ALAN WILSON
ATTORNEY GENERAL

August 30, 2018

The Honorable Alan Clemmons, Member
South Carolina House of Representatives
District No. 107
PO Box 11867
Columbia, SC 29211

Dear Representative Clemmons:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> Water sports, in particular parasailing and banana boating, are popular amusement and tourist attractions in Horry County. As with any waters sports, safety should always be a top priority. Unfortunately, there was a recent parasailing accident which resulted in a man having to have both of his legs amputated. This tragic event has shed light on how this industry is regulated.
>
> Passenger carrying vessels that operate or pull the parasail and banana boat are regulated by the U.S. Coast Guard (USCG). There are two types of captain licenses available that authorizes a person to operate these vessels. An Operator of an Uninspected Passenger Vessel (OUPV) or "Six-Pack" license is required for operators of vessels carrying six or less passengers. The vessel allowed to be operated with an OUPV license is not required to be inspected and is less regulated by the USCG. The Master 100 Gross Ton license is required for operators of vessels carrying seven or more passengers. The vessel allowed to be operated with this license must meet the USCG Commercial Vessel Inspection standards. My understanding is most operators of vessels towing a parasail or banana boat have an OUPV license; therefore, the vessels are not required to be inspected.
>
> The Federal Aviation Administration (FAA) controls the airspace in which a parasail flies. Every parasail company must request a waiver from the FAA to operate in the airspace. They are regulated in the same manner the FAA regulates kites.

> The parasail and banana boat equipment such as the parachute, winch rope, harness and floats are not regulated by any entity; therefore, inspection of this equipment is not required.
>
> In light of the above, I respectfully request your opinion regarding the State's ability to regulate water sport industries that operate in our territorial waters. In addition, may the State require inspections of the vessels that are currently not required to be inspected by the USCG?

Law/Analysis

It is this Office's opinion that the General Assembly has the authority to regulate water sport industries within the territorial waters of South Carolina. The General Assembly possesses "plenary power to enact legislation" within the boundaries of the state. Cty. of Florence v. W. Florence Fire Dist., 422 S.C. 316, 321, 811 S.E.2d 770, 773 (2018); S.C. Const. art. III, § 1 ("The legislative power of this State shall be vested in ... the 'General Assembly of the State of South Carolina.'"). This Office's August 3, 2012 opinion addressed to Lieutenant Governor Glenn McConnell observed that the State's jurisdictional boundaries have been interpreted to include its "'territorial waters' [which] are those waters in the Atlantic Ocean out to three geographic miles extending from the mean low-water mark of South Carolina's naturally-occurring coastline." Op. S.C. Atty. Gen., 2012 WL 3540453 (August 3, 2012).

The General Assembly has, in fact, exercised its authority to regulate boats, watercraft, and other water devices used or held for use on the waters of the State. In enacting the South Carolina Boating and Safety Act of 1999 ("SCBSA"), the General Assembly granted the South Carolina Department of Natural Resources ("DNR") primary enforcement authority over "all laws pertaining to boating." S.C. Code Ann. §§ 50-21-5 *et seq.* The SCBSA further authorizes DNR "to make special rules and regulations with reference to the operation of vessels on waters within the territorial limits of this State." S.C. Code Ann. § 50-21-30(3) (emphasis added). The South Carolina Supreme Court has interpreted this statute to "manifest[] a clear legislative intent that state law ... regulate watercraft on navigable waters." S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (discussing Barnhill v. City of N. Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999)).

The answer to the second question raised in the request letter, whether the State can require inspections of vessels that are not required to be inspected by the USCG, will depend on the specific details of the proposed inspection program. Such a program could be preempted by federal statutes or regulations. The South Carolina Supreme Court has explained the preemption doctrine as follows:

> The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct.

> 2608, 120 L.Ed.2d 407 (1992). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." Id. (quoting Malone v. White Motor Co., 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." Ingersoll–Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Moreover, "[f]ederal regulations have no less pre-emptive effect than federal statutes." Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).
>
> A federal law may either expressly or impliedly preempt a state law. Congress may expressly preempt state law through specific language clearly stating its intent. On the other hand, implied preemption occurs through "field preemption" or "implied conflict preemption." Implied conflict preemption occurs in one of two ways—either where compliance with both federal and state regulations is physically impossible or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). ...

