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January 6, 2021

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**RE: TATE MCNEILLY V. TENNESSEE DEPARTMENT OF ENVIRONMENT AND
CONSERVATION, APD Case No. 04.30-202563J**

Enclosed is an *Initial Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL & GAS

IN THE MATTER OF:

TATE MCNEILLY,
Petitioner,

v.

VOLUNTEER SAND & GRAVEL, LLC,
Intervenor,

and

**TENNESSEE DEPARTMENT OF
ENVIRONMENT AND
CONSERVATION,**
Respondent.

**APD Case No. 04.30-202563J
TDEC Case No. WPC20-0070**

INITIAL ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter comes before Administrative Judge Claudia Padfield upon VOLUNTEER SAND & GRAVEL, LLC’S MOTION FOR SUMMARY JUDGMENT filed on December 21, 2020 (“MOTION FOR SUMMARY JUDGMENT”). Intervenor also filed an accompanying Memorandum of Law, Statement of Material Facts, and three exhibits. PETITIONER’S RESPONSE IN OPPOSITION TO VOLUNTEER SAND & GRAVEL, LLC’S MOTION FOR SUMMARY JUDGMENT was filed on December 29, 2020. Petitioner also filed a response to the Statement of Material Facts and their own Statement of Additional Material Facts. THE TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION’S REPLY IN SUPPORT OF INTERVENOR’S MOTION FOR SUMMARY JUDGMENT was filed on January 4, 2021. TDEC also filed replies to Petitioner’s Statement of Additional Material Facts, in support of the Motion, and in response to Intervenor’s Statement of Material Facts. Intervenor filed REPLY BRIEF IN FURTHER SUPPORT OF VOLUNTEER SAND & GRAVEL, LLC’S MOTION FOR SUMMARY JUDGMENT on January 4, 2021. Intervenor also filed a response to Petitioner’s Statement of Additional Material Facts.

Pursuant to TENN. COMP. R. & REG. 1360-04-01-.09(3), “a party may request oral argument on the motion; however, a brief memorandum of law submitted with the motion is preferable to oral argument.” Per the PREHEARING ORDER issued by Judge Rob Wilson on October 30, 2020, the parties have fourteen days to file responses on dispositive motions. All parties have filed timely responses, and no party has requested oral arguments. The motion is deemed to be submitted for disposition.

TDEC issued NPDES Permit TN0082236 to Intervenor on July 1, 2020. Petitioner timely filed the underlying petition on July 30, 2020, pursuant to TENN. CODE ANN. § 69-3-105(i). Said statute allows a permit applicant or “any aggrieved person” to file a petition.

Petitioner is a Tennessee citizen and a member of the Tate family, which owns the property on the Duck River in Humphreys County adjacent to, and immediately downstream from, Intervenor’s operations. Intervenor was granted permission by Respondent to discharge treated wastewater and storm water into an unnamed tributary to the Duck River in Hurricane Mills, Tennessee. Respondent made a preliminary finding that the proposed discharge would cause *de minimis* degradation to receiving waters and that the treatment structures would exceed the Division of Water Resources’ preferred design of a 10-year/24-hour storm event. Petitioner alleges in the petition that the mine “will cause future impacts detrimental to quality of the north and west wetlands that are located on the Mine property, and to the Duck River.” PETITION FOR APPEAL OF COMMISSIONER’S ISSUANCE OF NPDES PERMIT TN0082236 TO VOLUNTEER SAND AND GRAVEL, LLC, HUMPHREYS COUNTY, p. 2, ¶ 6.

Intervenor served interrogatories and requests for production of documents to Petitioner on September 4, 2020. Petitioner provided responses and a supplement to the responses. Petitioner also submitted to a deposition during the course of discovery. Petitioner is not the owner of the Tate family property, as his grandmother, Margaret Tate, is the sole owner. Petitioner does not

live on the property nor derive any income from the property. The Tate family property is used for farming and hunting. As a family member, Petitioner hikes and observes wildlife on the property. “Petitioner has an interest in protecting and maintaining the aesthetic and recreational benefits of the Tate family property” and “the property has deep emotional meaning for Petitioner and his family.” MOTION FOR SUMMARY JUDGMENT, EXHIBIT A, p. 8. Petitioner did not alter or amend this answer in the supplementary responses. In his deposition, Petitioner stated he also has an interest in preserving the aesthetic value and current uses of the land.

