9344-9894

ALAN WILSON
ATTORNEY GENERAL

March 26, 2015

Colonel Alvin A. Taylor
Deputy Director for Law Enforcement
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, SC 29202

Dear Colonel Taylor:

You have informed this Office that the South Carolina Department of Natural Resources ("SCDNR" or "the Department") did not renew a commercial shellfish culture permit on the basis that the Permittee failed to document adequate production from an area as was required as a condition to the permit. Because the Permittee has questioned the Department's ability to make this decision, you have requested the opinion of this Office regarding the SCDNR's authority to issue, condition, revoke, and decline to renew a shellfish culture permit. Based on the analysis below, we believe the SCDNR is authorized to issue, condition, revoke, and decline to renew a shellfish culture permit as these powers are specifically and unambiguously delineated to the Department by statute.

Law / Analysis

Article 9 of Chapter 5 within Title 50 of the South Carolina Code governs commercial shellfish culture permits.[1] S.C. Code Ann. § 50-5-900 is the salient provision, stating that

> (A) The department may grant permits to any state resident for the exclusive use of portions of the intertidal or subtidal state-bottoms or waters for commercial shellfish culture or mariculture not to exceed an aggregate of five hundred acres of bottoms or an aggregate of one hundred surface acres of waters to any entity. In exercising its discretion the department may consider applicants' previous performance and compliance with natural resources laws.
>
> (B) Each permit is valid for five years and may be renewed for additional terms.

S.C. Code Ann. § 50-5-900 (1976) (emphasis added). S.C. Code Ann. § 50-5-930 also speaks to renewal of shellfish culture permits and shellfish mariculture permits, specifying that "[i]f a person granted a Shellfish Culture Permit or a Shellfish Mariculture Permit reapplies for the same bottoms or waters in the next ensuing term, the department must give preference to that

[1] Pursuant to S.C. Code Ann. § 50-5-15(50) (Supp. 2014) "shellfish" is defined as "oysters, clams, mussels, scallops, and all nonmotile molluscan fish having shells."

applicant if the applicant has complied with all requirements of this article and his permit. S.C. Code Ann. § 50-5-930 (1976) (emphasis added).

Furthermore, both S.C. Code Ann. §§ 50-5-915(B) and 50-5-950 authorize the Department to condition permits on specified requirements and to revoke or suspend permits due to noncompliance with the conditions imposed. Specifically, S.C. Code Ann. § 50-5-915(B) (1976) provides in relevant part that: "[p]ermits may be conditioned by the department to include requirements related to: (1) Shellfish production and reporting . . . . [and] (8) revocation for failure to comply with permit performance conditions. S.C. Code Ann. § 50-5-950 (1976) further extends the Departments authority to impose conditions and permits revocation or suspension for noncompliance by stating that: "[i]n addition to the requirements of this article, the department may specify other permit terms and conditions. . . . If the permittee violates any terms or conditions of the permit . . . the department may revoke or suspend the permit."

Interpretation of the aforementioned statutes requires review of the relevant rules of statutory interpretation. "[T]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Henry-Davenport v. Sch. Dist. of Fairfield County, 391 S.C. 85, 88, 705 S.E.2d 26, 28 (2011) (citation omitted). When ascertaining legislative intent, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Media General Commc'ns Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "In construing a statute, the words must be given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose [of] limiting or expanding its operation." Walton v. Walton, 282 S.C. 165, 168, 318 S.E.2d 14, 16 (1984). If it can be ascertained, courts must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

In addition to these rules of statutory construction it is important to point out that this Office has continuously recognized that we will defer to the administrative agency charged with regulating the subject matter at hand so long as the agency's interpretation is reasonable. See Op. S.C. Att'y Gen., 2014 WL 1398595 (Jan. 2, 2014); Op. S.C. Atty Gen., 2013 WL 5651550 (Sept. 23, 2013); Op. S.C. Att'y Gen., 2013 WL 4873939 (Sept. 5, 2013); Op. S.C. Att'y Gen., 2013 WL 4497164 (Aug. 9, 2013); Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013) (quoting Logan v. Leatherman, 290 S.C. 400, 408, 351 S.E.2d 146, 148 (1986) ("Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons")). This practice is followed because "it is well recognized that administrative agencies possess discretion in the area of effectuating the policy established by the Legislature in the agency's governing law." Op. S.C. Att'y Gen., 2013 WL 5651550 (Sept. 23, 2013); Op. S.C. Att'y Gen., 2013 WL 4497164 (Aug. 9, 2013).

We do note, however, that the authority of a state agency or governmental entity created by statute "is limited to that granted by the legislature." Nucor Steel v. South Carolina Public Serv. Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992). "As creatures of statute, regulatory bodies . . . possess only those powers which are specifically delineated. By necessity however, a regulatory body possesses not only the powers expressly conferred on it but also those which

must be inferred or implied to effectively carry out the duties for which it is charged." City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control, 302 S.C. 161, 165, 394 S.E.2d 327, 300 (1990) (internal citations omitted). As such, this Office has recognized on numerous occasions that governmental agencies "can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly inherently, or impliedly." Op. S.C. Atty. Gen., 2002 WL 31341825 (Sept. 9, 2002); Op. S.C. Atty. Gen., 1999 WL 92411 (Jan. 8, 1999); Op. S.C. Atty. Gen., 1988 WL 485289 (Sept. 22, 1988).

