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Opinion No. 09-93

HB 1204 – State Selenium Water Quality Criteria and the Federal Clean Water Act

QUESTIONS

1. Does the federal Clean Water Act (CWA) mandate the State of Tennessee, as a condition of participation in federal funding, to adopt only the criteria promulgated by the U.S. Environmental Protection Agency (EPA) under section 304(a) of the CWA as part of its water quality standards, or can it adopt other criteria that are scientifically defensible?

2. In the event EPA disapproves the water quality criteria for selenium promulgated pursuant to House Bill 1204, will the existing state water quality criteria for selenium remain in effect?

3. Did EPA disapprove the nutrient criterion for fish and aquatic life that was promulgated in 2005 by the Water Quality Control Board (the Board) because it was promulgated as an emergency rule?

OPINIONS

1. EPA regulations promulgated under the CWA provide that states may adopt numeric water quality criteria based on “(i) 304(a) Guidance; or (ii) 304(a) Guidance modified to reflect site-specific conditions; or (iii) Other scientifically defensible methods.” 40 C.F.R. § 131.11(b)(1) (2008). In Tennessee, water quality criteria are adopted by the Board. Thus, it is the opinion of this Office that the Board may adopt state water quality criteria that differ from EPA’s section 304(a) recommended criteria if the Board can support such criteria with sound science.

2. EPA’s regulations provide that a state’s authorized “applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard.” 40 C.F.R. § 131.21(e) (2008). If the Board promulgates revised selenium water quality criteria to comply with House Bill 1204 and EPA disapproves the revised criteria, then this Office is of the opinion that the existing EPA-approved state selenium criteria would remain the applicable water quality criteria for purposes of the CWA.

3. No. In response to an adverse court ruling, a nutrients water quality criterion was adopted by the Board as an emergency rule on July 22, 2003, not in 2005. The same nutrients criterion was part of the triennial review water quality standards (WQS) rulemaking that the

Board had commenced on January 31, 2003. When the emergency rule was adopted, the nutrients criterion had already been subject to public notice, public comments and public hearings through the regular rulemaking process utilized for the pending WQS rules. The emergency rule was submitted to EPA on July 31, 2003; the WQS rules were submitted on October 24, 2003. EPA approved the emergency rule nutrients criterion on December 22, 2003. It is the opinion of this Office that EPA approved the emergency rule criterion because, after receiving the WQS rules, it concluded that the CWA's public hearing requirements had been satisfied.

ANALYSIS

1. Section 303(c) of the federal Clean Water Act (CWA) 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). Whenever a state revises a water quality standard or adopts a new standard, “such revised or new standard [must] be submitted to the Administrator” of the U.S. Environmental Protection Agency (EPA) for review and approval. 33 U.S.C. § 131(c)(2)(A). *See also* 40 C.F.R. § 131.21 (2008).

Under CWA section 304(a), EPA is required “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. 75541-02, 75543 (Dec. 17, 2004). *See* 33 U.S.C. § 1314(a); 40 C.F.R. § 131.3(c) (2008). EPA has outlined its “process for deriving new and revised criteria” under section 304(a). 63 Fed. Reg. 68354-01 (Dec. 10, 1998). The federal agency first undertakes “a comprehensive review of available data and information,” publishes a public notice in the Federal Register and on the Internet seeking additional data and information, and then develops draft criteria. *Id.* at 68355. After draft criteria are developed, EPA will “initiate a peer review of the draft criteria [and] . . . [c]oncurrent with the peer review . . . EPA will publish a notice in the Federal Register and on the Internet of the availability of the draft water quality criteria and solicit views from the public on issues of science pertaining to the information used in deriving the draft criteria.” *Id.* Then, “EPA will evaluate the results of the peer review, and . . . at the same time will consider views provided by the public on issues of science.” *Id.* Finally, “EPA will then revise the draft criteria as necessary, and announce the availability of the final water quality criteria in the Federal Register and on the Internet.” *Id.*

In Tennessee, the Water Quality Control Board (the Board) “adopts standards of quality for all waters of the state.” Tenn. Code Ann. § 69-3-105(a)(1). The Board adopts water quality standards 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). House Bill 1204 (HB 1204), as amended, precludes the Board from adopting any fish and aquatic life water quality criterion for selenium “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 the agency.” House Bill 1204, as amended, § 1. As this Office discussed in a prior

opinion on the bill, this Federal Register reference is to the notice published by EPA in 69 Fed. Reg. 75541-02 (Dec. 17, 2004). Op. Tenn. Att’y Gen. No. 09-64 at 3 (Apr. 22, 2009) (copy attached). In that notice, EPA sought under CWA section 304(a) “scientific information, data, and views” from the public on “draft aquatic life criteria for selenium.”¹ 69 Fed. Reg. at 75541. As EPA stated in the notice, “[w]hen completed and published in final form, the revised criteria will replace EPA’s current [section 304(a)] recommended aquatic life criteria for selenium.” *Id.* EPA has not completed and published in final form revised selenium criteria. Thus, HB 1204 errs in referring to the 2004 draft, revised criteria as the “recommended” criteria for selenium. House Bill 1204, as amended, § 1.

To meet CWA section 303(c) requirements, all state water quality criteria “must be based on sound scientific rationale.” 40 C.F.R. § 131.11(a)(1) (2008). *See* 48 Fed. Reg. 51400-01, 51410 (Nov. 8, 1983) (“EPA will not approve standards unless they are based on sound scientific and technical analysis”). When state standards are submitted to EPA for review and approval, the state must show, *inter alia*, the “[m]ethods used and analyses conducted to support water quality standards revisions.” 40 C.F.R. § 131.6(b) (2008). As discussed in our previous opinion, EPA views the sound scientific rationale requirement as being met when a state adopts numeric water quality criteria based on recommended section “304(a) Guidance.” Op. Tenn. Att’y Gen. No. 09-64 at 4 (quoting from 40 C.F.R. § 131.11(b)(1)(i) (2008)). *See also* 48 Fed. Reg. at 51410 (“EPA believes it provides the basic scientific information on various levels of protection with the water quality criteria recommendations under section 304(a)”).

