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ATTORNEY GENERAL

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S.C. Department of Health and Environmental Control
2600 Bull Street
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Dear Ms. Dickman:

We received your request for an opinion of this office. By way of background, you note the South Carolina Department of Health and Environmental Control (“DHEC”) has established Regulations that contain both numeric and narrative water quality standards to evaluate the health of water bodies in South Carolina, and that DHEC is also required by the Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”) to develop Total Maximum Daily Loads (“TMDLs”) for waters that are considered “impaired” because they do not meet water quality standards.

Accordingly, DHEC’s Bureau of Water has been involved in the development of a total phosphorus and total nitrogen TMDL for the Reedy River Watershed, which targets loading into Boyd Millpond and the Reedy River arm of Lake Greenwood.¹ You explain that:

[t]he TMDL model application simulates phosphorus and nitrogen loadings into the lakes in order to predict chlorophyll-a concentrations. Under the current TDML approach, percent reductions required of permitted point source dischargers would be approximately 85-90% total phosphorus and 64% total nitrogen (60% phosphorus and 40% total nitrogen reduction for [municipal separate storm sewer systems or “MS4s”]). Under this approach, during the modeling period, the total phosphorus and total nitrogen numeric standards are exceeded 6% of the time, however, the chlorophyll-a numeric standard is never exceeded.

The applicable water quality standards for South Carolina water bodies are found in 25 S.C. Code Ann. Regs. 61-68 (Supp. 2010). Specifically, Reg. 61-68.E.11.b(2) states the numeric standard for lakes greater than 40 acres as follows:

¹See http://www.scdhec.gov/environment/water/tmdl/doc/Draft_Reedy_nut_TMDLs.

[f]or the Piedmont and Southeastern Plains ecoregions of the State, total phosphorus shall not exceed 0.06mg/l, chlorophyll a shall not exceed 40 ug/l, and total nitrogen shall not exceed 1.50 mg/l. [Emphasis added].

You inform us the Environmental Protection Agency (“EPA”) has not objected to DHEC’s modeling approach used to develop the TMDL for the Reedy River Watershed. However, because the numeric nutrient standard says “shall not exceed,” you state the EPA takes the position that the TMDL in this case must not lead to any excursions of the numeric criteria for the proper application of the South Carolina water quality standards for total nitrogen and total phosphorus.

Based on the extensive modeling work associated with this TMDL, you state:

[i]t is the opinion of [DHEC] staff that there is no reduction scenario by which to achieve zero excursions of the nutrient standards. Even if permitted sources were required to reduce phosphorus loading by 99%, excursions of the numeric standard would still occur. Furthermore, requiring continuous point source dischargers to reduce their phosphorus loadings by 99% is not practicable because it is extremely difficult and expensive to achieve on a consistent basis given the limits of current technology. . . . Therefore, after consultation with other State agencies, environmental groups and regulated entities, [DHEC’s] Division of Water Quality staff have adopted an approach that assesses the presence of chlorophyll-a as the dominant factor in determining the health of the Reedy River’s aquatic ecosystem . Under this approach, [DHEC] will limit the loading of nutrients to such a degree that the chlorophyll-a standard will not be violated and the water bodies will be able “to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water” as required by South Carolina water quality standards. S.C. Code Reg. 61-68.A.4. [Emphasis in original].

You ask us whether South Carolina law provides flexibility for DHEC to interpret its water quality standards in such a way that some excursions of a “shall not exceed” standard may be allowed for the Reedy River Watershed.

Law/Analysis

Before addressing your question, several principles of construction are herein applicable. First and foremost is the primary obligation of this office to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in the language used and construed in light of its intended purpose. Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Further, when interpreting a statute or regulation, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s or

regulation's operation. Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (2003); Converse Power Corp. v. DHEC, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002); see also Sutherland Statutory Construction, §46.05, p. 103 (1992) ["A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole"] Provisions of an act do not stand alone, but must be read in the context of an act or regulations as a whole. Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992).

Further, "it is well-recognized that courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one that the court would adopt in the first instance." Op. S.C. Atty. Gen., August 12, 1986. This office, like the courts of this State, "generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836, 838 (2003); see Ops. S.C. Atty. Gen., January 23, 2009; August 21, 1991; May 1, 1990. A court will reject an agency's interpretation only when the plain language of the regulation is contrary to the agency's interpretation. "Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons." William C. Logan & Associates v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986).

Pursuant to §48-1-20 of South Carolina's Pollution Control Act (the "Act"):

[i]t is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, maximum employment, the industrial development of the State, the propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources. It is further declared that to secure these purposes and the enforcement of the provisions of this chapter, [DHEC] shall have authority to abate, control and prevent pollution.

