State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
6th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

March 21, 2024

Grant Ruhl, Esq.
Tennessee Dept. of Environment and Conservation
William R. Snodgrass TN Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, TN 37243
Sent via email only to: Grant.Ruhl@tn.gov

Brian C. Quist, Esq.
Quist, Fitzpatrick & Jarrard, PLLC
800 South Gay Street, Suite 2121
Knoxville, TN 37929-2121
Sent via email also to: bcquist@qfjlaw.com

RE: TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION V. HYDRA POOLS, INC., APD Case No. 04.30-225204J

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 TENNESSEE BOARD OF WATER QUALITY, OIL AND GAS

IN THE MATTER OF: **TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION,** ***Petitioner,*** ***v.*** **HYDRA POOLS, INC.,** ***Respondent.***	**APD Case No. 04.30-225204J**

INITIAL ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT

Pursuant to TENN. CODE ANN. §§ 69-3-110(a), 4-5-301(a)(2), and 4-5-314(b), this contested case is pending before Administrative Judge Mary M. Collier, assigned by the Tennessee Secretary of State's Administrative Procedures Division (APD) to sit alone for the Tennessee Board of Water Quality, Oil and Gas (Water Quality Board). The Tennessee Department of Environment and Conservation (TDEC or the Department) is the Petitioner. Hydra Pools, Inc. (Hydra Pools) is the Respondent. Grant Ruhl represents TDEC and Brian C. Quist represents Hydra Pools.

Pending before the undersigned administrative judge are two motions: (1) TDEC's MOTION FOR SUMMARY JUDGMENT,[1] and (2) HYDRA POOLS, INC.'S MOTION TO STRIKE FROM THE RECORD PORTIONS OF PETITIONER'S SUPPORTING AFFIDAVITS (hereinafter MOTION TO STRIKE).[2] By ORDER SETTING ORAL ARGUMENTS AND CONTINUING THE HEARING IN THIS MATTER, issued on

[1] The MOTION FOR SUMMARY JUDGMENT, with related filings, was filed with APD on October 6, 2023. The Respondent filed a response to the MOTION FOR SUMMARY JUDGMENT on November 7, 2023.

[2] The MOTION TO STRIKE and a MEMORANDUM IN SUPPORT thereof were filed on November 3, 2023. In response, on November 9, 2023, TDEC filed the DEPARTMENT'S RESPONSE IN OPPOSITION TO RESPONDENT'S LATE-FILED PLEADINGS.

November 15, 2023,[3] oral argument for both motions was heard on December 13, 2023. The TRANSCRIPT of the oral argument was filed on December 26, 2023.

Based upon a review of the Record and the written and oral arguments of counsel, it is determined that there are no material facts in dispute and that TDEC is entitled to summary judgment as a matter of law. Accordingly, TDEC's MOTION FOR SUMMARY JUDGMENT is **GRANTED**. The Respondent's MOTION TO STRIKE is **GRANTED *in part* and DENIED *in part***.

FINDINGS OF UNDISPUTED MATERIAL FACTS[4]

1. The Tennessee Safe Drinking Water Act of 1983, TENN. CODE ANN. §§ 68-221-701 to 720 (SDWA), represents a comprehensive program for the monitoring, treatment, and distribution of water for human consumption in Tennessee.[5]

2. Persons supplying water to 15 or more connections or 25 or more individuals daily at least 60 days out of the year are considered "public water systems" and are subject to the SDWA.[6]

[3] This ORDER also denied TDEC's request that the Respondent's response to the MOTION FOR SUMMARY JUDGMENT not be considered.

[4] The Respondent admitted to all of TDEC's proposed Undisputed Material Facts, with some reservations and clarifications. As noted *infra*, the Respondent's reservations and clarifications do not affect the outcome of this summary judgment decision.

[5] The Respondent admitted this Fact with a limiting provision that "water systems that involve water not for human consumption are not subject to the SDWA and/or TDEC authority, supervision, or regulation." However, because the Respondent relies upon its disconnection of the sinks at the subject facility on March 29, 2022 (TRANSCRIPT from oral argument (TR.) at 14-15, 17-18, 45 & 53), for the argument that the water system at issue was no longer for human consumption and that disconnection did not occur until after March 22, 2022, which is the final violation date contained in the DIRECTOR'S ORDER AND ASSESSMENT, that stated limitation has no bearing on this summary judgment decision.

