

**STATE OF TENNESSEE
BOARD OF WATER QUALITY, OIL, AND GAS**

IN THE MATTER OF:)	DIVISION OF WATER RESOURCES
COMPLAINT ID 117802)	CASE NUMBER WPC22-0006
SECTION 118(A) APPEAL)	
)	
MARK E. CLAYTON,)	
<i>Petitioner,</i>)	
)	
v.)	APD CASE NO. 04.30-220109J
)	JUDGE ELIZABETH D. CAMBRON
DEPARTMENT OF ENVIRONMENT)	
AND CONSERVATION,)	
<i>Respondent.</i>)	

FINAL ORDER

Currently pending is the Petitioner’s appeal of the Initial Order entered in this matter by Administrative Judge Shannon Barnhill on September 23, 2022. The Initial Order granted the Motion for Summary Judgment filed by the Respondent on September 7, 2022 and dismissed the pending contested case proceeding. In support of its motion, the Respondent filed a Memorandum of Law, Respondent’s Tenn. R. Civ. P. 56.03 Statement of Undisputed Facts, and a copy of a warranty deed transferring ownership of Petitioner’s Laws Road property to new owners on April 14, 2022. (Certified Copy of Technical Record (TR) at 233-258.) The Petitioner did not file a response to the Motion for Summary Judgment by the September 21, 2022 deadline established by the May 4, 2022 Order Setting Hearing. (TR at 81.) The Petitioner filed a late response to the Motion for Summary Judgment on October 6, 2022 without leave. (TR at 322-495.) The Administrative Judge denied the Petitioner’s request for reconsideration on October 18, 2022. (TR at 536-540.) The Petitioner then appealed the Initial Order to the Board of Water Quality, Oil, and Gas (Board) on October 19, 2022. (TR at 544-547.)

Administrative Judge Elizabeth Cambron was assigned to the appeal, and entered an Order on December 19, 2022, providing counsel for the parties the opportunity to file pre-hearing briefs by April 3, 2023, and present oral argument at the Board's April 18, 2023 meeting. The parties filed pre-hearing briefs on April 3, 2023. Judge Cambron transmitted the record to the Board on April 4, 2024 with instructions. Oral argument was held in the Nashville Room of the William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee on April 18, 2023. For the reasons stated herein, the Board upholds the Initial Order and dismisses this appeal.

FINDINGS OF FACT

1. On January 12, 2022, Respondent, Tennessee Department of Environment and Conservation (the Department) filed a Notice of Hearing (TR at 1-42.) pursuant to Tenn. Code Ann. § 69-3- 118(a) which permits any person to file with the commissioner a signed complaint against any person allegedly violating any provisions of Tennessee Water Quality Control Act (TWQCA).

2. Petitioner's December 15, 2021 section 118(a) complaint alleged that Joseph and Faye Dixon violated the Act by installing a culvert downstream of what was then Petitioner's home at 4948 Laws Road, Whites Creek, Tennessee without the required aquatic resource alteration permit (ARAP), and in a manner that harmed Petitioner's property. (TR at 5-35.)

3. The Department investigated the Complaint and determined the culvert had been properly installed in accordance with the required general ARAP and issued a Commissioner's Determination on March 7, 2022. (TR at 60-74.) When the culverts were installed, that general ARAP did not require an application for impacts of less than 25 feet, which is the case here. (TR at 61, 65, 69, 74.)

4. Petitioner claims in his complaint that he cannot sell his home or make improvements to his home until the alleged violations are corrected. (TR at 8.)

5. Petitioner sold or transferred his interest in his home on April 14, 2022, according to a warranty deed filed in Davidson County (TR at 257) and his own admission. (TR at 255, 326.) By selling his house, the Petitioner has reduced any alleged injury he may have had related to this matter to economic damages. Any economic damages Petitioner may have incurred are not issues within the jurisdiction of this tribunal.

6. To have standing, Petitioner must demonstrate a “special interest or injury beyond their concern as ‘public spirited citizens’.” *De Selm v. Tenn. Peace Officers Standards and Training Comm’n*, No. M200901525COAR3CV, 2010 WL 3959327, at *24 (TENN. CT. APP. Oct. 8, 2010). Petitioner must have standing under the TWQCA to the extent that he can articulate an injury based on his right to unpolluted waters.

7. Petitioner has failed to identify any party in their petition who violated or was in violation of the TWQCA. (TR at 60-74 (Commissioner’s Determination); *see generally* TR at 1-555.)

