



ALAN WILSON  
ATTORNEY GENERAL

May 13, 2015

The Honorable Larry Grooms  
Senator, District No. 37  
203 Gressette Bldg.  
Columbia, SC 29201

The Honorable Kevin Bryant  
Senator, District No. 3  
402 Gressette Bldg.  
Columbia, SC 29201

The Honorable Shane Massey  
Senator, District No. 25  
606 Gressette Bldg.  
Columbia, SC 29201

The Honorable Tom Corbin  
Senator, District No. 5  
501 Gressette Bldg.  
Columbia, SC 29201

Dear Senators Grooms, Bryant, Massey and Corbin:

We are in receipt of your letter requesting an opinion from this Office concerning the regulation and licensure of commercial pesticide applicators utilizing the herbicide, glyphosate, a chemical commonly associated with the product Roundup. In your letter, you explain the Clemson University State Crop Pest Commission (“the Commission”) has created a new category of licensure termed, “Limited Herbicide Application.” Continuing, you add that the purpose of this new category of licensure is “to lower the regulatory threshold” for commercial applicators who exclusively dispense glyphosate. In light of this, you ask the following questions:

1. Is it possible for the Commission to exempt from regulation applicators who utilize glyphosate or another substance that is offered for non-restricted retail sale and is labeled with the signal word “caution”? and;
2. Would this exemption find South Carolina law in conflict with FIFRA and endanger the current relationship between the Commission and EPA?

Our responses follow.

**I. Introduction to Federal and State Regulatory Law Regarding Pesticides**

**A. The Federal Insecticide, Fungicide and Rodenticide Act**

As mentioned in your letter, the regulation of pesticides in South Carolina is governed both by the EPA pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) as well as the director of the Commission, pursuant to the terms of the South Carolina Pesticide Control Act (“SCPCA”). See Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 601 (1991) (explaining FIFRA, as amended in 1972, granted the EPA regulatory power over the use, sale and labeling of pesticides and transformed the act from “a labeling law into a comprehensive regulatory statute.”); 7 U.S.C. § 136w(a)(1) (authorizing the Administrator of the EPA to promulgate regulations concerning the use and classification of pesticides); 7 U.S.C. § 136i(a)(2) (permitting States to certify applicators of restricted use pesticides upon EPA approval of State certification plan); 40 C.F.R. § 171.7 (providing parameters for the EPA to consider when determining whether to approve State certification plan); 7 U.S.C. § 136u(a) (enabling States to enter into cooperative agreements with the EPA regarding enforcement and assistance in developing and administering State programs); 7 U.S.C. § 136v(a) (“A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.”); 7 U.S.C. § 136w-1(b) (detailing that States entering into cooperative agreements pursuant to Section 136u, or have approved plans pursuant to Section 136i, are vested with primary enforcement responsibility for pesticide use violations); see also S.C. Code Ann. § 46-9-10 (2013 Supp.) (establishing the Commission and stating it is responsible for the execution of Title 46, Chapter 13 of the SCPCA); S.C. Code Ann. § 46-13-30 (2013 Supp.) (delegating regulatory authority under the SCPCA to the director of the Commission); S.C. Code Ann. § 46-13-60 (2013 Supp.) (“The director may prescribe standards for the certification of applicators of pesticides.”); S.C. Code Ann. § 46-13-70 (2013 Supp.) (stating the director must classify licenses to be issued to certified applicators). As described by the Supreme Court of the United States, this federal/state regulatory relationship should be understood as leaving “ample room for States and localities to supplement federal efforts” within the general field of pesticide regulation and leaves substantial portions of the field vacant such that States, acting consistent with the terms of FIFRA, may fill in the regulatory blanks. Mortier, 501 U.S. at 613-14.

#### **B. The South Carolina Pesticide Control Act**

Filling in FIFRA’s regulatory blanks, South Carolina, consistent with the authority granted under 7 U.S.C. §§ 136i, 136u, 136v and 136w-1, enacted the SCPCA, a regulatory scheme governing the registration, enforcement, classification, collection, storage, sale, use, licensing, certification and handling of pesticides in South Carolina. S.C. Code Ann. § 46-13-10, *et seq.* (2013 Supp.); S.C. Code Ann. Regs. § 27-1070, *et seq.* (2011). Pursuant to the terms of Section 46-13-10, the SCPCA “must be administered by the . . . Commission,” with the regulatory authority resting with the Commission’s director as detailed in Section 46-13-30 of the Code. The director is empowered to set standards regarding the certification and licensure of those applying pesticides under Section 46-13-60 of the Code and, pursuant to Section 46-13-70, “shall classify licenses to be issued to certified applicators under this chapter.” The SCPCA defines “pesticide” to include “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest” as well as “any substance or mixture of substances

intended for use as a plant regulator, defoliant, or desiccant.” S.C. Code Ann. § 46-13-20(DD) (2013 Supp.). This definition includes herbicides such as glyphosate. See S.C. Code Ann. § 46-13-20(R) (2013 Supp.) (explaining the word “herbicide” includes any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed or shrub).

