

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

IN THE MATTER OF:)	DIVISION OF WATER RESOURCES
)	CASE NUMBER WPC23-0018
)	
DEPARTMENT OF ENVIRONMENT AND CONSERVATION,)	
)	DOCKET NUMBER 04.30-242569J
<i>Petitioner,</i>)	
)	
v.)	Judge Alexander Rieger
)	
LDL INVESTMENTS ENTERPRISES, LLC,)	
<i>Respondent.</i>)	

**DEPARTMENT OF ENVIRONMENT AND CONSERVATION’S MOTION FOR
DEFAULT**

Comes now the petitioner, Department of Environment and Conservation (“Department”), by and through counsel and in accordance with Tennessee Code Annotated section 4-5-309 and Rule 1360-04-04-.14 of the Uniform Rules of Procedure for hearing Contested Cases before State Administrative Agencies (“APD Rules”), and respectfully moves for an order holding the respondent LDL Investments Enterprises, LLC (“Respondent”) in default and dismissing its appeal of Administrative Judge Mark Garland’s Initial Order (“Initial Order”) entered on March 21, 2025. In support of this motion, the Department would show Respondent filed its appeal of the Initial Order on April 10, 2025, and since that date has made no effort to prosecute its appeal, including failing to communicate with opposing counsel despite multiple attempts, failing to obtain a hearing date before the Board of Water Quality, Oil, and

Gas (“Board”) as directed, and failing to attend this matter’s pre-hearing conference despite receiving adequate notice.

BACKGROUND AND PROCEDURAL HISTORY

This matter arises from Respondent’s appeal of Commissioner’s Order and Assessment No. WPC23-0018 (“Commissioner’s Order”) issued by the Department on March 11, 2024, against Respondent for violations of the Water Quality Control Act of 1977 (WQCA), Tenn. Code Ann. §§ 69-3-101 to -148. The violations alleged in the Commissioner’s Order included engaging in soil disturbances greater than one acre without coverage under a valid permit, altering waters of the State without a valid permit, discharging pollutants or placing pollutants in a location from which it is likely the pollutants will move into waters of the State without a valid permit, and causing a condition of pollution, in connection with the unpermitted construction of a pond at Respondent’s property located in Rhea County, Tennessee (“Site”). (Not. of Hr’g, R. at 3, 7-19.)¹ The Commissioner’s Order required Respondent to bring the Site into compliance with the WQCA and its implementing rules and regulations, including obtaining coverage under a valid permit for the Site, submitting for approval a stream restoration plan to restore one segment of jurisdictional waters to pre-impact conditions, and implementing the stream restoration plan after approval. (Not. of Hr’g, R. at 3-4, 7-19.) The Commissioner’s Order also assessed divisional damages, civil penalties, and natural resource damages for the total resource loss of 365 linear feet of jurisdictional stream and severe impacts to 395 linear feet of jurisdictional stream. (*Id.*)

¹ Citations to the Certified Technical Record are identified by the initial “R” followed by the blue Bates reference number located on the lower left corner of each page.

Respondent was served with the order via private process server on March 14, 2024, and timely appealed the Commissioner's Order on April 2, 2024. (Not. of Hr'g, R. at 3-4, 7-29.) The matter was subsequently assigned to Administrative Judge Mark Garland by the Tennessee Secretary of State's Administrative Procedures Division (APD) to sit alone for the Tennessee Board of Water Quality, Oil and Gas ("Board"). On June 17, 2024, counsel for both parties appeared for a pre-hearing conference. Following the conference, Judge Garland entered a scheduling order setting the contested case in this matter for January 16-17, 2025, as well as various other pretrial deadlines, including discovery and dispositive motions. (Order Setting Hearing, June 17, 2024, R. at 37-42.)

