

**TENNESSEE BOARD OF WATER QUALITY, OIL, AND GAS
THE NASHVILLE ROOM, THIRD FLOOR, WILLIAM R. SNODGRASS
TENNESSE TOWER
NASHVILLE, TENNESSEE**

Summary of Action on Agenda Items of the

October 15th, 2019

Meeting of the Tennessee Board of Water Quality, Oil and Gas

Members Present: James W. Cameron, Neal Whitten, Kevin Davis, Elaine Boyd, Monty C. Halcomb, Gary Bible **Members Phone-In:** John McClurkan, Charlie Johnson

Chair: James W. Cameron **Members Not Present:** Judy Manners, Frank McGinley Jr. Terry Wimberley
Technical Secretary: Jennifer Dodd

Introduction by Chairman James W. Cameron

Chairman Cameron welcomed the Board and roll call was conducted. Six members were identified present in the room, two members were identified as present over the phone. Quorum was declared after signing a resolution (Unanimous approval) indicating that while quorum was not physically present, but is participating by means of a telephone/video conference call at the Nashville location specified in the meeting notice. Enabling all of the Board members to hear each other and any comments made by parties or the public.

Video of the proceeding is available at: <https://www.tn.gov/environment/about-tdec/boards-and-commissions/board-tennessee-board-of-water-quality--oil-and-gas.html>

Agenda Item 2. Presentation of TN Open Records and Open Meetings Training

The video which was required to watch by the Board lasted 12:41 minutes. This video is available at:

<https://www.youtube.com/watch?v=Q0nOznrQrEE>

Agenda Item 3. Presentation of Meeting Minutes

Before reviewing the minutes of last meeting, Chairman Cameron introduced the newest Board member Neal Whitten, who will represent manufacturing interests. Mr. Whitten replaces Anthony Robinson, the former member who moved out of state.

Chairman Cameron asked the Board to review the meeting minutes from April 16th, 2019.

Motion to approve: Gary Bible

Second: Kevin Davis

Vote: Unanimous approval

The minutes were approved.

Agenda Item 4. Semi-Annual Public Comment Session

The Chairman recognized Anthony Wheeler for a public comment

Anthony Wheeler: Thank you for letting me speak. My name is Anthony Wheeler. I live at 1831 Lewis Mine Road on Signal Mountain. I am a retired scientist engineer and I have a property that is involved in the Sewanic coal seam. I have a property that I bought in 1987 that had 7 coal mines on it. And I had a mediation program conducted on it by the federal government back in 1990. Where they did primary remediation of excavate and packing the openings with limestone. 30 years later, these remediation's are beginning to fail. We are having a rise in pH on these sites and TDEC has been out though the efforts of Trevor Martin to do some remediation on some of these sites. The primary issue I am here to talk about, is that a developer has now bought a piece of property directly above mine and he is proposing a 44,000sq. ft. grocery store with a 90,000 sq. ft. parking lot, on a 7 acre site that is directly over the coal seam and we believe that there are cavities underneath the coal seam. The site will be graded, 20ft will be taken off the top of the mountain. This is in the whiple shale and we have serious concerns about this issue because it effects the entire watershed, the Middle Creek watershed, which leads to Rainbow Lake and down to the Tennessee River. At present time from my reading I can find no regulation over coal seam hazards and the developer denying any hazard from his development. We have records and evidence to prove differently but our town council has decided allowed the rezoning to occur while waiting for any scientific determination of the hazards. In other words, they are going to shoot before and ask questions later. I am here to ask the Board to consider what kind of regulations can be executed over coal seam hazards. Because with the change in the zoning laws, the collapse of the coal industry, and the extreme pressures the development is creating in Signal Mountain, and in Hamilton County. We find ourselves in a situation where the town council and the planning commission have decided they are not concerned with health and human safety, but are more concerned with development. In fact the

