ALAN WILSON
ATTORNEY GENERAL

9338-9888

March 6, 2015

The Honorable David Hiott
Chairman, Agriculture, Natural Resources and Environmental Affairs Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Representative Hiott:

Attorney General Alan Wilson has referred your letter dated February 11, 2015 to the Opinions section for a response. The following is this Office's understanding of your questions and our opinion based on that understanding.

Issues:

1) Does your office's interpretation of the [South Carolina] Administrative Procedure Act consider a State plan to implement an EPA [U.S. Environmental Protection Agency] requirement to be a "regulation" as referred to in the Act?
2) If the State of South Carolina, through the Department of Health and Environmental Control or any other agency, chooses to submit a State plan [issued as a regulation] to implement the EPA's 111(d) requirements, would that implementation plan be subject to legislative approval prior to submission to the EPA?

Law/Analysis:

By way of background, in addition to the statutory authority given to the South Carolina Attorney General's Office to advise members of the General Assembly, this Office is also required to interpret State regulations. S.C. Code §§ 1-7-90; 1-23-70. It is the intention of this opinion to advise based on the current information as provided to us. As the EPA's regulations change, our answer is subject to change. Furthermore, our analysis is contingent on the authority delegated to the States and the implementation of the requirements set by the EPA in reducing carbon dioxide emissions being found satisfactory to the Administrator of the EPA. 79 F.R. 34830-01 at 34950 et seq. (referencing 40 C.F.R. § 60.27).[1] Moreover, emergency regulations are subject to alternate laws to implement, thus for purposes of this opinion we will presume such a State plan would not be attempted to pass as an emergency regulation. S.C. Code § 1-23-130. Furthermore, this opinion is intended to offer guidance from a legal perspective only without making any factual determinations. With those understandings, we will proceed with your questions.[2]

1) The answer to your question begins and ends with the legal question whence the requirement for such a plan originates. Thus, let us proceed to the applicable federal regulations. The proposed EPA rule at issue is the Carbon Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

[1] "Administrator" is defined as the "Administrator of the Environmental Protection Agency" or his representative. 40 C.F.R. § 60.2.

[2] Please note this opinion is intended to be an opinion reviewing some of the voluminous sources on your questions. There are many other applicable statutes, cases and regulations which we were not able to address in this opinion.

which includes guidelines for State plans under that rule. 79 Fed. Reg. 34,830 (June 18, 2014). Let us begin by examining the legal authority through which the Environmental Protection Agency is proposing this rule. Proceeding with an overly-simplified reading[3] of the EPA's declared authority for such action is as follows: the EPA claims that Section 111(d) of the Clean Air Act (42 U.S.C.A. § 7401 et seq.) authorizes the EPA to regulate carbon dioxide[4] from fossil fuel-fired EGUs (electrical generation unit). It is this Office's understanding that EGUs would include nuclear facilities as well as any such facility that produces carbon dioxide as a byproduct in its production of electricity using fossil fuels.[5] In order to equalize its proposed regulations, the EPA is using a system it refers to as "BSER" which stands for Best System of Emission Reduction. 79 F.R. 34830-01 at 34834. Avoiding the details of the plan and adhering to statutory authority, the EPA is attempting to use Section 111(d) to establish regulations to require each State to establish a plan by which it will establish a BSER approach solely reviewable by the EPA.[6] 79 F.R. 34830-01 at 34838. The proposed regulation requires each State plan to follow the format in 40 C.F.R. 60.23 using four criteria by which the EPA will evaluate and approve each State plan. Id. The four criteria are:

1) Enforceable measures that reduce EGU CO_2 emissions;
2) Projected achievement of emission performance equivalent to the goals established by the EPA, on a timeline equivalent to that in the emission guidelines;
3) Quantifiable and verifiable emission reductions;
4) A process for reporting on plan implementation, progress toward achieving CO_2 goals, and implementation of corrective actions, if necessary.

