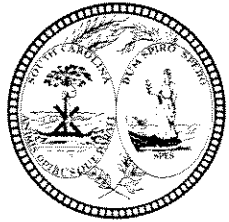


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 7, 1996

HAND-DELIVERED

Mr. Kenneth D. Long
Director
State Reorganization Commission
1105 Pendleton Street
Blatt Building, Suite 228
Columbia, SC 29201

Re: Safe Drinking Water Late Fees
Informal Opinion

Dear Mr. Long:

The Reorganization Commission has asked the opinion or advice of this Office about the questions set forth below. Essentially, the issue is whether a regulatory gap exists, and if so, whether it can be closed without additional legislation. My conclusion is that such a gap does exist and that legislation is probably necessary to cure it.

The issue is whether existing statutes and regulations already authorize DHEC to charge late fees and penalties (not exceeding \$5,000) with respect to annual Safe Drinking Water Act (SDWA) fees which DHEC charges operators of water systems. The regular fees, as opposed to the late fees and penalties, are authorized by §44-55-120 (Cum. Supp.), which provides that the Department is authorized "to collect an annual fee, which must be established annually in the general appropriations act, from each public water drinking system." That section was added in 1993 as part of Act No. 164, the General Appropriations Act, which was approved by the Governor on June 21, 1993. The statute as a whole is silent on the issue of late fees and penalties unless §44-55-30, part of the original pre-1993 Act, may be said to authorize these late fees. That section, however, is simply a general grant of enforcement power, providing in part that DHEC may establish rules and regulations "as may be necessary to protect the health of the public and to insure proper operation of and function of public water supplies and waterworks systems."

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In my opinion, the general enforcement language of §44-50-30 quoted above may not be sufficient to permit DHEC to promulgate a regulation which imposes late fees and penalties. The General Assembly apparently thought it necessary to add specific language (§44-55-120) authorizing the charge of the original fees, and there is no mention therein of authorization to charge late fees.

It has been suggested that such late fees might be authorized by another statute, enacted just a week before the above-quoted 1993 amendments allowing DHEC to collect annual fees from water systems. The earlier statute is the "Environmental Protection Fund Act," §48-2-10, et seq. (Act no. 122 of 1993, effective June 14, 1993). That Act provides for the charging of a number of fees by DHEC and further provides for their deposit in a new fund called the South Carolina Environmental Protection Fund.

With regard to the Safe Drinking Water Act, the Environmental Protection Fund Act provides that fees collected by DHEC for that program shall be placed in the Fund, §48-2-30(B)(3). But while the Act provides for the disposition of these fees, it does not specifically set the amount of the fees -- presumably because a separate bill under consideration at the same time, §44-55-120, already was in the process of providing that SDWA fees would be set by the General Assembly annually in the appropriations act. It is therefore probably an appropriate reading to say that with respect to SDWA fees, the Environmental Protection Fund Act provides only for the disposition of the fees and does not independently provide a basis for their collection or amount.¹

The final question is whether the 1995 DHEC regulation (R. 61-30) which provides for the charging of environmental protection fees (including late fees) is broad enough to cover late SDWA fees. Since this regulation was promulgated under the Environmental Protection Fund Act, and since as shown above, that Act probably does not provide for the amount and collection of SDWA fees, R. 61-30 should probably not be read as covering the charging of late fees related to the SDWA program.²

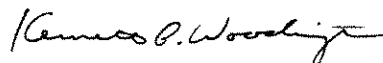
¹In the 1994 and 1995 Appropriations Acts, the General Assembly in temporary provisions set forth the amounts of the SDWA fees. This legislative construction is consistent with the above reading.

²Also, R. 61-30(D) provides for late fees in general, but nowhere does R. 61-30 specifically mention annual SDWA fees.

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This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Sincerely yours,



Kenneth P. Woodington
Senior Assistant Attorney General

KPW/rho