planning commission basically passed the buck on the health and human hazard and referred it to TDEC. When the documents I provided to the planning commission were from TDEC. So we find ourselves now with a political football using TDEC as the bouncing board for the issue. I am anxious to promote legislation covering this issue and would hope that TDEC would corporate with us in trying to get some control over these kinds of developments. The site that we are talking about is going to include a gas station, they are going to take off 20ft of the shale, or the sandstone layer, and at that point we have substances that have been filled still occurring under the site. So we are extremely concerned with a gas station instillation with storage tanks, suffering a substance leaking and putting gasoline or other volatiles into a 20 million ton coal seam. And that is what exists in the Sewanee coal seam on Signal Mountain according to the 1962 survey. We also have maps that indicate the mining in the area and the developer in the town chose to ignore that information and proceeding with this rezoning. We are now left with a position where we either litigate or recall and I don't that's a proper situation for a community to find itself in. This situation covers Signal Mountain, Walden, and the County of Hamilton. Which also includes issues with Sequatchie County. Since the Sewanee seam extends all the way up the state and into other states I view this as an issue that has to be regulated rather than remediated. Thank you for your consideration.

Chairman Cameron: Thank you Mr. Wheeler. Does anyone have any questions for Mr. Wheeler?

Kevin Davis: How far do you live from the site?

Mr. Wheeler: My home is less than 2,000 yards from the development. The TDEC remediation that was done in April on an open air shaft sits between the development and my property. There is a 160ft. drop between the development and my home. So its an extremely uneven terrain, ..., the bedrock is only 2ft. below the surface of the soils. I also have a presentation up on YouTube where I explain the geology, I have presented this to the public in a general way and we're still dealing with issues of people not understanding what the hazard represents. My concern is the coal seam fire, and with 20 million tons of coal and gasoline in the shale, I think the hazard up at an extreme rate.

Neal Whitten: Mr. Wheeler have you been in contact with TDEC Underground Storage Tank Division for discussion of your concerns there?

Mr. Wheeler: What I have done is reviewed the various regulations and I do not see anything that addresses coal seams specifically. No I have not been in contact with the tank people. The town has decided to approve the zoning and then do the testing. I see this as a game of shoot first and ask questions later. At this point I'm not a lawyer and I'm a long

time environmentalist, I know the hazard but we are looking for legal assistance, hence the presence of Mr. Paddock in this effort and as we go through the legislation we will find out. I don't know how I can watch the permitting process to know what is going on. That's part of the issue, Hamilton County has not been very open to the issues we are dealing with.

Gary Bible: You mentioned you have lightare imagery in the area they are talking about developing. Have you been able to see, are there any closed depressions over those sites?

Mr. Wheeler: The depression they closed in early June was right on the property line between that development and mine. That's the only way it was identified. Later lightare studies have shown 9 other active leaks in the upper part of the middle creek watershed.

Mr. Bible: Thank you

Chairman Cameron: Thank you Mr. Wheeler. Mr. Paddock, welcome again.

Brian Paddock: Thank you Mr. Chairman, members of the Board. I am Brian Paddock, I am an attorney, licensed in Tennessee, and I practice from a home office in Jackson County. I am the former legal chair for the Sierra Club chapter in Tennessee. I have taught environmental law so I usually am watching policy and operational issues at TDEC in particular in respect to water. I would like to address two topics very briefly. First is enforcement. I was really surprised when the agenda for this meeting came out and there was no mention of the fact that there had been a controllers general report on the difficulties in enforcement and the efficiencies in enforcement in TDEC. Which apparently occurs the divisions, and documented the fact that there were no standard procedures, no standard deadlines, no standards for record keeping and so forth. That was reported in the Tennessean, though many of you might be from different areas and may have not seen it. The controllers report on this is still available on their website. It is interesting reading. It also touches on one other concern of public health, which always touches on water quality in some way sooner or later. That is the Departments approach to the enforcement of the lead paint abatement. The difficulty with the controllers report and the enforcement of TDEC and the Division of Water Resources is uneven to say the least, this leads people to use Section 118a of the Statute. The statute which creates this Board, those 118a's which you may be aware complaints are first go to the...(background telephone noise interruption)

Paula Mitchell: If those on the phone we are hearing background noise, if you could please mute, that will be helpful, thank you.