The Act empowers DHEC with the authority to create and implement policies and procedures for the protection of South Carolina waters. See City of Rock Hill v. DHEC, 302 S.C. 161, 394 S.E.2d 327, 329-30 (1990); City of Columbia v. Board of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536, 537 (1987); see also §48-1-50(17) (DHEC is authorized to "[p]repare and develop a general comprehensive program for the abatement, control and prevention of air and water pollution"). Among the powers granted to DHEC is the ability to adopt water quality standards and to interpret those standards. See §48-1-50(23) (DHEC may "[a]dopt emission and effluent control regulations, standards and limitations that are applicable to the entire State, that are applicable only within specified areas or zones of the State, or that are applicable only when a specified class of pollutant is present"); see also §48-1-50(20) (DHEC may "[c]onduct investigations of conditions in the air or waters of the State to determine whether or not standards are being contravened and the origin of materials which are causing the polluted condition").

As creatures of statute, regulatory bodies are possessed only of those powers which are specifically delineated. Medical Society of South Carolina v. Medical University of South Carolina, 334 S.C. 270, 513 S.E.2d 352 (1999). By necessity, however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged. Carolina Water Service, Inc. v. South Carolina Public Service Commission, 272 S.C. 81, 248 S.E.2d 924 (1978); Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948).

DHEC is charged with the responsibility of insuring that the waters of the State are as free of pollutants as possible. The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public. City of Columbia, 355 S.E.2d at 537; Converse Power Corp. v. DHEC, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).

Pursuant to its authority, DHEC has promulgated Regulations to manage and protect the quality of South Carolina's surface and ground water. These Regulations "establish the State's official classified water uses for all waters of the State, establish general rules and specific numeric and narrative criteria for protecting classified and existing water uses, and establish procedures for classifying waters of the State." Reg. 61-68.A.1. The Regulations provide that:

[w]aters which meet standards shall be maintained. Waters which do not meet standards shall be improved, wherever attainable, to achieve those standards. However, [DHEC] cannot assure that classified waters shall at all times meet the numeric water quality standards for such uses. . . .

It is a goal of [DHEC] to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water.

Regs. 61-68.A.2 & 4.

As previously noted, DHEC has promulgated Regulations to measure and control the impact of nitrogen and phosphorous, as well as chlorophyll-a, in South Carolina bodies of water. Specific to the Reedy River Watershed, Reg. 61-68.E.11.b(2) states the numeric standard as follows:

[f]or the Piedmont and Southeastern Plains ecoregions of the State, total phosphorus shall not exceed 0.06mg/l, chlorophyll a shall not exceed 40 ug/l, and total nitrogen shall not exceed 1.50 mg/l.

While the numeric standard for the Reedy River Watershed is provided, DHEC has also created narrative standards to address biological criteria in South Carolina bodies of water. For example, Reg. 61-68.F.1.c provides:

[n]arrative biological criteria shall be consistent with the objective of maintaining and improving all surface waters to a level that provides for the

survival and propagation of a balanced indigenous aquatic community of fauna and flora attainable in waters of the State. . .

Reg. 61-68.E.11 further states that:

[i]n order to protect and maintain lakes and other waters of the State, consideration needs to be given to the control of nutrients reaching the waters of the State. Therefore, [DHEC] shall control nutrients as prescribed below.

a. Discharges of nutrients from all sources, including point and nonpoint, to waters of the State shall be prohibited or limited if the discharge would result in or if the waters experience growths of microscopic or macroscopic vegetation such that the water quality standards would be violated or the existing or classified uses of the waters would be impaired. Loading of nutrients shall be addressed on an individual basis as necessary to ensure compliance with the narrative and numeric criteria. . . . [Emphasis added].

You state that DHEC has assessed these various factors in developing the Reedy River Watershed TMDL. Further, DHEC has determined that significant reductions can be achieved and existing uses may be protected if the TMDL is implemented as proposed, and that although the numeric nutrient standard for Piedmont lakes states the criteria shall not be exceeded, “a literal interpretation of the standard is extremely difficult and costly to implement and is therefore not practicable.” You therefore suggest that the provisions of the Act and the Regulations provide flexibility to DHEC when developing standards. We agree.

In construing what the General Assembly intended with reference to DHEC’s authority under the Act, we deem it necessary to consider the Act as a whole. Pursuant to §48-1-60:

[i]t is recognized that, due to variable factors, no single standard of quality and purity of the environment is applicable to all ambient air, land or waters of the State. In order to attain the objectives of this chapter, [DHEC], after proper study and after conducting a public hearing upon due notice, shall adopt rules and regulations and classification standards. The classification and the standards of quality and purity of the environment shall be adopted by [DHEC] in relation to the public use or benefit to which such air, land or waters are or may, in the future, be put. Such classification and standards may from time to time be altered or modified by [DHEC]. . . .

Additionally, §48-1-80 provides that:

[i]n adopting the classification of waters and the standards of purity and quality, consideration shall be given to:

- (1) The size, depth, surface area covered, volume, direction, rate of flow, stream gradient and temperature of the water;
- (2) The character of the district bordering such water and its peculiar suitability for the particular uses and with a view to conserving it and encouraging the most appropriate use of the lands bordering on such water for residential, agricultural, industrial or recreational purposes;
- (3) The uses which have been made, are being made or may be made of such waters for transportation, domestic and industrial consumption, irrigation, bathing, fishing and fish culture, fire prevention, sewage disposal or otherwise; and
- (4) The extent of present defilement or fouling of such waters which has already occurred or resulted from past discharges therein.

