

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

STATE OF TENNESSEE, ex rel. )  
HERBERT H. SLATERY III, in his )  
official capacity as the Attorney General )  
and Reporter of Tennessee and )  
SHARI MEGHREBLIAN, Ph.D., )  
Commissioner of the Tennessee )  
Department of Environment and )  
Conservation, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
ACC, LLC f/k/a ASSOCIATED )  
COMMODITIES CORPORATION, )  
 )  
Defendant. )

No. 18-1352-III

**MEMORANDUM AND ORDER DENYING PLAINTIFFS'**  
**TEMPORARY INJUNCTION APPLICATION**

This lawsuit concerns a closed Class II (industrial) solid waste disposal facility owned and operated by Defendant ACC, LLC, located on 48 acres south of the City of Mt. Pleasant in Maury County, Tennessee (the "Site"). It is a hazardous substance site within the meaning of Tennessee Code Annotated section 68-212-202(3). In 2016 the parties entered into a Consent Order governing the final phase of remediation of the Site.

The Plaintiffs claim that the Defendant is not complying with the terms of the 2016 Consent Order and have filed this lawsuit to enforce the 2016 Consent Order and collect penalties for noncompliance. As the lawsuit states on page 1 of the *Verified Complaint*, it

is filed to obtain “judicial enforcement of the terms of a final administrative Consent Order between the Tennessee Department of Environment and Conservation (TDEC) and ACC, LLC, . . . that was entered in 2016 . . . .” pertaining to the landfill. The relief the Plaintiffs seek, stated in the *Verified Complaint*, is

- (1) an order and judgment declaring Defendant to be in violation of the final 2016 Consent Order and the Tennessee Water Quality Control Act, Tenn. Code Ann. §§ 69-3-101 to 69-3-148 (WQCA) for failing to perform such corrective actions at its closed industrial landfill in Maury County, Tennessee (the “Site”), 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 Defendant 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 Defendant 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 Defendant to achieve prompt surface water compliance with the Tennessee Water Quality Criteria.

The case has only recently been filed and is in its beginning phase. No answer has been filed by the Defendant. The case is presently before the Court with respect to preliminary relief. The Plaintiffs have filed an application seeking issuance of a temporary mandatory injunction.

The immediate relief the Plaintiffs seek is for the Court to issue an injunction setting a date certain for the Defendant to bring the Site into compliance with the Tennessee Water

Quality (“TWQ”) Criteria with respect to surface water leaving the Site. It is the Plaintiffs’ position that its sampling shows that water leaving the Site does not comply with TWQ Criteria and that under the provisions of Tennessee Code Annotated section 69-3-117 the Plaintiffs are granted statutory authority to seek an injunction in chancery court to require and obtain compliance with the water quality standards of the Tennessee Water Quality Control Act (“TWQCA”).

The Defendant opposes issuance of the temporary injunction on the grounds that the Tennessee Department of Environment and Conservation (“TDEC”) agreed in the 2016 Consent Order to a process for the final phase of remediation of the Site to be accomplished, and that the Plaintiffs’ application in this lawsuit for a temporary injunction violates the terms of the Consent Order in several ways. First, the Defendant disputes that this Court is the proper forum, under the terms of the 2016 Consent Order, to determine, in the first instance, whether the Consent Order is being violated. The Defendant asserts that because of the highly technical nature of this matter, the parties negotiated in the 2016 Consent Order a procedure where disputes concerning noncompliance with the 2016 Consent Order would be filed with and determined initially by the Commissioner’s Designee who has scientific, technical and agency expertise on landfill clean-ups. The Defendant also asserts in opposition to the issuance of a temporary injunction that TDEC’s actions have prevented the Defendant from performing the terms of the Consent Order. Lastly, the Defendant denies that there exists any immediate and irreparable harm to justify issuance of a temporary injunction.

On January 7, 2019, oral argument was conducted on the Plaintiffs' injunction application, and the matter was taken under advisement.

