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Water Law Reform in South Carolina

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Surface water comprises one percent of South Carolina's total water resources, yet South Carolina relies extensively on surface water to supply its water needs. In South Carolina, approximately 2.8 million people out of a total population of 4.2 million rely on surface water for drinking and other uses.[1] In 2006, 16.3 trillion gallons, or approximately 99.3% of total water use, were withdrawn from surface water to accommodate power generation, water supply, agricultural operations, golf course irrigation, industrial operations, and mining.[2] About 98% of South Carolina's surface water is used for power generation.[3] Nine power utilities operate in South Carolina, with 51 power plants containing 206 generators at a total rating capacity of 18,827.4 megawatts.[4] Excluding power generation, the remaining water use categories and amount of surface water withdrawn in 2006 is shown below:

Year 2006	**Surface Water Withdrawn (million gallons)**	**% of Surface Water Use**
Aquaculture	171.87	.05%
Golf Courses	9,275.15	2.68%
Industrial	138,188.07	40.0%
Irrigation	11,176.64	3.24%
Mining	498.44	.14%
Water Supply	186,149.20	53.88%
TOTAL	**345,459.37**	**100%**

Data Source: SCDHEC, Bureau of Water, S.C. Water Use Report: 2006 Annual Summary

With droughts seemingly becoming a common occurrence in the Southeast, and

[1] S.C. Department of Heath and Environmental Control, Bureau of Water, *South Carolina Water Use Report: 2006 Annual Summary*, 1 (July 2007) (*available at*: http://www.scdhec.net/environment/water/capuse. htm#reports).
[2] *Id*.
[3] *Id*.
[4] *Id*. at 11.

population growth booming in the region as well, Southeastern states can no longer take for granted an unlimited supply of water. During the 1990s, South Carolina's overall population grew by 15% with growth occurring mostly along the coast and in metropolitan areas.[5] During this same time period, water consumption in South Carolina rose by 20%.[6] According to the United States Geological Survey, South Carolina leads the Southeast in the intensity of water withdrawals, consuming from 220,000 to 300,000 million gallons per day per square mile.[7] South Carolina is expected to experience a 15% increase in population by 2025.[8] South Carolina must manage its water more efficiently in order to meet the challenges that population growth and climate change may bring in the future.

South Carolina has adopted several statutes concerning surface water quantity.[9] In 1967, the S.C. Water Resources Planning and Coordination Act was enacted, charging the State's natural resource agency with developing water policy and creating a State Water Plan.[10] Since 1982, a Surface Water Surface Water Withdrawal and Reporting Act has required surface water withdrawals exceeding three million gallons a month to report such use.[11] In 1985, South Carolina enacted its Interbasin Transfer Act,[12] and the South Carolina Drought Response Act.[13] These statutes leave intact South Carolina's common law governing water allocation.[14] To understand the need for a surface water permitting scheme in South Carolina, a look at South Carolina's riparian common law provides useful context.

1. Riparian Common Law in South Carolina

The basic law governing natural watercourses in South Carolina is the common law riparian doctrine. Riparian litigation in South Carolina reached its pinnacle during the advent of the industrial age, when upstate mills and cotton manufacturing plants turned to rivers and streams for energy supply.[15] Since the 1920s, riparian law has lain dormant except for sporadic disputes concerning related littoral rights. Because South Carolina case law concerning riparian rights is relatively sparse, many riparian questions remain unanswered by South Carolina courts.

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[5] Urban Land Institute, *Growing by Choice or Chance: State Strategies for Quality Growth in South Carolina*, p. 8 (2003).
[6] Georgia Tech, Center for Quality Growth and Regional Development, *Emerging MegaRegions: Studying the Southeastern United States*, p. 4 (Jan. 2006) (*available at*: http://www.cqgrd.gatech.edu/PDFs/PAM_overview _1-30-06.pdf).
[7] Susan S. Hutson, Nancy L. Barber, Joan F. Kenny, Kristin S. Linsey, Deborah S. Lumia, and Molly A. Maupin, USGS, *Estimated Use of Water in the United States in 2000*, p. 12 (Rev. 2005) (*available at*: http://pubs.usgs.gov/circ/2004/circ1268/).
[8] *Id*.
[9] Since 1990, South Carolina has regulated groundwater use. *See* S.C. Code Ann. § 49-5-10 *et seq*.
[10] S.C. Code Ann. § 49-3-10 *et seq*.
[11] S.C. Code Ann. § 49-4-10 *et seq*.
[12] S.C. Code Ann. § 49-21-10 *et seq*.
[13] S.C. Code Ann. § 49-23-10 *et seq*.
[14] *See, e.g.* the S.C. Interbasin Transfer Act, S.C. Code Ann. § 49-21-20(G) ("Any riparian landowner or person legally exercising rights to use water, suffering material injury for the loss of water rights as a consequence of an interbasin transfer shall have a cause of action against the water transferor in the court of common pleas of the county in which the water transfer originates to recover all provable damages for loss of riparian rights including increases in operating costs, lost production, or other damages directly caused him by the interbasin transfer …).
[15] William F. Steirer, Clemson University, *The Evolution of South Carolina Water Law 1783-1985*, p. 4 (WP082187 Clemson University, undated).

