

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 01-105

Agency Authority To Promulgate Rule Establishing Stop Work Orders

QUESTION

Does the Tennessee Water Quality Control Board have the authority under Tenn. Code Ann. § 69-3-105(b), or any other part of the Tennessee Water Quality Control Act, to promulgate a rule that would authorize the Commissioner of the Tennessee Department of Environment and Conservation to issue stop work orders for construction activity that is being done without a required permit or in violation of a permit?

OPINION

No. It is the opinion of this Office that the Board lacks authority under any provision of the Act to promulgate such a rule. The legislature has not given the Board statutory authority to establish by rule a new enforcement procedure by which violations of the Act may be remedied. Such a rule conflicts with the Act, because it would extend the stop work order authority already granted to the Commissioner by the General Assembly, and would be inconsistent with the statutory provisions directing the Commissioner to seek injunctive relief for violations of the Act through judicial proceedings.

ANALYSIS

The Tennessee Water Quality Control Board proposes to promulgate a rule that would authorize the Commissioner of the Tennessee Department of Environment and Conservation (TDEC) to issue a stop work order for construction activity that violates the Tennessee Water Quality Control Act (TWQCA or the Act), Tenn. Code Ann. §§ 69-3-101 to -137 (Supp. 2000). Specifically, the administrative order authorized by this rule would be issued by the Commissioner to stop construction activity that is being done without a permit required by the TWQCA, or construction activity that is being done in violation of a permit issued by the Commissioner under the Act.

For the reasons discussed, *infra*, it is the opinion of this Office that the Board lacks authority under Tenn. Code Ann. § 69-3-105(b), or any other TWQCA provision, to promulgate such a rule. The General Assembly has not given the Board statutory authority to establish by rule a new procedure for enforcing

violations of the Act. The proposed rule, moreover, conflicts with the TWQCA, because it would extend the stop work order authority already granted to the TDEC Commissioner by the legislature. The rule also is inconsistent with the Act's provisions directing the Commissioner to seek injunctive relief for TWQCA violations through judicial proceedings.

The rule proposed by the Board would extend the Commissioner's stop work order authority beyond that given by the General Assembly in Tenn. Code Ann. §§ 69-3-133 to -136 (Supp. 2000). Under these statutes, which were added to the TWQCA in 2000, the legislature gave the TDEC Commissioner the power to issue stop work orders when certain silvicultural activities have polluted waters of the state as a result of an operator's failure or refusal to use forestry best management practices. Tenn. Code Ann. § 69-3-133 (Supp. 2000). "Silvicultural activities" are defined in the Act as "forest management activities associated with the harvesting of timber" ¹ Tenn. Code Ann. § 69-3-103(38) (Supp. 2000). Forestry best management practices are established by the Tennessee Department of Agriculture (TDA). Tenn. Code Ann. § 69-3-103(35) (Supp. 2000). The TDEC Commissioner must consult with the TDA Commissioner before issuing or suspending a stop work order. Tenn. Code Ann. § 69-3-133 (Supp. 2000).

A stop work order is, in essence, an "administrative" injunction. When a stop work order is issued by the TDEC Commissioner, the operator must cease immediately all or part of the silvicultural activities that are contributing to the water pollution. Tenn. Code Ann. §§ 69-3-103(39), -133 (Supp. 2000). Thus, an administrative stop work order is similar to a restraining order issued by a court under Rule 65.03 of the Tennessee Rules of Civil Procedure. *See* Tenn.R.Civ.P. 65.03. A silvicultural operator may seek an administrative appeal of the stop work order by requesting a hearing before the Board. Tenn. Code Ann. § 69-3-135 (Supp. 2000). When a hearing is requested, the operator may meet with the TDEC Commissioner, or his designee, within three working days after the request is filed. The purpose of the meeting is to allow the operator to "show cause why a stop work order should not have been issued." Tenn. Code Ann. § 69-3-135 (Supp. 2000). If after the show cause meeting, TDEC upholds the stop work order, the order "remain[s] in effect until resolution of the appeal or the operator comes into compliance." Tenn. Code Ann. § 69-3-135 (Supp. 2000). This administrative show cause hearing is similar to the judicial show cause hearing that occurs after a restraining order is granted to determine whether a temporary injunction should issue pending trial on the merits. *See* Tenn.R.Civ.P. 65.04.

