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September 2, 2022

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**RE: TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION V.
HARPERS & COMPANY, INC., BILLY HARPER, JAMESWAY CONSTRUCTION,**

INC., AND HIGHWAYS, INC., APD Case No. 04.30-190641J

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:

**TENNESSEE DEPARTMENT OF
ENVIRONMENT AND
CONSERVATION,
*Petitioner,***

APD Case No. 04.30-190641J

v.

**BILLY HARPER,
HARPERS & COMPANY, INC.,
HIGHWAYS, INC.,
JAMESWAY CONSTRUCTION, INC.,
*Respondent.***

INITIAL ORDER

This matter was heard on September 27 through October 30, 2021, in Nashville, Tennessee before Administrative Law Judge Steve R. Darnell, designated by the Secretary of State, Administrative Procedures Division, to sit on behalf of the Board of Water Quality, Oil, and Gas, upon appeal of Commissioner's Order and Assessment WPC18-0016 by Billy Harper, Harpers & Company, Inc., Highways, Inc., and Jamesway Construction, Inc. pursuant to Tennessee Code Annotated sections 69-3-109(a)(3), -115(a)(2)(B), and -116(b).

Attorneys Stephanie Durman, Grant Ruhl, and Patrick Parker represented Petitioner, the Tennessee Department of Environment and Conservation (TDEC). Respondent Billy Harper was *pro se* (Mr. Harper). Respondent Harpers & Company, Inc. (Harpers & Co.) was dissolved prior to the contested case hearing and was not present or represented at the hearing. Attorneys Greg Cashion and William Fitts represented Respondent Highways, Inc. (Highways). Attorneys Sharon Jacobs and David Briley represented Respondent Jamesway Construction, Inc. (Jamesway).

This contested case involves a 25.2-acre tract of land in Coffee County, Tennessee previously owned by Harpers & Co. Throughout this litigation, the parties have referred to the tract of land at issue as either the “Harper Site” or “Site” and these terms of reference to the property are used herein.

ISSUE FOR DETERMINATION

Did TDEC show, by a preponderance of the evidence, that the Respondents filled or permitted to be filled, 8.09 acres of wetlands on the Harper Site?

SUMMARY OF DETERMINATION

There is no dispute that Harpers & Co. and Mr. Harper permitted both Highways and Jamesway to place fill dirt on the Harper Site. TDEC’s threshold obligation is to prove, by a preponderance of the evidence, that the 8.09 acres at issue here were in fact wetlands. As to Highways, TDEC failed to prove, by a preponderance of the evidence, that Highways filled 1.57 acres of wetlands. As to Jamesway, TDEC failed to show, by a preponderance of the evidence, that Jamesway filled 6.52 acres of wetlands. TDEC did prove, by a preponderance of the evidence, that Jamesway failed to obtain a General NPDES Permit for Stormwater Discharges Associated with Construction Activity for which a civil penalty of \$10,000. is assessed. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Mr. Harper is a retired Tennessee licensed general contractor. His construction business operated as Harpers & Co. Harpers & Co. had its principal place of business in an office located on the eastern side of AEDC Road in Hillsboro, Coffee County, Tennessee. AEDC Road provides access to the Arnold Engineering Development Complex, hence the name AEDC Road.
2. Mr. Harper was the sole shareholder and president of Harpers & Co.
3. Mr. Harper also farmed and raised cattle.

4. The Harper Site is located on the west side of AEDC Road across from Harpers & Co.'s office building. Mr. Harper became aware that the 25.2-acre Site would sell at auction in September of 2007.

5. Harpers & Co. purchased the Harper Site at auction on September 29, 2007. Mr. Harper intended to grow hay on the Site for his cattle.

6. The Harper Site was previously used for agricultural purposes. Mr. Harper wanted to fill the Site so it could be used more efficiently for agricultural purposes. As a contractor, he did not believe it could ever be used as a building site after placement of the fill material.

7. At the time Mr. Harper purchased the Site, there was a graveled driveway that provide access to the Site from AEDC Road. Aerial photography confirms this graveled driveway has been present on the Site for many years prior to Harpers & Co. purchasing it. This driveway is elevated on fill dirt.

