June 3, 2008

The Honorable Chip Campsen
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Campsen:

We received your letter requesting a supplemental opinion of this Office to an opinion we issued on May 8, 2008 to Senator John M. Knotts concerning the authority of Councils of Governments ("COGs") under state law. You state:

> As you may know, the actions of COGs with respect to water treatment systems are also subject to provisions of federal law. The federal Clean Water Act conditions federal finanical support for infrastructure projects on planning and review by entities such as COGs. I am requesting an opinion on whether the General Assembly, by enacting state legislation that prohibits COGs from deciding which entities may provide water and sewer service in the area represented by a particular COG, would run afoul of the Clean Water Act. An additional issue is whether such legislation could hinder or slow the provision of federal funds to South Carolina and any of its subdivisions, including the COGs.

Law/Analysis

We understand the legislation in question is contained in House Bill 3030. Among other things, the bill proposes to add section 6-7-145 to the South Carolina Code. This provision states: "A regional council of government is not authorized or empowered to determine which entities may or may not provide water and sewer service in the area represented by the council." You question whether or not this provision runs afoul of the Clean Water Act (the "Act") and in particular, section 208 found in section 1288 of title 33 of the United States Code.

A recent South Carolina Court of Appeals decision describes section 208 of the Act as follows: "Section 208 of the federal Clean Water Act provides a framework for states, through local and regional governmental authorities; to create and implement area-wide waste treatment management plans to control water pollution." Carolina Water Serv., Inc. v. Lexington County Joint

Mun. Water & Sewer Comm'n, 367 S.C. 141, 625 S.E.2d 227 (Ct. App. 2006). Under section 208, the Governor is charge with designating "a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area." 33 U.S.C.A. § 1288(a)(2). Furthermore, subsection 1288(a)(5) states that this planning agency may include "[e]xisting regional agencies." We understand that in South Carolina, our Governor appointed various COGs to serve as the planning agencies. Thus, these entities are charged with preparing an areawide plan in order to comply with this portion of the Act.

Although we did not opine as to the relationship between councils of government with respect to section 208 of the Act in our previous opinion to Senator Knotts, we believe that a COG's performance of this planning function as required by section 208 is consistent with the authority given to COGs. Section 1288(b) of title 33, under the Act, specifies that the planning agency is to develop a plan, which identifies the treatment facilities necessary to meet the area's needs, establishes a regulatory program, and develops various processes to identify and control particular waste water treatment concerns. Once the planning agency completes the plan, the Governor is required to certify it and the Administrator of the Environmental Protection Agency must approve it. 33 U.S.C.A. § 1288(b). According to section 1288(e): "No permit under section 1342 of this title shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section." Thus, it appears that facilities must comply with the plan to receive a permit. In addition to developing an areawide plan, section 1288(c) states that planning agencies are to advise the Governor, who is responsible for selecting facilities to provide service in the area. 33 U.S.C.A. § 1288(c).

As we explained in our recent opinion, article VII, section 15 and article VIII, section 13 of the South Carolina Constitution (1976) authorizes the Legislature to create regional councils of governments. Article VII, section 15 states:

> The General Assembly may authorize the governing body of a county or municipality, in combination with other counties and municipalities, to create, participate in, and provide financial support for organizations to study and make recommendations on matters affecting the public health, safety, general welfare, education, recreation, pollution control, utilities, planning, development and such other matters as the common interest of the participating governments may dictate. Such organizations, which shall be designated regional councils of government, may include political subdivisions of other states. The studies and recommendations by such organizations shall be made on behalf of and directed to the participating governments and other governmental instrumentalities which operate programs within the jurisdiction of the participating governments.

> The legislature may authorize participating governments to provide financial support for facilities and services required to implement recommendations of such organizations which are accepted and approved by the governing bodies of the participating political subdivisions. Such organizations shall not have the power to levy taxes. Local funds for the support of such organizations shall consist of contributions from the participating political subdivisions as may be authorized and granted by their respective governing bodies. The prohibitions against dual office holding contained in Section 2 of Article 2 and Section 24 of Article 3 of this Constitution shall not apply to any elected or appointed official or employee of government who serves as a member of a regional council.

Article VIII, section 13(A) of the South Carolina Constitution (Supp. 2007) provides, in pertinent part: "Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof."

In addition, the Legislature authorized the creation of regional councils of governments as provided in sections 6-7-110 et seq. of the South Carolina Code (2004). Section 6-7-140 of the South Carolina Code provides the powers and duties of regional councils. These powers include the power to:

> (1) Prepare studies and make recommendations on such matters as it deems appropriate;
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> (2) Coordinate and promote cooperative programs and action with and among its members and other governmental and nongovernmental entities, including those of other states;
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> (3) Study and make recommendations on matters affecting the public health, safety, general welfare, education, recreation, pollution control, utilities, planning, development and such other matters as the common interest of the participating governments may dictate;
>
> (4) Provide continuing technical assistance, and information to the member local governments and other agencies and individuals;
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> (5) In general, the regional council of government shall have the power to carry on such planning activities and the development of such studies and programs as it deems to be in the interest of the area;

> (6) Acquire and dispose of real and personal property necessary to the conduct of its business;
>
> (7) After coordination with the appropriate State, local and Federal agencies, the regional council of government may adopt such plans and programs as it may from time to time prepare. Such plans and programs as are adopted shall constitute the recommendations of the regional council of government.

S.C. Code Ann. § 6-7-140.

