The State of South Carolina

Office of the Attorney General

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Bruce Weddle, Director
Permits and State Programs Division (WH-563)
Office of Solid Waste
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Weddle:

Your recent letter to the Attorney General has been referred to me for handling and reply. Please address any future correspondence in this matter directly to me.

In your letter, you advise that the Environmental Protection Agency (EPA) is promulgating an interim final rule to amend the financial responsibility requirements concerning liability coverage for owners and operators of hazardous waste treatment, storage, and disposal facilities. This proposed amendment will allow the use of a parent corporate guarantee as an additional financial responsibility mechanism for owners or operators to comply with the third-party liability requirements in the federal Resource Conservation and Recovery Act (RCRA), 40 CFR 264.147 and 265.147. You have requested an opinion of this Office as to whether such a guarantee is fully valid and enforceable in South Carolina by third parties who are injured by accidents arising from the operation of a particular facility covered by the guarantee.

Section 33-3-20 of the 1976 CODE OF LAWS OF SOUTH CAROLINA, as amended, generally prescribes the powers of corporations in this State including, among other things, the power to "enter into contracts of guaranty or suretyship." Section 33-3-20 (a)(11). Although Section 33-13-170 prohibits certain types of guarantees, it does not prohibit a corporation from guaranteeing the obligation of a wholly-owned subsidiary corporation. Tuller v. Nantahala Park Co, 276 S.C. 667, 281 S.E.2d 474, 478 (1981). Therefore, a corporation is generally authorized in this State to enter into a valid guarantee contract.

Nevertheless, the particular provisions of a statute of more specific application, such as the South Carolina Hazardous Waste Management Act (Section 44-56-10, et seq.), will control as a matter of law. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). Accordingly, it should be recognized that the HWMA does not contain express authorization for the use of a corporate guarantee as an appropriate device for meeting the financial responsibility requirements of Section 44-56-60. That provision of law and its accompanying regulations presently permit the use of, among other things, liability insurance coverage as an acceptable means of insuring financial responsibility for sudden and nonsudden accidental occurrences. R. 61-79.5. Assuming that the S.C. Department of Health and Environmental Control (DHEC), upon subsequent review and consideration, agrees with the proposed change as being sound public policy, it appears that an appropriate policy determination could be made by the Department without substantial revision, if any, of the HWMA and accompanying regulations.

As mentioned above, it is clear that a corporation may validly enter into a guarantee contract under general provisions of State law. The enforceability of such a contract by injured third-parties against corporations domiciled or holding substantial assets in the State is not in serious doubt.

However, it should also be recognized that the proposed contract you forwarded contains no requirement that a parent corporation agree to submit to the jurisdiction of the state in which the injury has occurred. Indeed, we must accordingly presume that such a corporation, foreign or domestic, would be entitled to seek removal of any such actions to distant fora outside South Carolina. Therefore, in light of the vagaries of the U.S. Bankruptcy Code and international law (see e.g., Ohio v. Kovacs, 105 S. Ct. 705 (1985)), the more prudent course may be to require a parent corporation to agree to submit to the jurisdiction of the state in which injury has occurred. These and other considerations presumably may properly be considered by DHEC in any subsequent review of a proposed policy change to permit the use of a parent corporate guarantee in satisfaction of the financial responsibility requirements of the HWMA. We accordingly must reserve any opinion concerning the possible enforceability of such a device beyond the jurisdiction of the courts of this State.

I trust the preceding discussion adequately answers your questions, however, if any further explanation or assistance is required, of course, please do not hesitate to contact me.

Very truly yours,

Richard P. Wilson
Assistant Attorney General

RPW:bvc

REVIEWED AND APPROVED BY:

ROBERT D. COOK
Executive Assistant for Administration