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ATTORNEY GENERAL

April 18, 2011

The Honorable Danny Verdin
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Columbia, SC 29202-0142

The Honorable David L. Thomas
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The Honorable Larry A. Martin
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The Honorable Michael A. Fair
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The Honorable Phillip W. Shoopman
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Dear Senators:

Our Opinion has been requested regarding an interpretation of certain provisions of the South Carolina Surface Water Withdrawal, Permitting, Use and Reporting Act, enacted last year by the General Assembly. See Act No. 247 of 2010, codified at S.C. Code Ann. §§ 49-4-10 *et seq*. (hereinafter "Surface Water Act" or "Act"), effective on January 1, 2011. You state that the "Act is a significant environmental statute for the state with widespread ramifications for public health, economic development, and interstate relations" and that the consequences of "its implementation are important issues for our constituents and their quality of life." You pose four specific questions regarding the implementations of the Act, which are as follows:

(1) Is the holder of an interbasin transfer (IBT) permit or registration an "existing surface water withdrawer" under the South Carolina Surface Water Withdrawal Permitting, Use and Reporting Act?

(2) Under the Surface Water Act, may an existing surface water withdrawer, including the holder of an IBT permit or registration, file an application for a surface water withdrawal permit within 180 days of promulgation of the implementing regulations?

(3) Under the Surface Water Act, to what extent are new surface water withdrawers subject to the provisions of the South Carolina Drought Response Act or a drought response plan required by the owner of a licensed impoundment?

(4) Under the Surface Water Act, to what extent are "existing surface water withdrawers" subject to the provisions of the South Carolina Drought Response Act or a drought response plan required by the owner of a licensed impoundment?

You note that § 49-4-70(C) states in part that "[f]or the purposes of this chapter, existing interbasin transfer permit or interbasin registration holders are deemed to be existing surface water withdrawers." Further, you observe that § 49-4-70(B)(1) provides that "[a]n existing surface water withdrawer must apply for a permit pursuant to this chapter within one hundred eighty days of the effective date of regulations promulgated by the department pursuant to this chapter." In addition, you argue that

> [t]he statute also provides that for the holder of an IBT permit or registration, the expiration date of the original permit or registration remains intact. Some would argue that this might cause confusion, but, again, this language was the simplest and most expedient way to retain the legal validity and viability of existing permits with the full expectation that these would be transitioned into surface water withdrawal permits at the IBT holder's earliest convenience—which we would encourage to be as early as possible. It also provided cover during the transition period, such as the gap that currently exists, between the effective date of the Act on January 1, 2011, and 180 days from the effective date of implementing regulations, which could be some time from now.
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> A contrary interpretation could require the holder of an IBT permit or registration to wait decades before being able to seek its initial surface water withdrawal permit as an existing user. That is not at all what the General Assembly intended. As we noted, the Act was never intended to create a lower class of existing surface water withdrawer, but rather to treat existing withdrawers equally. And the intent of the Act was to encourage all existing surface water

> withdrawers, including IBT permit or registration holders, to engage in the surface water withdraweral permitting process as soon as possible.
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> Indeed, the Act was not intended to punish the holders of an IBT permit or registration by withholding the benefits of statutory protections (such as the civil liability protection found in Section 49-4-110(B)) that are conferred upon all other existing withdrawers. The holders of an IBT permit or registration should be entitled to avail themselves of the same protections of other existing withdrawers on the same terms and on the same footing as those other existing withdrawers.

This Office previously interpreted the Act in an opinion issued on January11, 2011. There, we addressed questions similar to those presented here regarding the implementation of the Act with respect to IBT Permit or registration holders. The previous opinion concluded that

> ... it is our opinion that the Surface Water Withdrawal Act does not authorize public water suppliers who are currently operating pursuant to an interbasin transfer (IBT) permit or registration, to bypass the terms and conditions of their current IBT permit in order to prematurely apply for an initial permit as an existing surface water withdrawer. Applying the rules of statutory construction, we believe the Surface Water Act requires that the IBT permit remains effective for the life of the permit. In short, the Act would likely not be interpreted by a court to permit the PWS [Public Water Supplier], as an IBT permittee, to prematurely seek the permit authorized by § 49-4-70(B)(1) for existing surface water withdrawers, a permit ultimately issued for at least thirty years. Instead, a court would employ the well recognized principles of statutory construction to reach the conclusion that both public and private IBT withdrawers remain subject to the existing IBT permit for the life of that permit.
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> For the same reasons, it is our opinion that the Act does not authorize a PWS currently operating pursuant to an IBT permit or registration to be exempt from the Drought Recovery Act and drought response plans required by the owner of a licensed impoundment.

