ALAN WILSON
ATTORNEY GENERAL

September 28, 2011

Carlisle Roberts, Jr., Esquire
General Counsel
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Dear Mr. Roberts:

We received your request regarding the authority of the South Carolina Department of Health and Environmental Control ("DHEC") to alter drug schedules. By way of background, you note that on October 11, 2011, the Drug Enforcement Administration ("DEA") will temporarily schedule the following synthetic cathinones into Schedule I of the federal Controlled Substances Act ("CSA"): 4-methyl-N-methylcathinone (mephedrone); 3, 4-methylenedioxy-N-methylcathinone (methylone); and 3, 4-methylenedioxypyrovalerone (MDPV). Specifically, you ask whether DHEC may add these substances as "Schedule I" controlled substances after these substances are scheduled under the CSA?

Law/Analysis

The United States Attorney General, through the Administrator of the DEA, provided notice in the Federal Regulations to temporarily schedule mephedrone, methylone, and MDPV under the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811 (h).[1] 76 Fed. Reg., Number 174, pp. 55616 - 55619 (September 8, 2011) (2011 WL 3917902). The DEA's notice states that these synthetic cathinones have a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for use under medical supervision. (Notice, Background). These substances are "designer drugs" which have not been approved by the Food and Drug Administration for human consumption. (Notice, Factor 3). The notice further states these substances "are being used as recreational drugs," and "are being perceived as being 'legal' alternatives to cocaine, methamphetamine, and MDMA." The popularity of these synthetic cathinones has increased across the United States and, according to law enforcement and health officials, these substances are becoming increasingly prevalent and abused. The synthetic cathinones are falsely marketed as "research chemicals," "plant food," and "bath salts." They are sold at smoke shops, convenience stores, gas stations, etc., as well as on the Internet and mailed using the United States Postal Service and international mail services. (Notice, Factor 4). The notice states "these substances can cause acute health problems, can potentially lead to dependence, or can cause death." (Notice, Factor 6). The action by the DEA "is based on the finding by the Administrator

[1]The Code of Federal Regulations provides five specific, detailed "schedules" of controlled substances. 21 C.F.R. §§1308.11-15. See 21 U.S.C. §812.

that the placement of these synthetic cathinones into schedule I of the CSA is necessary to avoid an imminent hazard to the public safety." The final order will not be published in the Federal Register prior to October 11, 2011. Further, "any final order will impose the administrative, civil, and criminal sanctions and regulatory controls of Schedule I substances under the CSA on the manufacture, distribution, possession, importation, and exportation of these synthetic cathinones." (Notice, Summary).

Article 3, Chapter 53 of Title 44 of the South Carolina Code of Laws governs Narcotics and Controlled Substances in South Carolina. Specifically, S.C. Code Ann. §§44-53-110, -180 through -270 provide definitions as well as specific, detailed "schedules" and tests for inclusion in said "schedules" of controlled substances.

To address your question, we must look at §44-53-160, which is titled "Manner in which changes in schedule of controlled substances shall be made." This statute provides as follows:

> (1) Annually, within thirty days after the convening of each regular session of the General Assembly, [DHEC][2] shall recommend to the General Assembly any additions, deletions or revisions in the schedules of substances, enumerated in §§ 44-53-190, 44-53-210, 44-53-230, 44-53-250 and 44-53-270, which it deems necessary. [DHEC] shall not make any additions, deletions or revisions in such schedules until after notice and an opportunity for a hearing is afforded all interested parties. In making a recommendation to the General Assembly regarding a substance, [DHEC] shall consider the following:
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> (a) The actual or relative potential for abuse;
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> (b) The scientific evidence of its pharmacological effect, if known;
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> (c) State of current scientific knowledge regarding the substance;
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> (d) The history and current pattern of abuse;
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> (e) The scope, duration, and significance of abuse;
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> (f) The risk to the public health;
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> (g) The potential of the substance to produce psychic or physiological dependence liability; and
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> (h) Whether the substance is an immediate precursor of a substance already controlled under this Division.

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[2]For purposes of this Chapter, §44-53-110 provides that "Department" means DHEC.

> (2) After considering the above factors, [DHEC] shall make a recommendation to the General Assembly, specifying to what schedule the substance should be added, deleted or rescheduled, if it finds that the substance has a potential for abuse.
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> (3) During the time the General Assembly is not in session, [DHEC] may by rule add, delete or reschedule a substance as a controlled substance after providing for notice and hearing to all interested parties. Upon the adoption of such rule, [DHEC] shall forward copies to the chairmen of the Medical Affairs Committee of the Senate, and the Military, Public and Municipal Affairs Committee of the House of Representatives and to the Clerks of the Senate and House and to the Chairman of the Joint Legislative Committee on Drugs and Narcotics.
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> (4) If any substance is added, deleted, or rescheduled as a controlled substance under federal law or regulation, [DHEC] shall by rule, at its first regular or special meeting after publication in the federal register of the final order designating the substance as a controlled substance or rescheduling or deleting the substance, reschedule the substance into the appropriate schedule, such rule having force of law unless overturned by the General Assembly. This rule issued by [DHEC] shall be in substance identical with the order published in the federal register effecting the change in federal status of the substance. [DHEC] shall notify the General Assembly in writing of the change in federal law or regulation and of the corresponding change in South Carolina law.
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> (5) [DHEC] shall exclude any nonnarcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act and the law of this State, be lawfully sold over the counter without a prescription.

