

2. Passed in 2010, the Withdrawal Act created a permitting and registration system for large surface water withdrawers in South Carolina. The Act employs a specifically-defined concept—the “safe yield”—as a cap on large water withdrawals in order to preserve certain “minimum instream flows” in South Carolina’s rivers and streams. S.C. Code Ann. § 49-4-20(25). The minimum instream flows protected by the “safe yield” are expressly intended to ensure that large water withdrawals leave “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.” *Id.* § 49-4-20(14).

3. In stark contrast to the Withdrawal Act, DES’s regulations for determining the “safe yield” authorize industrial agriculture surface water users to deplete the “minimum instream flows” set by the Act—up to and including the removal of *all water* from South Carolina rivers.

4. Under the Act, “safe yield” conserves “minimum instream flows” for rivers and people downstream, regardless of how much water this leaves for large withdrawers. DES’s “safe yield” regulations do the opposite—guaranteeing a set amount of water to industrial agriculture, regardless of what is left for rivers or people downstream. To make matters worse, the amount of water DES has granted to industrial agriculture exceeds the *total flow* in most South Carolina rivers and streams for *over half the year*. That is, DES’s “safe yield” rules authorize the *complete de-watering* of most South Carolina rivers. The South Carolina Department of Natural Resources (“SCDNR”), the United States Environmental Protection Agency (“EPA”), and DES itself have all confirmed that DES’s rules have this devastating effect on South Carolina’s rivers and streams. SCDNR and EPA have both concluded that DES’s “safe yield” regulations are not only immensely destructive for South Carolina’s natural resources, they are also unlawful. Among its agency colleagues, DES stands alone in defending the legality of these rules.

5. Pursuant to S.C. Code Ann. § 1-23-150(a), the Conservation Groups petitioned DES seeking a declaratory ruling that the Department lacks statutory authority to promulgate and administer its “safe yield” regulations in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)–(B). *See* Ex. A (the “Petition”). In January 2024, DES submitted a response to the Petition. Ex. B (the “DES Response”). The DES Response evades the central legal and factual issues raised in the Petition. The Response does not mention, let alone dispute, the central fact that DES’s “safe yield” rules authorize the complete de-watering of South Carolina’s rivers and streams. The Response does not attempt to reconcile these rules with an Act that defines “safe yield” to preserve “minimum instream flow.” Despite having no defense to the central charges of the Petition, the DES Response denies the requested relief and upholds DES’s “safe yield” rules.

6. The DES rules cause significant harm to South Carolina’s rivers and streams, and to the Conservation Groups, their missions, and members, who depend on these valued natural resources.

7. Having exhausted their administrative remedies, *see* S.C. Code Ann. § 1-23-150(a), the Conservation Groups respectfully request that this Court grant necessary and appropriate relief pursuant to S.C. Code Ann. § 1-23-150(b). Specifically, the Conservation Groups request that the Court issue: [*i*] a declaratory ruling that DES’s “safe yield” regulations 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, and [*ii*] an injunction barring DES from applying, implementing, or relying on these unlawful “safe yield” regulations and compelling the agency to faithfully obey, follow, implement, and carry out the provisions of the Withdrawal Act.

JURISDICTION AND VENUE

8. Because the Conservation Groups have complied with the petition procedure in S.C. Code Ann. § 1-23-150(a), this Court has subject matter jurisdiction over their claims and may grant declaratory and injunctive relief under S.C. Code Ann. § 1-23-150(b) and under the South Carolina Constitution, Art. V § 11 (granting Circuit Courts general jurisdiction over civil cases).

9. Venue is proper in the Fifth Circuit in Richland County under S.C. Code Ann. § 15-77-50² because this action affects a State agency and arose in Columbia, where DES promulgated the “safe yield” rules at issue in this case. *See Whetstone v. S.C. Dep’t of Highways & Pub. Transp.*, 272 S.C. 324, 328 (1978) (“[Section 15-77-50 is] essentially a venue statute which has as its purpose to fix the venue of [cases against State agencies] ‘in the circuit where such question, action, or controversy shall arise.’” (quoting § 15-77-50, other citations, quotations, and alterations omitted)).

PARTIES

I. Plaintiffs

10. Plaintiff Friends of the Edisto (“FRED”) is a local non-profit educational and advocacy organization established in 1998 and headquartered in Batesburg-Leesville, South Carolina. FRED has merged with Edisto Riverkeeper to serve as the primary advocate for the Edisto River, working to ensure fair access to drinkable, fishable, swimmable water and to support sustainable economic development throughout the Edisto Basin. The Edisto is the longest free-flowing blackwater river in North America, winding through cypress forests, bottomland swamps, salt marshes, and estuaries and supplying drinking water to several municipalities including the city

² Section 15-77-50 is the applicable venue statute because this case does not involve “rates of public service companies for which specific procedures for review are provided in Title 58.” *Id.*

of Charleston. The Edisto supports a diverse array of aquatic life, including shad and other popular fishing species, and rare plants and endangered species like the Shortnose and Atlantic sturgeon, which swim up the River to lay eggs. A unique and irreplaceable resource, the Edisto is prized by local communities, ecotourists, and FRED members, who rely on the Edisto River to swim, fish, boat, paddle, drink from, camp and walk along, and to observe and appreciate.

