

September 27, 2022

*Via electronic mail by agreement to [Patrick.Parker@tn.gov](mailto:Patrick.Parker@tn.gov)*

Tennessee Board of Water Quality, Oil & Gas  
William R. Snodgrass – Tennessee Tower  
Third Floor – Nashville Room  
312 Rosa L. Parks Avenue  
Nashville, TN 37243

**PETITION FOR DECLARATORY ORDER REGARDING INVALIDITY OF  
TENNESSEE RULES AND REGULATIONS 0400-40-10-.04, MUNICIPAL SEPARATE  
STORM SEWER SYSTEMS**

**Introduction and Summary**

Harpeth Conservancy (“Petitioner”) hereby files a Petition for Declaratory Order to establish the invalidity of the Tennessee Board of Water Quality, Oil and Gas’ (“the Board”) promulgation of Tennessee Rules and Regulations 0400-40-10.04, Municipals Separate Storm Sewer Systems (“the Rule”). This Rule establishes the effluent limitations which must be included in National Pollutant Discharge Elimination System (“NPDES”) permits issued by the Tennessee Department of Environment and Conservation (“TDEC”) to entities that operate municipal separate storm sewer systems (“MS4s”) and their discharges into Tennessee’s rivers and streams.

Storm sewer systems are the second largest source of water pollution in Tennessee, after agriculture. The subject rule establishes effluent limitations which must be included in MS4 permits issued by the State, including pollution control measures that local governments must require of developers who build new projects and/or redevelop real estate. The rule contains two problematic loopholes that undermine stormwater control measures throughout Tennessee. First, the rule establishes effluent limitations for MS4 permits which allow local governments to exempt so-called “uncontaminated roof runoff” from the volume of water that stormwater control measures must be designed to treat. Second, the rule requires MS4 permits to allow infiltration-based stormwater control measures to be placed inside riparian buffers rather than leaving such buffers undisturbed.

Roofs are impervious surfaces that send stormwater into our rivers and streams. Roof runoff is contaminated with pollutants including organic material (like pollen and leaf litter), fecal matter from birds and wildlife, industrial pollutants deposited from the air, and deteriorating roofing materials. Excluding roof runoff from stormwater treatment will increase water pollution as Tennessee experiences increasing urban sprawl and severe rain events.

If developers are allowed to ignore roof runoff when designing stormwater treatment systems, those systems will be permanently undersized, ineffective, and subject to being

overwhelmed during rain events. Ignoring roof runoff when designing permanent stormwater control measures will increase pollution, aggravate streambank instability and erosion, exacerbate urban flooding, and make it more difficult for cities to develop climate-resilient infrastructure. Also, allowing stormwater control measures to be sited inside riparian buffers will increase water pollution and contribute to urban flooding.

The Clean Water Act,<sup>1</sup> the Tennessee Water Quality Control Act (“TWQCA”),<sup>2</sup> and their implementing regulations mandate that Tennessee’s NPDES permitting program requires that discharges from MS4s reduce pollutants to the Maximum Extent Practicable (“MEP”). Those statutes and regulations also require that renewed or reissued permits contain standards or conditions which are at least as stringent as comparable limitations in previous permits. By including loopholes in Tenn. R. & Regs. 0400-40-10-.04 that do not ensure that stormwater pollutants are reduced to the MEP, and by mandating that these loopholes be included in MS4 permits, the Board is facilitating the issuance of MS4 permits which contain standards or conditions less stringent than those in the previous permit and which violate federal and state water protection statutes and their implementing regulations.<sup>3</sup>

### What’s at stake?

Stormwater pollution control is critical to maintaining clean water. As noted in Tennessee’s *TNH2O Plan*, “MS4 discharges are by far the leading pollution source in Tennessee that is subject to regulation.”<sup>4</sup> As TDEC states in the *Tennessee Permanent Stormwater Management and Design Guidance Manual*:

Clean water resources are essential to the economic viability of Tennessee, where we have over 60,000 miles of rivers and streams and over 570,000 acres of lakes and reservoirs.

...

The transformation from native landscapes to a built environment increases the amount of impervious surfaces, such as roads, parking areas, and rooftops. Native soils are altered during the construction process such that their infiltration properties are generally degraded. These changes reduce, disrupt, or eliminate natural drainage features, such as infiltratable soils, native vegetation, shallow depressions, and native drainage patterns. As development progresses, the land area

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<sup>1</sup> 33 U.S.C. § 1251 *et seq.*

<sup>2</sup> Tenn. Code Ann. § 69-3-101 *et seq.*

<sup>3</sup> 33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.34; 40 C.F.R. § 122.44(1); Tenn. Code. Ann. § 69-3-102; Tenn. Code Ann. § 69-3-108(g)(1); Tenn. R. & Regs. 0400-40-05-.08(1)(j); Tenn. R. & Regs. 0400-40-10.04.

<sup>4</sup> TDEC, *TNH2O*, Natural Resources Chapter at 17 (2018),

[https://www.tn.gov/content/dam/tn/environment/water/tn-h2o/documents/plan-&-appendices/wr-tnh2o\\_plan-app\\_natural-resources-chapter.pdf](https://www.tn.gov/content/dam/tn/environment/water/tn-h2o/documents/plan-&-appendices/wr-tnh2o_plan-app_natural-resources-chapter.pdf).

that contributes overland flow (or runoff) in short time periods (minutes) increases, while the land area that stores, infiltrates, and recharges groundwater over long periods of time (days, weeks) decreases []. The cumulative effect of these changes . . . results in destabilized stream channels, impacted groundwater resources, degraded water quality, and more frequent flooding.<sup>5</sup>

TDEC also acknowledges that “[w]ater quality degradation due to urban runoff [] creates the need for costly water treatment at drinking water plants, increased maintenance of municipal infrastructure, and increased risk to public health.”<sup>6</sup>

Because the stakes are high, the Board must ensure that its rules governing MS4 permits comply with all applicable federal and state laws and regulations. Anything less will not protect Tennessee’s water resources and will violate Petitioner’s and its members’ legal right to unpolluted waters.

### **Challenged Rule Provisions**

Pursuant to Tenn. Code Ann. § 4-5-223(a), Petitioner seeks a declaratory order on the invalidity of Tenn. R. & Regs. 0400-40-10-.04 based on recent changes to the State of Tennessee’s management of post-construction stormwater. Specifically, the TWQCA was recently amended to require that NPDES permits issued by TDEC to local governmental entities administering a municipal separate storm sewer system contain only those numeric or narrative effluent limitations to manage post-construction stormwater which have been previously adopted by the Board of Water Quality, Oil and Gas as rules under the Uniform Administrative Procedures Act (“UAPA”).<sup>7</sup> To fulfill the requirements of that statute, the Board thereafter promulgated rules to establish those effluent limitations in Tenn. R. & Regs. 0400-40-10.04 (“the Rule”), which became effective for the first time on May 15, 2022. That new Rule establishes that permits issued to MS4s “shall” include the effluent limitations contained in the Rule.<sup>8</sup> In other words, the Rule requires that any NPDES permits subsequently issued by TDEC to MS4s contain the numeric or narrative effluent limitations specified therein.

Petitioner challenges two provisions of the Rule containing such effluent limitations: (1) the “uncontaminated roof runoff” loophole found in Tenn. R. & Regs. 0400-40-10.04(2)(c); and (2) Tenn. R. & Regs. 0400-40-10.04(4) which allows for the placement of certain stormwater control measures inside riparian buffers. As discussed in detail below, these provisions require issuance of MS4 permits which fail to ensure that pollutants are reduced to the MEP, and they otherwise violate the Clean Water Act and TWQCA.

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<sup>5</sup> TDEC, *Tennessee Permanent Stormwater Management and Design Guidance Manual*, 9 (last updated Mar. 2, 2015) (internal citations omitted), <https://app.box.com/s/pdl1afehg00s1wwqa94d8qmizyptxw3i>.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> Tenn. Code. Ann. § 69-3-108(s).

