

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 00-122

Authority of Water Quality Control Board to Promulgate Rules Affecting Aquatic Resource Alteration Permits

QUESTION

Does the Tennessee Water Quality Control Board have the authority to promulgate rules that require permit applicants to evaluate practicable alternatives and conduct an avoidance, minimization and/or mitigation analysis for activities that will impact waters of the State?

OPINION

Yes. It is the opinion of this Office that, under the terms of the Water Quality Control Act, the Board has broad rulemaking authority such that it may adopt regulations necessary to advance the legislative policy of preserving and protecting the waters of the State from conditions of pollution, including rules of the sort described in the question.

ANALYSIS

The Water Quality Control Act of 1977, set out at Tenn. Code Ann. §§ 69-3-101 to 69-3-132, creates a state Water Quality Control Board and provides that board with a broad range of duties and powers affecting “standards of quality for all waters of the state.” Tenn. Code Ann. § 69-3-105(a). Among other things, the Act authorizes the Board to establish standards of water quality, to adopt a state water quality plan that incorporates standards of quality and purity for the various classes of waters and to promulgate rules,

... which the board *deems necessary for the proper administration of this part*, the prevention, control and abatement of pollution, or the modification of classifications and the upgrading of the standards of quality in accordance with subsection (a).

Tenn. Code Ann. § 69-3-105(b) (emphasis supplied).

According to the facts presented in the request, the Board is considering the promulgation

of new rules that would affect aquatic resource alteration permits (ARAPs) issued by the Commissioner of the Tennessee Department of Environment and Conservation (TDEC). The proposed rules, which have undergone several revisions and public comment, contain provisions that would require applicants for individual ARAPs to evaluate practicable alternatives and conduct an avoidance, minimization and/or mitigation analysis for activities that will impact waters of the State. It is our understanding that during the public comment process interested parties have questioned the Board's authority under the Act to adopt rules containing such requirements.

This Office is aware of only one Tennessee case addressing the Board's jurisdiction over ARAPs. In an unreported decision, the Tennessee Court of Appeals for the Middle Section held that the Water Quality Control Board had the authority to approve the Commissioner's issuance of an ARAP for the relocation of a stream. *Sierra Club and Tennessee Scenic Rivers Association v. Tennessee Dept. of Health & Environment and CBL of Nashville, Inc.*, No. 01-A-01-9203-CH-00131 (Tenn. Ct. App. Oct. 16, 1992). While the court noted that the Water Quality Control Act did not expressly address ARAPs or stream relocation, it found that the law did make ample provisions for protecting state waters from pollution. *Id.*, slip op. at 2-3. It then concluded that an ARAP was justified, stating “. . . CBL did not need a permit to relocate the stream; it was required to obtain a permit because the stream relocation might pollute the waters of the state.” *Id.*, slip op. at 4.

We believe the Court of Appeal's initial statement that a permit is not per se required to relocate a stream is only dicta, because the legislature has expressly required a permit for any activity that will alter “the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state.” Tenn. Code Ann. 69-3-108(b)(1). Waters of the State are defined at Tenn. Code Ann. § 69-3-103(33) to include “any and all water . . . , on or beneath the surface of the ground, which are contained within, flow through, or border upon Tennessee” The relocation of a stream entails, at the very least, an alteration of the *physical* properties of a body of water. But the core issue in *CBL of Nashville* was the Board's authority to permit a stream location through the use of an ARAP. We do not believe the opinion stands for anything beyond that.

We understand that, in the past, TDEC's Division of Water Pollution Control has employed a mitigation or “no net loss” policy in considering proposed activities that will impact the waters of the state. Under this policy, the Division has weighed the loss to the water resource against the mitigation proposed by the applicant and authorized a permit for relocation or removal of a stream where the proposal will result in no net harm to the waters of the state. Thus, if there is appropriate and sufficient mitigation to offset the proposed loss, issuance of a permit is not deemed to result in a condition of pollution that would be prohibited under the Act.

The most current version of the Board's proposed rules would amplify this mitigation policy by requiring applicants for individual ARAPs to evaluate practicable alternatives that would avoid or minimize impacts to state waters if the proposed mitigation is not reasonably calculated to result in no net loss of water resource values. We believe such a requirement is within the Board's broad

delegation of rulemaking authority under the Act, as reflected in Tenn. Code Ann. § 69-3-105(b). This conclusion is based on the following considerations.

The Water Quality Control Act is remedial legislation and, as such, it expressly provides in pertinent part:

- (b) All sections in this part shall be liberally construed for the accomplishment of its policy and purpose.
- (c) All grants of power to the board or commissioner shall be liberally construed.
- (d) Any list in this part preceded by “include” or “including” shall not be construed as exhaustive or otherwise limiting unless specifically stated.

Tenn. Code Ann. § 69-3-120. The Act contains a declaration of policy and purpose in Tenn. Code Ann. § 69-3-102, which provides that the waters of Tennessee are the property of the State and are held in public trust. This provision goes on to state that among the Act’s objectives is the abatement and prevention of pollution and the planning “for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.” Tenn. Code Ann. § 69-3-102(b).

These statutory pronouncements, combined with the delegation of authority in § 69-3-105(b) permitting the Board to adopt rules that it “deems necessary for the proper administration of this part,” weigh in favor of a broad construction of the Board’s rulemaking powers. The Tennessee Supreme Court has held that administrative agencies may be afforded the discretion to implement legislative policy, but not determine that policy. *Bean v. McWhorter*, 953 S.W.2d 197, 199 (1997). In *Bean*, the court had to consider whether a delegation of rulemaking authority to an administrative body contained sufficient standards to prevent the agency from acting arbitrarily. The court concluded:

Detailed or specific legislation may be neither required nor feasible when the subject matter requires an agency’s expertise and flexibility to deal with complex and changing conditions. . . . The requirement of expressed standards may also be relaxed when the discretion to be exercised relates to or regulates for the protection of the public’s health, safety, and welfare.

Id.; compare *Tasco Developing and Building Corp. v. Long*, 212 Tenn. 96, 368 S.W.2d 65 (1963) (upholding broad delegation of power to board to grant contractor licenses “as it shall deem best”).

It is the opinion of this Office that the Water Quality Control Board has the authority to adopt rules that require applicants for individual ARAPs to evaluate practicable alternatives and conduct

an avoidance, minimization and/or mitigation analysis for activities that will impact waters of the State. Such requirements are in keeping with the public trust doctrine and the legislative policy of preserving and protecting the waters of the State from conditions of pollution.

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