



ALAN WILSON  
ATTORNEY GENERAL

May 16, 2019

Ms. Ashley Harwell-Beach  
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South Carolina Legislative Council  
223 Blatt Building  
Columbia, SC 29201

Dear Ms. Harwell-Beach:

You have asked for our opinion concerning the Administrative Procedures Act. See S.C. Code Ann. § 1-23-10 *et seq.* We have had numerous exchanges by email regarding your issue and you and members of your staff met with the Attorney General, the Chief Deputy and myself on May 13<sup>th</sup> regarding your question. You note that staff members of the Legislative Council “all are in agreement that approving part of a single regulation and disapproving a part of the same regulation in one Joint Resolution . . . is not an authorized method pursuant to 1-23-125(A).” Apparently, the staff person of the Senate Fish, Game, and Forestry and its chairman disagree with Legislative Council’s analysis. They consider the regulations in question each to be separate regulations, and thus may be amended by the Committee, while Legislative Council considers R. 123-204 (Doc. 4860) to be a single regulation and thus may be changed only by withdrawal and deletion.

By way of background, you state that

[t]he Department of Natural Resources promulgated Regulation Document Number 4860 that amends Regulation 123-204. The 120-day legislative review period ended on May 8, 2019.

On May 7, the Senate Fish, Game and Forestry Committee introduced a joint resolution (S. 829) to approve all of the changes made to Regulation 123-204, except for the changes in Section 2 of the regulation, which were disapproved. It received third reading in the Senate on May 9, 2019 and was not taken up in the House. Incidentally, the House passed and sent to the Senate H. 4364 which approved the regulation in its entirety in mid-April. . . .

Legislative Council’s opinion, based on its past practices and current reading of the Administrative Procedures Act, is that S. 829 did not toll the 120-day period on any portion of the regulation, and due to the expiration of the 120-day period on May 8,

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2019, the entire regulation should be published in the State Register are taking effect upon that publication.

You state the following questions:

“Our question really is what is the effect of the Joint Resolution, does it violate the APA? Is this a lawful way to toll the clock on Section 2 and thereby keep it from taking effect? If so is section (2) effectively deleted from the rest of the regulation which would then take effect?”

#### Law/Analysis

The issue surrounds S. 829, a Joint Resolution offered by the Senate Fish, Game, and Forestry Committee. The title of S. 829 is as follows:

To Approve Regulations of the Department of Natural Resources Relating to Regulations Applicable To Specific Properties, Designated In Regulation Document Number 4860, With the Exception of Regulation 123-2042 Z., Relating To A Prohibition Of Access To Certain Public Trust Lands, Which Is Disapproved, Pursuant To The Provisions of Article 1, Chapter 23, Title 1 of The 1976 Code.

That Joint Resolution reads as follows:

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The regulations of the Department of Natural Resources, relating to Additional Regulations Applicable to Specific Properties, designated in Regulation Document Number 4860 and submitted to the General Assembly pursuant to the provisions of Article 1, Chapter 23, Title 1 of the 1976 Code, are approved with the exception of Regulation 123-204 Z.

SECTION 2. Regulation 123-204 Z., relating to a complete prohibition of access to certain beaches and tidelands in the public trust, is hereby disapproved.

SECTION 3. This joint resolution takes effect upon approval by the Governor.

In addition, S. 829 contains the following summary appended thereto:

These regulations amend Chapter 123-204, which governs the conduct and activities of visitors to wildlife management areas, heritage preserves, shooting ranges, and other lands owned or leased by the Department of Natural Resources.

A Notice of Drafting was published in the State Register on October 26, 2018, Volume 42, Issue No. 10.

Section 1-23-125(A) referenced by you, provides as follows:

- (A) The legislative committee to which a regulation is submitted is not authorized to amend a particular regulation and then introduce a joint resolution approving the regulation as amended; however, this provision does not prevent the introduction of a resolution disapproving one or more of a group of regulations submitted to the committee and approving others submitted at the same time or deleting a clearly separable portion of a single regulation and approving the balance of the regulation in the committee resolution.

It is our understanding that the Legislative Council views Regulation 103-204 as constituting a “single regulation” for purposes of § 1-23-125(A). Thus, according to Legislative Council, the sole method under the APA for amending the regulations once submitted to the General Assembly for review is by “deleting a clearly separable section of a single regulation and approving the balance of the regulation in the committee resolution.” On the other hand, as we understand it, the staff and Chairman of the Senate Fish, Game and Forestry Committee deem R. 103-204 to constitute a “group of regulations submitted to the committee. . . .” We understand that their interpretation is that § 1-23-125(A) “does not prevent the introduction of a resolution disapproving one or more of a group of regulations submitted to the committee and approving others submitted at the same time. . . .” Thus, the first issue turns is whether R. 103-204 is a “single regulation” or a “group of regulations. . . .”

