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The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 4, 2002

Buford S. Mabry, Jr., Chief Counsel
SC Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

**Re: Your Letter of April 23, 2002**
**Act No. A178 (S.C. Code Ann. §50-5-2517) and the Marine Mammal Protection Act**

Dear Mr. Mabry:

In your above-referenced letter, you request that this Office "issue an opinion as to whether or not Act [A]178 of 2002 is preempted by the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*)." To your letter, you attach the following:

1. Letter from Kevin J. Collins, Deputy Asst. General Counsel for U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) dated April 11, 2002;

2. Copy of Act A178 of 2002; and

3. Letter dated February 11, 1993 from Margaret F. Hayes, Asst. General Counsel, NOAA and attached discussion paper.

You also indicate that "[i]n light of the position taken by NOAA in 1993 with regard to §50-17-105 and the notification of April 11, 2002, [you are] under the impression that Act No. [A]178 would also be pre-empted by the Marine Mammal Protection Act."

Initially, it should be noted that the Act in question is entitled to a strong presumption of validity. Further, while this Office may comment on the legality or constitutionality of such an Act, only a court could declare the Act invalid or unconstitutional. See OP. ATTY. GEN. Dated March 9, 1999.

## LAW/ANALYSIS

### State/federal statutes

Act No. A178, to be codified as S.C. Code Ann. §50-5-2517, provides that:

> Except when authorized by a federal permit, it is unlawful for any person to catch, attempt to catch, feed, feed by hand, kill, or harass any mammalian dolphin or porpoise. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not less than two hundred fifty dollars nor more than one thousand dollars or imprisoned for not more than thirty days, or both.

The Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* (MMPA) was originally enacted by the United States Congress in 1972. Generally, the MMPA prohibits the "taking" of marine mammals, including dolphins and porpoises. According to the provisions of the MMPA, "take" is defined as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." See 16 U.S.C. 1362(13). The MMPA provides an extensive permitting scheme and provides for regulation by federal authorities (NOAA or Secretary of the Interior) related to the enforcement of the Act.

The MMPA also expressly provides that states are prohibited from enforcing state laws related to the taking of marine mammals unless such authority has been transferred to a particular state pursuant to the provisions of the Act. Specifically, 16 U.S.C. 1379(a) states that:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species ... to the State ... .

16 U.S.C. 1379 also provides numerous prerequisites which must be met prior to any transfer of authority taking place and sets forth a number of standards which a state must meet in order for a state to maintain the authority to regulate marine mammals. 16 U.S.C. 1379(b) - (e).

### Preemption

The preemption doctrine has its roots in the second clause of Article VI of the United States Constitution (the Supremacy Clause). The Supremacy Clause provides, in pertinent part, that "... the Laws of the United States ... shall be the supreme Law of the Land; and the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In determining whether federal laws preempt state laws, congressional intent must

be examined. In Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982), the United States Supreme Court analyzed the preemption issue this way:

> Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. ... Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because [t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose. ... Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility ... or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 458 U.S. at 153 (Citations and internal quotations omitted).

Preemption has been held to occur when it is physically impossible to comply with both federal and state regulation, the nature of the subject matter requires federal supremacy and uniformity or if the Congress has clearly intended to displace state legislation. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). Authorities reviewing the MMPA have generally recognized that, through 16 U.S.C. 1379, Congress "expressed its clear intent to preempt concurrent state jurisdiction." See Alaska OP. ATTY. GEN. Dated August 7, 1985. Given this recognition of Congressional intent expressed in the MMPA, the Alaska Attorney General opined that "there is no room for the [State Department of Fish and Game] to issue a marine mammal collecting permit, even if it merely duplicates a federal permit." Id. Also, in comparing the MMPA to Congress' Wild Free-Roaming Horses and Burros Act, the United States Court of Appeals noted that the MMPA "... establishes plenary federal authority for the conservation of marine mammals and preempts entirely state laws pertaining to their taking." Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986).