A person who owns property contiguous to a natural watercourse is a riparian. A natural water course is a stream or river flowing in a definite channel and discharges into some other stream or water body.[16]

Under riparian law, a riparian owner has a property right to the access and use of the stream flow running through his/her property. A riparian owner does not have a claim of ownership of the water itself.[17] The nature of the right is a right of use only. The riparian right to use water is automatically conveyed in the transfer of title to riparian land.[18] Whether water is used or not does not alter a riparian right, nor extinguish it.[19] Whether a watercourse is navigable has no bearing on the determination of a riparian right.[20] Each riparian owner has an equal right of use, subject to the corresponding rights of others.[21]

A riparian may make beneficial use of water accessible from his or her property. The traditional riparian right of use includes the right to use water for domestic, agricultural and recreational purposes, to use the shoreline or bank for access to water, and to construct a dock or pier.[22] Further, a riparian owner has a right to detain water temporarily by means of a dam so long as it is reasonable and used for rightful purposes.[23] South Carolina courts have not given preference to one particular type of use over others.

There are limitations to the riparian right of use. First, a riparian owner may use water only for the benefit of his or her riparian land.[24] This limitation primarily affects water utilities who, by their very nature, distribute water off of riparian land to its customers. Although South Carolina courts have not addressed this limitation, a majority of states hold that diversion of water by a riparian public water utility for distribution to its non-riparian customers is not considered to be a valid riparian use.[25] "It has been held with practical unanimity that a municipal corporation, in its construction and operation of a water supply system, by which it impounds the water of a stream and distributes such water to its inhabitants, receiving compensation therefore, is not in the exercise of the traditional right of a riparian owner …."[26] Such use is deemed extraordinary and unreasonable, subjecting a municipality to liability.[27]

Second, the use of water must be reasonable. In *White v. Whitney Manufacturing Company,* the South Carolina Supreme Court established the riparian rule of reasonableness, stating that "[e]ach proprietor is entitled to such use of the stream, so far as it is reasonable … and not inconsistent with a likewise reasonable use by the other proprietors of land on the same stream above and below."[28] The amount of water that a riparian owner may need does not

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[16] *Lawton v. South Bound R.R.*, 39 S.E. 752, 753-754 (S.C. 1901).
[17] *White v. Whitney Mfg. Co.,* 38 S.E. 456, 460 (S.C. 1901).
[18] 78 AM. JUR.2d § 32.
[19] *Id*.
[20] 78 AM. JUR. 2d *Waters* § 32.
[21] *McMahan v. Walhalla Light & Power Co*., 86 S.E. 194, 195 (S.C. 1915).
[22] 78 AM. JUR. 2d Waters § 35.
[23] 93 C.J.S. *Waters* § 25.
[24] Charles E. Hill, *Limitation on Diversion from the Watershed: Riparian Roadblock to Beneficial Use*, 23 S.C. L.REV. 43, 59 (1971).
[25] *See* 141 A.L.R. § 639 (the majority rule, that municipalities have no right to divert water off riparian land for water supply, is followed by Alabama, Connecticut, Georgia, Indiana, Kansas, Maine, Massachusetts, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Dakota, Virginia and Washington).
[26] *Pernell v. City of Henderson*, 16 S.E.2d 451 (N.C. 1941); *see also Town of Purcellville v. Potts*, 19 S.E.2d 700, 703 (Va. 1942); *State of N. C. v. Hudson*, 665 F.Supp. 428, 447 (E.D. N.C. 1987); *Harrell v. City of Conway*, 271 S.W.2d 924, 927 (Ark. 1954).
[27] *Town of Purcellville v. Potts*, 19 S.E.2d 700, 702 (Va. 1942).
[28] *White v. Whitney Mfg. Co*., 38 S.E. 456, 457 (S.C. 1901).