11. Plaintiff South Carolina Wildlife Federation (the “Federation”) is a non-profit founded in 1946, with its forerunner group established in 1931. Headquartered in Columbia, the Federation uses education and advocacy to conserve and restore the State’s wide variety of indigenous plants, fish, and wildlife and the diverse habitats these species depend on for the benefit of the public and future generations. The Federation works to protect vulnerable ecosystems and to ensure that policymakers use sound scientific data to make decisions that affect wildlife. Members of the Federation use rivers and streams across the State, including the Edisto and its tributaries, to swim, paddle, fish, and to observe and appreciate our State’s remarkable diversity of aquatic life.

12. Plaintiff American Rivers is a non-profit headquartered in Washington, D.C., with members in South Carolina. American Rivers has worked for over 20 years in South Carolina and 50 years across the Nation to protect and restore rivers. American Rivers educates the public on the essential role of clean, naturally-flowing rivers to the health of people, plants, and animals. The organization tackles a diverse range of threats to riverine ecosystems throughout the country, working to protect vital aquatic habitat from harmful development and pollution, removing unnecessary dams that harm river ecosystems, and securing policies to ensure that we all have access to clean, abundant water. American Rivers’ members depend on rivers and

streams across South Carolina for a wide variety of activities and to appreciate living life in the outdoors.

13. The shared mission of the Conservation Groups and their members' use and enjoyment of South Carolina's rivers and streams are seriously harmed as a result of DES's "safe yield" regulations, which are the subject of this case. Among other things, DES's "safe yield" regulations authorize industrial agriculture to deplete and de-water rivers and streams across the State, including the Edisto River, which is particularly vulnerable to unsustainable water use.

14. For example, according to DES's own calculations, the agency's "safe yield" rules allow industrial agriculture to remove *all the water* in the cherished South Fork Edisto River for over half the year. Indeed, DES has already approved agricultural withdrawals up to the full "safe yield" along virtually the entire stretch of the South Fork—meaning that, at any given time, existing, approved users may completely de-water this river. Under these "safe yield" approvals, industrial agriculture is authorized to withdraw several *billion* gallons of water each month from the Edisto River Basin; such users in fact withdraw *billions* of gallons from the Edisto and its tributaries in the summer months alone. Research by SCDNR confirms, unsurprisingly, that withdrawals by industrial agriculture have materially reduced stream flow in the Edisto, impacts that will only worsen as population growth and more frequent drought further strain South Carolina's water resources.

Edisto Basin Withdrawals – Agriculture

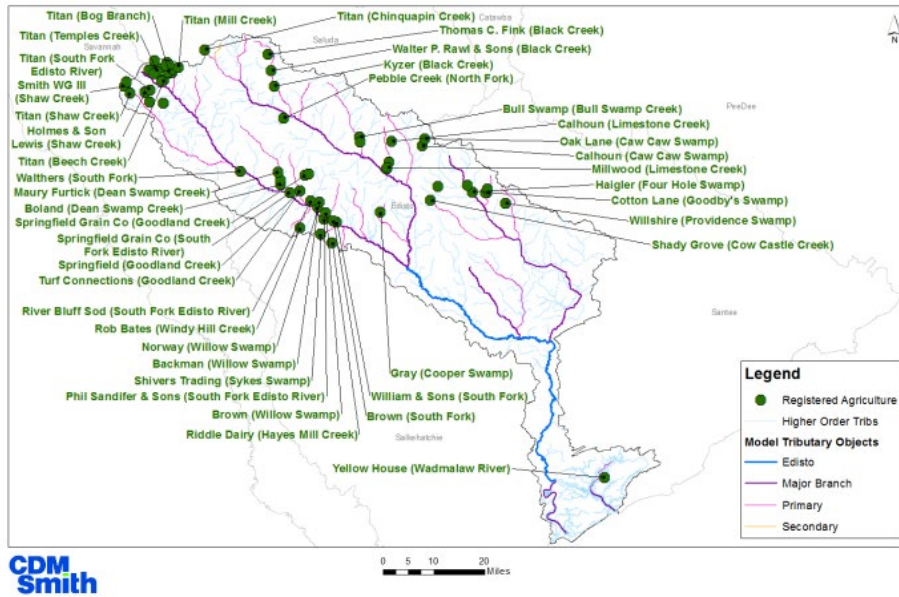


Figure 1 (above). Map of registered agricultural surface water withdrawals in the Edisto River Basin, including the North and South Forks and the main stem of the Edisto River.

15. Members of the Conservation Groups have suffered and will continue to suffer harm to their diverse uses of South Carolina rivers and streams as a result of DES’s “safe yield” rules. For example, members own property and live on the banks of the South Fork Edisto River; own and operate kayaking businesses on the Edisto River and the South Fork; and paddle, fish, boat, swim, birdwatch, walk along, observe, enjoy, and appreciate the Edisto and its tributaries, and have done so for many years. In the summer some years, when agricultural water use is at its highest, flow has drawn down so low in the Edisto downstream of major agricultural withdrawals that members have been unable to fish, float their boats, kayaks, or canoes, or rent watercraft to paying customers in stretches of the Edisto and South Fork long used for these activities. Members who own property downstream of major agricultural facilities have observed drastic flow decreases in the South Fork along their lands, impairing their ability to access, boat,

use, and appreciate the river from their homes. DES’s allocation of the full “safe yield” on the South Fork—more water than is even present in the river at most times—effectively deprives riparian members of their rights to reasonable use of the river water, unless they expend significant resources to institute a civil action to protect those rights. In sum, members’ aesthetic, recreational, business, and property interests are all injured by DES’s “safe yield” regulations.