Under the SCPCA, pesticides or devices distributed within the State must be registered. See S.C. Code Ann. § 46-13-40 (A) (2013 Supp.) (“Every pesticide or device which is distributed within this State or delivered for transportation or transported in intrastate commerce or between points within this State through a point outside this State must be registered.”); S.C. Code Ann. Regs. § 27-1071(A) (2011) (“All pesticide products must be registered with the Department for the period in which the products are offered for sale or distribution within the State.”). The SCPCA further mandates that those engaged in the business of selling pesticides must be a licensed pesticide dealer.<sup>1</sup> See S.C. Code Ann. § 46-13-50 (A) (2013 Supp.) (“[N]o person shall act in the capacity of a pesticide dealer, or shall engage or offer to engage in the business of, advertise as, or assume to act as a pesticide dealer unless he is licensed annually as provided in this chapter.”); S.C. Code Ann. Regs. § 27-1081(A)(1) (2011) (“The distribution of pesticides which have been classified for restricted use must be made only to . . . licensed pesticide dealers.”). Additionally, “[n]o person (including officials or employees of federal, state, or local government) may use or supervise the use of a restricted use pesticide without a private, commercial, or noncommercial applicator license issued by the director.” S.C. Code Ann. § 46-13-60(3)(a); see also S.C. Code Ann. Regs. § 27-1081(A)(2) (2011) (“The distribution of pesticides which have been classified for restricted use must be made only to . . . [I]icensed certified applicators.”). That said, SCPCA exempts veterinarians applying pesticides to animals during the normal course of business as well as medical personnel applying pesticides to humans during the normal course of business from Section 46-13-60’s pesticide licensure requirements. See S.C. Code Ann. § 46-13-140(A) (2013 Supp.) (stating § 46-13-60’s licensure requirements do not apply to a doctor of veterinary medicine applying pesticides to animals during the normal course of veterinary practice); S.C. Code Ann. § 46-13-140(B) (explaining § 46-13-60’s licensure requirement does not apply to medical personnel applying pesticides to humans during the normal course of medical practice); see also S.C. Code Ann. Regs. 27-1080(A-B) (2011) (same). In other words, with the exception of veterinarians and medical personnel applying pesticides to their respective patients within the scope of their normal course of business, the SCPCA requires individuals applying and supervising the application of restricted use pesticides<sup>2</sup> to have either a private, commercial, or non-commercial license. The licensure requirements for each of these categories, as well as the requirements for a pesticide dealer, are delineated within

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<sup>1</sup> However, the phrase “pesticide dealer” does not include individuals “whose sales of pesticides are limited to pesticides which are not restricted use pesticides,” nor does it include “practicing veterinarians and physicians who prescribe, dispense, or use pesticides in the performance of their professional services.” S.C. Code Ann. § 46-13-20(EE)(1-2) (2013 Supp.).

<sup>2</sup> A “Restricted use pesticide” is defined as “any pesticide or pesticide use classified for restricted use by the administrator [of the EPA] or the director [of the Commission].” S.C. Code Ann. § 46-13-20(MM) (2013 Supp.). In contrast, “general-use pesticides are relatively safe to both the environment and humans and may be purchased and applied by anyone.” Clemson Univ. Co-op. Ext. “Pesticide Related Laws and Regulations,” found at [http://www.clemson.edu/extension/pest\\_ed/safety\\_ed\\_prog/laws\\_regs.html](http://www.clemson.edu/extension/pest_ed/safety_ed_prog/laws_regs.html) (last visited December 15, 2014).

both the SCPCA and the accompanying regulations promulgated by the Commission. See S.C. Code Ann. § 46-13-60 (“The director may prescribe standards for the certification of applicators of pesticides. The standards must conform with the standards for certification as specified by [FIFRA].”); S.C. Code Ann. Regs. § 27-1076 (2011) (providing licensing requirements for pesticide dealers); S.C. Code Ann. Regs. § 27-1077 (2011) (providing licensing requirements for private applicators); S.C. Code Ann. Regs. § 27-1078 (2014 Supp.) (providing licensing requirements for commercial applicators); S.C. Code Ann. Regs. § 27-1079 (2011) (providing licensing requirements for non-commercial applicators).