8. In addition to the findings of the Initial Order, the Board finds that Petitioner’s section 118(a) complaint was not a permit application. (TR at 5-35.) Petitioner did not submit an ARAP application to the Department, but instead indicated that it was difficult for his engineers to design a stream crossing (TR at 62) and insisted that the section 118(a) complaint was his notice that he intended to apply. (TR at 189.) The Department appropriately provided the Petitioner information about how to apply for permits. (TR at 21-22.)

CONCLUSIONS OF LAW

9. In addition to the conclusions of the Initial Order, the Board of Water Quality,

Oil, and Gas is the agency with contested case authority. Tenn. Code Ann. §§ 69-3-103(4), -110(a), and -118(a). The Board has reviewed the Initial Order *de novo* with no presumption of correctness, and has limited its review to the record. Tenn. Code Ann. § 69-3-110(a). The parties were provided the opportunity to file briefs and present oral argument.

10. The Petitioner bears the burden of proof in this matter. Tenn. Comp. R. & Regs. 1360-04-01-.02(3) and (7). This burden is to show by a preponderance of the evidence that the issue should be resolved in favor of the Petitioner. Tenn. Comp. R. & Regs. 1360-04-01-.02(7).

11. The Petitioner's Complaint focuses on alleged damage to his former property located on Laws Road and to himself as the "upper riparian owner," not pollution of waters of the state. (TR at 5-35.) The Complaint alleges actions by the Dixons that have nothing to do with the Act, but instead are part of a private property dispute between former neighbors. *Id.* Petitioner primarily alleged that the culverts harmed him as the "upper riparian owner" and reduced his property value by altering drainage and causing flooding. (TR at 7-9.) The Act does not regulate flooding or ensure property values, but instead protects the interest of Tennesseans in unpolluted waters. Tenn. Code Ann. § 69-3-102(a).

12. Moreover, nothing in the Act creates a right of action to pursue private property disputes or provides for recovery of damages by individuals. *See generally* Tenn. Code Ann. §§ 69-3-101 to -148; *see also Jones v. City of Lakeland*, 224 F.3d 518, 523-24 (6th Cir. 2000) (the Act does allow private parties to enforce its provisions). The alleged violators are not a party to this action and this Board cannot give the Petitioner the relief he seeks.

13. Further, the Petitioner lacks standing in this matter because he cannot demonstrate a "special interest or injury beyond their concern as 'public spirited citizens.'"

14. In addition to the conclusions of the Initial Order, the Board finds that because

Petitioner never applied for an ARAP, he is not a “permit applicant” subject to the protections of the Bill of Rights for Permit Applicants, Tenn. Code Ann. § 69-3-141, and does not have standing to pursue this section 118(a) appeal on that basis. Rather, Petitioner is a complainant under section 118(a) of the Act. Tenn. Code Ann. § 69-3-118(a). (TR at 5-35.) Accordingly, the Department had no obligation to assist the Petitioner. Tenn. Code Ann. § 69-3-118(a)(4).

15. Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” TENN. R. CIV. P. 56.04; *Rye v. Women’s Care Ctr. of Memphis*, 477 S.W.3d 235, 250-52, 264-65 (Tenn. 2015).

16. The party seeking summary judgment has the burden of persuading the court that its motion satisfies the requirements of Rule 56. *Rye*, 477 S.W.3d at 250-52, 264-65. Further, when considering a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party’s favor. *Huggins v. McKee*, 500 S.W.3d 360, 364 (Tenn. Ct. App. 2016). A motion for summary judgment must be supported by admissible evidence. TENN. R. CIV. P. 56.06.

17. Courts consistently have emphasized that a party opposing a motion for summary judgment may not simply rest on its pleadings, but must affirmatively oppose the motion. *Holland v. City of Memphis*, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003). *See, e.g., Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 89 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). Such opposition may be made by pointing to the evidence in the record which indicates disputed material facts. *McCarley*, 960 S.W.2d at 588.

18. Summary judgment should therefore be granted only if the uncontroverted facts

presented, and conclusions to be drawn from the facts, make it so clear that a reasonable person can reach only one conclusion. *Young v. FedEx Express*, 2016 WL 1056958, at *3 (Tenn. Ct. App. March 17, 2016).