After considering the law, the record and argument of Counsel, it is ORDERED that the Plaintiffs' application for a temporary injunction is denied. Tennessee Civil Procedure Rule 65 requires "clear" evidence for a temporary injunction to issue. The facts of record in this case are not clear whether the cause for Plaintiffs' claims that the Defendant is not in compliance with TWQ Criteria are the actions of TDEC or the Defendant. Tennessee law does not authorize issuance of a temporary injunction unless the evidence is clear. In addition, the record does not establish immediate and irreparable harm. Last, this Court is not the proper forum, in the first instance, to determine whether the Defendant is not complying with TWQ Criteria. A process provided in the 2016 Consent Order supplants this proceeding.

The facts and law on which this decision is based are as follows.

### **Facts From the Temporary Injunction Record**

#### **Content of 2016 Consent Order**

The 2016 Consent Order has been filed in the record. It explains the history of this matter and the bases for the Consent Order. It establishes that the ACC Landfill is a hazardous substance site within the meaning of Tennessee Code Annotated section 68-212-202(3). The 2016 Consent Order explains that in past consent orders between the parties waste was successfully relocated, isolated, capped and contained. The purpose of the 2016 Consent Order is to address the next phase of the clean-up 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.” Consent Order, first paragraph, Exhibit 1 to *Declaration of Sharon O. Jacobs*, January 4, 2019.

Section XX of the 2016 Consent Order is entitled “Order,” and it contains nine subsections, (A)-(I). Section XX (A), “Correction Action Objectives,” states that the objective of the 2016 Consent Order is for the surface water in the unnamed tributary draining the ACC landfill to Sugar Creek and for Sugar Creek not to be impaired due to pollutants associated with the ACC landfill. Further this section states that the corrective action objective for surface water leaving the ACC site is to meet the TWQ Criteria.

The 2016 Consent Order next states in Section XX (B) how the corrective action is to proceed, paraphrasing as follows.

- Subsection B(1) provides that within 120 days of receipt of the order, the Defendant shall implement an interim action approved by the Department that prevents surface water and leachate that does not meet the TWQ Criteria from leaving the property. The interim action is to be implemented until an approved corrective action has been implemented and approved.
- Subsection B(2) provides that within 90 days of the Order, a written corrective action work plan to replace the interim action may be submitted by the Defendant. The corrective action work plan is to be revised within 15 days of receipt of the Department’s comments to the plan to incorporate those comments and to implement the corrective action as approved by the Department.
- Subsection B(3) provides for submission to the Department, within 90 days of completion of corrective action construction, an operation and maintenance plan to maintain the effectiveness of the corrective action.

- Subsection B(4) requires the Respondent to submit quarterly reports with monitoring data until the Department determines that the reports are no longer necessary.

The format and logic of the 2016 Consent Order is that the foregoing deadlines of Section XX (B) are then explicitly referred to and addressed in Section XX (I) entitled “Contingent Penalties.” This latter subsection provides that “[m]issing any deadline . . . shall result in a contingent penalty of five hundred dollars (\$500.00) per day per deadline missed for calendar days one (1) through seven (7) and one thousand dollars (\$1,000.00) for day eight (8) and each day thereafter until the item associated with the deadline is met or the noncompliance is resolved to the Department’s satisfaction.” Subsection (I) goes on to provide the dispute resolution process which the Defendant asserts should have been used in this case instead of the Plaintiffs filing in chancery court the pending application for injunctive relief, quoting subsection (I) as follows.

Contingent penalties shall be payable to the Department within forty-five (45) days of the Department invoicing Respondent for the stipulated penalty. If Respondent disputes a contingent penalty, Respondent shall submit written notice of dispute and any supporting documentation within thirty (30) days of receipt of the Department’s invoice for the contingent penalty. If Respondent disputes a contingent penalty, said penalty continues to accrue pending resolution of the dispute and does not affect other penalties or their due dates. Resolution of dispute of contingent penalty shall be decided by the Commissioner’s designee. This decision may be further appealed pursuant to the Uniform Administrative Procedures Act (UAPA).

### **Parties’ Conduct**

In addition to the facts of the content of the 2016 Consent Order, pertinent to deciding whether a temporary injunction should issue are the facts concerning the parties’ conduct in performing and complying with the 2016 Consent Order. The parties have

filed competing and disputed evidence on their conduct, in support and in opposition to the application for a temporary injunction.

