

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

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<b>IN THE MATTER OF:</b>	)	<b>DIVISION OF WATER RESOURCES</b>
<b>PERMIT # SOP-19004</b>	)	<b>CASE NUMBER WPC25-0016</b>
	)	
<b>AQUA GREEN UTILITY, INC.,</b>	)	
<i>Petitioner,</i>	)	
	)	
v.	)	<b>DOCKET NUMBER 04.30-252016A</b>
	)	
<b>DEPARTMENT OF ENVIRONMENT</b>	)	
<b>AND CONSERVATION,</b>	)	
	)	
<i>Respondent.</i>	)	

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**DEPARTMENT OF ENVIRONMENT AND CONSERVATION’S APPEAL BRIEF**

The Department of Environment and Conservation (“Department”), by and through the undersigned counsel, in accordance with the Rules of the Tennessee Department of State Administrative Procedures Division (APD) and the Tennessee Rules of Civil Procedure, submits the following Appeal Brief.

**SUMMARY OF POSITION ON APPEAL**

This case involves Aqua Green Utilities, Inc.’s (“Aqua Green”)’s appeal of State Operating Permit No. SOP-19004 (“2025 Permit”) (attached to Not. of Hr’g as Exhibit A, R. at 8-24),<sup>1</sup> which was issued by the Department pursuant to Tennessee Code Annotated section 69-3-108 and in accordance with the provisions of the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 through 69-3-120. (Not. of Hr’g, R. at 1-26). Administrative Judge Alexander Rieger was assigned to sit on behalf of the Board of Water Quality, Oil & Gas (“Board”) at the

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<sup>1</sup> 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.

initial stage. Tenn. Code Ann. § 69-3-110(a). After the close of discovery, the Department moved for summary judgment on the basis that the petition fails to meet the threshold requirements for a permit appeal and that it fails to state a claim for relief based on an alleged inconsistency with the Water Quality Control Act of 1977 or the applicable rules and regulations promulgated by the Board. (Mot. for Summ. J., Aug. 14, 2025, R. at 160-251). The Department moved to strike the response Mr. Kendall subsequently filed on behalf of Aqua Green in an effort to prevent the unauthorized practice of law. (Mot. to Strike Resp. and Prevent the Unauthorized Practice of Law, Aug. 28, 2025, R. at 255-273.)

Judge Rieger granted the Department's motion for summary judgment, confirming the Department met its burden for summary judgment and that the appeal was subject to dismissal. (Initial Order, Nov. 14, 2025, R. at 288-304). Judge Rieger entered an Initial Order on November 14, 2025 ("Initial Order") finding Aqua Green's permit appeal petition fails to either meet the threshold requirements for a permit appeal or to state a claim for relief. *Id.* The Initial Order fully disposed of Aqua Green's permit appeal and dismissed it with prejudice. *Id.* Mr. Kendall timely appealed the Initial Order. (Letter from Dart Kendall, President, Aqua Green Utility Inc. to State of Tennessee Board of Water Quality, Oil, and Gas, Dec. 1, 2025 ("Order Appeal"), R. at 306-307).

The Department agrees with the Initial Order's findings, specifically that:

1. Aqua Green's petition, Mr. Kendall's January 31, 2025 letter, does not comply with the threshold requirements for a permit appeal set forth by Rule 0400-40-06-.13(2) of the Tennessee Comprehensive Rules & Regulations. *Id.* at R. at 301.
2. Aqua Green has failed to state a claim that the 2025 Permit is inconsistent with the Water Quality Control Act or the applicable rules, as required by Rule 0400-40-06-

.13(2) of the Tennessee Comprehensive Rules & Regulations. *Id.*

- 3. Mr. Kendall, a non-lawyer representative of corporate entity Aqua Green, is limited to offering factual assertions on behalf of Aqua Green and is prohibited from practicing law on behalf of Aqua Green. *Id.* at 290-291.

The Department agrees with the Initial Order’s findings and determinations. The Board should affirm and adopt the Initial Order.