necessarily equate to reasonable use.[29] If a riparian owner needs more water for his business than he is entitled to, then he must pay for it.[30] What is deemed reasonable use depends upon the particular circumstances at hand.[31] South Carolina courts have identified the width, depth and capacity of a stream, the volume of water, and common usage within the community, as factors to consider in determining reasonable use.[32] In South Carolina, increased turbidity of a river caused by mining upstream, which damaged a boiler, was found to be unreasonable.[33] A cotton mill's flooding of a downstream riparian by retention of water, then release of water in a volume that exceeded the stream capacity, was found to be unreasonable.[34] An upstream riparian dumping raw sewage into a river was found to be unreasonable.[35] For a use to be unreasonable, the use must cause "appreciable damage."[36] Whether a use is reasonable is a fact dependent inquiry for a jury to decide.[37] No recent South Carolina cases exist that indicate what may be considered unreasonable in modern times.

Third, riparian use is limited by the State's exercise of police power. "Each state … is authorized to delineate the extent of riparian rights appurtenant to property within its borders."[38] And fourth, navigable watercourses are subject to a navigational servitude. The State controls water below the ordinary high water mark of navigable streams.[39] Such property is held by the State in public trust for public use. Watercourses impressed with the public trust confer to the public a right of access for travel, recreation and navigational purposes.[40] A riparian owner cannot prevent public use of navigable waters.[41]

The problems of riparian common law have been well dissected by legal scholars and will only be briefly identified here.[42] Because what is considered reasonable water use changes over time, riparian owners lack certainty that the quantity of their use would survive challenge in the future.[43] Furthermore, riparian common law does not adequately take into account the public interest in water use.[44] And the question of allocation in times of drought is largely unanswered under riparian law.[45] Droughts in the early 1950s and from 1980-1982 caused South Carolina to re-examine its riparian law and the recent droughts are prompting the same assessment.

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[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 457.
[33] *Griffin v. Nat'l Light & Thorium Co*., 60 S.E. 702, 703 (S.C. 1908).
[34] *Mason v. Apache Mills*, 62 S.E. 399, 400 (S.C. 1908).
[35] *Lowe v. Ottaray Mills*, 77 S.E. 135, 136 (S.C. 1913).
[36] *Chalk v. McAlily*, 45 S.C.L. (11 Rich.) 153, 162 (S.C. 1857).
[37] *White v. Whitney Mfg. Co*., 38 S.E. 456, 458 (S.C. 1901).
[38] *Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 784 (S.C. Ct. App. 2001)
[39] *Sierra Club v. Kiawah Resort Ass'n*, 456 S.E.2d 397, 402 (S.C. 1995).
[40] *Id*.
[41] *Id*.
[42] *See, e.g.,* Richard C. Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 547 (1983); Robert H. Abrams, *Replacing Riparianism in the Twenty-First Century*, 36 WAYNE L. REV. 93 (1989); Joseph W. Dellapenna, *Adopting Riparian Rights to the Twenty-First Century*, 106 W. VA. L. REV. 539 (2004).
[43] Joseph W. Dellapenna, *Adopting Riparian Rights to the Twenty-First Century*, 106 W. Va. L. Rev. 539, *16 (2004).
[44] Richard C. Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 554 (1983).
[45] Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern United States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, *16 (2002).

3. Impetus for Change

The adage that crisis brings about opportunity is certainly true in the context of water resource management. Recent droughts that have ravaged South Carolina and other southeastern states brought water resource planning and protection into sharp focus among South Carolina policy makers and water managers. The Southeast experienced one of the worst droughts on record from 1998-2002.[46] In South Carolina, stream flows reached historic flows, causing saltwater to push inland from coastal plain rivers and threaten public water supply intakes.[47] Lake Thurmond on the Savannah River almost exhausted its storage for downstream flow requirements.[48] Reservoirs on the Yadkin-Pee Dee, a river basin shared by North Carolina and South Carolina, were almost drained to meet water demands downstream and to prevent saltwater contamination of water supply intakes in the Myrtle Beach area.[49]