As quoted above, the 2016 Consent Order contains two corrective action provisions. First, it requires Defendant, by a date certain, to implement an interim action approved by TDEC to prevent surface water and leachate with concentrations of ammonia, chlorides and/or dissolved solids exceeding the Tennessee Water Quality Criteria from leaving the ACC property and polluting downstream waters (Section XX (B)(1)). Second the 2016 Consent Order (Section XX (B)(2)) allows Defendant to submit to TDEC a written corrective action work plan (CAWP) “to replace the interim action [the interim action is provided for in Section XX (B)(1)],” which must be designed to prevent ammonia, chlorides and/or total dissolved solids in surface water front leaving the Site in concentrations exceeding the Tennessee Water Quality Criteria. Section XX (B)(2) of the Consent Order expressly requires the Defendant to incorporate TDEC’s written comments on the proposed CAWP, submit a revised CAWP, and thereafter implement the revised CAWP “as approved by the Department. These provisions are paraphrased *supra* at 2.

It is undisputed that in accordance with Section XX (B)(1) of the 2016 Consent Order, Defendant initiated an interim action at the Site in January 2017, by installing a leachate collection system for the new waste relocation area and by transporting the leachate for off-site treatment. Eventually, though, Defendant decided to invoke the second component CAWP provided for in Section XX (B)(2) of the 2016 Consent Order. As required by Section XX (B)(2), on March 18, 2017, the Defendant submitted a written CAWP to TDEC. Following the submission of Defendant’s CAWP in March 2017,

TDEC personnel reviewed it and engaged in discussions with Defendant on its content. The affidavits filed by both sides show that ongoing exchanges between the parties have not achieved consensus on the CAWP.

The Plaintiff's position is that the most recent exchanges on the CAWP still do not address the corrective action objectives of the 2016 Consent Order for the surface water in the unnamed tributary draining the ACC landfill to meet TWQ Criteria. In addition it is the Plaintiffs' position that TDEC's comments, which are required to be incorporated into the CAWP as provided in Section XX (B)(2) of the 2016 Consent Order, set a deadline of November 1, 2018, for discharge from the Site to be compliant with TWQ Criteria and, thereby, the November 1, 2018 deadline has become a part of the Consent Order and is being violated by the Defendant due to noncompliance by that date with TWQ Criteria.

The facts sworn to by the Defendant's witnesses in their affidavits<sup>1</sup> are that the Defendant has not failed to comply with the 2016 Consent Order because (1) the Plaintiffs have prevented the Defendant from performing the 2016 Consent Order and (2) the Plaintiffs' water sampling is not accurate.

The details on these facts asserted by the Defendant are that, first, the delay on completing the clean-up is due to TDEC's failure to approve a very important, basic, first step: for the Defendant to perform a site investigation to identify the horizontal and vertical impact to site soils and their relationship to site waters. In addition Engineer

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<sup>1</sup> Filed in opposition by the Defendants are the affidavits of: Nancy Sullivan, Professional Engineer and Principal at TriAD Environmental Consultants, Inc. ("TriAD"); Christopher M. Scott, Senior Hydrogeologist with TriAD; and Thomas Grosko, designated general manager of ACC, LLC. TriAD is a consulting firm hired by the Defendant to assist with the remediation.



Sullivan attests that TDEC is preventing the Defendant from performing the 2016 Consent Order because the remediation plan TDEC is asserting will not achieve the desired water quality criteria, and that it is futile for the Defendant to implement an ineffective solution. These parts of the affidavit of Defendant's Engineer Nancy Sullivan are quoted as follows.

5. 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 submittals to the TDEC, approval of this first step has not been granted by TDEC for any of the Corrective Action Work Plans provided 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 constructs a cap over the remaining in-place soils, 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 and disposal and a new cap subsequently constructed, all at an additional cost.

6. Due to the large upgradient drainage area to the Road Crossing which generates millions of gallons of surface water runoff in a year, the collection and off-site treatment of all surface water discharging through this location is not a technologically practicable action, conflicts with the 2012 Consent Order, would not address the source of impact to the receiving waters nor is it an economically reasonable or cost-effective option for implementation. In addition, the time to construct the infrastructure necessary to collect and treat millions of gallons of surface water far exceeds any time allotted in the TDEC's August 8, 2018, letter- to achieve the water quality criteria by the November 1, 2018 deadline.

