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May 2, 1985

Honorable Alfred H. Vang
Executive Director
S.C. Water Resources Commission
Post Office Box 4440
Columbia, South Carolina 29240

Dear Mr. Vang:

You have requested an opinion as to whether the Department of Health and Environmental Control has statutory authority to promulgate the proposed regulations set forth below. Notice of intent to issue the regulations in question was first published in the State Register on July 27, 1984, and the regulations are presently before the General Assembly for approval. The specific regulations in question are Paragraphs C(1)(b)&(c), part of the "Antidegradation Rules" on page 5 of the document now before the General Assembly for review, and provide as follows:

(b) Existing uses and water quality necessary to protect these uses are presently affected or may be affected by instream modifications or water withdrawals. The streamflows necessary to protect existing uses and the water quality supporting these uses shall be maintained.

(c) Existing or classified ground water uses and the conditions necessary to protect those uses shall be maintained and protected.

The written explanation accompanying the proposed regulation at the time the Board of Health and Environmental Control considered the proposal states in part as follows:

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> Paragraph C.(1)(b) outlines the Department's approach to activities which could affect in-stream flow and therefore in-stream water uses. Controlled releases from reservoirs may impair downstream uses in addition to affecting aquatic life survival and propagation. Water withdrawals for irrigation and other purposes during low flows can also make classified uses unattainable and degrade existing uses.

Simply stated, the idea behind the proposed regulation is that dilution will permit a certain amount of pollution, but if another party reduces streamflow to the point that inadequate dilution causes diminished water quality, DHEC proposes to prohibit the streamflow reduction.

South Carolina's principal legal doctrine regarding water use is the riparian doctrine. See, e.g., White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456 (1901). The main idea of the riparian doctrine is that each riparian proprietor has a nonexclusive right to the reasonable use of water, and none has an exclusive right to the use of it. This has been the rule in South Carolina since at least 1820. Omelvany v. Joggers, 20 S.C.L. (2 Hill) 634 (1820). This rule is in contrast to the other principle of water law, found primarily in the arid Western states, of prior appropriation. Under that doctrine, "the one who first diverts and applies the waters of a stream to some beneficial use has a prior right thereto, to the extent of his appropriation." 78 Am.Jur.2d Waters, § 316. This doctrine has been adopted exclusively in states consisting in part of desert lands.

The common law adoption of the riparian doctrine is of long standing in this state. The present proposal would effectively overrule that doctrine by allowing one party, the permitted user, to use water to the exclusion of others who might wish to use it. Moreover, the preferred party under this arrangement would be one who is permitted to pollute the water, and who would prevail over one who might seek to make a use of the water which would have a less harmful effect on water quality.

It is clear beyond the need for citation that the common law will not be deemed abrogated by statute in the absence of a clear expression of legislative intent. It is therefore necessary to examine DHEC's authorizing legislation in this area, which is the Pollution Control Act, §§ 48-1-10, et seq.

It is true that the Pollution Control Act contains certain language in several spots which, if broadly read and in the absence of a common law rule to the contrary, could support the regulations in question. These are listed in the footnote.1/ On the other hand, however, the Act contains many more references to the creation of a system which will regulate discharges and emissions rather than water use. These references, which are clearly expressed and require no interpretation, are set forth in the footnote.2/ In addition, the State's pollution control program since its inception well over 20 years ago has been aimed at the source of pollution rather than the extent to which pollution is diluted by streamflow. Thus, it is apparent that the principal focus of the Pollution Control Act is on the regulation of discharges rather than on regulation of water use.

1/ See, e.g., § 48-1-40 (DHEC "shall adopt standards and determine what qualities and properties of water ... shall indicate a polluted condition"); § 48-1-50(9) (DHEC may develop a comprehensive program for abatement, control and prevention of pollution); § 48-1-70(5) (water quality standards may include "other physical ... properties [of water] which may be necessary).