<sup>8</sup> Tenn. R. & Regs. 0400-40-10.04.

a. *Tenn. R. & Regs. 0400-40-10.04(2)(c) is unworkable and unlawful.*

Petitioner seeks a declaratory order on the invalidity of Tenn. R. & Regs. 0400-40-10.04(2)(c), which mandates that MS4 permits allow permittees to exclude “uncontaminated roof runoff” from the water quality treatment volume (“WQTV”) which must be considered when designing water quality treatment stormwater control measures (“SCMs”) at new development or redevelopment projects.

Tenn. R. & Regs. 0400-40-10.04 sets forth the permanent stormwater standards to be included in MS4 permits. The Rule provides that that “Uncontaminated roof runoff may be excluded from the WQTV.”<sup>9</sup> The WQTV is “a portion of the runoff generated from impervious surfaces at a new development or redevelopment project by the design storm.”<sup>10</sup> The total quantity of the WQTV depends on the SCM treatment type in use.<sup>11</sup> Per the Rule, “SCMs must be designed, at a minimum, to achieve an overall treatment efficiency of 80% [total suspended solids] removal from the WQTV.”<sup>12</sup>

In its *Concise Statement of the Principal Reasons for Rulemaking*, the Board acknowledged that adoption of Tenn. R. & Regs. 0400-40-10.04 was necessary to comply with Tenn. Code. Ann. § 69-3-108(s).<sup>13</sup> The Board also noted that the substance of the Rule “reflects the terms of a settlement of the appeal of the 2016 Phase II MS4 General Permit by the Homebuilders Association of Tennessee and several nongovernmental organizations.”<sup>14</sup> However, the Board also noted that the Rule had been further modified beyond the terms of the settlement agreement in response to comments from the broader public. One change made was the language establishing the “uncontaminated roof runoff” loophole.

The Board apparently inserted the new “uncontaminated roof runoff” provision into the final Rule in response to public comments labelled as Comment 63 and Comment 64.<sup>15</sup> Those commenters essentially argued that, because different impervious surfaces at development sites can contribute different loads of pollution to stormwater (one commenter gave the example that a residential home roof contributes less pollution to stormwater systems than a bus parking lot), they should be weighted differently in calculating the WQTV. In response to those comments, the Board did not take the opportunity to engage in discussion of varying pollution loads which may originate from different impervious surfaces on development and redevelopment sites. Instead, the

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<sup>9</sup> Tenn. R. & Regs. 0400-40-10.04(2)(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Tenn. Bd. of Water Quality, Oil & Gas, *Rule Chapter 0400-40-10 National Pollutant Discharge Elimination System General Permits*, Concise Statement of the Principal Reasons for Rulemaking (Mar. 2020).

<sup>14</sup> *Id.*

<sup>15</sup> Tenn. Bd. of Water Quality, Oil & Gas, *Rule Chapter 0400-40-10 National Pollutant Discharge Elimination System General Permits*, Response to Comments (Mar. 2020).

Board took the unprecedented step of creating a new exception to WQTV calculations for purposes of SCM design, stating that “The final rule has been revised to allow permittees to exclude uncontaminated roof runoff to from [sic] the WQTV calculation.”<sup>16</sup>

The “uncontaminated roof runoff” loophole has never been included in TDEC’s permanent stormwater standards, and it was not part of the previous MS4 general permit issued in 2016.<sup>17</sup> Thus, the loophole does not achieve pollution control to the MEP because it is less protective than the stormwater control measures that Tennessee required of MS4s—and by extension, developers—for years. Moreover, the Board did not include the “uncontaminated roof runoff” loophole in the draft rule that it published for public notice and comment. That loophole constitutes such a dramatic departure from the language of the draft rule, and such a dramatic change in the law governing post construction stormwater control, that the Board should have afforded the public notice of and an opportunity to comment on the loophole before the Board adopted it. Because the loophole constitutes a change outside of the scope of the Rule’s rulemaking notice, the Board’s failure to provide adequate notice violated the public notice, hearing and comment procedures of the UAPA.<sup>18</sup>

After promulgation of Tenn. R. & Regs. 0400-40-10-.04, TDEC subsequently issued a NPDES General Permit for Discharges from MS4s, Permit No. TNS000000, which contained identical language to the Rule and authorized MS4 use of the “uncontaminated roof runoff” loophole.<sup>19</sup> TDEC received over 160 pages of comments on the draft MS4 permit.<sup>20</sup> None of those comments support the “uncontaminated roof runoff” loophole. Many commenters noted the significant legal and practical problems arising from the new roof runoff exclusion, and they requested that the final permit remove the language. Others asked that the Department at least define the term “uncontaminated roof runoff” and expressed concern that TDEC provides no legal precedent or scientific basis upon which MS4s can rely when implementing the exclusion. Objecting commenters included professional engineers, the Tennessee Stormwater Association,

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<sup>16</sup> *Id.*

<sup>17</sup> See TDEC, NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (MS4) Permit No. TNS000000, Part 4.2.5.2 (2016) (“2016 MS4 Permit”).

<sup>18</sup> See Tenn. Code Ann. § 4-5-203(c)(2).

<sup>19</sup> TDEC, National Pollutant Discharge Elimination System (NPDES) from Small Municipal Separate Storm Sewer Systems Permit Number TNS000000 (effective Sept. 1, 2022) (“MS4 Permit”).

<sup>20</sup> See Comments to 2022 Draft MS4 Permit, available at

[https://dataviewers.tdec.tn.gov/dataviewers/apex\\_util.count\\_click?p\\_url=BGWPC.GET\\_WPC\\_DOCUMENTS?p\\_file=198222780811973562&p\\_cat=DOCS&p\\_id=198222780811973562&p\\_user=APEX\\_PUBLIC\\_USER&p\\_workspace=19833722515258996](https://dataviewers.tdec.tn.gov/dataviewers/apex_util.count_click?p_url=BGWPC.GET_WPC_DOCUMENTS?p_file=198222780811973562&p_cat=DOCS&p_id=198222780811973562&p_user=APEX_PUBLIC_USER&p_workspace=19833722515258996) (document date May 23, 2022).

numerous city and county governments, environmental consultants, water protection and conservation organizations, drafters of the State’s *TNH2O Plan*, and concerned private citizens.<sup>21</sup>

Instead of heeding the overwhelming public response requesting that the problematic loophole be removed from the MS4 Permit, TDEC retained it. In addition, the Department failed to define the term “uncontaminated roof runoff” or provide any defensible legal or scientific basis for the loophole’s inclusion in the Permit. Rather, the Department issued a so-called “guidance” document which purportedly “describes the implementation of the uncontaminated roof runoff exclusion”<sup>22</sup> while shifting the burden of defining “uncontaminated roof runoff” to local governments.

The Board’s promulgation of Tenn. R. & Regs. 0400-40-10.04(2)(c) was unlawful. It relies on the false premise that roof runoff can be permanently “uncontaminated.” By requiring that subsequently-issued MS4 permits contain this loophole, the Rule does not ensure that stormwater pollutants are treated to the maximum extent practicable (MEP) under the State’s permitting regime and as required by federal and state law.

- i. The exclusion relies on the false premise that roof runoff can be considered permanently “uncontaminated.”

The “uncontaminated roof runoff” exclusion is practically unworkable because it is impossible to establish that a particular site’s roof runoff will be perpetually “uncontaminated.” Developers should not be allowed to premise their design and implementation of permanent SCMs upon the fictitious assumption that their roof runoff is forever clean.

As pointed out by multiple commenters on the MS4 Permit,<sup>23</sup> roofs can and do produce contaminated roof runoff at every stage of their use.<sup>24</sup> Roofing materials become a source of contamination as they age, weather, and deteriorate.<sup>25</sup> Roof runoff can also become contaminated

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<sup>21</sup> See, e.g., Comments to 2022 Draft MS4 Permit, 16–20, 22, 26, 29, 34–35, 37, 64, 66, 73, 80, 85, 100–102, 107, 113, 117, 120-121, 122–125, 128, 136–138, 152–153, 154–156, 158–159.

