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The State of South Carolina

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The Honorable Edward E. Saleeby
Senator, District No. 29
205 Gressette Building
Columbia, South Carolina 29202

Dear Senator Saleeby:

You have asked for our opinion with respect to the legality of DHEC Regulation Numbers 1090 and 1091. You note that these Regulations "impose a new requirement that applications for a permit to construct or expand a hazardous or non-hazardous solid waste facility must be accompanied by a 'demonstration of need,' which must be of a form and content as the Department may specify." Your concern is that such regulations have been promulgated in the absence of specific statutory authority and that DHEC, "in requiring demonstration of need without specific statutory authority, ... [is] exercising a legislative function in violation of the Separation of Powers provision contained in Article I, Section 8 of the South Carolina Constitution." You further note that specific statutory authority exists for requiring certificates of need in other areas. See, Sections 44-7-160, 58-9-280, 58-11-100, 58-27-1230 and 58-33-110.

While the question you raise is a close one, it is our opinion that a court would most probably conclude that these regulations are authorized by existing statutes.

The Hazardous Waste Management Act is codified at § 44-56-10 et seq. of the Code of Laws of South Carolina (1976 as amended). Section 44-56-60 (a) provides that no person "shall construct, substantially alter, or operate any hazardous waste treatment, storage or disposal facility or site, nor shall any person store, treat, or dispose of any hazardous waste without first obtaining a permit from the department for such facility, site or activity." Section 44-56-30 of the Code authorizes the South Carolina Board of Health and Environmental Control to

> ... promulgate such regulations, procedures, or standards as may be necessary to protect the health and safety of the public, the health of

> living organisms and the environment from the effects of improper, inadequate, or unsound management of hazardous wastes. Such regulations may prescribe contingency plans; the criteria for the determination of whether any waste or combination of wastes is hazardous; the requirements for the issuance of permits required by this chapter; standards for the transportation, containerization, and labeling of hazardous wastes consistent with those issued by the United States Department of Transportation; operation and maintenance standards; reporting and record keeping requirements; and other appropriate regulations. (emphasis added).

Pursuant to the foregoing authority the Board (DHEC) promulgated Regulation 1090. (No. 61-99), Regulation 1090 deals with the hazardous waste management planning and basically requires that "applicants for permits to establish or expand hazardous waste management facilities shall demonstrate to the Department the need for such new or expanded facilities in order to:

1. ensure that the needs of South Carolina industries and other necessary users are met, and to prevent dangerous and illegal disposal practices

2. prevent excess capacity which may become technologically obsolete and/or unnecessary as changes occur in production practices, methods of treatment, utilization of waste materials, and other waste minimization efforts;

3. minimize the burden placed on State resources through activities associated with the permitting, operation, and supervision of such facilities; and

4. minimize potential adverse environmental and public health effects.

Regulation 1090 further specifies that the demonstration of need shall include:

1. documentation of the remaining available capacity at existing hazardous waste management facilities within the State of South Carolina;

2. documentation of the current volume generated within the state which will require off-site management and an annual projection of each of the next five (5) years, based on an reliable data; and

3. a description of any additional factors such as geographical or physical barriers which may limit transportation, or the existence of additional available capacity outside of the State of South Carolina which may serve the projected need. 1/

The Regulation further specifies that, for purposes of demonstrating need, waste generated outside the county or regional planning area shall not be included.

It is well recognized that

> [b]oards of health or other sanitary authorities have no inherent legislative power; they cannot by their rules and regulations, enlarge or vary the powers conferred on them by the law creating them and defining their powers, and any rule or regulation which is inconsistent with such law, or which is antagonistic to the general law of the state, is invalid.

