



HENRY McMASTER  
ATTORNEY GENERAL

August 27, 2008

The Honorable Dennis Carroll Moss  
Member, House of Representatives  
306 Silver Circle  
Gaffney, South Carolina 29340

Dear Representative Moss:

We understand you desire an opinion of this office concerning landfills. Particularly, you ask that we address the following questions:

First, do the Department of Health and Environmental Control commissioners have the authority to place a moratorium on issuing permits for construction and debris landfills until such time as relevant regulations are amended? Second, is there anything that would prevent existing permits for construction and debris landfills from being made subject to any change in regulations?

In addition to these questions, you also ask in order to obtain a permit to operate a construction and debris landfill, whether a facility must demonstrate the need for such a facility?

### **Law/Analysis**

Chapter 96 of title 44 of the South Carolina Code, the South Carolina Solid Waste Policy and Management Act (the "Act"), generally governs matters involving the disposal of solid waste in South Carolina. Article 2 under the Act, in particular, governs solid waste management and provides the Department of Health and Environmental Control ("DHEC") with the authority to "issue, deny, revoke, or modify permits, registrations, or orders under such conditions as the department may prescribe, pursuant to procedures consistent with the South Carolina Administrative Procedures Act, for the operation of solid waste management facilities . . ." S.C. Code Ann. § 44-96-260 (2002). Section 44-96-290 of the South Carolina Code (2002) specifies the requirements for obtaining a permit for a solid waste management facility. This provision also allows DHEC to promulgate regulations for the permitting of solid waste facilities. S.C. Code Ann. § 44-96-290(D). However, in our review of the provisions contained in the Act, we did not locate a provision allowing DHEC to place a moratorium on the issuance of permits pending legislative approval of its regulations.

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An opinion of this Office issued in 1989 addressed whether the Town of Hilton Head Island could amend its land management ordinance and place a moratorium on the issuance of building permits if the level of traffic congestion reaches a certain level. Op. S.C. Atty. Gen., February 3, 1989. We cited case law from other jurisdictions stating counties only have powers expressly granted to them or necessarily implied therefrom. Id. Likewise, upon finding no statutory provision allowing a municipality to impose a moratorium on the issuance of building permits, we concluded: “A court considering the issue could easily find a basis to hold the amendment to have been adopted without statutory authorization, either express or necessarily implied.” Id.

Subsequent to our opinion, the South Carolina Court of Appeals came to a similar conclusion with regard to the City of Gaffney’s ability to place a moratorium on the issuance of building permits for multi-family housing. Simpkins v. City of Gaffney, 315 S.C. 26, 431 S.E.2d 592 (Ct. App. 1993). Examining the statutes giving municipalities the authority to enact zoning regulations, the court determined “nothing in these two sections or in any other statute grants a municipal corporation the power to suspend an ordinance.” Id. at 29, 431 S.E.2d at 594.

We understand from your request letter and our conversations with you that some amendments have been proposed that change the requirement for permitting construction and debris landfills. Thus, in light of these proposed amendments, you ask whether DHEC may place a moratorium on its issuance of these types of permits until these amendments are finalized and approved by the Legislature. Based on the following analysis, we do not believe DHEC has such authority.

The Act gives DHEC the authority and the responsibility of issuing permits for solid waste management facilities. While the provisions of section 44-96-260 allow DHEC to issue these permits in accordance with such conditions as DHEC may provide, we do not believe DHEC has the ability to place a moratorium on the issuance permits. Our courts have found DHEC, as a creature of statute, only has the authority granted to them by the Legislature. Responsible Econ. Dev. v. South Carolina Dep’t of Health and Env’tl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007); DuRant v. South Carolina Dep’t of Health and Env’tl. Control, 361 S.C. 416, 421, 604 S.E.2d 704, 707 (Ct. App. 2004). In the absence of such authority, we are of the opinion that DHEC may not place a moratorium on issuing permits for construction and debris landfills until relevant regulations are amended.

