S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

April 2, 2001

Opinion No. 01-052

Effect of Scenic River Area Classification on Permitting of Proposed Dam Outside Designated Segment of Scenic River

QUESTIONS

1. Are there any provisions in the Tennessee Scenic Rivers Act that would prohibit the permitting of a proposed dam in an area outside of a designated segment of a Class I Natural River?

2. What effect would Senate Bill 1651, which would classify a segment of the Caney Fork River as a Class I Natural River under Tenn. Code Ann. § 11-13-104, have on the state permitting process for a proposed dam outside of that designated stream segment?

3. Are there any state agencies, other than the Tennessee Department of Environment and Conservation, that have the authority to consider and/or comment upon a state scenic river designation in the evaluation and permitting process for a proposed dam site on a separate portion of the same river?

4. What effect, if any, would Senate Bill 1651 have on any state or federal agency's analysis of the proposed dam project under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*., and that agency's implementing regulations or policies?

OPINIONS

1. No. There are no provisions under the Scenic Rivers Act that would expressly prohibit the permitting of a dam outside the designated segment of a Class I Natural River. Only those proposals for an impoundment that would lie *within* a designated Class I or Class II scenic river area would contravene the purposes and provisions of the Act.

2. It is the opinion of this Office that neither the Water Quality Control Act nor its implementing regulations obligate TDEC to consider the proximity of a designated scenic river segment in its permit review process for a dam and water supply reservoir on a separate portion of the same river. But the Department has the discretion to consider such a designation in its application of the water quality standards and criteria necessary to such a permit review.

3. Yes. The Tennessee Wildlife Resources Agency has broad administrative authority under the Scenic Rivers Act and it is authorized by its own enabling statutes to further the public interest in the protection and preservation of wildlife and its habitat. It is therefore the opinion of this Office that TWRA has the authority to evaluate and comment upon the proposed dam project in the permitting process, if it believes that any wildlife or habitat may be affected thereby either on the designated scenic river segment or elsewhere.

4. Given the limited facts presented in the request, we do not believe that the proposed dam project would constitute a "major Federal action" subject to NEPA requirements.

ANALYSIS

A. Scope of the Request

You have requested an analysis of the potential impact of Senate Bill 1651, which would classify a segment of the Caney Fork River as a Class I Natural River under the Tennessee Scenic Rivers Act, on a proposal to construct a dam and water supply reservoir on the Caney Fork River or one of its tributaries. In framing your request you have posited the following three hypothetical scenarios for the location of the proposed impoundment:

1. The dam and reservoir to be located downstream and outside of the designated segment of the Caney Fork, either on the river itself or on a tributary, whose confluence with the river is downstream of the designated reach of the river; or

2. The dam and reservoir to be located on a tributary to the Caney Fork and outside any designated scenic area boundary, while the tributary's confluence with the river is within the designated scenic area; or

3. The dam and reservoir to be located upstream and outside of the designated segment of the Caney Fork, either on the river itself or on a tributary, whose confluence with the river is upstream of the designated reach of the river.

B. Analysis of the Issues

1. Prohibitions Under the Scenic Rivers Act

The Tennessee Scenic Rivers Act, set out at Tenn. Code Ann. §§ 11-13-101 to 11-13-117 (the Act), includes among its stated objectives the preservation of selected rivers "in their free- flowing natural

or scenic condition" and the protection of their water quality and adjoining land.

Tenn. Code Ann. § 11-13-101(b). The Act seeks to accomplish these objectives by designating specific rivers and river segments for inclusion in the scenic river system and classifying them in one of three categories: Class I Natural River Areas; Class II Pastoral River Areas; and Class III Developed River Areas. Tenn. Code Ann. § 11-13-103. The Act further provides detailed criteria for each of these classifications and specifically characterizes both Class I and Class II river areas as "free-flowing rivers or sections of rivers", while Class III river areas are defined as including "rivers with some impoundments." *Id*.

Senate Bill 1651 proposes to add a segment of the Caney Fork River that is contained within the Bridgestone/Firestone Centennial Wilderness Area to the category of Class I Natural River Areas under Tenn. Code Ann. § 11-13-104. According to the request, there is currently pending a permit proposal for a dam and water supply reservoir on the Caney Fork River well upstream of the designated segment. You have inquired whether the addition of this designated river segment to the scenic river system would prohibit the permitting of the dam under any of the three factual scenarios raised above.