Keeping these principles in mind, we turn to the statutes quoted above to determine if they afford, as you ask in your letter, the authority to "issue, condition, revoke, and decline to review" shellfish culture permits. The plain language of S.C. Code Ann. § 50-5-900 affords the Department clear discretionary authority to issue shellfish culture or mariculture permits. Specifically, the legislature provides that "[t]he department *may* grant permits. . ." S.C. Code Ann. § 50-5-900 (1976). Although use of the term "may" can be construed as mandatory in certain instances,[2] the legislature expressly denotes that whether or not a permit is issued is discretionary when it states "[i]n *exercising its discretion* the department may consider applicants' previous performance and compliance with natural resources laws." Id. (emphasis added). The discretionary authority to renew shellfish permits is also illustrated by S.C. Code Ann. § 50-5-900 as the legislature provides that permits "*may* be renewed for additional terms." This discretionary authority is further indicated by the plain language of S.C. Code Ann. § 50-5-930 (1976) which provides that the Department "must give preference to the applicant" but only "if the applicant has complied with all requirements of this article and his permit." As such, we believe the plain language of S.C. Code Ann. §§ 50-5-900 and 50-5-930 clearly provide the Department with the discretionary authority to issue shellfish culture permits after considering the applicant's pervious performance and compliance with natural resource laws and to renew shellfish culture permits if the permittee has complied with the provisions of S.C. Code Ann. § 50-5-900 et seq. and the conditions of the permit.

S.C. Code Ann. § 50-5-915 (1976) is the statute that authorizes the Department to condition permits on certain requirements and to revoke permits for noncompliance. As noted above, § 50-5-915 states in part that "[p]ermits may be conditioned by the department to include requirements related to: (1) shellfish production and reporting . . . [and] (8) revocation for failure to comply with permit performance conditions." S.C. Code Ann. § 50-5-950 (1976) also extends the SCDNR's authority to place conditions on permits and authorizes the power to revoke or suspend a permit for noncompliance of those conditions by providing that "[i]n addition to the

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[2] In T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 402, 450 S.E.2d 87, 95 (Ct. App. 1994) our Court of Appeals expanded on interpretation of use of the word "may" in statutes. Specifically, it explained that:

> [a] basic rule of statutory construction is that words in a statute must be given their plain and ordinary meaning. *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993). Ordinarily, the use of the word "may" in a statute signifies permission and generally means the action spoken of is optional or discretionary. *Robertson v. State*, 276 S.C. 356, 278 S.E.2d 770 (1981). But, when the question arises whether "may" is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling. *Id.* And the use of the word "may" in a statute can be interpreted to mean "shall" *Id.* This is especially so where the original statute used the term "shall" but a later amendment uses the term "may", and there is no explanation for the change in terminology. *Id.* In interpreting the interchangeability of the word "may" and "shall" in statutes, other jurisdictions have held that "may" will be construed as "shall" or as imposing an imperative duty whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of a public or private interest. *Puckett v. Sellars*, 235 N.C. 264, 69 S.E.2d 497 (1952). Accord, *Independent Bankers Assoc. of Ga., Inc. v. Dunn* 230 Ga. 345, 197 S.E.2d 129 (1973).

requirements of this article, the department may specify other permit terms and conditions . . . . If the permittee violates any terms or conditions of the permit . . . , the department may revoke or suspend the permit." S.C. Code Ann. § 50-5-915 (1976). Based on the plain language of these sections, it is our belief that these sections clearly authorize the Department to condition permits on certain requirements and to revoke or suspend permits for noncompliance of such conditions.

Your correspondence suggests that the Department has interpreted these statutes to mean that it can issue, condition, revoke, and decline to review shellfish culture permits. We believe this interpretation is consistent with the plain language of the statutes analyzed above and therefore find no cogent reason to stray from the SCDNR's interpretation. In other words, we agree with the Department that the language of the statutes addressing issuance, renewal, conditioning, and revocation of shellfish culture permits are unambiguous, conveying a clear and definite meaning. Therefore, it is our opinion that a court would find that the imposition of the plain meaning of these statutes is mandated.

Conclusion

We agree with the SCDNR's interpretation that the plain language of the statutory provisions analyzed above clearly and unambiguously authorize the SCDNR to determine whether or not to issue, renew, condition, or revoke shellfish culture permits. Accordingly, it is our belief that the plain meaning of those statutes must be applied.

While it is our opinion that statutory authority provides the SCDNR with authority not to renew a shellfish culture permit if the permittee has failed to comply with the requirements of S.C. Code Ann. § 50-5-900 et seq. or the conditions of his or her permit, we note that whether the permittee has failed to meet the requirements and conditions imposed is of course a question of fact that our Office, pursuant to longstanding Office policy, is not equipped to determine. See Op. S.C. Att'y Gen., 2013 WL 3479877 (June 26, 2013) ("[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions"); see also Op. S.C. Att'y Gen., 2013 WL 3479876 (June 26, 2013) (explaining this Office does not investigate facts, but instead only issues legal opinions).

Should you have any additional questions, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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