On October 16, 2024, counsel for the Department served the Department's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission on Respondent's counsel of record via electronic and U.S. Mail. (Dep't. Mot. Partial Summ. J., Ex. B, R. at 63-91.) On November 15, 2024, Respondent's counsel served Respondent's responses to the Department's requests for admissions but did not provide responses to either the Department's interrogatories or requests for production. (*Id.*) On December 23, 2024, the Department filed a motion for partial summary judgment based on Respondent's admissions. (Dep's Mot. Partial Summ. J., Dec. 23, 2025, R. at 43-198.) Respondent did not file a response to the Department's motion in accordance with the deadlines established in either APD's rules or the June 17, 2024, scheduling order, but instead requested an extension of time via email three days after the expiration of the deadline. (R. at 213-14.) On January 3, 2025, Judge Garland entered an order giving Respondent until January 7, 2025, to respond to the Department's motion. (Order, Jan. 3, 2025, R. at 215-17.)

Also on January 3, 2025, the Department filed a motion to prohibit Respondent from presenting proof at the contested case hearing due to its failure to respond to the Department's interrogatories and document production requests.² (Dep't Mot. to Exclude, R. at 223-56.) On January 6, 2025, Judge Garland entered an order directing Respondent to comply with discovery and provide the Department with responses to its First Set of Interrogatories and Requests for Production of Documents by 10:00 am on January 8, 2025. (Order, Jan. 6, 2025, R. 257-60.) On January 7, 2025, Respondent submitted written responses to the Department's interrogatories, however, it produced no documents. (R. at 261-68.) After the expiration of the deadline established in Judge Garland's order, on January 8, 2025, the Department filed an omnibus motion to grant its pending motions for partial summary judgment and to exclude Respondent from presenting proof at the contested case hearing.³ (Dep't Omnibus Mot., R. at 269-73.)

On January 9, 2025, Judge Garland issued an order granting the Department's Motion for Partial Summary Judgment, dismissing counts 2, 3, 4, 5, 6, 7, 8, and 11 of Respondent's appeal in their entirety and dismissing counts 9, 10, and 12 as to all claims excepting the calculations of damages and civil penalties. (Order, Jan. 9, 2025, R. at 274-88.) Judge Garland also entered an order granting, in part, the Department's Motion to Exclude, sanctioning Respondent for its failure to comply with discovery and the orders of the tribunal and prohibiting Respondent from introducing any documents as evidence during the contested case hearing or through any pretrial motion. (Order, Jan. 9, 2025, R. at 289-91.) On January 10, 2025, the parties filed witness and exhibit lists for the contested case hearing. (R. at 292-327.) Respondent filed an exhibit list identifying 25 exhibits and attaching 21 documentary exhibits to its filing. (R. at 301-27.) On

² Pursuant to the June 17, 2024, scheduling order, all discovery was to be completed by December 16, 2024.

³ Despite being granted an extension of time, Respondent again failed to file a response to the Department's motion for partial summary judgment.

January 13, 2025, the Department filed a motion to strike, seeking to strike Respondent's exhibit list from the record for violating Judge Garland's January 9, 2025, order. (Dep't Mot. to Strike, R. at 328-31.) Judge Garland promptly entered an order setting a pre-hearing conference for January 15, 2025, however, Respondent's counsel advised he was unavailable on that date and therefore the parties agreed to reset the conference to January 14, 2025. (R. at 334-35, 344-45, 377-79.) Department's counsel appeared on January 14, 2025, for the scheduled conference. (R. at 387.) *Respondent did not appear. (Id.)*