**ARGUMENT**

**I. Aqua Green’s permit appeal is inadequate and its dismissal should be affirmed.**

The Department is entitled to summary judgment because the Petition fails to meet the threshold requirement for a permit appeal and because the Petition and Response fail to state a claim upon which relief can be granted.

State Operating Permits are issued for the operation of non-discharging sewage treatment works, including land application systems. The SOP Rules promulgated by the Board, Tenn. Comp. R. & Regs. Chapter 0400-40-06 (“SOP Rules”), require that the Petitioner “specify what terms or conditions they are appealing in their petition” and “specify the basis for their appeal.” Tenn. Comp. R. & Regs. 0400-40-06-.13(2). The SOP Rules, require the Petitioner to “state a claim for relief based on an alleged inconsistency with the Act or the rules promulgated thereunder.” Tenn. Comp. R. & Regs. 0400-40-06-.13(2); *see also* Tenn. Code Ann. § 69-3-105(i).

On August 15, 2019, the Commissioner of the Department issued SOP No. 19004 to the Petitioner (“2019 Permit,” R. at 185-201), which authorized the operation of trickling filter with drip dispersal system in Greene County, Tennessee to serve the Bulls Gap Love’s Travel Stop (“Site”). *Id.* The design capacity of the system is 0.0137 million gallons per day (“MGD”) to be dispersed on approximately 1.2 acres of suitable soils. *Id.*

The 2019 Permit requires the drip irrigation system to be “operated in a manner preventing the creation of a health hazard or a nuisance.” *Id.* The 2019 Permit prohibits “discharge of wastewater to any surface waters or to any location where it is likely to enter surface waters.” *Id.*, R. at 186. The 2019 Permit also prohibits “[i]nstances of surface saturation, ponding or pooling within the land application area as a result of system operation.” *Id.*, R. at 187. Part A of the 2019 Permit requires all wastewater to be properly treated and to comply with specified limitations for land application. *Id.*, R. at 187-88.

The Department conducted a site survey in January 2024 and a compliance inspection of the Site in August 2024. (SOP Drip Field Special Investigation, SOP-19004 – Bulls Gap Love’s, Jan. 8, 2024 (January Inspection Report), R. at 203-09; SOP Drip Field Special Investigation, SOP-19004 – Bulls Gap Love’s, Aug. 12, 2024 (August Inspection Report), R. at 213-18.) During these inspections, Department staff observed evidence of hydraulically overloaded soil conditions within the land application area, including evidence of the presence of saturated soil conditions, ponded effluent, and long-term ponding. *Id.* The ponded conditions were over a large area or dosing zone as may be expected with overloaded soil conditions. *Id.* During the January 2024 survey, the ponded conditions were observed to result in overland flow from the land application area or system leaving the land application area and entering surface waters or drainage features that lead to surface waters. *Id.*, R. at 204.

The 2019 Permit expired on August 15, 2024. *See* 2019 Permit, R. at 186. The Petitioner filed an application to renew its 2019 Permit on October 9, 2024. (Application for a SOP, Permit Reissuance, Aqua Green Utility Inc., Oct. 9, 2024, R. at 220-30.) The Department issued a notice and Draft of State Operating Permit No. SOP-19004 on October 22, 2024. (Letter from Brad Harris, P.E. to Dart Kendall, Subject: Draft of SOP No. SOP-19004, Oct. 22, 2024, R. at 232-33).

The notice of the draft permit advised the Petitioner of its rights to notify the Department of objections within 30 days of when the draft permit was issued. *Id.* Mr. Kendall only provided two comments on the draft permit. (Email from Bradley E. Smith to Dart Kendall, Subject: Summary of your comments, Nov. 27, 2024 2:46 PM and Email from Dart Kendall to Bradley E. Smith, Subject: [EXTERNAL] RE: Summary of your comments, Nov. 27, 2024 5:13:29 PM, R. at 253-54.) On January 8, 2025, the Department reissued SOP No. 19004 to the Petitioner (2025 Permit, R. at 8-24). The 2025 Permit largely mirrors the 2019 Permit.

