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April 22, 2009

Opinion No. 09-64

Effect of SB 1331/HB 1204 Regarding Water Quality Criteria for Selenium

QUESTIONS

1. In Amendment 1, as amended, to Senate Bill 1331/House Bill 1204, does the clause "[n]otwithstanding any law to the contrary" and the provision in Section 2 directing the Tennessee Water Quality Control Board (the Board) to adopt a certain water quality criterion by public necessity rule require the Board to adopt the selenium criteria for fish and aquatic life set out in the Notice published by the United States Environmental Protection Agency (EPA) at Volume 69, Federal Register No. 242, Friday, December 17, 2004, notwithstanding that such criteria are not included in the current EPA recommendation for state water quality standards set out at http://www.epa.gov/waterscience/criteria/wqctable/?

2. If the Tennessee Water Quality Control Board were to adopt by regulation the selenium criteria for fish and aquatic life set out in the Notice published by EPA at Volume 69, Federal Register No. 242, Friday, December 17, 2004, what, if any, effect would this have on the Tennessee Department of Environment and Conservation's (TDEC's) permitting and enforcement activities and on the validity and legality of TDEC's application of a new water quality standard for selenium?

3. Are there any other provisions in the Tennessee Water Quality Control Act, Tenn. Code Ann. §§ 69-3-101 to -142, in which the Legislature has mandated the Board to adopt a specific water quality standard?

4. If the Board were to adopt by regulation the selenium criteria for fish and aquatic life set out in the Notice published by EPA at Volume 69, Federal Register No. 242, Friday, December 17, 2004, under the directive of this bill, would the revised selenium criteria and the "public necessity" rulemaking procedure specified under the bill comply with the EPA regulations governing adoption of water quality standards and the EPA guidance on water quality standards?

OPINIONS

1. Yes. The aquatic life criteria for selenium in EPA's 2004 notice, which was published in 69 Fed. Reg. 75541-02 (Dec. 17, 2004), are draft, revised criteria and have not been published in final form by EPA. Although Amendment 1, as amended, to Senate Bill 1331/House Bill 1204 does not expressly direct the Board to adopt EPA's draft, revised criteria,

it is the opinion of this Office that, as a practical matter, the Board would have to do so in order to comply with the amendment. Having the Board adopt EPA's 2004 draft, revised criteria appears to be consistent with the legislative intent of Amendment 1, even though the draft criteria have not been finalized by EPA.

2. The federal Clean Water Act (CWA) requires states to adopt surface water quality standards, which include water quality criteria, review them at least every three years, and revise them if appropriate. After state water quality criteria are adopted, they must be reviewed and approved by EPA as meeting the requirements of the CWA. 33 U.S.C. § 1313(c). Thus, TDEC does not implement, in its permitting or enforcement actions, revised or new water quality criteria adopted by the Board until after the state criteria are approved by EPA. It is the opinion of this Office that EPA would not approve state fish and aquatic life criteria for selenium based on EPA's 2004 draft, revised criteria. While the states can rely on EPA's currently-recommended national water quality criteria as providing a sound scientific rationale for state criteria, it is this Office's opinion that EPA's regulations only allow states to rely upon final criteria published by EPA, not draft criteria.

3. Yes. In 1991, the legislature amended the Tennessee Water Quality Control Act (TWQCA) to provide that waters in "swamped-out bottomland hardwoods" and "swamped-out cropland" cannot be classified by the Board "for the protection of fish and aquatic life." 1991 Tenn. Pub. Acts, ch. 123, § 1 (codified as Tenn. Code Ann. § 69-3-105(k)).

4. No. Under the TWQCA, the Board adopts water quality criteria through rulemaking. Tenn. Code Ann. § 69-3-105(b). If the Board promulgates a revised fish and aquatic life criteria for selenium as a public necessity rule in accordance with Amendment 1, then the rule would be adopted without "notice and a public hearing." Tenn. Code Ann. § 4-5-302(a)(2). The CWA requires a state to "hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." 33 U.S.C. § 1313(c)(1). It is the opinion of this Office that revised fish and aquatic life criteria for selenium adopted by the Board as a public necessity rule would not meet the requirements of the CWA. Thus, it is also the opinion of this Office that EPA would not approve such state criteria.