On January 15, 2025, Respondent filed a motion to set aside the grant of the Department's motion for partial summary judgment and a motion for interlocutory appeal to the Tennessee Court of Appeals. (Resp't Mots., R. at 380-86.) Given that the parties' contested case hearing was set to begin in less than 18 hours, the Department promptly drafted and filed responses to both motions (Dep't Resp. Resp't Mots., R. at 392-98.) On January 16, 2025, the parties appeared before Judge Garland for the contested case hearing in this matter. Prior to the commencement of the contested case, the parties argued the three pending motions: Respondent's Motion to Set Aside and Motion for Interlocutory Appeal and the Department's Motion to Strike. (Initial Order, R. at 628-29.) After reviewing the pleadings and hearing the arguments of the parties, Judge Garland denied both of Respondent's motions and granted the Department's motion. (*Id.*) Given the previous grant of partial summary judgment, the sole remaining issue for the contested case hearing was whether, by a preponderance of the evidence, the Department's assessed damages and civil penalties in the Commissioner's Order were appropriate and properly calculated in accordance with applicable law and policy. (Initial Order, R. at 627, 629.) On March 21, 2025, Judge Garland entered the Initial Order, determining, after a review of the testimony of the witnesses and the record as a whole, that the damages and civil

penalties sought were appropriate and properly calculated and affirming the Commissioner's Order. (R. at 629-39.)

On April 10, 2025, Respondent filed its appeal of the Initial Order. (Not. of Appeal, R. at 644-61.) On May 6, 2025, Chief Administrative Judge Phillip R. Hilliard advised the Department that APD would rely on the parties to communicate with one another to get an available hearing date before the Board, then assign a new administrative judge to Respondent's appeal upon receipt of a motion to set from the parties. (Dep't Mot. Pre-Hr'g Conf., 2, Ex. A.) Over the next several weeks, counsel for the Department repeatedly attempted to contact Respondent's counsel to select a hearing date. (*Id.*) Respondent's counsel did not respond to any of the Department's counsel's attempts to meet and confer as instructed. (*Id.*)

On July 22, 2025, the Department filed a motion for a pre-hearing conference in an effort to move this matter forward. (Dep't Mot. Pre-Hr'g Conf.) On August 5, 2025, Administrative Judge Alexander Rieger entered an order granting the Department's motion and scheduling a pre-hearing conference for August 12, 2025. (Order Granting Mot. for Pre-Hr'g Conf., Aug. 5, 2025.) The order specifically cautioned that "any failure by either party to 'participate in a pre-hearing conference, hearing or other stage' of these proceedings, including compliance with the motion and response filing deadlines, *may result in that party's being held in default pursuant to TENN. CODE ANN. § 4-5-309, and this matter being dismissed.*" (*Id.* (emphasis added).) On August 12, 2025, counsel for Department appeared for the scheduled pre-hearing conference. *Respondent did not appear.* At this pre-hearing conference, counsel for the Department made an oral motion for default and to dismiss Respondent's appeal due to Respondent's failure to appear. On September 18, 2025, Judge Rieger emailed the parties and requested the Department file its motion in writing. The Department now files its Motion for Default.

ARGUMENT

A. Standard of Review – Default

Pursuant to section 4-5-309 of the Uniform Administrative Procedures Act (UAPA),
Tenn. Code Ann. Title 4, Chapter 5,

[i]f a party fails to attend or participate in a prehearing conference, hearing or other stage of a contested case, the administrative judge or hearing officer, hearing the case alone, or agency, sitting with the administrative judge or hearing officer, may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

Tenn. Code Ann. § 4-5-309(a) (emphasis added); *see also* Tenn. Comp. R. & Regs. 1360-04-01-.14(1)(a) (“The failure of a party to attend or participate in a pre-hearing conference, hearing or other stage of contested case proceedings after due notice thereof is cause for holding such party in default pursuant to T.C.A. § 4-5-309.”). “[A] motion may be made to hold the absent party in default and either to adjourn the proceedings or continue on an uncontested basis[,]” provided the moving party “enter[s] into the record evidence of service of notice to [the] absent party.” Tenn. Comp. R. & Regs. 1360-04-01-.14(1)(b). If the service of notice is held to be adequate, the Administrative Judge may grant or deny the motion for default, taking into consideration the criteria listed in Rule 1360-04-01-.06, subsections (2)(a) through (2)(d), when appropriate. Tenn. Comp. R. & Regs. 1360-04-01-.14(1)(d).