In response to the 1998-2002 drought, Governor Sanford appointed a Water Law Review Committee to "advise the Governor about initiatives needed to preserve, maintain, and manage the water resources of [South Carolina] to ensure available and affordable quantities and qualities of water for present and future multiple uses."[50] This Committee highlighted the inadequacies of riparian common law. It called attention to the problem that "the cumulative effect of all riparian owners … withdrawing water may be reasonable as to each other, but fails to account for what is reasonable for protection of the entire river system as a public resource."[51] Further, the Committee pointed out the inherent uncertainties in the lawfulness of a water withdrawal under riparian law.[52] The Committee also focused attention on the need for proactive efforts to manage interstate rivers with our neighboring states of Georgia and North Carolina with the goal of negotiating interstate water compacts that allocate waters between the states.[53] In order to successfully negotiate and enforce interstate water compacts, the Committee concluded that the State needed to enact a surface water permitting system so that a compact may be enforceable.[54] To address the issues of both intrastate and interstate water resource management, the Committee urged South Carolina legislators to enact a comprehensive surface water permitting scheme.[55]

In 2004, the Governors of South Carolina and Georgia each appointed Savannah River Committees to establish communication between the States and work together to solve issues of

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[46] S.C. Dep't of Natural Resources, *South Carolina Water Plan*, p. iv (2nd ed. 2004) (*available at*: http://www .dnr.sc.gov/water/ admin/pubs/pdfs/SCWaterPlan2.pdf).
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] Governor Sanford Exec. Order 2003-16 (filed June 24, 2003) (*available at*: http://www.scgovernor.com/uploads/executiveorders/2003-16%20Creating%20Water%20Law %20Review%20Committee.pdf).
[51] Report of Governor Sanford's Water Law Review Committee, p. 13 (Jan. 2004).
[52] *Id*. at 9, 15.
[53] *Id*. at p. 19-25.
[54] *Id*. at 15.
[55] Governor Sanford's Water Law Review Committee, Water Law Report, p. 12-18 (Jan. 2004) (*available at:* http://scwaterlaw.sc.gov/Governors%20W% 20L%20R%20%20Report%20revised4_ 27.pdf).

mutual concern affecting the Savannah.[56] Among these issues was apportionment of the Savannah River's waters. Foreseeing the possibility of Georgia solving its dire water supply problems through interbasin transfers from the Savannah, the Committee sought to initiate negotiation of an interstate allocation of the Savannah River in order to prevent the type of intractable water conflict seen among Georgia and its other neighboring states. The South Carolina Savannah River Committee advocated for a surface water permitting bill so that interstate allocation could be definable and accountable.

Also in 2004, a bi-state commission was created by the state legislatures of both South Carolina and North Carolina to provide an advisory forum for integrated management of the Catawba-Wateree and Yadkin-Pee Dee River Basins.[57] In 2006 and 2007, the relationship between North Carolina and South Carolina became strained over a highly emotional and controversial request for an interbasin transfer in North Carolina from the Catawba-Wateree River.[58] As the downstream State, South Carolina complained that North Carolina's interbasin transfer would harm South Carolina during drought conditions.[59] Ultimately, the Attorney General of South Carolina brought suit against North Carolina in the United States Supreme Court, seeking an equitable apportionment of the Catawba-Wateree River.[60] This experience subtly shaped support for a surface water permitting bill in South Carolina by soothing fears, real or imagined, that water was escaping from the State's grasp.

In 2006, a surface water permitting bill was introduced in the South Carolina Senate, and referred to the Senate Agriculture and Natural Resources Committee.[61] The bill was swiftly killed in Committee by industry groups who strongly opposed state regulation of their water withdrawals. In 2007, the need to adopt a surface water permitting bill took on more urgency in the face of the current devastating drought afflicting the southeastern states.

4. The Current Surface Water Permitting Bill

During the 2007-2008 Legislative Session, another effort was made to pass a surface water permitting bill. Senate Bill 428 and House Bill 3578 (hereinafter referred to as "Bill"), drafted by the South Carolina Department of Health and Environmental Control ("SCDHEC"), was introduced and read for the first time in February 2007, and referred to the Senate and House Agriculture and Natural Resources Committees. The bill as originally drafted was largely drawn

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[56] Governor Sanford Exec. Order 2005-14 (filed June 21, 2005) (*available at*: http://www.scgovernor.com/uploads/executiveorders/2005-14CreatingtheGovernorsSavannahRiverCommittee .pdf); Governor Purdue Exec. Order (filed June 21, 2005) (available at: http://www.gov.state.ga.us/ExOrders 06_21_05_01.pdf).
[57] S.C. Code Ann. § 44-59-10 *et seq*. and N.C. Gen. Stat. § 77-110 *et seq*.
[58] See website of the Catawba Riverkeeper Foundation, http://www.catawbariverkeeper.org, to gain a sense of the organized and angry opposition to the transfer.
[59] S.C. Department of Natural Resources, *Summary of Catawba-Wateree Basin Natural Flows and the Impact of Water Transfers from that Basin in North Carolina* (May 31, 2007) (*available at*: http://www.scattorneygeneral.com/currentcases/ waterwar.html).
[60] *South Carolina v. North Carolina*, No. 22O138 (United States Supreme Court) (filed June 8, 2007) (*available at*: http://www.scattorneygeneral.com/currentcases/ waterwar.html).
[61] S.B. 1159, 2005-2006 Leg. 116th Sess. (S.C. 2006).