<sup>22</sup> TDEC, *NPDES Municipal Separate Storm Sewer Systems (MS4) Permit Uncontaminated Roof Runoff Exclusion Guidance*, DWR-NR-G-12-Municipal Stormwater-08012022, 1 (Aug. 1, 2022) (“Uncontaminated Roof Runoff Guidance”).

<sup>23</sup> Again, because the “uncontaminated roof runoff” exclusion was included for the first time in the final version of Tenn. R. & Regs. 0400-40-10-.04, commenters on that draft Rule were unable to submit comments on the inappropriateness of the exclusion. Petitioner therefore relies on comments submitted on the identical language found in the 2022 MS4 Permit to discuss the legal and practical problems with this language.

<sup>24</sup> See, e.g., Comments to 2022 Draft MS4 Permit, 17, 22, 29, 64, 85, 107, 113, 117, 124, 136, 152, 158–159.

<sup>25</sup> See, e.g., Shirley Clark *et al.*, *Roofing Materials’ Contributions to Storm-Water Runoff Pollution*, 134 J. of Irrigation and Drainage Engineering 5 (2008), <https://ascelibrary.org/doi/full/10.1061/%28ASCE%290733->

by external elements to various degrees depending on the season and weather patterns. Contamination occurs due to organic debris, such as leaf litter, as well as fecal matter from birds and other wildlife.<sup>26</sup> The speed of decomposition of organic matter, as well as how much metals and other pollutants leach from roof material, depends partly on ambient air temperature and the chemical characteristics of rainfall, both of which vary over time.<sup>27</sup> Surrounding infrastructure and industry can also contribute to rooftop pollution.<sup>28</sup> Moreover, even if roof runoff could somehow avoid being physically contaminated (an unlikely miracle), the water can still be thermally polluted so as to interfere with the designated uses of receiving waterways.<sup>29</sup>

As time passes, roof materials degrade, weather conditions change, wildlife activity fluctuates, and further development occurs. Thus, it is never reasonable or accurate to assume that the runoff from a particular roof will always be clean.<sup>30</sup>

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[9437%282008%29134%3A5%28638%29](#) (noting that potential for pollutant release from some roofing panel types can exist for more than sixty years).

<sup>26</sup> See, e.g., Kristen Nicole Wyckoff, *Drivers of Stormwater Runoff Characteristics from Non-Point Source Urban Pollution*, PhD diss., University of Tennessee, 10 (2017), [https://trace.tennessee.edu/utk\\_graddiss/4841](https://trace.tennessee.edu/utk_graddiss/4841) (“Pollutants found in rooftop runoff and in cisterns vary based on different characteristics such as location, storm event characteristics, and rooftop characteristics. Commonly measured parameters measured include pH, conductivity, total suspended solids (TSS), turbidity, anions, cations, metals, and organic pollutants.”). Other scientific papers also support these points. See, e.g., P.J. De Buyck et al., *Roof runoff contamination: a review on pollutant nature, material leaching and deposition*, REV ENVIRON SCI BIOTECHNOL 20, 549–606 (2021), <https://link.springer.com/article/10.1007/s11157-021-09567-z> (“Available data from literature however show that roof runoff can be contaminated by a wide range of (micro)pollutants, and in concentrations often exceeding surface water quality and/or drinking water standards.”).

<sup>27</sup> This variability in pollution level was demonstrated by the recent fish consumption advisory released by TDEC for mercury likely caused by “atmospheric deposition which has been shown to be the result of the global burning of coal.” Adrian Mojica, *Fish consumption advisory issued for parts of midstate due to mercury, chemical levels*, FOX17 WZTV NASHVILLE (June 20, 2022), <https://fox17.com/news/local/fish-consumption-advisory-issued-for-parts-of-midstate-due-to-mercury-chemical-levels-tennessee-fishing-wildlife>.

<sup>28</sup> See Kathy DeBusk et al., *Water Quality of Rooftop Runoff: Implications for Residential Water Harvesting Systems*, North Carolina Cooperative Extension, 1 (undated), [https://www.ctahr.hawaii.edu/hawaiirain/Library/Guides&Manuals/NC\\_WaterQuality\\_RooftopRunoff2009.pdf](https://www.ctahr.hawaii.edu/hawaiirain/Library/Guides&Manuals/NC_WaterQuality_RooftopRunoff2009.pdf) (“Primary substances of concern in roof runoff include heavy metals, polycyclic aromatic hydrocarbons [PAHs], microbes, pathogens, and pesticides. In areas of heavy traffic and industry, dust and particular matter from vehicle exhaust and the burning of fossil fuels can collect on roof surfaces, producing elevated PAH levels in runoff.”).

<sup>29</sup> See, e.g., Tenn. R. & Regs. 0400-40-03-.03 (specifying temperature criteria for each designated water use); see also Comments to 2022 Draft MS4 Permit, 124.

<sup>30</sup> As one commenter on the draft MS4 Permit pointed out, the exclusion does not seem to contemplate situations like “a new roof on a building that would result in the runoff being

In TDEC's *Tennessee Permanent Stormwater Management and Design Guidance Manual*, the Department acknowledges that rooftops are continuous sources of pollution loading into stormwater systems. Specifically, when discussing maintenance of impervious surface areas, TDEC states, "[a]t all times, the roof area shall be maintained to reduce the debris and sediment load to the system."<sup>31</sup> This language reflects the necessity of long-term management of rooftops in acknowledgement of their varying pollution loads. Research, experience, and common sense make clear that no roof can be guaranteed to remain pollution free; therefore, roof runoff cannot be permanently determined to be "uncontaminated" for the life of a structure.

- ii. The roof runoff exclusion does not require MS4s to reduce pollutant discharges to the MEP.

Given the impossibility of establishing that roof runoff will remain truly "uncontaminated" by pollutants during the life of the site, the question remains what level of pollution can exist in roof runoff but still be considered "uncontaminated" for purposes of the Rule. The Rule does not say. And ignoring the request of several commenters to at least define the term "uncontaminated roof runoff," the Department declined to do so in its subsequently-issued MS4 Permit instead leaving the decision to MS4s themselves.

The Rule's failure to define "uncontaminated roof runoff" is more than a simple exercise in wording. Instead, it allows MS4s to exclude pollutant-laden runoff from the NPDES permitting regime entirely by defining contamination into nonexistence. The subsequent MS4 Permit issued by TDEC likewise failed to address this deficiency. By requiring MS4 permits to contain this exclusion as part of its effluent limits for stormwater control measures, the Rule therefore violates the Clean Water Act's regulatory mandate that MS4 permits require, at minimum, that MS4s "reduce the discharge of pollutants from the MS4 to the maximum extent practicable."<sup>32</sup> It also violates the regulation's requirement that MS4 permits "ensure that controls are in place that would prevent or minimize water quality impacts."<sup>33</sup> Instead of establishing effluent limitations that are "clear, specific, and measurable," the Rule creates an undefined loophole which, when subsequently incorporated into MS4 permits, allows MS4s to not require roof runoff treatment in certain situations *at all*.<sup>34</sup>

Treating stormwater that runs off of roofs is practicable. We know this is true because Tennessee has previously and successfully required developers to do so.<sup>35</sup> TDEC has also

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considered contaminated," or "a bird infestation that would cause the runoff to be considered contaminated." Comments on 2022 Draft MS4 Permit, 80. Neither the final Permit nor the guidance addresses these scenarios.

<sup>31</sup> TDEC, *Tennessee Permanent Stormwater Management and Design Guidance Manual*, 186 (last updated Mar. 2, 2015).

<sup>32</sup> 40 C.F.R. § 122.34(a).

<sup>33</sup> 40 C.F.R. § 122.34(b)(5).