8. Aerial photographs confirm that others had placed fill dirt on the Site prior to its purchase by Harpers & Co. in 2007. At the time of its purchase, Mr. Harper observed mowed vegetation and he was unaware that any part of it was filled.

9. At the time Harpers & Co. purchased the Site, a dilapidated barn estimated to be 40 to 50 years old was located near AEDC Road in the northeastern corner of the Site. A farm pond was also located in this same area. This area was fenced and appeared to be the remnants of an old livestock yard. This is the same area TDEC asserts were wetlands filled in by Jamesway.

10. The Site had a slight topography generally sloping from the southwest to the northeast allowing stormwater to drain to the northeast corner of the Site. Additionally, a system of ditches along the northern and southern boundaries drained the Site to a ditch that ran along AEDC Road. The AEDC Road ditch drained stormwater to culverts under AEDC Road to the eastern side of

AEDC Road. These ditches and culverts were in place when Mr. Harper purchased the Site in 2007.

11. Mr. Harper grew hay on the Site until it became too burdensome to transport the hay to the location of his cattle. Thereafter, Mr. Harper mowed or bushhogged the open areas of the Site and maintained the ditches, so they properly drained stormwater.

12. Other than Highways and Jamesway, Mr. Harper never allowed anyone else to place fill dirt on the Site. He occasionally caught individuals dumping debris on the Site and installed a locking gate across the driveway to restrict entry to his land.

13. Around 2005, a developer created a ski lake and built houses fronting the lake on the east side of AEDC Road to the rear of Harpers & Co.'s office building. The ski lake was created by damming up stormwater flow from the west. By 2008, the ski lake had filled and caused Harpers & Co.'s land behind its office building to become inundated with standing stormwater.

14. Harpers & Co.'s land behind its office building became unusable as a result of the ski lake. Mr. Harper and the ski lake owner resolved the issue by exchanging Harper & Co.'s now inundated land for dry land fronting on AEDC Road owned by the ski lake developer.

15. At some time after Harper & Co. purchased the Site, property owners to the south of the began placing fill in low areas of their land restricting the drainage of stormwater past the south boundary of the Site.

16. The construction of AEDC Road and I-24 also affected the hydrology of the Harper Site. AEDC Road was constructed directly on Guthrie soils that are hydric soils. The placement of AEDC Road stopped the surface drainage of stormwater from the Harper Site and forced stormwater into a drainage ditch along AEDC Road to the two culverts under AEDC Road.

17. The creation of the ski lake, placement of fill to the south of the Harper Site, and the construction of AEDC road and I-24 changed the hydrology of the Harper Site.

18. The foregoing changes to the hydrology of the Harper Site caused it to drain less efficiently and required Mr. Harper to ensure the drainage ditches remained free of vegetation so as to not restrict the flow of stormwater.
19. Standing stormwater became such an issue along AEDC Road, that Mr. Harper contacted Coffee County and had its road crew clean the ditch along AEDC Road. Coffee County also installed a culvert Mr. Harper purchased under the gravel drive to the Harper Site.
20. Mr. Harper offered credible testimony.
21. In 2013, the Tennessee Department of Transportation (TDOT) awarded Highways a contract to renovate the east and west bound 1-24 weigh stations in Coffee County.
22. Highways sought a waste site for excess dirt to be removed from the TDOT site. Highways contacted Mr. Harper about using the Harper Site as its waste site. Mr. Harper agreed to Highway's request.
23. Highways retained Wilson & Associates, an engineering firm that performs surveying, environmental permitting and inspections, civil engineering, and environmental engineering, to obtain a Notice of Coverage under the General NPDES Permit for Stormwater Discharges Associated with Construction Activity (Permit) to place waste material on 2.5 acres of the Harper Site.
24. Wilson & Associates' engineer Tony Holcomb oversaw the process of obtaining the Permit. Mr. Holcomb has been employed as an engineer by Wilson & Associates since 1990 and over the course of his career, he has extensive experience with environmental permit writing, projects involving the Tennessee Department of Transportation, and wetland identification. Mr. Holcomb is a certified professional in erosion and sediment control and has obtained the TDEC Level 1 Certification.

