



January 12, 2024

VIA CERTIFIED MAIL AND EMAIL

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Southern Environmental Law Center
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Re: Petition for Declaratory Rulings and Rulemaking

Dear Mr. Holleman and Mr. Brzorad:

The South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) is in receipt of your Petition for Declaratory Rulings and Rulemaking and Memorandum in Support (together, “the Petition”), dated December 4, 2023, filed on behalf of Friends of the Edisto, American Rivers, and South Carolina Wildlife Federation.

The Petition seeks the following:

- (1) A declaratory ruling that DHEC’s “safe yield” calculations in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)–(B) are inconsistent with and violate the Withdrawal Act and are outside the agency’s authority and illegal.
- (2) A declaratory ruling that DHEC will immediately cease applying, implementing, or relying on these unlawful “safe yield” regulations and will faithfully obey, follow, implement, and carry out the provisions of the Withdrawal Act.
- (3) The initiation of a rulemaking to repeal those unlawful provisions and amend the rules to add lawful calculations of “safe yield.”

Based upon the Department’s review of the Petition, the South Carolina Surface Water Withdrawal, Permitting, Use, and Reporting Act, S.C. Code Ann. § 49-4-10, et seq. (“the SWWA” or “the Act”) and its implementing regulation, S.C. Code Ann. Regs. 61-119 (“R. 61-119”), Petitioner misapprehends the application of the definition of minimum instream flow as it relates to the calculation of safe yield. Minimum instream flow triggers real-time actions only by permitted withdrawers when actual conditions warrant. On the other hand, safe yield applies to both permitted withdrawers and registered withdrawers. Because it must be determined before a permit is issued or a registration is acknowledged, the Department consistently and conservatively calculates safe yield based on average annual daily flow that takes into account water availability over time.

Responding to the Petition, the Department states as follows:

Declaratory Ruling:

The ‘safe yield’ calculation methodology included in R. 61-119 is consistent with the statutory directives of the SWWA and within DHEC’s authority to promulgate. DHEC will continue applying and implementing these provisions based upon their lawful promulgation and consistency with the SWWA.

Response to Petition for Rulemaking:

At this time, DHEC will not initiate the requested rulemaking to amend R. 61-119. DHEC has held stakeholder meetings which included technical assessments of multiple potential alternative methods for calculating ‘safe yield’. Ultimately, those meetings and assessments did not identify a method of calculating ‘safe yield’ within the authority given to DHEC in the SWWA that would be a significant improvement relative to the current calculation method. Stakeholders have expressed the opinion there are more consequential issues with the SWWA and R. 61-119 than the ‘safe yield’ calculation itself. DHEC believes that the concerns identified by stakeholders—including the concerns currently expressed by the Petitioners—can be more appropriately addressed through the SWWA by the Legislature. If improvements in how South Carolina’s surface water resources are managed are identified, DHEC is committed to assisting with the development of recommendations concerning the SWWA for consideration by the Legislature.

Background:

- The SWWA was enacted during Legislative Session 118 (2009-2010) and went into effect on January 1, 2011.
- As authorized by the SWWA, the Department initiated the regulation promulgation process which included a notice of drafting, notice of proposed regulation, submittal to the General Assembly for review, and publication of the final regulation in the *State Register*. The promulgation process included a public comment period and a public hearing, allowing DHEC to receive input from key stakeholders such as public water suppliers, industry, environmental organizations, and agriculture. After completion of the promulgation process, R. 61-119 went into effect on June 22, 2012.
- In response to comments from stakeholders regarding the ‘safe yield’ calculation, DHEC hosted a series of stakeholder meetings during the Spring and Summer of 2020. During these meetings, the group discussed potential alternatives for the ‘safe yield’ calculation. At the conclusion of the meetings, DHEC determined it would not pursue a change in the calculation of safe yield.
- On August 7, 2021, DHEC published a Notice of Drafting proposing amendments to R. 61-119 in the *State Register*. DHEC invited a diverse group of stakeholders to provide information and recommendations regarding permitting and registration of surface water withdrawals in order to clarify anticipated withdrawal amounts and the Department’s administration of its regulatory role in water resource management. Stakeholders met three times and discussed potential amendments to R. 61-119. This process did not result in any regulatory changes.

- On July 22, 2022, DHEC published a Notice of Drafting proposing amendments to S.C. Code Ann. Regs. 61-68, Water Classifications and Standards ("R. 61-68"), including potential inclusion of narrative hydrologic criteria in R. 61-68. This Notice was published in response to an EPA letter dated May 20, 2022, in which EPA determined that several provisions of the SWWA and R. 61-119 constituted new water quality standards which were disapproved by EPA for purposes of the federal Clean Water Act. Stakeholders met to discuss possible amendments to R. 61-68 on August 4, 2022. This effort did not result in any regulatory changes.