Mr. Paddock: Thank you, as you will hear later from Mr. Parker. Let me go through the 118a thing real quickly. The 118a means that a written complaint of water pollution is filled with

the department, the department has 60 days to respond, and to give a written response to what it finds via investigation and what it intends to do about it. And then to a letter determination on what they've found, and what they are going to do, or none of the above. That determination is actually appealable to this Board. The first stop is an administrative law judge, who holds a contested case trial, and those can take a couple of days, as I've watched them with taking of evidence in an ordinary court, with a court reporter and live testimony under oath as well as documents admitted from both sides of the issue, and the department of council has acts to defend the department in these proceedings, then after the administrative law judge's decision can go on up to the Board on appeal. The Board may do that under the statute, and say we want to look at that one again, and see what the ALJ decided and think about it. Or it can be done by notice of appeal, and there is a time limit on that, which has not yet been reached yet on that case, and Mr. Parker will describe to you. The difficulty with this whole thing, after it goes to the Board, the Board's decision can go to chancery court in Nashville and at that point, the Board becomes the respondent, the Board is represented by the Attorney General, not TDEC council and so the whole thing shifts gears and you all find yourself, in a litigation you never bargained for. The difficulty with this is, we need to nip it in the bud. We need to have effective enforcement at the Environmental Field Office level, we need to reverse a historical error that was made by an earlier commissioner several years ago, when he essentially advised the division of water resources staff that the clients of this agency were the ones that bought permits and that he wasn't very interested in enforcement, you've seen a rapid falling off and statistical reports from the Tennessee Clean Water Network, and now this review by the controller's office. The Board needs to consult with the commissioner on how to keep things off its doorstep quite frankly, and how to make enforcement honest, effective, and responsive enough that you have a situation where these cases don't get filled as 118a's and start this whole possible chain of events where this lands on your doorstep and where you have to maybe have a special called meeting and take a better part of a day to review an administrative law judge's decision and the record that underlies it. The second thing I would address is you'll see later on your agenda that the Aquatic Resource Alteration Permit rules were changed with the approval of this Board. Those are in effect now but the joint governments operations committee declined to approve those. That does not effect the effectiveness of the rule but it casts a cloud over it. These ARAP rules are interlinked and don't require EPA approval but they are linked together with the water quality standards and the anti-degradation requirements in the water quality standards. Some of you have heard me talk about this before but basically, and my colleagues in the environmental community think that many of the ARAP rules were in fact a significant improvement in terms of the clarity and precision of rules about processing ARAP permit applications and about the standards to be applied in accepting or rejecting the idea of a permit. But there is one place where these rules are linked to anti-degradation and the approval of anti-degradation for the water quality standards and that's one of the reasons that those rules have not been set to

EPA standards which they must approve. They have water quality standards under the tri-annual review, each change in those or each iteration with or without changes has to be approved by EPA at the region 4 level in Atlanta and that includes anti-degradation. That material has not been sent to region 4, we have been in contact with them frequently, and it looks to us that its because of this issue of the ARAP rules. And the ARAP rules have one basic problem, and some of you may have heard about this before. It basically says that if you offer what's called in system mitigation which is some extent, mitigation that simply occurs within the same major watershed that you can avoid the anti-degradation of determination. That is not consistent in my view of the Federal Clean Water Act, which specifically provides for anti-degradation requirements, and for the EPA regulations. That issue has not been entertained yet before EPA and Region 4. If for some reason this Board feels it needs to, I would ask you to reconsider that aspect of the ARAP rules and reopen that to public discussion because it seems to me that we are creating a problem. And here is what that problem is on the ground, some ecosystems services for a wetland or a stream can be created off site, can be handled off site. But there are certain ecosystems services that are site specific. If a wetland or stream is an important part of storm water management. That can't be done 20 miles away. That has to occur where the storm water occurs which is in that urban or suburban area in most cases. And storm water as you know is an increasing problem in Tennessee. And as we see more and more of these very heavy precipitation events. You don't have to believe in climate change to know, you just read the statistics to see how many 500 year floods we've had, which is a 1 in 500 chance every year, compared to previous experiences. The loss of these exceptional Tennessee waters by mitigation elsewhere is going to exacerbate that problem and the ability of the municipalities and local governments which these existing exceptional Tennessee water streams and wetlands occur, to handle their storm water in their communities. That's a reason why we should really reconsider this issue about whether mitigation, and particularly mitigation that does not handle all the ecosystem services is allowed to operate and bypass anti-degradation. And just one moment on what anti-degradation is. It is a determination that there is a social and economic necessity for an activity to occur at a given site. Says something like its important that we do this for the good of this community for its notwithstanding it may have adverse environmental/water quality impacts but without it we are hurt much. And that is a complicated decision to make because it involves a lot of human factors, a lot of environmental factors, and a lot of economic factors. There's a lot of literature on that, and quite frankly, the people who have to decide social and economic necessity to me are in a difficult situation particularly in an era of high speed development in many areas and infilled development in urban areas. To bypass that is to bypass tests that are built into the clean water act that basically says, look at this site and decide, is there no where else you can do this? Is there no other way you can do this? And some of that is built into the ARAP regulations but not explicitly the social and economic determination. What is built into the regulations is now at both the water quality standards