[6] The Respondent admitted this Fact with a limiting provision that "businesses having less than 25 employees on a daily basis are not subject to the SDWA and/or TDEC authority, supervision, or regulation." However, because the Respondent employed 25 or more employees during all times relevant to the DIRECTOR'S ORDER AND ASSESSMENT, that stated limitation has no bearing on this summary judgment decision. *See* TR. at 19.

3. The SDWA grants the Department authority to exercise supervision over the construction, operation, and maintenance of public water systems throughout the state.[7]

4. The Department's supervision extends to all features of operation and maintenance that affect the quality or quantity of the water being supplied by a public water system.[8]

5. The Board of Water Quality, Oil and Gas ("Board") has promulgated rules governing the operation of public water systems, TENN. COMP. R. & REGS. 0400-45-01 ("Rules").[9]

6. The Rules state that public water systems must prepare system plan documents and submit them to the Department for review and approval, supply safe drinking water that meets all applicable maximum contaminant levels and treatment technique requirements, and provide adequate operation and maintenance of the system.[10/11]

[7] The Respondent admitted this Fact with a limiting provision that "TDEC has no authority to exercise supervision over water systems not subject to SDWA," citing back to the responses to Facts #s 1 and 2. That limitation has no bearing on this decision for the same reasons that the stated limitations in response to Facts #s 1 & 2 have no bearing on this summary judgment decision.

[8] The Respondent admitted this Fact with a limiting provision that "TDEC's supervision does not extend to water systems not subject to SDWA," citing back to the responses to Facts #s 1 and 2. That limitation has no bearing on this decision for the same reasons that the stated limitations in response to Facts #s 1 & 2 have no bearing on this summary judgment decision.

[9] The Respondent admitted this Fact with a limiting provision that "said Board and Rules do not govern water systems not subject to SDWA," citing back to the responses to Facts #s 1 and 2. That limitation has no bearing on this decision for the same reasons that the stated limitations in response to Facts #s 1 & 2 have no bearing on this summary judgment decision.

[10] TENN. COMP. R. & REGS. 0400-45-01-.02(1).

[11] The Respondent admitted this Fact with a limiting provision that "said Rules do not govern water systems not subject to SDWA," citing back to the responses to Facts #s 1 and 2. That limitation has no bearing on this decision for the same reasons that the stated limitations in response to Facts #s 1 & 2 have no bearing on this summary judgment decision.

7. Whenever the Commissioner of the Department has reason to believe that a violation of the SDWA or Rules has occurred, is occurring, or is about to occur, the Commissioner may order corrective action be taken.[12]

8. The Commissioner has authority to assess civil penalties against any violator of the SDWA or Rules up to $5,000.00 per day for each day of violation.

9. The Commissioner also has authority to assess damages incurred by the Department resulting from the violation.

10. The Commissioner may delegate to the Director of the Division[13] any of the powers, duties, and responsibilities of the Commissioner under the Act.

11. The Respondent is a "person."

12. On or about August 14, 2017, the Respondent installed or allowed the installation of a water well and related equipment ("System") for purposes of supplying water to sinks, hose-faucets, and toilets at its swimming pool manufacturing facility at 710 Farrell Street, Niota, Tennessee ("Facility"). *As clarified by the Respondent*,[14] this installation was made "because the City of Niota had disconnected Hydra Pools from its water system (other than for fire suppression)."[15]

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[12] The Respondent admitted this Fact with a limiting provision that "the Commissioner may not order corrective action when there is no basis to believe a violation of the SDWA or Rules is occurring or about to occur," citing back to the responses to Facts #s 1 and 2. That limitation has no bearing on this decision for the same reasons that the stated limitations in response to Facts #s 1 & 2 have no bearing on this summary judgment decision.

[13] The Department is organized into divisions. This matter was handled by the Division of Water Resources. Jennifer Dodd was the Director of that division when the administrative order that is the subject of this case was issued against the Respondent.

[14] In response to this Fact, the Respondent clarified the response by including additional information.

[15] The disconnection of Hydra Pools' water by the City of Niota related to a dispute over a water leak and not the facts at issue in this case. AFFIDAVIT OF JAMES JEFFERSON BEENE, II, ¶¶5 & 6.

