

1981 S.C. Op. Atty. Gen. 95 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-77, 1981 WL 96603

Office of the Attorney General

State of South Carolina

Opinion No. 81-77

August 26, 1981

***1 SUBJECT: Procedure—Emergency—Governor—Water and Waterways**

(1) The existence or threat of a severe water shortage in South Carolina, resulting from extreme drought or other conditions, would constitute a public calamity warranting the Governor's declaration of a state of emergency for affected areas and the exercise of his emergency powers to regulate, allocate, etc. water usage and consumption therein.

(2) The South Carolina Water Resources Commission may not, by way of emergency regulation promulgated under the Administrative Procedures Act (§ 1-23-130), expand its regulation of water usage during drought conditions.

TO: The Governor

QUESTION:

1. Would the existence or threat of a severe water shortage in South Carolina, resulting from extreme drought or other conditions, constitute a public calamity thereby authorizing the Governor, under his emergency powers, to regulate water usage and consumption?

OPINION:

Yes. The Governor, as the elected Chief Executive of the State, has long been provided with extraordinary powers to preserve the public peace, safety, security and welfare of the State. See §§ 1-3-410 to 1-3-460, *Code of Laws of South Carolina (1976)* relating to violence and public disorder; §§ 25-1-1840 to 25-1-1860, *Code of Laws of South Carolina (1976)* relating to ordering out the National Guard; and § 25-1-1870, *Code of Laws of South Carolina (1976)* authorizing control and possession of utilities when the public safety may require it.

Additionally, 'emergency powers' have been repeatedly granted to the Governor in the various legislative enactments dealing with civil defense, disaster control and emergency preparedness. See Act No. 128, 1973 Acts and Joint Resolutions; Act No. 138, 1977 Acts and Joint Resolutions; and Act No. 199, 1979 Acts and Joint Resolutions, Part II, Section 21. The provisions of Act No. 199, *supra*, are now contained at §§ 25-1-420 to 25-1-450, *Code of Laws of South Carolina (1976)*, as amended.

Section 25-1-440 provides in pertinent part:

(a) The Governor, when an emergency has been declared, . . . shall be responsible for the safety, security and welfare of the State and shall be empowered with the following additional authority to adequately discharge this responsibility:

(1) Issue emergency proclamations and regulations and amend or rescind them. Such proclamations and regulations shall have the force and effect of law as long as the emergency exists.

(2) Declare a state of emergency for all or part of the State if he finds a disaster has occurred, or that the threat thereof is imminent, and extraordinary measures are deemed necessary to cope with the existing or anticipated situation. A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly.

(3) Suspend provisions of existing regulations prescribing procedures for conduct of state business if strict compliance with the provisions thereof would in any way prevent, hinder or delay necessary action in coping with the emergency.

*2 (4) Utilize all available resources of state government as reasonably necessary to cope with the emergency.

(5) Transfer the direction, personnel or functions of state departments, agencies and commissions, or units thereof, for purposes of facilitating or performing emergency services as necessary or desirable.

...

'Emergency' is defined in that Act to mean actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot or other public calamity. § 25-1-430. 'Calamity' has been defined as 'a state of extreme distress or misfortune, produced by some adverse circumstance or event; misery' Black's Law Dictionary, 4th Ed. This Office has previously advised that severe oil shortages and large scale interruptions in natural gas supplies would constitute public calamities warranting exercise of the Governor's emergency powers under former legislation. See 1973 Op. Atty Gen., No. 3647; 1975 Op. Atty Gen., No. 4114. Clearly, severe water shortages, resulting from extreme drought or other conditions, could pose far greater danger to the health, safety and welfare of the people and the economic well being of the State.

It is thus the opinion of this Office that the existence or threat of severe water shortages resulting from extreme drought or other conditions would be a public calamity authorizing the declaration of a state of emergency as to those areas of the State affected and the exercise of the emergency powers above set forth.