**a. Aqua Green failed to meet the threshold requirements for appealing a permit.**

Aqua Green timely appealed the 2025 Permit. Aqua Green’s Petition was a one-page letter dated January 31, 2025 (“Petition”), which merely states that the Petitioner “disagree[s] with the changes to [its] permit SOP 19004” and that it “wish[es] to appeal this matter.” (Not. of Hr’g, Petition, R. at 26). However, the Petition does not comply with the threshold requirements for a permit appeal set forth by Tenn. Comp. R. & Regs. 0400-40-06-.13(2) because it does not identify any portion of the 2025 Permit it is aggrieved by, nor does it specify the terms and conditions it seeks to appeal.

Accordingly, the Petition does not satisfy the threshold requirement for a permit appeal. As noted by Judge Reiger, dismissal is appropriate on this ground alone.

**b. Aqua Green failed to state a claim for relief based on an alleged inconsistency with the Act or SOP Rules.**

In addition, the Petitioner failed to state a claim for relief based on any alleged inconsistency with the Act or the SOP Rules. Aqua Green’s Petition merely “disagree[ing] with the changes to [its] permit SOP 19004” fails to specify any inconsistency. (*See* Petition, R. at 26.) In fact, no such claim could be made because none of the changes to the permit are inconsistent with either the Act or the SOP Rules. As Judge Reiger observed: “[m]any of the changes from the

2019 Permit to the 2025 Permit were not substantive. Most add clarity, rule citations, or remove inapplicable requirements.” (Initial Order, R. at 301.)

The only two concerns Mr. Kendall raised during the comment period on the draft 2025 Permit were related to the inspection frequency and the addition of *E.coli* sampling.<sup>2</sup> The 2025 Permit kept the 14-day default inspection frequency provided in the 2019 Permit but removed the optional phrase that allowed Aqua Green to adjust the inspection frequency by submitting an operating and maintenance inspection schedule to the Department. The Rationale for the 2025 Permit clearly explained that the inspection frequency reverted to the default 14-day frequency because of the hydraulically overloaded condition of the drip dispersal area documented by the Department during both of the site inspections conducted in 2024. (2025 Permit, R. at 24). The optional phrase – “or in accordance with an operating and maintenance inspection schedule in the permit administrative file record” – allows a potential deviation from the default 14-day inspection frequency for SOPs. However, this optional phrase is not included in either the Act or the SOP Rules. There is no requirement that permits must include this optional phrase. Instead, the Act and Rules require the Division to set inspection schedules needed to ensure compliance.

The requirement in the 2025 Permit to sample for *E. coli* only applies in the unlikely scenario of the currently fenced drip fields becoming no longer fenced. *Id.*, R. at 22. Aqua Green is not currently aggrieved by the *E. coli* sampling since this requirement is only triggered when a field is unfenced. The SOP Rules require permits to “impose ... inspection requirements as determined necessary by the Commissioner to assure adequate treatment of wastewater and proper

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<sup>2</sup> Specific changes between the 2019 and 2025 Permits are reflected in a chart and bullet points provided in the Department’s Memorandum of Law (Mem. In Supp. Of Department’s Mot. for Summ. J., Aug. 14, 2025, R. at 166-68.) that is replicated in the Initial Order (Initial Order, R. at 294-95.)

operation of the sewerage system to meet the requirements of the Act and of this chapter.” Tenn. Comp. R. & Regs. 0400-40-06-.05(2). “In determining whether to reissue a permit, the Commissioner shall review the permit and other available information to ensure that: (a) The permittee is in compliance with or has substantially complied with all terms, conditions, requirements, and schedules of compliance of the expiring or expired permit ... .” Tenn. Comp. R. & Regs. 0400-04-06-.12(3)(a).

Aqua Green’s Petition failed to state a claim for relief based on any alleged inconsistency with the Act or the SOP Rules. Even the two concerns Mr. Kendall raised during the comment period would not satisfy the requirement because neither concern is inconsistent with the Act or SOP Rules. Neither the Act nor the SOP Rules specify inspection frequencies or sampling requirements. There is no inconsistency that satisfies the requirement for appealing the Permit. The Initial Order granting the Department’s summary judgment motion should be affirmed because the Petition and the Response fail to state a claim upon which relief can be granted. Specifically, they fail to state a claim for relief based on an inconsistency with the Act or the SOP Rules.

