

## **MEMORANDUM**

**TO:** **FILE**

**FROM:** **JAMES H. McLEMORE (CAPELL & HOWARD, P.C.)**

**DATE:** **SEPTEMBER 30, 2009**

**RE:** **PROPOSED ADMINISTRATIVE REGULATIONS,  
ALABAMA FORESTRY COMMISSION  
20266-006**

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At the request of Chris Isaacson, I reviewed the several proposed administrative regulations of the Alabama Forestry Commission. Below are concerns and observations of some proposed rules which I have relayed to Chris Isaacson.

First, several of the regulations imposed criminal sanctions for certain conduct. As discussed below, some of the proposed regulations appear to be clearly beyond the statutory authority conferred upon the Commission.

As a general rule, the Legislature may delegate to state agencies the authority to make rules and regulations as are necessary for the administration of its general statutes. However, the Legislature cannot delegate its authority to make law. In other words, the regulations which a state agency promulgates must be within the scope of authority conferred upon it by the Legislature. It is well recognized that “an agency cannot be vested with the power to create a criminal offense.” Timmons v. City of Montgomery, 641 So.2d 1263 (Ala.Crim.App 1993). (“The designation of conduct as a criminal offense can only be done by the Legislature.”) In the Timmons case, the Court of Criminal Appeals struck down an administrative regulation of the Department of Public Safety which criminalized a certain level of car window tinting, beyond that which had been prescribed by the Legislature.

Of course, in some instances administrative regulations imposing criminal sanctions for certain conduct have been upheld as consistent with the agencies’ statutory authority. For example, in RSV v. State, 632 So.2d 24 (Ala.Crim.App, 1993), the Court upheld a regulation imposing criminal sanctions for the failure to wear hunter orange while hunting. Its worth noting that several statutes associated with the Department of Conservation are criminal in nature so the agency’s promulgation of a criminal regulation was not far afield of the Legislature’s statutes. Also, while there is no bright line test as to what a statute must provide in order to confer criminal rule-making authority, helpful guidance appears from the Supreme Court of Alabama in Tolbert v. State, 321 So.2d 227 (Ala. 1975), “[t]he civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole.” Obviously, the use of hunter orange is designed for the protection of society, and therefore is appropriate for the criminal process. Matters involving private contracts, however, without direct legislative authority, are not appropriate for administrative criminal sanction.

In this regard, the powers of the Commission conferred by the Legislature are “to protect, conserve and increase the timber and forest resources of this State and to administer all laws relating to timber and forestry and the protection, conservation and increase of such resources.” Alabama Code § 9-3-4 (1975). While the rule-making authority of Alabama Code § 9-3-9 says that the Commission may enact rules for “all phases of forestry,” the above case law makes clear that such authority is not boundless, and must be restricted within the context of § 9-3-4.

#### **Admin. Code No. 390-X-10-.01 Failure to Remit Payment to Owner After Purchase of Forest Products**

This rule appears to run afoul of the general prohibition against administrative agencies to create criminal offenses. Nothing in the Alabama Forestry Act lends support to the notion that the Legislature authorized the Commission to create a criminal offense involving the non-payment by a logger to a landowner. Also, generally, criminal laws to compel the payment of civil debts are unconstitutional. Such laws have been permitted only in the limited context of the issuance of bad checks. Tolbert v. State, 321 So.2d 227 (Ala. 1975). Even then, such laws cannot be used to collect a debt. A criminal penalty for the non-payment of an outstanding bill incurred in a private commercial context is unconstitutional. In any event, a number of fraudulent practices in commerce is already covered by the Alabama Criminal Code, Alabama Code § 13A-9-1, et seq.

#### **Admin. Code No. 390-X-9-.01 Timber Trespass**

This rule proposes a criminal violation for trespass which generally is defined as crossing a visibly marked boundary line while timber harvesting is underway, and without the permission of the landowner. I observe multiple problems with this rule. Again, this criminal provision appears beyond the Commission’s statutory authority. The Legislature has specific laws on criminal trespass, and to the extent this rule conflicts with the existing laws and the cases interpreting them, this rule would be unconstitutional. See Alabama Code § 13A-7-1 through 4. On its face, I note that the proposed rule conflicts with established laws for trespass. Under existing law, a criminal trespass occurs only if someone goes onto the property of another, not only without permission, but also with notice from the landowner that their entry onto the property is prohibited. Contrary to the proposed rule, existing law requires more than simply the absence of a permission slip from the landowner, but also evidence of actual notice that the trespasser had been warned not to cross onto the landowner’s property. I could make several other objections to the rule if you need to hear me out on those.

#### **Admin. Code No. 390-X-11-.01 Maintenance of Timber Harvesting Records**

The regulation imposes a criminal penalty. In this context, a misdemeanor is imposed for the failure to keep a loader’s log as provided in the rule. Again, I think the imposition of a criminal sanction is beyond the authority conferred by the Alabama Legislature in the Alabama Forestry Act. In addition, if the requirements are overbroad and unduly burdensome, or essentially the requirements are not reasonably related to the statutory purpose, it could be unconstitutional. That’s an assessment that is probably better made by a forester.

### **Admin. Code No. 390-X-8-01 Inspection of Forestry Records**

This proposed rule imposes a criminal sanction for the failure to permit a representative of the Commission to inspect any Forestry records. Certainly, a right of the Commission to inspect relevant Forestry records is within the scope of the Alabama Forestry Act. However, there is nothing in the Act that indicates the Legislature provided authority to the Commission to enforce any such right with the threat of prosecution for criminal misconduct. Also, this area is subsumed by the Alabama Criminal Code under Alabama Code § 13A-10-1, which addresses “Obstruction of Public Administration.” Specifically, § 13A-10-3 makes it a crime to refuse to permit inspection of property by a public servant who is legally authorized to inspect a property. The proposed regulation, in addition to being unauthorized, conflicts with the provisions of the existing Criminal Code.

### **Admin. Code No. 390-X-12-01 Providing False Information to the Alabama Forestry Commission**

This rule makes it a crime for anyone to provide unlawful information to the Commission or authorized representatives, to acquire a burn permit, or in connection with a timber transaction. As above, this proposed rule is subject to scrutiny under the general prohibition against agencies making criminal laws. I also note that the existing Criminal Code makes it a crime to obstruct by unlawful means government operations. Arguably, the proposed rule is already covered by the Criminal Code and is inconsistent with the Code. I know I am repeating myself, but I simply caution that the promulgation of administrative regulations to enforce those provisions by the threat of criminal sanction is generally inappropriate unless specifically directed by the Legislature. Also, remember that by criminalizing conduct, the Commission defers the enforcement of the Forestry regulation in question to the District Attorney to his exclusive discretion. Needless to say, he or she has other things more pressing, at least in the public’s eye. I question whether the Commission really wants to relinquish control of enforcing the Forestry Act in these instances.