



HENRY McMASTER  
ATTORNEY GENERAL

October 25, 2010

William D. "Dean" Moss, Jr., Chairman  
Savannah River Maritime Commission  
6 Snake Road  
Okatie, South Carolina 29909-3739

Dear Mr. Moss:

We received your letter requesting an opinion of this Office concerning the powers of the Savannah River Maritime Commission, particularly as those powers relate to federally delegated responsibilities of state agencies. You asked the following questions:

1. Does the Savannah River Maritime Commission have the right and the responsibility to provide South Carolina's official comments on the Savannah Harbor Expansion Project and may it require the comments of other State Agencies on the project to be routed through the Commission?
2. Must the Department of Health and Environmental Control's (DHEC) action on the matter of the issuance or denial of a water quality certification under Section 401 of the Clean Water Act for the Savannah Harbor Expansion Project be consistent with the position of the Savannah River Maritime Commission?

As a way of background, you explained in the request letter that the Savannah Harbor Expansion Project (SHEP) will provide for the deepening of the Savannah Harbor from 42 feet to 48 feet to allow for the passage and accommodation of much larger container ships. The project is jointly sponsored by the State of Georgia (through the Georgia State Ports Authority) and the U.S. Army Corps of Engineers. Over the next several months, the Corps of Engineers will solicit public comments on the Draft Environmental Impact Statement on SHEP. The change caused by this project would have a significant potential impact on water quality in the Savannah River and on South Carolina's environment and economy.

Section 401 of the federal Clean Water Act provides that South Carolina is responsible for providing a 401 water quality certification (or to deny such certification) when the permitting process begins. As part of its delegated authority from the federal Environmental Protection Agency, DHEC is responsible for providing or denying this certification.

### Law/Analysis

#### Question 1

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impact of their proposed actions and reasonable alternatives to those actions. 42 U.S.C. 4321 *et seq.*<sup>1</sup> As mentioned above, the U.S. Army Corps of Engineers is preparing an Environmental Impact Statement for SHEP pursuant to the National Environmental Policy Act and is required to receive and consider public comments.<sup>2</sup>

The General Assembly created the Savannah River Maritime Commission (“Commission”) in 2007 by joint resolution, 2007 Act No. 56, Section 6 which is now codified as S.C. Code § 54-6-10. The Commission’s authority is stated as follows:

In addition to the above provisions of this joint resolution, a commission to be known as the Savannah River Maritime Commission is hereby established to **represent this State** in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels. The commission as an instrumentality of this State is empowered to **negotiate on behalf of the State** of South Carolina and **enter into agreements** with the State of Georgia, the United States Army Corps of Engineers, and other involved parties in regard to the above which bind the State of South Carolina; provided, however, that any such agreements which require state funding are subject to the funding being provided by the General Assembly in a general or supplemental appropriations act or in a bond bill.

S.C. Code § 54-6-10(A) (emphasis added).

If a statute’s language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which

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<sup>1</sup> “The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. 4321.

<sup>2</sup> As of October 2010, the SHEP “Fact Sheet” can be found at the following link:  
<http://www.sas.usace.army.mil/shexpan/Shep%20Fact%20Sheet-Sep%202010.pdf>

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limit or expand the statute's operation. Strickland v. Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007); Op. S.C. Atty. Gen., June 13, 2008.

It is clearly stated that the Commission has authority to "represent the State," "negotiate on behalf of the State," and "enter into agreement." However, there is no mention of the Commission's authority to restrict the federal right of another to submit comments. The Commission certainly has a right to submit comments and is encouraged to do so. In fact, the Commission may "represent the State" and relay comments from the public or other South Carolina agencies to the U.S. Corps of Engineers. However, the Commission does not have power to prevent others from independently submitting comments on the Draft Environmental Impact Statement. Individuals and agencies may directly submit comments to the U.S. Corps of Engineers.

#### Question 2

S.C. Code § 54-6-10(F) specifically explains the Commission's authority in relation to other state agencies or departments:

Except as provided below, **nothing in this section shall supersede the authority of other state agencies, departments, or instrumentalities including** the Department of Natural Resources, the **Department of Health and Environmental Control**, or the State Ports Authority to exercise all powers, duties, and functions within their responsibilities as provided by law. **However, on an interstate basis and specifically in regard to the State of Georgia, the responsibilities granted to the Savannah River Maritime Commission in this joint resolution supersede any other concurrent responsibilities** of a particular state agency or department. Any requirements for permitting and constructing new terminal facilities on the Savannah River in Jasper County are declared not to be the responsibility of this commission,<sup>3</sup> except as they may relate to this state's responsibility for the navigability or depth of the South Carolina portion of the Savannah River.

