HENRY MCMASTER
ATTORNEY GENERAL

January 10, 2011

The Honorable Robert W. Hayes, Jr.
South Carolina Senate, District 15
205 Gressette Building
Columbia, South Carolina 29201

Dear Senator Hayes:

You have asked for an interpretation of the recently enacted South Carolina Surface Water Withdrawal, Permitting, Use and Reporting Act of 2010 (Act No. 247 of 2010). Specifically, you ask two questions which are as follows:

(1) does the Surface Water Withdrawal Act exempt from the statute's surface water withdrawal permit ("SWW permit) renewal criteria those public water suppliers (PWS) currently operating pursuant to an inter-basin transfer (IBT) permit or registration?

(2) does the Surface Water Withdrawal Act exempt a PWS currently operating pursuant to an IBT permit or registration from the South Carolina Drought Recovery Act ("Drought Recovery Act"), S.C. Code Ann. 49-23-10 to 100 and drought response plans required by the owner of a licensed impoundment?

You state that "[a]s a co-sponsor of this legislation, I assure you this was never the intent of the General Assembly."

By way of background, you state the following:

[i]n the final days of the 2010 session, the General Assembly passed and Governor Sanford signed into law the Surface Water Withdrawal Act. The purpose of the legislation is to provide the State of South Carolina a process for regulating surface water withdrawals from rivers and streams throughout the State. Unregulated withdrawals may threaten public health

> and the environment especially during times of drought. It is important the State's regulations properly reflect our legislative intent not to allow IBT permit and registration holders to prematurely apply for an initial SWW permit and thereby avoid the SWW Permit renewal and applicable drought plan water conservation criteria.

With respect to your first question – are current IBT permit and registration (hereinafter collectively "IBT permit(s)") holders exempt from the SWW renewal criteria – you note that IBT systems are "deemed to be existing surface water withdrawers" pursuant to the Act and it is thus "this declaration that could create confusion." You state that

> [s]uch a designation could mistakenly allow "existing surface water withdrawers" who apply for a SWW Permit within one hundred eighty (180) days of the effective date of the regulations to argue that they should be "grandfathered" into the new SWW scheme both initially and upon each subsequent renewal (see, Act No. 247, Section 49-4-70(B)(1). Should this be allowed, an IBT permit or registration would bypass the SWW permit renewal criteria for 30 years. This was not intended by the statute. The Surface Water Withdrawal Act is clear: Existing IBT permits and registrations remain effective until the IBT permits and registration expires. The new SWW Permit provisions do not create an opportunity for IBT's to prematurely void IBT permits or registrations for a more flexible SWW Permit.

With respect to your second question concerning the Drought Response Act, you likewise observe as follows:

> Improper interpretation of the statute on this point may have far-reaching implications not intended by the General Assembly. I contend the statute is more properly interpreted to create a subcategory of IBT's, that being existing and future PWS which must comply with drought protocols addressed in Section 49-4-150 (A)(6).
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> Any interpretation of the Surface Water Withdrawal Act to exempt PWS IBT's from the Drought Response Act or drought response plans managed by the owner of a licensed impoundment conflicts with the express provisions of the statue: "Nothing in this section limits or precludes any action authorized by Drought Response Act. In 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 supersedes any actions taken pursuant to this subsection or the permit." S 452 Section 49-4-160(B) ... . Moreover, such an erroneous interpretation would result in a PWS, that is not an IBT

system, being required to comply with such drought measures, while exempting a PWS that is an IBT system meeting those same standards. There was no legislative intent to treat IBT and non-IBT PWS differently.

Thus, you ask our assistance "in advising DHEC that IBT systems holding current water withdrawal permits or registrations must continue to operate under those authorizations until their expiration, and are not authorized by the statute to prematurely apply for an initial SWW Permit because they are already a *permitted* surface water withdrawer. Likewise, DHEC should be advised that existing and future PWS must comply with the required drought protocols addressed in Section 49-4-150(A)(6), even if a PWS is also an IBT system." (emphasis in original).

Law / Analysis

Section 49-4-80 of the Surface Water Withdrawal Act sets forth in great detail the information which an applicant for a surface water withdrawal permit must include. In addition subsection (B) sets forth the criteria to determine whether an applicant's "use is reasonable." Among these criteria are (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 as well as (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 ...." In addition, DHEC must apply criteria such as

> (3) the reasonably foreseeable future need for the surface water ... [and]
>
> (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 ... .

Numerous other criteria are specified therein. Further, § 49-4-80 lists certain duties which DHEC must carry out in reaching its decision on a pending application. See § 49-4-80(C) through (L). DHEC must determine ultimately whether a "new surface water withdrawal permit application or an application to significantly increase the amount of water that may be withdrawn . . ." may be permitted. See § 49-4-80(L). It will, in short, be DHEC's task to determine the "safe yield of the surface water source and the volume of the supplemental water supply, if needed, necessary to sustain the applicant's water use." § 49-4-80(C).

With respect to drought response measures for public water suppliers, as you note, "[a]s established by the State Drought Response Committee, each service territory of a PWS is governed by certain low-flow protocols during drought conditions. Specifically, § 49-4-150(6) provides as follows:

> [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.

Moreover, the primacy of the Drought Response Act is emphasized by § 49-4-160(B) which further provides:

> [n]othing in this section limits or precludes any action authorized by the South Carolina Drought Response Act. In 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 supersedes any actions taken pursuant to this subsection or permit.