ANALYSIS

1. Amendment 1, as amended, to Senate Bill 1331/House Bill 1204 substitutes for the entire bill and would amend Tenn. Code Ann. § 69-3-105 of the Tennessee Water Quality Control Act (TWQCA) by adding the following:

> Section 1. Notwithstanding any law to the contrary, any water quality criterion for fish and aquatic life established for selenium shall be no more stringent than the recommended national criterion established by the United States Environmental Protection Agency at Volume 69, Federal Register No. 242, Friday, December 17, 2004, or as subsequently modified by such agency.

> Section 2. The water quality control board is directed to take such action as is necessary to effectuate this action. To the extent rulemaking is necessary, any such rules shall be promulgated and adopted as public necessity rules.
>
> Section 3. This act shall take effect upon becoming law, the public welfare requiring it,

Section 303(c) of the federal Clean Water Act requires all states to adopt surface water quality standards, review them at least every three years, and revise them if appropriate. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20 (2008). Water quality standards include the classified or designated use or uses of waters and the "water quality criteria for such waters based upon such uses." 40 C.F.R. § 131.3(i) (2008). *See also* 33 U.S.C. § 1313(c)(2)(A). Under the TWQCA, the Tennessee Water Quality Control Board (the Board) "adopts standards of quality for all waters of the state." Tenn. Code Ann. § 69-3-105(a)(1). Water quality standards are adopted by the Board through rulemaking. Tenn. Code Ann. § 69-3-105(b). *See* Tenn. Comp. R. & Regs., ch. 1200-04-03 (June 2008 Revised) and -04 (Oct. 2007 Revised) (water quality criteria and use classifications).

One of the classified or designated uses of waters in Tennessee is for the protection of fish and aquatic life. *See* Tenn. Comp. R. & Regs., ch. 1200-04-04 (Oct. 2007 Revised). Amendment 1 prevents the Board from adopting fish and aquatic life criteria for selenium that are "more stringent that the recommended national criterion established by the United States Environmental Protection Agency at Volume 69, Federal Register No. 242, Friday, December 17, 2004, or as subsequently modified by such agency." Amend. 1, as amended, to SB 1331/HB 1204 (Amend. 1), § 1. This reference in Amendment 1 is to the Environmental Protection Agency's (EPA's) published notice of "draft aquatic life criteria for selenium" found in 69 Fed. Reg. 75541-02 (Dec. 17, 2004). As provided in the notice, "[s]ection 304(a) of the Clean Water Act (CWA) requires EPA to develop and publish and, from time to time, revise recommended water quality criteria to accurately reflect the latest scientific knowledge. Water quality criteria developed under section 304(a) provide guidance to states and tribes in adopting water quality criteria into their water quality standards under section 303(c)." 69 Fed. Reg. at 75543. *See* 33 U.S.C. § 1314(a); 40 C.F.R. § 131.3(c) (2008).

In the 2004 notice, EPA seeks "scientific information, data, and views" pertaining to the draft, revised criteria. 69 Fed. Reg. at 75541. The notice provides that "[w]hen completed and published in final form, the revised criteria will replace EPA's current recommended aquatic life criteria for selenium." *Id*. "EPA's currently-recommended aquatic life water quality criteria for selenium were published in 1987." *Id*. at 75543.

EPA has not completed and published in final form revised aquatic life criteria for selenium. As EPA notes on its Internet web page for the National Recommended Water Quality Criteria, the agency "is currently undertaking a reassessment of selenium and expects the 304(a) criteria will be revised based on the final reassessment (63 FR 26186). However, until such time as revised water quality criteria for selenium are published by the Agency, the recommended water quality criteria in this compilation are EPA's current 304(a) criteria." Additional Note 11, U.S. Environmental Protection Agency, *National Recommended Water Quality Criteria* (Mar. 18, 2009) *available at* http://www.epa.gov/waterscience/criteria/wqctable/index.html.

