January 11, 2008

John E. Frampton, Director
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Dear Mr. Frampton:

We received your letter requesting an opinion of this Office concerning sections 12-6-3520 and 50-15-55 of the South Carolina Code. In your letter, you provided us with the following information:

> In the 1999-2000 Budget Bill (Act. No. 100, Part II, Sec. 95C), the General Assembly enacted both of the above-referenced sections. These sections together provide for a tax credit against the income tax liability for taxpayers who do habitat management or improvements on real property for endangered species or species in need of management. § 12-6-3520 . . . refers to § 50-15-55(C) . . . in order for the tax credits to be applicable. § 50-15-55(C) contains the proviso that specified that the section would take effect on July 1, 1999, only if sufficient funding in the opinion of the Department of Revenue, is available to fund the credit, (emphasis added).
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> Before July 1, 1999, the Department of Revenue made the determination that funding was not available. The question thus arises if the proviso in item (C) of §50-15-55 was the triggering event and DOR made a determination that there was insufficient funding, what is the current legal effect of that section?

Law/Analysis

As you mention in your letter, the Legislature enacted sections 12-6-3520 and 50-15-55 of the South Carolina Code as part of the 1999 appropriations act. 1999 S.C. acts 355. Section 12-6-3520, as provided in section 95(A) in the 1999 act, states in pertinent part:

> (A) There shall be allowed as a tax credit against the income tax liability of a taxpayer an amount equal to fifty percent of the costs incurred by the taxpayer for habitat management or construction and maintenance of improvements on real property that are made to land as described in Section 50-15-55(A) and which meets the requirements of regulations promulgated by the Department of Natural Resources pursuant to Section 50-15-55(A). For purposes of this section, 'costs incurred' means those monies spent or revenue foregone for habitat management or construction and maintenance, but does not include revenue foregone as increases in land values or speculative costs related to development.

Id. In addition, section 95(B) of the 1999 act provides for section 50-15-55 of the South Carolina as follows:

> (A) The department shall promulgate regulations addressing criteria for designating land as certified management area for endangered species or of species in need of management in order to qualify a taxpayer for the income tax credit provided for in Section 12-6-3520.
>
> (B) Every five years the department may review the population status of species subject to certified management agreements and shall revise the regulations accordingly. The department may revise criteria at that time as necessary for lands to retain their designation as certified management areas.

Id. In addition to adding these two provisions, in section 95(C) of the act, the Legislature also included the following proviso: "This section takes effect July 1, 1999, only if sufficient funding, in the opinion of the Department of Revenue, is available to fund the credit." Id.

You informed us in your letter that the Department of Revenue determined in 1999 that sufficient funding did not exist. Based on this information, apparently the event upon which the enactment of these provisions is contingent did not occur in 1999. Therefore, we do not believe sections 12-6-3520 and 50-15-55 became effective pursuant to the appropriations act of 1999.

However, in 2001, the Legislature passed act 89, part of which purports to amend section 12-6-3520. 2001 S.C. acts 2029. Pursuant to act 89, the Legislature, for the most part, restates sections (A), (B), and (D) as they appeared in the 1999 legislation changing only a few words in these provisions. Id. In addition, the Legislature rewords subsection (C) and revises subsection (E) to allow limited liability companies taxed as partnerships to pass the credit along to their members.

Id. The act states it becomes effective upon the approval of the Governor, which occurred on August 20, 2001. Id. Thus, although we believe section 12-6-3520 did not become effective in 1999, we are of the opinion that the Legislature enacted this provision for the first time in 2001 and that legislation became effective on August 20, 2001.

Despite finding section 12-6-3520, as enacted in 2001, operable and enforceable, we come to a different conclusion with regard to section 50-15-55. When the Legislature amended and restated section 12-6-3520 in 2001, it had the opportunity to do the same for section 50-15-55. However, it did not do so. In addition, although the 2001 version of section 12-6-3520 makes reference to section 50-15-55(A), we do not believe the mere reference of this provision is sufficient to enact section 50-15-55 as previously provided under the 1999 appropriations act. Therefore, we are of the opinion that section 50-15-55 is not an enforceable provision of law.

The question then becomes whether the authority for DNR to promulgate regulations may be gleaned from section 12-6-3250. In reading section 12-6-3520, we must keep in mind the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In addition, courts "presume the legislature intends to accomplish something by its enactments and that it would not do a futile thing." Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

As we previously concluded, section 12-6-3520 did not become effective pursuant to the 1999 legislation. Therefore the amendments made to this provision in 2001 actually constitute the initial enactment of this provision. One presumes that in enacting section 12-6-3520, the Legislature intended to create a tax credit for habitat management activities with the accompanying authority to promulgate regulations. Thus, it might be argued that to conclude such a credit does not exist because section 50-15-55(A), as referenced in this provision, never became operable, we would be interpreting section 12-6-3520 contrary to the intent of the Legislature. Furthermore, it could be argued that from the plain and ordinary meaning of the language used in section 12-6-3520, that the Legislature contemplated DNR's authority to promulgate regulations in order to determine whether the costs incurred as a result of particular activities are eligible to be taken into account for purposes of the tax credit. However, this is far from clear, inasmuch as section 50-15-55 did not go into effect and was not enacted in 2001, as was section 12-6-3520. Thus, we suggest that, in order to clarify DNR's authority to promulgate regulations in this area, the Legislature make it clear that the agency is authorized to do so.

Conclusion

Based upon our analysis above, we are of the opinion that sections 12-6-3520 and 50-15-55 did not become effective in 1999 as their effectiveness was conditioned upon a contingency that did not occur. However, we believe by its amendment and restatement of section 12-6-3520 in 2001, the Legislature enacted this provision, effective upon the signature of the Governor. Nevertheless, because we do not find section 50-15-55 currently in effect, it is uncertain whether DNR is authorized to promulgate regulations governing habitat management. Thus, consistent with this ambiguity, legislative clarification is advisable in order to make it clear that DNR possesses authority to promulgate such regulations. Such clarification would enable taxpayers to take advantage of the credit provided for pursuant to section 12-6-3520.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General