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Opinion No. 09-76

Legality of Senate Bill 631 and Antidegradation Water Quality Standards

QUESTIONS

1. Does the first provision in Section 1 of Senate Bill 631 (SB 631), which provides that federal Clean Water Act (CWA) § 303(d) impaired waters shall not be considered exceptional or tier 2 waters, violate the CWA or 40 C.F.R. § 131?

2. Does the second provision in Section 1 of SB 631, which declares publicly funded projects to be in the public interest and therefore establishes for antidegradation purposes a presumption of social and economic necessity for such projects to degrade any exceptional or tier 2 waters, violate the CWA and 40 C.F.R. § 131?

OPINIONS

1. No. Tennessee no longer uses "tier" terminology for designating water quality but does designate waters as Exceptional Tennessee Waters. We have analyzed both provisions in Section 1 of SB 631 in the context of their effect on Exceptional Tennessee Waters. Based upon the decision in *Kentucky Waterway Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008), it is the opinion of this Office that waters in Tennessee can be excluded from consideration as Exceptional Tennessee Waters if they have a listed § 303(d) impairment that prevents those waters from supporting aquatic life-based uses or recreation-based uses. Thus, the first provision in the bill would likely be found to be consistent with the CWA and the antidegradation provisions in 40 C.F.R. § 131.12(a)(2).

2. Yes. *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp.2d 732 (S.D. W. Va. 2003), held that the antidegradation provisions in 40 C.F.R. § 131.12(a)(2) are location-specific. It is the opinion of this Office that *Horinko* would be viewed as persuasive authority by courts in Tennessee. The second bill provision makes a blanket presumption that all publicly funded projects have social and economic necessity and circumvents the location-by-location analysis required in the federal rule. In addition, the provision is inconsistent with intent underlying the intergovernmental coordination and public participation requirements in the federal rule because it places upon government agencies and the public the burden of overcoming the social/economic necessity presumption. Thus, it is this Office's opinion that this provision would likely be found to be inconsistent with the CWA and 40 C.F.R. § 131.12(a)(2).

ANALYSIS

1. Section 1 of SB 631 would amend Tenn. Code Ann. § 69-3-105 of the Tennessee Water Quality Control Act. The first provision in Section 1[1] would add the following:

> Notwithstanding any other provision in this title to the contrary, waters identified as impaired by the commissioner and that appear on the list compiled by the commissioner pursuant to Section 303(d) of the federal Clean Water Act shall not be considered exceptional or tier 2 waters.[2]

Senate Bill 631, § 1.

Section 303(d) of the Clean Water Act (CWA) requires states to compile a list of waters and water segments that are impaired, which means that they are water quality limited. 33 U.S.C. § 1313(d). A "water quality limited segment" is defined by federal regulation as "[a]ny segment where it is known that water quality does not meet water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by [the CWA]." 40 C.F.R. § 130.2(j) (2008). The Tennessee 303(d) list is compiled and revised periodically by the Tennessee Department of Environment and Conservation (TDEC). The list is submitted to the United States Environmental Protection Agency (EPA) for review and approval. 33 U.S.C. § 1313(d).

The CWA and implementing regulations also require states as part of their water quality standards to establish provisions addressing degradation of water quality. A state's antidegradation statement must meet the federal antidegradation requirements in 40 C.F.R. § 131.12. The antidegradation statement is part of a state's water quality standards and under CWA § 303(c) it is also subject to EPA's review and approval. 33 U.S.C. § 1313(c)

In the federal antidegradation regulation, high quality waters are those in which the "quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 C.F.R. § 131.12(a)(2). High quality waters cannot be degraded unless a state after "intergovernmental coordination and public participation" determines that "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." 40 C.F.R. § 131.12(a)(2) (2008). Even if economic or social necessity for degradation is established, water quality cannot be lowered below that required "to protect existing uses fully." *Id*.

In Tennessee's EPA-approved antidegradation statement is a category of waters designated as Exceptional Tennessee Waters, which includes waters that support both aquatic life-based uses and recreation-based uses. Tenn. Comp. R. & Regs. ch. 1200-04-03-.06(4)(a)

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[1] The first provision of SB 631 has been deleted in its entirety by amendment but the requestor asked that this opinion nevertheless address the deleted provision.

[2] Tennessee no longer uses "tier" terminology for designating water quality. Tennessee does currently have a designation of "Exceptional Tennessee Waters." Tenn. Comp. R. & Regs. ch. 1200-4-3-.06(4) (June 2008 Revised). We have analyzed this provision of SB 631 in the context of its effect on waters that are "Exceptional Tennessee Waters."