Priester v. Cromer, 401 S.C. 38, 43–44, 736 S.E.2d 249, 252 (2012).

In Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51 (2002), the United States Supreme Court examined whether state common-law tort actions which sought damages from an outboard motor manufacturer were preempted by the Federal Boat Safety Act of 1971 ("FBSA"), 46 U.S.C. §§ 4301-4311, or by a subsequent decision of the Coast Guard not to issue a regulation requiring propeller guards. The FBSA's stated purpose is that it was "enacted 'to improve boating safety,' to authorize 'the establishment of national construction and performance standards for boats and associated equipment,' and to encourage greater 'uniformity of boating laws and regulations as among the several States and the Federal Government.' Pub.L. 92–75, § 2, 85 Stat. 213–214." 537 U.S. at 57. Section 10 of the FBSA contains a preemption clause which reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The Act also contains a saving clause which states, "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The Court examined whether common law tort actions were preempted, either by the express terms of the preemption clause or implicitly. The Courts analyzed the express preemption clause as follows:

> Because the FBSA contains an express pre-emption clause, our "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). Here, the express pre-emption clause in § 10 applies to "a [state or local] law or regulation." 46 U.S.C. § 4306. We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article "a" before "law or regulation" implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law. Second, because "a word is known by the company it keeps," Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.
>
> The Act's saving clause buttresses this conclusion. See Geier v. American Honda Motor Co., 529 U.S., at 867–868, 120 S.Ct. 1913. It states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." § 4311(g). As we held in *Geier*, the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions." Id., at 868, 120 S.Ct. 1913.
>
> The saving clause is also relevant for an independent reason. The contrast between its general reference to "liability at common law" and the more specific and detailed description of what is pre-empted by § 10—including the exception for state regulations addressing "uniquely hazardous conditions"—indicates that § 10 was drafted to pre-empt performance standards and equipment requirements imposed by statute or regulation.

Sprietsma, 537 U.S. at 62–63 (emphasis added).

As the Court's opinion states, the FBSA's express preemption clause clearly preempts states from drafting performance standards and equipment requirements which conflict with

those adopted by federal authority. The SCBSA recognizes the statutes and regulations enacted by the United States Congress or appropriate federal agency "that pertain to watercraft and watercraft safety, associated marine equipment, performance and operation of watercraft, standard numbering and registration of watercraft, and boating accident reporting ... are the law of the State of South Carolina." S.C. Code Ann. § 50-21-170. Further, while Section 50-21-610(1) grants DNR the authority to "promulgate regulations which establish boat construction or associated equipment performance or other safety standards," subsection 50-21-610(2)(a) requires that such regulations "be identical to Federal Regulations for enforcement purposes" with exceptions for uniquely hazardous conditions within this State.[1] DNR has adopted such a regulation which states:

> Those portions of the Federal Boat Safety Act of 1971 (86 STAT. 213; 46 USC 1451, et seq. as amended) concerning boat construction, associated equipment, performance and operation, safety, standard numbering and registration and the Federal Rules and Regulations adopted pursuant thereto and those portions of the Inland Navigation Rules Act (94 STAT. 3415; 33 USC 2001 et seq. as amended); and the International Navigation Rules Act of 1977 (91 STAT. 308; 33 USC 1601 et seq. as amended), concerning required equipment, vessel operation and safety and the Federal Rules and Regulations adopted pursuant thereto are hereby declared to be the law of this State.

S.C. Code Ann. Regs. 123-1.