7. In my opinion, it is unlikely that isolation and collection of water from the existing on-site impoundments for subsequent treatment

would achieve the water quality criteria due to the interconnection between surface water and groundwater and the presence of seeps within waterways at the site. Evidence for the ineffectiveness of this option is demonstrated by the results of sampling conducted at the road crossing during the summer months of 2018 when the ponds were not discharging. A site-specific investigation is required to determine the most effective option(s) for implementation to achieve the specified water quality criteria. To date, ACC has not received approval from TDEC to commence a site-specific investigation.

8. Based on the limited subsurface information available for the site, it is my professional opinion that there is currently no reasonable, cost-effective interim measure that can with certainty be implemented at the site to ensure all surface water will meet the water quality criteria by a date certain.

*Affidavit of Nancy Sullivan*, January 4, 2019, at pp. 2-3.

The affidavits of the Defendant's other witnesses assert that delays and an impasse in performing the 2016 Consent Order have resulted from TDEC changing its position on the water quality standards which apply. Engineer Christopher Scott testifies that it was as late as December 7, 2017, that TDEC stated it would not accept developed site-specified water quality criteria as the applicable standard, and that TDEC's additional requirement for date-certain compliance with a standard independent of the responsible party's study was an unprecedented break with Mr. Scott's 28-year work with TDEC.

24. On December 7, 2017, TDEC, in a letter from Mr. Spann, submitted comments on the CAWP. In this letter, TDEC identified WQC that were selected by the Division of Water Resources independent of site-specific studies or input from ACC. The letter also rejected use of the interim standards that were proposed to be used during the time needed to complete site-specific studies and set a date-certain upon which all water leaving the site had to meet the WQC set by TDEC. This letter was the first time in the process in which I was aware that TDEC would not accept the development of site-specific WQC for the site and the first time in my 28 years working with the TDEC that it mandated a date-certain by which water must meet a specific standard independent of a responsible party's studies.

25. On January 31, 2018, a revised CAWP was submitted to TDEC that incorporated the TDEC comments to the extent that ACC and TriAD judged those comments to be technically practicable and explained in an accompanying letter which TDEC comments were not technically practicable. This version of the CAWP proposed 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.

26. On August 8, 2018, TDEC, in a letter from Mr. Spann, rejected the revised CAWP and the accompanying explanations. In a subsequent meeting I attended with TDEC representatives including Mr. Spann and Mr. Gregory M. Denton on September 24, 2018, TDEC explained why they would not accept site-specific WQC for the site. This explanation was based on their interpretation of Rule Chapter 0400-40-03 General Water Quality Criteria. To my knowledge, this was the first time TDEC had explained to ACC and TriAD why site-specific WQC would not be accepted. 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."

*Affidavit of Christopher M. Scott, PG, January 4, 2019.*

There also is the *Affidavit of Thomas Grosko*, designated general manager of the Landfill Site for ACC, LLC, who attests that the facts do not establish ACC is noncompliant with the 2016 Consent Order because the Defendant has received no invoice for contingent penalties from TDEC nor new orders, as required by the procedure stated in Section XX (I) of the 2016 Consent Order to formalize and process noncompliance issues.

6. In carrying out the requirements of the 2012 and 2016 Consent Orders, ACC has relied on the advice of its environmental consultants, Triad Environmental Consultants, Inc.

7. ACC, through its environmental consultants, has explored numerous options and submitted several corrective action plans to the TDEC in an effort to comply with the 2012 and 2016 Consent Orders.

8. ACC is not in receipt of any invoice for contingent civil penalties from the Commissioner of the Tennessee Department of Environment and Conservation.

10.[sic] ACC has not received any subsequent Orders from the Commissioner of TDEC after the November 2016.

11. ACC, though its environmental consultants, has repeatedly contacted TDEC personnel in an effort to remain in compliance with both the 2012 Amended Consent Order and the 2016 Consent Order and finish the remedial actions at the former ACC landfill site.

12. On March 14, 2018, I sent a letter to Evan Spann, that presented a timeline of the requests, meetings, and submittals regarding the proposed changes to the groundwater monitoring network at the ACC Landfill site in response to TDEC letters. A copy of the correspondence is attached hereto as Exhibit 1.