While the Governor is vested with discretion in determining when an actual or threatened water shortage has attained 'emergency' proportions and what action is required to effectively deal with the same, it is anticipated that he would utilize the advice, assistance and expertise of those officials and agencies regularly involved in water management including the South Carolina Water Resources Commission and the South Carolina Department of Health and Environmental Control. Should the Governor determine that restrictions on use and consumption are necessary or that allocation is required among competing domestic, municipal, agricultural and industrial users, or that other measures need be taken, he can provide for such by way of an emergency proclamation or regulation. Such declared state of emergency and emergency measures cannot continue more than fifteen (15) days without the consent of the General Assembly.

QUESTION:

2. May the South Carolina Water Resources Commission expand its regulation of water usage during drought conditions by way of an emergency regulation promulgated under the Administrative Procedures Act, § 1-23-130?

OPINION:

No. Further inquiry has been made as to whether the South Carolina Water Resources Commission would be authorized to expand its regulation of water usage during emergency conditions by virtue of Section 1-23-130 of the Administrative Procedures Act. That Commission was created by the South Carolina Water Resources Planning and Coordination Act as now contained in §§ 49-3-10 to 49-3-50, Code of Laws of South Carolina (1976). Its powers and duties as prescribed in § 49-3-40 are primarily advisory and informational in nature for the benefit of the Governor and

*3 Limited regulatory authority is provided to the Commission under the Groundwater Use Act of 1969 now contained in §§ 49-5-10 to 49-5-120, Code of Laws of South Carolina (1976). Section 49-5-40 provides that the Commission, 'upon the request of a county, municipality or other political subdivision of State Government, may declare and delineate from time to

time, and may modify, capacity use areas of the State where it finds that the use of groundwater requires coordination and limited regulation for protection of the interests and rights of residents or property owners of such areas or of the public interest.’

That section further establishes the procedures to be followed in declaring and delineating a ‘capacity use area’ which include investigation, published notice and public hearing. Once a ‘capacity use area’ has been declared, the Commission may then promulgate regulations to apply concerning the use and withdrawal of ground waters within such area. Section 49–5–50 establishes the procedure, including published notice and public hearing, which must be followed in promulgating such ‘capacity use area’ regulations. Section 49–5–100 further authorizes the Commission to adopt and modify rules and regulations to implement the Act. The Administrative Procedures Act (Act No. 176, 1977 Acts and Joint Resolutions, Art. I) provided for the creation of a State Register and Code of Regulations and established further procedures regarding the promulgation of agency regulations. That legislation, as now contained in §§ 1–23–10 to 1–23–160, *Code of Laws of South Carolina (1976)*, as amended, would apply to any regulation of the South Carolina Water Resources Commission not previously promulgated and filed with the Secretary of State on January 1, 1977.

The Administrative Procedures Act has not enlarged the authority of an agency to regulate, but only prescribes additional procedures by which a regulation must be promulgated. Likewise, Section 1–23–130 dealing with emergency regulations simply allows for noncompliance with those additional procedures when ‘any agency finds that an imminent peril to the public health, safety or welfare requires immediate promulgation of an emergency regulation prior to compliance with the procedures prescribed in [that Act].’ That section does not waive compliance with other procedures which may otherwise exist by law with respect to a particular agency or its regulations.

In summary, it is the opinion of this Office that the Administrative Procedures Act in no way enlarges the regulatory authority of the South Carolina Water Resources Commission nor waives, in the event of an emergency, the statutory procedures established by the Groundwater Use Act of 1969 for the enactment of regulations for ‘capacity use areas’.

CONCLUSION:

Under existing law there is no comprehensive statutory scheme for the management and control of the State’s water resources. As discussed above, the South Carolina Water Resources Commission possesses limited regulatory authority under somewhat cumbersome procedures as to Ground Water only. The South Carolina Department of Health and Environmental Control’s regulatory authority under the State Safe Drinking Water Act (§§ 44–55–10. et seq., *Code of Laws of South Carolina [1976]*, as amended) is likewise limited to a ‘public water supply’ as therein defined.

*4 At present, neither agency has statutory authority to promulgate regulations by which to effectively cope with or respond to emergency conditions brought about by severe water shortages. While the Governor’s emergency powers are sufficiently broad to insure an adequate response, such are of limited duration (fifteen days without consent of the General Assembly). Under these circumstances, attention and study towards further legislation in this area is recommended.

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