(June 2008 Revised). TDEC maintains a list of Exceptional Tennessee Waters. Tenn. Comp. R. & Regs., ch. 1200-04-03-.06(4)(b) (June 2008 Revised). Currently, impaired waters that are on the §303(d) list can be considered Exceptional Tennessee Waters. For example, the Pigeon River, located in Cocke County, has three segments of the river on the §303(d) list for unknown toxicity, flow alteration, and color. However, two of those same segments of the Pigeon River are also considered Exceptional Tennessee Waters by virtue of the fact that the segments are habitat for the state endangered Tuckasegee Darter and because these segments are located in the Cherokee National Forest. Such high quality waters are afforded additional protections from degradation. Degrading such waters is prohibited unless an applicant can demonstrate to TDEC, after full satisfaction of intergovernmental and public participation provisions, that allowing degradation is "justified as a result of necessary economic or social development and will not interfere with or become injurious to any classified uses existing in such waters."[3] Tenn. Comp. R. & Regs. ch. 1200-04-03-.06(4)(c) (June 2008 Revised).

The first provision in Section 1 of SB 631 would alter the current antidegradation procedure in Tennessee and preclude any § 303(d) impaired waters from being designated as Exceptional Tennessee Waters. This provision would deny these waters the additional protections from degradation afforded to high quality waters. The inquiry is whether this provision of the bill would violate the CWA or 40 C.F.R. § 131.

The Sixth Circuit Court of Appeals recently addressed a very similar issue with respect to EPA's approval of the antidegradation provisions adopted by the Commonwealth of Kentucky. *Kentucky Waterway Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008) (petition for rehearing denied). The court upheld EPA's approval of Kentucky's antidegradation rules that categorically excluded §303(d) impaired waters from Tier II protections. Tier II is EPA's designation for high quality waters under the antidegradation statement in 40 C.F.R. §131.12(a)(2).

As provided in the federal rule, high quality waters are those in which the "quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 C.F.R. § 131.12(a)(2) (2008). EPA argued that because this regulation "requires Tier II protection only for waters whose quality supports *both* aquatic life-based uses *and* recreation-based uses, Kentucky may reasonably exclude bodies of water from Tier II protection if the water is impaired for any of those uses." *Id*. at 478 (emphasis supplied). The Sixth Circuit agreed with EPA that the "exclusion of 'impaired' waters from Tier II protection is consistent with the requirements of 40 C.F.R. § 131.12(a)(2)." *Id*. As the court concluded, "[i]mpaired waters do not even have the minimum quality level that is necessary to support their designated uses, let alone a quality that is better than necessary to support aquatic-life based uses, wildlife uses, *and* recreational uses. . . . Accordingly, we are not persuaded that the EPA's approval of Kentucky's exclusion of impaired waters from Tier II protection was arbitrary, capricious, or contrary to law." *Id*. at 481 (emphasis in original).

[3] TDEC's economic/social necessity determination may be challenged before the Tennessee Water Quality Control Board by third parties through a declaratory order proceeding, or by a permit applicant under Tenn. Code Ann. § 69-3-105(i).

Under the Sixth Circuit's ruling, if a listed impairment under § 303(d) prevents waters from supporting aquatic life-based uses or recreation-based uses, then those waters can be validly excluded from the antidegradation protection afforded high quality waters under 40 C.F.R. § 131.12(a)(2). In view of the *Kentucky Waterway Alliance* decision, it is the opinion of this Office that waters in Tennessee can be excluded from consideration as Exceptional Tennessee Waters if they have a listed § 303(d) impairment that prevents those waters from supporting aquatic life-based uses or recreation-based uses. Thus, the first provision in Section 1 of SB 631 would likely be found to be consistent with the CWA and the antidegradation provisions in 40 C.F.R. § 131.12(a)(2).

2. The second provision in Section 1 of SB 631 would add the following to Tenn. Code Ann. § 69-3-105:

> The general assembly hereby recognizes that in the application of water quality standards, publicly-funded projects are in the public interest. Where the board must make a finding of social and economic necessity related to degradation of any exceptional or tier 2 waters any degradation shall be presumed to be socially and economically necessary. The burden shall be on the opponent of such position to demonstrate by clear and convincing evidence that the degradation is not justified on the basis of social and economic necessity.[4]

This bill provision would change the procedure by which permit applicants seek to degrade an Exceptional Tennessee Water, which is a high quality water. The effect of this bill provision would be to establish, in a proceeding before the Tennessee Water Quality Control Board, a presumption of social and economic necessity when a permit applicant's project is publicly funded.[5] That presumption can only be overcome when someone who opposes the degradation of an Exceptional Tennessee Water establishes by clear and convincing evidence that degradation is not justified by social and economic necessity.