Further, there is additional authority for the expansive application of the MMPA in determining what activities are subject to federal preemption. In Fouke Company v. Mandel, 386 F.Supp. 1341 (D.Md. 1974), the United States District Court held the MMPA to preempt a Maryland statute banning seal importation even though 16 U.S.C. 1379 only addresses state regulations "relating to the taking ... of ... marine mammals." The Fouke court stated that even though there was

no specific Congressional intent that MMPA preempt importation, it was, "... by the very nature of the enactment of the MMPA, necessarily preempted for federal control." 386 F.Supp. at 1360.[1]

**Application to §50-5-2517**

There is no question that S.C. Code Ann. §50-5-2517 relates to the taking of marine mammals as addressed in the MMPA. There is also no question that Congress has expressed the intention to preempt state regulation relating to the taking of marine mammals. The only question left is the extent of the intended preemption.

As stated by the United States Supreme Court in Fidelity Federal Savings and Loan Association v. de la Cuesta, supra, Congress can express an intent to preempt state regulation by explicit language or by enacting a "... scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." With the MMPA, Congress has both explicitly indicated an intent to preempt and expressed such an intent through extensive regulation of the field by federal authorities. When such an intent is evident, the authorities above seem to indicate that state regulation in the area is preempted entirely. That is, even consistent state regulation is unwarranted. Such an interpretation of the MMPA would clearly result in the conclusion that S.C. Code Ann. §50-5-2517, absent a transfer of authority from the Secretary of the Interior pursuant to 16 U.S.C. 1379(b), is preempted in its entirety.[2]

In any event, even without Congress' express intention to preempt, state law is nullified to the extent that it actually conflicts with federal law. According to the Court in Fidelity Federal Savings and Loan Association v. de la Cuesta, supra, "[s]uch a conflict arises when compliance with both federal and state regulations is a physical impossibility ... or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." While Section 50-5-2517 contains an exception to its prohibitions based on the issuance of a federal permit, certain provisions of the MMPA appear to allow marine mammals to be taken even without a permit. For example, 16 U.S.C. 1379 (h) allows for the taking of a marine mammal by a government employee as part of his or her official duties. 16 U.S.C. 1371(c) and (d) allow for the taking of a marine mammal if such taking is in self defense or defense of others or is necessary to avoid imminent injury to the marine mammal itself. Such inconsistencies could lead a reviewing court to find that Section 50-5-2517 is in conflict with the MMPA and thus preempted.

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[1] But see State v. Arnariak, 941 P.2d 154 (Ak. 1997) (Alaska Supreme Court holds MMPA does not preempt state statute restricting entry into and prohibiting discharge of firearms in wildlife sanctuary).

[2] There is no indication that there has been a transfer of authority to South Carolina pursuant to 16 U.S.C. 1379(b).

Moreover, NOAA regulations require that, with regard to the viability of state laws, the following, among other things, be taken into account:

> The extent to which such laws and regulations are consistent with, or constitute an integrated management or protection program with, the laws and regulations of other jurisdictions whose activities may affect the same species or stocks or marine mammals; and
>
> The existence of or preparations for an overall State program regarding the protection and management of marine mammals to which the laws and regulations under review relate.

50 C.F.R. §216.4(d)(2) & (3). Federal regulations preempt state law to the same extent as federal statutes. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. at 153. No indication has been provided that S.C. Code Ann. §50-5-2517 is consistent with or part of an integrated management program with the laws of other states. Similarly, there is no indication that Section 50-5-2517 is related to an overall plan regarding the protection and management of marine mammals. Inconsistencies between Section 50-5-2517 and these regulations could result in preemption. Further, such inconsistencies could lead a reviewing court to find that Section 50-5-2517 stands as an obstacle to Congress' purposes and objectives in enacting the MMPA.

## CONCLUSION

Based on the foregoing, it is my opinion that a reviewing court would most likely find that S.C. Code Ann. §50-5-2517 is preempted by the MMPA.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

DKA/an