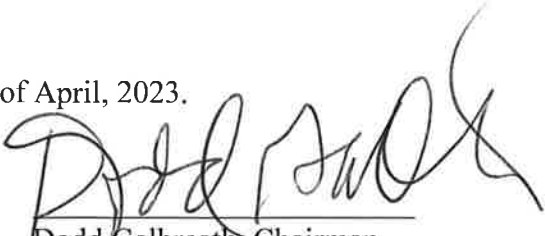
19. Based on the totality of the evidence, the Department has demonstrated that the Petitioner lacks standing to pursue this action, that the particular issues raised by Petitioner are not governed by the TWQCA, and that the culverts were installed in compliance with the general ARAP, to the extent required. It is clear from the record that this matter concerns an ongoing property dispute between former neighbors.

20. In examining the Complaint and Notice of Appeal (TR at 5-40) and the record as a whole, it is determined that the relief Petitioner seeks cannot be granted under Tenn. Code Ann. § 69-3-118(a)(1) as Petitioner failed to identify any current violations or violators and this Board cannot grant economic damages to the Petitioner. Accordingly, the Petitioner lacks standing to pursue this contested case proceeding so this Board lacks subject matter jurisdiction to decide the matter.

FINAL ORDER

Upon review of the pleadings and arguments of the parties, it is **CONCLUDED** that the Petitioner has failed to prove by a preponderance of the evidence that he has standing, that this Board has subject-matter jurisdiction over his section 118(a) appeal, or that his claims are supported by law or fact. Accordingly, Petitioner's Appeal of the Initial Order is **DENIED** and Petitioner's Petition for Appeal of Commissioner's Determination on Formal Complaint pursuant to Tenn. Code Ann. § 69-3-118(a) is hereby **DISMISSED** with prejudice. The policy reasons for this decision are to uphold the laws of the State of Tennessee and to facilitate the fair and efficient administration of the Water Quality Control Act.

This FINAL ORDER executed on this 16 day of April, 2023.



Dodd Galbreath, Chairman

APPENDIX A TO FINAL ORDER
NOTICE OF APPEAL PROCEDURES
REVIEW OF FINAL ORDER

1. PETITION FOR STAY – T.C.A. § 4-5-316

A party may submit to the agency a petition for stay of effectiveness of an initial or final order within seven (7) days after its entry unless otherwise provided by statute or stated in the initial or final order. The agency may take action on the petition for stay, either before or after the effective date of the initial or final order.

2. PETITION FOR RECONSIDERATION – T.C.A. § 4-5-317

(a) A party, within fifteen (15) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. A petition for reconsideration of a final order that has become a final order by operation of law when no party timely filed a petition for reconsideration of an initial order or when the petition for reconsideration of an initial order was denied is not permitted. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

(b) The petition shall be disposed of by the same person or persons who rendered the initial or final order, if available.

(c) The person or persons who rendered the initial or final order that is the subject of the petition, shall, within twenty (20) days of receiving the petition, enter a written order either denying the petition, granting the petition and setting the matter for further proceedings; or granting the petition and issuing a new order, initial or final, in accordance with § 4-5-314. If no action has been taken on the petition within twenty (20) days, the petition shall be deemed to have been denied.

(d) An order granting the petition and setting the matter for further proceedings shall state the extent and scope of the proceedings, which shall be limited to argument upon the existing record, and no new evidence shall be introduced unless the party proposing such evidence shows good cause for such party's failure to introduce the evidence in the original proceeding.

(e) The sixty-day period for a party to file a petition for review of a final order shall be tolled by granting the petition and setting the matter for further proceedings, and a new sixty-day period shall start to run upon disposition of the petition for reconsideration by issuance of a final order by the agency.

3. JUDICIAL REVIEW – T.C.A. §§ 4-5-322 and 69-3-110

A person who is aggrieved by a final order of the Board of Water Quality, Oil and Gas is entitled to judicial review under T.C.A. title 4, chapter 5, which shall be the only available method of judicial review. Proceedings for review are instituted by filing a petition for review in chancery court. Venue for appeals of final orders shall be 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. Petitions seeking judicial review shall be filed within sixty (60) days after the entry of the agency's final order thereon.

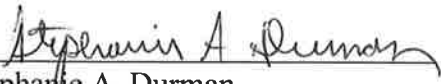
This order was received for filing in the Office of the Secretary of State, Administrative Procedures Division and became effective on the ___ day of _____, 2023.

Stephanie Shackelford, Director
Administrative Procedures Division
Office of the Secretary of State

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PREPARED FOR ENTRY:

DEPARTMENT OF ENVIRONMENT AND CONSERVATION


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Prehearing Brief has been sent to the following counsel of record by U.S. Mail, with a courtesy copy by electronic mail, on this 19th day of April, 2023:

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