II. Defendant

16. Defendant DES is a State agency headquartered in Columbia. The agency’s predecessor, the Department of Health and Environmental Control (“DHEC”), was tasked with administering and enforcing the Withdrawal Act, S.C Code Ann. § 49-4-170, and promulgated and administered the “safe yield” regulations at issue in this case. When DHEC was abolished on July 1, 2024, these responsibilities were transferred to DES. *See* S.C. Code Ann. §§ 48-6-10, 48-6-20. For simplicity, this complaint refers to the agency by its new title, DES, throughout.

BACKGROUND

I. The Surface Water Withdrawal, Permitting, Use, and Reporting Act.

17. The Surface Water Withdrawal, Permitting, Use, and Reporting Act of 2010 created permitting and registration requirements for major water withdrawers—those who remove over three million gallons in any month from South Carolina’s surface waters. S.C. Code Ann. §§ 49-4-20(28), 49-4-25, 49-4-35. The Act set distinct standards for different water sources and types of withdrawals.

The Role of “Safe Yield” in the Statutory Scheme

18. Relevant here, the Act set registration and reporting requirements for major surface water withdrawals made for agricultural purposes. *Id.* §§ 49-4-20(23), 49-4-25, 49-4-35(A). Under those standards, no new agricultural withdrawals may commence without a written finding from

DES that the anticipated withdrawal quantity is within the “safe yield” of the water source. *Id.* § 49-4-35(C). If a proposed agricultural withdrawal is “not within the safe yield, then the proposed registered surface water withdrawer may not proceed with the construction or installation of a water intake.” *Id.* If the withdrawal is determined by DES to be within the “safe yield,” the user may only withdraw up to the amount of water approved by DES. *Id.*

19. South Carolina has a burgeoning interstate agriculture industry making growing demands on limited water resources, particularly in the Edisto River Basin. To manage these demands, the Legislature crafted the “safe yield” limit to maintain South Carolina’s rivers not only for major agriculture, but also for the people, small farmers, recreators, and wildlife downstream that depend on healthy stream flows. S.C Code Ann. §§ 49-4-20(25), (14). Because the Withdrawal Act exempts industrial agriculture from permitting and reasonable use review, S.C. Code Ann. §§ 49-4-35, 49-4-20(23), the “safe yield” definition is critically important because it is the Act’s *sole* backstop against excessive water withdrawals by industrial agriculture. *See id.* § 49-4-35(C).

20. Although “safe yield” is most relevant to agriculture as the Act’s sole limit on major agricultural withdrawals, it also applies to other major users. Under the Act, “safe yield” must be considered before any permit may be issued for any major water withdrawer as one factor in a multi-factor analysis “[t]o determine whether an applicant’s proposed use is reasonable.” *Id.* § 49-4-80(B).

The Withdrawal Act Defines “Safe Yield” to Preserve “Minimum Instream Flow”

21. Far from a blank check, “safe yield” places concrete limits on water withdrawals. The Act defines “safe yield” as:

the amount of water **available for withdrawal** from a particular surface water source **in excess of** the **minimum instream flow** . . . 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.

Id. § 49-4-20(25) (emphasis added).³ “Safe yield” is thus defined to ensure that major surface water withdrawals do not impair “minimum instream flow.” The Act defines “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.” *Id.* § 49-4-20(14). “Safe yield” conserves these minimum flows, limiting industrial agriculture users to only removing the “excess” water “available.” Put differently, the Act’s “safe yield” conserves minimum flows for rivers and people downstream, regardless of how much water is left for large withdrawers—it does *not* guarantee water to large withdrawers, regardless of how much is left for rivers and the people downstream.

22. For unimpounded waters, the Act sets “minimum instream flow” at 40%, 30%, or 20% of mean annual daily flow (“MADF”), depending on the month. *Id.* § 49-4-20(14). For waters downstream of and influenced by an impoundment, “minimum instream flow” is defined as the “flow specified in the license” for the impoundment. *Id.* §§ 49-4-20(14), 49-4-150(A)(3). Such licenses are often issued by the Federal Energy Regulatory Commission or the U.S. Army Corps of Engineers.

II. DES Defines “Safe Yield” to Authorize the Depletion of “Minimum Instream Flow,” Up to and Including the Complete De-Watering of Rivers and Streams.

³ For withdrawals from impoundments, safe yield is pegged to the “minimum water level” for the impoundment. S.C. Code §§ 49-4-20(15), 49-4-150(A)(4). Minimum water level is not at issue in this case.

