ALAN WILSON
ATTORNEY GENERAL

November 17, 2016

The Honorable Stephen L. Goldfinch, Jr.
South Carolina House of Representatives
PO Box 823
Murrells Inlet, SC 29576

Dear Representative Goldfinch:

Attorney General Alan Wilson referred your letter dated June 9, 2016 to the Opinions section for a response. Please find following our understanding of your questions and our response.

Issue (as quoted from your letter):

I respectfully request an opinion as to whether the South Carolina Department of Natural Resources or other state agency, a county government, or a local government has the authority to additionally limit, restrict, or close waterfowl hunting on navigable waters of the state during statewide waterfowl seasons.

In particular, the inquiry involves the navigable waters that are part of [certain named areas] listed by DNR as Category II WMAs and involve restrictions such as limiting hunting to one or two partial days per week, require additional licensing, and require a limit on the number of shotgun shells a hunter may have in their possession.

In like manner, I also seek an opinion as to whether any of these government entities has the authority to completely close navigable waters to hunting when the statewide waterfowl season otherwise is open. [Your letter then provides examples of certain other navigable waters in Wildlife Management Areas.] This request is based on a statement in an opinion offered by the State of South Carolina Office of the Attorney General to James A. Quinn, Assistant Chief Counsel of the SCDNR on July 14, 2005. The conclusion of that opinion states, in part, that "[b]ased upon longstanding and irrefutable South Carolina case law, the public possesses the right to hunt on navigable waters."

Based on prior opinions, I am not seeking further opinion of your office on artificially constructed canals or on navigable waters under United States jurisdiction such as Cape Roman. I am also not asking for an opinion as to whether SCDNR has the authority to set the frameworks of the United States Fish and Wildlife Service (USFWS), and with USFWS approval.

I am aware that the Office of the Attorney General is not a finder of fact and will not try to determine if waters mentioned above are navigable. The waters mentioned above are indistinguishable from waters outside the marked boundaries, other than for the boundary markers themselves, to the navigability is not in question.

Thank you for rendering an Attorney General Opinion on this matter.

In our follow-up telephone conversations, you helpfully describe generally the situation of a person hunting from a boat upon navigable waters, such as a marsh creek, and that person passes into the geographic boundaries of a Wildlife Management Area, possibly without even realizing it. Such a person stays in the boat, and does not set foot on land.

Law/Analysis:

It is the opinion of this Office that a court would find that SCDNR has the statutory authority to limit or prohibit hunting, whether of waterfowl or otherwise, on navigable waters located within the boundaries of Wildlife Management Areas [WMAs]. The South Carolina Constitution protects the rights of citizens of our state both to travel upon navigable waters, and to hunt and fish; however, those provisions do not preclude regulation of hunting upon navigable waters within WMAs. While our 2005 opinion cited in your letter relates to this question, it specifically addressed the actions of a private landowner to restrict hunting, and did not address public regulation pursuant to statutory authority. While we are not aware of any authority for a county or local government to regulate hunting in a WMA, the General Assembly has specifically empowered SCDNR to regulate WMAs in order to manage the limited resources for the benefit of all citizens. Although we are not aware of a South Carolina case squarely addressing this question, we believe a court would apply that statute to find that SCDNR may regulate hunting in navigable waters in WMAs in the way that you describe.

South Carolina has a long and loving relationship with hunting[1]. Our state is home to many beautiful natural resources, from the coastal marshes to the foot of the Blue Ridge Mountains. For centuries, South Carolinians often hunted out of basic necessity in order to put food on the table, and even today some households supplement their income by legally harvesting natural resources. This legacy continues on now as citizens hunt both for sport and to

[1] See, for example, the 1818 opinion of the Constitutional Court of Appeals of South Carolina, which begins:

> "Until the bringing of this action, the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement of the country up to the present time; and the time has been, when, in all probability, obedient as our ancestors were to the laws of the country, a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege. It was the source from whence a great portion of them derived their food and raiment, and was, to the devoted huntsman, (disreputable as the life now is,) a source of considerable profit."

