



ALAN WILSON
ATTORNEY GENERAL

July 14, 2011

The Honorable Joe H. Jefferson, Jr.
SC House of Representatives
District No. 102 – Berkeley County
1375 Colonel Mahem Drive
Pineville, SC 29468

Dear Representative Jefferson:

We received your letter requesting an opinion of this Office concerning the burning practices used by the US Forest Service in South Carolina.

As a way of background, the letter explains that “[s]pring and summer are nesting seasons for all types of native birds found in abundance on the National Forest.” It is also explained that national forests such as Francis Marion National Forest is home to “[h]atchling wild turkey” and “new-born whitetail deer.” The letter states that acreage goals can easily be met “by burning [only] in the fall and winter.”

The question is specifically posed as to whether the S.C. Code of Laws permits landowners to deliberately burn land when it is known that such burning will cause harm or death to birds and animals.

Law/Analysis

According to the South Carolina Prescribed Fire Act a “prescribed fire” is defined as follows:

“Prescribed fire” means a controlled fire applied to forest, brush, or grassland vegetative fuels under specified environmental conditions and precautions which cause the fire to be confined to a predetermined area and allow accomplishment of the planned land management objectives. It also is known as “controlled burn”.

S.C. Code § 48-34-20. The State Commission of Forestry is authorized to promulgate regulations for the use of prescribed fire and for the certification of prescribed fire managers. S.C. Code § 48-34-30. The requirements for conducting prescribed fires are as follows:

Prescribed fires conducted pursuant to this chapter:

- (1) must have a prescribed fire plan prepared before authorization to burn is given by the State Commission of Forestry, and the plan must be on site and followed during the burn;
- (2) must have at least one certified prescribed fire manager present and supervising the burn from ignition until it is declared safe according to certification guidelines;
- (3) are considered in the public interest and do not constitute a public or private nuisance when conducted pursuant to state air pollution statutes, smoke management guidelines, and regulations applicable to the use of prescribed fire;
- (4) are considered a property right of the property owner.

S.C. Code § 48-34-40. **Unless negligence is proven, “no property owner or lessee or his agent or employee conducting a prescribed fire pursuant to this chapter is liable for damage, injury or loss caused by fire.”** S.C. Code § 48-34-50 (emphasis added).

S.C. Code of Laws § 48-35-10 *et seq.* outlines the procedures to be followed with respect to outdoor burning where one starts a fire in woodlands, grasslands or other places unlawful unless certain precautions are taken. S.C. Code § 48-35-10 states as follows:

It shall be **unlawful for any owner or lessee of land or any employee of such owner or lessee or other person to start, or cause to be started, a fire in any woodlands, brushlands, grasslands, ditchbanks, or hedgerows or in any debris, leaves or other flammable material adjacent thereto, except under the following conditions:**

- (a) Proper **notification** shall be **given to the State Forester**, or his duly authorized representative or other persons designated by the State Forester. The notice shall contain all information required by the State Forester or his representative.
- (b) Such persons shall have **cleared around the area to be burned** and have immediately available sufficient equipment and personnel to adequately secure the fire and prevent its spread.
- (c) The **person starting the burning shall supervise carefully** the fire started and have it under control prior to leaving the area.

S.C. Code § 48-35-10 (emphasis added). In a prior opinion of this Office dated October 12, 1989, we further explained:

Section 48-35-50 provides that the “State Forester may direct at any time, when deemed necessary in the interest of public safety, that fires covered by this chapter not be started.” Section 48-35-60 provides criminal penalties for violations of Chapter 35 of Title 48. Additionally, within the **Forest Fire Protection Act**, Section 48-33-10 *et seq.*, the **State Commission of Forestry is given the authority to make and enforce rules and**

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regulations “necessary for the administration of forest fire protection.” S.C. Code § 48-33-70.

Op. S.C. Atty. Gen., October 12, 1989 (emphasis added). In other words, a landowner may legally start a fire if the State Forester is properly notified and the required precautions are taken such as appropriately clearing and supervising the land and following any applicable rules or regulations of the State Commission of Forestry.

The “State Commission of Forestry may make such rules and regulations as it deems advisable for the protection, preservation, operation and maintenance, and for the most beneficial service to the general public, of the State forests in this State. S.C. Code § 48-23-200. Regulations pertaining to SC Forestry Commission Lands can be found in the S.C. Code of Regulations, 55-1. In relevant part, S.C. Code of Regulations, 55-1 states that:

12. Molesting, injuring, poisoning, destroying, or attempting such acts, of any plant or animal life on South Carolina Forestry Commission lands are prohibited except by permit.

S.C. Code of Regulations, 55-1 (12). It is clear that “injuring” or “destroying” “any plant or animal life on South Carolina Forestry Commission lands” is prohibited under S.C. Code of Regulations, 55-1(12); however, an exception is made if one has a proper permit to do so. Therefore, one should ensure that all appropriate permits are obtained and all SC Forestry Commission rules are followed before any burning commences.

The letter mentioned that the forest at issue was a national forest, specifically Francis Marion National Forest. S.C. Code of Laws § 50-1-190 governs the agreements made between the SC Department of Natural Resources and the United States:

The department may enter into a cooperative agreement with the United States Government, or with the proper authorities thereof, for the protection and management of the wildlife resources of the national forest lands within the State and for the restocking of such lands with desirable species of game, birds and other animals and fish.

S.C. Code § 50-1-190 (emphasis added).

The Forest Management Protection Act can be found in Title 50, Chapter 2. The purpose of the act “is to encourage and protect landowners’ ability to maintain their land for forest use and to conduct forest management activities.” S.C. Code § 50-2-20. Forestry Management Activities, such as controlled burning and fire control are often necessary. S.C. Code § 50-2-30. Such activities take place in an area called a “forestry operation area.” S.C. Code § 50-2-30. The Forest Management Protection Act explains that a “forestry operation inherently includes

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lengthy periods between forest management activities and shall be deemed continuously operating so long as the operation supports an actual or developing forest.” S.C. Code § 50-2-30. **“No established forestry operation is or may become a nuisance, private or public, if the forestry operation adheres to best management practices as promulgated by the South Carolina Forestry Commission.”** S.C. Code § 50-2-50(A) (emphasis added).¹

As stated in many prior opinions, “investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court.” E.g., Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Therefore, our Office must take the information provided in the request letter and apply the law accordingly. We are unable to perform investigations to verify the burning activity that takes place at Francis Marion National Forest.

Conclusion

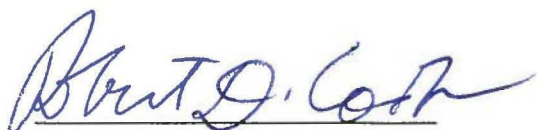
While “injuring” or “destroying” “any plant or animal life on South Carolina Forestry Commission lands” is prohibited under S.C. Code of Regulations, 55-1(12), an exception is made if one has a proper permit to do so. In other words, to “intentionally [burn an animal] to death” would be both criminal and repulsive. However, proper procedures have been put in place by the Legislature and the State Forestry Commission regarding prescribed fires. If one adheres to the relevant statutes discussed above and follows the rules and regulations of the State Forestry Commission, then unless negligence is proven, “no property owner or lessee or his agent or employee conducting a prescribed fire pursuant to this chapter is liable for damage, injury or loss caused by fire.” S.C. Code § 48-34-50.

Sincerely,



Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

¹ One should note that “open burning” is prohibited by DHEC Regulation 61-62.2 unless one of the exceptions listed in Section I apply. However, the issue before us would be considered “controlled burning” or a “prescribed fire,” not “open burning.”