23. The Withdrawal Act empowers DES to promulgate “regulations necessary to implement the policies and purposes of the” statute. S.C. Code § 49-4-170(A)(1). In 2012, the Department enacted rules purporting to implement the Act. S.C. Code Ann. Reg. § 61-119 *et seq.*

DES’s “Safe Yield” for Unimpounded Waters

24. In the “Definitions” section, DES’s regulation incorporates the Act’s definition of “safe yield.” S.C. Code Ann. Reg. § 61-119(B)(29). In stark contrast to the Act, the regulation includes “Evaluation Criteria” specifying that “safe yield” for withdrawals from unimpounded streams “is calculated as the difference between the mean annual daily flow and twenty (20) percent of mean annual daily flow at the withdrawal point”—i.e., *eighty (80) percent of MADF*. *Id.* § 61-119(E)(3)(a)(ii)(A). This flips the Act’s definition of “safe yield” on its head, guaranteeing a set amount of water to major agricultural users—eighty percent of MADF—regardless of how much water is actually present in the river or how much is left for the people, small farmers, and wildlife downstream.

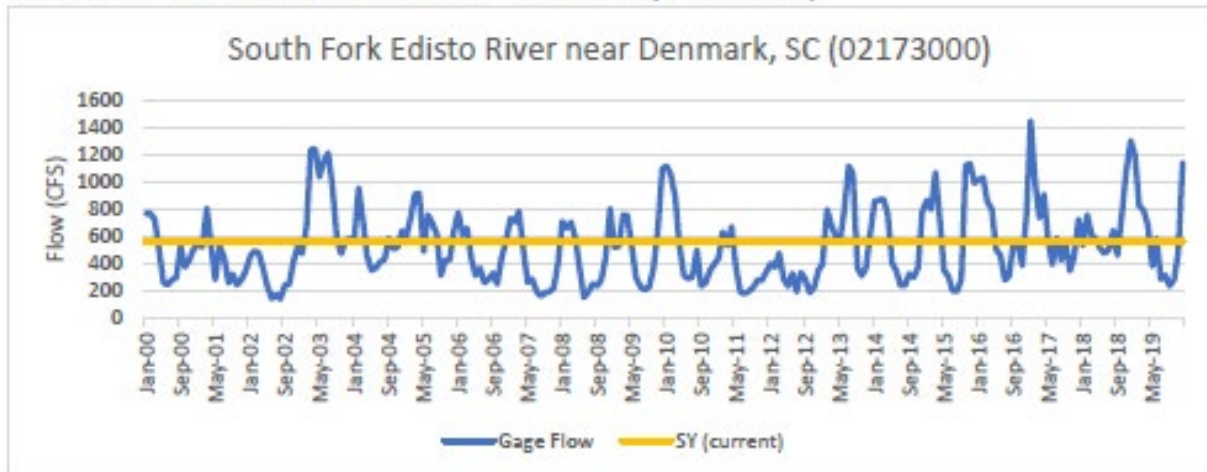
25. Moreover, as SCDNR, EPA, and DES itself have confirmed, eighty percent of MADF is more than *total flow* for *over half the year* in most South Carolina rivers and streams. That is, DES’s “safe yield” guarantees industrial agriculture *more water than is typically present* in the State’s streams. Far from preserving “minimum instream flow,” as the Withdrawal Act requires, DES’s “safe yield” authorizes the complete de-watering of most South Carolina rivers.

26. As SCDNR concludes, “[f]or most streams, [DES’s] ‘safe yield’ **will not be available more than half of the time**, without even considering the need to leave some water in the stream to maintain the biological, chemical, and physical integrity of the stream”—a result that is plainly “inconsistent” with the definition of “safe yield” used in the Withdrawal Act. *See id.* at 82 (emphasis in original); *accord id.* at 72 (SCDNR PowerPoint, noting “glaring inconsistencies

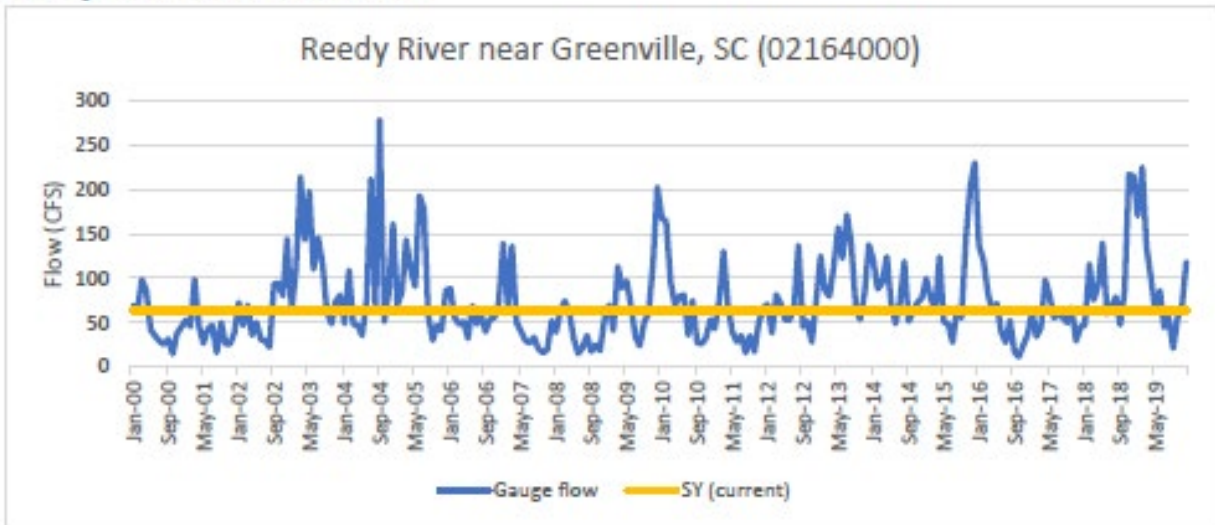
between the Act and Regulations” on the definition of “safe yield”). In a formal review of South Carolina’s stream flow standards, EPA concurred with SCDNR’s findings, concluding that DES’s “safe yield” rules lack “any discernible sound scientific rationale” and do not “protect designated uses” or water quality—or require leaving any water in rivers at all. *Id.* at 12–13.