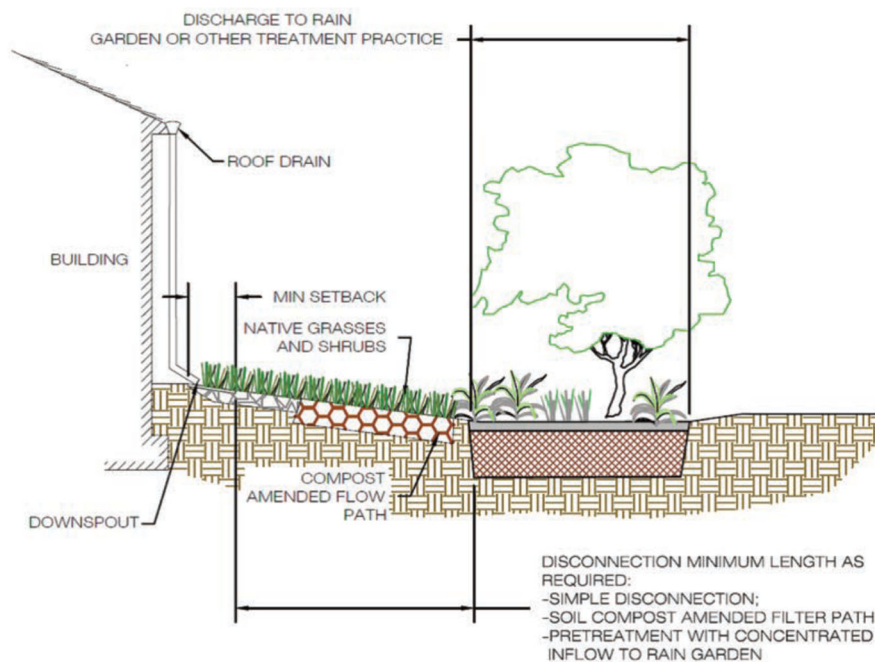
<sup>34</sup> 40 C.F.R. § 122.34(a).

<sup>35</sup> See, e.g., 2016 MS4 Permit, Part 4.2.5.2 (requiring permanent stormwater management programs to calculate WQTV based on the runoff generated from all impervious surfaces at the site).

published documents demonstrating that it can and must be done. As mentioned, past iterations of the small MS4 general permit required treatment of runoff from impervious surfaces, including roofs. And the *Tennessee Permanent Stormwater Management and Design Guidance Manual* highlights the importance of rooftop runoff treatment, stating:

The [runoff] treatment volume is any runoff generated from the first inch of rainfall from site elements that can potentially contribute pollutants. These areas include impervious surfaces (such as **rooftops**, pavements, dirt roads, etc.) . . . **In order to be compliant with treatment requirements, this volume must run through an SCM that is approved for treatment.**<sup>36</sup>

TDEC's manual also includes drawings demonstrating stormwater control measures that can treat roof runoff:



**Figure 21: Residential Rooftop Disconnection to downstream rain garden – Bioretention without an underdrain (Source: VADCR).<sup>37</sup>**

By making the subject exclusion in the Rule discretionary, the Board also implicitly acknowledges that roof runoff can still be practicably treated. For if an MS4 chooses not to utilize the exclusion, developers will be required to incorporate roof runoff into their WQTV and SCM calculations as they have in the past.

<sup>36</sup> TDEC, *Tennessee Permanent Stormwater Management and Design Guidance Manual*, 52 (last updated Mar. 2, 2015).

<sup>37</sup> *Id.* at 159.

The Board has promulgated a Rule which caused TDEC to fail to include clear, specific, and measurable terms in the MS4 Permit to satisfy the federal requirement that pollutant-laden discharges are treated to the maximum extent practicable. The Rule also runs astray of that legal requirement by causing the MS4 Permit to allow a category of stormwater to be left untreated when state guidance, past practice, and past Permit provisions all indicate that it can practicably be done.

- iii. MS4s will be under enormous pressure to utilize the exclusion regardless of their ability to legally create and implement such an exception.

Because the Board only added the “uncontaminated roof runoff” exclusion into the final version of Tenn. R. & Regs. 0400-40-10-.04, the public did not have an opportunity to raise concerns with the language in the public comment period for that rulemaking. However, when issuing the MS4 Permit, TDEC attempted to wave away all of the concerns raised by commenters with the exclusion by insisting that it is *permissive* and therefore there is nothing to worry about. Not true. As highlighted by numerous commentors on the MS4 Permit, such a position by TDEC willfully ignores the political pressures that developers will bring to bear on MS4s. Developers will push small localities, who frequently lack adequate funding and expertise, to utilize the new loophole and to accept the developers’ assertions that the roof runoff associated with various projects is miraculously “uncontaminated.”

Through the subject loophole, the Rule and subsequent MS4 Permit illegally saddle small MS4s with the burden of establishing measures required to reduce pollution to the MEP. In its 2016 remand rule, the U.S. Environmental Protection Agency (“EPA”) clearly stated that such is the responsibility of the permitting authority (i.e. TDEC), not the MS4. As EPA stated:

*A. Permitting Authority as the Ultimate Decision-Maker*

To directly address the clear message from the Ninth Circuit remand that the regulations need to preclude the small MS4 from determining on its own what actions are sufficient to meet the MS4 standard “to reduce pollutants to the maximum extent practicable, protect water quality and satisfy the appropriate water quality requirements of the CWA,” EPA proposed revisions throughout § 122.34 to make it clear that the permitting authority is responsible for establishing permit requirements that meet the standard. For this reason, EPA proposed to shift the focus of the requirements in § 122.34 to the “NPDES permitting authority” rather than the regulated small MS4.<sup>38</sup>

TDEC is the entity charged with the responsibility of ensuring that its Permit requires MS4s to reduce pollution to the MEP. Neither it nor the Board can legally foist that responsibility onto MS4s or grant MS4s the discretion to pollute Tennessee waters. As demonstrated by the comments

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<sup>38</sup> U.S. Env’t Prot. Agency, National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89320, 89333 (Dec. 9, 2016).

of the City of Bristol, the City of Chattanooga, the City of Elizabethton, the City of Franklin, the City of Gallatin, the City of Maryville,<sup>39</sup> Johnson City, Knox County, the Metropolitan Government of Nashville and Davidson County, Montgomery County, and the Tennessee Stormwater Association, the Rule and subsequent MS4 Permit effectively saddle MS4s with the burden of contending with a regulatory loophole that developers will attempt to exploit, in violation of federal and state law.

- iv. The Rule's roof runoff exclusion requires TDEC's MS4 permit to contain a less stringent standard or condition than the comparable provision in the 2016 MS4 permit.

The 2022 version of the MS4 Permit was substantially revised from the MS4 Permit TDEC issued in 2016. As discussed previously, these changes reflect new effluent limitations which were promulgated by the Tennessee Board of Water Quality, Oil and Gas in Tenn. R. & Regs. 0400-40-10-.04. In particular, the section governing permanent stormwater standards underwent significant change. For the first time, in the 2022 MS4 Permit, TDEC included the loophole provided in Tenn. R. & Regs. 0400-40-10.04(2)(c) allowing "uncontaminated roof runoff" to be exempted from the WQTV.<sup>40</sup> The 2016 version of the permit, in contrast, required that all impervious surfaces be included in the WQTV.<sup>41</sup> Whereas before the MS4 Permit required that stormwater management programs address pollutant-laden runoff from all impervious surfaces, the newer iteration of the Permit—as required by the newly promulgated Rule—does not. Such a change constitutes a revision to the MS4 Permit's standards or conditions which serves to weaken water quality protection and permanent stormwater controls.

Imposing stormwater standards which require issuance of an MS4 permit with the less stringent and less protective roof runoff exclusion takes stormwater pollution control backwards.

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<sup>39</sup> The City of Maryville made a comment dated May 18, 2022 on the draft MS4 Permit, but TDEC did not include that document in the comments posted to TDEC's Data Viewer.

Accordingly, that comment is attached hereto as Exhibit A.