level and at the ARAP standards is if you can do something that deals with some of the environmental impacts elsewhere then you can bypass that. And that simply is a problem. This also applies to discharge situations as well as to hydrological modifications. So I appreciate the Boards time to becoming aware of this, and it seems to me that this is a problem and in our current era we need to do it. I really don't want to look back in 10 years where all our wetlands have disappeared for the most part in urban and suburban areas. And all of our streams are rock lined channels. That's what's happening, if you look at the channel of storm water that is now coming off of urban areas and going into surface waters in the adjacent areas, it is creating such a flush and such a flow that it is eroding the banks, changing the contours of the stream, it is overwhelming the stream in terms of its capacity for volume. And more and more we are permit applications say, well let's just go put in 200 or 400 ft. of big rock riprap and lets turn this into a rock lined channel at least on one side. And that is not the kind of open water streams we want in Tennessee and we need to deal with that at the causal level which is this big flush of storm water, and that means storm water management on site and through the wetlands and receiving stream that can take it in smaller amounts earlier on. Thank you.

Chairman Cameron: Thank you Mr. Paddock. Alright I think the next item on our agenda, Mr. Parker is enforcement update. Which is appropriate considering Mr. Paddock's comments.

Agenda Item 5. OGC – Enforcement Update

Patrick Parker: I think we started this update in response to comments about enforcement from the Board and asking the division and OGC to report out to you with what's happened since the last one. I can do that today. Since the April 16th, 2019 Board meeting, the Division of Water Resources has issued 29 new enforcement orders within this Boards jurisdiction. 13 of those are Drinking Water orders, 16 are NPDES permit violations or lack of permit and/or ARAP the Aquatic Resource Alteration Permit which Mr. Paddock also mentioned. 16 of those orders have become final, including 6 drinking water and 10 NPDES/ARAP orders. There have been 2 new permittee appeals and no new 3rd party permit appeals. Our database indicates 16 pending permit appeals, a number of those permit appeals are stay pending rule making that the division is going through at this time. With a goal of reaching a consensus on the rule which would resolve the permit appeals. The only initial order which is up next for you, which is Ms. Durman's case, who couldn't be here today because she is in training outside of Nashville. I'd be happy to answer any questions, I don't have specific knowledge of all the enforcement orders, I've reviewed some of them.

Chairman Cameron: Do any of the members have any questions for Mr. Parker in regards to enforcement? Any of our members on the phone have any questions?

Frank McGinley: No, Mr. Chairman

Chairman Cameron: Alright, thank you. Let's move onto the Twin K order Mr. Parker.

Agenda Item 6. WPC 18-0065 Twin K Initial Order Dismissing Appeal

Mr. Parker: I believe in the email sent to the board you got a copy of the order that was issued by a Judge Hadfield. Ms. Durman tried this case and the complaint, a 118a appeal which Mr. Paddock had described to you where the department received complaint, which was sent to the commissioner, we investigate it, we do what we are going to do, and if they don't like determination they can appeal it. An Administrative Law Judge hears these matters, including the enforcement cases I just talked about. Once that order is rendered from that trial the Board has the opportunity as do both of the parties, at its next scheduled meeting or the parties get 30 days, which hasn't happened yet on this order, so the appeal period has not yet run. But the order dismissed the complaints case and what the Board has the opportunity to do today is if you wish to take this case up and hear it on appeal, which would be made on the record below, you have the opportunity to do that pursuant to the water quality control act. So that's what the Board decision needs to be today, to take this up or not take it up. The department is not planning to appeal and Ms. Durman is not aware, she's been in communication with Shelby Ward who is the plaintiff's attorney, and she has not responded if she is going to appeal or not.