from South Carolina's existing Interbasin Transfer Act and the Regulated Riparian Model Water Code.[62] It was intended to serve merely as a placeholder until the important aspects of permitting could be negotiated among water users and environmental groups. Learning its lesson from last session, SCDHEC organized a group of water users to work on a draft bill to replace the filed bill and received input from the SC Catawba-Wateree Advisory Commission. This version seemed to fall by the wayside in light of the efforts by the Chairman of the Senate Agricultural and Natural Resources Committee to craft a new bill that could be supported by industrial waters, municipal water suppliers, and environmental groups. At the same time, the South Carolina Chamber of Commerce worked on its own version of a surface water permitting bill. Both the Committee version and the S.C. Chamber of Commerce version were heavily influenced by fears from industrial water users, farmers, and power utilities that a surface water permitting scheme would upset their water use expectations. As a result, the bill at the time of this writing confers considerable protection to existing water users. However, it is important to note that the Bill analyzed for purposes of this paper may change as it moves through the legislative process. As of April 3, 2008, the Bill was reported from the Senate Agriculture and Natural Resources Committee to the full Senate, with a majority of the Committee recommending approval and a minority recommending disapproval.[63]

The Bill requires intrabasin surface water withdrawers to apply to SCDHEC for a surface water withdrawal permit.[64] Interbasin transfers remain subject to the S.C. Interbasin Transfer Act.[65] A "surface water withdrawer" is defined as "a person withdrawing surface water for any purpose, other than an interbasin transfer … in excess of three million gallons during any one month from a single intake or multiple intakes under common ownership within a one-mile radius from any one existing or proposed intake."[66] "Withdrawal" is defined as "to remove or divert, water from its natural course or location regardless of whether the water is returned to its waters of origin, consumed, or discharged elsewhere but does not include interbasin transfers."[67] Thus, a person making intrabasin withdrawals from a stream, river, pond, lake or reservoir in quantities greater than three million gallons during any one month are subject to the requirements of the Act as opposed to the rules of riparian common law.

Exempt from the permit requirements of the Act, and thus still operate under riparian common law, are 1) withdrawals associated with active instream dredging or sand mining operations or other non-consumptive instream mining operations; 2) emergency withdrawals; 3) agricultural uses from a farm pond owned by the person making the withdrawal or situated on two or more separately owned parcels; 4) withdrawals from a pond completely situated on private property and fed from diffuse surface water or springs located entirely on that private

[62] American Society of Civil Engineers, Water Laws Committee, Joseph W. Dellapenna, ed., *The Regulated Riparian Model Water Code* (ASCE 1997).
[63] See history of legislative actions at http://www.scstatehouse.net/sess117_2007-2008/bills/428.htm.
[64] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-25 (S.C. 2007).
[65] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-20(26) (S.C. 2007). The Bill does, however, amend the Interbasin Transfer Act to require public hearings on applications for interbasin transfers, which is comparable to North Carolina's Interbasin Transfer Act, N.C.G.S.A. § 143-215.22L.
[66] *Id*. at (25).
[67] *Id*. at (26).

property; and 5) withdrawals, use or discharges for the purpose of wildlife management.[68] Withdrawals for non-consumptive flow-through hydropower generation is exempt from all requirements of the Bill except for reporting of amounts of water withdrawn.[69]

To address the reality of public water providers transporting surface water from riparian land for use by non-riparians, the Act abrogates riparian common law by expressly stating that use of water on non-riparian land is lawful and shall be treated the same as use of water on riparian land in an administrative or judicial proceeding relating to allocation, withdrawal, or use of water.[70] As a result, public water providers are given protection from claims of unlawful use under riparian common law.