As noted, under 40 C.F.R. § 131.12(a)(2), high quality waters may only be degraded if a state after "intergovernmental coordination and public participation" determines that "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." In *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp.2d 732, 761 (S.D. W. Va. 2003), the court held that "[t]his standard, by its terms, is location-specific." The court in *Horinko* was considering EPA's approval of West Virginia's regulations that excluded from Tier II antidegradation review activities in high quality waters that were covered under a general discharge permit. *Id*. at 757. The court questioned whether review consistent with 40 C.F.R. § 131.12(a)(2) could be conducted by a state "prior to the identification and evaluation of specific discharges into specific waters." *Id*. at 762. The court concluded that no rationale was offered to explain "how, before the fact, the State could determine whether a given discharge was associated with 'important' economic or social

[4] As with the first provision in Section 1 of SB 631, we have analyzed this second provision in the context of its effect on waters that are "Exceptional Tennessee Waters."

[5] The bill establishes a presumption of both social and economic necessity for all publicly funded projects. Under 40 C.F.R.. § 131.12(a)(2), a state only has to determine that lowering water quality "is necessary to accommodate important economic *or* social development." (Emphasis supplied).

development or whether, in the particular area in which the affected waters are located, lowering water quality was 'necessary' for such development." *Id*. at 761. Thus, the court ruled that EPA's approval of West Virginia's antidegradation provision "was arbitrary and capricious." *Id*. at 762.

The analysis of 40 C.F.R. § 131.12(a)(2) in *Horinko* informs our review of the second provision in Section 1 of SB 631. By creating a presumption that all publicly funded projects meet the social or economic necessity standard, SB 631 removes from state antidegradation rules the federal requirement for location-specific determinations set forth in 40 C.F.R. §131.12(a)(2). In the bill, economic and social necessity is being presumed for all publicly funded projects before "the identification and evaluation of specific [projects in] specific waters." *Id*. at 762. The bill appears to presume that important economic and social development will always be associated with a project that is publicly funded. Even assuming this to be true, the bill offers no rationale to explain how public funding in and of itself also establishes that "in the particular area in which the affected waters are located, lowering water quality [is] necessary for such development." *Id*. at 761. Although *Horinko* was decided by a federal court outside the Sixth Circuit and therefore is not binding, it is this Office's opinion that the decision would be viewed as persuasive by courts in Tennessee. Thus, it is the opinion of this Office that under a *Horinko* analysis the second provision in Section 1 of SB 631 would likely be held to be inconsistent with the CWA and the location-specific antidegradation provisions in 40 C.F.R. § 131.12(a)(2).

We have also been informed that EPA has sent a letter to TDEC questioning whether the second provision in SB 631 is consistent with the intergovernmental coordination and public participation requirements of 40 C.F.R. § 131.12(a)(2). Letter from James D. Giattina, Director, Water Protection Division, EPA, to Paul L. Sloan, Deputy Commissioner, TDEC (April 14, 2009) (copy attached). The federal rule requires that a state make an economic/social necessity determination "*after* full satisfaction of the intergovernmental coordination and public participation" requirements. 40 C.F.R. § 131.12(a)(2) (2008) (emphasis supplied). EPA views SB 631 as providing for intergovernmental coordination and public participation only when an opponent to degradation demonstrates that lowering water quality is not justified by economic and social necessity.

We also think that this provision is problematic because it places upon the public and other government agencies the burden of overcoming the presumption of economic and social necessity. Moreover, that burden can be overcome only by clear and convincing evidence. Certainly nothing in 40 C.F.R. 131.12(a)(2) requires clear and convincing evidence either to establish or rebut economic or social necessity. It is this Office's opinion that this is inconsistent with the intent underlying 40 C.F.R. 131(a)(2) in having the state coordinate with other state and federal agencies and receive public input before making a determination of economic or social necessity.

In its letter to TDEC, EPA indicates that because the second provision in Section 1 of SB 631 does not appear to be consistent with the intergovernmental coordination and public participation requirements of 40 C.F.R. § 131.12(a)(2), it may not be approved by EPA. Giattina Ltr. at 2-3. As the *Kentucky Waterway Alliance* ruling makes clear, EPA's reasonable

interpretation of its own regulations and its approval/disapproval decisions regarding state water quality standards are given considerable deference by the federal courts.

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