Definitions and Provisions at Issue:

- Both the SWWA and R. 61-119 define 'safe yield' as:

the amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses.

- Both the SWWA and R. 61-119 define 'minimum instream flow' as :

the flow that provides an adequate supply of water at the surface water withdrawal point to maintain the biological, chemical, and physical integrity of the stream taking into account the needs of downstream users, recreation, and navigation and that flow is set at forty (40) percent of the mean annual daily flow for the months of January, February, March, and April; thirty (30) percent of the mean annual daily flow for the months of May, June, and December; and twenty (20) percent of the mean annual daily flow for the months of July through November for surface water withdrawers as described in Section 49-4-150(A)(1). For surface water withdrawal points located on a surface water segment downstream of and influenced by a licensed or otherwise flow controlled impoundment, 'minimum instream flow' means the flow that provides an adequate supply of water at the surface water withdrawal point to maintain the biological, chemical, and physical integrity of the stream taking into account the needs of downstream users, recreation, and navigation and that flow is set in Section 49-4-150(A)(3).

- The Department evaluates safe yield at the point of withdrawal for both permit applications and agricultural withdrawal registrations in accordance with the following provisions found in R. 61-119(E)(3)(a)(ii)(A)–(B):

(A) For withdrawals in a stream segment not influenced by a licensed or otherwise flow controlled impoundment, the safe yield is calculated as the difference between the mean annual daily flow and twenty (20) percent of mean annual daily flow at the withdrawal point, taking into consideration natural and artificial replenishment of the surface water and affected downstream withdrawals.

(B) For withdrawals located on a stream segment materially influenced by a licensed or otherwise flow controlled impoundment, the safe yield is calculated as the difference

between mean annual daily flow and the lowest designated flow in the license specified for normal conditions (non-drought), taking into consideration natural and artificial replenishment of the surface water and affected downstream withdrawals and natural attenuation of the stream flow between the licensed or otherwise flow controlled impoundment and the surface water withdrawal point.

Discussion:

By enacting the SWWA, the South Carolina legislature created a statutory scheme that provides for permitting and registration of surface water withdrawals above 3 million gallons per month. In general, surface water withdrawals above this threshold must either be permitted by DHEC or must be properly registered with DHEC. *See*, S.C. Code Ann. §§ 49-4-25 through 49-4-45. Although not directly relevant to the Petition, the SWWA creates exemptions from permitting and registration and also includes specific permitting provisions for nonconsumptive water uses, withdrawals from licensed impoundments, and existing withdrawers. *Id.*

- A. *The SWWA includes minimum instream flow requirements that are triggered in real-time and only apply to permitted withdrawers when actual conditions warrant.*

The SWWA and R. 61-119 contain identical definitions of ‘minimum instream flow’ which is a lengthy provision that bears careful analysis. The first sentence of the definition includes two substantive aspects, separated by the word “**and**”:

‘Minimum instream flow’ means the flow that provides an adequate supply of water at the surface water withdrawal point to maintain the biological, chemical, and physical integrity of the stream taking into account the needs of downstream users, recreation, and navigation **and** that flow is set at forty percent of the mean annual daily flow for the months of January, February, March, and April; thirty percent of the mean annual daily flow for the months of May, June, and December; and twenty percent of the mean annual daily flow for the months of July through November **for surface water withdrawers as described in Section 49-4-150(A)(1).**” S.C. Code Ann. § 49-4-20(14) (emphasis added).

Notably, this definition of ‘minimum instream flow’ only “set[s]” or establishes flow percentages of mean annual daily flow (“MADF”) “for surface water withdrawers as described in Section 49-4-150(A)(1)”. That section only describes, and only applies to, **permitted withdrawers** who are “located on a stream segment not influenced by a licensed or otherwise flow controlled impoundment”, whose withdrawal amount has been authorized by a DHEC-issued permit.

By defining ‘minimum instream flow’ as a percentage of MADF (40%, 30%, or 20%, depending on month), the SWWA provides quantifiable flow levels that act as triggers for permitted withdrawers (not registered withdrawers) to begin reducing and discontinuing consumptive use, as detailed in S.C. Code Ann. § 49-4-150(A)(1). The definition of ‘minimum instream flow’ speaks clearly in establishing percentages of MADF applicable to a limited subset of permitted withdrawers. There is no textual requirement in the SWWA mandating use of those percentages when calculating ‘safe yield’ for proposed agricultural registrations.