If the proceedings are conducted without the participation of the party in default, “the administrative judge . . . shall include in the initial order a written notice of default, otherwise, the agency, sitting with the administrative judge . . . shall include such written notice of default in the final order.” Tenn Code Ann. § 4-5-309(b). “If the proceedings are adjourned and not conducted, the administrative judge . . . may render an initial default order, otherwise, the

agency, sitting with the administrative judge . . . , may render a final default order.” *Id.* Regardless of the stage or whether the proceedings are adjourned or continued on an uncontested basis, “[a]ll default orders and notices of default in default orders shall include a written statement of the grounds for the default.” *Id.*

In *Madison County v. Tennessee State Board of Equalization*, the petitioner failed to attend or participate in the pre-hearing conference either personally or by authorized representative, and the administrative judge found the petitioner in default and then decided the appeal on the record. *Madison Cty.*, No. W2007-01121-COA-R3-CV, 2008 Tenn. App. LEXIS 312, at *3-5 (Ct. App. May 27, 2008). The petitioner later argued that it did not receive adequate notice of the pre-hearing conference, but the Tennessee Court of Appeals held that “there is no dispute that Madison County received notice of the pre-hearing conference” when it was mailed to the petitioner. *Id.* at 16 n.12. In *Poursaied v. Tennessee Board of Nursing*, the board revoked the petitioner’s license, and the petitioner then failed to appear at the scheduled contested case hearing, so the board sought default under Tennessee Code Annotated section 4-5-309. *Poursaied*, 643 S.W.3d 157, 160-64 (Tenn. Ct. App. 2021); *see also Wyttenbach v. Bd. of Tenn. Med. Exam'rs*, No. M2014-02024-COA-R3-CV, 2016 Tenn. App. LEXIS 192, at *5-6 (Ct. App. Mar. 15, 2016) (granting default against the petitioner after he did not attend the contested case hearing). The Tennessee Court of Appeals in *Poursaied* held that the board adhered to its notice requirements by entering into evidence proof that the petitioner had been served notice of both the charges and the notice of hearing at the petitioner’s address via certified mail, and that the petitioner exchanged several emails with the board’s attorney about the upcoming hearing. *Poursaied*, 643 S.W.3d at 167. Based on this evidence, the administrative judge advised the board that the petitioner received legally sufficient notice of the hearing, and the board then

voted to grant the motion for default and to proceed without the participation of Ms. Poursaied. *Id.* Citing section 4-5-309(a), the Tennessee Court of Appeals held that “the laws of this state give an administrative agency the discretion to proceed without the presence of a party when a default judgment is entered against that party, ‘having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.’” *Id.*

B. Burden of Proof

Under the UAPA “[t]he ‘petitioner’ in a contested case proceeding is the ‘moving’ party, i.e., the party who has initiated the proceeding [and] . . . usually bears the ultimate burden of proof” Tenn. Comp. R. & Regs. 1360-04-01-.02(5). The “burden of proof is generally assigned to the party who seeks to change the present state of affairs with regard to any issue” Tenn. Comp. R. & Regs. 1360-04-01-.02(3). This burden refers to the duty of the party “to present evidence on and to show by a preponderance of the evidence . . . that an allegation is true or should be resolved in favor of that party.” *Id.*

As the petitioner, the Department properly carries the burden of proof during the contested case proceedings. The Department met its burden at the contested case hearing in this matter. Respondent then initiated its appeal of the Initial Order affirming the Commissioner’s Order. (Not. of Appeal, R. at 644-61.) Therefore, it is the Department’s position that, for only the purpose of this motion for default, Respondent is the “moving” party seeking to change the status quo. Accordingly, Respondent should bear the burden of proof to establish that it should not be held in default and the proceedings adjourned.