<sup>40</sup> MS4 Permit, Part 4.2.5.2.

<sup>41</sup> 2016 MS4 Permit, Part 4.2.5.2.2.

It constitutes impermissible backsliding that contravenes federal law,<sup>42</sup> federal regulations,<sup>43</sup> and state regulations.<sup>44</sup> During the public comment period on the draft MS4 Permit, when the public was first able to submit comments on the “uncontaminated roof runoff” exclusion, several commenters voiced concern to TDEC regarding the regressive nature of the exclusion, and its weaker protections as compared to previous state stormwater requirements. Commenters pointed out that this exclusion was newly added to Tennessee’s permanent stormwater standards,<sup>45</sup> would result in less stormwater treatment,<sup>46</sup> exacerbate stormwater runoff problems in state waterways,<sup>47</sup> and ultimately provide less pollution control resulting in negative impacts to water quality.<sup>48</sup> Yet TDEC retained the exclusion. In doing so, the Department impermissibly included a less stringent standard or condition in the Permit as compared to its previous version.

The MS4 Permit must require treatment of stormwater from impervious surfaces—including roofs—in order to ensure that treatment is performed to MEP, and that other state and federal standards, including water quality standards, are not violated. Because the MS4 Permit must contain effluent limitations as promulgated by the Board, Tenn. R. & Regs. 0400-40-10.04(2)(c) must be declared invalid and its terms amended.

v. The roof runoff exclusion will cause SCMs to be undersized and ineffective.

Problems with the roof runoff exclusion are not limited to the roof runoff discharge itself. By exempting so-called “uncontaminated” roof runoff from WQTV, the Rule and the MS4 Permit put all stormwater discharge treatment at risk.

Roof runoff is not required to be physically separated from other stormwater runoff in the final design of the site by the terms of the Rule, the MS4 Permit, or that Permit’s accompanying

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<sup>42</sup> 33 U.S.C.A. § 1342(o)(1) states that for “effluent limitations established on the basis of section 1311(b)(1)(C) . . . a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.” The law contains an exception for compliance with 33 U.S.C.A. § 1313(d)(4), which relates to meeting particular water quality standards and does not here apply. 33 U.S.C.A. § 1311(b)(1)(C) describes the need to achieve “any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations [] or any other Federal law or regulation, or required to implement any applicable water quality standard. . .”

<sup>43</sup> 40 C.F.R. § 122.44(l)(1) states that, except under conditions not here applicable, “interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit.”

<sup>44</sup> Tenn. R. & Regs. 0400-40-05-.08(j)(1) states: “When a permit is renewed or reissued, effluent limitations, standards or conditions shall be at least as stringent as the effluent limitations, standards, or conditions in the previous permit unless” conditions not here applicable apply.

<sup>45</sup> See e.g., Comments to 2022 Draft MS4 Permit, 101–102.

<sup>46</sup> See e.g., *Id.* at 136–137.

<sup>47</sup> See e.g., *Id.* at 26.

<sup>48</sup> See e.g., *Id.* at 113.

“guidance” document,<sup>49</sup> which Petitioner has separately challenged as an unlawful rulemaking.<sup>50</sup> Therefore, during storm events, runoff from the roof can commingle with other stormwater which must go through the site's SCM.<sup>51</sup> However, because project designers can now exclude “uncontaminated” roof runoff from the volume of water that stormwater control measures must be designed to treat, those SCMs will be too small. Undersized SCMs will become inundated with more water than they are equipped to handle, ensuring that all pollution contained in flowing stormwater will not be treated to the MEP. At least one commenter alerted TDEC to this issue during the public comment period on the draft MS4 Permit, noting:

From an SCM design perspective, splitting roof discharges from other stormwater flows can be tricky to design, especially for residential developments. A fallback approach for this would be to just credit the roof area from the WQTV calculation without actually diverting the runoff onsite and allowing an equivalent portion of impervious area to runoff untreated or just under-sizing the SCM. (These situations are not prohibited by the draft permit and will be attempted by site designers.). So, sending roof runoff to a SCM and not accounting for the volume of the roof inherently makes the SCM undersized and thus, it neither functions as intended nor provides the treatment required.<sup>52</sup>

Although TDEC maintains that it is only concerned with water quality, not water quantity, when undersized SCMs are overwhelmed with amounts of water larger than they are designed to treat, the result is more pollution and degraded water quality. The Rule, the Permit, and the “guidance” do not prevent such a scenario. Moreover, given that roofs can constitute over half of the impervious surface area at new development or redevelopment sites, the additional pollution caused by this exclusion will result in serious negative impacts to state water quality.<sup>53</sup>

*b. Tenn. R. & Regs. 0400-40-10.04(4) wrongfully allows placement of SCMs in riparian buffers.*

Petitioner also challenges Tenn. R. & Regs. 0400-40-10.04(4), which required the later-issued MS4 Permit to allow “infiltration-based SCMs” to be placed within riparian buffers. This

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<sup>49</sup> See *Uncontaminated Roof Runoff Guidance*.

<sup>50</sup> See Harpeth Conservancy, *Petition for Appeal of NPDES Permit No. TNS000000, Small Municipal Separate Storm Sewer Systems* (Aug. 30, 2022).

<sup>51</sup> In the *Uncontaminated Roof Runoff Guidance*, TDEC asserts that, “[f]or purposes of calculating WQTV, the roof runoff must be physically separated (uncontaminated) from other sources of runoff.” While not the model of clarity, this language does not seem to require physical separation of “uncontaminated” roof runoff from other stormwater sources in the permanent design of the site. In other words, the guidance appears to only require separation of excluded runoff when *establishing* the WQTV amount to design SCMs. It does not seem to require that the roof runoff has to *remain* separate from other stormwater sources during the lifetime of the site when those SCMs are in use.

<sup>52</sup> Comments to 2022 Draft MS4 Permit, 136–37.

<sup>53</sup> See, e.g., Comments to 2022 Draft MS4 Permit, 153.

provision allows such SCMs to be located in areas immediately adjacent to streams, wetlands, or other waterbodies. As discussed by several commenters on the draft MS4 Permit, such placement inhibits the proper functioning of those SCMs and therefore prevents them from reducing pollutant runoff to the MEP. The provision also allows placement of SCMs in areas where they cannot be managed effectively, and it combines two separate stormwater control measures, thereby reducing water quality. Moreover, this provision weakens stormwater control measures governing riparian buffers as compared to the protections in the previous 2016 MS4 Permit.

- i. The provision does not require MS4s to reduce pollutant discharges to the MEP.

Infiltration-based SCMs include stormwater treatment devices such as bioretention areas. Those areas “use the interaction of plants, soil, and microorganisms to store, treat, and reduce runoff volume, and to reduce flow rate of stormwater runoff.”<sup>54</sup> *Tennessee Permanent Stormwater Management and Design Guidance Manual* states that to operate effectively, those systems should be at least two feet from the water table, thirty feet from surface water, and generally outside the 100-year floodplain.<sup>55</sup> Yet, neither the Rule nor the later-issued Permit contain such constraints, and instead allow developers to install such infiltration-based SCMs within riparian buffers regardless of the location of the water table, floodplain, and in certain circumstances, closer than thirty feet to surface waters.

The problems with such an approach are threefold: First, in areas where the water table is high, bioretention areas will not be able to “store” or “reduce” stormwater runoff because the soil in the areas will already be saturated with water and unable to hold more. Second, such infiltration-based SCMs are impracticable to maintain in riparian buffers, as they become clogged with silt and sediment during high-water events, thus impeding their effectiveness.<sup>56</sup> Third, by allowing permittees to combine two separate stormwater control measures, which are individually required in the Rule and in the MS4 Permit without additional protection, the Board and TDEC are essentially allowing permittees to reduce the overall treatment required on site.