13. The System has never been owned by anyone other than the Respondent and is currently owned by Hydra Pools.

14. The System has always been operated by Hydra Pools.

15. The System has always been controlled by Hydra Pools.

16. The Respondent's System served a non-transient, non-community population of over 25 employees at the Facility from 2019 until at least March 29, 2022, and therefore was a "public water system" under the SDWA during these years. Specifically, the Respondent employed 52 employees per day in 2019, 52 employees per day in 2020, 38 employees per day in 2021, and 38 employees per day in 2022. *As clarified by the Respondent*,[16] "Hydra has employed less than 25 employees on a daily basis at its Niota Hydra Plant commencing June 23, 2023[,] to the present."[17]

17. On August 20, 2020, the City of Niota notified the Respondent that a backflow prevention device must be placed between the Respondent's facility plumbing and the fire line being supplied water by the City. The City again notified the Respondent of the backflow prevention device requirement on May 5, 2021. The Respondent installed the backflow prevention device in the winter of 2022.

18. On June 30, 2021, following an inspection at the Facility, the Division sent the Respondent correspondence notifying it that the System met the definition of a non-transient, non-community water system and outlining various compliance requirements, including, but not limited to, source well testing and monitoring.

[16] In response to this Fact, the Respondent clarified the response by including additional information.

[17] Because the Respondent employed 25 or more employees during all times relevant to the DIRECTOR'S ORDER AND ASSESSMENT, that later reduction in the number of employees on June 23, 2023, has no bearing on this summary judgment decision. *See* TR. at 19.

19. On October 25, 2021, the Division issued a Notice of Violation (NOV) and Show Cause letter to the Respondent for its failure to comply with the requirements outlined in the June 30, 2021 letter.

20. On November 29, 2021, Division staff conducted a Show Cause meeting with the Respondent and discussed the compliance requirements outlined in the June 30, 2021 letter.

21. The Division subsequently sent multiple letters to the Respondent regarding its failure to monitor the source well for total coliform and on December 17, 2021, issued a second NOV to the Respondent for outstanding compliance requirements and failing to perform required bacteriological monitoring.

22. The Respondent performed required sampling in late 2021 and early 2022. On January 19, 2022, the Respondent notified the Division of a total coliform positive and *E. coli*[18] negative test result, and the Division informed the Respondent that the System could not return to quarterly monitoring from monthly monitoring for at least a period of one year based on the positive total coliform result.

23. On January 24, 2022, the Division performed an inspection of the Respondent's System and determined that the Respondent failed to collect a total coliform sample in December 2021.

24. The System subsequently tested positive for total coliform and *E. coli* on March 3 and March 22, 2022. A positive total coliform sample followed by at least one repeat positive sample for *E. coli* is a Maximum Contaminant Level violation for *E. coli*.

25. On May 6, 2022, the Division issued a third NOV to the Respondent for violations of the SDWA. The Respondent failed to comply with the requirements of the NOVs, including

[18] *E. Coli* is an abbreviation of the species name *Escherichia coli* and as a species name it is italicized herein.

obtaining the services of a certified System operator, installing required source well disinfection, and submitting a bacteriological sampling plan to the Division.

26. On July 6, 2022, the Department issued the DIRECTOR'S ORDER AND ASSESSMENT[19] to the Respondent. The DIRECTOR'S ORDER AND ASSESSMENT cited seven violations of the SDWA and Rules: (1) failure to install a backflow prevention device; (2) failure to perform bacteriological monitoring for the monthly compliance periods ending July 31, August 31, September 30, October 31, November 30, and December 31, 2021; (3) failure to submit a bacteriological monitoring plan; (4) violating the Maximum Contaminant Level for *E. coli* multiple times in March 2022; (5) failure to obtain a certified operator; (6) failure to submit a cross-connection control statement; and (7) failure to pay the System's annual maintenance fee. The DIRECTOR'S ORDER AND ASSESSMENT required the Respondent to perform corrective actions, including: (1) submitting plans for the installation of well disinfection via chlorination to the Division; (2) installing Division-approved disinfection plans; (3) conducting weekly bacteriological and nitrate monitoring to confirm adequacy of the disinfection plans and the System; (4) monitoring daily for disinfectant residual and turbidity and submission; (5) obtaining and maintaining the services of a qualified certified operator; (6) installing an approved backflow prevention device; (7) performing all required public notifications and posting non-potable water signs above the Facility's sinks and water fountains; (8) submitting a cross-connection control plan to the Division, and paying the required annual maintenance fee.

27. The DIRECTOR'S ORDER AND ASSESSMENT assessed the Respondent $28,128.00 in civil penalties and $1,084.87 in damages incurred during the Division's investigation of the case.