Your questions necessarily require a review of that January 11, 2011 Opinion and whether such opinion remains in effect.

Law / Analysis

We have reviewed at length your first two questions. These inquiries are difficult and present a close legal question. Only a court can resolve the issues you raise with finality. Section 49-4-70 is indeed ambiguous and the legal interpretation expressed in your letter is a credible one. Based upon your inquiries, we are required to revisit our earlier opinion. This Office "recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous." *Op. S.C. Atty. Gen.*, November 23, 2010. While the answers to your questions are not free from doubt, we apply the "clearly erroneous" standard and reaffirm the January 11, 2011 opinion in response to your first two inquiries.

Section 49-4-70(C) of the Act provides as follows:

> [t]he expiration date of an interbasin transfer permit or an interbasin registration, including any water withdrawal right or authority contained in the permit or registration, in existence on the effective date of this chapter, remains effective. For the purposes of this chapter, existing interbasin transfer permits or interbasin registration holders are deemed to be existing surface water withdrawers. A renewal of an interbasin transfer permit or registration must be made pursuant to the criteria established in this chapter for existing surface water withdrawers, except that permits or registrations renewed within three years after the effective date of this chapter must be renewed for a quantity at least equal to the quantity in the expired permit. All other renewals must be issued in accordance with the criterion applicable to existing surface water withdrawers and for a quantity equal to the permitted quantity in the expired permit, unless the department demonstrates by a preponderance of the evidence that the quantity above maximum withdrawals are not necessary to meet the permittee's future need.

Section 49-4-70(B)(1) also provides:

> [a]n existing surface water withdrawer must apply for a permit pursuant to this chapter within one hundred eighty days of the effective date of regulations promulgated by the department pursuant to this chapter. An existing surface water withdrawer that applies for a permit must be issued an initial permit but the initial permit and subsequent renewals are not subject to the permitting criteria in Section 49-4-80 and are not subject to Section 49-4-150. The initial permit must

> authorize the existing surface water withdrawer to withdraw water in an amount equal to its documented historical water use, current permitted treatment capacity, design capacity of the intake structure as of the effective date of this chapter, design capacity of a pending intake structure.

In our January 11, 2011 opinion, we attempted to reconcile the apparent conflict between these provisions. We concluded as follows:

> [b]ased upon the foregoing rules of construction, it is our opinion that the Surface Water Withdrawal Act does not contemplate a PWS, which is the holder of an IBT permit or registration, to employ the procedure in § 49-4-70(B)(1) by applying for an initial permit within one hundred eighty days of the regulations promulgated by DHEC. It is true that Subsection (C) of § 49-4-70 provides that "[f]or the purposes of this chapter, existing interbasin transfer permit or interbasin registration holders are deemed to be existing surface water withdrawers." However, for a number of reasons, we do not deem this provision controlling with respect to any PWS currently operating pursuant to an interbasin transfer permit or registration such that it may abandon its existing IBT permit and assume the role of an existing surface water withdrawal[er] for purposes of § 49-4-70(B)(1). The first sentence of Subsection (C) of § 49-4-70, which we believe is the more specific provision, expressly provides that "[t]he expiration date of an interbasin transfer permit or an interbasin registration, including any water withdrawal right or authority contained in the permit or registration, in existence on the effective date of this chapter, *remains effective*. (emphasis added). Such provision would, in our view, prevail over the more general provision deeming IBT permit holders to be "existing surface water withdrawers" for the general purpose of the "chapter" relating to surface water withdrawal. As we understand it, the Surface Water Withdrawal Act repealed the previously existing IBT licensure law. See Section 4 of the Surface Water Withdrawal Act repealing Chapter 21 of Title 49 of the Code (entitled Interbasin Transfer of Water). In light of such repeal, making IBT permitting now subject to the Surface Water Act, the Legislature was thus cognizant that existing IBT permits must be honored and thus declared that such "existing permits" were deemed to be "existing surface water withdrawers" for the purposes of the Surface Water Withdrawal Act. Such does not mean, however, that the more specific provision, mandating that the IBT permit "remains effective," may be ignored in favor of the general language referred to above,