Several commenters alerted TDEC to these problems during public comment on the MS4 Permit. For instance, one commenter questioned the effectiveness of infiltration-based SCMs in riparian buffers because “the water table adjacent to a stream would likely prevent any meaningful infiltration, particularly during a storm event.”<sup>57</sup> Another city commenter noted that at least one infiltration-based SCM within a riparian buffer in its jurisdiction has been effectively abandoned after having been silted over and subsequently cleaned numerous times. The City wrote that “[a]t the last cleaning it was determined no more cleaning of the area would be performed as cleaning was not successful at restoring infiltrative capacities.”<sup>58</sup> A third commenter urged TDEC to clarify

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<sup>54</sup> *Tennessee Permanent Stormwater Management and Design Guidance Manual*, 141.

<sup>55</sup> *Id.* at 141, 143.

<sup>56</sup> See Comments to 2022 Draft MS4 Permit, 19, 120.

<sup>57</sup> *Id.* at 22.

<sup>58</sup> *Id.* at 120.

that, if infiltration-based SCMs were allowed in the riparian buffer, the Department should require that those SCMs “do not count towards the buffer area” otherwise required on site and that mitigation would be necessary to offset the lost treatment capacity.<sup>59</sup>

Despite the obvious problems with this loophole, both the Rule and the final MS4 Permit retain the ability of MS4 permittees to allow infiltration-based SCMs in riparian buffers. In TDEC's Notice of Determination for the final MS4 Permit, TDEC states that “the specifics of buffer use are at the discretion of the local jurisdiction.”<sup>60</sup> Yet, as described above, such practices result in water discharges where pollutants are not treated to the MEP. Furthermore, neither the Rule nor the MS4 Permit clarifies whether SCMs can or cannot be counted toward the required minimum buffer area.

As acknowledged in the Rule and the Permit, riparian buffers are meant to provide “*additional* water quality treatment in riparian areas” beyond that which is already required of stormwater management elsewhere in the Permit, including SCMs based on WQTV.<sup>61</sup> Yet, the Rule and subsequently-issued Permit impermissibly allow permittees to minimize the amount of water quality controls maintained on site by combining infiltration-based SCMs and riparian buffers and then counting both requirements as individually met. Such an approach has been demonstrably shown to reduce water quality treatment and thus does not ensure that stormwater pollution is reduced to the MEP.

- ii. The Rule's riparian buffer provision relaxes permit standards or conditions protecting and maintaining these water quality enhancing measures.

Following the Board's promulgation of Tenn. R. & Regs. 0400-40-10.04(4), the Department modified the 2022 version of the MS4 Permit to mirror that Rule's language and provide less protection of water quality enhancing riparian buffers than was previously required in the 2016 MS4 permit. These changes to stormwater control requirements constitute weaker water quality treatment standards or conditions than were previously applicable and therefore violate federal and state regulations.

Specifically, Tenn. R. & Regs. 0400-40-10.04(4)—and by extension, the 2022 MS4 Permit—reduces the width of undisturbed riparian buffers required as permanent stormwater standards.<sup>62</sup> Previously, the 2016 version of the MS4 Permit specified that infiltration-based SCMs could only be placed in the “outer zone” of riparian buffers.<sup>63</sup> Depending on the drainage area of the stream, that meant that infiltration-based SCMs were prohibited from being within 30-40 feet of the waterway. As discussed in detail above and noted in the *Tennessee Permanent Stormwater Management and Design Guidance Manual*, such spacing between infiltration-based SCMs and surface water is crucial to ensuring that infiltration-based SCMs function properly. The 2022 MS4

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<sup>59</sup> *Id.* at 124.

<sup>60</sup> TDEC, NPDES Permit TNS000000 Notice of Determination, NOD-9 (2022).

<sup>61</sup> See Tenn. R. & Regs. 0400-40-10-.04(4); MS4 Permit, Section 4.2.5.4.

<sup>62</sup> Tenn. R. & Regs. 0400-40-10-.04(4); MS4 Permit, 4.2.5.4.

<sup>63</sup> 2016 MS4 Permit, 4.2.5.2.4.

Permit modified these conditions, however, to reflect the smaller buffer requirements contained in Tenn. R. & Regs. 0400-40-10.04(4) which allow infiltration-based SCMs to be placed within fifteen feet of certain waters and thirty feet for all the rest, regardless of the waterway's drainage area.<sup>64</sup>

Tenn. R. & Regs. 0400-40-10.04(4) and the 2022 MS4 Permit's reduction of unaltered riparian buffer zones results in a pollution reduction standard or condition that is less stringent than was imposed in a previous permit. Commenters on the 2022 MS4 Permit pointed out as much, noting that such revisions "weaken buffer zones,"<sup>65</sup> "invite more flooding,"<sup>66</sup> and will "render [infiltration-based SCMs] ineffective."<sup>67</sup> By allowing infiltration-based SCMs to encroach on riparian buffers, the Rule and the 2022 MS4 Permit reduce their effectiveness as water quality treatment tools and results in a final MS4 Permit with standards or conditions less protective than its predecessor.

### Claims for Relief

#### I. Claim 1: Violation of Section 301 of the federal Clean Water Act and implementing regulations

The purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>68</sup> To that end, Congress established an "interim goal of [achieving] water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation" as well as a longer-term goal "that the discharge of pollutants into navigable waters be eliminated by 1985."<sup>69</sup> To meet those goals, Congress prohibited the discharge of pollutants from point sources without a permit.<sup>70</sup>

Congress designed the NPDES permitting program so that permits for municipal discharges "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."<sup>71</sup> Federal regulation specifies that permits issued to regulated MS4s must "include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy

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<sup>64</sup> Tenn. R. & Regs. 0400-40-10-.04(4); MS4 Permit, 4.2.5.4.

<sup>65</sup> Draft MS4 Permit Comments, 74.

<sup>66</sup> *Id.* .

<sup>67</sup> *Id.* at 107.

<sup>68</sup> 33 U.S.C. § 1251(a).

<sup>69</sup> *Id.*

<sup>70</sup> 33 U.S.C. § 1311(a); *see also* 33. U.S.C. § 1362 (defining "pollutant" and "point source").

<sup>71</sup> 33 U.S.C. § 1342(p).

the appropriate water quality requirements of the Clean Water Act.”<sup>72</sup> Additionally, MS4 permits “must ensure that controls are in place that would prevent or minimize water quality impacts.”<sup>73</sup>

As required by Tennessee statute, any NPDES permit issued by TDEC can only contain effluent limitations which have previously been promulgated in a rulemaking by the Board.<sup>74</sup> The 2022 MS4 Permit adheres to this requirement, mirroring the applicable regulatory language found in Tenn. R. & Regs. 0400-40-10.04. The Rule’s roof runoff provision violates the Clean Water Act and its implementing regulations because it fails to ensure that MS4 permits issued by the state require pollutant discharges to be reduced to the MEP. As discussed in detail above, the provision creates an exclusion which requires MS4 Permits to allow permittees to forego requiring treatment of potentially significant percentages of impervious surface on development and redevelopment sites. The Rule does so without defining or otherwise clearly detailing when this exemption can apply, and as seen by the later-issued MS4 Permit, the result is that permittees are left to craft their own definitions. The Rule lacks clear, specific, and measurable requirements required by the Clean Water Act and its implementing regulations to control the discharge of pollutants to the MEP, and it allows the MS4 Permit to illegally shift the burden of establishing protective standards to under-resourced small MS4s.

The Rule provision allowing infiltration-based SCMs in riparian buffers likewise violates the Clean Water Act and its implementing regulations. As detailed above, the provision requires that MS4 Permits allow for pollution control measures to be sited in riparian areas demonstrated to interfere with the effectiveness of the SCMs. Moreover, the provision allows for the combination of pollution control measures such that overall pollution control is minimized or otherwise impaired. Because the Rule results in a stormwater management program which fails to reduce discharge of pollutants to the MEP, it violates federal law and regulations.