79 FR 34830-01 at 34838. Under the proposed regulation, the State plans would have to comply with the EPA regulations 40 C.F.R. 60.23-60.29, unless specifically changed by the proposed regulations. 79 F.R. 34830-01 at 34911. In addition to requiring a State plan, the EPA proposed regulations require each State plan to evidence authority to implement its plan. 79 F.R. 34830-01 at 34911 (and incorporation by reference 40 C.F.R. § 60.26). Moreover, the EPA proposed regulations at this time would allow each State to authorize a local agency to carry out the State plan or any part thereof. 79 F.R. 34830-01 at 34911

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[3] The summary of the proposed regulations and applicable law is for background purposes only and is not an opinion as to the scope of the proposed regulations and applicable law, nor are we agreeing with such authority.

[4] This proposed regulation of carbon dioxide emissions is controversial, and this opinion in no way endorses such governmental encroachment. We do not address herein questions regarding the legal authority of the EPA to promulgate the proposed regulations which are the subject of federal litigation including one suit to which the State is a party. We do not waive any positions of the State in that litigation..

[5] As a further aside, the EPA is planning on using Section 111(b) of the Clean Air Act to include facilities not currently built in its calculation to reduce carbon dioxide emissions as if they were already producing emissions. With no assertions being made, there are only three States currently with such facilities under construction, one of which is South Carolina. Florence P. Belser, General Counsel, South Carolina Office of Regulatory Staff, *Comments of The South Carolina Office of Regulatory Staff*, EPA-HQ-OAR-2013-0602 (comments before the Environmental Protection Agency on Proposed Rule 40 C.F.R. § 60).

[6] Please note the federal authority cited for this federal regulation and most others regarding a State plan and the requirements thereof are derived from 42 U.S.C.A. § 7401 where Congress made a finding that "air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments; and that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C.A. § 7401 (a)(3)-(4). The other statutory authority cited is sections 111, 301, 302, and 307 (d)(1)(V) of the Clean Air Act (42 U.S.C. 7411, 7601, 7602, 7607(d)). 79 F.R. 34830-01 at 34950.

(and incorporation by reference 40 C.F.R. § 60.26(d)-(e)). Furthermore, the proposed regulations imply the State air pollution control agency will be responsible for implementing the State plan when the proposed regulations state that a State governmental agency "other than the State air pollution control agency may be assigned responsibility for carrying out a portion of a plan if the plan demonstrates to the Administrator's satisfaction that the State governmental agency has the legal authority necessary to carry out that portion of the plan." Id.

Thus begins our analysis of State implementation. It goes without saying that the South Carolina Legislature, whose power is plenary, may choose to pass a specific state law pursuant to EPA regulation on this issue. Op. S.C. Att'y Gen., 2015 WL 836507 (February 18, 2015) (referencing Clark v. S.C. Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481 (1935)). However, we would be remiss if we did not mention that the federal regulations allow for two or more states to enter into an agreement for a plan, including necessary State legal authority to implement the plan. 79 F.R. 34830-1 at 34911. As this Office has previously opined, any agreement with another State would require specific approval by the Governor or the Legislature, depending on the federal law and the terms of the agreement. Op. S.C. Atty. Gen., 1989 WL 406222 (November 15, 1989).

In the event the Legislature does not pass a State law, let us examine the laws concerning regulations to see if such a plan should be considered a regulation. Section 1-23-10 of the South Carolina Code of Laws defines terms used in the statutes regarding regulations passed by agencies in South Carolina. Therefore, let us look to the statute to begin our analysis. South Carolina Code Section 1-23-10(1) defines "agency" or "state agency" as "each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." Thus, any of the aforementioned would be authorized to make a regulation pursuant to this section. Id. Examining the definition of the term "regulation" as defined by South Carolina Code § 1-23-10(4), the statute reads:

