



State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

September 23, 2022

Mark E. Clayton
4938 Laws Road
Whites Creek, TN 37189

Mark E. Clayton
P.O. Box 8
Gordon, GA 31031

Stephanie Durman, Esq.
Tennessee Dept. of Environment and Conservation
William R. Snodgrass TN Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, TN 37243

**RE: MARK E. CLAYTON V. TENNESSEE DEPARTMENT OF ENVIRONMENT AND
CONSERVATION, APD Case No. 04.30-220109J**

Enclosed is an *Initial Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
BOARD OF WATER QUALITY, OIL, AND GAS**

**IN THE MATTER OF:
COMPLAINT ID 117802
SECTION 118(A) APPEAL**

**MARK E. CLAYTON,
Petitioner,**

v.

**TENNESSEE DEPARTMENT OF
ENVIRONMENT AND
CONSERVATION,
Respondent.**

**DIVISION OF WATER RESOURCES
CASE NUMBER WPC22-0006**

DOCKET NO: 04.30-220109J

INITIAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Currently pending is a Motion for Summary Judgment filed by the Respondent on September 7, 2022. The Petitioner filed a response on September 7, 2022, which was primarily in response to an issue regarding the issuance of subpoenas but did contain attached as Exhibit B a photocopy of Petitioner's redacted Tennessee driver's license and a reference to Tenn. Code Ann. §69-3-118(a). Based upon the facts and law, the Respondent's Motion for Summary Judgment is **GRANTED.**

In support of its motion, 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.

FINDINGS OF FACT

1. On January 12, 2022, Respondent, Tennessee Department of Environment and Conservation (the Department) filed a Notice of Hearing 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.

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. 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.

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

5. Petitioner sold or transferred his interest in his home on April 14, 2022, according to a warranty deed filed in Davidson County. 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.

CONCLUSIONS OF LAW

The Petitioner bears the burden of proof in this matter. 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. 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. Petitioner primarily alleged that the culverts harmed him as the "upper riparian owner" and reduced his property value by altering drainage and causing flooding. The Act does not regulate flooding or ensure property values, but instead protects the interest of Tennesseans in unpolluted waters.

Moreover, nothing in the Act creates a right of action to pursue private property disputes or provides for recovery of damages by individuals. The alleged violators are not a party to this action and this tribunal cannot give the Petitioner the relief he seeks.

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

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).

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.

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.

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. *Yount v. FedEx Express*, 2016 WL 1056958, at *3 (Tenn. Ct. App. March 17, 2016).

It is **CONCLUDED** that, considering 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.

In examining the complaint and petition, 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 that this tribunal lacks subject matter jurisdiction to decide the matter.

Upon review of the pleadings and arguments of the parties, it is determined Respondent's motion is well taken and is hereby **GRANTED**. Accordingly, 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.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **23rd day of September, 2022.**



**J. SHANNON BARNHILL
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE**

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **23rd day of September, 2022.**

NOTICE OF APPEAL PROCEDURES

REVIEW OF INITIAL ORDER

The Administrative Judge's decision in your case **BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL & GAS (the Board)**, called an Initial Order, was entered on **September 23, 2022**. The Initial Order is not a Final Order but shall become a Final Order unless:

1. **A Party Files a Petition for Reconsideration of the Initial Order:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must **receive** your written Petition no later than 15 days after entry of the Initial Order, which is no later than **October 10, 2022**. A new 30 day period for the filing of an appeal to the Board (as set forth in paragraph (2), below) starts to run from the entry date of an order ruling of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued. Filing instructions are included at the end of the document.¹

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied you may file an appeal, which must be **received** by APD no later than 30 days after the date of denial of the Petition. *See* TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **A Party Files an Appeal of the Initial Order and/or Other Earlier Orders:** You may appeal the decision, together with any earlier order issued by the Administrative Judge you specifically choose to appeal, to the Board, by filing an Appeal of the Initial Order with APD. An Appeal of the Initial Order should include your name and the above APD case number and state that you want to appeal the decision to the Board, specifying any earlier order(s) issued by the Administrative Judge that you also want to appeal, along with the specific reasons for your appeal. APD must **receive** your written Appeal no later than 30 days after the entry of the Initial Order, which is no later than **October 24, 2022**. The filing of a Petition for Reconsideration is not required before appealing. *See* TENN. CODE ANN. § 4-5-317.
3. **The Board Decides to Review the Initial Order:** In addition, the Board may give written notice of its intent to review the Initial Order within the longer of 30 days or 7 days after the first board meeting to occur after entry of the Initial Order. No later than 7 days after the entry of an Initial Order, TDEC shall file, and serve, a Notice of Filing containing the date of the next Board meeting. No later than 7 days after the next Board Meeting, TDEC shall file, and serve, a Notice of Filing setting forth what action, if any, the Board took with respect to the Initial Order.

If either of the actions set forth in paragraphs (2) or (3) above occurs prior to the Initial Order becoming a Final Order, there is no Final Order until the Board renders a Final Order affirming, modifying, remanding, or vacating the administrative judge's Initial Order.

If none of the actions in paragraphs (1), (2), or (3) above are taken, then the Initial Order will become a Final Order. **In that event, YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER.**

¹ See TENN. CODE ANN. §§ 68-201-108 (Air Pollution Control Board); 68-211-113, 68-212-113, 68-212-215, 68-215-115, 68-215-119 (Underground Storage Tanks and Solid Waste Disposal Control Board); TENN. CODE ANN. §§ 60-1-401, 69-3-110, 68-221-714 (Board of Water Quality, Oil & Gas).

NOTICE OF APPEAL PROCEDURES

STAY

In addition, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Initial Order. A Petition for a stay must be **received** by APD within 7 days of the date of entry of the Initial Order, which is no later than **September 30, 2022**. See TENN. CODE ANN. § 4-5-316. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

REVIEW OF A FINAL ORDER

When an Initial Order becomes a Final Order, a person who is aggrieved by a Final Order in a contested case may seek judicial review of the Final Order by filing a Petition for Review “in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person’s discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County,” within 60 days of the date the Initial Order becomes a Final Order. See TENN. CODE ANN. § 4-5-322. The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.

FILING

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

Email: APD.Filings@tn.gov

Fax: 615-741-4472

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

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