McConico v. Singleton, 9 S.C.L. 244 (2 Mill), 1818 WL 787 (1818).

enjoy the fruits of their efforts. In some families, hunting is a rite of passage for young people, and is part of passing traditions from generation to generation. Hunting associations have been at the forefront of many conservation efforts both in our state and nationally, in order to preserve natural resources for use by themselves and posterity[2]. Unlike certain other developed societies, recreational hunting in this state is a sport that is beloved and enjoyed across all income levels: here, hunting is a right, not a privilege to be enjoyed by only a few[3]. With this background, and as more fully set out below, our state has constitutionalized the rights of its citizens to hunt within the bounds of the law, and has deliberately set out a procedure by which certain lands may be set aside for public hunting, and managed by the South Carolina Department of Natural Resources for the common good.

South Carolina also has a strong historical relationship with navigable waters. In the era before modern interstate travel, our waterways were the state's commercial highways. Farmers and merchants used rivers to transport their goods to markets, and colonial towns grew up around waterways and harbors. Our industrial commerce has since moved to the interstate highway system, but navigable waters remain a vital resource for recreation. The South Carolina Constitution protects the right of citizens to travel upon it navigable waters, as also set out below.

With that background, we turn to your question, which concerns an intersection of law, tradition, and culture in our State. As you note, our Office has opined that South Carolinians generally have a right to hunt upon navigable waters of this state. Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). You also refer in your letter to the authority of SCDNR to set statewide rules for hunting waterfowl. Essential, we understand your question to be: where a person is otherwise licensed and lawfully hunting upon navigable waters in this State outside a WMA, does SCDNR (or another governmental entity) have the authority to further limit or prohibit hunting by such a person simply because that hunter passes into the geographic boundaries of a WMA while traveling on navigable water, without exiting the boat or setting foot on land? For the reasons set out below, we believe that the answer is yes, a court would find that SCDNR may do so.

The South Carolina Constitution provides that "[a]ll navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . ." S.C. Const. Art. I § 4. That section goes on to discuss taxes and tolls, but nowhere does it reference hunting. *Id.* Instead, the plain language of the section focuses on protecting the right to travel freely. As to hunting, our Constitution later provides:

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[2] As one example among many, it appears that Ducks Unlimited has contributed to setting aside 13 million acres nationwide to preserve waterfowl habitat. www.ducks.org/conservation/how-du-conserves-wetlands-and-waterfowl.
[3] S.C. Const. Art. I § 4, discussed *infra*.

> The traditions of hunting and fishing are valuable parts of the state's heritage, important for conservation, and a protected means of managing nonthreatened wildlife. The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued, subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly. Nothing in this section shall be construed to abrogate any private property rights, existing state laws or regulations, or the state's sovereignty over its natural resources.

S.C. Const. Art. I § 25. The General Assembly also codified this right at [citation]. Accordingly, South Carolina law extends strong legal protection to hunters, subject to the right of the State to pass laws regulating the practice and exercising "sovereignty over its natural resources."

One example of the state exercising its sovereign power over its resources is found in S.C. Code Ann. § 50-11-2200 (2015), which provides for the establishment, of wildlife management areas. Section 2200(A) provides in part that SCDNR "shall acquire sufficient wildlife habitat through lease or purchase or otherwise to establish wildlife management areas for the protection, propagation, and promotion of fish and wildlife and for public hunting, fishing, and other natural resource dependent recreational use." Section 2200(B) empowers SCDNR to "promulgate regulations for the protection, preservation, operation, maintenance, and use of wildlife management areas." This broad grant of rule-making power is followed by Section 2200(C), which prohibits various activities in WMAs, unless specifically allowed by SCDNR.

Section 2200(C) merits particular attention, in that the General Assembly chose to issue a blanket prohibition on numerous activities in wildlife management areas, including all hunting, unless expressly permitted. The section reads, as relevant here:

> (C) The following acts or conduct are prohibited and shall be unlawful on all wildlife management areas, state lakes and ponds owned or leased by the department, heritage preserves owned by the department, and all other lands owned by the department[4]; provided, however, the department may promulgate regulations allowing any of the acts or conduct by prescribing acceptable times, locations, means, and other appropriate restrictions not inconsistent with the protection, preservation, operation, maintenance, and use of such lands and areas:

[4] For the purposes of this section, S.C. Code Ann. § 50-1-5(2) (2015) defines "department" as the South Carolina Department of Natural Resources.