**II. The Board should restrict Aqua Green’s arguments and evidence on appeal to those properly before the Board.**

**a. The restriction on Mr. Kendall’s ability to practice law should be upheld.**

Tennessee law prohibits any person who does not have an active law license from engaging in the practice of law. *See* Tenn. Code Ann. §§ 23-3-103; 23-3-101(3) (defining the “practice of law”). A corporate entity can participate in administrative hearings through representatives, but the participation of an unlicensed representative may not violate Tennessee’s prohibition on the unauthorized practice of law. Tenn. Code Ann. § 4-5-305(a); *Petition of Burson*, 909 S.W.2d 768, 775-76 (Tenn. 1995).

Aqua Green is not represented by counsel in this matter. Regardless, Aqua Green's President, Dart Kendall, filed a response in opposition to the Department's Motion for Summary Judgment. Mr. Kendall is not a licensed attorney. In turn, the Department filed a Motion to Strike Response and Prevent the Unauthorized Practice of Law. Recognizing that a non-lawyer filing a response to a legal brief constitutes the unauthorized practice of law, Judge Rieger limited his consideration of Mr. Kendall's response to factual assertions in the response, "on a limited basis, to the extent they do not cross the line into the practice of law." (Initial Order, R. at 290-91.) In his appeal of the Initial Order, Mr. Kendall conceded that he is not, "and won't be, practicing law. [He] will only be presenting [his] testimony and evidence." (Order Appeal, R. at 312.) Mr. Kendall's representation of Aqua Green should continue to be limited to factual assertions to the extent they do not cross the line into the practice of law. The Board should not consider legal arguments in Mr. Kendall's filings or permit him to make legal arguments when he testifies to the Board.

**b. The issues should be limited to those addressed in the Initial Order**

As an appeal of a permit and based on the record in this case, the only issues for consideration are whether Aqua Green met the threshold requirements for filing a permit appeal, including: (a) whether the Petition specified which terms or conditions Aqua Green was appealing; and (b) whether the Petition stated a claim for relief based on an alleged inconsistency with the Act or the SOP Rules. The rulings in the Initial Order were limited to these issues and those raised in the Department's motion challenging Mr. Kendall's unauthorized practice of law, which the Board can also review.

The Uniform Administrative Procedures Act (UAPA) requires that the petition state its basis. Tenn. Code Ann. § 4-5-315(c). Mr. Kendall appealed the Initial Order to the Board on behalf

of Aqua Green claiming: “What I wish to present to the Gas and Water Board is evidence that we were not in violation of our permit, so the changes are not justified. I would like to present evidence that the problems with this permit and many of the recently reported permit violations are a result of failed TDEC policies or procedures.” (Order Appeal, R. at 311-312.)

In the appeal brief he filed, Mr. Kendall asserted that he would “testify and present evidence of” five issues. (Brief on appeal to the Division of Water Resources, Feb. 6, 2026.) Three of the issues are alleged claims against the Department of inconsistency with policies, disregard for financial impact on Aqua Green’s customers, of “actions and rulings [that] could be construed as retaliatory”. The other two issues included a bare claim that Aqua Green was not in violation of the Permit and that “Aqua Green has suggestions as to how to improve future water quality for the people of Tennessee.” However, none of these issues are within the scope of the facts or findings relevant to the Initial Order.

The Board has the authority to “(1) [h]ear appeals as specified in subsection (i) from administrative judges’ orders assessing penalties or damages, or issuing, denying, or modifying a permit; and (2) [a]ffirm, modify, or revoke such orders, as specified in subsection (i).” Tenn. Code Ann. § 69-3-105(f). The Tennessee Supreme Court has confirmed that the permit appeal procedures in Tennessee Code Annotated section 69-3-105(i) is the “exclusive means for obtaining administrative review of the commissioner’s issuance or denial of a permit.” Tenn. Code Ann. § 69-3-105(i); *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 517 (Tenn. 2013). The statute clarifies “the procedure for conducting the contested case shall be in accordance with § 69-3-110(a)”. Tenn. Code Ann. § 69-3-105(i). “If appealed to the board, the review of the administrative judge's initial order shall be limited to the record.” Tenn. Code Ann. § 69-3-110(a).