A surface water withdrawal permit "confers a right upon the permittee to withdraw and use surface water pursuant to the terms and conditions of the permit."[71] SCDHEC must issue a permit if the proposed use is reasonable.[72] In its determination of reasonableness, DHEC must first determine the minimum instream flow or minimum water level for the water source at issue and then consider the following criteria.[73]

> (1) the minimum instream flow or minimum water level and the safe yield for the surface water at the location of the proposed surface water withdrawal;
> (2) the anticipated effect of the applicant's proposed use on existing users of the same surface water, including, but not limited to present agricultural, municipal, industrial, electrical generation and instream users;
> (3) the reasonably foreseeable future water need for the surface water, including, but not limited to reasonably foreseeable agricultural, municipal, industrial, electrical generation, and instream uses;
> (4) the applicant's reasonably foreseeable future water needs from that surface water;
> (5) the beneficial impact on the State and its political subdivisions from a proposed withdrawal;
> (6) the impact of the applicable industry standard on the efficient use of water, if followed by the applicant;
> (7) the anticipated effect of the applicant's proposed use on:
> a. interstate and intrastate water use if the permit is granted;
> b. likelihood of significant detrimental impact of a proposed withdrawal on navigation, fish and wildlife habitat, or

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[68] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-30(A) (S.C. 2007).
[69] *Id*. at (B).
[70] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-60 (S.C. 2007).
[71] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-110(A) (S.C. 2007).
[72] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-90(E) (S.C. 2007).
[73] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-90(B) (S.C. 2007).

recreation;
c. public health and welfare; and
d. economic development and the economy of the State;
(8) applicable federal laws and interstate agreements and compacts; and
(9) any other reasonable criteria that DHEC promulgates by regulation that it considers necessary to make a final determination.[74]

Permit issuance based upon a determination of reasonableness resolves the common law riparian problem of uncertainty over whether a certain use is reasonable. The Bill's criteria for reasonableness also provides security to existing users by giving preference to existing surface water withdrawers over future surface water withdrawers.[75]

The Bill also injects public interest considerations in the calculus of reasonableness. The reasonableness criteria include the public interest in navigation, fish and wildlife habitat, recreation, public health and welfare, conservation, and economic development.[76] However, SCDHEC's consideration of navigation, fish and wildlife habitat, and recreation are constrained to whether the withdrawal may have the likelihood of *significant detrimental* impact upon these interests.[77] Furthermore, consideration of conservation measures are limited to industry standards for efficient use of water, if the applicant uses such standards.[78] The Bill does not define what is considered to be an acceptable industry standard. Overall, the public interest factors are a welcome addition to the determination of reasonableness even though the narrowness of the public interest factors does not encourage applicants to conserve water. In an interstate water dispute, the paucity of conservation requirements may weigh against South Carolina.[79]

The scant attention to conservation in the determination of reasonableness is mitigated somewhat by the Bill's requirement that every permittee prepare an operational and contingency plan for low flow events.[80] As part of the permit, the permittee must develop and implement a contingency plan for circumstances during which the actual flow of surface water is less than the established minimum instream flow for the water body from which the withdrawal is made.[81] This plan must implement a strategy to respond to low flow conditions such as conservation, alternative water supplies, off-stream water storage, seasonal flow variations and reduced downstream releases from hydroelectric operations.[82] In the event that low flow is caused by drought, actions taken pursuant to the South Carolina Drought Response Act take precedence over any conflicting provisions of the Bill.[83]

[74] *Id*.
[75] *Id*. at (2) and (4).
[76] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-90(B)(7) (S.C. 2007).
[77] *Id*. at (B)(7)(b).
[78] *Id*. at (6).
[79] *See Colorado v. New Mexico*, 467 U.S. 310, 320 (1984) (stating that a State's conservation measures is a factor in balancing the equities of water diversion).
[80] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-170(A) (S.C. 2007).
[81] *Id*.
[82] *Id*.
[83] *Id*. at (B).

All surface water withdrawals approved by SCDHEC are presumed to be reasonable.[84] It is unclear whether this presumption is rebuttable. Surface water withdrawers are immune from any private cause of action for damages so long as they comply with applicable requirements of the Bill.[85] Because the Bill's immunity provision refers only to damages, injunctive relief appears to be available to a downstream riparian owner.