(1) hunting or taking wildlife or fish;

(2) exceeding bag or creel limits;

(3) hunting or taking wildlife or fish by unauthorized methods, weapons, or ammunition;

(4) hunting or taking wildlife or fish during closed seasons, days, or times;

(5) hunting or taking wildlife by aid of bait or feeding or baiting wildlife;

S.C. Code Ann. § 50-11-2200(C)(1)-(5) (2015).

As stated in our 2005 opinion to Mr. Quinn (which you reference in your letter):

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.,E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).
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> The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan*, supra. Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When construing an undefined statutory term, such term must be interpreted in accordance with its usual and customary meaning. *Id.* When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.*

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

Applying these rules to Section 50-11-2200(C), we believe that a court would find that the language is "plain and unambiguous, and conveys a clear and definite meaning." Put very simply, the legislative scheme evident here might be restated: "no hunting or fishing is allowed at all in a WMA, except as explicitly permitted by SCDNR regulations." Under this statutory scheme, a court considering this statute would surely find that SCDNR has the statutory

authority to regulate waterfowl hunting in the ways described in your opinion request, in accordance with their own regulations, provided that the statute is constitutional.

This Office has consistently stated regarding the constitutionality of statutes passed by the General Assembly that:

> ... legislation passed by the General Assembly is presumed constitutional. *Horry County School Dist. v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Joytime Distribs. and Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Att'y Gen., August 9, 1997.

Op. S.C. Att'y Gen., 2016 WL 4698867 (August 29, 2016) (quoting Op. S.C. Att'y Gen., 2010 WL 1808720 (April 6, 2010)). This Office does not see any conflict between the text of S.C. Code Ann. § 50-11-2200(C)(1)-(5) (2015) and the constitutional protection of hunting found in Article I § 25 of the South Carolina Constitution, especially in light of the Constitution's specific affirmation of "the state's sovereignty over its natural resources."

Your opinion request refers to a 2005 opinion of this Office, which did opine that "the public possesses the right to hunt on navigable waters." *See* Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). Our Office stands behind our 2005 opinion and we believe that it remains an accurate statement of the law; however, we also believe that it is not dispositive here. That opinion addressed the lawfulness of a private individual interfering with a person otherwise lawfully hunting by attempting to prevent the hunter from legally hunting upon a public waterway, by baiting his lands which were adjacent to the waterway and posting signs to that effect. *Id.* We concluded in that opinion that the landowner in question could be subject to prosecution for "willfully imped[ing] or obstruct[ing] another person from lawfully hunting." *Id.* The key distinction from the scenario that your question presents is that the hunter in our 2005 opinion was hunting on a waterway adjacent to private property under the control of a private individual, not property designated as a WMA. *See id.* In other words, our 2005 opinion

concerned a private individual attempting to functionally outlaw otherwise legal behavior; the question here concerns a valid exercise of state sovereignty[5].

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that a South Carolina court generally would find that the South Carolina Department of Natural Resources has the authority to limit, restrict, or close hunting on navigable waters in Wildlife Management Areas in the ways that you describe. We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt by this Office to establish or comment upon public policy. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. *See* S.C. Code Ann. § 15-53-20 (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Having offered our advisory opinion, we hasten to reiterate that our Office is not aware of any reported case of a South Carolina court which specifically addresses the question presented in your request. Given that there is no binding precedent interpreting this statute or the applicable regulations, it is possible that a court would disagree with our interpretation and rule to the contrary. Therefore, while we routinely note the availability of a declaratory judgement in our opinions, we take this opportunity to highlight that S.C. Code Ann. § 15-53-20 (2015) provides an avenue for citizens to seek definite, certain answers to questions which the courts have not yet had the opportunity to consider – such as the question presented here.

Sincerely,

David Jones

David S. Jones
Assistant Attorney General

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[5] Similarly, compare *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997), which affirmed the decision of the circuit court to overturn the conviction of an individual for "fishing on the lands of another without the owner's permission." There, the S.C. Wildlife Commission cited the defendant for fishing on private property without consent, but the circuit court overturned the conviction on the grounds that the waters were in fact navigable, and therefore the defendant had a right to be there. 330 S.C. at 84-87, 91-92, 498 S.E.2d at 391-393, 395. Again, the crucial distinction from the scenario presented in your request is that the General Assembly had not exercised its sovereign authority to designate the waters in *State v. Head* as a Wildlife Management Area.

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General