> deeming an IBT permit holder to be an "existing surface water withdrawer" so that the IBT holder could then apply for the initial permit pursuant to § 49-4-70(B)(1). In our opinion, the prevailing rules of statutory construction dictate otherwise. We do not think the General Assembly intended that Public Water Systems who are existing IBT permit holders may prematurely end the terms of their existing IBT permit in this way.

Following considerable review, we stand by our analysis in the earlier opinion. While your interpretation of § 49-4-70(C), as you have presented in your letter, is reasonable, and a court could possibly adopt such interpretation, in our view, our earlier analysis is more consistent with prevailing rules of statutory construction. Section 49-4-70(C)'s first sentence, which provides that "[t]he expiration date of an interbasin transfer permit or an interbasin registration ... in existence on the effective date of this chapter, remains effective" leads us to this conclusion. Moreover, we note that Subsection (C) also uses the term "*expired* permit" on two occasions, suggesting that an IBT permit continues until expiration. Further, we see no purpose to Subsection (C), including the first sentence contained therein, if the 180-day provision found in Subsection (B)(1) is controlling with respect to existing interbasin transfer permits and registrations. Admittedly, there is ambiguity imposed by the second sentence of § 49-4-70(C), which designates IBT permit and registration holders to be "existing surface water withdrawers" for the purpose of the Surface Water Withdrawal Act. As you note, this second sentence could lead to the alternative construction set forth in your letter, and thus we conclude such construction is plausible. However, applying the standard which we typically utilize – that an opinion must be "clearly erroneous" to displace it – we must, in answer to your first two questions, adhere to the earlier interpretation. In other words, we reaffirm our conclusion that, while the holder of an IBT permit or registration is an "existing surface water withdrawer" under the South Carolina Surface Water Withdrawal Act, Section 49-4-70(C) precludes such IBT permit or registration holder from filing an application for a surface water withdrawal permit within 180 days of promulgation of implementing regulation.

We turn to your remaining two questions. In essence, you ask whether, pursuant to the Surface Water Withdrawal Act, to what extent are new surface water withdrawers and "existing surface water withdrawers" subject to the provisions of the South Carolina Drought Response Act or a drought response plan required by the owner of a licensed impoundment?

You indicate in your letter that, "[t]he General Assembly devoted Section 49-4-150 to setting forth the drought responsibilities of new users ...." You note that § 49-4-150 contains

"continual references to 'new' withdrawers in the statutory language." Your letter further argues that

> [t]hese new withdrawers are subject to drought response provisions found in Section 49-4-150 and they are required to prepare and maintain an operational in contingency plan for less than minimum in stream flow situations in accordance with Section 49-4-160. Moreover, Section 49-4-160(B) specifically provides that the South Carolina Drought Response Act applies and would trump any requirement in this Act if a conflict arose.
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> Public water suppliers that are new surface withdrawers are exempt from certain requirements in Section 49-4-150. S.C. Code Ann. § 49-4-150(A)(6). But these public water supplier new withdrawers may be bound by not just the South Carolina Drought Committee declarations, but also to any drought response plan required by the owner of the licensed impoundment.

You further note that

> [c]onsistent with the structure of the Act, existing withdrawers are treated differently than new withdrawers. The statute clearly indicates that existing withdrawers are exempt from the drought response provisions found in Section 49-4-150. The Act provides that an "existing surface water withdrawer that applies for a permit must be issued an initial permit but ... [is] not subject to Section 49-4-150." S.C. Code Ann. § 49-4-70(B)(1). Instead, existing surface water withdrawers are permittees subject to the provisions of a qualified Section 49-4-160. That section requires the preparation of a less than minimum flow plan, among other things. However, the statute is qualified, providing that "for an existing surface water withdrawer, the operational and contingency plan required under Section 49-4-160 will only address appropriate industry standards for water conservation." S.C. Code Ann. § 49-4-70(B)(2).
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> In contrast to the requirements for new withdrawers and consistent with the modified contingency plan, these terms apply to all existing surface water withdrawers. There is no separate distinction between the broad class of existing surface water withdrawers and public water suppliers who are existing withdrawers.