25. Paul Roy, also with Wilson & Associates, assisted Mr. Holcomb in researching the Harper Site and securing the Permit. Mr. Roy holds a bachelor's degree in environmental science and biology from U.T.-Chattanooga. He has completed the North Carolina State University wetlands delineation and certification course that is equivalent to TDEC's wetlands delineation and certification course.

26. Both Mr. Holcomb and Mr. Roy visited the Harper Site before applying for the Permit. Highway's Permit application prepared by Mr. Holcomb and Mr. Roy described the Harper Site as "approximately two and a half acres of field that has been previously used as a soil waste area and capped with wood mulch to stabilize the placed soils."

27. In preparing Highway's Permit application, Mr. Holcomb and Mr. Roy reviewed the National Wetlands Inventory (NWI) map for the Harper Site. The NWI map is prepared and maintained by the U.S. Fish and Wildlife Service. The NWI map showed that the proposed 2.5-acre waste area on the Harper Site was not wetlands.

28. Mr. Holcomb and Mr. Roy also reviewed the topographic map of the Harper Site prepared and maintained by the U.S. Geological Survey. This map did not identify any wetlands on or adjacent to the proposed 2.5-acre waste site.

29. Mr. Roy also requested a rare species database review of the proposed 2.5-acre waste site from TDEC. By letter dated November 26, 2013, TDEC acknowledged that the proposed waste site had previously been filled. TDEC's letter stated, "this area has been previously impacted and the habitat for the above state and federally listed plants appears scarce in the project vicinity."

30. Mr. Roy also requested an environmental review of the proposed 2.5-acre waste site from the U.S. Department of Interior's Fish and Wildlife Service. By letter dated December 11, 2013, the Fish and Wildlife Service responded, "The proposed site consists of a field that has been previously used as a waste area" and provided the NWI map indicating the proposed 2.5-acre waste

area was not wetlands but were near wetlands. The Fish and Wildlife Service went on to state, “[p]rovided that impacts to wetlands are avoided or mitigated and best management practices are implemented, we would have no objection to use of this site as a waste area.”

31. Mr. Roy also contacted the Tennessee Wildlife Resource Agency (TWRA) concerning the proposed 2.5-acre waste site. In response, TWRA stated:

The Tennessee Wildlife Resources Agency has reviewed the information that you provided regarding the proposed waste area for Highways, Incorporated, in Coffee County, and we have no concerns or objection to the proposed project, provided that the proposed project is in compliance with the rules and the regulations of the Tennessee Department of Environment & Conservation and the statute of the U.S. Environmental Protection Agency and that the waste material is stabilized onsite and that best management practices are employed to address erosion and sediment.

32. Wes Johnson with TDOT construction and Chris Rogers TDOT’s ESPC inspector, also inspected the 2.5-acre waste site prior to fill being placed.

33. Highway’s placed fill in the 2.5 acre permitted area beginning late January 2015 through late September 2015.

34. TDOT employees inspected the site twice a week and sometimes daily. TDOT employees always inspected the site after rain events.

35. TDOT retained the engineering firm of Neel-Schaffer to inspect the proposed 2.5-acre waste site prior to fill being placed and monthly thereafter to ensure Highways complied with proper procedures.

36. There is no proof in the record that any of the professionals employed by Highways, Wilson & Associates, Neel-Schaffer, or TDOT ever observed hydrophytic vegetation or hydrology on or near the Highway’s waste area.

37. Highway’s foreman became worried that there was too much fill for the permitted 2.5-acre waste area. Wilson & Associates secured approval from TDEC to expand the site

to 3.89 acres. However, the originally permitted 2.5-acres was sufficient and Highways never placed fill beyond it.

38. The USDA Natural Resources Conservation Services' (USDA) soil map indicate that Guthrie soils are present beneath portions of the 2.5-acre waste site. Guthrie soils are considered hydric soils. The presence of hydric soils alone is not sufficient to delineate a wetland.

39. TDEC dug test pits near the 2.5-acre permitted waste area, but it did not soil bore or dig test pits within the 2.5-acre permitted waste area to confirm the presence of Guthrie soils.

40. Some of the test pits dug by TDEC show striations in the fill indicating different fill material was placed on the Site at different times.

41. TDEC discovered root mass during the excavation of the test pits, but made no effort to investigate this plant matter to determine if was hydrophytic vegetation.