13. TDEC by letter dated October 19, 2018 rejected ACC's revised Corrective Work Plan submitted to TDEC on October 1, 2018. I replied to the TDEC by letter on November 2, 2018; in my letter I identified four actions that ACC would undertake in the continued effort to prevent ammonia, chlorides, and/or total dissolved solids in surface water at the road crossing from leaving the ACC property in concentrations exceeding Tennessee Water Quality Criteria for the designated uses. ACC has completed three of the four tasks identified in this correspondence; the weather prevented ACC from constructing the weir, however, ACC will begin construction of the weir as soon as the weather is permitting. A copy of this correspondence is attached hereto as Exhibit 2.

14. To date I have not received any correspondence from the TDEC in response to my November 2, 2018 letter.

*Affidavit of Thomas Grosko, January 4, 2019, at pp. 2-3.*

Lastly, there is paragraph 28 of the affidavit of Christopher Scott who contests the accuracy of the Plaintiffs' water sampling on which they base their application for an injunction. Mr. Scott testifies,

28. On December 11 and 12, 2018, I directed a surface water sampling event at the site that included the collection and analysis of samples from the unnamed tributary and Sugar Creek as well as other required monitoring points. In this event, ACC and TriAD were granted access to an adjacent landowner's property, allowing for the first time ACC and TriAD to collect samples from Sugar Creek immediately downstream of the confluence with the unnamed tributary. The results for Sample SC-DS-UT, collected approximately 100 feet downstream of the confluence, show that water in Sugar Creek met the WQC TDEC cited in its December 7, 2017, letter.

**Competing Analyses of Parties on Exclusivity of  
2016 Consent Order Section XX (I) Dispute Resolution**

**Plaintiffs**

The Plaintiffs' position is that Section XX (I) of the 2016 Consent Order—providing for disputes about noncompliance with the 2016 Consent Order to be decided in the first instance by the Commissioner's Designee—is not the Plaintiffs' exclusive remedy to obtain the Defendant completing remediation of the Site. The Plaintiffs cite to Tennessee Code Annotated section 69-3-117 and the temporary injunction procedure provided in Tennessee Civil Procedure Rule 65 as giving the Plaintiffs broad authority to file this case in chancery court, including seeking issuance of a temporary injunction. Section 69-3-117 of the WQCA provides,

§ 69-3-117. Actions and proceedings; relief; injunctions

The commissioner may initiate proceedings in the chancery court of Davidson County or the county in which the activities occurred against any person who is alleged to have violated or is about to violate this part, conditions of permits issued under this part, the rules and regulations of the board or orders of the board or commissioner. In such action the commissioner may seek, and the court may grant, injunctive relief and any other relief available in law or equity. Specifically, the commissioner may seek injunctive relief against industrial users of publicly owned treatment works who fail to pay user or cost recovery charges or who violate pretreatment standards or toxic effluent limitations established as a condition to the permit of the treatment works.

**Defendant**

The Defendant's position is that in the 2016 Consent Order the Plaintiffs waived their right to obtain completion of remediation of the Site through the provisions of section 69-3-117 and Tennessee Civil Procedure Rule 65 court injunctive relief when the remediation issue pertains to and emanates from the provisions of the 2016 Consent Order. Instead, by agreeing, as the first step on disputes about compliance with the Consent Order to proceed before the Commission's Designee as provided in Section XX (I), the Plaintiffs have waived proceeding on the matter in this Court. Defendant's position derives from several sources.

First, there is the explicit text of Section XX (I) of the 2016 Consent Order which states, quoting again, the "Resolution of dispute of contingent penalty shall be decided by the Commissioner's designee. This decision may be further appealed pursuant to the Uniform Administrative Procedures Act (UAPA)." Applying this quoted text of the 2016 Consent Order to see if it matches and fits this lawsuit, there is the prominent statement of the Plaintiffs at the outset of the *Verified Complaint* that the lawsuit seeks for the

“Defendant to pay contingent civil penalties assessed under the 2016 Consent Order until such times as Defendant achieves surface water compliance” with TWQ Criteria. The *Verified Complaint*, then, with its claim for penalties, matches and fits the circumstances set forth in Section XX (I) which states that penalty disputes will be resolved in the first instance, not in court, but by the Commissioner’s Designee.