As discussed above, where federal authorities have regulated in regards to watercraft performance standards and equipment requirements the states are preempted from adopting contrary standards. However, your second question raises the issue of whether the State can regulate vessels which are not required to be inspected by USCG regulations. Whether state legislation requiring inspection of vessels which are not subject to inspection by the USCG would be preempted would likely be determined by answering whether the proposed terms of the program "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Priester, supra. The Court in Sprietsma stated that there is precedent for states retaining legislative and regulatory authority over boating safety where the USCG has not regulated as follows:

> The day after the President signed the FBSA into law, the Secretary of Transportation took action that was based on the assumption that § 10 would pre-empt existing state regulation that "is not identical to a regulation prescribed" under § 5 of the Act, even if no such federal regulation had been promulgated. On August 11, 1971, the Secretary issued a statement exempting all then-existing state laws from pre-emption under the Act. 36 Fed.Reg. 15764–15765. He explained that boating safety would "not be adversely affected by continuing in

[1] See also S.C. Code Ann. § 50-21-610(2)(b) ("Operational regulations and other equipment regulations such as for mufflers shall not be in conflict with Federal requirements").

> effect those existing laws and regulations of the various States and political subdivisions" until new federal regulations could be issued. Id., at 15765.
>
> One year later, on August 4, 1972, the Coast Guard issued its first regulations under § 5 of the Act. See 37 Fed. Reg. 15777–15785. Those regulations included boat performance and safety standards such as requirements for hull identification numbers, maximum capacity and warnings of such capacity, and minimum boat flotation. They did not include any propeller guard requirement. After those federal regulations became effective, the Secretary limited the scope of his original blanket exemption to pre-empt those "State statutes and regulations" that concerned requirements covered by the 1972 regulations. See 38 Fed. Reg. 6914–6915 (1973). Existing state laws that regulated matters not covered by the federal regulations continued to be exempted from pre-emption. Ibid.

Sprietsma, 537 U.S. at 59-60.

> Indeed, history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards. That was the course the Coast Guard followed in 1971 immediately after the Act was passed, and again when it imposed its first regulations in 1972 and 1973.

Id. at 65. While Sprietsma provides that states retain regulatory authority in the absence of positive federal regulation under the FBSA, a court would, nonetheless, likely evaluate whether the proposed State regulation would be an obstacle to the purposes of Congress or a significant regulatory objective. See Preister, 401 S.C. at 45-47 (discussing Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323 (2011). As noted in the request letter, the USCG has promulgated regulations regarding uninspected vessels. See 46 C.F.R. §§ 24.01 *et seq.* This Office cannot say categorically that a state inspection program would be preempted as we have not been provided with proposed terms for such a plan, however such legislation would be presumed to be valid. Cty. of Florence v. W. Florence Fire Dist., 422 S.C. at 321 ("[A]ll statutes are presumed constitutional").

Conclusion

It is this Office's opinion that the General Assembly has the authority to regulate water sport industries within the territorial waters of South Carolina. The General Assembly possesses "plenary power to enact legislation" within the boundaries of the state. Cty. of Florence v. W. Florence Fire Dist., 422 S.C. 316, 321, 811 S.E.2d 770, 773 (2018); S.C. Const. art. III, § 1 ("The legislative power of this State shall be vested in … the 'General Assembly of the State of South Carolina.'"). The General Assembly has, in fact, exercised its authority to regulate boats, watercraft, and other water devices used or held for use on the waters of the State. In enacting

the South Carolina Boating and Safety Act of 1999 ("SCBSA"), the General Assembly granted the South Carolina Department of Natural Resources ("DNR") primary enforcement authority over "all laws pertaining to boating." S.C. Code Ann. §§ 50-21-5 *et seq*. The SCBSA further authorizes DNR "to make special rules and regulations with reference to the operation of vessels on waters within the territorial limits of this State." S.C. Code Ann. § 50-21-30(3) (emphasis added).

The answer to the second question raised in the request letter, whether the State can require inspections of vessels that are not required to be inspected by the USCG, will depend on the specific details of the proposed inspection program. Such a program could be preempted by a federal statute or regulation. As discussed more fully above, in Priester v. Cromer, 401 S.C. 38, 736 S.E.2d 249 (2012), the South Carolina Supreme Court explained that state legislation can be found to be "without effect" when it conflicts with federal statutes or regulations under the preemption doctrine. This Office cannot say categorically that a state inspection program would be preempted as we have not been provided with proposed terms for such a plan, however such legislation would be presumed valid. Cty. of Florence v. W. Florence Fire Dist., 422 S.C. at 321 ("[A]ll statutes are presumed constitutional").

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General