27. These facts are not disputed. To the contrary, in its 2020 *Safe Yield Workgroup Meetings Summary Report*, DES concedes that its “safe yield”—i.e., the amount of water that industrial agriculture is authorized to withdraw under DES’s rules—“is exceeding flow” in rivers and streams across South Carolina. For example, this occurs 62% of the time in the South Fork Edisto; 50% of the time in the Reedy River; 35% of the time on the Tyger River; 46% of the time in McTier Creek; and 75% of the time in Steven’s Creek. Ex. A at 92. DES’s report provides dozens of pages of graphs showing that the “safe yield” calculated according to DES’s rules often exceeds the total amount of water present in rivers and streams across South Carolina. *See id.* at 92–126.

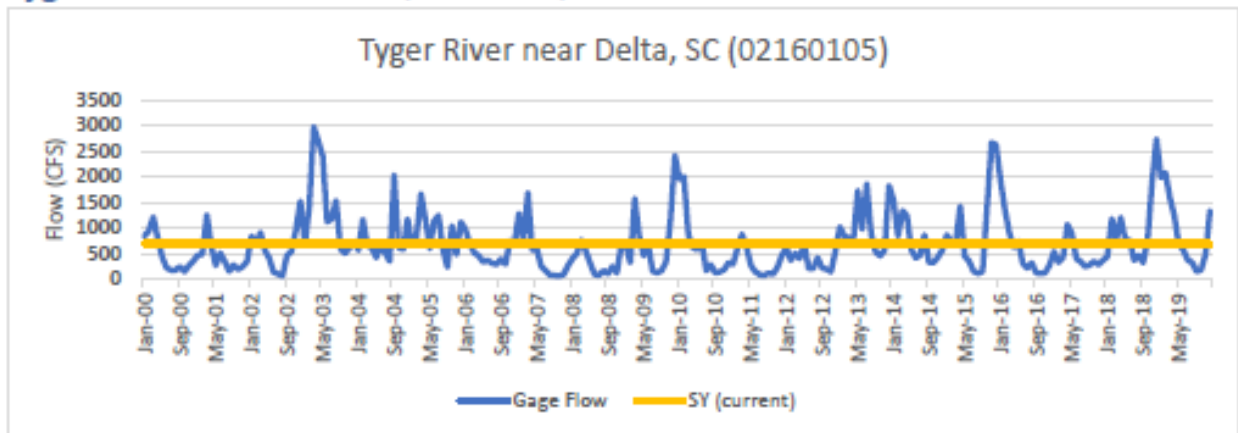
South Fork Edisto River near Denmark, SC (02173000)