The Petition appears to ignore the limiting language contained in the definition of ‘minimum instream flow’, instead making the blanket statement that the SWWA “sets minimum instream flow at 40%, 30%, or 20% of mean annual daily flow” for “unimpounded waters”. *See*, Petition pg. 7; *see also*, Petition pg. 10 (“For unimpounded waters, the Act sets minimum flows of 40%, 30%, or 20% of MADF, depending on the month); *and* Petition pg. 14 (“the Act prohibits withdrawals that would reduce flow beneath minimum instream flow—i.e., 40%, 30%, or 20% of MADF, depending on the month”). The Petition argues, in effect, that ‘safe yield’ must be calculated for all surface water withdrawers—including proposed agricultural registrations—based on the seasonally variable percentages of MADF included in the definition of ‘minimum instream flow’.

In reality, such a requirement is not found in the text of the SWWA and is contradictory to the structure of the Act. To reiterate, the definition of ‘minimum instream flow’ only purports to “set” or establish specific percentages of MADF for the permitted withdrawers described in S.C. Code Ann. § 49-4-150(A)(1). Agricultural registrations are not subject to S.C. Code Ann. § 49-4-150(A)(1); therefore, registered withdrawers are not required to reduce their withdrawals based on minimum instream flow levels at different times of the year. By suggesting that ‘safe yield’ must be calculated for agricultural registrations based on 40%, 30%, 20% of MADF (depending on month), the Petition effectively attempts to impose a requirement on registered agricultural water users that the SWWA omitted. The logic of the Petition would require different calculations of ‘safe yield’ for agricultural registrations depending on the month of the year. As a result, registered withdrawers would potentially be required to discontinue withdrawals (or reduce withdrawals) during months when their registered quantity is not within ‘safe yield’. Had the legislature intended such a result, it would have included provisions for registered agricultural withdrawers similar to S.C. Code Ann. § 49-4-150, which makes withdrawal amounts for permitted withdrawers dependent on ‘minimum instream flow’.

For **permitted withdrawers**, the SWWA clearly provides that “amount[s] of withdrawal [are] dependent on [the] definition of minimum instream flow.” S.C. Code Ann. § 49-4-150. In other words, permitted withdrawers are subject to additional requirements intended to preserve specified levels of ‘minimum instream flow’, based on the location where water

will be withdrawn. *See*, S.C. Code Ann. § 49-4-150(A)(1)(a). In particular, permittees who are “located on a stream segment not influenced by a licensed or otherwise flow controlled impoundment” must take affirmative steps to reduce and discontinue consumptive water withdrawals in situations where available water flow falls to certain levels of ‘minimum instream flow’, as defined by the Act. *See*, S.C. Code Ann. § 49-4-150(A)(1)(b). Permittees whose withdrawal point is “located downstream of and influenced by a licensed or otherwise flow controlled impoundment” are also subject to a ‘minimum instream flow’ standard, defined based on “the flow specified in the license by the appropriate governmental agency”. *See*, S.C. Code Ann. § 49-4-150(A)(3).

By contrast, the SWWA does not contain minimum instream flow limitations for **registered surface water withdrawals**. As discussed above, the definition of minimum instream flow found in the SWAA specifically states that it is “for surface water withdrawers as described in Section 49-4-150(A)(1).” *See* S.C. Code 49-4-20(14). Proposed agricultural registrations are subject only to a ‘safe yield’ determination by DHEC pursuant to S.C. Code Ann. § 49-4-35(C) that focuses narrowly on whether the quantity of water proposed for withdrawal “is within the safe yield for [the relevant] water source at the time of the request” for registration. Once an agricultural withdrawal is properly registered with DHEC, the withdrawer is “authorized to withdraw surface water up to their registered amount”. S.C. Code Ann. § 49-4-35(A). The SWWA’s registration provisions do not require registered agricultural withdrawers to reduce or discontinue withdrawals based on specified ‘minimum instream flow’ levels that must be preserved. *See*, S.C. Code Ann. § 49-4-35.

- B. The SWAA does not specify a method for calculating safe yield and does not require the seasonal variations specifically reserved for permitted withdrawals with respect to minimum instream flow requirements. To determine safe yield for a withdrawal registration and to specify a permitted withdrawal quantity, the Department reasonably accounts for water availability over time by using an average annual daily flow.*

Like minimum instream flow, the SWWA and R. 61-119 contain identical definitions of ‘safe yield’ which is defined in relation to ‘minimum instream flow’, as “the amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source”. S.C. Code Ann. § 49-4-20(25). A ‘safe yield’ determination is required for proposed agricultural registrations but must also be considered by DHEC in reviewing an application for a withdrawal permit as one of the enumerated “reasonableness” criteria detailed by the Act. *See*, S.C. Code Ann. § 49-4-80(B)(1).