Our Supreme Court has recently advised with respect to the Administrative Procedures Act and agency regulations the following:

Under the APA, a regulation is defined as an “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.” S.C. Code Ann. § 1-23-10(4) (2005). Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a “binding norm.” Home Health Serv., Inc. v. S.C. Tax Com'n, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). The “key inquiry” is

The extent of which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Sloan, 370 S.C. at 491, 636 S.E.2d 598 (Toal, C.J., dissenting) (quoting Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983)). “When there is a close question whether a pronouncement is a policy statement or a regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA.” Home Health Serv., Inc. v. S.C. Tax Com'n, 312 S.C. at 329, 440 S.E.2d at 378.

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Joseph v. S.C. Dept. of Labor, Licensing and Regulation, 417 S.C. 436, 453-54, 790 S.E.2d 763, 772 (2016). Your question is a somewhat close one. We are aware of no decision of our appellate courts, nor can we locate any opinion from this Office which directly addresses your situation. While, as stated, the APA defines the term “regulation,” the Act does not define the term “single regulation” or “group of regulations.” Thus, we defer to the Legislative Council’s interpretation which has long provided guidance to the General Assembly concerning the APA’s requirements for submission of regulations to the Legislature for approval or disapproval.

R. 123-204 was apparently promulgated as a single regulation originally. The title of Article 5.5, of which R. 123-204 is a part, is “Regulation of Real Property Owned and Leased By The Department [of Natural Resources].” The title of R. 123-204 itself is “Additional Regulations Applicable to Specific Properties.” DNR, upon submission to the General Assembly, summarized Document 4860 (containing amendments to R. 123-204) as “amend[ing] Chapter 123-204 that governs the conduct and activities of visitors to Wildlife Management Areas, Heritage Preserves, shooting ranges and other lands owned by the Department of Natural Resources.” (emphasis added). Thus, DNR submitted R. 123-204 as a single regulation to govern “conduct and activities of visitors” to its various properties.

There is also overlap among the regulated properties. For example, DNR has provided in R. 103-204 that dogs are not allowed on a number of the properties. Also, motorized vehicles are prohibited on several of these lands. Thus, while the proposed regulation addresses various individual DNR properties, and each could possibly be deemed to stand on its own separately, there appears to be a coherent overarching purpose of R. 123-204, so that it may be deemed to constitute a single regulation. That single purpose is the regulation of conduct and activities of visitors to specific properties of the Department of Natural Resources.

By analogy, the decision of the South Carolina Supreme Court in State ex rel. Medlock v. S.C. State Family Farm Devel. Auth., 279 S.C. 316, 306 S.E.2d 605 (1983) is instructive here. In Medlock, the Court upheld a statute as germane under Art. III, § 17, even though the law contained a collection of various methods of financing. According to the Court, “[t]he subject of Act No. 179 is the authorization of a bonded indebtedness to fund various government programs.” 279 S.C. at 316, 306 S.E.2d at 607. Likewise, here, although the constitutional provision requiring germaneness is not relevant, the analysis in Medlock is. R. 123-204, like the statute in Medlock, possess a single coherent subject matter – the regulation of conduct and activities concerning visitors to various DNR properties – such that it may be deemed by Legislative Council as a “single regulation,” rather than a “group of regulations” for purposes of § 1-23-125(A). The agency, in promulgating the regulation certainly intended this purpose as the overarching theme. Thus, Legislative Council gave R. 123-204 a single regulation number, consistent with its longstanding practice. We deem such a conclusion by Legislative Council to be reasonable and here controlling.

Because we defer to Legislative Council’s determination that R. 123-204 constitutes a “single regulation,” and one consistent with its prior practices of that agency, we believe the

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issue is governed by that portion of § 1-23-125(A), which provides for “deleting a clearly separable portion of a single regulation and approving the balance of the regulation in the Committee resolution.” (emphasis added). In our view, such is the sole recognized method under the APA for amending a single regulation once it has been submitted to the General Assembly for review. In a previous opinion, Op. Att’y Gen., 1984 WL 159856 (No. 84-49) (May 2, 1984), this Office provided guidance regarding the approval by the General Assembly of agency regulations under the APA. There, we stated the following:

The Administrative Procedures Act generally requires that after an agency has promulgated regulations, the agency must submit the regulations to the General Assembly for approval. . . . Sections 1-23-120 through 1-23-125 provide the procedure for General Assembly approval or disapproval of promulgated regulations.

Pursuant to § 1-23-120 of the amended Code, the General Assembly may disapprove regulations promulgated by an agency by Joint resolution. . . . Such affirmative action by the General Assembly appears to be the only procedure whereby disapproval by the General Assembly may be effectuated.

Section 1-23-125 provides certain authority to the standing committees of the Senate and House with regard to review of regulations... If a reviewing committee determines ‘that it cannot approve a regulation in the form submitted, it may notify the promulgating agency in writing along with its recommendation as to changes that would be necessary to obtain committee approval.’ The promulgating agency may then decide whether to withdraw either permanently or temporarily, or leave the regulation with the General Assembly for its ultimate approval or disapproval.