Based on the authority given to COGs under State law, we believe the Governor's appointment of a COG to create an areawide plan under section 208 of the Clean Water Act and advise him or her on the selection of facilities to implement the plan is consistent with its constitutional purpose "to study and make recommendations on matters affecting the public health, safety, general welfare, education, recreation, pollution control, utilities, planning, development and such other matters as the common interest of the participating governments . . . ." In addition, section 208 appears to particularly coincide with the authority given to COGs to "adopt such plans and programs as it may from time to time prepare" pursuant to section 6-7-140. Thus, we are of the opinion that COGs are authorized under State Law to preform the functions assigned to the planning agency under section 208 of the Clean Water Act.

The proposed legislation does not appear to limit a COG's responsibilities under section 208. Rather, it prohibits a COG from determining which entities may provide water and sewer service in the area represented by the COG. As we stated in our May 8, 2008 opinion:

> we did not find that a regional council of government has the authority to determine who may provide water and sewer service in the area represented by the council. Rather, it appears that a council of governments' authority is limited to studying issues pertaining to local governments and to working with local governments on plans to resolve such issues by making recommendations. Although the COG has the ability to make recommendations to the governments it serves concerning water and sewer service, we do not believe the COG has authority to determine who may provide water and sewer service in the area served by the COG. Moreover, we find no authority indicating that the COG has authority to issue or deny permits for sewer systems.

Op. S.C. Atty. Gen., May 8, 2008. Thus, while we believe a COG's authority pursuant to State law allows it to perform the functions of a planning agency as described in section 208 of the Act, we do not believe a COG has authority under State law to make determinations as to what entities

provide water and sewer service in a particular area.[1] Accordingly, it is our opinion that the proposed legislation is consistent with our previous conclusions.

Notwithstanding our previous opinion, you question whether this legislation runs afoul of the Act. While at first blush, the proposed legislation appears to take authority away from COGs, that may impact its role under section 208 of the Act, upon closer examination, we believe a COG may continue to fulfill its role as a planning agency under section 208. However, we must first note that nothing in section 208 of the Act requires that COGs in particular perform a certain function. As we cited above, section 1288(a)(2) requires the Governor of the State to designate a representative organization to develop the areawide plan. However, this provision does not require the Governor to designate COG's in particular. Thus, presumably, the Governor could appoint another body authorized under state law to perform this function. Nonetheless, from our understanding of a COG's role with respect to the implementation of section 208 of the Clean Water Act, as set forth more fully below, the COG is not responsible for making determinations as to which entities may provide water and sewer service in the area represented by the COG.

In our discussions with you along with a member of the Berkeley-Charleston-Dorchester Council of Governments and a representative from the Department of Health and Environmental Control ("DHEC"), we understand that while a COG may develop the areawide plan, it does not make decisions as to whether a particular facility receives a permit to operate a waste treatment facility. DHEC, as part of its permitting procedures, considers whether a proposed facility is consistent with the COG's plan. In addition, DHEC sometimes seeks the advice of the COG with respect to whether or not permitting a particular facility is consistent with the areawide plan. However, DHEC makes the final decision as to whether to issue a permit. Thus, we do not believe that a statute denying COGs the authority to determine which entities may provide water and sewer service is inconsistent with section 208.

In addition to your question as to the pending legislation's consistency with section 208 of the Act, you ask about whether this legislation may "hinder or slow the provision of federal funds to South Carolina and any of its subdivisions, including the COGs." While we did not find that section 6-7-145, as proposed, is inconsistent with section 208, certainly if it were or if the Legislature were to pass legislation inconsistent with section 208, the federal funds received by the State may be jeopardized. Section 1288(f) of title 33 permits the Administrator of the EPA to make grants to

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[1] We note that if section 208 of the Clean Water Act vested authority in a planning agency to make decisions as to whether or not a particular entity may receive a permit, the COG cannot exercise authority not provided to it under state law. See N. Colorado Water Conservancy Dist. and its Mun. Subdistrict v. Bd. of County Comm'r of the County of Grand, 482 F.Supp. 1115, 1118 (D.C. Colo. 1980) (finding the agencies appointed by the Governor to create the areawide plan "are not acting as federal entities or as agents of the Environmental Protection Agency. Any acts undertaken or powers exercised can only have been undertaken or exercised pursuant to state, not federal law. Petitioners owe their existence and whatever powers they possess to state law.").

the planning agencies for "payment of the reasonable costs of developing and operating a continuing areawide waste treatment management planning process . . . ." Section 1288, along with other provisions under title 33, appear to provide grants under certain circumstances to treatment facilities. Thus, if a state fails to comply with the requirements of section 208, it risks loss of grant funds. Accordingly, caution in this area is advised.

Conclusion

Based upon our analysis above, we are of the opinion that the proposed section 6-7-145 does not run afoul of section 208 of the Clean Water Act. Initially, we found no requirement that COGs in particular must perform the planning function currently assigned to them by the Governor. Thus, presumably this State could continue to comply with section 208 despite the removal of authority from COGs under state law. Furthermore, section 208 of the Act calls for planning agencies to develop areawide plans for waste treatment and management. While these planning agencies may advise the Governor, or in our case DHEC, as to whether a particular facility complies with the plan, we do not believe it requires planning agencies to issue permits. Thus, if our Legislature were to remove this authority from COGs, we do not believe it inhibits their role under section 208 as designated by the Governor. Thus, in our opinion, 6-7-145 does not remove authority necessary for a COG to serve in the role of a planning agency under section 208.

Moreover, while we do not believe section 6-7-145 makes it impossible for South Carolina to comply with section 208, if the Legislature passed legislation making it impossible to comply with section 208, this State would certainly suffer by losing significant funding from federal grants.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General