The Bill charges SCDHEC with establishing minimum flows for every surface water segment or minimum level in an impoundment from which a withdrawal is to be made.[86] At the outset, the Bill creates a special rule pertaining to surface water withdrawals located on a water segment downstream from a flow-controlled impoundment.[87] In this situation, the Bill prohibits SCDHEC from establishing a minimum instream flow for a withdrawal downstream from and influenced by an impoundment that is "less than the lowest flow specified by the appropriate regulatory authority pursuant to controlling law in effect at the time of the permit, as may be amended or superceded."[88] The downstream applicant is afforded an opportunity to present a different instream flow for SCDHEC's consideration, which SCDHEC may accept if certain conditions are met.[89]

The issue of how other minimum instream flows are established has become the most controversial aspect of the Bill. SCDHEC is empowered to promulgate regulations necessary to establish minimum instream flows for surface water not influenced by an impoundment.[90] In the Senate Agriculture and Natural Resources Committee, business interests lobbied for the Bill to establish the minimum flow at "7Q10," the annual minimum seven-day average flow rate that occurs with an average frequency of once in ten years. 7Q10 is essentially a drought level of flow. State environmental agencies and environmental groups strenuously opposed this effort. After a contentious Committee meeting, the Committee directed all stakeholders to work out a compromise. The S.C. Chamber of Commerce proposed an amendment that established the minimum instream flow at 20% of mean annual daily flow. Environmental groups argued that 20% of mean annual daily flow was still too low, and artificially "flat-lined" rivers by maintaining 20% mean annual daily flow year-round instead of reflecting seasonal variations in stream flow.[91] Each interest group stood firm on their respective positions, and the Senate Committee was deadlocked. On March 26, 2008, the Senate Committee adopted the Bill with its own crafted compromise. In lieu of establishing minimum flows in the Bill, the Committee chose to include language that created an advisory committee to recommend minimum flows to SCDHEC.[92]

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[84] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-110(B) (S.C. 2007).
[85] *Id*.
[86] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-150(A)(1) (S.C. 2007).
[87] *Id*.
[88] *Id*.
[89] *Id*. at (2) and (3).
[90] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-180(A)(1) (S.C. 2007).
[91] Bo Petersen, *Another Skirmish on Tap in State's Water War*, The Post and Courier (March 13, 2008) (*available at*: http://www.postandcourier.com/news /2008/mar/13/ another_skirmish_on_tap_states _water_war33713/).
[92] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-185(A) (S.C. 2007).

The issue of equitable treatment among water users may become the subject of some controversy. Certain water uses are treated differently than others. Some differential treatment is justified, such as the Bill's lesser standards for non-consumptive uses. Under the Bill, surface water released from a reservoir for hydropower purposes is only required to be reported.[93] Hydropower operations are generally instream, non-consumptive uses, which typically do not raise concerns outside of a hydropower licensing process. Similarly, any non-consumptive withdrawals are only required to report the amount of water withdrawn.[94] Non-consumptive uses are defined as a "use of surface water withdrawn in such a manner that it is returned to its waters of origin at or near its point of withdrawal with no or minimal changes in water quantity."[95] DHEC must issue a permit for non-consumptive uses so long as the withdrawal will result in no or minimal changes in water quantity at the point of withdrawal.[96] Because non-consumptive uses put water back into the river or reservoir, the Bill's lenient treatment for this category of uses is not objectionable; however, one shortcoming in the Bill's treatment of non-consumptive users is that they are not required to prepare an operational and contingency plan for low flow conditions.

Treatment of other uses may not be so justifiable. The Bill does not require agricultural users to obtain a permit.[97] Instead, the Bill creates a separate category – a registered surface water withdrawer - for agricultural users, which requires only that they report their surface water withdrawals.[98] An existing agricultural withdrawer is entitled to maintain its reported level of surface water without any consideration of minimum instream flows, or whether the withdrawal amount is reasonable.[99] New agricultural water users need only register their withdrawals as well, but cannot begin surface water withdrawals unless SCDHEC determines that the proposed quantity is within the safe yield for that water source.[100] This differential treatment between existing agricultural users and new agricultural users provides an advantage to existing agricultural users. If South Carolina's agricultural use of surface water was significantly higher than its current amount of 3.24% of all surface water use (excluding power production), then the Bill's de facto exemption of existing agricultural users and minimal regulation of new agricultural users could lessen the effectiveness of the Bill. In any event, the degree of protection afforded to agricultural users raises issues of fairness, especially in light of the fact that a registered agricultural user is immune from a private cause of action for damages arising directly from the user's withdrawals unless the plaintiff can show a violation of the user's registration.[101]

Although the State must offer some special protections for vested water withdrawers, the Bill's treatment of all other vested surface water withdrawers serves to entrench these users. An

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[93] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-40(A)(2) (S.C. 2007).
[94] *Id*.
[95] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-20(14) (S.C. 2007).
[96] *Id*.
[97] The Bill states that "nothing in this chapter prohibits a registered user from applying for and obtaining a surface water withdrawal permit." S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-35(G) (S.C. 2007).
[98] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-35(A) (S.C. 2007).
[99] *Id*. at (B).
[100] *Id*. at (C).
[101] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-110(B) (S.C. 2007).