1/ Regulation 1091 is similarly worded, but deals with non-hazardous solid waste. The statutory authority upon which this Regulation is based is §§ 48-1-10 et seq. and 44-1-140 (11) of the Code. Section 48-1-30 authorizes the Department "to promulgate regulations to implement this chapter (Pollution Control Act) to govern the procedure of the Department with respect to meetings, hearings, filing of reports, the issuance of permits and all other matters relating to procedure." These regulations are limited in certain aspects by the statute in a manner not here relevant. Section 44-1-140 (11) authorizes DHEC to promulgate and enforce reasonable regulations regarding the methods of disposition of garbage or sewage "and any like refuse matter in or near any village, town or city of the State, incorporated or unincorporated, and to abate obnoxious and offensive odors caused or produced by septic tank toilets by prosecution, injunction or otherwise." The legislative purpose expressed in § 48-1-20 (Pollution Control Act) is as broad as that stated in the Hazardous Waste Management Act--i.e. "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 propogation and protections of terrestial and marine flora and fauna and the protection of physical property and other resources." Because these various statutory provisions are similar to the broad purpose expressed in § 44-56-30, we believe Regulation 1091 is not repugnant to existing statutes, for the same reasons expressed herein.

30 A C.J.S., Health and Environment, § 14. On the other hand, however,

> ... health authorities, both state and local may be invested by the legislature with the power of making rules and regulations for the protection of the public health; and such officials often have great latitude and much discretion in performing their duty to safeguard the public health.

Supra. Moreover,

> "[t]he power to make and enforce regulations necessary to administer an environmental protection or pollution control law has been conferred on designated agencies ... .
>
> In order to be upheld the regulations must be within the terms of the statute pursuant to which they are adopted. Regulations which constitute a valid exercise of the power delegated by the legislature will generally be upheld, and particular regulations have been held not arbitrary, unreasonable or capricious, or legally insufficient on the basis that they are reasonably understandable and adequately specific. Furthermore, such regulations have been held not to be invalid as an unlawful delegation of legislative authority, or on the ground of want of legislative standards in the statute authorizing their promulgation.

Supra at § 137.

Rules and regulations adopted pursuant to a specific legislative delegation of authority are presumed to be valid and are generally upheld when reasonably consistent with the statute being implemented. Washington Water Power Co. v. Washington State Human Rights Commission, (Wash.) 586 P.2d 1149 (1978). Such regulations are valid so long as they are reasonably related to the legislative purpose being sought. Comm. to Save the Bishop's House v. Med. Center Hosp. of Vermont, (Vt.) 400 A.1d 1015 (1979).

Our Supreme Court has usually upheld various administrative regulations against challenges that such regulations were not within their statutory authority and that the authorizing statute unlawfully delegated legislative authority. For example, in Johnson v. Roberts, 269 S.C. 119, 236 S.E.2d 737 (1977), the Court upheld

regulations of the State Fire Marshal requiring that each gasoline service station in South Carolina have an attendant on duty whenever the station is open for business. The Fire Marshal had acted pursuant to legislative authority authorizing him to promulgate regulations to insure fire prevention and for the protection of life and property. Specifically, the statute authorized the adoption of regulations requiring "conformance with minimum fire protection standards, based upon nationally recognized standards." In concluding that the authorizing statute was not an unlawful delegation of legislative power, the Court quoted from South Carolina State Highway Department v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955), which had earlier articulated the standard for determination of whether an unlawful delegation of legislative power had occurred:

> It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. (citing cases). 'However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.

269 S.C. at 125, quoting 226 S.C. at 594. See also, Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962). The Court held that the term "nationally recognized standards" was constitutionally sufficient pursuant to the Harbin test and that no unlawful delegation of legislative power had occurred.

Likewise, in Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972), the Court upheld a statute giving the ABC Commission the authority to refuse to grant any license if it is of the opinion that the store or place of business to be occupied by the applicant is not suitable. The Court noted that in order for the Commission to make its determination, it was required, pursuant to the statute, to hold a hearing and to make a finding of fact regarding the suitability of the location. Thus, there was no unlawful delegation.