Petitioner asserts that “his interests will be adversely impacted by the direct, secondary, and cumulative impacts of the discharge **authorized by** the NPDES permit.” MOTION FOR SUMMARY JUDGMENT, EXHIBIT B, p. 1 (emphasis added).

Summary judgment is appropriate when the court determines there is no issue of material fact to consider at trial. The goal of summary judgment is to avoid the time and expense of unnecessary trials. The parties have filed fifteen documents relating to this motion. Intervenor has clearly articulated the legal standards for summary judgment, standing, and burden of proof under the UAPA, and they will not be reiterated herein. This tribunal agrees with Respondent in that the zone of interests protected by the Tennessee Water Quality Control Act (the “TWQCA”) must also be considered. All parties have complied with the requirements as specified in TENN. R. CIV. P. 56.

Petitioner has filed a lengthy and detailed response to Intervenor’s Statement of Material Facts in which he disputes many of the listed facts. Petitioner has also filed a Statement of Additional Material Facts. However, to even file a petition, Petitioner must be “an aggrieved party” under TENN. CODE ANN. § 69-3-105(i). To be an aggrieved person, a petitioner must demonstrate a “special interest or injury beyond their concern as ‘public spirited citizens’.” *De Selm v. Tenn. Peace Officers Standards and Training Comm’n*, No. M200901525COAR3CV,

2010 WL 3959327, at *24 (TENN. CT. APP. Oct. 8, 2010). Petitioner must have standing under the TWQCA to the extent that he can articulate an injury based on his right to unpolluted waters.

Petitioner has cited his right under the Tennessee Constitution to hunt but has failed to show how the activities allowed under the Permit or Intervenor's alleged violation of operation with inadequate water treatment would violate his right to hunt. While Petitioner has cited various cases relating to standing in other environment cases, those cases are distinguishable from the current case in that standing in those cases was based on water-based activities such as canoeing, boating, or swimming.

Petitioner has not shown that he will suffer harm to any water-quality based activities with which he had previously been engaged. Despite stating that he will be harmed by the authorized activity under the Permit, Petitioner has not articulated *how* the permitted activities under the Permit will injure any cognizable interest under the TWQCA. Petitioner has stated how he will be harmed from violations of the Permit, but those alleged violations are not grounds to rescind the Permit or to file the instant petition. The alleged injuries are not fairly traceable to the Permit. Petitioner has not articulated an interest in water quality in the Duck River that differs from an interest shared in common with the general public. Petitioner has no distinct interest in water quality, nor has he articulated how his recreational activities would be harmed by the discharges authorized by the Permit.

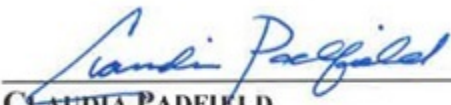
Many of the disputed facts are only at issue if Petitioner has standing to bring the Petition. As it is found that Petitioner lacks standing, the other issues will not be addressed.

There is no genuine issue of material fact that Petitioner lacks standing to bring the Petition. For good cause shown, in support by Respondent and in opposition by Petitioner, Intervenor's MOTION FOR SUMMARY JUDGMENT is well taken and is hereby **GRANTED**. The NOTICE OF HEARING filed on August 4, 2020, which contains PETITION FOR APPEAL OF COMMISSIONER'S

ISSUANCE OF NPDES PERMIT TN0082236 TO VOLUNTEER SAND AND GRAVEL, LLC, HUMPHREYS COUNTY is hereby **DISMISSED**. The trial scheduled for March 2-5, 2021, is hereby **CANCELLED** and shall be removed from the docket.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **6th day of January, 2021**.



CLAUDIA PADFIELD
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **6th day of January, 2021**.



STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

NOTICE OF FILING PROCEDURES

Due to the COVID-19 pandemic, APD has changed its filing procedures. Until further notice, filings should be made by **email** to APD.Filings@tn.gov or by **facsimile** to 615-741-4472. Paper filings should only be made by mail if a litigant has no access to either email or facsimile. If you are filing by email, documents should be saved in PDF format prior to filing. Each document to be filed must be a separate PDF. Only one filing method should be used. Please name PDFs for filing in the following format:

“APD CASE NUMBER YOUR NAME ABBREVIATED NAME OF DOCUMENT BEING
FILED AGENCY NAME”

NOTICE OF APPEAL PROCEDURES

REVIEW OF INITIAL ORDER

The Administrative Judge's decision in your case **BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL & GAS (the Board)**, called an Initial Order, was entered on **January 6, 2021**. The Initial Order is not a Final Order but shall become a Final Order unless:

1. **A Party Files a Petition for Reconsideration of the Initial Order:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Initial Order, which is no later than **January 21, 2021**. A new 30 day period for the filing of an appeal to the Board (as set forth in paragraph (2), below) starts to run from the entry date of an order disposing of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied you may file an appeal. Such an Appeal must be **received** by the APD no later than 30 days after the date of denial of the Petition. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **A Party Files an Appeal of the Initial Order and/or Other Earlier Orders:** You may appeal the decision, together with any earlier order issued by the Administrative Judge you specifically choose to appeal, to the Board. Mail to the APD a document that includes your name and the above APD case number, and states that you want to appeal the decision to the Board, specifying any earlier order(s) issued by the Administrative Judge that you also want to appeal, along with the specific reasons for your appeal. The APD must **receive** your written Appeal no later than 30 days after the entry of the Initial Order¹, which is no later than **February 5, 2021**. The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.
3. **The Board Decides to Review the Initial Order:** In addition, the Board may give written notice of its intent to review the Initial Order, within 15 days after entry of the Initial Order.

If either of the actions set forth in paragraphs (2) or (3) above occurs prior to the Initial Order becoming a Final Order, there is no Final Order until the Board renders a Final Order affirming, modifying, remanding, or vacating the administrative judge's Initial Order.

If none of the actions in paragraphs (1), (2), or (3) above are taken, then the Initial Order will become a Final Order. **In that event, YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER.**

¹ See TENN. CODE ANN. §§ 68-201-108 (Air Pollution Control Board); 68-211-113, 68-212-113, 68-212-215, 68-215-115, 68-215-119 (Underground Storage Tanks and Solid Waste Disposal Control Board); TENN. CODE ANN. §§ 60-1-401, 69-3-110, 68-221-714 (Board of Water Quality, Oil & Gas).

NOTICE OF APPEAL PROCEDURES

STAY

In addition, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Initial Order. A Petition for a stay must be **received** by the APD within 7 days of the date of entry of the Initial Order, which is no later than **January 13, 2021**. See TENN. CODE ANN. § 4-5-316.

REVIEW OF A FINAL ORDER

1. **A Party may file a Petition for Reconsideration of the Final Order:** When an Initial Order becomes a Final Order, a party may file a Petition asking for reconsideration of the Final Order. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the Final Order is incorrect. If the Initial Order became a Final Order without an Appeal being filed, and without the Board deciding to modify or overturn the Initial Order, the Administrative Judge will consider the Petition. If the Board rendered a Final Order, the Board will consider the Petition. The APD must receive your written Petition for Reconsideration no later than 15 days after: (a) the issuance of a Final Order by the Board; or (b) the date the Initial Order becomes a Final Order. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing the Final Order will be adjusted. If no action is taken within 20 days of filing of the Petition, it is deemed denied. See TENN. CODE ANN. § 4-5-317.
2. **A Party Files an Appeal of the Final Order:** A person who is aggrieved by a Final Order in a contested case may seek judicial review of the Final Order by filing a Petition for Review “in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person’s discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County,” within 60 days of (a) the date of entry of a Final Order; or (b) the date the Initial Order becomes a Final Order. See Tenn. Code Ann. § 4-5-322. The filing of a Petition for Reconsideration is not required before appealing. See Tenn. Code Ann. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. See Tenn. Code Ann. §§ 4-5-322 and 4-5-317.
3. **A Party may request a stay of the Final Order:** A party may file a Petition asking for a stay that will delay the effectiveness of the Final Order. If the Initial Order became a Final Order without an Appeal being filed, and without the Board deciding to modify or overturn the Initial Order, the Administrative Judge will consider the Petition. If the Board rendered a Final Order, the Board will consider the Petition. A Petition for a stay of a Final Order must be received by the APD within 7 days after the Initial Order becomes a Final Order. See Tenn. Code Ann. § 4-5-316.

FILING

To file documents with the Administrative Procedures Division, use this address:

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