HENRY MCMASTER
ATTORNEY GENERAL

April 6, 2010

Philip L. Lawrence, General Counsel
South Carolina State Ports Authority
P. O. Box 22287
Charleston, South Carolina 29413-2287

Dear Mr. Lawrence:

In a letter to this office you requested an opinion regarding the authority of the South Carolina State Ports Authority to enter and perform an agreement with the United States Army Corps of Engineers for work on certain dredge disposal facilities in Charleston Harbor. In your letter you stated:

> [t]he South Carolina State Ports Authority has received a draft "Project Partnership Agreement" from the United States Army Corps of Engineers [USACE]...The immediate purpose for the agreement is to repair, raise, and improve existing spoil disposal facilities to store dredge spoil materials produced from dredging in Charleston Harbor and its approaches. Such an agreement is required by law before the USACE can commence the work under the cost-sharing program provided by the Water Resources Development Act of 1986...
>
> The South Carolina State Ports Authority serves as the nonfederal sponsor for the project, and as such, it provides the property for the spoil disposal facility site to the federal government. Without provision of the spoil disposal site by the Authority, and without a signed agreement in accordance with the requirements of the USACE, the USACE cannot proceed with the work under the cost-sharing ordered by Congress.
>
> Contained in the "Project Partnership Agreement" [PPA] is a "Hold and Save" provision that would hold the United States Government harmless from damages arising from construction or operation and maintenance of the project not caused by the negligence of the United States Government...In the case of local cooperation with the United States Secretary of the Army or the Chief of Engineers, however, the South Carolina General Assembly has provided authority for the State and agencies

> to contract or commit themselves to hold the United States harmless and satisfy conditions of local cooperation required by the Secretary of the Army or in the congressional documents covering the particular project, as specified more particularly in *South Carolina Code of Laws, 1976*, Section 3-7-10....
>
> This is to request that the South Carolina Attorney General's Office review this matter and provide an opinion certifying whether the South Carolina State Ports Authority is authorized to agree to and perform the obligations in the "Hold and Save" provision of the subject PPA.

Specific reference was made to Article IX of the PPA, captioned "Hold and Save" which states:

> [s]ubject to the provisions of Article XXI of this Agreement, the Non-Federal Sponsor shall hold and save the Government free from all damages arising from construction or operation and maintenance of the *Project* and any *betterments*, and the provision of capacity pursuant to Article II.L.3 of this Agreement, except for damages due to the fault or negligence of the Government or its contractors.[1]

Reference was also made to S.C. Code Ann. § 3-7-10 which states:

> [t]he State, the agencies of the State, the governing bodies of the counties and municipalities are authorized to adopt resolutions or ordinances of assurances required by the Secretary of the Army or the Chief of Engineers for the fulfillment of the required items of local cooperation as expressed in the appropriate acts of Congress or congressional documents upon a determination by the State, State agencies, governing bodies of the counties or municipalities that a project will accrue to the general or special benefit of the governing authority, may contract or otherwise commit itself to the United States to provide the necessary interest in lands and all

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[1]Such provision would be consistent with the Water Resources Development Act of 1986, Section 101(e) which states:

> (e) AGREEMENT. Before initiation of construction of a project to which this section applies, the Secretary and the non-Federal interests shall enter into a cooperative agreement according to the provisions of section 1962d-5b of Title 42. The non-Federal interests shall agree to -
>
> > ...(2) hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors;....

> existing structures on the lands, to make contributions of money or property in lieu of providing disposal areas for dredge materials, to hold the United States safe and harmless from damages done or caused to be done or for any claim or demand whatsoever for such damages suffered by or done to any property on which work is being performed and to provide or satisfy any other items or conditions of local cooperation as required by the Secretary of the Army or in the congressional documents covering the particular project. (emphasis added).

As you set forth in your request letter, this office has issued several prior opinions holding that, generally, state agencies do not have the authority to enter into indemnification agreements. As stated in an opinion dated September 29, 2004 determining that indemnification agreements "are without legal authority",

> "[i]t is our longstanding opinion that a state agency possesses no authority to enter into indemnification agreements. It is our further opinion that this conclusion is not changed by the addition of language "so far as the laws of the State permit" or any other language. Because a state agency possesses no authority to enter into indemnification agreements, insertion of the above-cited language or any other language cannot change or alter such lack of authority. Our opinions concluding that a state agency possesses no authority to enter into indemnification or "hold harmless" agreements date back at least to 1966.

Another opinion dated September 27, 1972 by former Attorney General McLeod stated that

> [i]n my opinion, there is no authority for the execution by the State of "hold harmless" clauses. Similar instances occur in nearly all agreements with the federal government and, while such clauses have been inserted in many instances in various agreements, there is, in my opinion, no authority for the inclusion of such clauses. The basis for this position is that the State thereby subjects itself to tort action, for which there is no authority absent legislative authorization. (emphasis added).

An opinion of this office dated August 15, 1972 determined that

> [it] has been the consistent opinion of this Office that governmental agencies, in the absence of specific authority therefor, do not have the authority to execute such "hold harmless" clauses. The basis of this conclusion is that this State possesses sovereign immunity, with certain deviations therefrom in limited circumstances...The execution of a "hold harmless" clause is nothing more nor less than subjection of the State or one of its political subdivisions to tort liability and, in the opinion of this Office, can only be done by the State itself through legislative enactment. (emphasis added).

See also: Op. dated February 13, 1968 ("[w]e have uniformly advised State agencies that they do not have authority to enter into indemnification agreements of this nature. Even if entered into, it is questionable if any rights could arise thereunder.").

As also stated in the referenced September 29, 2004 opinion, "...we have consistently concluded that a state agency 'derives its powers solely from the statutes created by the Legislature.'" See also: Op. Atty. Gen. dated March 18, 2004 citing Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1993) and Nucor Steel v. S.C. Public Service Comm., 310 S.C. 539, 426 S.E.2d 319 (1992). As pointed out by the 1972 opinions referenced above, generally, the State cannot subject itself to tort action "absent legislative authorization" or "in the absence of specific authority therefor." In this instance, as set forth in Section 3-7-10, an agency of this State, which would include the State Ports Authority, has been specifically authorized to "adopt resolutions or ordinances of assurances required by the Secretary of the Army or the Chief of Engineers for the fulfillment of the required items of local cooperation" and to "hold the United States safe and harmless from damages done or caused to be done or for any claim or demand whatsoever for such damages suffered by or done to any property on which work is being performed." In the opinion of this office, pursuant to such grant of statutory authority, the South Carolina State Ports Authority would be authorized to enter and perform an agreement with the USACE for work on certain dredge disposal facilities in Charleston Harbor which would include the authorization to agree to and perform the obligations in the "Hold and Save" provision of the subject PPA, Article IX. I would only add that the conclusions of this opinion are solely related to the matter addressed in this opinion and should not be read more broadly to reverse the long-standing interpretation by this office that a state agency possesses no authority to enter into "hold harmless" agreements generally.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General