> "Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. The term "regulation" includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, but does not include descriptions of agency procedures applicable only to agency personnel; opinions of the Attorney General; decisions or orders in rate making, price fixing, or licensing matters; awards of money to individuals; policy statements or rules of local school boards; regulations of the National Guard; decisions, orders, or rules of the Board of Probation, Parole, and Pardon Services; orders of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients; decisions of the governing board of a university, college, technical college, school, or other educational institution with regard to curriculum, qualifications for admission, dismissal and readmission, fees and charges for students, conferring degrees and diplomas, employment tenure and promotion of faculty and disciplinary proceedings; decisions of the Human Affairs Commission relating to firms or individuals; advisory opinions of agencies; and other agency actions relating only to specified individuals.

(1976 Code, as amended) (emphasis added). There are two aspects as to whether such a State plan would be a "regulation" as defined in the statute. First and foremost would be whether an "agency" would issue it, which we presume, based on your questions, that an agency within the definition of South Carolina Code Section 1-23-10(1) is the governmental entity issuing the regulation (noting the caveat above that the Legislature has plenary power). Moreover, as we referenced above, in the proposed federal regulations, a State must have special permission for an agency other than the State air pollution control agency to carry out any portion of the State plan. 79 F.R. 34830-01 at 34911 (and incorporation by reference 40 C.F.R. § 60.26(d)-(e)). Furthermore, "State" is defined as "all non-Federal authorities, including local agencies, interstate associations, and State-wide programs that have delegated authority to implement..." Id.

Thus, let us address the question of whether the State plan would be a "regulation" pursuant to the definition in the statute. S.C. Code § 1-23-10(4). The statute defines "regulation" as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." Id. Therefore, without specific knowledge of the contents of the State plan, we will presume such plan would call for statewide uniformity and regulation. Furthermore, it is statewide uniformity predicated by the State plan that causes us to mention the general public applicability. See also 42 U.S.C.A. § 7401(a) (Congressional finding that air pollution causes danger to the public's health and welfare, crops and livestock, and transportation). Furthermore, the requirement of implementation and/or prescription of law or policy required in the definition of a "regulation" is fulfilled by the implementation of the requirement for statewide uniformity. S.C. Code § 1-23-10(4). While this may sound duplicative, it assures us that the regulation (if passed as such) would comply with federal law. However, as stated above, as the EPA has only submitted proposed regulations, implementation will depend on the requirements coming henceforth. 79 F.R. 34830-01. Please also note that the proposed federal regulations include a provision allowing any State or political subdivision to have more stringent emission standards and limitations than required under the EPA regulations for such a facility. 79 F.R. 34830-01 at 34892 (citing 40 C.F.R. § 60.24(g)). Contingent upon the actual contents of the plan, a State Plan would most probably fit the definition of "regulation" at least in significant part as defined in the South Carolina Administrative Procedures Act.

2) As we stated in our answer to Question number 1, South Carolina Code Section 1-23-10 defines "agency" or "state agency" as "each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." You asked if submitted by DHEC or other state agency, would a State plan (issued as a regulation) have to be reviewed by the legislature?[7] Therefore let us review statutory authority for review of a regulation. South Carolina Code Section 1-23-120 requires submission of proposed regulations to the South Carolina Legislative Council, who in turn submits them for reading by the General Assembly. However, specifically exempted from review by the General Assembly are regulations promulgated pursuant to federal law. S.C. Code § 1-23-120. Quoting from the statute, it reads:

[7] Please note, as we stated in the answer to your first question, because the EPA has only promulgated a proposed regulation at this time without specification as to the detail of implementation, we are basing this opinion off the information we have. It is possible the State plan is something that would need legislative direction as opposed to being implemented as a regulation through a State agency or may involve regulation through more than one State agency.