S.C. Code § 54-6-10(F) (emphasis added). The statute is clear that the Commission's authority does not supersede any other state agency's authority, specifically DHEC's. However, there is an exception: "on an interstate basis and specifically in regard to the State of Georgia" when "concurrent responsibilit[y]" is given. The situation at hand does not fall into the exception because there is no concurrent responsibility here.

DHEC is solely responsible for issuing or denying the 401 water quality certification. The only regulation in South Carolina that provides a procedure for issuing 401 certifications is R. 61-101. This regulation specifies DHEC's process as follows:

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<sup>3</sup> The matter at issue here is the Savannah Harbor Expansion Project and does not involve responsibility for permitting and constructing a new terminal facility in Jasper County. A 401 certification involves water quality, not navigability or depth.

A. GENERAL

- (1) This regulation establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.
- (2) Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department.<sup>4</sup> Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained . . .
- (3) The Department may issue, deny, or revoke general certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations. Such general certifications are subject to the same process as individual certifications.

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F. SCOPE OF REVIEW FOR APPLICATION DECISIONS

- (3) In assessing the water quality impacts of the project, the Department will address and consider the following factors:
  - (a) whether the activity is water dependent and the intended purpose of the activity;
  - (b) whether there are feasible alternatives to the activity;
  - (c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:
    - (1) impact on existing and classified water uses;
    - (2) physical, chemical, and biological impacts, including cumulative impacts;
    - (3) the effect on circulation patterns and water movement;
    - (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

25A S.C. Code Ann. Regs. 61-101(Supp. 2009). The regulation above specifically references DHEC and gives DHEC the authority to issue or deny the 401 certifications.

S.C. Code § 54-6-10(F) explains that the Commission will not supersede the authority of another state agency or department unless there is concurrent responsibility between the agency and the Commission relating to an issue “on an interstate basis . . . specifically in regard to the State of Georgia.” The South Carolina Code of Laws of 1976 does not mention the term “interstate basis”

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<sup>4</sup>“Department” means the Department of Health and Environmental Control. 25A S.C. Code Regs. 61-101(B)(4).

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anywhere else in the code. Therefore, we must rely on the plain language of the term "interstate basis." The Savannah Harbor Expansion Project does involve the State of Georgia, so the project could be considered interstate. Nevertheless, there does not appear to be concurrent responsibility shared between DHEC and the Commission as provided in the joint resolution. S.C. Code § 54-6-10(A) gives the Commission authority to "represent the State," "negotiate on behalf of the State," and "enter into agreement," yet there is no mention of the Commission's authority to require DHEC to issue a certification consistent with the Commission's position.

### **Conclusion**

#### Question 1

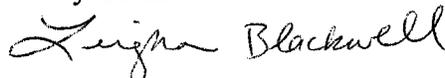
It is the opinion of this Office the Savannah River Maritime Commission has the right to provide comments on the Savannah Harbor Expansion Project. However, S.C. Code § 54-6-10 provides no authority for the Commission to restrict the federal right of another to file comments on the Environmental Impact Statement or to require any party to route comments through the Commission.

#### Question 2

It is the opinion of this Office that DHEC has the sole authority to issue 401 water quality certifications. The General Assembly did not change this authority in the joint resolution, S.C. Code § 54-6-10. Therefore, DHEC's action on the matter of issuance or denial of a water quality certification under Section 401 of the Clean Water Act for the Savannah Harbor Expansion Project need not be consistent with the position of the Commission. The Commission does not possess the authority to order DHEC to reach any certain decision as the decision on a 401 certification is solely DHEC's responsibility. 25A S.C. Code Ann. Regs. 61-101 (Supp. 2009). However, DHEC seeks and considers the views of interested persons in regard to a 401 certification through public notice and hearing. 25A S.C. Code Ann. Regs. 61-101(D) & (E) (Supp. 2009).

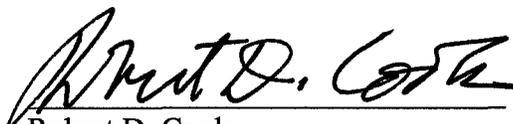
Sincerely,

Henry McMaster  
Attorney General



By: Leigha Blackwell  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General