As an administrative body, the Board has "no inherent or common law powers." *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Bd.*, 560 S.W.2d 910, 914 (Tenn. Ct. App. 1976), *cert. denied*, (Tenn. Oct. 4, 1976). An agency's authority derives from the General Assembly, therefore, its power must be based expressly upon a statutory grant of authority or must arise therefrom by necessary implication. *Tennessee Public Service Comm'n v. Southern Railway Co.*,

¹ The TWQCA does not otherwise apply to silvicultural, or forestry, activities unless such activities result in a "point source discharge from a discernable, confined, and discrete water conveyance" to waters of the state. Tenn. Code Ann. § 69-3-120(g).

554 S.W.2d 612, 613 (Tenn. 1977); *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988). Even with remedial laws that are to be liberally construed, such as the TWQCA, “the authority they vest in an administrative agency must have its source in the language of the statutes themselves.” *Sanifill of Tennessee, Inc. v. Tenn. Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995).

In *Wayne County*, the Court of Appeals considered whether the Tennessee Solid Waste Disposal Control Board could impose an enforcement remedy beyond those established by the General Assembly to redress a violation of the Tennessee Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to -121. Specifically, the court considered whether the Solid Waste Board or the TDEC Commissioner had authority to grant “remedial relief to private parties.” 756 S.W.2d at 283. The court noted that the legislature by statute has provided the Solid Waste Board and the Commissioner with six enforcement options to redress violations of the Solid Waste Act. But the power to seek or grant private relief is not one of these express statutory remedies. The Board argued that its power in this regard was necessarily implied, because it was “reasonable and consistent with the Act’s purposes.” *Id.* Although the Court of Appeals recognized the “logic and appeal” of this argument, it held that this “provides an insufficient basis for this Court to engraft remedies onto the Act that were not put there by the General Assembly.” *Id.*

Similarly, in *General Portland*, the appeals court considered whether the Chattanooga-Hamilton County Air Pollution Control Board had “express or implied authority to require General Portland to post [a] \$10,000 bond” for the company’s violation of local air pollution control laws. 560 S.W.2d at 913. The local air pollution control program had been established under Tenn. Code Ann. § 53-3422 (now § 68-201-115) of the Tennessee Air Quality Act. *Id.* at 911-12. The appeals court held that “[a]dministrative determinations are enforceable only by the method and manner conferred by statute and by no other means.” *Id.* at 914. The court noted that the local board was not acting to implement substantive legal “standards,” but was seeking to establish new “enforcement methods.” *Id.* The statutory provisions in the Air Quality Act providing for enforcement did not include the posting of a bond. *Id.* at 913. Because a bond was not a method of enforcement allowed by the Act, the Court of Appeals held that it “must be considered as being illegal.” *Id.*

The TWQCA specifies the means by which the Act can be enforced. Although the TDEC Commissioner is given the power to issue stop work orders, that authority is limited to certain silvicultural activities. Beyond this, if injunctive relief is needed to address violations of the TWQCA, the General Assembly has provided that the Commissioner shall seek such relief through a judicial action. Tenn. Code Ann. § 69-3-117. The request notes that the Act gives the Board the power to promulgate rules it “deems necessary for . . . the prevention, control, and abatement of pollution” Tenn. Code Ann. § 69-3-105(b). Although the General Assembly can delegate broad discretionary authority to agencies to promulgate rules, such rules must be consistent with statutory provisions. *Tasco Developing & Building Corp. v. Long*, 212 Tenn. 96, 100, 368 S.W.2d 65 (1963). “If the rules and regulations promulgated by [an agency] are inconsistent with the statute, then they are void.” *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850, 853 (Tenn. 1985).

This is not a situation where the Board is implementing substantive standards under the TWQCA through rulemaking. Rather, the Board's proposed rule would establish a new enforcement procedure by which violations of the Act may be remedied. It is this Office's opinion that the rule proposed by the Board is inconsistent with the TWQCA provisions limiting the TDEC Commissioner's stop work order authority to certain silvicultural activities. The Board's proposed rule also is inconsistent with Tenn. Code Ann. § 69-3-117, wherein the General Assembly has provided that injunctive relief to redress TWQCA violations should be obtained through a judicial, not an administrative, proceeding. Thus, this Office is of the opinion that the Board lacks authority under § 69-3-105(b), or any other TWQCA provision, to promulgate a rule giving the Commissioner the power to issue stop work orders for construction activity that is being done without a required permit, or construction activity that is being done in violation of a permit issued under the Act.²

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² If construction activity violates a permit issued under the TWQCA, and the public health, safety, or welfare imperatively requires emergency action, the Commissioner has the power under the Uniform Administrative Procedures Act to order a summary suspension of the permit "pending proceedings for revocation or other action." Tenn. Code Ann. § 4-5-320(c).