> General Assembly review is not required for regulations promulgated:
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> (1) to maintain compliance with federal law including, but not limited to, grant programs; however, the synopsis of the regulation required to be submitted by subsection (B)(4) must include citations to federal law, if any, mandating the promulgation of or changes in the regulation justifying this exemption. If the underlying federal law which constituted the basis for the exemption of a regulation from General Assembly review pursuant to this item is vacated, repealed, or otherwise does not have the force and effect of law, the state regulation is deemed repealed and without legal force and effect as of the date the promulgating state agency publishes notice in the State Register that the regulation is deemed repealed. The agency must publish the notice in the State Register no later than sixty days from the effective date the underlying federal law was rendered without legal force and effect. Upon publication of the notice, the prior version of the state regulation, if any, is reinstated and effective as a matter of law. The notice published in the State Register shall identify the specific provisions of the state regulation that are repealed as a result of the invalidity of the underlying federal law and shall provide the text of the prior regulation, if any, which is reinstated. The agency may promulgate additional amendments to the regulation by complying with the applicable requirements of this chapter;

S.C. Code § 1-23-120(H)(1) (1976 Code, as amended). If our analysis stopped at this statute, we would naturally conclude no review by the General Assembly is necessary due to the regulation's attempt to maintain compliance with federal law via the EPA's soon-to-be enacted regulations. However, careful review of the applicable statutes would lead to the opposite conclusion. South Carolina law requires an economic assessment for regulations with a substantial economic impact. S.C. Code § 1-23-115. Regarding economic assessment reports, our law states:

> (E) An assessment report is not required on:
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> (1) regulations specifically exempt from General Assembly review by Section 1-23-120; however, if any portion of a regulation promulgated to maintain compliance with federal law is more stringent than federal law, then that portion is not exempt from this section;

S.C. Code § 1-23-115 (1976 Code, as amended). The plain language of the statute concerning a proposed regulation reads "is more stringent than federal law." Id. As we discussed above, federal regulation only requires a plan for such reductions and outlines the requirements of such a plan. 79 F.R. 34830-01 at 34838. The State plan may require much detail in the administration of the plan and implementation of the options chosen. Simply supplying such detail is likely to make the plan, at least in significant part, more stringent than the federal regulation, although the plan would be adopted to comply with federal requirements. Furthermore, South Carolina Code Section 1-23-110(A)(3) requires a preliminary assessment report prepared by an agency for a regulation with a substantial economic impact compliant with Section 1-23-115, which is consistent with our understanding of the interpretation of such a proposed regulation. The statute defines "substantial economic impact" as having a "financial impact upon commercial enterprises; retail businesses; service businesses; industry; consumers of a product or service; taxpayers; or small businesses...." S.C. Code § 1-23-10(7). Without making any factual

determinations, we only foresee the State plan impacting all of the above, not just some of those listed in the statute. 42 U.S.C.A. § 7401(a) (Congressional finding that air pollution affects the public's health and welfare, crops and livestock, and transportation).

Therefore, it is based on a plain reading of the statutes without factual determination that this Office believes that at least a considerable part of a State plan could only have a significant economic impact and would likely more stringent than required by federal law, and as such, is required to have an economic assessment report and be submitted to the General Assembly for review as a regulation. Please note in the past where federal regulation under the Clean Air Act did not require the feasibility or technological capability to be a factor in the Administrator [of the EPA] approving or disapproving a State plan, our U.S. Supreme Court did not consider them either. Union Electric Co. v. Environmental Protection Agency, 427 U.S. 246, 96 S.Ct. 2518 (1976).[8] Thus, if the regulations do not allow for feasibility and technological capability to be factors in approval or disapproval of a State plan, a South Carolina court would likely find a State plan would have significant economic impact justifying Legislative review (i.e., every citizen's utility cost could be increased significantly almost instantaneously).

Conclusion: Based upon the above analysis, this Office believes that all or significant parts of a proposed State plan would have to be submitted to the General Assembly for review as a regulation. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. Absent a court decision or legislation action, and until the State plan is actually developed, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[8] See also Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 121 S.Ct. 903 (2001) (finding specific authorization is required for the EPA to consider costs of implementation under the Clean Air Act).