In addition to the events in this case matching the dispute process provided for in the 2016 Consent Order, the Defendant also asserts evidence of routine and custom. The Defendant cites to the standard Reservation of Rights issued in TDEC consent orders which expressly provides that the Commissioner is not waiving any provision of any regulation or statute which would including not waiving the right to seek injunctive relief under Tennessee Code Annotated section 69-3-117 and Tennessee Civil Procedure Rule 65. Provided in the filings of the Defendant is an example of a TDEC routine reservation of rights.

#### RESERVATION OF RIGHTS

In agreeing to the foregoing CONSENT ORDER, the Director does not implicitly or expressly waive any provisions of the Act or regulations promulgated thereunder. Compliance with the provisions of this CONSENT ORDER will be considered a mitigating factor in determining the need for future enforcement action(s).

Respondent agrees to comply with this CONSENT ORDER to avoid the cost of protracted litigation.

Exhibit 3 to *ACC, LLC’S Response in Opposition to Plaintiffs’ Motion for a Temporary Injunction*, January 4, 2019, at p. 9. This routine wording is not used in the 2016 Consent Order.

Instead, the Reservation of Rights of the 2016 Consent Order, Section XX (I), is very specific and identifies precisely the rights reserved to the Plaintiff, quoting as follows.

- assess liability for costs, expenditures, damages incurred by the State, or civil penalties;
- to order further investigation, remedial action, and/or monitoring and maintenance; and
- to issue further Orders to require further or different corrective action for issues associated with the Site but not addressed in this Order or based on changes of conditions or new information or for noncompliance with this ORDER, to assess civil penalties for all violations of law, and to assess all damages, including but not limited to, Natural Resource Damages.

From the wording of Section XX (I), providing a dispute resolution process with the Commissioner's Designee, and Section XXI identifying only specific rights reserved to the Plaintiffs, and the evidence of routinely broad reservation of rights of TDEC provisions, the Defendant argues that the 2016 Consent Order provides an exclusive process binding on the parties in this case of filing, in the first instance, disputes concerning noncompliance with the 2016 Consent Order with the Commissioner's Designee and not with a court through an application for an injunction, quoting the Defendant's briefing as follows.

The plain terms of the 2016 Consent Order, which were negotiated and approved by the State *ex rel.* the Commissioner, reserved the Commissioner's right to issue "further Orders." Any exercise of that right would require the Commissioner to notify ACC of alleged violations of the 2016 Consent Order, issue an invoice, and afford ACC its appeal rights under the TUAPA. (Verified Complaint, Ex. 2 at p.13-14.) The rights to seek injunctive relief were waived by the Commissioner, and cannot be undone unilaterally by the State.

*ACC, LLC'S Response in Opposition to Plaintiffs' Motion for a Temporary Injunction,*

January 4, 2019, at p. 9.



Further, the Defendant argues, the binding effect of the exclusive resolution dispute process of the 2016 Consent Order is provided in Tennessee law as “about the most binding of agreements that can be made.” *Silliman v. City of Memphis*, 449 S.W.3d 440, 448-49 (Tenn. Ct. App. 2014) (citing *Bringham v. Tual*, 598 S.W.2d 620, 622 (Tenn. Ct. App. 1980); *Smelcer v. Broyles*, 225 Tenn. 187, 465 S.W.2d 355, 356 (Tenn. 1971)); *Boyce v. Stanton*, 83 Tenn. 346, 37-76 (1885)). “[A] consent order is binding on the consenting parties, and ‘can neither be amended nor in any way varied without like consent.’” *Barcardi v. Tenn. Bd. of Registration in Podiatry*, 124 S.W.3d 553, 562 (Tenn. Ct. App. 2003). Such orders are valid and binding and are “favored by the courts and represent the achievement of an amicable result to pending litigation.” *Id.* A consent order is a “solemn contract or judgment of the parties put on file with the sanction and permission of the court.” *Id.* Therefore, courts are to strictly construe provisions contained in a consent order against the party seeking to enforce them. *Central Drug Store v. Adams*, 201 S.W.2d 682, 684-85 (Tenn. 1947). *See also, Emory v. Sweat*, 9 Tenn. App. 167, 176 (1927)).

