STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 19, 2024

Opinion No. 24-018

Water and Wastewater Operator Certification Act and Proposed Prohibition on Third-Party Testing Services for Operator Certification Examinations

Question 1

Under current law, would the Board of Water and Wastewater Operators Certification (the "Board") violate Tenn. Code Ann. §§ 68-221-901, *et seq.* and its regulations, or any other law, if it contracts with a third-party testing service provider to use a standardized operator examination that does not contain any customized or state-specific regulatory questions, or that does not otherwise align with the classification system established in Tenn. Code Ann. § 68-221-907?

Opinion 1

Likely not. The Water and Wastewater Operator Certification Act and its regulations provide the Board with broad authority over operator examinations and do not specify what content must be covered by those examinations.

Question 2

Would a proposed amendment to Tenn. Code Ann. § 68-221-906 that prohibits the Board from entering into a contract, agreement, or other arrangement with a third-party regarding testing services for its operator certification program, including exam validation services performed by psychometricians, be constitutionally suspect under Contract Clause of the Tennessee Constitution, the Supremacy Clause of the United States Constitution, or other constitutional provisions?

Opinion 2

It depends. An amendment that operates prospectively likely would not raise constitutional concerns, but an amendment that operates retrospectively to abrogate existing contracts likely would raise constitutional concerns.

Question 3

Would such a state prohibition on third-party testing services pose a risk of violating the Safe Drinking Water Act and applicable regulations?

Opinion 3

Likely not.

Question 4

If the answer to Question 3 is yes, what is the likely effect of such a violation on funds allocated to the State from the Drinking Water State Revolving Fund Loan Program?

Opinion 4

In light of Opinion 3, this question is moot.

ANALYSIS

Several decades ago, Congress enacted the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974). That law and its implementing regulations instruct the U.S. Environmental Protection Agency to set national drinking water standards, *see NRDC v. Regan*, 67 F.4th 397, 398–99 (D.C. Cir. 2023), and empower both the federal government and the States to enforce those standards, *see Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 395 (4th Cir. 2006). Against that federal backdrop, the General Assembly approved the Tennessee Safe Drinking Water Act of 1983 to ensure an adequate quantity and quality of safe drinking water to all Tennesseans. *See* 1983 Tenn. Pub. Acts, ch. 324; Tenn. Code Ann. § 68-221-701.

Recognizing the State could not supply that water without collection, treatment, and distributions systems managed by qualified personnel, the General Assembly created a "system of certification of operators" designed "to prevent inadequate operation" of water systems. 1984 Tenn. Pub. Acts, ch. 812, § 2; Tenn. Code Ann. § 68-221-902. The Water and Wastewater Operator Certification Act establishes and regulates that certification program. *See* Tenn. Code Ann. § 68-221-901. To manage the program, the legislature created the Board of Certification, 1983 Tenn. Pub. Acts, ch. 812, § 5; Tenn. Code Ann. § 68-221-905, which administers an important component of the operator certification program: the examination, *see* Tenn. Code Ann. § 68-221-906(a). Operators must achieve a satisfactory score on the examination to obtain certification, unless they are certified in another State with which Tennessee shares reciprocity. *See id.* § 68-221-910(e); Tenn. Comp. R. & Regs. 0400-49-01-.01.

Tennessee classifies its facilities into fourteen categories based on various criteria, including among other things the type of water being treated (water or wastewater) and how much water the facility processes. *See* Tenn. Code Ann. § 68-221-907 (requiring classification); Tenn. Comp. R. & Regs. 0400-49-01-.06, 0.8 (making classifications). Operators must obtain different certifications depending on what water or wastewater treatment facilities they manage. Individuals seeking certification to operate a Grade IV water treatment plant, for example, must have qualifications that operators for lower-graded facilities need not possess. *Compare* Tenn. Comp. R. & Regs. 0400-49-01-.07(1)(a), *with id.* 0400-49-01-.07(1)(d).

1. The Board likely does not violate the Water and Wastewater Operator Certification Act by using a standardized examination developed by a third party.

To begin, the Act entrusts the Board with the responsibility to "[p]repare … examinations." Tenn. Code Ann. § 68-221-906(a)(7). Because the law does not define what it means to "prepare" an examination, that word conveys its ordinary meaning. *Lawson v. Hawkins County*, 661 S.W.3d 54, 59 (Tenn. 2023). At the time of enactment, "prepare" generally meant "to make ready beforehand for some purpose, use, or activity." Webster's Ninth New Collegiate Dictionary 929 (1984).