42. Roger McDonald was previously assistant vice president of Highways. He was in charge of the TDOT project including the waste area on the Harper Site. Mr. McDonald's testimony was credible.

43. Jamesway is a Canadian construction company authorized at the time to conduct business in Tennessee. Jamesway is headed by Alvin James Way who has been in the construction business for approximately 40 years. Mr. Way has dealt with wetlands over his career and is very familiar with wetland characteristics.

44. Mr. Way's testimony was credible.

45. Jamesway secured a contract with Fischer Steel to renovate and add to Fischer's production facility in Coffee County. Jamesway contacted Harpers & Co. about using the Harper Site as a waste area for soil from the Fischer job.

46. Mr. Harper agreed to allow Jamesway to use the Harper Site as a waste area. His only requirement was that Jamesway spread the soil and remove rocks from the fill so he could sow it with grass.

47. Beginning in the fall of 2015 through May 2016, Jamesway placed fill from the Fischer job on the Harper Site. Jamesway used various subcontractors from the local area to truck the fill to the Harper Site. Jamesway maintained a bulldozer on the Site to spread the fill.

48. The soil removed from the Fischer job was “muck,” consisting of very wet chert soil. Truck driver Cheyne Stewart described the Fischer fill to be “like [a] bag and sand water. You dump it out of the bed, and it just kind of runs out like wet cement.”

49. Dump trucks would get stuck in the mud at the Harper Site, but it was because of wet material being hauled in from the Fischer job not the natural condition of the Harper Site.

50. Rain events would cause the fill operation to cease for a few days to allow the ground to dry.

51. Jamesway created a second drive in the northeast corner of the Site to accommodate the large number of trucks accessing the Site daily.

52. Truck driver Charles Roberts observed an area of approximately 10,000 square feet of standing water in the northeast corner of the Harper Site. There is no evidence of when he observed it, how long it was present, etc.

53. Mr. Roberts’ testimony is the only evidence presented by TDEC of the actual presence of standing water on the Harper Site.

54. Jamesway, Harpers & Co., nor Mr. Harper secured a General NPDES Permit for Storm Water Discharges Associated with Construction Activity (CGP) from TDEC for the placement of the Fischer fill on the Harper Site.

55. On March 31, 2017, TDEC received a citizen's complaint about the fill at the Harper Site. TDEC personnel investigated the site and discovered the presence of hydric soils. They also observed hydrophytic vegetation in areas where the fill ended and the preexisting ditches.

56. TDEC calculated the total fill on the Harper Site to be 16.3 acres. The USDA's soil map for the Harper Site indicates approximately 8.09 acres of Guthrie Soils present on the site. Based on the soil map, TDEC concluded that the Harper Site included 8.09 acres of wetlands that had been filled.

57. TDEC issued Commissioner's Order and Assessment WPC18-0016 seeking a total of \$657,200 for natural resources damages for permanent loss of wetlands, a civil penalty of \$31,250, and \$2,754.10 in damages.

58. TDEC asserts that Highways filled 1.57 acres and Jamesway filled 6.52 acres of wetlands. TDEC asserts that Mr. Harper, as the person who authorized the placement of the fill, is jointly liable with Highways and Jamesway for the entire 8.09 acres.

59. TDEC based its determination mainly on the presence of Guthrie soils as reflected on USDA's soil maps. The USDA cautions users of its soil maps that they are not accurate at the scale TDEC used.

60. TDEC failed to show, by a preponderance of the evidence, that 8.09 acres of wetlands existed on the Harper Site.

CONCLUSIONS OF LAW

1. The Board of Water Quality, Oil, and Gas (Board) has jurisdiction to hear and render a decision in this contested case proceeding pursuant to Tenn. Code Ann. §§ 69-3-109(a)(3), -115(a)(2)(B), and -116(b). Pursuant to Tenn. Code Ann. §§ 69-3-110(a), the undersigned heard this matter, sitting alone, for the Board. The Board, not the Department, is the “agency.” Tenn. Code Ann. § 4-5-102(2).

2. TDEC has the burden of proof to show by a preponderance of the evidence that the Respondents have violated the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148, and that the civil penalties, Department damages, natural resource damages, and corrective actions imposed by Commissioner’s Order and Assessment WPC18-0016 are reasonable and supported by the facts of this case.