C. Respondent Has Failed to Attend or Participate in Contested Case Proceedings as Required by Law and Therefore Should be Held in Default.

Despite receiving adequate notice, Respondent failed to attend the August 12, 2025, pre-

hearing conference scheduled in this matter by Administrative Judge Rieger. The Department filed its motion for pre-hearing conference on July 22, 2025, serving a copy via email on Respondent's counsel that day, in accordance with the APD Rules and the Tennessee Rules of Civil Procedure. (Dep't Mot. Pre-Hr'g, Conf. 3.) Judge Rieger then entered the order granting the Department's motion 14 days later, setting the pre-hearing conference another seven days from date of the entry of the order. (Order, Aug. 5, 2025.) Respondent had a total of 21 days from the filing of the Department's motion to the date of the pre-hearing conference; however, it failed to file a response to the Department's motion,⁴ contact the Department or APD, or appear for the pre-hearing conference.⁵ Both the Department's motion and Judge Rieger's order were served via email using the email address provided to the Department and APD by Respondent's counsel and utilized throughout this matter as evidenced on counsel for Respondent's letterhead, (R. at 23, 86, 261, 297, 383, 482, 584, 617, 644), correspondence to the parties from APD enclosing orders and notices, (R. at 30, 37, 215, 257, 274, 289, 333, 601, 626, 662), and emails from Respondent's counsel to Judge Garland, APD Filings, and the Department's counsel. (R. at 35-36, 85, 213-14, 344-45, 377-79, 387-91, 598-600.)

As established in the Order Granting Motion for Pre-Hearing Conference, Respondent's failure . . . to "participate in a pre-hearing conference, hearing or other stage" of these proceedings, including compliance with the motion and response filing deadlines, may result in that party's being held in default pursuant to TENN. CODE ANN. § 4-5-309, and this matter being dismissed." (Order, Aug. 5, 2025.) Despite being put on notice of the potential for default and the dismissal of its appeal, Respondent failed to request a continuance prior to the

⁴ It is worth noting that the Department's Motion for Prehearing Conference was the sixth motion filed by the Department in this matter. The Respondent did not file a response to any of the Department's motions.

⁵ This is the second pre-hearing conference the Respondent has failed to appear for in this matter. The Respondent also failed to appear for the pre-hearing conference scheduled on January 14, 2025.

conference, then failed to appear and participate in the pre-hearing conference as ordered and has made no filing or offered any explanation for its failure to appear to date. The record establishes that Respondent was served with an order setting the pre-hearing conference with sufficient time to respond and attend, satisfying the evidence of service of notice requirement found in APD Rule 1360-04-01-.14(1)(b) and meaning Respondent is subject to default. Consequently, Respondent should be held in default according to section 4-5-309 of the UAPA, APD Rule 1360-04-01-.14, and applicable case law.

D. The Board Should Dismiss Respondent’s Appeal in the Interest of Justice and the Orderly and Prompt Conduct of the Proceedings.

Section 4-5-309(a) of the UAPA allows an administrative judge sitting alone or the agency sitting with an administrative judge to hold a party in default “and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.” Tenn. Code Ann. § 4-5-309(a). As discussed above, Respondent’s failure to appear for the pre-hearing conference is a sufficient basis on which to hold Respondent in default. In truth, since its initial filing on April 10, 2025, Respondent has made no effort to pursue its appeal in any way. It has failed to communicate with Department’s counsel despite multiple attempts, failed to obtain a hearing date before the Board as directed, failed to attend the pre-hearing conference as ordered, and provided no explanation for any of its inactions. As outlined in the Department’s motion for pre-hearing conference, because the Initial Order affirmed the Commissioner’s Order, it is in the Respondent’s interest to delay this matter as long as possible. Because Respondent is under no obligation to comply with the requirements of the Commissioner’s Order while this matter remains under appeal, Respondent has no incentive to diligently pursue its appeal before the

Board. However, the Department has a compelling interest in protecting and preserving the integrity of the waters of the state, which are held in public trust, and therefore a responsibility to seek a timely resolution of this matter.