The Board "prepare[s]" the examination even if it chooses to administer a standardized examination drafted by a third-party contractor. The Board's act of contracting with a third party to develop an examination is what "make[s]" that examination "ready beforehand" for use. *Id.* After all, the Board's action—that is, the decision to contract with a third party and the consideration offered to enter that contract—causes the examination to be produced. That the Board members themselves do not personally draft the examination questions does not change the fact that the Board's conduct is responsible for making the examination ready to be administered to applicants for certification. *Cf. State v. Moses*, 92 Wash. App. 1022 (Wash. Ct. App. 1998) (unpublished); *Ind. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors v. Nord*, 600 N.E.2d 124 (Ind. Ct. App. 1992). Indeed, the regulations expressly contemplate third-party involvement in the examination process. *See* Tenn. Comp. R. & Regs. 0400-49-01-.02(7).[1]

Nor does the Water and Wastewater Operator Certification Act require the examination to include specific substantive content. To be sure, the implementing regulations assume that different examinations will be administered depending on what grade of certification an operator seeks. *See id.* 0400-49-01-.02(9) (discussing "Grade III" and "Grade IV examination[s]"). But those regulations do not mandate that the Board use "customized" or "state-specific" questions. Op. Request 1. And although the Board's regulations specify what *form* the examination questions may take, *see* Tenn. Comp. R. & Regs. 0400-49-01-.01(3) (allowing "multiple choice" and "true-false" questions), neither the statute nor the regulations dictate what substance those questions must cover. On the contrary, the law leaves details about the examination to the Board's discretion. *See* Tenn. Comp. R. & Regs. 0400-49-01-.02(1) ("All examinations shall be taken in a manner provided by the board.").

2.-4. The legality of the proposed amendment depends on whether it operates prospectively or retrospectively. An amendment that operates prospectively to prohibit the Board from executing contracts with third parties in the future after the amendment's enactment would not violate the State or federal Contract Clauses. *See Edwards v. Kearzey*, 96 U.S. 595, 603 (1877); Tenn. Const. art. I, § 20 (forbidding "retrospective law[s]" that "impai[r] the obligations of contracts"). But if the proposed amendment operated retrospectively to abrogate contracts the Board has already entered, that would raise serious questions under the State and federal Contract Clauses. *See Doe v. Sundquist*, 2 S.W.3d 919, 923–25 (Tenn. 1999); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322–27 (6th Cir. 1998); *see, e.g., Cummings, McGowan & West, Inc. v. Wirtgen Am., Inc.*, 160 F. App'x 458 (6th Cir. 2005).

In addition, the proposed amendment likely would not violate the Safe Drinking Water Act and applicable regulations or the Supremacy Clause. Although EPA guidance *permits* States to use third-party contractors in the examination process, *see* Op. Request 5, federal law does not *require* States to use third-party contractors. Indeed, Tennessee did not begin using third-party contractors in the examination process until recently. *See* Jenny Dodd, Tenn. Dep't of Env't & Conservation, Operator Exams 3 (Mar. 6, 2024); Op. Request 5 (noting that Tennessee started using a third-party contractor in 2011). So long as the Board administers an examination that meets federal standards, *see* Env't Protection Agency, Final Guidelines for the Certification and

[1] The Opinion Request questions whether the decision to use a standardized examination developed by a third party without "customized or state-specific regulatory questions" violates the Act. This Opinion answers that question and expresses no view on whether the Board's current practices—which the Office lacks sufficient information to evaluate—otherwise violate the law.

Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems, 64 Fed. Reg. 5,916, 5,919–20 (Feb. 5, 1999),[2] federal law appears to be agnostic about whether the examination comes from the State or a third party.

JONATHAN SKRMETTI
Attorney General and Reporter

J. MATTHEW RICE
Solicitor General

PHILIP HAMMERSLEY
Senior Assistant Solicitor General

BENNETT HEIDELBERGER
Assistant Attorney General

Requested by:

The Honorable Kelly Keisling
State Representative
425 Rep. John Lewis Way N.
Suite 566 Cordell Hull Building
Nashville, Tennessee 37243

[2] Prohibiting the Board from using a standardized exam developed by a third party would likely mean that the Board must develop its own examination that meets federal standards. If the State could not develop and administer an adequate examination, *see* Dodd, *supra* at 3–4 (discussing failed attempt to develop exam), and it could not otherwise rely on third-party exams, that would risk violating federal law and jeopardize the State's access to federal funds, *see* 42 U.S.C. § 300g-8(b). But the mere act of prohibiting the use of third-party contracts *itself* would not violate federal law.