## II. Law/Analysis

Understanding the regulatory background regarding your request, we now return to your questions—first, whether the Commission may “exempt” from regulation commercial applicators of glyphosate or another substance that is offered for non-restricted retail sale—and second, whether such an exemption would endanger the current regulatory relationship between the Commission and the EPA. Because we understand both of these questions are purely hypothetical since the Commission has now promulgated a regulation<sup>3</sup> which in fact regulates commercial applicators exclusively utilizing glyphosate by creating the “Limited Herbicide” licensure classification for such applicators, we decline to issue an opinion on these questions.<sup>4</sup>

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<sup>3</sup> See S.C. Code Ann. Regs. § 27-1078(P)(1) (2014 Supp.) (“Treatment of turf and ornamental plantings with a (sic) herbicide containing glyphosate as the sole active ingredient with ‘Caution’ as the signal word, when performed as part of terrestrial landscape weed control for compensation on the property of another, requires only a Category 12E Limited Herbicide Application license provided that applications are performed using portable backpack and hand-held compressed-air sprayers, each of which is of no more than 5 gallons total capacity per applicator per site.”).

<sup>4</sup> See Op. S.C. Att’y Gen., 2014 WL 6387161 (November 4, 2014) (“[T]his Office, as a matter of policy cannot answer hypothetical questions.”); Op. S.C. Att’y Gen., 2014 WL 5796033 (October 27, 2014) (“[W]e cannot address questions that involve . . . hypothetical matters.”); Op. S.C. Att’y Gen., 2014 WL 2884612 (June 10, 2014) (“[T]his Office, as a matter of policy, does not answer hypothetical questions.”); Op. S.C. Att’y Gen., 2013 WL 3362068 (June 25, 2013) (explaining questions involving hypothetical matters will not be addressed by an Attorney General’s opinion); Op. S.C. Att’y Gen., 2013 WL 3362070 (June 19, 2013) (“[T]his Office only issues legal opinions so we will refrain from commenting on . . . hypotheticals.”); Op. S.C. Att’y Gen., 2013 WL 2121457 (May 6, 2013) (declining to address an issue regarding potential liability of an entity created by a public/private partnership as the question of liability is premised upon individual facts and circumstances which were not presented); Op. S.C. Att’y Gen., 1998 WL 196485 (March 23, 1998) (“[P]ursuant to Office policy, we will not answer hypothetical questions in a legal opinion.”); Op. S.C. Att’y Gen., 1992 WL 575652 (August 18, 1992) (explaining it would be imprudent to answer hypothetical questions concerning matters that have yet to occur and it would be better to address such questions if and when they actually arise); Op. S.C. Att’y Gen., 1992 WL 682823 (July 9, 1992) (finding a broad and hypothetical question regarding the legality of various internal American Legion procedures cannot be addressed in an Attorney General’s opinion); Op. S.C. Att’y Gen., 1990 WL 599032 (June 4, 1990) (stating that the determination of whether a newly-passed law is constitutional as applied is a hypothetical issue dependent upon the facts and is outside of the scope of an Attorney General’s opinion); Op. S.C. Att’y Gen., 1988 WL 383516 (April 11, 1988) (concluding the constitutionality and administration of a proposed statute is a hypothetical question since the proposed legislation “has not yet been adopted by the Legislature.”); Op. S.C. Att’y Gen., 1975 WL 29304 (December 3, 1975) (noting agencies such as this Office do not issue opinions on “hypothetical facts.”); Op. S.C. Att’y Gen., 1967 WL 12047 (August 15, 1967) (explaining this Office would be “ill-advised” to give opinions on hypothetical questions); Op. S.C. Att’y Gen., 1959 WL 10353 (June 16, 1959) (advising that we cannot address a legal question “with any degree of accuracy” unless we are apprised of actual facts rather than hypothetical ones).

