

**TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
UNDERGROUND STORAGE TANKS &
SOLID WASTE DISPOSAL CONTROL BOARD**

IN THE MATTER OF :)	
)	
ACC, LLC,)	
)	
Petitioner,)	
)	
vs.)	CASE NOS. SWM 11-0006
)	WPC 11-0024
)	DOR 16-0010
)	
TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION,)	
)	
Respondent.)	

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

Petitioner brings this action, pursuant to Tenn. Code Ann. § 68-212-117 (2013) and Tenn. Code Ann. § 4-5-223 (2011), as an affected person seeking a contested case hearing before the Underground Storage Tanks & Solid Waste Control Board (the “Board”) to determine whether the Commissioner of the Tennessee Department of Environment and Conservation (“TDEC”) exceeded her delegated authority by failing to comply with this Board’s Final Order of August 7, 2012, APD Docket NO. 04.27-116746A (“Board’s 2012 Order”) (Exhibit 1); and the subsequent November 23, 2016 Consent Order, Case No. DOR 16-0010 (“2016 Consent Order”) (Exhibit 2) when the Commissioner failed to provide ACC, LLC (“ACC” or “Petitioner”), with notice of any alleged noncompliance, failed to invoice ACC for alleged missed deadlines pursuant to the 2016 Consent Order, and failed to afford ACC its appeal rights outlined in the 2016 Consent Order

pursuant to the Tennessee Uniform Administrative Procedures Act (“TUAPA”) Tenn. Code Ann. § 4-5-101 *et. seq.*

Petitioner seeks a Declaratory Order from the Board declaring the Commissioner exceeded her delegated authority when she repeatedly denied Petitioner’s proposed corrective action plans, certified by a professional engineer, which stated the plans were designed to eventually achieve compliance with this 2016 Consent Order (2016 Consent Order, Ex. 2, Pg. 10, ¶ XX(B)(2)) at the former ACC Landfill (“Site”). Petitioner requests the Board convene a contested case hearing and make an expedited ruling as to the Commissioner’s interpretation and compliance with this Board’s 2012 Order, 2016 Consent Order, applicable statutes, Rules and Regulations including Petitioner’s appeal rights as outlined in the 2016 Consent Order.

Petitioner seeks a Declaratory Order from the Board opining the Commissioner exceeded her delegated authority when she failed to comply with this Board’s 2012 Order, the 2016 Consent Order, the Act, and the Rules and Regulations.

II. FACTS

1. ACC, LLC (“ACC” or “Petitioner”), is a limited liability company organized and existing under the laws of the State of Tennessee with its principal office located at 400 Arrow Mines Road, Mt. Pleasant, Maury County, Tennessee.

2. ACC owns and operates a closed Class II industrial solid waste disposal facility known as the “ACC Landfill.” In June of 2011, TDEC and ACC entered into a Consent Order to remediate environmental problems with the ACC Landfill. Shortly after the 2011 Consent Order was filed in Davidson County Chancery Court, a neighboring landowner, Starlink Logistics, Inc. (Starlink), was allowed to intervene in the action. On November 11, 2011 the Chancery Court remanded the matter Tennessee Solid Waste Disposal Control Board for a contested case accordance with Tenn. Code Ann. § 4-5-301, *et seq.* The contested case hearing was held before the Tennessee

Solid Waste Disposal Board on August 7, 2012 with an Administrative Law Judge presiding. This Board entered its Order on August 9, 2012. (Board's 2012 Order, Ex.1).

3. The Board's 2012 Order required a "removal action". Since remediation activities were initiated in 2012, approximately 555,500 cubic yards of impacted wastes and soil from the former landfill have been excavated and relocated to a lined waste disposal area on the site. These activities, including the construction of a synthetic cover over the relocated wastes, were conducted over 5 phases encompassing 5 years of construction activity. Since waste relocation, the monitored constituent concentrations of ammonia, chlorides, and total dissolved solids (TDS) have resulted in more than a 95 percent reduction in constituent concentrations within the surface water at the road crossing. (Aff. Nancy Sullivan, Exhibit 3, ¶ 4).