## **II. Claim 2: Violation of federal anti-backsliding laws and regulations.**

Section 402 of the federal Clean Water Act prohibits the issuance of backsliding permits. Specifically, the statute states that “a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. . . .”<sup>75</sup> The implementing federal regulations contain a similar prohibition.<sup>76</sup>

Tenn. R. & Regs. 0400-40-10.04 requires that permits issued by TDEC to MS4 operators contain the effluent limitations contained in the Rule’s provisions. These include the roof runoff loophole and the provision allowing placement of infiltration-based SCMs in riparian buffers. The Rule’s roof runoff loophole violates federal anti-backsliding laws because it requires MS4 permits to contain stormwater management effluent limitations that weaken permanent stormwater control measures required by the previous permit. Whereas the previous permit did not contain a roof

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<sup>72</sup> 40 C.F.R. § 122.34(a).

<sup>73</sup> 40 C.F.R. § 122.34(b)(5).

<sup>74</sup> Tenn. Code Ann. § 69-3-108(s).

<sup>75</sup> 33 U.S.C.A. § 1342(o)(1).

<sup>76</sup> 40 C.F.R. § 122.44(l)(1).

runoff loophole, the new Permit is required to do so. Similarly, the Rule's provision related to placement of infiltration-based SCMs in riparian buffers also causes the MS4 permit to engage in illegal backsliding, because it requires weakened permanent storm water control measures as compared to the previous permit. By reducing riparian buffer zones and allowing placement of SCMs in areas where their effectiveness is compromised, the provision relaxes the prior permit's standards and limitations unlawfully.

### **III. Claim 3: Violation of Section 108 of the Tennessee Water Quality Control Act and implementing regulations**

Tennessee, in partnership with the U.S. Environmental Protection Agency, manages the state's NPDES permitting program.<sup>77</sup> As part of this process, the State and TDEC must comply with applicable federal statutes and regulations.<sup>78</sup> The TWQCA requires all NPDES permits to include "[t]he most stringent effluent limitations and schedules of compliance . . . necessary to comply with other state or federal laws or regulations."<sup>79</sup> Because the Rule dictates the MS4 Permit's terms which together violate the Clean Water Act and its implementing regulations (*see* Claims 1 and 2, above), the Rule also violates the TWQCA.

TDEC regulations additionally prohibit issuance of any permit that would violate the TWQCA or Section 301 of the Clean Water Act.<sup>80</sup> Further, TDEC regulations specify that when "more stringent effluent limitations are necessary . . . to comply with other state or federal laws or regulations, then they *should* be imposed in the permit."<sup>81</sup> The regulations also require that renewed or reissued permits contain effluent limitations, standards, and conditions "at least as stringent" as those in the previous permit subject to limited exceptions.<sup>82</sup> As discussed above, because the Rule mandates that the Permit violate both the state and federal statutes, it likewise violates TDEC's own regulations.

The roof runoff exclusion provision violates the TWQCA and implementing regulations because it prevents the MS4 Permit from requiring permittees to reduce the discharge of pollutants to the MEP. The provision allowing infiltration-based SCMs in riparian buffers also violates the TWQCA and implementing regulations for the same reason. In addition, both provisions violate state regulations because they require the MS4 Permit to contain less protective conditions than were imposed in the previous permit. The provisions are unlawful because they require issuance of a NPDES permit which allows permittees to reduce the overall amount and effectiveness of stormwater control measures.

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<sup>77</sup> 33 U.S.C. § 1342; Tenn. Code Ann. § 69-3-108.

<sup>78</sup> Tenn. Code Ann. § 69-3-108(g)(1); Tenn. R. & Regs. 0400-40-05-.04(6).

<sup>79</sup> Tenn. Code Ann. § 69-3-108(g)(1).

<sup>80</sup> Tenn. R. & Regs. 0400-40-10.03(1) ("No permit shall be issued which will violate any provision of §§ 301, 302, 303, 306, or 307 of the Federal Water Pollution Control Act, or of the Tennessee Water Quality Control Act of 1977, or otherwise result in a condition of pollution.")

<sup>81</sup> Tenn. R. & Regs. 0400-40--05.07(1)(a) (emphasis added).

<sup>82</sup> Tenn. R. & Regs. 0400-40-10-.03(c)(3).

Because the Rule provisions discussed above violate the TWQCA and implementing regulations, they are unlawful.

**IV. Claim 4: Unlawful delegation of the responsibility to determine whether to invoke the uncontaminated roof runoff exclusion and the riparian buffer loophole from the State to MS4s**

The Rule results in TDEC illegally delegating to local jurisdictions the responsibility of determining whether roof runoff is “uncontaminated” and therefore excludable from stormwater treatment. Likewise, the Rule results in TDEC illegally delegating to small MS4s the responsibility of determining whether to allow construction of infiltration-based SCMs inside riparian buffers. Those illegal delegations are in derogation of the public notice, public comment, and public hearing requirements associated with NPDES permit making, and they contravene the EPA’s National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89320, 89333 (Dec. 9, 2016) and other applicable regulations. By failing to require permit effluent limitations that meet the MS4 regulatory standards required in NPDES General Permits, the Rule also contravenes 40 C.F.R. § 122.28.

**V. Claim 5: Unlawful adoption of the uncontaminated roof runoff exclusion found in Tenn. R. & Regs. 0400-40-10-.04(2)(c)**

The uncontaminated roof runoff exclusion found in Tenn. R. & Regs. 0400-40-10-.04(2)(c) was not included in the draft Rule that the Board published for public notice and comment. That newly added exclusion constitutes such a dramatic departure from the language of the draft rule, and such a dramatic change in the law governing post construction stormwater control, that the Board should have afforded the public notice and an opportunity to comment on it. The Board failed to do so. By failing to provide the public with adequate notice and an opportunity to comment on the newly added expansive loophole, the Board violated the public notice and comment procedures of the UAPA. Specifically, the Board violated Tenn. Code Ann. § 4-5-203 by instituting a change to the Rule which went beyond the scope of the rulemaking notice filed with the secretary of state.

**About Petitioner**

Petitioner and its members are affected persons entitled to review of the Board’s decision to promulgate Tenn. R. & Regs 0400-40-10-.04<sup>83</sup> The UAPA provides that affected persons may petition an agency for a declaratory order as to the validity or applicability of a rule within the primary jurisdiction of that agency.<sup>84</sup>

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<sup>83</sup> Tenn. R. & Regs. 0400-40-05-.12

<sup>84</sup> Tenn. Code Ann. § 4-5-223(a).

The TWQCA recognizes Tennesseans' interests in the waters of the state, which are "held in public trust for the use of the people of the state."<sup>85</sup> The TWQCA declares it to be the public policy of Tennessee that "the people of Tennessee, as beneficiaries of this trust, have a right to unpolluted waters."<sup>86</sup> The Act further asserts that an additional purpose of the statute is to enable the state to qualify for full participation in the NPDES system established under § 402 of the Federal Water Pollution Control Act, Public Law 92-500 (33 U.S.C. § 1342).<sup>87</sup>

Petitioner has been involved in stormwater management in the State for decades, and it submitted comments on the draft MS4 Permit effectuating the Rule's provisions.<sup>88</sup> And as set forth below, the Rule and subsequent issuance of the Permit harms Petitioner's organizational interests. The Rule and subsequent Permit also harms Petitioner's members' recreational and aesthetic interests as well as their interests in the waters of the State as public trust beneficiaries. Each of these legally recognized interests is protected by the federal Clean Water Act and the TWQCA.

Petitioner, Harpeth Conservancy, is a public benefit corporation based in Brentwood, Tennessee. Petitioner is organized under the laws of Tennessee, and it was previously known as the Harpeth River Watershed Association, which was formed in 1998.

Petitioner's Bylaws describe its purpose as follows:

Harpeth Conservancy is an organization of citizens dedicated to restoring and protecting clean water and healthy ecosystems for rivers in Tennessee by employing scientific expertise and collaborative relationships to develop, promote and support broad community stewardship and action.

