The State of South Carolina

Office of the Attorney General

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The Honorable Eugene D. Foxworth, Jr.
Member, House of Representatives
102 Church Street
Charleston, South Carolina 29401

Dear Representative Foxworth:

In a letter to this Office you referenced two proposed bills dealing with airboats. Airboats are defined as "watercraft propelled by air pressure caused by a motor mounted on the watercraft aboveboard." You have requested an opinion on the constitutionality of such proposed legislation inasmuch as the bills limit the operation of airboats on specific waters of this State. I was informed in a telephone conversation with Mr. Mike Fields of the House Agriculture and Natural Resources Committee that the purpose of such legislation is to protect certain marshland areas. However, it may also be argued that in protecting such areas, game would also be protected.

One proposed bill, identified as No. 0569Y, states in part:

> (i)t is unlawful for a person to operate an airboat on the waters of Game Zone No. 9 from the freshwater-saltwater dividing line, established by Section 50-19-340, seaward. 1/

1/ Section 50-19-340 which established a saltwater-freshwater dividing line in Georgetown County was repealed by Act No. 387 of 1980. Current provisions designating such lines on certain waters are now set forth in Section 50-17-35 of the Code.

The other proposed bill, identified as No. 0571Y, states in part:

> (i)t is unlawful for a person to operate an airboat on the waters of this State from the freshwater-saltwater dividing line, established by Section 50-19-340, seaward.

While this Office cannot predict how a court facing the issue of constitutionality of the proposed legislation would resolve the issue, we would note that, generally, an act of the General Assembly is presumed to be constitutional in all respects. Such an act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). All doubts as to constitutionality are typically resolved in favor of constitutionality. Moreover, while this Office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an ordinance unconstitutional.

Inasmuch as it may be argued that in protecting marshland areas located within certain waters game would also be protected, such legislation would probably be considered constitutional pursuant to Article III, Section 34 of the State Constitution. Such provision specifically authorizes special legislation which provides for the creation of game zones and the protection of game therein.

While apparently the referenced legislation presents no conflict with State Constitutional provisions, inasmuch as it regulates activity on navigable waters in this State, consideration must be given to the authority of a state to regulate activity on such waters. However, a response in such regard is dependent in some respect on whether the referenced waters are interstate or intrastate. Such, however, is a factual question and we have repeatedly state that an opinion of this Office is inadequate to resolve factual questions. See: Opinion of the Attorney General dated November 15, 1985.

If the waters were considered intrastate waters, I would advise that generally, subject to certain qualifications, each state has the authority to control the navigable or public waters within its boundaries. As to waters which lie totally within a particular state and which are not considered a part

of the navigable waters of the United States, a state's authority over such waters is considered to be complete and exclusive. Therefore, a state may enact and enforce such reasonable police regulations with regard to such waters as may be deemed necessary. A state may even close waters to navigation where such is determined to be of public benefit. 78 Am. Jur. Waters, Sections 76, 78. Therefore, to the extent the waters included in the referenced legislation are considered intrastate waters, the legislation appears to be valid inasmuch as you have stated that the purpose of the legislation is to protect marshland areas, a purpose which arguably would qualify as a public benefit.

While a state has broad authority over intrastate waters, the federal government has paramount authority over all navigable waters of the United States. As stated by the United States Supreme Court in Kaiser Aetna v. U. S., 444 U.S. 164 at 173 (1979):

> (i)t has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause. Early in our history this Court held that the power to regulate commerce necessarily includes the power over navigation.

Therefore, as to navigable waters of the United States, any regulatory authority of a state is subject to the paramount authority of the federal government in its regulation of interstate commerce. However, states may still exercise such control as is not in conflict with federal responsibility and authority and does not constitute an unreasonable interference or burden on interstate commerce. 78 Am. Jur. Waters, Section 76.

To the extent the proposed legislation prohibits the operation of airboats on navigable waters, an examination must be made as to whether such legislation conflicts with the authority of the federal government as to navigable waters. It has been stated that while the commerce clause acts as a limitation on state power, where there is an absence of conflicting federal legislation, there is a "residuum of power" left to the various states to enact laws affecting matters of local concern which nevertheless affect or regulate interstate commerce. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977). Therefore, not every exercise of state authority which imposes some burden on the free flow of commerce is invalid.

A significant factor in evaluating whether the legislation referenced in your letter conflicts with the commerce clause is the fact, as explained to me, that the legislation is being offered to protect the marshlands in the affected area. Generally, in dealing with the challenges to state regulatory statutes where it is claimed that such regulation violates the commerce clause, the test by which such regulation is judged has been stated as:

> (w)here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Hughes v. Oklahoma, 441 U.S. 322 at 331 (1979). See also: Camille Corp. v. Phares, 705 F.2d 223 (7th Cir. 1983). Such a test has been applied to areas of particular local concern, such as the protection of the environment and natural resources. See: Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456 (1981). However, not all environmental concerns of the states withstand challenges to attacks that such concerns violate the commerce clause. For instance, in City of Philadelphia v. State of New Jersey, 437 U.S. 617 (1978) a New Jersey statute prohibiting the importation of solid waste collected outside the state was determined to violate the commerce clause. The Court held that such legislation was basically a protectionist measure and did not meet the test of being a law directed to legitimate local concerns with only incidental effects upon interstate commerce.

To the extent that the proposed legislation prohibiting airboats regulates traffic in interstate waters, it appears that such legislation would probably withstand a challenge to its constitutionality. Obviously, such legislation in protecting the environment serves a legitimate public interest. Moreover, inasmuch as the restriction is limited to airboats, arguably, the effect on interstate commerce is only incidental. It

also appears that any burden on commerce is not excessive in relation to the local benefit.

Referencing the above, it is our conclusion that the legislation is most probably constitutional. If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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