In Young v. S. C. D. H. P. T., 287 S.C. 108, 336 S.E.2d 879 (1985), the Court of Appeals upheld a regulation promulgated by the Department of Highways and Public Transportation defining "transient or temporary" for the purpose of a statute permitting outdoor signs in designated areas. The Court expressly noted that the General Assembly had not defined "transient or temporary"; however, the Department possessed the authority to promulgate regulations governing outdoor sign permits. Since the regulation was not "overly restrictive" and provided "specific time limitations which will assume that the statute will be applied in a consistent manner", the Court deemed the regulation valid.

In Hunter and Walden v. S. C. State Licensing Board for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978), the Court deemed valid a regulation requiring that an applicant for licensure must show a net worth of $50,000 in order to be licensed. Pursuant to statute, the Contractors Board was authorized to promulgate such rules and regulations "as it shall deem best, provided they are not in conflict with the laws of the State." The Court stated that "[a]n administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." 272 S.C. at 213. The challenged regulation was deemed by the Court to bear "a reasonable relation to the statutory requirement that a financial statement be submitted with a contractor's license application." Supra.

Other cases decided by our Supreme Court have reached similar conclusions. See, Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Port Royal Min. Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1888).

In the area of public health and environmental law, two decisions from other jurisdictions are particularly applicable. In Fort Gratiot Charter Township v. Kettlewell, 150 Mich. App. 648, 389 N.W.2d 468 (1986), the Michigan Court of Appeals upheld as valid a regulation promulgated by the Department of Natural Resources requiring that where a site for a solid waste disposal area is located in one county but serving another county such site "shall be identified in both county solid waste management plans." Defendants alleged that the Legislature unconstitutionally delegated its power in conferring upon the DNR the authority to promulgate rules. The Court rejected the argument, concluding that the regulation was within the legislative authority and that the standards set forth in the regulation were as precise as possible.

In Sturman v. Public Health Council, 397 N.Y.S.2d 168 (1977), the Court reviewed a regulation promulgated by the Public Health Council which required that licensure of a nursing home could be

revoked if the Council found that the operator had been convicted in a court of competent jurisdiction of a crime. The Council relied on a statute which provided that the Council was not to grant an application unless it was "satisfied" as to the character and competence of the operator. Moreover, the statute explicitly authorized the Council to promulgate regulations to "effectuate the provisions and purposes of this section." The Court held that no unconstitutional delegation of authority had occurred. Concluding that the authorizing statute enunciated sufficient standards that "by any reasonable interpretation of the powers granted, including the adoption of rules and regulations, pursuant to section 2801-a would govern as guidelines and standards for the revocation of the prior approval of an establishment ... ." See also, U. S. Steel Corp. v. Ill. Pollution Control Board, (Ill.), 367 N.E.2d 327 (1977).

Thus, based on the foregoing authorities, we would conclude that the proposed Regulations in question do not contravene existing statutory authority. Instead, we believe the Regulations are "reasonably related to the purpose of the enabling legislation." Hunter and Walden v. S. C. State Licensing Board, supra. By § 44-56-30, the legislative purpose is apparent, i.e. "to protect the health and safety of the public, the health of living organisms and the environment from the effects of improper, inadequate or unsound management of hazardous wastes." By requiring that a hazardous waste facility applicant set forth and demonstrate the need to establish or expand a hazardous waste facility, it would appear that Regulation 1090 fulfills the legislative purpose. The Regulation seeks to receive data on remaining space at the facility, data on the projected generation of waste and additional factors which might limit storage outside the State. These are requirements which would appear to protect the health and safety of the public. Moreover, since §44-56-30 contains sufficient standards and guidelines, there does not appear to be a constitutional problem regarding unlawful delegation and separation of powers.