Our review of the Scenic Rivers Act indicates that the proposed classification of a portion of the Caney Fork would not prohibit a stream impoundment under any of the three scenarios suggested. The Act contains the following mandate at Tenn. Code Ann. § 11-13-107(b):

> (b) No scenic river area shall be managed in a manner that would:
> (1) Result in the area falling into a lower class; or
> (2) Be detrimental to the highest water quality classification standards determined by federal and/or state agencies.

The major criteria for a Class I river area are that it include "free-flowing rivers or sections of rivers with . . . vistas . . . essentially unchanged, by man, . . . " and that its waters "be kept unpolluted." Tenn. Code Ann. § 11-13-103(1). The Act defines "free-flowing" as "existing or flowing in natural condition without *impoundment*, diversion, . . .or other modification of the waterway." Tenn. Code Ann. § 11-13-102(2) (emphasis supplied). We have previously opined that impounded river segments that include lakes and dams may not be designated as Class I or Class II scenic river areas under the Act. *See* Op. Tenn. Atty. Gen. 99-066 (March 16, 1999). But the three hypotheticals posed in the request all involve the location of a dam outside of the designated stream segment of a potential scenic river area. Moreover, there is nothing to indicate at this point that such a project under any of the suggested scenarios would cause a condition of pollution affecting this designated stream segment. Therefore, we see no statutory bar under the Scenic Rivers Act to the proposed impoundment.

2. Effect of Scenic River Designation on State Permitting Process

A more far-reaching, but less determinative, analysis applies to the second issue posed by this

request. Any proposal to impound a stream for a water supply system must be permitted under the Water Quality Control Act of 1977, set out at Tenn. Code Ann. §§ 69-3-101 to 69-3-132. These permits are issued by the Tennessee Department of Environment and Conservation (TDEC) through its Division of Water Pollution Control. Tenn. Code Ann. § 69-3-108. The Department is guided in its permit review by the standards and criteria set out in the Water Quality Control Act, the regulations thereunder, and its own policies, all of which require an analysis of the potential impacts to water quality, flow, and existing water uses. But the primary consideration informing the Department's assessment of such a proposal is the prevention of pollution. This Act provides that "[u]nder no circumstances shall the commissioner issue a permit for an activity which would cause a condition of pollution either by itself or in combination with others." Tenn. Code Ann. § 69-3-108(e).

In 2000, the Water Quality Control Board promulgated new rules that affect aquatic resource alteration permits, or ARAPs, which are required for any activity, including construction activities, that may result in the alteration of the "physical, chemical, radiological, biological, or bacteriological properties of any waters of the State." Tenn. Comp. R. & Reg., ch. 1200-4-7-.01(3). The proposed dam on the Caney Fork River is subject to this ARAP requirement, and, presumably, federal permitting requirements under the federal Clean Water Act, 33 U.S.C. §§ 1341 and 1344.

The State's ARAP rules do not expressly address the issue of existing scenic river area classifications, nor do the Board's regulations governing general water quality criteria, beginning at Tenn. Comp. R. & Reg., ch. 1200-4-3-.01. But these latter rules recognize that all waters of the State have many uses "which in the public interest are reasonable and necessary." Tenn. Comp. R. & Reg., ch. 1200-4-3-.02(2). They also reflect that the "relative importance assigned to each use will differ for different waters and sections of waters." Tenn. Comp. R. & Reg., ch. 1200-4-3-.02(3).

The Caney Fork River has been classified under the Board's Use Classifications for Surface Waters, found at Tenn. Comp. R. & Reg., ch. 1200-4-4-.13, for virtually all regulated uses, including domestic water supply, industrial water supply, fish and aquatic life, recreation, irrigation, livestock watering and wildlife, and, in certain areas, navigation and/or trout fishing. It is unclear from the request which tributaries to the Caney Fork might be considered in the three hypothetical scenarios raised, but it is assumed that any tributary in the Upper Cumberland River Basin would also have multiple uses, and at least be classified for fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. *See* Tenn. Comp. R. & Reg., ch. 1200-4-4-.13 at page 33.

