

1983 WL 181955 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 28, 1983

\*1 Mr. Stuart E. Greeter, Jr.  
Environmental Planner  
S.C. Heritage Trust  
S.C. Wildlife & Marine Resources Department  
Rembert C. Dennis Building  
Columbia, South Carolina 29201

Dear Mr. Greeter:

You have requested an opinion as to whether the dedication of a river bottom to the South Carolina Heritage Trust would prevent the construction of a dam that is permitted by the Federal Energy Regulatory Commission (FERC). Such a dedication would require, pursuant to § 51-17-90(5)(d), that the stream should not be dammed or have its course altered.

The Federal Energy Regulatory Commission was created by the Federal Power Act, [16 U.S.C. § 791 et seq.](#) That act is an exercise by Congress of the commerce power and regulates the development of water power and the improvement of navigation in the navigable waters of the United States. (The Catawba River at Landsford Canal has been deemed such a navigable watercourse by the Corps of Engineers under the expansive federal definition of navigability, and presumable FERC has also reached this conclusion.) Under [16 U.S.C. § 797\(e\)](#), FERC is authorized to issue licenses for hydroelectric dams such as the one proposed for the Catawba River. Thus, the question here presented is whether the State, by designating the area a protected natural resource, may prevent the construction of a dam which FERC, it is assumed for purposes of this question, will license.

While the question is not free from doubt and could well be contested by FERC if it decided to issue the license, [16 U.S.C. § 821](#) provides that the act shall not affect or interfere with state laws relating to control, appropriation or use of water or any vested right acquired therein. This section and several cases decided thereunder strongly suggest that the property rights of the Heritage Trust not to have the river dammed would take precedence over a FERC license. However, as mentioned above, the question could well be the subject of lengthy litigation with FERC.

Finally, it should be pointed out that the inclusion of the property within the Heritage Trust Program might well be a factor in persuading FERC to deny the license. If that were to occur, then of course the question raised above would not arise.

Please feel free to call for further advice or information as this matter progresses.

Sincerely yours,

Kenneth P. Woodington  
Senior Assistant Attorney General

1983 WL 181955 (S.C.A.G.)