The Defending additionally argues that, “When entering into a consent order, the parties are free to negotiate terms that are different from the terms of the statutes that would apply if the parties did not reach an agreement. For example, Tennessee courts have long upheld contractual limitations that reduce the statutory period for filing a lawsuit; parties may shorten the statute of limitations by agreement. *Town of Crossville Housing Authority v. John A. Murphy, et. al.* No. M2013-02576-COA-R3-CV (Tenn. Ct. App. filed July 25, 2014). *See also Guthrie v. Connecticut Indem. Ass’n*, 49 S.W. 829. 830 (Tenn. 1899); *Hill v. Home Ins. Co.*, 125 S.W. 2d 189, 192 (Tenn. Ct. App. 1938). Here, the

Commissioner agreed to a specific enforcement process pursuant to the TUAPA.” *ACC, LLC’S Response in Opposition to Plaintiffs’ Motion for a Temporary Injunction*, January 4, 2019, at p. 9. The Defendant’s analysis is that the “State believes this Court can apply the general enforcement provisions in Tenn. Code Ann. § 68-212-224, § 69-3-117, and § 68-212-227, each of which allow the Commissioner to initiate proceedings in chancery court to enforce a **Board Order** or a **Commissioner’s Order**. But the State is not enforcing a Board order or a Commissioner’s order here. In reality, the State is seeking to assert its remedies under the 2016 Consent Order, which they can only do if they follow its terms. And they have not [emphasis is original].” *Id.*

### Court’s Analysis

Under Tennessee law, this Court is instructed to apply four factors in determining issuance of a temporary injunction:

- whether the movant has established a substantial likelihood of success on the merits,
- whether the movant has established the existence of immediate and irreparable harm,
- whether the equities weigh in favor of the movant, and
- whether issuance of the injunction is inimical to the public interest.

*South Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (quoting Robert F. Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 4-3(1) (1999)). See also, *Union Planters’ Bank & Trust Co. v. Memphis Hotel Co.*, 139 S.W. 715, 718-19 (Tenn. 1911); *Butts v. S. Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977)

(citing *Wilson v. Louisville & Nashville L.R. Co.*, 12 Tenn. App. 327 (Tenn. Ct. App. 1930)); *Henry County v. Summers*, 547 S.W.2d 247, 251 (Tenn. Ct. App. 1976) (citing *King v. Elrod*, 268 S.W.2d 103 (Tenn. 1953)); *Kaset v. Combs*, 434 S.W.2d 838, 841 (Tenn. Ct. App. 1968) (citing *Greene County Tire & Supply, Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960), *Herbert v. W.G. Bush & Co.*, 298 S.W.2d 747 (Tenn. Ct. App. 1956)).

Upon applying the foregoing factors to the record, the Court concludes that the temporary injunction must be denied because the issues in this case must first be filed with and decided by the Commissioner's Designee. The Plaintiffs' statutory and procedural remedies to seek injunctive relief from this Court have been supplanted by the process provided for in the 2016 Consent Order in Section XX (I) of the Commissioner's Designee. In so ruling, the Court concludes that the Defendant's construction of the Consent Order is correct for these reasons.

First, there is the plain, unambiguous wording of Section XX (I) that if a dispute arises concerning the Defendant complying with the provisions of the Consent Order, the Plaintiffs' remedy is to assess a penalty which triggers the dispute resolution procedure of the Commissioner's Designee. The facts of record establish that the parties have reached an impasse because of alleged noncompliance by the Defendant with the terms of the 2016 Consent Order. These circumstances are the very circumstances identified in the 2016 Consent Order for which the Plaintiffs' remedy is Section XX (I).

Further, as to the **exclusivity** of the dispute process provided for in Section XX (I) of the 2016 Consent Order, the Defendant's evidence that the wording of the reservation of rights in the 2016 Consent Order is limited, deliberately carves out and lists reserved

rights, and does not include the customary expansive wording that there is no waiver of any provisions of the Act or regulations, establishes that the Plaintiffs' exclusive remedy for the matters in this case is the dispute resolution procedure before the Commissioner's Designee stated in Section XXI of the 2016 Consent Order.