With regard to disapproval of the regulation by joint resolution, the Administrative Procedures Act does not address when or if such regulation should be resubmitted. Likewise, there is no restraint upon an agency resubmitting the same regulation or to submitting modified regulations pertaining to the same subject matter. Again, pursuant to § 1-23-120 a joint resolution only approves or disapproves a submitted regulation. . . .

With regard to a regulation withdrawn by the promulgating agency pursuant to § 1-23-125, there exists no legislative mandate as to when or if such regulation should be resubmitted. If the agency elects to amend the regulation and proceed pursuant to § 1-23-125(a), this option contemplates resubmission by the agency. But again, there is no legislative restriction within the Administrative Procedures Act as to when the regulation with suggested changes incorporated therein must be resubmitted.

Section 1-23-125(b) provides the promulgating agency the option to '[w]ithdraw the regulation permanently', after an assigned committee notifies the agency that it cannot approve the regulation in the form submitted. It appears that this statutory option envisions with the use of the word ‘permanently’ that the identical regulation not be resubmitted during the same legislative session. Again, there is no legislative mandate within the Administrative Procedures Act that the regulation be resubmitted.

The entire statutory scheme relative to the promulgation of regulations by executive agencies suggests that the General Assembly's role is limited to either approving or disapproving regulations. Thus, it is not contemplated by the Administrative Procedures Act that the General Assembly will determine when or if an agency must resubmit regulations disapproved by the General Assembly or withdrawn by the agency pursuant to a request by the assigned committee. You suggest in your letter that an agency may be compelled to promulgate certain regulations pursuant to its enabling act... Nonetheless, the within noted provisions of the Administrative Procedures Act appear to provide the only procedure for obtaining approval by the General Assembly. The promulgating agency may not compel the General Assembly to approve its regulations; it may only submit them in accordance with the Administrative Procedures Act.

(emphasis added). It is noteworthy that the Opinion concluded that a Joint Resolution “only approves or disapproves a submitted regulation.” Moreover, § 1-23-125(A), in its first part, expressly states that “[t]he legislative committee to which a regulation is submitted is not authorized to amend a particular regulation and then introduce a joint resolution approving the regulation as amended.” (emphasis added). When construed together with the remainder of Subsection (A), it is apparent that the sole method under the APA to amend a “single regulation” is that of “deleting a clearly separable portion . . . and approving the balance of the regulation in the committee resolution.” (emphasis added). In short, as the 1984 Opinion recognizes, “if the agency elects to amend the [withdrawn] regulation and proceed pursuant to § 1-23-125[A] the option contemplates resubmission by the agency.”

Legislative Council has submitted to us a memorandum reflecting this same analysis of this situation as it is governed by § 1-23-125(A) and as applied to this situation. That analysis states in pertinent part that:

Regulation 123-204 regulates specific properties owned and leased by the Department of Natural Resources. It is one of twelve numbered regulations contained within Article 5.5, ranging from Regulation 123-200 to 123-211. Legislative Council would treat Section Z related to the Tom Yawkey Wildlife Center as simply a part of Regulation 123-204, and not as a separate regulation according to the long-standing practices of the agency as it administers the regulation process through the Administrative Procedures Act.

The normal procedure in cases such as the one at hand, is for the committee to ask the agency involved to withdraw the regulation and resubmit it with the offending portion removed or amended as requested. Because of time constraints, this option was not possible... The committee opted to introduce a joint resolution approving all of the regulation but disapproving Section Z. . . .

Legislative Council's opinion, based on its past practices and current reading of the Administrative Procedures Act, is that S. 829 did not toll the 120-day period on any portion of the regulation, and due to the expiration of the 120-day period on May 8,

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2019, the entire regulation should be published in the State Register as taking effect upon that publication.

We agree.

### **Conclusion**

We concur with Legislative Council's analysis. Legislative Council considers R. 123-204 to be a single regulation and, although that may be a somewhat close question, Legislative Council's interpretation is a reasonable one, and one consistent with its historical practices. Thus, we defer to Legislative Council's expertise as the agency which has historically provided guidance regarding legislative approval or disapproval of an agency's submitted regulations. In this instance, DNR submitted R. 123-204 as a single regulation and one designed to govern "the conduct and activities of visitors" to its various properties. Such appears to be a subject which is entirely consistent with a single regulation. That being the case, the APA only recognizes one method for amending or revising a single regulation once it is submitted to the General Assembly. That method is withdrawal and deletion. See Op. Att'y Gen., May 2, 1984, *id.* Such method was not followed in this case due to lack of remaining time in the session. Instead, the Committee attempted to approve and disapprove portions of a single regulation in the Joint Resolution. The APA does not contemplate or authorize this procedure.

Accordingly, it is our opinion that a court would conclude that Legislative Council is correct in concluding that "S. 829 did not toll the 120-day period on any portion of the regulation, and due to the expiration of the 120-day period on May 8, 2019, the entire regulation should be published in the State Register as taking effect upon that publication."

Sincerely,



Robert D. Cook  
Solicitor General