The water quality criteria a state adopts to comply with CWA section 303(c) "must be based on sound scientific rationale." 40 C.F.R. § 131.11(a)(1) (2008). EPA views the sound scientific rationale requirement as being met when a state adopts criteria establishing numeric values based on "304(a) Guidance." 40 C.F.R. § 131.11(b)(1)(i) (2008). *See also* 33 U.S.C. § 1313(c)(2)(b). It is our understanding that the fish and aquatic life criteria for selenium adopted by the Board and used in Tennessee at present are based on EPA's currently-recommended CWA section 304(a) national selenium criteria that were published in 1987. *See* Tenn. Comp. R. & Regs., ch. 1200-04-03-.03(g) (June 2008 Revised). The Tennessee Department of Environment and Conservation (TDEC) informs us that EPA's currently-recommended selenium criteria are more stringent than the 2004 draft, revised criteria.

Amendment 1 prevents the Board from adopting state selenium criteria more stringent than the 2004 draft, revised criteria. Therefore, Amendment 1 precludes the Board from continuing with the current fish and aquatic life criteria for selenium. We are informed that the Board utilizes EPA's section 304(a) criteria to meet the "sound scientific rationale" requirement because the Board and TDEC do not have sufficient research capability to generate the science needed to support the state criteria independently. Thus, although Amendment 1 does not expressly direct the Board to adopt EPA's 2004 draft, revised selenium criteria as the state criteria, it is this Office's opinion that, as a practical matter, the Board would have to do so in order to comply with the amendment. Having the Board adopt EPA's 2004 draft, revised selenium criteria appears to be consistent with the legislative intent of Amendment 1, even though the draft criteria have not been finalized by EPA.

2. CWA section 303(c)(2)(A) provides that "[w]henever the State revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the [EPA] Administrator." 33 U.S.C. § 1313(c)(2)(A). *See also* 40 C.F.R. § 131.21 (2008). EPA reviews state water quality criteria to determine if they meet "the requirements of [the CWA]." 33 U.S.C. § 1313(c)(3). *See also* 40 C.F.R. § 131.21(b) (2008). Once revised or new criteria are adopted by a state, they are submitted to EPA, which then has 60 days to approve the criteria or 90 days to disapprove. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(1)-(2) (2008). When state criteria are approved by EPA, "such standard shall thereafter be the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3). If the criteria are disapproved, the state has an opportunity to correct the criteria in accordance with EPA direction. If the state does not change the criteria, then the CWA provides that the EPA "Administrator shall promulgate such standard." 33 U.S.C. § 1313(c)(3). *See also* 40 C.F.R. § 131.22 (2008).

Because federal law requires EPA to approve all state water quality criteria, it is our understanding that TDEC does not implement, in its permitting or enforcement actions, revised or new criteria adopted by the Board until after the criteria are approved by EPA. If the Board adopts fish and aquatic life criteria for selenium based on EPA's 2004 draft, revised criteria to meet the requirements of Amendment 1, then the state criteria would be subject to EPA review and approval. And TDEC would not implement the revised state selenium criteria until EPA has given its approval.

As with all state criteria, Tennessee's revised selenium criteria would have to be "based on sound scientific rationale." 40 C.F.R. § 131.11(a) (2008). For the reasons noted above, that