We could caution however that, because the relevant statutes do not explicitly authorize DHEC's issuance of a certificate of need, our conclusion is not free from doubt. An argument could be made that the Regulation represents the exercise of a legislative function and is thus violative of Article I, § 8 mandating a separation of powers. As a general rule, demonstrations of need or certificates of convenience or necessity must be expressly authorized by the Legislature. See e.g., 60 C.J.S., Motor Vehicles, §82; compare, §§ 44-7-160, 58-9-280, 58-11-100, 58-27-1230, 58-33-110. Moreover, some courts have held that administrative regulations requiring demonstrations of need for licensure, where such are not

expressly authorized by statute, are void. See, Williams v. Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 409 P.2d 720 (1966). Arkansas Railroad Commission v. Independent Bus Lines, 172 Ark. 3, 285 S.W. 388 (1926). However, in both of these cases the statute authorizing the administrative agency to promulgate regulations was much narrower than § 44-56-30. In the Arkansas Railroad Commission case, where the relevant statute stated that the jurisdiction of the regulatory authority extended to "all matters pertaining to the regulation and operation" of carriers, the Court concluded:

> It follows, then, that if such authority exists in the Railroad Commission, it is by necessary implication from language used in the statute. The language is not broad enough to justify the implication. "Regulation and operation" does not import the right of denial or the right to grant an exclusive franchise or permit which, in effect, involves a denial to some. "Regulation" is not synonymous with "prohibition" and a delegation of the authority by the Legislature does not imply authority to prohibit.

Unlike the statute in the Arkansas Railroad Commission, case, however, § 44-56-30 is very specific. It authorizes the Commission to promulgate regulations to prescribe the "requirements for the issuance of permits required by this chapter ...". Thus, it would appear that Regulation 1090 is within the statutory authority provided by §§ 44-56-30 and 44-56-60(a) in establishing a demonstration of need as one of the criteria for licensure of a hazardous waste facility. Likewise, Regulation 1091 would appear to fall within the statutory authority of § 48-1-30.

Nevertheless, we must address the fact that there are cases decided by our own Supreme Court which have concluded that agency regulations fell outside the statutory authority given by the Legislature. See, Brooks v. S. C. State Bd. of Fun. Serv., 271 S.C. 457, 247 S.E.2d 820 (1978).; Milliken Co. v. S. C. Dept. of Labor, 275 S.C. 264, 269 S.E.2d 763 (1980). In Brooks, the existing statute governing licensure of funeral directors required a minimum of 12 months' service as apprentice funeral director. The Board's regulation required a minimum of 24 months. The Court held that the "conflict between these two provisions is irreconcilable and must be resolved in favor of the statute and against the administrative rule." 271 S.C. at 461-462.

In Milliken and Co. v. S. C. Dept. of Labor, the Court invalidated Department of Labor regulations providing for post-citation discovery. There, the Department cited certain mills for violation

of the South Carolina Occupational Safety and Health Act. Subsequently, the Department served extensive interrogatories upon the mills. Regulations of the Department authorized service of these interrogatories. The relevant statute authorized the Department to promulgate such regulations as were necessary for the establishment of a procedure for administrative review of the Commissioner's official acts. The Court construed such statute as authorizing review "essentially appellate in nature." Such review "should be undertaken only upon information which was available to the officer or examiner responsible for issuing the citation in the first place." Pursuant to the regulation, the Court concluded that the Department of Labor "would be able to conduct two full-scale investigations, using its designedly very broad investigatory powers, in the course of pursuing one basic inquiry into the activities of a business." 275 S.C. at 266. The Court held that the Regulations permitting post-citation discovery "materially add to [the] ... laws" providing for post-citation discovery. Supra at 268.

Again, however, Brooks and Milliken, appear to be distinguishable from the present situation in that the regulations in question in those cases actually conflicted with the statutes authorizing the promulgation of regulations. Here, we see no actual conflict with the statutory authorization. To the contrary, as stated, the proposed Regulations appear to be consistent with § 44-56-30 and § 48-1-30.

In summary, while the question is a close one , it is our opinion that Regulation Numbers 1090 and 1091 are authorized by existing statutes. 2/

With kindest regards, I remain

Very truly yours,

T. Travis Medlock
Attorney General

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2/ We make no comments concerning the Regulations beyond this narrow issue. However, from our review, we note issues that could be raised involving the Commerce Clause and Equal Protection. It is a policy matter for DHEC and the Legislature as to whether these Regulations are adopted.