The State of South Carolina

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The Honorable Harry M. Hallman, Jr.
Member, House of Representatives
1275 Vagabond Lane
Mount Pleasant, South Carolina 29464

Dear Representative Hallman:

You have requested the opinion of this Office concerning recent developments in the State of South Carolina concerning this State's involvement with other states in disposing of hazardous waste generated in these states over the next twenty years. You have raised several questions about disposal of hazardous waste, each of which will be dealt with separately.

First, you have asked whether the South Carolina Department of Health and Environmental Control and the Budget and Control Board would have authority to enter into an interstate compact on a regional basis to address disposal of hazardous waste without the concurrence of the General Assembly. It is our understanding that the Governor of South Carolina, rather than the Department of Health and Environmental Control or the Budget and Control Board, has entered into such a compact as you have described. It appears that his doing so complies with federal law and thus does not require concurrence of the General Assembly.

The pertinent portion of federal law is 42 U.S.C. §9604 (c)(9), which provides:

> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which --

> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
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> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
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> (C) are acceptable to the President, and
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> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. §6921 et seq.]

Thus, federal law requires assurances from the State, by way of a contract or cooperative agreement, that certain conditions regarding disposal of hazardous wastes will be met. We believe that in executing the referenced document, the Governor is actually certifying that this State is signifying its compliance with federal law.

Article IV, Section 1 of the State Constitution provides that "[t]he supreme executive authority of this State shall be vested in" the Governor. One of the duties constitutionally assigned to the Governor is specified in Article IV, Section 15: "The Governor shall take care that the laws be faithfully executed." Thus, the Governor is taking care that federal law applicable to this State is being executed. In a similar instance, former Attorney General McLeod examined a proposed agreement between the governors of North and South Carolina, relating to water storage and use; in an opinion dated November 1, 1967, Attorney General McLeod advised that the proposed draft was "a mere statement of policy." The opinion continued:

> [The draft] basically provides that the respective states propose to plan and operate federally licensed water resources developments near the State boundary in such a way that the maximum beneficial use by each state may be realized.
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> . . . .
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> As presently worded, the compact would consist merely of a statement of policy... .

There again, the Governor was taking care that laws relative to federally licensed water resources developments were being executed. Similarly, the agreement under consideration in today's opinion is a statement of policy on behalf of the State of South Carolina.

Based on the foregoing, it is concluded that in this instance the Governor is exercising his constitutional mandate, as the supreme executive officer of the State, to take care that "the laws be faithfully executed." We note further that the State of South Carolina was required to take some action with respect to 42 U.S.C. §9604 (c)(9) by October 17, 1989 or face the loss of non-emergency federal remedial action funding after that date. Negotiations with other states have been underway for several years, and the agreement with three other states was reached at a time when our General Assembly was not in session. While we are of the opinion that confirmation of the agreement by the General Assembly is not legally required as stated above, the General Assembly is certainly not precluded from confirming or assenting to this statement of policy on behalf of the State of South Carolina or otherwise enacting implementing legislation. Thus, the document signed by the Governor on behalf of the State of South Carolina on the eve of the federally imposed deadline has signified our faithful execution of federal law. 1/

Your second and third questions relate to whether, assuming the GSX landfill will reach its permitted capacity in the year 2000, South Carolina may enter a compact to provide landfill capacity until 2010. You suggest that entering the compact would amount to the pre-emption, by either state officials or EPA, of the permitting process by authorizing the expansion of the GSX facility beyond currently-permitted levels.

In connection with these questions, legal counsel for DHEC has advised this Office that the GSX landfill may receive less than the full permitted capacity over the next 10 years, which would mean that space would be available beyond the year 2000. This is a factual matter which this Office cannot resolve in the context of an opinion request; moreover, it is uncertain whether anyone could say with assurance whether the GSX facility will be full or not by 2000. Nevertheless, the Regional Agreement will not pre-empt the regulatory powers of the State, because the Agreement expressly

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1/ Because the relevant federal legislation provides the authority for the Governor to act here, our opinion need not address the general authority of the Governor to contract on behalf of the State or to enter into compacts for the State.

provides that "[n]othing in this Agreement shall be construed to affect the rights and powers of any State to regulate any hazardous waste or hazardous waste facility within its borders." The Agreement also provides that it may be renegotiated every two years, and clearly the unavailability of capacity would be one basis for such a renegotiation.

Regarding your fourth question, we are not sufficiently familiar with EPA's role in the permit appeal to be able to say with certainty how that agency's approval of a compact would affect its role in the appeal. However, since the State retains the power to regulate hazardous waste facilities and to renegotiate the Agreement if capacity projections prove incorrect, South Carolina's signing the compact would not diminish South Carolina's sovereignty over its own environment.

Sincerely,

T. Travis Medlock
Attorney General

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