In light of the foregoing, this Office believes that there are a number of criteria and variables that TDEC may or may not consider in the permitting of the proposed dam under each of the three scenarios posed. But we can find no express provisions under either the Water Quality Control Act or its implementing regulations that would obligate TDEC to take into account the proximity of a designated scenic river segment in its permit review process. We do note that under the ARAP rules any applicant who desires to conduct construction activity that will impact the waters of the State must evaluate practicable alternatives and conduct an avoidance, minimization and/or mitigation

analysis for such activities. Tenn. Comp. R. & Reg., ch. 1200-4-7-.01(1) and 1200-4-7-.04(5). But this requirement would appear to apply to the proposed impoundment regardless of its location in relation to a potential scenic river segment. 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. Tenn. Code Ann. § 69-3-102.

In conclusion, this Office cannot predict what, if any, effect the passage of Senate Bill 1651 would have on the permit review process for the proposed dam. We can only opine that the relevant statutes and rules do not expressly require that the Department consider such a designation during the permitting process.

3. Involvement of Other State Agencies in Permit Evaluation Process

You have also inquired whether there is the potential for any state agencies other than TDEC either to evaluate the proposed dam project in light of any scenic river designation on the Caney Fork, or to have an impact on TDEC's permit review process for the dam. We believe that there is such a potential, but, again, we cannot predict the outcome on the state permit review process.

The Scenic Rivers Act provides that the scenic rivers system is to be administered by TDEC in cooperation with the Tennessee Wildlife Resources Agency (TWRA), and according to the policies and criteria under the Act. Tenn. Code Ann. § 11-13-106(a). The Act further imposes a duty on *all* state agencies to inform the Commissioner of TDEC of any proceedings, studies, or activities within their jurisdictions that could affect any rivers designated under Tenn. Code Ann. § 11-13-104. *See* Tenn. Code Ann. § 11-13-113(a).

TWRA has a statutory obligation to further the public interest in the protection and preservation of wildlife and its habitat. Tenn. Code Ann. §§ 70-1-302(a)(2) and (e). Although the wildlife statutes and the agency's regulations do not expressly address scenic river areas, the Scenic Rivers Act does give TWRA broad administrative authority over scenic river areas. And inasmuch as the Water Quality Control Board has promulgated rules governing water quality criteria for various uses that may affect, among other things, fish and aquatic life, TWRA has an interest in the implementation of those rules and an obligation to evaluate any projects that may impact wildlife habitat. Therefore, we believe that TWRA is statutorily authorized to evaluate and comment upon the proposed dam project in the permitting process, regardless of the dam's proximity to a designated scenic river area, if it believes that any wildlife or habitat may be affected thereby. This Office simply cannot say what influence Senate Bill 1651 would have on TWRA's evaluation of the proposed impoundment.

4. Effect of Scenic River Designation on Analysis of Dam Project Under NEPA

Lastly, you have inquired about the impact that Senate Bill 1651 might have on any state or federal agency's analysis of the proposed dam under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (NEPA) and that agency's implementing regulations or policies. NEPA is primarily a procedural statute that requires federal agencies to consider the environmental consequences of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). It ensures that federal agencies take a "hard look" at the environmental implications of their actions or non-actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). But only "major Federal actions" trigger NEPA analysis under the implementing regulations promulgated by the federal agency or the Council on Environmental Quality (CEQ), created under NEPA.

Typically, a project is considered a major federal action when it is either funded with federal money, or there is substantial involvement of federal agencies in the permitting and approval of the project. *Southwest Williamson County Community Association, Inc. v. Slater*, 2001 WL 245779 (6th Cir. March 14, 2001) at 5-6. The request does not specify whether the proposed dam project on the Caney Fork is eligible for federal funding. But if we assume that it would be a non-federally funded project, it is more than likely that it will entail compliance with federal permitting requirements under the federal Clean Water Act, 33 U.S.C. §§ 1341 and 1344, as indicated above in section 2. These latter provisions contain requirements for water quality certifications and permitting for the discharge of dredged or fill material into navigable waters.

Significantly, the Clean Water Act expressly exempts these types of permitting actions from the category of "major federal actions" under NEPA. The Act provides:

> Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

33 U.S.C. § 1371(c)(1). Given the limited facts provided in the request, we therefore believe that the proposed dam project would not be likely to invoke NEPA requirements.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ELIZABETH P. McCARTER
Senior Counsel

Requested by:

Lincoln Davis
State Senator
Suite 6A Legislative Plaza
Nashville, TN 37243-0212