Chairman Cameron: This is the one where the concrete trucks were being washed out and into a creek on the petitioner's property, is that correct?

Mr. Parker: I believe that is correct, I read the order, but I'm not intimately familiar with the case.

Chairman Cameron: There was a question raised by one of our members regarding some language in paragraph 17 of this order that is stated in a negative manor which made it a little confusing to us.

Mr. Parker: That's a typographical error and I am not sure what Ms. Durman wants to do about that, but it was brought to her attention today. She might want to address that to the judge and see if they want to make a typographical change to that but that doesn't have any bearing on the decision.

Chairman Cameron: Is there any questions or further discussion by other members of the Board regarding this initial order? How do you feel regarding letting the order stand, or entertaining the order for further review.

Mr. Whitten: After reading the order, I think we should consider letting it stand. I move to let this stand.

Motion: Neal Whitten: I move we let this stand pending any official appeal.

Second: Elaine Boyd

Chairman Cameron: Is there any further discussion?

Vote: Unanimous approval

Agenda Item 7. DWR Update – Rule Amendment 0400-40-03/04

Emily Urban: Thank you very much Board members. I'm Emily Urban, I am assistant general counsel in the Office of General Counsel for TDEC. I am here to give you an update on the status of the Aquatic Resource Alteration Permit rules. That were heard by the Government Operations committees of the Tennessee General Assembly, that is part of the statutory review process, those committees will hear the rule during the 90 day period that the rule are posted on the secretary of states website, before it takes effect. During the discussion of the rules, the Senate Government Operations committee had a tie vote which meant that the rules received no recommendation and so in essence that meant that the Senate approved the rules not terminating on June 30th of next year. The House Government Operations Committee voted to give the rules a negative recommendation, so that means when the bill that continues all rules that were promulgated during last calendar year will not terminate June 30th and will stay in effect and there would be an amendment to that bill to the ARAP rules actually terminating on June 30th. So what the Boards vote did, was not to prevent the rules from taking effect, they did take effect, but what happened, is that amendment would be presented to the entire general assembly and they would vote on that. And if they voted to add the amendment to the bill then the ARAP rules would terminate June 30th. There's been a recent development, in that the rules have been placed on the Government Operations committee agenda tomorrow at 1pm in Cordell Hall. And on the agenda it stated that the House Government Operations committee would be taking up the matter of reconsidering their action of the negative recommendation. We will definitely update the Board on what the results of the discussion tomorrow are. We understand there will likely be a motion to take up the matter so we are hopeful that with more information they will reconsider their action and either again give the rules either a

positive recommendation or no recommendation. Either of which would result in the rules continuing in effect. That's a little complicated so I am happy to answer any questions.

Chairman Cameron: Why did the House Government Operations Committee give a negative vote to the rules?

Ms. Urban: Our understanding, based on the discussion in the committee, that one of the members raised some issues with hydrologic determinations. Which were not subject to the rules but he had some concerns with the determination if a waterbody is a stream or not. And he has had some personal experience with those type of issues, so I believe he wanted to get his concerns on the record. We assured him that the ARAP rules did not have anything to do with that. I think that his concerns raised some questions in other members minds that hadn't occurred to them before the meeting, and they followed his line of thinking and determined to vote against the rules. There were also concerns raised about flooding, and issues with quality of wetlands. The staff Jonathon Burr, Patrick Parker, and myself were testifying before the committee. We assured the members that looking at loss of resources and the appropriate mitigation would address the concern the member raised about a high quality and low quality wetland. With the flooding issues our staff have been working on a new updated guidance on what community members can do when they have concerns about flooding, when they need to remove articles from streams that may be causing some blockage, and when they need a permit and when they don't. So our understanding is, with speaking with members that those concerns have been elevated with the ARAP rules themselves. The discussion was not as much about the amendments themselves but other water issues that members had concerns with.