It is the Department's position that, although the Department is the petitioner for the purposes of the contested case proceedings, Respondent initiated the appeal of the Initial Order before the Board and therefore it is the moving party with the burden of proof for the purpose of this motion for default. APD Rule 1360-04-01-.14(2) provides:

[u]nless the proceedings are continued, charges shall be dismissed as to all issues on which the petitioner bears the burden of proof if the petitioner is held in default at a contested case hearing. Upon entry into the record of the default of the respondent at a contested case hearing, the matter shall be tried as uncontested as to such respondent, unless the proceedings are continued.

Tenn. Comp. R. & Regs. 1360-04-01-.14(2)(a)-(b). Accordingly, because Respondent is the party seeking to change the status quo, if Respondent is held in default, then it is the Department's position that its appeal should be dismissed pursuant to APD Rule 1360-04-01-.14(2)(a). In the present situation, this is the outcome that most aligns with section 4-5-309(a)'s directive to have "due regard for the interest of justice and the orderly and prompt conduct of the proceedings." Tenn. Code Ann. § 4-5-309(a). Judge Garland's Initial Order affirmed the Commissioner's Order in total and, therefore, the Department has no desire to seek review of the decision before the Board. On the contrary, as previously discussed, every day this matter remains on appeal is another day the violations identified in the Commissioner's Order remain unenforced. Additionally, requiring the Department and Board to proceed with Respondent's appeal would be a waste of state resources, not to mention the Board's and APD's time, and add additional unnecessary delay to an already unreasonably protracted proceeding. Respondent was

aware of the potential consequences of its actions, or inactions in this case, and still made its choice.

In the alternative, if the Board is unpersuaded by the Department's argument that Respondent bears the burden of proof for the purpose of this motion, then the Department respectfully requests Respondent be held in default and the appeal be immediately heard before the Board without Respondent's participation. The Board only meets every other month and the October 21, 2025, meeting will likely be its final meeting of the year. Respondent's actions have already resulted in this appeal failing to appear on the Board's agenda for either its June or August meetings, and it is against the public interest to allow Respondent to continue to benefit from delays of its own creation. The Department has spoken with the Board Coordinator and confirmed that the October Board meeting agenda currently only has one other item, estimated to take approximately 10 minutes, so the Board will have sufficient time to take this matter up. The Department has also provided the Certified Technical Record to the Board Coordinator for inclusion in the Board's packet for the October meeting.

CONCLUSION

For these reasons, the Department respectfully requests its Motion for Default be granted and the proceedings adjourned pursuant to Tennessee Code Annotated section 4-5-309(a) and APD Rule 1360-04-01-.14. Respondent filed its Notice of Appeal over five months ago and, to date, has taken no further action to prosecute its appeal, including failing to attend a pre-hearing conference despite receiving adequate notice. Respondent has violated the provisions of the UAPA and its implementing rules without cause, improperly delaying the resolution of this matter and making default and adjournment of the proceedings in "the interest of justice and the orderly and prompt conduct of the proceedings." Tenn. Code Ann. § 4-5-309(a).

Respectfully submitted,

/s/ Emily B. Vann
EMILY B. VANN (BPR No. 026642)
Senior Associate Counsel
Office of General Counsel
Davy Crockett Tower, 5th Floor
500 James Robertson Parkway
Nashville, Tennessee 37243
Telephone: (615) 626-2782
E-Mail: emily.vann@tn.gov

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing has been served upon the following via electronic mail and first-class U.S. Mail, postage prepaid, on this 29th day of September, 2025:

Howard L. Upchurch
PO Box 381
Pikeville, Tennessee 37367
upchurchlaw@bledsoe.net

/s/ Emily B. Vann
Emily B. Vann
Senior Associate Counsel