existing surface water withdrawer is defined as "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 an intake permit application filed before January 1, 2008."[102] For existing water users (aside from hydropower, non-consumptive, and agriculture uses), DHEC must issue an initial permit without consideration of reasonableness of the withdrawal amount, nor consideration of minimum instream flows.[103] The initial permit must authorize a withdrawal amount equal to its documented historical water use, capacity of a pending intake permit application, or an amount necessary to recover indebtedness from an outstanding revenue bond, whichever is greater.[104] Additionally, for existing water users, the operation and contingency plan for low flow conditions must "only address appropriate industry standards for water conservation."[105] An existing water user's initial permit must be issued for a term of thirty years, or up to forty years if SCDHEC finds a longer period to be reasonable given the particular facts and circumstances of the withdrawal.[106] Existing water users are immune from a private cause of action for damages arising directly from the user's withdrawals unless the plaintiff can show a violation of the user's permit.[107]

New water users must undergo DHEC's evaluation of reasonableness and all other permit requirements.[108] A new surface water withdrawer may receive a permit for a term of twenty years, or up to forty years if SCDHEC finds a longer period to be reasonable given the particular facts and circumstances of the withdrawal.[109] Governmental entities may receive a permit for any period of time necessary, not exceed fifty years, in order to recover indebtedness from outstanding water revenue bonds.[110]

SCDHEC may modify, suspend, or revoke a permit if a permittee fails to comply with the terms of the permit, obtains a permit through misrepresentation or failure to disclose a material fact in the application, or ceases to withdraw water for at least 36 consecutive months.[111] Additionally, SCDHEC may modify, suspend or revoke a permit if "a change in circumstances results in a permitted activity endangering human health or the environment and can only be prevented by a temporary or permanent modification or termination."[112]

A permittee may apply for a modification of permitted withdrawal amounts.[113] If the requested increase in withdrawal is significant, then the request must be evaluated for reasonableness.[114]

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[102] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-20(9) (S.C. 2007).
[103] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-70(b)(1) (S.C. 2007).
[104] *Id*.
[105] *Id*. at (B)(2).
[106] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-100(B)(2) (S.C. 2007).
[107] *Id*. at (B).
[108] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-70(A) (S.C. 2007).
[109] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-100(B)(1) (S.C. 2007).
[110] *Id*. at (B)(3).
[111] S.B. 428, 2007-2008 Leg., 117th Sess. § 49-4-120(A)(1)-(3) (S.C. 2007).
[112] *Id*. at (4).
[113] *Id*. at (C)(2).
[114] *Id*.

Surface water permits shall not be transferred without prior written consent from SCDHEC.[115]

5. Concluding Thoughts

The double whammy of two severe droughts occurring in the Southeast over the past decade has motivated South Carolina to take stock of its water assets and re-evaluate its water management policies and practices. The droughts caused South Carolina to look both inward and outward. Water supply shortages within South Carolina forced water managers to assess the State's performance in responding to drought, taking a critical look at South Carolina's water law. Looking beyond its boundaries, South Carolina's attention was riveted by the drought's devastating impact on its neighboring states. Amid speculation of the City of Atlanta turning to the Savannah River as its solution to its water problems, South Carolina began taking a defensive posture. Similarly, North Carolina's approval of an interbasin transfer from the Catawba-Wateree River sparked a firestorm of opposition in South Carolina, which culminated in an original suit brought by the South Carolina Attorney General against the State of North Carolina in the United States Supreme Court. Fortifying South Carolina's water laws was seen as essential to protecting its share of interstate water resources.

Water users in South Carolina have mightily resisted efforts to establish a surface water permitting scheme. In 2007, business interests could no longer forestall a surface water permitting bill, so they drafted their own bill and successfully lobbied the Senate Agriculture and Natural Resources Committee to adopt its bill largely intact. As far as the bill's chances of passage, it is too soon to tell. But at this point in time, the fear of scarcity may trump the fear of regulation. State Senator Chip Campsen may have summed it up the best, stating that a surface water permitting law is "not about shutting down industry," but rather, "it's about preserving a way of life."[116]

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[115] *Id*. at (B).
[116] Bo Petersen, *Senate Panel Considers Water Plan*, The Post and Courier (March 19, 2008) (*available at*: http://www.charleston.net/news/2008/mar/19/senate_panel_considers_water_plan34252/?).