3. TDEC alleges the respondents damages “waters of the state” by placing fill over 8.09 acres of Guthrie soils on the Harper Site. The Tennessee Water Quality Control Act of 1977 defines “waters” as follows:

“Waters” means any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters. Tenn. Code Ann. §§ 69-3-103 (45)

4. The Tennessee Water Quality Control Act of 1977 does not define a wetland. Rule 0400-40-07.03 (31) defines a wetland the same as the federal government as follows:

"Wetland" means an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

5. Neither the Board nor TDEC have promulgated rules for the delineation of wetlands. TDEC relies on the U.S. Army Corps of Engineers for its mythology found in the Corps’ Wetlands

Delineation Manual. Relevant to this case, the Corps' requirements can be summarized as requiring the presence of hydric soils, hydrophytic vegetation, and hydrology in order to delineate an area as a wetland. Additionally, the Corps' manual exempts "an area that was once a wetland but, in the past, has been transformed into dry land." Nor does the Corps' manual permit a delineation of wetlands based purely on hydric soils. Hydric soils can be drained and not allow the growth of hydrophytic vegetation.

6. The Tennessee Water Control Act of 1977 exempts agricultural and forestry activities and lands from its coverage unless there is a point source discharge from a discernible, confined, and discrete water conveyance. Tennessee Code Annotated § 69-3-120(g) provides as follows:

Nothing whatsoever in this part shall be so construed as applying to any agricultural or forestry activity or the activities necessary to the conduct and operations thereof or to any lands devoted to the production of any agricultural or forestry products, unless there is a point source discharge from a discernible, confined, and discrete water conveyance.

DISCUSSION

TDEC bears the burden of proving, by a preponderance of the evidence, that the 8.09 acres of the Harper Site were wetlands. Assuming its reliance of the Corps' manual for the delineation of wetlands is appropriate, it must prove the three elements of a wetland. The presence of hydric soils alone is insufficient. Hydric soils alone are insufficient because hydric soils can be drained preventing the growth of hydrophytic vegetation and hydrology. Mr. Harper offered credible testimony that he constantly maintained the ditches so that his property drained to the east and under AEDC Road toward the man-made ski lake.

TDEC must also prove, by a preponderance of the evidence, that hydrophytic vegetation and hydrology were present on all 8.09 acres. The Corps' guidance on how to evaluate an atypical situation is helpful but not controlling. The presence of hydrophytic vegetation on the adjoining sites is evidence that hydrophytic vegetation *might* have been present on the Harper Site. But to

extrapolate from the presence of hydrophytic vegetation in the pre-fill drainage ditches, gullies created by the fill, and on the adjoining sites to the entire 8.09 acres of the Harper Site is not reasonable.

TDEC must also prove, by a preponderance of the evidence, that the entire 8.09 acres was inundated with water, or what is referred to as hydrology, for sufficient time to be delineated as wetlands. The presence of water, whether it is storm or ground water, does not require any expertise. Still during the period of Highways' and Jamesway's fill operations, that lasted approximately one and a half years, TDEC was only able to produce one truck driver, Robert Stewart, that observed standing water in the northeast corner of the Site. There is no proof of when he observed the standing water or how long it was present. This is the same northeast corner where the old barn, farm pond, and fenced livestock area were located. It is difficult to imagine someone built a barn and maintained livestock in an area that was prone to standing water. It is also the same northeast corner where the second access road was laid. It is difficult to accept that Jamesway created an access point to the Harper Site in an area that was inundated with water. It is also unlikely that the Harper Site was saturated with ground water and still able to support the triple-axel dump trucks loaded with 20 cubic yards of wet soil. It is unlikely that either Highways or Jamesway would have found it acceptable as a waste area if it were inundated with water. Additionally, the 8.09 acres is located along AEDC Road which is a throughfare between the local community and Arnold Engineering Development Complex to access Interstate 24. Yet TDEC presented no witness who observed standing water on the 8.09-acre Site.

Lastly, it is difficult to accept that all of the trained and experienced professionals from Wilson & Associates, Neel-Schaffer, and TDOT failed to notice an 8.09-acre wetland. Additionally, Highways and Jamesway employees have years of experience in excavation and dealing with wetlands. None saw any indication of the existence of wetlands on the Harper Site.