Chairman Cameron: Do any of the members have any questions? Thank you Ms. Urban.

Agenda Item 8. DWR Update – Statutory changes to the TWQCA

Emily Urban: I think the most significant change that was made in water law and change in the Water Quality Control Act was legislation sponsored by Chairman Sutherland, Senator Stevens, and Representative Marsh. The legislation addressed ARAPs again, and was relative to public transportation projects, so you might remember that when the ARAP rules were promulgated there was a provision that applied to public transportation projects, road projects where it was stated that the alternatives analysis did not need to include road locations. So the legislatures moved to sponsor legislation that language into the statute. So it was amended so that if a permit was required for a public transportation project by a federal, state, or local government the alternatives analysis required does not need to include alternative road locations but must include other measures to avoid and minimize impacts to resource value. Which would be design alternatives that would

mitigate some of the impacts to resource values by the project. The language only applies to alternative locations.

Chairman Cameron: This Board's concern that TDOT be subject to the same rules as everybody else has been changed in the legislature?

Ms. Urban: Yes Sir.

Chairman Cameron: Any other questions? None. Thank you very much.

*John McClurkan asked if any votes we make need to be roll call since there isn't a physical quorum, Patrick Parker answered No.

Emily Urban: There were issues in primarily Hamilton County with persons requesting septic permits in areas where sewer service was technically available and there was sewer infrastructure but there was a moratorium in place on further connections. So legislation was sponsored by Representative Hazelwood, Senator Gardenhigher to prohibit the Commissioner from denying the issuance of a permit solely because there was a moratorium on additional sewer connections so we asked the sponsors to be sure that the environmental concerns were addressed. The permit would not be granted unless it met all the requirements in the rules and statutes and also that the permit applicant had to provide documentation with an application that the moratorium is actually in place. So that is a change to the law in that we were able to grant waivers in some instances under those situations but this actually clearly states in the law that if there is a moratorium in place, we can not deny a permit application solely because sewer is technically available. Because they determined that it really isn't available if there is a moratorium. So that was another change that I thought would be of interest to the Board. Thank you.

Mr. Parker: I don't believe the law requires a roll call vote but for the sake of clarity on the one motion the Board has voted on it might be best to do a roll call vote.

Chairman Cameron: That would be the initial order. Mr. Canada can you call for a roll call vote. The motion that was made a seconded was to let the order stand.

Mr. Canada:

Charlie Johnson: Yea

Neal Whitten: Yea

Kevin Davis: Yea

Elaine Boyd: Yea

John McClurkan: Yea

Monty Halcomb: Yea

James Cameron: Yea

Gary Bible: Yea

Mr. Cameron: Is there any old business? None.

Mr. Whitten: Rule making status update on the NPDES rule and SOP rule update? If you could give us an update on where that stands?

Mr. Parker: Where that stands now, we have received the official public comments, we have held some listening sessions both on the reuse component and the land application component of those rule makings. We are working with stakeholders to resolve any issues that we might have. I don't know if we have an exact time frame but we anticipate that after the first of the year we will bring those to the Board for consideration of the rule making.

Elaine Boyd: I just want to make everyone aware, one of the recommendations that came out of TNH2O was to participate in things that raise awareness and outreach and education and the value of water. And so TDEC is participating this year in 'Imagine a Day Without Water' which is October 23. I encourage my fellow Board members to participate as well. It is a national campaign and this is actually the 5th year of this campaign by the US Water Alliance just to awareness among the public about the value of water. So you will see some social media posts, some things in the paper, we also have a proclamation from the Governor for Imagine a Day Without Water. And if you do participate in social media we are asking people to use the hashtag #ValueWaterTN.

Chairman Cameron: Okay, do I hear a motion to adjourn?

Motion: Mr. Davis – Motion to adjourn.

Second: Mr. Bible

Vote: Unanimous approval

We are adjourned.

SUBMITTED.

Jennifer Dodd
Technical Secretary

Date

APPROVED BY THE TENNESSEE BOARD OF WATER QUALITY, OIL AND GAS

James W. Cameron, Chair
Tennessee Board of Water Quality, Oil and Gas

Date