2/ § 48-1-50(3) (orders requiring discontinuance of waste discharges); § 48-1-50(5) (discharge permits); § 48-1-50(10) (approval of plans for disposal systems); § 48-1-50(22) (require dischargers to maintain records); § 48-1-50(23) (adoption of emission and effluent control regulations); § 48-1-70 (water quality standards to include permissible levels of physical and chemical effluents); § 48-1-90 (unlawful to discharge effluents without a permit); § 48-1-100 (permit program established for discharge of wastes); § 48-1-110 (permits required for sewage and disposal systems); § 48-1-130 (DHEC may order discontinuance of discharges).

Other references in General Assembly actions (or inaction) also lead to the conclusion that it was never intended for DHEC, as part of its pollution control program, to effectively protect polluters by guaranteeing them adequate dilution of pollutants. For example, in the early 1950's, the General Assembly commissioned a major study of the desirability of shifting to an appropriation system. Act No. 377 of 1953. The study report, "A New Water Policy for South Carolina" (1954) by the Water Policy Committee recommended the adoption of the western appropriation concept, but such legislation never passed.

On the other hand, the General Assembly has in fact recently endorsed the concept of minimum streamflows. Act No. 198 of 1983 is a joint resolution which requires the Water Resources Commission, after a lengthy notice and consultation process, to prepare proposed streamflow standards for certain streams, with a final identification list to be completed by January 1, 1987. Even then, the list would be only one of "proposed" streamflow standards; presumably the General Assembly intended that the standards would not become effective without further General Assembly action. The existence of this joint resolution provides ample evidence that the General Assembly has not previously authorized a state agency to establish minimum streamflow standards, and in fact has not done so even now.

For the foregoing reasons, then, it is the opinion of this Office that DHEC lacks statutory authority to require minimum streamflow as a means of controlling pollution, and that the General Assembly has recently enacted legislation which proves that it has not yet authorized any state agency to provide for minimum flow of surface water.

Nevertheless, it is obvious that the amount of flow in a stream affects the water quality of the stream, especially when the stream receives discharges, but also even in its natural condition. It is also possible that streamflow can be regulated to maintain water quality without, in every case, interfering with the riparian's right to reasonable use of the water; thus, for instance, where a proposed or existing use constitutes an unreasonable use of the water, the riparian use doctrine would afford no protection insofar as the use is unreasonable. This Office would therefore suggest the proposed regulation could be withdrawn and

modified to eliminate the problems it presently creates. An appropriate modification would be to add the following to Paragraph C(1)(b):

> Consistent with each riparian landowner's right to reasonable use of water, the streamflows necessary to support existing uses and the water quality supporting these uses shall be maintained.

Even as modified, however, this regulation would only authorize a limited amount of regulation and would in no way serve as a substitute for the sort of comprehensive streamflow regulation envisioned by Act No. 198 of 1983.

With regard to Paragraph C(1)(c), the provision relating to groundwater, this Office does not read the proposed regulation as an attempt to apportion the use of groundwater. This provision is similar to a longstanding provision in present R61-68(B)(1). Presumably, it is intended only to require that the uses to which groundwater is put shall not degrade it so as to make presently existing uses impossible.

Any reading of this regulation which would amount to an appropriation system for groundwater would be unlawful, because groundwater is also held to be subject to the right and restriction that each landowner is entitled to the reasonable use thereof. See 78 Am.Jur.2d Waters, § 158. Moreover, even in states which have adopted the appropriation doctrine for surface water have generally rejected it as to groundwater. Id., § 163.

For the same reasons stated above with regard to surface water, this Office is unable to find anything in the discharge-oriented Pollution Control Act which would authorize DHEC to create what would be in effect a groundwater appropriation system. Moreover, the General Assembly, in enacting the Groundwater Use Act, §§ 49-5-10, et seq., has already created a limited system for the allocation of groundwater, albeit only in those areas in which the Water Resources Commission has been requested by a local governmental body to act. This legislation delineates the extent to which the General Assembly has authorized the regulation of groundwater use, and it stops far short of the

proposed regulation. Again, however, the presently proposed regulation apparently is not intended as a groundwater appropriation measure.

Therefore, for all of the above reasons, it is the opinion of this Office that the proposed regulations in question exceed the statutory authority of DHEC.

Sincerely yours,

Kenneth P. Woodington
Senior Assistant Attorney General

KPW:rmr

REVIEWED AND APPROVED BY:

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