would likely be taken away.

For example, in the past, the legislature has found it necessary to appropriate funds to pay attorneys fees even though the State was not a party to the law suit where liability was found. For example, in Southeast Booksellers Ass'n v. McMaster, 371 F.Supp.2d 773 (2005), the "Plaintiffs allege that [the Act which provides criminal sanctions for "disseminating harmful material to minors"] violates the First Amendment and the Commerce Clause because it prohibits adults, and even older minors, from viewing and sending constitutionally-protected images over the Internet and has the effect of prohibiting constitutionally-protected communications nationwide." Southeast Booksellers, 371 F.Supp.2d 773, 776. The Court concluded that the statute violated the First Amendment and Commerce Clause, and the Defendants were "permanently enjoined and prohibited from enforcing S.C.Code Ann. § 16-15-385 as applied to 'digital electronic files' under S.C.Code Ann. § 16-15-375(2) that are sent or received via the Internet." Southeast Booksellers, 371 F.Supp.2d 773, 788. In Southeast Booksellers, the Defendants' motion for summary judgment was denied and the General Assembly, in the end, appropriated funds to pay plaintiffs' attorneys fees.

Conclusion

The General Assembly certainly possesses authority to place a moratorium on permits issued by DHEC, as proposed in S.800.

However, a word of caution is in order. Assuming the Administrative Law Court affirms the granting of the permit,[1] one should be aware that the enactment of S.800 may present due process implications. It could be argued that in such case the joint resolution, having the force and effect of law, effectively removes a property right (the permit) from the permit holders without due process. This removal of the property right would likely cause the federal grant recipients to lose their funding from the Department of Agriculture because the DHEC permit would not be valid under the joint resolution.

Of course, every situation will turn upon its own facts and we cannot predict with certainty how a court might rule if S.800 is deemed to retroactively change the law after the permit is issued. Such would be in the province of the courts based upon all the facts and circumstances. We can only caution here that a due process issue will likely be raised if such occurs. That being the case, there is at least the potential for liability on the part of the State or at the very least the State could potentially be financially responsible for payment.

Sincerely,

Leigha Blackwell

Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[1] If the ALC denies the permit, the issue before us is moot.