Presuming the amendments to the DHEC regulations governing construction and debris landfills are approved, you ask whether these regulations apply to permits previously issued for construction and debris landfills. As mentioned above, section 44-96-290 governs permitting of solid waste management facilities. According to this provision, DHEC has the authority to promulgate regulations for the permitting of solid waste management facilities. S.C. Code Ann. § 44-96-290(D). Section 44-96-290 does not state whether regulations promulgated by DHEC are applicable retroactively. However, courts general presume that regulations are prospective in operation. See, Leventis v. South Carolina Dep’t of Health and Env’tl. Control, 340 S.C. 118, 133

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n.8, 530 S.E.2d 643, 651 n.8 (Ct. App. 2000); Dolese Bros. v. State ex rel. Oklahoma Tax Comm'n, 64 P.3d 1093, 1098 (Okla. 2003) (“Generally, substantive administrative rules and regulations apply only to conduct that occurs after their effective date.”); Champagne v. Thurston County, 178 P.3d 936, 942 (Wash. 2008) (“Generally, we presume prospective application of newly amended administrative regulations, particularly where the amendments change substantive rights.”).

In addition, subsection (E) of section 44-96-290 states: “No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” S.C. Code Ann. § 44-96-290(E). This provision further clarifies: “The department shall promulgate regulations to implement this section. These regulations must apply to all solid waste management facilities which have not obtained all permits required for construction.” (emphasis added). Thus, the Legislature specified that DHEC regulations pertaining to a facility’s demonstration of need requirement apply to those facilities who have yet to procure the necessary permits for operation. Accordingly, a facility that already obtained the necessary permits would not be subject to new or amendments to regulations pertaining to the facility’s demonstration of need.

Although we do not believe facilities operating under an established permit are subject to new or amendments to DHEC’s permitting regulations, we must note that DHEC has the authority to place conditions upon facilities operating under DHEC permits. See S.C. Code Ann. § 44-96-290(H). From our review of section 44-96-290(H), we understand that these conditions are established at the time DHEC issues the permit. Id. However, section 44-96-290(I) allows DHEC to amend or attached conditions to an existing permit under certain conditions including when “the amendment is necessary to meet changes in applicable regulatory requirements.”

Finally, you inquire as to whether a construction and debris landfill must demonstrate a need for the facility prior to receiving a DHEC permit. As noted previously, section 44-96-290(E) of the South Carolina Code states:

No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department. Facilities which lawfully burn nonhazardous waste for energy recovery up to the normal rate of manufacturing production or which lawfully use or reuse the waste to make a product shall not be excluded from the demonstration of need requirement. No construction of new or expanded solid waste management facilities may be commenced until all permits required for construction have been issued. In determining if there is a need for new or expanded solid waste disposal sites, the department shall not consider solid waste generated in jurisdictions not subject to the provisions of a county or regional solid waste management plan pursuant to this chapter.

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The department shall promulgate regulations to implement this section. These regulations must apply to all solid waste management facilities which have not obtained all permits required for construction. This subsection does not apply to inert or cellulosic solid waste facilities which are not commercial solid waste management facilities or to industrial facilities managing solid waste generated in the course of normal operations on property under the same ownership or control as the solid waste management facility if the industrial facility is not a commercial solid waste management facility.

Furthermore, in accordance with this provision, regulations pertaining to the demonstration of need requirement can be found in section 61-107.17 of the South Carolina Code of Regulations (Supp. 2007).

#### Conclusion


Based upon our analysis above, we do not believe DHEC has the authority to place a moratorium on its issuance of permits for construction and debris landfills until proposed amendments to DHEC regulations are approved. In addition, we do not believe amendments to DHEC's permitting regulations apply to existing permittees. However, we point out that under certain circumstances, DHEC may impose additional conditions upon existing permittees. Lastly, based upon the statutory requirements set forth in the Act and DHEC regulations, solid waste management facilities, including construction and debris landfills, seeking permits for the construction must demonstrate a need for such a facility.

Very truly yours,

Henry McMaster  
Attorney General



REVIEWED AND APPROVED BY:



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