In reading this statute, we must keep in mind the general rules of statutory interpretation. As the South Carolina Supreme Court stated in State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 161 (2007):

> [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). 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. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). A statute's language must be construed in light of the intended purpose of the statute. Id. Whenever possible, legislative intent should be found in the plain language of the statute itself. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581.

Subsection (1) of §44-53-160 deals with DHEC's classification of a substance as a controlled substance upon its own initiative. In performing that function, DHEC is required to consider eight specified aspects, and thereafter pursuant to subsection (2) "make recommendations . . . if it finds that the substance has a potential for abuse." Subsection (3) allows DHEC "by rule" to "add, delete or reschedule a substance" as a controlled substance during the time in which the Legislature is not in session, after providing notice and a hearing to all interested parties.

Subsection (4) specifically addresses your question. Pursuant to this provision, when "any substance is added, deleted, or rescheduled as a controlled substance under federal law or regulation [DHEC] shall by rule, at its first regular or special meeting after publication in the federal register of the final order designating the substance as a controlled substance or rescheduling or deleting the substance, reschedule the substance into the appropriate schedule. . ." Subsection (4) further provides that such action will have the "force of law unless overturned by the General Assembly." It should be noted that an amendment in 2010 S.C. Acts No. 273, §36, rewrote subsection (4).[3] The Title to Act 273 states the amendment was intended "to amend Section 44-53-160, relating to the manner in which changes to the schedule of controlled substances are made, so as to change the method of notifying the General Assembly when a controlled substances is added, deleted, or rescheduled. . . ." It is generally recognized the title of an act may be used in aid of construction to show legislative intent. Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972); University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966). Finally, the mandatory intent of subsection (4) is further evident

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[3]Prior to the 2010 amendment, subsection (4) stated as follows:

> [i]f any substance is added, deleted, or rescheduled as a controlled substance under Federal law and notice of the designation is given to [DHEC], [DHEC] shall recommend that a corresponding change in South Carolina law be made by the next regular session of the General Assembly not less than thirty days after publication in the Federal register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless [DHEC] objects to the change. In that case, [DHEC] shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, [DHEC] shall announce its decision and shall notify the General Assembly in writing of the change in Federal law or regulations and of [DHEC's] recommendation that a corresponding change in South Carolina law be made, or not be made, as the case may be.
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> If [DHEC] does not object to the change of schedule, it shall by rule, at its first regular or special meeting after the final order by the Bureau or its successor agency is published in the Federal register, reschedule the substance into the appropriate schedule, such rule having force of law unless overturned by the General Assembly; in such case, no hearing need be given unless requested by an interested party. This rule issued by [DHEC] shall be in substance identical with the order published in the Federal register effecting the change in Federal status of the substance.

through the use of the word "shall" by the Legislature. Ops. S.C. Atty. Gen., September 27, 2000; July 11, 1984; see Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). Prior opinions of this office recognize that a mandatory provision must be strictly complied with and there is no discretion in the agency. Ops. S.C. Atty. Gen., September 22, 1994; April 29, 1968; see Hyder v. Edwards, 269 S.C. 138, 236 S.E.2d 561 (1977).

In your request, you suggest that §44-53-160 (4) authorizes DHEC to schedule these substances without complying with the normal requirements of South Carolina's Administrative Procedures Act ("APA") for promulgating a regulation. We agree.

The promulgation of agency regulations is generally governed by the APA, which is codified at §§1-23-10 *et seq*. The pertinent provision relating to your question is §1-23-110. Before promulgating or amending regulations, the APA requires public notice of a drafting period through publication in the State Register. §1-23-100 (A) (1). The agency must also "give notice of a public hearing at which the agency will receive data, views, or arguments, orally and in writing, from interested persons on proposed regulations . . ." §1-23-110 (A) (3). The notice of a public hearing must include either the text or a synopsis of the proposed regulation. §1-23-110 (A) (3) (c). Other requirements for promulgation are also specified in this provision. See Leventis v. S.C. Dept. of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Section 1-23-111 further governs the regulation promulgation process, including public hearings upon the proposed regulations. Legislative approval of agency regulations is provided for in §§1-23-120 and -125. "Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. §1-23-10 (4).