The Regulations also expressly provide for DHEC's flexibility in assessing the impact of nutrients in lakes. For example, Reg. 61-68.E.11.c states that:

[i]n evaluating the effects of nutrients upon the quality of lakes and other waters of the State, [DHEC] may consider, but not be limited to, such factors as the hydrology and morphometry of the waterbody, the existing and projected trophic state, characteristics of the loadings, and other control mechanisms in order to protect the existing and classified uses of the waters.

Reg. 61-68.E.7.f further allows for water quality standards variances when:

- a. Natural conditions prevent the attainment of the use; or
- b. Natural, ephemeral, intermittent, low flow conditions, or water levels prevent the attainment of the use; or
- c. Human caused conditions or sources prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- d. Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
- e. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, preclude attainment of aquatic life protection uses; or

f. Controls more stringent than those required by Sections 301(b) and 306 of the Clean Water Act would result in adverse social and economic impact, disproportionate to the benefits to the public health, safety or welfare as a result of maintaining the standard.

We agree that while on its face, Reg. 61-68.E.11.b(2) addresses numeric nutrient levels in all Piedmont lakes larger than 40 acres, the Act and Regulations must be read as a whole, not focusing on only one provision, such as Reg. 61-68.E.11.b(2), in isolation. The Act and Regulations must be interpreted with common sense to avoid absurd consequences, or unreasonable or unattainable results. See United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1950); Ops. S.C. Atty. Gen., September 16, 2005; June 15, 2004. Generally, courts will reject interpretations of a statute which will lead to absurd consequences. Robson v. Cantwell, 143 S.C. 104, 141 S.E. 180 (1928). In other words, a sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). In an opinion dated August 23, 1988, we quoted with approval 82 C.J.S. Statutes, §326, wherein it was stated that:

[a] construction which will cause objectionable results should be avoided and the court will, if possible, place on the statute a construction which will not result in injustice, and in accordance with the decisions constituting statutes, a construction which will result in oppression, hardship, or inconvenience will also be avoided, as will a construction which will prejudice public interest, or construction resulting in unreasonableness, as well as a construction which will result in absurd consequences.

Thus, when the interpretation of the Act or Regulations would produce an unreasonable or unachievable result, only a reasonable interpretation of the law should prevail. The South Carolina Supreme Court noted in Bruner v. Smith, 188 S.C. 75, 188 S.E. 184, 188 (1938):

[h]owever plain the ordinary meaning of the words used in a statute may be, the Courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the legislature, or would defeat the plain legislative intent, and if possible will construe the statute so as to escape the absurdity and carry the intention into effect.

Conclusion

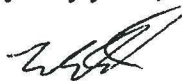
The Act empowers DHEC with the authority to create and implement policies and procedures for the protection of South Carolina waters. DHEC is charged with insuring that the waters of the State are as free of pollutants as possible and, accordingly, it has promulgated Regulations to manage and protect the quality of South Carolina's surface and ground water. Following consultation with other State agencies, environmental groups and the regulated community, DHEC has developed a framework for improving water quality for the Reedy River Watershed. DHEC has thus assessed various factors to develop the TMDL target for the Reedy River Watershed that it deems appropriate, and has determined that focusing on chlorophyll-a, rather than nitrogen and phosphorus, is both a reasonable and an achievable approach

Ms. Dickman
Page 8
December 9, 2011

that can be implemented to significantly protect water quality and to provide for a balanced aquatic ecosystem. The "shall not exceed" standard in Reg. 61-68.E.11.b(2) should not be read in isolation from other provisions of the Act and Regulations. Instead, the provisions of the Act and Regulations as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the General Assembly in enacting the Act and granting authority to DHEC develop water quality standards such that some excursions of a "shall not exceed" standard may be allowed in South Carolina waters. While we believe that DHEC's interpretation of the Act and Regulations is reasonable, follows the plain language of the Act, is consistent with the legislative intent, and gives effect to the entire Act as a whole, we note this office is not a fact-finding entity. Investigations and determinations of fact to determine whether DHEC's approach will result in significant reductions and protection of existing uses are beyond the scope of an opinion of this office. See Ops. S.C. Atty. Gen., August 5, 2010, September 14, 2006, April 6, 2006. However, we note that our courts afford considerable leeway with respect to an agency's interpretation of its own regulations and generally do not "second guess" such interpretation unless clearly erroneous. University of South Carolina v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). This office will not, therefore, "second guess" DHEC's interpretation of the Act and its own Regulations regarding water quality standards, and its development and implementation of the Reedy River Watershed TMDL as written. See Ops. S.C. Atty. Gen., September 8, 2005; Sept. 12, 1985.

If you need anything further, please advise.

Very truly yours,



N. Mark Rapoport
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REVIEWED AND APPROVED BY:



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