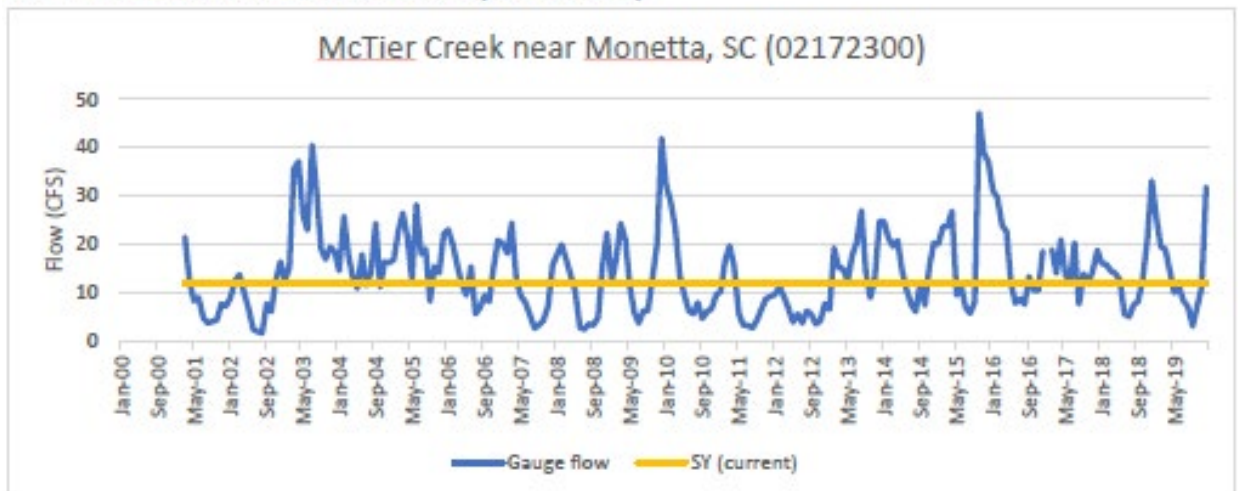
Reedy River near Greenville



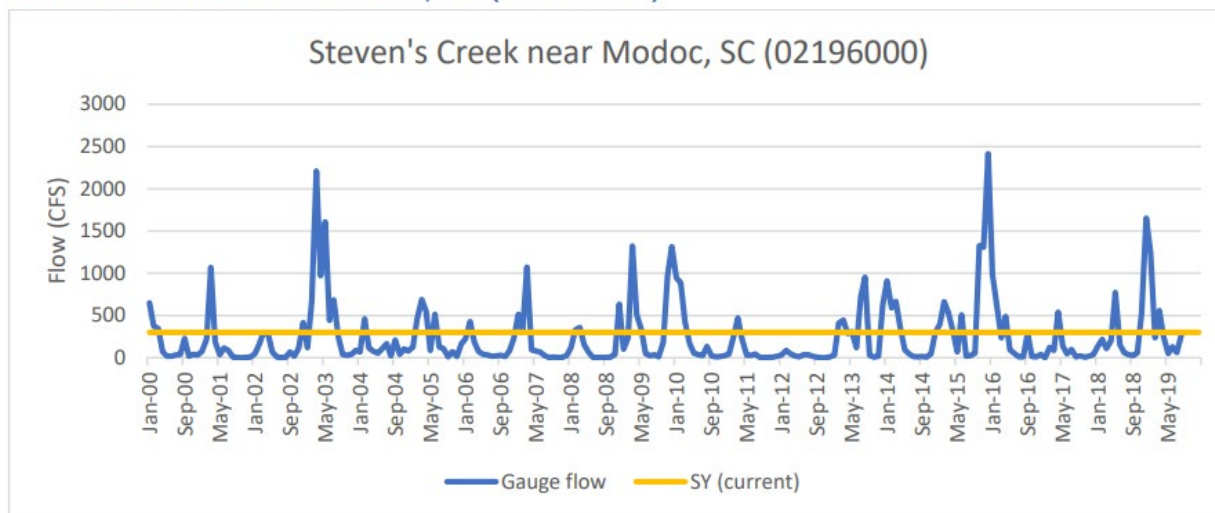
Tyger River near Delta, SC (02160105)



McTier Creek near Monetta, SC (02172300)



Steven's Creek near Modoc, SC (02196000)



Figures 2–6 (above). Graphs of actual stream flow (“Gauge flow”) and DES’s “safe yield” (“SY”) in various South Carolina rivers and streams. Excerpted from DHEC Bureau of Water, *Safe Yield Workgroup Meetings Summary Report* at 35–88 (2020) (see Ex. A at 89–128).

28. By setting a “safe yield” greater than actual stream flow, DES’s rules authorize the removal of all water in most rivers and streams, thus setting a “minimum instream flow” of *zero* in the context of water withdrawals by industrial agriculture. This is a flagrant violation of the Act, which defines “safe yield” to preserve “minimum instream flow,” S.C. Code Ann. § 49-4-20(25)—i.e., “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.” *Id.* § 49-4-20(14). No rational reading of the Act would have “safe yield” *exceed total flow* and “minimum instream flow” *equal zero*.

DES’s “Safe Yield” for Streams Influenced by an Impoundment

29. For withdrawals from streams influenced by an impoundment, DES defines “safe yield” as “the difference between mean annual daily flow and the lowest designated flow in the license specified for normal conditions (non-drought)[.]” S.C. Code Ann. Reg. § 61-119 (E)(3)(a)(ii)(B).

Yet anytime actual flow drops below the mean, this “safe yield” will not be “available . . . in excess of” the flow “specified in the license,” as the Withdrawal Act requires, S.C. Code § 49-4-20(14), 49-4-150(A)(3). Any day flow drops below average, DES’s formula allows withdrawals that deplete minimum instream flow. As SCDNR concurs, “this ‘safe yield’ definition will produce unrealistically large values.” Ex. A at 83.

30. Far from a minor oversight impacting a small subset of streams, many of the major rivers in South Carolina—including the Pee Dee, Catawba, Broad, Saluda, and Savannah—are “influenced” by upstream impoundments. For many such rivers and streams across the State, DES’s “safe yield” rules authorize depleting the minimum instream flows set by the Legislature.

31. Instead of preserving minimum instream flow, as the Act requires, DES’s “safe yield” rules authorize the depletion of minimum flows—up to and including the complete de-watering of rivers. Where the Act places concrete limits on agricultural withdrawals, DES’s rules grant a blank check.

III. The Conservation Groups’ Petition and the DES Response.

32. For the reasons stated above, the Conservation Groups in December 2023 petitioned DES under S.C. Code § 1-23-150(a) seeking a declaration that DES’s “safe yield” rules violate the Withdrawal Act and are outside the agency’s authority, and requesting that the Agency immediately cease applying the unlawful rules and faithfully comply with the Act. Ex. A

33. The Petition contains extensive legal analysis demonstrating that DES’s “safe yield” rules in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)–(B) are unlawful, and attaches significant legal and factual analysis by SCDNR and EPA illustrating the flaws in DES’s rules. *Id.* at 33–88. The Petition repeatedly emphasizes a central flaw in DES’s rules: that they “authorize the complete

de-watering of South Carolina’s rivers and streams.” *Id.* at 2, 5, 7–14. The Petition includes dozens of pages of DES’s own analysis confirming that fact. *See, e.g., id.* at 89–127.