4. The Board's 2012 Order expressly provided that "[t]reatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed." (Board's 2012 Order, Ex. 1, Pg 17, ¶ XXVI(B)(3)) Specific post-closure care and ground water corrective action requirements are to be established by the landfill operator in the Post-Closure Care Plan and the Ground Water Corrective Action Plans. ACC has also not received approval of its Post-Closure Care Plan or submitted to the TDEC. (Aff. Nancy Sullivan, Ex. 3, ¶ 11).

5. The 2012 Board Order contained a reservation of rights section wherein the Commissioner reserved the right to require further or supplemental corrective action due to impacts from the discharges from the ACC Landfill, or based on changes of conditions or new information, to assess civil penalties for all violations of the law, and to assess all damage in the 2012 Amended Consent Order. (Ex 1.)

6. On September 16, 2016 Evan Spann sent a letter to ACC directing ACC to submit a plan by October 31, 2016 for abandonment and replacement of two monitoring wells at the site, wells MW-4 and MW-6 in response to the June 2016 groundwater monitoring report submitted pursuant to this Board's Order. (Aff. Christopher Scott, Ex. 4, ¶ 5).

7. On November 23, 2016, TDEC exercised its reserved right and entered into a supplemental Consent Order with ACC "to cause the remediation of hazardous substances, solid waste, or other pollutants that are impacting portions of Sugar Creek and an unnamed tributary of Sugar Creek ("hereinafter referred to as the "2016 Consent Order") (2016 Consent Order, Ex. 2; Pg. 1). The 2016 Consent Order stated the primary goal was "to reduce the loading of contaminants discharging from the Site via surface water."

8. On April 19, 2017, TriAD, on behalf of ACC, submitted the written plan requested by TDEC for changes to the groundwater monitoring network. The plan included abandonment and replacement of MW-6 and the addition of two new monitoring wells. The plan also included a detailed explanation of why abandonment of MW-4 was not needed. (Aff. Christopher Scott, Ex. 4, ¶ 9).

9. On July 28, 2017, Mr. Spann sent a letter to ACC regarding the report of the routine June 2017 groundwater monitoring event in which he again required abandonment and replacement of MW-4 and MW-6. TriAD on behalf of ACC, replied the same day, asking if Mr. Spann had reviewed the April 19 plan. On August 2, 2017, Mr. Spann replied via email that he had probably received the plan but could not find it. He asked that it be resubmitted. TriAD on behalf of ACC, emailed the plan to Mr. Spann on that date. (Aff. Christopher Scott, Ex. 4, ¶ 10).

10. Eight months after ACC submitted its proposed CAWP, on December 7, 2017, TDEC finally responded to the April 19, 2017 plan stating it would require the submittal of a

revised Corrective Action Work Plan (CAWP), to include revisions to the groundwater monitoring network, and extended the due date for the revised CAWP to January 31, 2018. The December 7, 2017 letter included extensive written comments in response to the draft CAWP. The letter provided, purpose of these comments was "to establish performance standards and a timetable for [Defendant] ... to achieve Tennessee Water Quality Criteria for the designated surface water uses at the Site." (Aff. Christopher Scott, Ex. 4, ¶ 11). TDEC's comments stated WQC were selected by the Division of Water Resources independent of site-specific studies and/or without input from ACC in direct conflict, the explicit terms of this Board's 2012 Order and the regulations. The letter rejected use of the interim standards that were proposed to be used during the time needed to complete site-specific studies and stated a date-certain of April 15, 2018 wherein ACC should cease discharging surface water from the site in excess of the WQC set by TDEC. (Aff. Christopher Scott, Ex. 4, ¶ 24).

11. On January 31, 2018, TriAD on behalf of ACC submitted the revised CAWP, which included the previously submitted April 2017 proposed changes to the groundwater monitoring network in the revised groundwater monitoring plan, an appendix to the revised CAWP. This was the third time that TriAD, on behalf of ACC, submitted to Mr. Spann the proposed changes to the groundwater monitoring network Mr. Spann had previously requested. (Aff. Christopher Scott, Ex. 4, ¶ 12).