But states are not required to adopt water quality criteria derived from EPA’s section 304(a) recommended criteria. As provided in EPA’s regulations, states may base numeric water quality criteria on “(i) 304(a) Guidance; or (ii) 304(a) Guidance modified to reflect site-specific conditions; or (iii) Other scientifically defensible methods.” 40 C.F.R. § 131.11(b)(1) (2008). Thus, EPA has stated that “[w]hile States are free to draw on EPA’s 304(a) criteria as support for state criteria, they are equally free to use any other criteria for which they have sound scientific support.” *Id.* at 51411. *Accord City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.5 (10th Cir. 1996) (“States can draw upon the EPA’s recommended water quality criteria or use other criteria for which they have sound scientific support”). Therefore, it is the opinion of this Office that the Board may adopt state water quality criteria that differs from EPA’s section 304(a) recommended criteria if the Board can support such criteria with sound science.

2. As noted, the CWA requires 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” for review and approval. 33 U.S.C. § 1313(c)(2)(A). *See also* 40 C.F.R. § 131.21 (2008). When state criteria are approved by EPA, CWA section 303(c)(3) directs that “such standard shall thereafter be the water quality standard for the applicable waters of that State.” 33 U.S.C. § 1313(c)(3). *See Alaska Clean Water Alliance v. Clark*, 1997 WL 446499 at *3 (W.D. Wash. 1997) (“the language of 303(c)(3) . . . supports plaintiff’s argument that Congress did not intend new or revised state standards to be effective until after EPA had reviewed and approved them”).

¹ It appears EPA had already initiated the peer review process for the draft criteria when the 2004 notice was published. *See* 69 Fed. Reg. at 75543 (“In 2002, EPA prepared an early draft revision of its aquatic life criteria document and submitted it to peer review”).

Consistent with CWA section 303(c)(3), EPA's regulations provide that a state's authorized "applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard."² 40 C.F.R. § 131.21(e) (2008). Tennessee's current fish and aquatic life water quality criteria for selenium have been approved by EPA. If the Board promulgates revised selenium criteria to comply with HB 1204 and EPA disapproves the revised criteria, then it is the opinion of this Office that the existing EPA-approved state selenium criteria would remain the applicable water quality criteria for purposes of the CWA.

3. On July 22, 2003, the Board adopted as an emergency rule a narrative water quality criterion for nutrients. Like a public necessity rule, an emergency rule may be adopted without "notice and a public hearing." Tenn. Code Ann. § 4-5-202(a)(2). The nutrients criterion in the emergency rule was the same criterion that was part of the pending triennial review water quality standards (WQS) rulemaking that had been commenced by the Board on January 31, 2003, under the rulemaking hearing rule provisions of state law. See Tenn. Code Ann. §§ 4-5-202(a), -203. In that rulemaking, the public was provided with notice and had the opportunity to offer comment during public hearings held in March and early April of 2003.

The statement of necessity in the Board's July 22, 2003, emergency rule referenced the WQS rulemaking the Board had commenced on January 31, 2003, and stated that the "WQS rules include a narrative criterion for nutrients and there have been public hearings and public comments on those WQS rules." Emergency Rule 1200-04-03-.03(3)(k), Statement of Necessity Regarding Emergency Rules, (July 22, 2003) (copy attached). Although the WQS rulemaking was pending, the Board promulgated the nutrients criterion as an emergency rule to respond more quickly to an adverse lower court ruling on July 16, 2003, "that organic enrichment resulting from excessive nutrients cannot be addressed in NPDES permits issued by TDEC absent a water quality standard adopted by the Board." *City of Cookeville v. Tenn. Water Quality Control Bd., et al.*, 2004 WL 2607539 at *3 n. 10 (Tenn. Ct. App. Nov. 16, 2004).

After the Board adopted the emergency rule on July 22, 2003, the rule was submitted to EPA for review and approval on July 31, 2003. The triennial review WQS rules were adopted by the Board on September 23, 2003, and were submitted to EPA for review and approval on October 24, 2003. EPA reviews state water quality standards 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). As this Office discussed in our prior opinion, the CWA requires states to "hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." Op. Tenn. Att'y Gen. No. 09-64 at 6 (quoting from 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 revisions and supporting analyses shall be made available to the public prior to the hearing").

On December 22, 2003, EPA approved the nutrients criterion in the emergency rule. When the emergency rule was adopted by the Board on July 22, 2003, the nutrients criterion had

² It is our understanding that the Tennessee Department of Environment and Conservation (TDEC) is going to recommend to the Board that it include language comparable to 40 C.F.R. § 131.21(e) in future state water quality standards rules.

already been subject to public notice, public comments and public hearings through the regular rulemaking process utilized for the WQS rules. Although the emergency rule had been submitted to EPA on July 31, 2003, the federal agency did not make a determination on the emergency rule until after the WQS rules had been adopted by the Board and submitted to EPA on October 24, 2003. As noted, the nutrients criterion in the emergency rule was the same as the nutrients criterion in the WQS rules. It is the opinion of this Office that EPA approved the emergency rule criterion because, after receiving the WQS rules, it concluded that the CWA's public hearing requirements had been satisfied.

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