34. In January 2024, DES responded to the Petition. Ex. B. The DES Response evades the central legal and factual issues raised in the Petition. The Response does not mention, let alone dispute, the central fact that DES’s “safe yield” rules authorize the complete de-watering of South Carolina rivers and streams. The Response does not explain how such rules could be consistent with an Act that expressly defines “safe yield” to preserve “minimum instream flow.”

35. Instead of addressing the undisputed facts, the DES Response badly contorts the words of the Act to justify the agency’s blank check for water withdrawals by industrial agriculture.

36. First, the DES Response asserts that the Withdrawal Act’s “minimum instream flow requirements . . . ***only apply to permitted withdrawers***”—i.e., not to agricultural users subject to registration requirements. Ex. B at 4–5. This overlooks the plain text of the Act, which requires that major agricultural withdrawals must be within the “safe yield,” S.C. Code Ann. §§ 49-4-35(C), 49-4-20(23), which the Act defines as “the amount of water available for withdrawal from a particular surface water source *in excess of the minimum instream flow.*” *Id.* § 49-4-20(25) (emphasis added).

37. Similarly, the DES Response asserts that the Act’s 40%, 30%, 20% minimum instream flow standard “only applies to [certain] permitted withdrawers,” not to agricultural users. Ex. B at 4. This claim overlooks the entire definition of “minimum instream flow,” which the Act defines 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.” S.C. Code Ann. § 49-4-20(14). This minimum instream flow definition plainly applies to agricultural users through the

“safe yield” limit defined to protect those minimum flows. S.C. Code Ann. §§ 49-4-35(C), 49-4-20(23), 49-4-20(25). Even assuming, for the sake of argument, that the specific 40%, 30%, 20% MADF standard does not apply to agriculture, this does *not* exempt agriculture from minimum instream flow and does *not* leave DES free to authorize the complete de-watering of rivers.

38. Next, the DES Response asserts that the Withdrawal Act “does not specify a method for calculating safe yield,” “does not require. . . seasonal variations” in “safe yield,” and permits DES to set a safe yield “using an average annual daily flow.” Ex. B at 6. These general claims do nothing to defend DES’s actual rules, which define “safe yield” to authorize the removal of all water from rivers, thus setting a minimum instream flow of “zero” for water withdrawals by industrial agriculture.

39. Finally, as to “safe yield” for streams influenced by an impoundment, the DES Response claims that the regulations are consistent with the statute simply because DES’s “method bases the ‘safe yield’ calculation on ‘the flow specified in the license of the appropriate governmental agency.’” Ex. B at 8 (quoting S.C. § Code 49-4-150(A)(3)). This evades the critical point that DES defines “safe yield” for such waters as “*the difference between mean annual daily flow and the lowest designated flow in the license specified for normal conditions (non-drought).*” S.C. Code Ann Reg. § 61-119(E)(3)(a)(ii)(B) (emphasis added). Anytime actual flow drops below mean annual daily flow, DES’s “safe yield” will not be “available . . . in excess of” the flow “specified in the license,” as the Act requires, S.C. Code § 49-4-20(14), 49-4-150(A)(3).

40. In short, the DES Response does not remedy the fatal legal flaws in the “safe yield” regulations.

LEGAL STANDARDS

41. As a state agency constrained by statute, DES “has only such powers as have been conferred by law and must act within the authority granted for that purpose.” *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (citation and quotations omitted). As follows, the “agency may not make rules that conflict with, or change in any way the statute conferring [its] authority.” *Ahrens v. South Carolina*, 392 S.C. 340, 349, 709 S.E.2d 54, 58 (2011) (citation, quotations, and alterations omitted); *accord, e.g., Fisher v. J.S. Sheridan Co., Inc.*, 182 S.C. 316, 326, 186 S.E. 356, 360 (1936). When a regulation “alters or adds to a statute,” the regulation, of course, “must fall.” *McNickel’s Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998).

42. To enforce these principles, the South Carolina Administrative Procedures Act provides that “[a]ny person may petition an agency in writing for a declaratory ruling as to the . . . authority of the agency to promulgate a particular regulation. The agency shall, within thirty days after receipt of such petition, issue a declaratory ruling thereon.” S.C. Code Ann. § 1-23-150(a).

43. After complying with this administrative procedure,

any person affected by the provisions of any regulation of an agency may petition the Circuit Court for a declaratory judgment and/or injunctive relief if it is alleged that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or that the regulation exceeds the regulatory authority of the agency. The agency shall be made a party to the action.

Id. § 1-23-150(b).

CLAIMS FOR RELIEF

I. COUNT ONE: Claim for Declaratory and Injunctive Relief under S.C. Code § 1-23-150(b) against DES’s “Safe Yield” Regulations for Stream Segments not Influenced by an Impoundment, see S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)

44. The allegations in the preceding paragraphs are incorporated herein by reference.

45. The Withdrawal Act defines “safe yield” to preserve “minimum instream flow” in order to maintain river integrity and preserve water for the people and wildlife downstream. This statutory “safe yield” applies to users withdrawing over three million gallons in any month from South Carolina’s surface waters, including water withdrawals made for agricultural purposes.

46. For water withdrawals from stream segments not influenced by a licensed or otherwise flow controlled impoundment, DES’s regulations define “safe yield” as eighty (80) percent of mean annual daily flow at the withdrawal point. S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A).