> The exemption for all existing surface water withdrawers from the provisions of Section 49-4-150, including Section 49-4-150(A)(6), was intentional, to allow the status quo to continue and for the established protocols in any existing relationships to remain unchanged in addressing the drought situation. The statute does not impose or alter any duty or obligation on existing withdrawers that are public water suppliers regarding drought response plans required by the owner of a licensed impoundment. Importantly, existing surface water withdrawers, as reflected in Section 49-4-160(B) and in the surface water permit terms, S.C. Code Ann. § 49-4-100(A)(9), remain subject to the S.C. Drought Response Act.

As we read § 49-4-150, such entire Section appears to provide for the contingency plans and drought response responsibilities for *new* surface water withdrawers. See § 49-4-150(A)(1)(a) ["For *new* surface water withdrawers ... ."] (emphasis added). New surface water withdrawers are governed by drought response provisions found in § 49-4-150 (A)(1)-(6), and are required to prepare and maintain an operational and contingency plan for less-than-minimum flow situations in accordance with Section 49-4-160.

Section 49-4-150(A)(6), however, treats a public water supplier (PWS), that is a new surface water withdrawer, differently from other new water withdrawers. Pursuant to Subsection (A)(6), the Legislature provided that

> [t]he requirements of items (1) through (4) do not apply to public water suppliers. Public water suppliers are required to implement their contingency plan measures, applicable to their service territory, commensurate with the drought level declared by the State Drought Response Committee and in accordance with any drought response plan required by the owner of a licensed impoundment.

Thus, a PWS which is a new surface water withdrawer is exempt from requirements of items (1) through (4) of § 49-4-150. However, pursuant to the plain language of § 49-4-150(A)(6), a new surface water withdrawer must comply with the South Carolina Drought Response Act [PWS is required "to implement their contingency plan measures ... commensurate with the State Drought Response Committee"], as well as "any drought response plan required by the owner of a licensed impoundment."

It is important to note also that § 49-4-70(B)(1) expressly provides that an "existing surface water withdrawer that applies for a permit ... [is] not subject to Section 49-4-150." Thus, this provision strongly reinforces a reading that § 49-4-150 only applies to *new* surface water withdrawers. Instead, § 49-4-70(B)(2) states that for an existing surface water withdrawer, "the operational and contingency plan required under Section 49-4-160 will only address appropriate industry standards for conservation." However, Subsection (B) of § 49-4-160 states that "[i]n the event that an action authorized by the South Carolina Drought Response Act conflicts with this subsection or a permitted use, the action taken pursuant to the South Carolina Drought Response Act conflicts with this subsection or a permitted use, the action taken pursuant to the South Carolina Drought Response Act supersedes any actions taken pursuant to this subsection or the permit." Moreover, the Surface Water Withdrawal Act requires that "[s]urface water withdrawal permits issued by the department [DHEC] must ... clearly state that the terms and conditions of the permit are subject to the provisions of the South Carolina Drought Response Act." Thus, existing surface water withdrawers are unquestionably subject to the provisions of the South Carolina Drought Response Act.

Accordingly, we agree with you that the Surface Water Withdrawal Act does not impose or alter any duty or obligation on an *existing surface water* withdrawer regarding drought response plan requirements of the owner of a licensed impoundment. Section 49-4-150(A)(6), which subjects a PWS to a degree of control by the owner of a licensed impoundment, only applies to public water suppliers who are *new* surface withdrawers. Pursuant to § 49-4-70(B), "[a]n existing surface water withdrawer that applies for a permit must be issued an initial permit but the initial permit and subsequent renewals ... *are not subject to Section 49-4-150.*" (emphasis added). Accordingly, the Act makes an existing surface water withdrawer subject to the South Carolina Drought Response Act, but exempts such existing surface water withdrawers from the Act's provisions concerning the drought response requirements by owners of licensed impoundments.

Although your letter does not raise the question of the status of a current IBT permit holder in this regard, we believe it is necessary to address that issue as well. Your first two questions deal with this subcategory of user and § 49-4-70(C) separates IBT permit and registration holders from other existing surface water withdrawers.