Finally, Defendant's construction and application of the 2016 Consent Order is not only correct from a legal analysis but also is sensible and comports with Tennessee law. As shown by the disputed facts in the affidavits, deciding the core issue of whether the Defendant has not complied with the 2016 Consent Order entails analysis of scientific, engineering and technical information such as: whether TDEC's clean up method is effective, whether a preliminary vertical and horizontal soil survey is a prudent first step to implement a CAWP, and the correct locations for sampling. The expertise of the agency, in this case the Commissioner's Designee, to make findings on technical, factual claims in the first instance before the matter is appealed for judicial review comports with the preference of Tennessee law. *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 669 (Tenn. 2016) (“[C]ourts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise.”) (citations omitted); *Pickard v. Tennessee Water Quality Control Bd.*, 424 S.W.3d 511, 522; 523 (Tenn. 2013) (“Courts traditionally demonstrate their respect for administrative agencies in two ways. First, they generally give great deference to an agency's interpretation of its own rules because the agency possesses special knowledge, expertise, and experience with regard to the subject matter of the rule . . . Second, the courts demonstrate their respect for administrative agencies through the common-law “exhaustion of administrative remedies”

doctrine.”); *Byrd v. Tennessee Bd. of Chiropractic Examiners*, No. M2010-01473-COA-R3CV, 2011 WL 3558166, at \*8 (Tenn. Ct. App. Aug. 11, 2011) (“As a general rule, courts must give great deference and controlling weight to an agency’s interpretation of its own rules and regulations, except where the interpretation is plainly erroneous or inconsistent with the regulation itself.”) (citation omitted); *Willamette Indus., Inc. v. Tennessee Assessment Appeals Comm’n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999) (“Generally speaking, courts will ‘defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise.’”) (citation omitted).

Thus, the Court concludes, as a matter of law from a textual analysis of the Consent Order and its application to the events of this case and the preference under Tennessee law for deferring to the agency technical, scientific fact finding and application of regulations, that the Plaintiffs’ exclusive remedy in this case is the Section XX (I) dispute resolution process with the Commissioner’s Designee. Accordingly, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits in initiating their claims in this Court, and the Plaintiffs are unable to demonstrate that the equities weigh in their favor. Further it is not in the public interest to issue the process of an injunction when the parties are bound by a different process in the 2016 Consent Order.

As to the existence of immediate and irreparable harm, the baseline for assessing this factor is the condition of the Site when the 2016 Consent Order was entered because, as stated in the *Verified Complaint*, enforcement of the 2016 Consent Order is the basis of this lawsuit. The record establishes that since the pre-2016 waste relocation and capping, the monitored constituent concentrations of ammonia, chlorides and total dissolved solids

(TDS) have declined more than 95 percent within the surface water leaving the site. In addition, it is not disputed that the discharge emanating from the Site is nontoxic and does not pose a threat to human health or the environment.

As to the present level of concentrates in the surface water leaving the Site, the evidence of record, as recited above from the affidavits, is not clear. The Plaintiffs assert that the correct sampling point is from an unnamed tributary of Sugar Creek exiting the Site in a culvert at the road crossing. The State's sampling from that location showed noncompliance with TWC Criteria. The Defendant's evidence is that its sampling of Sugar Creek offsite met the criteria prescribed by TDEC in its December 7, 2017 letter. The Plaintiffs dispute that Defendant's sampling location is correct. Tennessee Civil Procedure Rule 65 requires clear evidence to obtain a temporary injunction. Where there are disputed facts, a temporary injunction can not issue.

At most, then, the Plaintiffs have demonstrated ongoing issues and incomplete remediation, but they have not demonstrated any new, worsening or changed environmental circumstances from the Defendant's alleged noncompliance with the 2016 Consent Order to justify bypassing, with the issuance of a temporary injunction, the Section XX (I) dispute resolution process of the 2016 Consent Order. The Plaintiffs, therefore, have failed to demonstrate immediate and irreparable harm.

In conclusion, the requirements of Tennessee law for issuance of a temporary injunction are not present in this case, and therefore the Plaintiffs' Rule 65 application for such relief must be denied.

*s/ Ellen Hobbs Lyle*  
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ELLEN HOBBS LYLE  
CHANCELLOR

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