12. The January 31, 2018, revised CAWP was submitted to TDEC incorporated the TDEC comments to the extent that ACC and TriAD judged those comments to be technically practicable along with an accompanying letter wherein the licensed Professional Engineer explained some of TDEC's comments were not technically practicable in her professional opinion and therefore she could not include in plans stamped by a Professional Engineer. The

ACC proposed CAWP included the use of interim standards (lower than those proposed in previous versions of the CAWP) to be used only during the time required for the studies needed to set site-specific WQC, which were, as understood by ACC and TriAD, allowed consistent with the regulations and the Orders. (Aff. Sullivan, Ex. 3, ¶ 6-8); (Aff. Christopher Scott, Ex. 4, ¶ 25).

13. On March 5, 2018, Mr. Spann once again responded to the routine December 2017 groundwater monitoring report with a letter again requiring abandonment and replacement of MW-4 and MW-6, with a plan for such work due by March 30. (Aff. Christopher Scott, Ex. 4, ¶ 13).

14. On March 14, 2018, Mr. Tom Grosko of ACC sent a letter to Mr. Spann in response to the March 5, 2018 letter, presenting the timeline of the requests, meetings, and submittals regarding the proposed changes to the groundwater monitoring network at the site. (Aff. Grosko, Exhibit 5, ¶ 12); (Aff. Christopher Scott, Ex. 4, ¶ 14).

15. On September 27, 2018, Mr. Spann sent a letter to Mr. Grosko, approving the plan submitted to TDEC on April 19, 2017, with the exception that TDEC asked why MW-4 was not proposed for replacement and requesting again that it be replaced. (Aff. Christopher Scott, Ex. 4, ¶ 15).

16. On August 8, 2018, TDEC, in a letter from Mr. Spann, rejected the revised CAWP and the accompanying explanations-again attempting to direct a licensed Professional Engineer to include items in a plan in violation of the Rules of State Board of Architectural and Engineering Examiners, Chapter 0120-02 Rules of Professional Conduct. TDEC further stated ACC it should somehow stop all surface water from leaving the ACC site in excess of the WQC

by November 1, 2018 pursuant to an “approved plan”- ACC had not received an approved plan. (Aff. Christopher Scott, Ex. 4, ¶ 26)

17. In a subsequent meeting with TDEC representatives including Mr. Spann and Mr. Gregory M. Denton on September 24, 2018, TDEC explained to ACC’s consultants it would not comply with this Board’s 2012 Order and instead would set its own WQC and would use the US EPA ecological screening level for chloride (230 mg/L) as a WQC rather than as guidance for developing WQC. (Aff. Christopher Scott, Ex. 4, ¶ 26).

18. TDEC also explained that it planned to use the U.S. EPA ecological screening level for chloride (230 mg/L) as a WQC rather than as guidance for developing WQC as intended by U.S. EPA. The text accompanying the U.S. EPA screening levels includes the following: “Since these numbers are based on conservative endpoints and sensitive ecological effects data, they represent a preliminary screening of site chemical concentrations to determine the need to conduct further investigations at the site. ESVs are not recommended for use as remediation levels.” (Aff. Christopher Scott, Ex. 4, ¶ 26).

19. On October 1, 2018, ACC submitted a revised written CAWP to TDEC. (Aff. Christopher Scott, Ex. 4, ¶ 27)

20. TDEC responded in writing to ACC on October 19, 2018, rejecting ACC's revised CAWP, TDEC “suggested “in this letter that Defendant consider pumping and hauling the accumulated surface water in excess of the WQC set by TDEC as an interim measure, in an effort to comply with the arbitrary November 1, 2018 deadline. (Aff. Grosko, Ex. 5, ¶ 13).

21. There are numerous corrective actions that could be implemented at the site to further reduce constituent concentrations in surface water. To determine the most effective corrective action(s) that would achieve the specified water quality criteria, a site investigation is

required to delineate the horizontal and vertical impact to site soils and their associated relationship to site waters. After numerous Corrective Action Work Plans (“CAWP”) submittals to the TDEC, approval of this first step has not been granted by TDEC since completion of the waste relocation activities. Without this site-specific information, the development of engineering details, establishment of base flow conditions, and relation to storm events cannot accurately be developed. In addition, implementation of corrective actions without this site-specific information could result in unnecessary expenditures and/or the construction of ineffective actions that would later require removal and replacement of previously constructed measures with alternate measures. For example, in the event ACC put a cap on the remaining in-place soils, it is likely ACC and/or TDEC may later determine, after completion of additional site studies and continuing surface water monitoring, that the underlying soils require removal or in-situ stabilization to prevent leaching of contaminants in which case the previously constructed cap could require removal, disposal, and a new cap all at an additional cost prior to implementation of the next phase of the corrective action. (Aff. Nancy Sullivan, Ex. 3, ¶ 5).