Numerous others in the excavation business were on the Site either operating equipment or hauling fill. This included Alford Trucking, Allen Dozier Service, and the Rogers Group, but none complained to TDEC or were presented to testify on TDEC's behalf that they observed standing water or any other indication of wetlands.


TDEC has failed to show, by a preponderance of the evidence, that 8.09 acres of wetland existed on the Harper Site. Wetlands, as defined by Rule 0400-40-07.03 (31) cited above, "generally include swamps, marshes, bogs, and similar areas." There is inadequate proof that these conditions existed on 8.09 acres of the Harper Site. The record indicates, more likely than not, that the areas filled by Highways possibly were wetlands at some point in history but filled and returned to dry land prior to Harper & Co. purchasing the Site. The record also indicates, more likely than not, that area filled by Jamesway possibly had some small area of wetlands but nowhere near 8.09 acres. Finally, the record indicates, more likely than not, that the Site became difficult to drain due to placement of fill on the adjoining property and creation of the ski lake. This may have resulted in a manmade wetland on a portion of the area filled by Jamesway as occurred behind Harpers and Co. office building. Mr. Harper worked to keep his property drained by cleaning the drainage ditches and having the county clean the ditch along AEDC Road. Harpers & Co. sold the Site on August 31, 2017. There is no proof in the record as to what the new owner has done or not done to maintain the drainage ditches along the boundary of the Site since then.

TDEC having failed to prove the existence of 8.09 acres of wetlands on the Harper Site, its action against the respondents seeking natural resources damage assessments, civil penalties of failing to obtain an ARAP, and civil penalties for discharging pollution into water of the state are **DISMISSED**. TDEC's investigation cost is predominately related to its efforts to prove the existence of wetlands on the Harper Site. TDEC did not prevail on this issue, and therefore, is not entitled to recover its investigational cost.

TDEC has shown, by a preponderance of the evidence, that Jamesway and Mr. Harper failed to obtain a General NPDES Permit for Stormwater Discharges Associated with Construction Activity prior to placing fill at the Harper Site. There is no proof in the record of a stormwater discharge related to Jamesway's placement of fill. Jamesway and Mr. Harper are jointly assessed a civil penalty of \$10,000 for this violation.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **2nd day of September, 2022**.



STEVE R. DARNELL
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 **2nd day of September, 2022**.

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 **September 2, 2022**. 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 with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must receive your written Petition no later than 15 days after entry of the Initial Order, which is no later than **September 19, 2022**. 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 ruling of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued. Filing instructions are included at the end of the document.¹

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, which must be received by 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, by filing an Appeal of the Initial Order with APD. An Appeal of the Initial Order should include your name and the above APD case number and state 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. APD must receive your written Appeal no later than 30 days after the entry of the Initial Order, which is no later than **October 3, 2022**. 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 the longer of 30 days or 7 days after the first board meeting to occur after entry of the Initial Order. No later than 7 days after the entry of an Initial Order, TDEC shall file, and serve, a Notice of Filing containing the date of the next Board meeting. No later than 7 days after the next Board Meeting, TDEC shall file, and serve, a Notice of Filing setting forth what action, if any, the Board took with respect to 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.

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).

**IN THE MATTER OF:
TENNESSEE DEPARTMENT OF ENVIRONMENT AND
CONSERVATION V. HARPERS & COMPANY, INC., BILLY
HARPER, JAMESWAY CONSTRUCTION, INC., AND
HIGHWAYS, INC.**

APD CASE No. 04.30-190641J

NOTICE OF APPEAL PROCEDURES

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.**

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 APD within 7 days of the date of entry of the Initial Order, which is no later than **September 9, 2022**. *See* TENN. CODE ANN. § 4-5-316. 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.

REVIEW OF A FINAL ORDER

When an Initial Order becomes a 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 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.

FILING

Documents should be filed with the Administrative Procedures Division by email *or* fax:

Email: APD.Filings@tn.gov

Fax: 615-741-4472

In the event you do not have access to email or fax, you may mail or deliver documents to:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue, 8th Floor
Nashville, TN 37243-1102