(Article I, Section B of Harpeth Conservancy Bylaws). In furtherance of those goals, Petitioner's members and volunteers engage in community outreach, habitat restoration, recreation, scientific research, engagement with government officials, and statewide advocacy.

Petitioner is committed to analyzing and understanding the Harpeth River and other Tennessee waterways, including in-stream flows (hydrology), aquatic biodiversity, physical characteristics, and chemical composition. Scientific understanding of the Harpeth River watershed and other Tennessee waterways is central to Petitioner's purpose and work.

Petitioner commissions and performs scientific research, and it often commissions experts to perform scientific analyses of the Harpeth River and its watershed. Petitioner commissions those scientific studies in order to provide its staff and membership with data that enhances

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<sup>85</sup> Tenn. Code Ann. § 69-3-102(a); *see also* *Tenn. Env'tl. Council v. Bright Par 3 Associates, L.P.*, 2004 WL 419720 at \*3 (Mar. 8, 2004) (holding that all citizens of Tennessee have legally protected interest as beneficiaries of conservation easements "held for the benefit of the people of Tennessee").

<sup>86</sup> Tenn. Code Ann. § 69-3-102(a).

<sup>87</sup> Tenn. Code Ann. § 69-3-102(c).

<sup>88</sup> Draft MS4 Permit Comments, 101-104.

understanding of the river, including whether water quality and ecological conditions are changing and whether management efforts are resulting in improvements.

Petitioner helps convene expert advisory groups to design and carry out scientific studies, and Petitioner's staff and volunteers work on designing and carrying out scientific studies regarding water quality. Petitioner's water protection efforts include, *inter alia*, sediment study; a grant from the Tennessee Department of Agriculture's Nonpoint Source Program to conduct a Visual Habitat Assessment of tributaries on the § 303(d) list of impaired streams in the Harpeth watershed; identification of stream restoration sites; multiple diurnal studies of dissolved oxygen in the Harpeth watershed; an impoundment characterization study on the Harpeth River; preparation of watershed management plans; restoration projects on agricultural property along § 303(d) listed streams; assembling and cataloguing scientific studies of and data on the Harpeth River; sharing reports and data compilations with federal, state and local government officials; conducting studies of the water quality effects of various development designs via pre- and post-construction monitoring; working with cities on stormwater related issues; reviewing development proposals; reviewing NPDES sewer plant permits; purchasing and using state of the art water quality monitoring equipment; land use and development planning; providing expert analyses to state and federal agencies regarding permit applications affecting water quality in Tennessee; and engaging in statewide policy advocacy.

Petitioner has provided comments and analyses regarding all MS4 Phase II permits over the last twenty years. In addition, Petitioner has expertise in writing stormwater regulations at the local jurisdictional level, working with small MS4s like the City of Franklin, the City of Brentwood, and the City of Dickson as well as with Phase I jurisdictions like the Metropolitan Government of Nashville and Davidson County.

For more than twenty years, the Petitioner has worked with Williamson County, the City of Franklin, Metro Nashville, and other communities around middle TN on stormwater management, on stream restoration, and with the development and engineering profession on approaches that can improve water quality and reduce the risk of flooding and erosion. In 2003, Petitioner secured a \$200,000 EPA grant with both Williamson County and the City of Franklin as partners to design stormwater approaches with representatives of the development and the engineering communities. In addition to a focus on riparian buffers, another key focus was on how to integrate nutrient reduction targets from the EPA's Harpeth TMDL on low dissolved oxygen and nutrients into stormwater management.

Robert Karesh, TDEC's Stormwater Program Coordinator, worked at the Petitioner on the EPA grant after his position as the Williamson County Stormwater Coordinator and before his position at TDEC. One of Robert Karesh's efforts while working at the Petitioner was to launch the TN Stormwater Association, an organization that enables stormwater coordinators across the state to confer and learn from experts. Petitioner's current Science Director, Dr. Ryan Jackwood, has served as a board member of that organization.

Petitioner's President/CEO, Dorene Bolze, served on Williamson County Stormwater Appeals Board since its formulation in 2004 as the Environmental Representative. That work included serving as the Vice Chair and Chair for several years. Similarly, Ms. Bolze served on the City of Franklin stormwater committee that prepared the city's new stormwater ordinance over fifteen years ago, and she served on the city's Stormwater Appeals Board for several years.

The regulatory loopholes contained in the Rule and subsequently-issued MS4 Permit, described above, will directly harm Petitioner's interests by reducing or eliminating effective post construction stormwater treatment in many instances and degrading water quality in the Harpeth River, its tributaries, and other Tennessee rivers and streams. In addition, if the subject loopholes take legal effect, Petitioner will be required to expend philanthropic and programmatic resources as it works to persuade local municipalities not to allow developers to exclude so-called "uncontaminated roof runoff" from the volume of water that must be treated by post construction stormwater control measures, and Petitioner will be required to expend resources advocating against the construction of SCMs inside riparian buffers. In addition, Petitioner will be required to expend time, money and effort monitoring water quality and conducting additional scientific studies to document the effects and degradation of Tennessee waterways resulting from the post-construction stormwater management loopholes challenged in this proceeding.

Petitioner's members, supporters, and volunteers fish, swim, float, paddle, and otherwise recreate in and along the Harpeth River and other Tennessee rivers and streams. Some of Petitioner's members, supporters and volunteers live and/or own property along the Harpeth River and other Tennessee rivers and streams. The regulatory loopholes challenged in this petition for declaratory order will directly harm the interests of Petitioner's members, supporters, and volunteers by causing issuance of an MS4 Permit which increases pollution in the Harpeth River and other Tennessee rivers and streams caused by stormwater runoff. In addition, the subject loopholes will harm the interests of Petitioner and its members by exacerbating urban flooding as post-construction SCMs are permanently undersized and riparian buffers are disrupted.

### **Relief Requested**

Petitioner requests the following relief:

- i) That the Board find that the exclusions contained in Tenn. R. & Regs. 0400-40-10-.04(2)(c) and Tenn. R. & Regs. 0400-40-10-.04(4) contravene the Clean Water Act, the TWQCA, and those statutes' implementing regulations by failing to require that NPDES permits issued by the State to MS4 operators include clear, specific, and measurable requirements to reduce pollution to the maximum extent practicable;
- ii) That the Board find that the exclusions contained in Tenn. R. & Regs. 0400-40-10-.04(2)(c) and Tenn. R. & Regs. 0400-40-10-.04(4) contravene the Clean Water Act, the TWQCA, and those statutes' implementing regulations by failing to require that NPDES permits issued by the State to MS4 operators include standards or conditions which are no less stringent than the standards or conditions in the

previous permit governing discharges from small municipal separate storm sewer systems;

- iii) That the Board find that the exclusions contained in Tenn. R. & Regs. 0400-40-10-.04(2)(c) and Tenn. R. & Regs. 0400-40-10-.04(4) contravene the Clean Water Act, the TWQCA, and those statutes' implementing regulations by failing to require that permits issued by the State to MS4 operators do not unlawfully delegate to MS4s the responsibility of determining when to invoke those exclusions;
- iv) That the Board find that the uncontaminated roof runoff exclusion found in Tenn. R. & Regs. 0400-40-10-.04(2)(c) is invalid because it was not adopted in accordance with Title 4, Chapter 5, Part 2 of the Tennessee Code;
- v) That the Board find that the exclusions contained in Tenn. R. & Regs. 0400-40-10-.04(2)(c) and Tenn. R. & Regs. 0400-40-10-.04(4) are unsupported by the evidence and insufficient to protect the quality of Tennessee waters;
- vi) That the Board issue a declaratory order stating that the exclusions contained in Tenn. R. & Regs. 0400-40-10-.04(2)(c) and Tenn. R. & Regs. 0400-40-10-.04(4) are invalid and unenforceable; and/or
- vii) That the Board grant such additional relief which it deems just and proper and to which Petitioner is entitled.

Respectfully submitted,

s/ *George Nolan*

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