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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

February 7, 2002

The Honorable Phil P. Leventis
Senator, District No. 35
601 Gressette Building
Columbia, South Carolina 29202

Dear Senator Leventis:

You have requested an opinion concerning the application of the Administrative Procedures Act as it relates to proposed regulations of a state agency. Your specific question is whether regulations promulgated by a state agency (see, South Carolina Department of Health and Environmental Control (DHEC) "Swine Regulations" - Document No. 2646) containing substantive changes that were not "considered or discussed by public comment," are required to be "refiled" and "processed as a new regulation." It is our opinion that South Carolina's Administrative Procedures Act requires that all substantive changes in a state agency's regulations not receiving public input must be refiled, re-noticed and public comment reheard before becoming valid.

The Administrative Procedures Act was enacted to insure that before agency regulations become law, state agencies must follow proper procedure by giving the public notice and an opportunity to be heard. If an agency desires to make substantive changes in regulations, it must give the public notice of those changes and give citizens the chance to voice opinions and concerns regarding those changes.

Specifically, the APA's requirements are that there must be a publication of notice of the proposed regulations and that the public be given an opportunity for comment. Section 1-23-110. The APA's mandated procedure also specifies that if the final promulgated regulation contains a "substantive change," from the regulations as originally proposed and published, and the substantive change was "not raised, considered or discussed by public comment," the regulation must be refiled and re-proposed as a new regulation. Section 1-23-125(E).

Of course, the term "substantive change" may be only defined in its context. However, such a change is generally understood to be one that is essential and includes something less than a wholesale alteration or deviation. Typically, courts view a "substantive change" as one which "creates, defines or regulates rights or obligations." *City of Madison v. Town of Madison*, 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct. App. 1985); *Ores v. Kennedy*, 218 Ill.App.3d 866, 578 N.E.2d 1139, 161 Ill.Dec. 493 (1991). If such a change is made without the opportunity for public

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comment, the letter, as well as the spirit of the Administrative Procedures Act is violated. *Leventis v. DHEC*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) ["While DHEC may modify its proposed regulations based on comments received, the regulations subject to comment must be properly noticed to afford balanced participation and an adequate opportunity to submit comments."]

In conclusion, the Administrative Procedures Act requires that where a substantive change in a proposed regulation is made after the time period provided for public comment, and the change was not raised, considered or discussed, that regulation must be refiled by the promulgating agency and processed anew.

Sincerely,

A handwritten signature in cursive script that reads "Charlie Condon".

Charlie Condon
Attorney General