The recent decision in Spectre, Inc. v. S.C. Department of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (2010), illustrates the issue you present. In Spectre, as part of the Coastal Zone Management Act ("CZMA"), DHEC was required by statute to develop a comprehensive coastal management program ("CMP") for the "coastal zone." See §48-39-80. In developing the CMP pursuant to this provision, DHEC was required to develop a system whereby it was authorized to review all State and federal permits for compliance with the CMP. DHEC developed a plan and promulgated it in accordance with the procedures set forth in the CZMA. Based on its interpretation of §48-39-80, DHEC denied Spectre's application for a stormwater/land disturbance permit, because it found the project was inconsistent with various provisions of the CMP. Spectre challenged DHEC's action, arguing the CMP was not a valid regulation promulgated and approved by the Legislature in accordance with the APA. Id., 688 S.E.2d at 845-46. The Administrative Law Court ("ALC") agreed, finding that Spectre was entitled to the permit as a matter of law. The ALC noted that the CMP, as promulgated by DHEC, was not a regulation under South Carolina law. According to the ALC, because the CMP was not issued as a regulation and approved by the Legislature, it did not have the force and effect of law and that consequently, DHEC could not enforce it. Id., 688 S.E.2d at 846.

On appeal by DHEC, the South Carolina Supreme Court reversed the ALC. The Court found there was no requirement the CMP be promulgated as an APA regulation.[4] The Court explained the CZMA set out specific procedures for DHEC to develop a system for reviewing state and federal permit applications in the coastal zone for CMP consistency, and that DHEC was given responsibility for enforcing and administering the program in accordance with the provisions of the CZMA. The Court stated that, "[h]ad the [Legislature] intended to require DHEC to promulgate regulations, it could have so specified. . . [T]he stringent requirements for enactment of the CMP . . . suggest that the [Legislature] did not believe it was meant to be an unenforceable document." Id., 688 S.E.2d at 851." The Court concluded that "§48-39-80 provide[d] explicit statutory authorization to apply the CMP to state permits." Because DHEC properly developed the CMP and promulgated it in accordance with explicit statutory authorization, the Court deemed the CMP valid and enforceable. Id., 688 S.E.2d at 850-52.

We note that in Spectre, the Court distinguished the case of Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1992). In Captain's Quarters, the Coastal Council ("Council") refused permits to rebuild sea walls at their original locations pursuant to a test it developed based on its own interpretation of the 1988 Beach Management Act ("Act"). The trial court concluded the Council's test was invalid because, *inter alia*, it was not promulgated by regulation. Id., 413 S.E.2d at 13-14. The South Carolina Supreme Court affirmed. It held that an agency, "[a]s a creature of statute, . . . is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Id., 413 S.E.2d at 14; see Ops. S.C. Atty. Gen., January 5, 2011; October 22, 2004. In Captain's Quarters, the Court concluded the Legislature expressly mandated that the Council promulgate regulations to govern the evaluation of permit applications under the Act, and that the Council "overstepped its statutory authority in formulating and applying this test . . . without formalizing it by regulation." Id., 413 S.E.2d at 14.

By contrast, in Spectre §48-39-80 explicitly directed DHEC only to "[d]evelop a system" in "providing for the orderly and beneficial use of critical areas . . ." Spectre, 688 S.E.2d at 851. [Emphasis in original]. DHEC properly promulgated the CMP pursuant to this statutory authorization. Likewise, in the circumstance presented in your letter, §44-53-160 (4) expressly mandates that DHEC designate a substance as a scheduled controlled substance at the first regular or special meeting held after publication in the federal register of a final order of a similar federal designation of a substances as a controlled substance.

Conclusion

It is the opinion of this office and you are advised that, pursuant to the federal action temporarily adding mephedrone, methylone, and MDPV to the federal drug abuse controlled substance schedules as "Schedule I" controlled substances, DHEC is authorized and directed pursuant to the specific procedures of §44-53-160 (4) to designate these substances in §44-53-190 as Schedule I controlled substances at DHEC's first or special Board meeting after publication in the federal register of the final order of the federal designation, which is expected to occur on October 11, 2011. Such action by DHEC in accordance

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[4]The Court in Spectre noted that DHEC neither argued the CMP is the equivalent of a regulation nor that the CMP was passed in accordance with the APA. Id., 688 S.E.2d at 850 & n. 4.

with the express procedures set forth in §44-53-160 (4) would be valid and enforceable, "unless overturned by the [Legislature]."[5] Spectre, 688 S.E.2d at 851-52; see State v. Klinck, 44 Ohio St.3d 108, 541 N.E.2d 590, 592 (1989) [upholding Ohio law providing that drug classification made by United States Attorney General on the federal schedules "was automatically incorporated into" the Ohio statutes]. Once these substances become Schedule I controlled substances under state law, then the legislatively-prescribed criminal penalties may be imposed for their misuse. Cf. State v. Brown, 317 S.C. 55, 451 S.E.2d 888, 892 (1994) [noting that Legislature's classification between crack cocaine and cocaine was valid although the Legislature passed §44-53-375(B) without following §44-53-160, finding §44-53-160 did not limit the power of the Legislature to alter the drug statutes].

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[5]At the time of this writing, the South Carolina House of Representatives is considering specific legislation (H. 3793) that would add the above-referenced substances to the list of Schedule I controlled substances.