Tenn. Code Ann. § 69-3-105(i) authorizes the Board to reverse or modify the Commissioner's permit decisions when those decisions fail to comply with the Act.

The Act, in turn, specifies that the Commissioner's permitting decisions must comply with the regulations promulgated by the Board. Tenn. Code Ann. § 69-3-108(g).

*Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 525 (Tenn. 2013).

**c. Aqua Green's unauthenticated "Proposed Exhibits" should not be admitted.**

The Administrative Judge should not admit or consider documents in the Certified Copy of Technical Record that are not authenticated. The certified record in this case contains documents identified in the Index as "Proposed Exhibits." (R. at 39-141.) Mr. Kendall emailed these documents to the Administrative Procedure Division *ex parte* (i.e., without following instructions from the administrative judge to copy the undersigned counsel on communications) and did not provide them to counsel for the Department during discovery or at any other time. The documents submitted by Mr. Kendall include many pages that appear to be fragments of documents without title pages, source information, or other context. None of the documents identified within the "Proposed Exhibits" were authenticated by Aqua Green. Some of the documents submitted by Aqua Green, like the 2025 Permit, were properly entered into the record by the Department making the unauthenticated version submitted by Aqua Green duplicative. Another document in the collection of "Proposed Exhibits" is a permit for an entirely different site. It is not relevant.

The Administrative Judge "shall admit and give probative effect to evidence admissible in court ..." Tenn. Code Ann. § 4-5-313(1). "[E]vidence not admissible thereunder may be admitted" may be admitted only "when necessary to ascertain facts not reasonably susceptible to proof under the rules of court" "if it is a type commonly relied upon by reasonably prudent men in the conduct of their affairs." *Id.* The Administrative Judge "shall exclude evidence which in its judgment is irrelevant, immaterial, or unduly repetitious." *Id.* The Tennessee Rules of Evidence recognize that authentication of a document is a condition precedent to the document's admissibility. Tenn. R.

Evid. 901.

The “Proposed Exhibits” from Aqua Green are not authenticated and several of the documents are either duplicative of properly entered exhibits, incomplete fragments, or irrelevant to Aqua Green’s permit appeal. These documents do not demonstrate that the permit is inconsistent with the Water Quality Control Act or this Board’s rules. These documents do not meet the threshold requirement of authentication and do not constitute evidence that would be admissible in court. Nor are they “necessary to ascertain facts not reasonably susceptible to proof under the rules of court.” Accordingly, the “Proposed Exhibits” are not admissible, and were not admitted into evidence or considered by the administrative judge when deciding the initial order of dismissal. The Administrative Judge should not admit and the Board should not give probative effect to the proposed exhibits submitted by Mr. Kendall, found at pages 39 through 141 in the Certified Copy of Technical Record.

**PRAYER FOR RELIEF**

The Department respectfully requests that the Board review and adopt the Initial Order in this matter entered on November 14, 2025, and affirm the following rulings:

- (1) Aqua Green’s petition, Mr. Kendall’s January 31, 2025 letter, does not comply with the threshold requirements for a permit appeal set forth by Rule 0400-40-06-.13(2) of the Tennessee Comprehensive Rules & Regulations.
- (2) Aqua Green has failed to state a claim that the 2025 Permit is inconsistent with the Water Quality Control Act or the applicable rules, as required by Rule 0400-40-06-.13(2) of the Tennessee Comprehensive Rules & Regulations.
- (3) Mr. Kendall, a non-lawyer representative of corporate entity Aqua Green, is limited to offering factual assertions on behalf of Aqua Green and is prohibited from practicing

law on behalf of Aqua Green.

Respectfully submitted this 13<sup>th</sup> day of February, 2026.

/s/ Catherine Anglin

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*Attorney for the Department of Environment and  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been sent to: Aqua Green Utility, Inc. at the email addresses below, on this 13<sup>th</sup> day of February 2026.

Aqua Green Utility, Inc.  
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/s/ Catherine Anglin  
Catherine W. Anglin

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