DHEC uses a method of calculating ‘safe yield’ that is applied consistently for both permitted withdrawers and registered withdrawers. R. 61-119 calculates safe yield for

stream segments not influenced by an impoundment as “the difference between the mean annual daily flow and twenty (20) percent of mean annual daily flow at the withdrawal point, taking into consideration natural and artificial replenishment of the surface water and affected downstream withdrawals.” R. 61-119(E)(3)(a)(ii)(A). This method ensures that ‘safe yield’ is never calculated based on flows below the lowest level contemplated in the definition of ‘minimum instream flow’, 20% of MADF. At the same time, this calculation method respects the decision of the Legislature as discussed above to impose seasonally variable ‘minimum instream flow’ requirements only on permitted withdrawers described in S.C. Code Ann. § 49-4-150(A)(1).

The Petition argues that ‘safe yield’ can only be properly calculated by accounting for the actual amount of water available for withdrawal above minimum instream flow. *See*, Petition pg. 15 (“To comply with the Act, safe yield must vary based on actual flow—specifically, based on how much water is actually present in excess of minimum instream flow”); *see also*, Petition pg. 16 (“Absent a flat rate of ‘zero,’ DHEC’s [safe yield] formula must dispense with averages and peg safe yield to the amount of water actually ‘available’ in excess of minimum flows, as the Act requires”). This argument is not supported by the text of the SWWA. First, S.C. Code Ann. § 49-4-35(C) states that DHEC must make a ‘safe yield’ determination for proposed agricultural registrations “**at the time of the request**” (emphasis added). It is not possible to comply with this requirement of the Act while continuously adjusting calculations of ‘safe yield’ based on actual water availability. Second, withdrawal permits are required to “specify the amount of water that may be withdrawn”, which involves consideration of ‘safe yield’ among other criteria. S.C. Code Ann. § 49-4-100(A)(2). It is not possible to specify this amount in the permit while also continuing to recalculate or adjust ‘safe yield’ based on changing stream flows. By using an average (mean annual daily flow) to calculate ‘safe yield’, DHEC is able to account for water availability over time, while also complying with the SWWA’s requirements to determine ‘safe yield’ at the time of the registration request and to specify withdrawal quantities in withdrawal permits.

The Petition asserts that DHEC’s method for calculating ‘safe yield’ specifically for streams influenced by an impoundment violates the SWWA. As noted in the Petition, the Act states that ‘minimum instream flow’ for “surface water segment[s] downstream of and influenced by a licensed or otherwise flow controlled impoundment...shall be **the flow specified in the license of the appropriate governmental agency.**” S.C. Code Ann. § 49-4-150(A)(3) (emphasis added); *see also*, S.C. Code Ann. § 49-4-20(14) (defining ‘minimum instream flow’ for downstream waters influenced by an impoundment as the “flow set in Section 49-4-150(A)(3)). In South Carolina, the relevant impoundment licensing authority is typically either the Federal Energy Regulatory Commission (“FERC”) or the United States Army Corps of Engineers (“USACE”). By setting ‘minimum instream flow’ as the “the flow specified in the license”, the SWWA directs

DHEC to rely on the determination of the licensing authority as to flows to be released from the impoundment, rather than using a different and conflicting level of flow as the basis for determining 'minimum instream flow'. Accordingly, 'safe yield' is calculated for waters influenced by an impoundment as "the difference between mean annual daily flow and the lowest designated flow in the license specified for normal conditions (non-drought), taking into consideration natural and artificial replenishment of the surface water and affected downstream withdrawals and natural attenuation of the stream flow between the licensed or otherwise flow controlled impoundment and the surface water withdrawal point" R. 61-119(E)(3)(a)(ii)(B). This method bases the 'safe yield' calculation on "the flow specified in the license of the appropriate governmental agency", as required by the SWWA. As discussed above, the SWWA does not provide for DHEC to consider actual flow levels when determining 'safe yield' for proposed agricultural registrations or when specifying withdrawal quantities in permits. Thus, the Petition is misplaced in arguing that DHEC must consider "actual flow conditions", Petition pg. 19, for purposes of registering and permitting withdrawals on waters influenced by an impoundment.

In summary, the Department is not granting the relief requested in the Petition for the reasons set forth herein. However, the Department remains committed to exploring improvements in how South Carolina's surface water resources are managed. If you have any questions regarding this response, please do not hesitate to contact the Department's legal counsel, Bennett Smith, at (803) 898-3570 or via email at smithbw@dhec.sc.gov.

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Sincerely,



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