47. Whereas the Act defines “safe yield” to maintain minimum instream flows for rivers and the people and wildlife downstream, DES defines “safe yield” to guarantee a set amount of water to industrial agriculture, regardless of how much is left for the people and wildlife downstream.

48. DES’s “safe yield” of eighty percent MADF exceeds *total flow* in most South Carolina rivers and streams for *over half the year*. That is, DES’s “safe yield” authorizes industrial agriculture to withdraw more water than is even present in South Carolina’s rivers and streams.

49. By authorizing industrial agriculture to completely de-water South Carolina rivers and streams, DES has set a “minimum instream flow” of *zero* for water withdrawals by industrial agriculture. This plainly contradicts the Withdrawal Act, which defines “safe yield” to preserve enough flow in-stream to “provide[] 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.” S.C. Code Ann. § 49-4-20(14), (25).

50. DES’s “safe yield” calculation in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A) violates the Withdrawal Act and exceeds the regulatory authority of DES and is thus unlawful.

51. The Conservation Groups have complied with the petition procedure in S.C. Code § 1-23-150(a).

52. The Conservation Groups and their members are “person[s] affected” by the challenged “safe yield” regulation within the meaning of S.C. Code Ann. § 1-23-150(b). The challenged “regulation [and] its threatened application interfere[] with [and] impair[], [and] threaten[] to interfere with [and] impair, the legal rights [and] privileges of the plaintiff[s],” including their members’ ability to use and enjoy healthy flowing rivers and streams across South Carolina free from excessive and unlawful water withdrawals that impair these diverse uses. *See* S.C. Code Ann. § 1-23-150(b); *supra* ¶¶ 10–15. The challenged regulation also “exceeds the regulatory authority of the agency,” providing a separate basis for suit under S.C. Code Ann. § 1-23-150(b).

II. COUNT TWO: Claim for Declaratory and Injunctive Relief under S.C. Code § 1-23-150(b) against DES’s “Safe Yield” Regulations for Stream Segments Influenced by an Impoundment, see S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(B)

53. The allegations in the preceding paragraphs are incorporated herein by reference.

54. The Withdrawal Act defines “safe yield” to preserve “minimum instream flow” in order to maintain river integrity and preserve water for the people and wildlife downstream. This statutory “safe yield” applies to users withdrawing over three million gallons in any month from South Carolina’s surface waters, including water withdrawals made for agricultural purposes.

55. For withdrawals from stream segments downstream of and influenced by a flow controlled impoundment, the Withdrawal Act sets minimum instream flow as “the flow specified in the license by the appropriate governmental agency.” S.C. Code Ann. § 49-4-150(A)(3). Thus, the “safe yield” for such waters is “the amount of water available for withdrawal from [such waters] in excess of the [flow specified in the license by the appropriate governmental agency].” *Id.* § 49-4-20(25).

56. In contrast to the Act, DES defines “safe yield” for streams influenced by an impoundment as “the difference between mean annual daily flow and the lowest designated flow in the license” for the impoundment. S.C. Code Ann. Reg. § 61-119 (E)(3)(a)(ii)(B). Yet anytime actual flow drops below the mean, DES’s “safe yield” will not be “available . . . in excess of” the flow “specified in the license,” as the Act requires, S.C. Code § 49-4-20(14), 49-4-150(A)(3). Any day flow drops below average, DES’s rules allows withdrawals that deplete minimum instream flow.

57. Whereas the Act defines “safe yield” to maintain minimum instream flows for rivers and the people and wildlife downstream, DES defines “safe yield” to guarantee a set amount of water to industrial agriculture, regardless of how much water it leaves the river or people and wildlife downstream.

58. DES’s “safe yield” calculation in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(B) violates the Withdrawal Act and exceeds the regulatory authority of DES and is thus unlawful.

59. The Conservation Groups have complied with the petition procedure in S.C. Code § 1-23-150(a).

60. The Conservation Groups and their members are “person[s] affected” by the challenged “safe yield” regulation within the meaning of S.C. Code Ann. § 1-23-150(b). The challenged “regulation [and] its threatened application interfere[] with [and] impair[], [and] threaten[] to interfere with [and] impair, the legal rights [and] privileges of the plaintiff[s],” including their members’ ability to use and enjoy healthy flowing rivers and streams across South Carolina free from excessive and unlawful water withdrawals that impair these diverse uses. *See* S.C. Code Ann. § 1-23-150(b); *supra* ¶¶ 10–15. The challenged regulation also “exceeds the regulatory authority of the agency,” providing a separate basis for suit under S.C. Code Ann. § 1-23-150(b).

PRAYER FOR RELIEF

For the reasons stated herein, Plaintiffs respectfully request that the Court:

1. Declare that the “safe yield” provisions 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 DES’s authority and illegal;
2. Enjoin DES from applying, implementing, or relying on the unlawful “safe yield” provisions in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)–(B) and order DES to faithfully obey, follow, implement, and carry out the provisions of the Withdrawal Act defining “safe yield” to preserve “minimum instream flow;”
3. Vacate the unlawful “safe yield” regulations in S.C. Code Ann. Reg. § 61-119(E)(3)(a)(ii)(A)–(B); and
4. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this the 15th day of July 2024.

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