[19] The DIRECTOR'S ORDER AND ASSESSMENT includes an identifier of "Case No. DWS22-0014."

28. The Respondent was served with the DIRECTOR'S ORDER AND ASSESSMENT on July 11, 2022, and timely appealed the ORDER on August 5, 2022.

29. As of the date of the filing of the SUMMARY JUDGMENT MOTION, the Respondent had failed to comply with all of the requirements of the DIRECTOR'S ORDER AND ASSESSMENT and continues to own and operate the System without a certified operator in violation of the SDWA and Rules.

APPLICABLE LAW

TDEC's MOTION FOR SUMMARY JUDGMENT is made pursuant to TENNESSEE RULE OF CIVIL PROCEDURE 56. 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), *cert. denied*, 578 U.S. 1003 (2016). The party seeking summary judgment has the burden of persuading the court that its motion satisfies the requirements of RULE 56. *Id.* 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).

When the movant files a properly supported RULE 56 Motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Conclusory allegations and generalizations in opposition to a properly supported RULE 56 motion are insufficient and will not create a material factual dispute sufficient to prevent the trial court from granting a summary judgment. *Psillas v. Home Depot, U.S.A., Inc*., 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001); *Davis v. Campbell*, 48 S.W.3d 741, 747 (Tenn. Ct. App. 2001). Such opposition

must be made by identifying evidence in the record which indicates disputed material facts. *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

For facts to be considered at the summary judgment stage, they must be included in the Record pursuant to RULE 56 and they must be admissible in evidence. *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009). When ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment. *Huggins*, 500 S.W.3d at 364.

Summary judgment should 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*, No. W2015-00389-COA-R3-CV, 2016 WL 1056958, at *3 (Tenn. Ct. App. March 17, 2016). Summary judgment is a preferred vehicle for disposing of purely legal issues. *See Byrd v. Hall,* 847 S.W.2d 208 (Tenn.1993); *Bellamy v. Federal Express Corp.,* 749 S.W.2d 31 (Tenn. 1988). Summary judgment is appropriate when the tribunal determines there is no issue of material fact to consider at trial. The goal of summary judgment is to avoid the time and expense of unnecessary trials.

ANALYSIS *and* CONCLUSIONS OF LAW

This contested case arises from TDEC's DIRECTOR'S ORDER AND ASSESSMENT issued on July 6, 2022, which assessed the Respondent $28,128.00 in civil penalties and $1,084.87 in damages incurred during the Division's investigation of the case. The Respondent timely appealed the DIRECTOR'S ORDER AND ASSESSMENT. This contested case was initiated based upon the Respondent's appeal.

The Tennessee Safe Drinking Water Act of 1983, TENN. CODE ANN. §§ 68-221-701 to 720 (SDWA), represents a comprehensive program for the monitoring, treatment, and distribution of water for human consumption in Tennessee. In the SDWA, the Tennessee General Assembly declared that "the waters of the state are the property of the state and are held in public trust for the benefit of its citizens . . . [and] the people of the state are beneficiaries of this trust and have a right to both an adequate quantity and quality of drinking water."[20] It is a violation of the SDWA for any supplier of water to fail to comply with the requirements of the SDWA or any promulgated rules.

Persons supplying water to 15 or more connections or 25 or more individuals daily at least 60 days out of the year are considered "public water systems" and are subject to the SDWA.[21] The Respondent operated a public water system at all times covered by the DIRECTOR'S ORDER AND ASSESSMENT. The time frame covered by the DIRECTOR'S ORDER AND ASSESSMENT is June 18, 2021, which is the date of the site visit and the first violation alleged therein, until March 22, 2022, which is the date of the last violation alleged therein. The SDWA grants the Department authority to exercise supervision over the construction, operation, and maintenance of public water systems throughout the State of Tennessee.[22] The Department's supervision extends to all features of operation and maintenance that affect the quality or quantity of the water being supplied by a public water system.[23] The Rules require that public water systems must prepare system plan documents and submit them to the Department for review and approval, supply safe drinking water

[20] TENN. CODE ANN. § 68-221-702.

[21] TENN. CODE ANN. § 68-221-703(19).

[22] TENN. CODE ANN. §§ 68-221-706 & 707.

