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December 30, 2020

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**RE: TATE MCNEILLY V. TENNESSEE DEPARTMENT OF ENVIRONMENT AND
CONSERVATION, APD Case No. 04.30-202742J**

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, INC.,
Intervenor,

and

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

APD Case No. 04.30-202742J

INITIAL ORDER ON MOTION TO DISMISS

This matter comes before Administrative Judge Claudia Padfield, assigned by the Secretary of State, Administrative Procedures Division, and sitting on behalf of the Tennessee Board of Water Quality, Oil and Gas, upon a Petition for Appeal of Commissioner's Determination on Formal Complaint pursuant to TENN. CODE ANN. § 69-3-118(a) filed by Petitioner, Tate McNeilly, regarding Intervenor, Volunteer Sand and Gravel, LLC, Humphreys County ("Volunteer") and Respondent, the State of Tennessee, Department of Environment and Conservation ("TDEC"). The matter has not been set for a hearing, and no scheduling order has been issued.

On September 8, 2020, Respondent filed MOTION TO DISMISS and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS. Petitioner filed RESPONSE MEMORANDUM OF PETITIONER TATE MCNEILLY IN OPPOSITION OF RESPONDENT'S MOTION TO DISMISS on September 15, 2020. Intervenor filed VOLUNTEER SAND & GRAVEL, LLC'S BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS on September 21, 2020. TDEC filed REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS on September 22, 2020. After the case was transferred to be heard by Judge Padfield, an ORDER SETTING PRE-HEARING CONFERENCE was issued on November 25, 2020.

During the PRE-HEARING CONFERENCE held on December 10, 2020, Petitioner was represented by attorneys Laura Heusel, J.W. Luna, and B. Hart Knight. Intervenor, Volunteer Sand and Gravel, LLC, was represented by attorneys Kathryn Grundy and Bill Penny. TDEC was represented by Stephanie Durman and Katherine Barnes.

As basis for the motion, TDEC argues the Board of Water Quality, Oil and Gas lacks subject matter jurisdiction pursuant to 12.02 of the Tennessee Rules of Civil Procedure. Specifically, TDEC argues TENN. CODE ANN. § 69-3-118(a) is only applicable to alleged violations upon which the commissioner received a signed complaint. Section 118(a)(1) states, “Any person may file with the commissioner a signed complaint against any person allegedly violating any provisions of this part.” Volunteer joins with TDEC in the argument that section 118(a) does not authorize citizen complaints about possible future violations.

Petitioner argues they may proceed with the current action under TENN. CODE ANN. § 69-3-118(a)(2), which states in pertinent part, “If either the complainant or the alleged violator believes that the commissioner’s action or determination is or will be inadequate or too severe, such person may appeal to the board for a hearing” On August 14, 2020, Petitioner filed the Section 118(a)(2) complaint. The complaint alleges the Commissioner’s determination to not require Volunteer to obtain an Aquatic Resources Alteration Permit (“ARAP”) was inadequate under Section 118(a)(2).

In their complaint to the Commission, Petitioner only requested the Commissioner require Volunteer to obtain an ARAP prior to conducting operations. In the petition, Petitioner seeks relief in the form of TDEC rescinding the permit issued to Volunteer and requiring Volunteer to obtain an ARAP. Permit appeals are governed by TENN. CODE ANN. § 69-3-105(i). Petitioner has filed a petition against Volunteer and TDEC under said statute which is Docket Number 04.03-202563J. While Petitioner made oral arguments that the petition was not a challenge to the water discharge

permit, this argument is contradictory to the language in the petition. The complaint alleges defects in the issuance of the permit involved in this action. Petitioner requested “that the Division rescind the Permit” issued by TDEC to Volunteer. Petition for Appeal of Commissioner’s Determination on Formal Complaint pursuant to TENN. CODE ANN. § 69-3-118(a) re Volunteer Sand and Gravel, LLC, Humphreys County, p. 2. While Petitioner argues, “It is absurd to suggest that Petitioner would intend to, or would in fact, file duplicative petitions to challenge the provisions of Volunteer’s NPDES permit”, said argument ignores the plain language in Petitioner’s pleadings. The complaint does not allege any violation of the Tennessee Water Quality Control Act (TWQCA); Petitioner argues that requiring current violations at the time of the filing of the complaint is myopic and a narrow reading of the TWQCA.

A motion to dismiss “tests only the legal sufficiency of the complaint itself.” *Swafford v. Comm’r of Revenue*, M2011-00913-COA-R3CV, 2012 WL 840648 (Tenn. Ct. App. Mar. 13, 2012) (quoting *Cook v. Spinnakers of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn.1994)). The motion “admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action.” *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn.1997). Dismissal for failure to state a claim upon which relief may be granted is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Marceaux v. Thompson*, 212 S.W.3d 263, 267 (Tenn. Ct. App. 2006).

While the petition does not lack clarity or specificity, Petitioner has failed to identify any party in their petition who violated or was in violation of the TWQCA. Petitioner discusses “likely adverse impacts” that are not hypothetical “but are likely and inevitable.” Petition for Appeal of Commissioner’s Determination on Formal Complaint pursuant to TENN. CODE ANN. § 69-3-118(a) re Volunteer Sand and Gravel, LLC, Humphreys County, p. 2. TENN. CODE ANN. § 69-3-118(a)(1)

permits a complaint to the commissioner against any person allegedly violating any provisions of the TWQCA.¹ While other sections of the TWQCA address possible future violations, Section 118(a) does not.

Petitioner places much emphasis upon the language in Section 118(a)(2) which states appeals are permitted if a Commissioner's determination "is or will be inadequate". However, the right to appeal is offered to "the complainant or the alleged violator". This language relates to an alleged violator – someone who has or is violating the TWQCA – and does not address any future or possible alleged violators.

In examining the complaint and petition, it is determined that the relief Petitioner seeks cannot be granted under TENN. CODE ANN. § 69-3-118(a)(1) as Petitioner failed to identify any current violations or violators and that this tribunal lacks subject matter jurisdiction to decide the matter. TENN. CODE ANN. § 69-3-105(i) is the only means available for administrative review regarding the issuance or denial of a permit.

Upon review of the pleadings and arguments of the parties, it is determined Respondent's motion is well taken and is hereby **GRANTED**. Accordingly, Petitioner's Petition for Appeal of Commissioner's Determination on Formal Complaint pursuant to TENN. CODE ANN. § 69-3-118(a) re Volunteer Sand and Gravel, LLC, Humphreys County is hereby **DISMISSED** with prejudice.


It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **30th day of December, 2020**.

¹ Petitioner attempted to argue during the PRE-HEARING CONFERENCE that Volunteer is now violating the TWQCA. Such allegations have not been made to TDEC, TDEC has not had the opportunity to investigation any possible allegations, and the current petition does not address these violations.


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
30th day of December, 2020.


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 **December 30, 2020**. 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 14, 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 **January 29, 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 6, 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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