sound scientific rationale cannot be generated independently by the Board and TDEC. As discussed, *supra*, the "sound scientific rationale" requirement can be met when numeric values in state criteria are based on "304(a) Guidance." 40 C.F.R. § 131.11(b)(1)(i) (2008). But it is the opinion of this Office that the reference to section 304(a) guidance in EPA's rule means guidance containing final criteria published by EPA, not draft criteria. As EPA notes on its National Recommended Water Quality Criteria web page, the agency "is currently undertaking a reassessment of selenium." Additional Note 11, U.S. Environmental Protection Agency, *National Recommended Water Quality Criteria* (Mar. 18, 2009) *available at* http://www.epa.gov/waterscience/criteria/wqctable/index.html. And as stated in EPA's 2004 notice for the draft, revised selenium criteria, "[w]hen completed and published in final form, the revised criteria will replace EPA's current recommended aquatic life criteria for selenium." 69 Fed. Reg. at 75541. But "until such time as revised water quality criteria for selenium are published by the Agency, the recommended water quality criteria in this compilation are EPA's current 304(a) criteria." Additional Note 11, U.S. Environmental Protection Agency, *National Recommended Water Quality Criteria* (Mar. 18, 2009) *available at* http://www.epa.gov/waterscience/criteria/wqctable/index.html. Because EPA's 2004 draft selenium criteria have not been finalized, and because the Board would not have a "sound scientific rationale" for the state criteria outside of final section 304(a) criteria, it is the opinion of this Office that EPA would not approve state selenium criteria adopted by the Board that are based on EPA's draft, revised criteria.[1]

3. As discussed, Amendment 1 prevents the Board from adopting fish and aquatic life criteria for selenium that are "more stringent than the recommended national criterion established by the United States Environmental Protection Agency at Volume 69, Federal Register No. 242, Friday, December 17, 2004, or as subsequently modified by such agency." Amend. 1, § 1. The General Assembly has previously limited the Board's power to establish water quality standards. As noted, water quality standards include not only criteria but also the classified or designated use or uses of the waters. Under the TWQCA, the Board is authorized "to classify all waters of the state." Tenn. Code Ann. § 69-3-105(a)(2). One of the classified or designated uses of Tennessee waters is for the protection of fish and aquatic life. *See* Tenn. Comp. R. & Regs., ch. 1200-04-04 (Oct. 2007 Revised). In 1991, the legislature amended the TWQCA to provide that the waters in "swamped-out bottomland hardwoods" and "swamped-out cropland," as defined therein, "shall not be classified for the protection of fish and aquatic life." 1991 Tenn. Pub. Acts, ch. 123, § 1 (codified as Tenn. Code Ann. § 69-3-105(k)).

4. Amendment 1 directs the Board to take the action necessary to adopt state selenium criteria no more stringent than EPA's 2004 draft, revised criteria, and if rulemaking is necessary for such action, "any such rules shall be promulgated and adopted as public necessity rules." Amend. 1, § 2. As noted, under the TWQCA, the Board adopts water quality criteria through rulemaking. Tenn. Code Ann. § 69-3-105(b). A public necessity rule means, among other

[1] Amendment 1 refers to the revised selenium criteria in EPA's 2004 notice "or as subsequently modified by such agency." If EPA completes and publishes revised aquatic life criteria for selenium in final form, then those criteria would become EPA's recommended national criteria. And if the Board adopted those criteria, then under 40 C.F.R. § 131.11(a) and (b), it could rely on EPA's "304(a) Guidance" as providing the "sound scientific rationale" for the state criteria.

things, that the rule is adopted without "notice and a public hearing." Tenn. Code Ann. § 4-5-302(a)(2).

Under CWA section 303(c)(1), a state is required to "hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." 33 U.S.C. § 1313(c)(1). *See also* 40 C.F.R. § 131.20(b) (2008) ("The state shall hold a public hearing for the purpose of reviewing water quality standards . . . proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing").[2] As discussed, *supra*, EPA reviews all state water quality criteria to determine if they comply with "the requirements of [the CWA]." 33 U.S.C. § 1313(c)(3). *See also* 40 C.F.R. § 131.21(b) (2008). If the Board were to adopt fish and aquatic life criteria for selenium as a public necessity rule in accordance with Amendment 1 and, thus, without notice and a public hearing, it is this Office's opinion that this would not meet the requirements of the CWA and that EPA would not approve the state criteria.

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[2] The TWQCA also provides that prior "to adopting, amending, or revising standards of quality for waters of the state . . . the board shall conduct, or cause to be conducted, public hearings in connection therewith." Tenn. Code Ann. § 69-3-105(d).