With that said, we note generally that while the Commission, acting through the director, certainly has authority to pass regulations concerning both licensing and licensing classifications of applicators,<sup>5</sup> and therefore Regulation 27-1078's limited herbicide licensing requirement looks to be valid, it appears *neither FIFRA nor the statutes making up the SCPCA* require commercial applicators applying a general-use pesticide, such as glyphosate, to have a license.<sup>6</sup>

Specifically, a review of FIFRA shows there is *no federal requirement* that a commercial applicator exclusively utilizing a general-use pesticide have a license to do so. This is so because EPA approval of a State certification plan delegates the subject matter of licensure and certification of commercial applicators to the State provided it complies with the other provisions of FIFRA. See 7 U.S.C. § 136i(a)(2) (permitting States to certify applicators of restricted use pesticides upon EPA approval of State certification plan); 7 U.S.C. § 136v(a) ("A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."). Thus, because South Carolina's previous regulatory scheme (i.e. prior to the passage of Regulation 27-1078(P)(1), *et al.*) and certification plan was approved by the EPA and did not require commercial applicators exclusively utilizing general-use pesticides to have a license to do so, it cannot be said that FIFRA requires a commercial applicator exclusively utilizing a general-use pesticide such a glyphosate to have a license. Indeed, if it did, South Carolina's previous regulatory scheme would have been at odds with 7 U.S.C. § 136v(a).

Similarly, *South Carolina statutory law* does not require a commercial applicator exclusively utilizing a general-use pesticide such a glyphosate to have a license to do so. For instance, it is clear Section 46-13-60(3)(a)'s licensure requirement only applies to individuals using or supervising the use of "a restricted use pesticide." Further, while Section 46-13-140, titled "[e]xemptions from licensing requirements" only reflects two licensing exemptions exist with respect to Section 46-13-60's licensure requirement—veterinarians and doctors acting in the normal course of business—these so-called exemptions only relate to the licensure requirement itself, a requirement that is limited to those dispensing "restricted use pesticides" as explained in Section 46-13-60.

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<sup>5</sup> See S.C. Code Ann. § 46-13-60 ("The director may prescribe standards for the certification of applicators of pesticides."); S.C. Code Ann. § 46-13-70 (stating the director must classify licenses to be issued to certified applicators).

<sup>6</sup> It is our understanding that, as noted in your letter, glyphosate is a general-use pesticide. Specifically, glyphosate does not appear on the Department of Pesticide Regulation's Restricted Use Products list. See Clemson Cooperative Extension, Restricted Use Pesticides List, available at [http://www.clemson.edu/extension/pest\\_ed/safety\\_ed\\_prog/rup.html](http://www.clemson.edu/extension/pest_ed/safety_ed_prog/rup.html) (last visited December 15, 2014). Further, it appears the EPA approved glyphosate for general use in 1974 and re-registered it in September 1993. Henderson, A.M.; Gervais, J.A.; Luukinen, B.; Buhl, K.; Stone D. 2010, *Glyphosate Technical Fact Sheet*; Nat'l Pesticide Info. Ctr., Oregon State Univ. Ext. Svcs., n.6 (September 2010); Reregistration Eligibility Decision (RED): Glyphosate; EPA-738-R-93-014; U.S. EPA, Ofc. Of Prevention, Pesticides, and Toxic Substances, Ofc. Of Pesticide Programs, U.S. Gov't Printing Ofc.: Washington, D.C. 1993; see also Report to Congress Re: Chemicals Used for the Aerial Eradication of Illicit Coca in Columbia and Conditions of Application, available at <http://www.state.gov/j/inl/rls/rpt/aeicc/13234.htm>, (last visited December 15, 2014); 34 No. 23 Westlaw Journal Environmental 7, "U.S. Court Partially Revives Ecuador Drug Crop Spraying Case" (June 11, 2014).

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As a result, only South Carolina regulatory law, Regulation 27-1078(P) in particular, requires commercial applicators exclusively dispensing general-use glyphosate to, at a minimum, obtain a "Limited Herbicide" license. However, because the Commission, acting through the director, has authority to pass regulations concerning both licensing and licensing classifications of applicators pursuant to Section 46-13-60 and 46-13-70 of the Code, we believe that, despite the fact neither FIFRA nor SCPCA require commercial applicators of general-use pesticides such as glyphosate to have a license, the Commission did not violate the law by passing such a regulation.

### III. Conclusion

In conclusion, it is the opinion of this Office that, as a result of the passage of Regulation 27-1078, your questions related to whether the Commission may "exempt" commercial applicators exclusively utilizing general-use pesticides from regulation are now hypothetical. Thus, as a matter of policy, we must decline to address such questions consistent with the prior opinions cited in footnote four above. That said, the Commission was clearly acting within the scope of its' statutory authority to pass regulations concerning both licensing and licensing classification when it promulgated its amendments to Regulation 27-1078(P)(1), *et seq.* Therefore, while neither FIFRA nor the statutes contained within SCPCA previously required commercial applicators exclusively applying a general-use pesticide such as glyphosate to have a license in order to do so, the promulgation of such a regulation does not appear to be in violation of the law.

Sincerely,



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REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General