It is true that, on its face, § 49-4-150(A)(6) appears to address all PWS. As discussed above, that Subsection deals with the subcategory of "public water suppliers" and provides that "items (1) through (4) do not apply to public water suppliers." However, Subsection (6) goes on

to say that "[p]ublic water suppliers are required to implement their contingency plan measures, applicable to their service territory, commensurate with the drought level declared by the State Drought Response Committee and in accordance with any drought response plan required by the owners of a licensed impoundment." Thus, the question arises whether Subsection (A)(6) applies to all PWS, or only to new ones, and whether such provision includes a *current IBT permit and registration holder* who also is a PWS. Of course, some public water suppliers also hold current IBT permits or registrations. But certainly all Public Water Suppliers are not also IBT permit or registration holders. Likewise, every IBT permit or registration holder may not be a PWS. Thus, it is problematical to apply § 49-4-150(A)(6) to current IBT permit or registration holders merely because some of these may also be a Public Water Supplier. The better construction is to apply § 49-4-150(A)(6) only to *new* public water suppliers.

Moreover, in keeping with this construction, we must read the Act as a whole, not focusing on only one provision, such as § 49-4-150(A)(6), in isolation. It is well recognized that "[a] statute should not be construed by concentrating on any isolated phrase." Instead, "[i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

We have already discussed above the fact that, by the express terms of § 49-4-70(B)(1), § 49-4-150 does not apply to existing surface water withdrawers. Based upon the language of §49-4-70(C), current IBT permit and registration holders would fall into that same category. ["For the purposes of this chapter, existing interbasin transfer permits or registration holders are deemed to be existing surface water withdrawers."]

Moreover, based upon a reading of the Act in its entirety, we do not believe the Legislature intended to include current IBT permit or registration holders, who are also public water suppliers, within the reach of § 49-4-150(A)(6). The General Assembly could easily have mentioned current IBT permit and registration holders in § 49-4-150(A)(6), just as it did in § 49-4-70(C), but it did not. Instead, as we have discussed, the Legislature only included within the scope of § 49-4-150 *new* surface withdrawers. Likewise, the Legislature could have exempted, but did not, current IBT permittees and registration holders from the reach of the exception to § 49-4-150, contained in § 49-4-70(B)(1) (which excludes existing surface water withdrawers who apply for a permit as not required to comply with § 49-4-150). Without such express mention of IBT permit and registration holders, we do not believe the Legislature intended to treat them differently for purposes of exclusion from § 49-4-150 than other surface water withdrawers.

Having not dealt with current IBT permit and registration holders at all in this context, the canon of statutory construction "expressio unius est exclusio alterius," or to "express or include one thing implies the exclusion of another of the alternative," is applicable. The omission of any mention of IBT permittees and registration holders in § 49-4-150, in contrast to the express discussion of such permittees and registration holders in § 49-4-70(C), would, in our opinion, be given considerable weight by a court.

Furthermore, in our view, it would be legally problematical to apply § 49-4-150 to current IBT permit or registration holders, while exempting other existing surface water withdrawers. It is well recognized that "[i]n the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary." *South Carolina Dept. of Revenue v. Rosemary Machines, Inc.*, 329 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). The exception is if the new law is procedural or remedial and that exception is inapplicable if the new enactment "supplies a legal remedy where [formerly] there was none." *Hyder v. Jones*, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978).

In this instance, the Surface Water Withdrawal Act contains a specific "savings clause." Section 6(A) of the Act provides in pertinent part as follows:

> [t]he repeal or amendment by this act of any law, whether temporary or permanent, does not affect pending actions, rights, duties, or liabilities founded on it, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision expressly provides it. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Thus, it is clear that the General Assembly did not intend to affect existing permits or rights through passage of the Surface Water Withdrawal Act "unless the repealed or amended provision expressly provides it."

Moreover, there 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.

Conclusion

In answer to your first two questions regarding current IBT permit and registration holders, it is our opinion that the January 11, 2011 Opinion is reaffirmed. We readily acknowledge that Section 49-4-70(C) is ambiguous, which means that more than one interpretation is possible. Thus, we find the alternative interpretation, discussed in your letter, certainly not to be an unreasonable construction of § 49-4-70 (C). However, we believe the better reading of the Surface Water Withdrawal Act, and the one most consistent with prevailing rules of statutory construction, is that found in our earlier Opinion.