The confusion of which you speak in your letter has apparently been created by § 49-4-70. This Section provides a "grandfathering" for "existing surface water withdrawers." "Existing surface water withdrawers" are given a permit at least "for thirty years for a permittee entitled to an initial permit pursuant to § 49-4-70(B) ...." § 49-4-100B(2). An "existing surface water withdrawer" is defined by § 49-4-20(9) as follows:

> 'Existing surface water withdrawer' means a surface water withdrawer withdrawing surface water as of the effective date of this chapter or a proposed surface water withdrawer with its intakes under construction before the effective date of this chapter or with all necessary applications for its intake permits deemed administratively complete before January first of the year of the effective date of this act.

Subsection (B)(1) of § 49-4-70 provides in pertinent part 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 his 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.

Subsection (C) of § 49-4-70 deals with interbasin transfers or IBT's. Such provision states 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 permit[s] 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 registration renewed within three years after the effective date of this chapter must be renewed for a quantity at least equal to the permitted 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 during the permit term are not necessary to meet the permittee's future need.

It is the sentence contained in subsection (C) – "(f)or the purposes of this chapter, existing interbasin transfer permit[s] or interbasin registration holders are deemed to be existing surface water withdrawers ..." which is causing confusion. Accordingly, we must resort to the rules of statutory construction. As our Supreme Court explained in *SCANA Corp. v. South Carolina Dept. of Revenue*, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009),

> [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)." All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n.*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give the words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

In addition, 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). As our Supreme Court long ago wrote: "'If any part of a statute be obscure, it is proper to consider the other parts; the words and meaning of one part of a statute frequently lead to

the sense of another.'" *Davenport v. Caldwell*, 10 S.C. (Rich.) 317 (1878), quoting 9 Bac. Abr. Stat. 239.

Moreover, it is well settled that where statutory provisions are in conflict with one another, "[r]epeal by implication is disfavored and is found only when [the] two statutes are incapable of any reasonable reconcilement." *Capco of Summerville v. J. H. Gayle Const. Co., Inc.*, 368 S.C. 137, 141, 628 S.E.2d 38, 41 (2006). As a means of such reconcilement, the Supreme Court has consistently recognized that

> [w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. *Wilder v. South Carolina Hwy. Dept.*, 228 S.C. 448, 90 S.E.2d 635 (1955). See also *Wooten ex rel. Wooten v. S.C. Dept. of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one); *Atlas Food Sys. And Servs. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one).

Capco, 368 S.C. 137.

In addition, as a remedial statute, the Surface Water Withdrawal Act would be entitled to a liberal construction in order to effectuate the legislative purpose. In an opinion, dated March 17, 2010, we stated the rule of construction as follows:

> ... if a statute is remedial in nature, it must be liberally construed to carry out the purpose mandated by the General Assembly. As noted at 3 Sutherland Statutory Construction § 60:1 (6th ed.),
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> > [a] liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction ... When there is an ambiguity in a remedial statute, it should be construed to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, providing the interpretation is not inconsistent with the language used, resolving all reasonable doubts in favor of applicability of the statute to a particular case ... Courts also presume the ambiguous language in a remedial statute is entitled to a generous construction consistent with its reformative mission.

Our Supreme Court has applied the foregoing rule of construction in a variety of circumstances. *See, Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-865 (2001) (FOIA); *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978) [mandating the commitment of a mentally ill person]; *Hartsville Cotton Mill v. S.C. Employment Security Comm.*, 224 S.C. 407, 79 S.E. 2d 381 (1953) [economic security due to unemployment].

Based 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 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.

Moreover, in our view, if the General Assembly had indeed intended that a PWS which held an existing IBT permit could bypass the express requirement that such permit "remains effective" the remaining language in Subsection (C) would have been completely unnecessary. Such a reading would fly in the face of the well recognized rule of construction, referenced above, which states that "in construing statutory language, the statute must be read as a whole and sections of the same general statutory law must be

construed together and *each one given effect*." *South Carolina State Ports Authority v. Jasper County, supra.*

Likewise, in our opinion, allowing a PWS holding an existing IBT permit to be released from that permit prematurely would allow the PWS to avoid the drought restrictions under the Drought Response Act. Section 49-4-150(A)(6) expressly provides 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 owner of a licensed impoundment." For the same reasons as discussed above, we believe the Legislature did not intend a PWS to circumvent these requirements. Again, there is a logical explanation for the Legislature's use of the language contained in § 49-4-70(C) deeming IBT permit holders to be "existing surface water withdrawers." Moreover, neither this language nor the general language of Subsection (B)(1) of § 49-4-70 may be deemed to override the more specific provision of § 49-4-150(A)(6).

Lastly, we deem the Surface Water Withdrawal Act to be remedial in nature and, therefore, entitled to a liberal construction. Accordingly, all doubts must be resolved in favor of the Legislature's purpose which is, as you note, "to provide the State of South Carolina a process for regulating surface water withdrawals from rivers and streams throughout the State." As you correctly point out, "[u]nregulated withdrawals may threaten public health and the environment especially during times of drought." In our view, interpretation of the Act to the end that a PWS holding an IBT permit could abandon the terms and conditions of such permit, and proceed to seek an initial permit as an "existing surface water withdrawer" under § 49-4-70(B)(1), would be inconsistent with the Surface Water Withdrawal Act's remedial purpose. Accordingly, we do not believe a court would so interpret the Act.

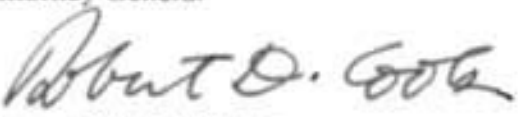
Conclusion

In answer to your first question, 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, 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.

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. As you indicate, to interpret the Surface Water Act in this manner would result in a PWS which is not an IBT permittee being required to comply with these drought measures, while exempting a PWS that is an IBT system from any such requirements. Such an interpretation would render meaningless § 49-4-150(A)(6) and, in our opinion, the General Assembly did not intend such an interpretation.

Very truly yours,

Henry McMaster
Attorney General



By: Robert D. Cook
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