22. On December 14, 2018 the Commissioner and the Tennessee Attorney General & Reporter filed a Verified Complaint and Motion for Temporary and Permanent Injunction in the Davidson County Chancery Court seeking:

(1) an order and judgment declaring ACC to be in violation of the final 2016 Consent Order and the WQCA by asserting ACC failed to perform such corrective actions at its closed industrial landfill in Maury County, Tennessee, as required under Section XX. B. 2. of the 2016 Consent Order, and TDEC's comments thereto, to achieve prompt surface water compliance with the Tennessee Water Quality Criteria; (2) an order and judgment requiring Defendant to pay contingent civil penalties assessed under the final 2016 Consent Order until such time as ACC achieves surface water compliance with the Tennessee Water Quality Criteria; and (3) a permanent injunction enforcing the terms of the parties' 2016 final administrative Consent Order by requiring ACC to incorporate and comply with the written comments submitted by TDEC to ACC's corrective action work plan for its closed industrial landfill in order for ACC to achieve prompt surface water compliance with the Tennessee Water Quality Criteria.

23. As of January 4, 2019, ACC has not received approval from the TDEC of any proposed CAWP and as a result has not completed construction of an approved CAWP. (Grosko Affidavit Exhibit 5.)

III. APPLICABLE LAW

24. ACC, LLC, is "Person" pursuant to Tenn. Code Ann. § 68-212-104 (13), 69-3-103(20) and 68-211-103(6).

25. The Commissioner is authorized under Tenn. Code Ann. § 68-212-224 to enter into a Consent Order to accomplish clean-up.

26. Tennessee Solid Waste Management Rule 0400-11-01-.04(8)(d) establishes a 30-year period of post-closure care for Class II (industrial) landfills, and Rule 0400-11-01-.04(8)(e) establishes the minimum activities that the landfill operator must perform during that post-closure care period. Specific post-closure care and ground water corrective action requirements are to be established by the landfill operator in the Post-Closure Care Plan and the Ground Water Corrective Action Plan as detailed in the regulations. Pursuant to Tenn. Code Ann. § 68-211-107, the Department is authorized to exercise general supervision over the operation and maintenance of solid waste processing facilities and disposal facilities or sites.

27. The Solid Waste Disposal Act ("SWDA") and the Water Quality Control Act ("WQCA") expressly authorize the Commissioner of TDEC to issue "orders for correction" to responsible persons when provisions of either Act are not being carried out. Tenn. Code Ann. § 68-211-112 (2013) and Tenn. Code Ann. § 69-3-109(a) (2008). *Id.* The Hazardous Waste Management Act ("HWMA") specifically authorizes the Commissioner to issue orders for clean-up and remediation of inactive hazardous substance sites. Tenn. Code Ann. § 68-212-206 (2011). *Id.*

28. The Commissioner of TDEC is authorized to issue “orders for correction” to responsible persons. Tenn. Code Ann. § 68-211-112, § 68-212-206, and § 69-3-109(a). The HWMA authorizes the Commissioner to enter into consent orders for clean-up and remediation of inactive sites. Tenn. Code Ann. § 68-212-224 (2011).

IV. DECLARATORY ORDER

29. Petitioner asks the Board to commence a contested case hearing to review TDEC’s failure to comply with this Board’s 2012 Order, the 2016 Consent Order, the Act, and the Rules and Regulations.

30. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority by violating ACC’s due process appeal rights when she failed to issue comply with the terms contained in the 2016 Consent Order and afford ACC its appeal rights pursuant to the UAPA in compliance with the 2016 Consent Order.

31. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority and violated this Board’s 2012 Order by failing to approve ACC’s plans for corrective action at the Site as certified by a Professional Engineer who opined the plan submitted was designed to achieve the goal of surface water meeting site specific standards for ammonia, chlorides, and total dissolved solids pursuant to the Acts.

32. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority when it denied ACC’s request to pump surface water onto an adjoining property it controls in direct conflict with the Commissioner’s prior approval authorizing a neighbor to pump the same water onto an adjoining golf course.

33. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority by violating the 2016 Consent Order by failing to approve

ACC's corrective action work plan certified by a Professional Engineer. (Aff. Nancy Sullivan, Ex. 3, ¶5-9).

34. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority by instructing a licensed Professional Engineer to stamp a report in violation of State Board of Architectural and Engineering Examiners, Chapter 0120-02, Rules of Professional Conduct. (Aff. Nancy Sullivan, Ex. 3, ¶ 6-8).

35. Petitioner asks the Board to issue an Order proclaiming the Commissioner lacked the authority to issue the mandatory and arbitrary deadlines contained in its December 7, 2017 letter.

36. Petitioner asks the Board to issue an Order proclaiming the Commissioner lacked the delegated authority to issue the mandatory and arbitrary deadlines to ACC contained in its August 8, 2018 letter. (Aff. Nancy Sullivan, Ex. 3, ¶5-6).

37. Petitioner asks the Board to issue an Order proclaiming the Commissioner lacks the authority to suggest and or to order a "person" to implement technically impracticable remedies by a mandatory date, based upon inadequate data. (Aff. Nancy Sullivan, Ex. 3, ¶5-6).

38. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her authority and the Act by denying ACC's Corrective Action plan in direct conflict with this Board's 2012 Order.

39. Petitioner asks the Board to issue an Order proclaiming the TDEC exceeded its delegated authority when it failed to consider Rule 0400-40-03-.02(9).

40. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority when it failed to comply with this Board's 2012 Order when

she denied the landfill operator's post-closure care and ground water monitoring plans. (Aff. Nancy Sullivan, Ex. 3, ¶11).

41. Petitioner asks the Board to issue an Order proclaiming the Commissioner lacks the authority to seek appeal of this Board's final 2012 Order pursuant to Tenn. Code Ann. § 69-3-111 (2013).

42. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority by using the US EPA ecological screening level for chloride (230 mg/L) as a WQC rather than as guidance for developing WQC at the ACC site. (Aff. Christopher Scott, Ex. 4, ¶ 26).

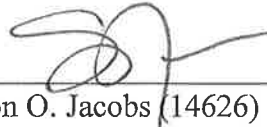
43. Petitioner asks the Board to issue an Order proclaiming the Commissioner exceeded her delegated authority when she rejected ACC's proposed CAP including the Ground Water Monitoring Plan and Surface Monitoring Plan included therein as the 2012 Order states "the results of testing shall be used to develop the appropriate standards and methods for future annual testing and shall be included in the Water Monitoring Plan submitted with the CAP. A revised Ground Water Monitoring Plan will also be prepared in conjunction with the Surface Monitoring Plan and included as part of the CAP". (Exhibit 1.)

44. The Commissioner exceeded her delegated authority when she failed to comply with the terms contained the 2016 Consent Order and denied ACC of its appeal rights pursuant to the 2016 Consent Order.

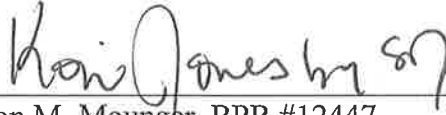
45. The Petitioner asks the Board to Order the Commissioner to pay ACC' attorney fees and all associated litigation costs including expert fees pursuant to Tenn. Code Ann. §§ 29-37-104, 4-5-325.

46. The Petitioner asks the Board to Order all other relief it deems appropriate.

Respectfully submitted,



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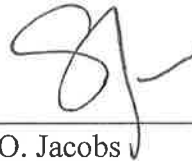
CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been mailed by U.S. First-Class Mail, postage prepaid, and/or hand-delivery to the following on January 4, 2019:

Patrick J. Flood, P.E., Technical Secretary
Underground Storage Tank & Solid Waste Disposal Board
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