In our earlier opinion, as we stated, "[a]pplying the rules of statutory construction we believe the Surface Water [Withdrawal] Act requires that the IBT permit remains effective for the life of the permit." It is our view that this conclusion may be based upon the express language contained in § 49-4-70(C) that "[t]he expiration date of an interbasin transfer permit or an interbasin registration, including any water withdrawal right or authority contained in the permit or registration, in existence on the effective date of this chapter remains effective." While credible alternative arguments can be, and have been made to us, concerning whether or not this sentence is governing in light of the second sentence of Subsection (C), deeming IBT permit and registration holders "existing surface water withdrawers," we must apply our long existing "clearly erroneous" standard of review to the earlier Opinion and reaffirm it. In short, while we fully acknowledge the alternative interpretation to be plausible, we reaffirm our conclusion that even though the holder of an IBT permit or registration is an "existing surface water withdrawer" under the South Carolina Surface Water Withdrawal Act, Section 49-4-70(C) precludes such IBT permit or registration holder from filing an application for a surface water withdrawal permit within 180 days of promulgation of implementing regulations. Under this construction, the IBT permit or registration remains in effect for the life of the permit.

With regard to your final two questions, it is our opinion, pursuant to the Surface Water Withdrawal Act, that new surface water withdrawers are subject to the provisions of the South Carolina Drought Response Act and the requirements of the owner of a licensed impoundment, but an existing surface water withdrawer, including an IBT permit or registration holder, is subject only to the South Carolina Drought Response Act and not to any additional restrictions or conditions from the owner of a licensed impoundment. We are constrained to reach this conclusion regarding IBT permit and registration holders because § 49-4-150 appears to refer only to new surface water withdrawers. Moreover, § 49-4-70(B)(1) expressly exempts existing surface water withdrawers from the reach of § 49-4-150. While § 49-4-150(A)(6) does deal with

public water suppliers, such provision must be read not in isolation, but in the context of the entire statutory scheme. Moreover, nowhere in § 49-4-150 are IBT permit and registration holders mentioned, as they are in § 49-4-70(C). Finally, to apply § 49-4-150 retroactively to existing IBT holders would be inconsistent with Section 6 of the Act, which provides that the Act does not affect existing rights "unless the repealed or amended provisions expressly provides it." Here, § 49-4-70(C), the provision which speaks specifically to IBT permit and registration holders, expressly states that "the water withdrawal right or authority contained in the permit or registration" remains in effect. Thus, all doubt must be resolved against a retroactive application of § 49-4-150 to existing IBT permit and registration holders.

Of course, our conclusion herein with respect to your last two questions applies only to any drought response based upon implementation of the Surface Water Withdrawal Act. We must also note that existing and new surface water withdrawers may be subject to other obligations or responsibilities imposed by contract or by federal law, such as the Federal Power Act. The Federal Power Act imposes federal standards through its regulatory agency, the Federal Energy Regulatory Commission (FERC). Of course, any interpretation of federal law, particularly, the Federal Power Act, is beyond the scope of an opinion of this Office. See, *California v. FERC*, 495 U.S. 490, 506 (1990) ("As Congress directed in FPA [Federal Power Act] § 10(a), FERC [Federal Energy Regulatory Commission] set the conditions of the license ...."). See also, *Pacificorps.*, 123 FERC P 62257, 2008 WL 2556658 (2008) ["Because the comprehensive development standard of FPA section 10(a)(1) continues to govern regulation of a project throughout the term of its license ..., it is the Commission's responsibility to give prior approval through appropriate license amendments, for all material changes to the [FERC] project and its maintenance and operation."]. Accordingly, federal law may well speak also to drought criteria concerning withdrawals from a FERC licensed project. See, *Order Modifying and Approving Amendment of License Article 34,* 128 FERC P 62037, 2009 WL 2029235 [FERC modifies license, imposing drought conditions]. Again, while we note FERC's jurisdiction in certain instances, any interpretation of federal law (FPA) would be a matter for determination by that agency, rather than this Office.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an