[23] TENN. CODE ANN. § 68-221-707.

that meets all applicable maximum contaminant levels and treatment technique requirements, and provide for adequate operation and maintenance of the system.[24]

Whenever the Commissioner of the Department has reason to believe that a violation of the SDWA or the Rules has occurred, is occurring, or is about to occur, the Commissioner may order corrective action to be taken.[25] The Commissioner has authority to assess civil penalties against any violator of the SDWA or Rules up to $5,000.00 per day for each day of violation.[26] The Commissioner also has authority to assess damages incurred by the Department resulting from any violation.[27] The Commissioner may delegate to the Director of the Division any of the powers, duties, and responsibilities of the Commissioner under the Act.[28] In this case, the DIRECTOR'S ORDER AND ASSESSMENT was issued in compliance with these laws.

The Respondent has admitted to all of the undisputed facts in this case, including that it operated the water system at issue and that the violations found by the Department were not corrected as required by the DIRECTOR'S ORDER AND ASSESSMENT. The Respondent's argument that the DIRECTOR'S ORDER AND ASSESSMENT is a two-part Order is misplaced. Essentially, the Respondent argues that it should only be subject to $7032 of the assessed civil penalties, plus the $1,084.87 in assessed damages, because it contends that it is no longer subject to the SDWA because on March 29, 2022, Hydra Pools turned off the water to the sinks and as of June 23, 2023, the Respondent no longer employs 25 employees. The Respondent does not dispute the amount

[24] TENN. COMP. R. & REGS. 0400-45-01-.02(1).

[25] TENN. CODE ANN. §§ 68-221-705 & 712.

[26] TENN. CODE ANN. §§ 68-221-705 & 713.

[27] TENN. CODE ANN. § 68-221-713.

[28] TENN. CODE ANN. § 68-221-705(12).

of $8,116.87 and requests that the total civil penalty of $28,128.00 be reduced because of these actions.

TDEC is correct that the plain language of the DIRECTOR'S ORDER AND ASSESSMENT requires that $7,032 of the assessed civil penalty is due "upfront" and that the corrective actions contained in the DIRECTOR'S ORDER AND ASSESSMENT had to be taken *within a specific time frame* in order to reduce the remaining $21,096 of the civil penalty.[29] While the Respondent has turned off the water to the sinks and no longer employs 25 employees, these actions occurred after the relevant time frames, and the Respondent admits that it has not performed all of the corrective actions itemized in the DIRECTOR'S ORDER AND ASSESSMENT. The DIRECTOR'S ORDER AND ASSESSMENT listed seven statutory and regulatory violations by the Respondent and provided eight corrective action steps that the Respondent would need to take to return to compliance with the SDWA and its implementing rules.[30] If a respondent fails or refuses to conduct the corrective actions outlined in an administrative enforcement order, the respondent is then responsible for the order's total assessed civil penalty. The Respondent did not timely perform the corrective actions required by the DIRECTOR'S ORDER AND ASSESSMENT, and therefore the total assessed civil penalty and damages became due. Accordingly, the total $28,128.00 in civil penalties and $1,084.87 in Division damages awarded in the DIRECTOR'S ORDER AND ASSESSMENT are still in effect and are still applicable in this case.

The Respondent's argument that this case is moot because as of June 23, 2023, the Respondent no longer employs 25 employees is without merit. The issue in this matter is not

[29] "The Respondent is assessed a total civil penalty of $28,128.00. The Respondent shall pay **$7,032.00**, which constitutes the upfront portion of the total civil penalty, on or before the thirty-first day after receipt of this Order. The Respondent shall pay the remaining $21,096.00 only if the Respondent fails to comply with the below corrective action items." DIRECTOR'S ORDER AND ASSESSMENT p. 10, ¶ (3) (emphasis in original).

[30] Undisputed Fact number 26 itemizes the violations and the corrective actions contained in the DIRECTOR'S ORDER AND ASSESSMENT.

whether the Respondent continues to fall within the ambit of the SDWA but whether the penalty assessed by the DIRECTOR'S ORDER AND ASSESSMENT was lawful. Were this a matter concerning only prospective relief, the Respondent could potentially argue mootness as a defense (which could possibly fail, as discussed *infra*). But here, a civil penalty has already been assessed. The action challenged has already been taken, and the controversy as to its correctness is still live.

While the Respondent may not be subject to the SDWA in the future due to the reduction in the number of employees in 2023,[31] it is undisputed that the Respondent employed 25 or more employees from June 18, 2021, until at least March 22, 2022, which is the time frame covered by the DIRECTOR'S ORDER AND ASSESSMENT. Similarly, the Respondent's argument that it turned off the water to the Hydra Pools sinks is also irrelevant to the ruling in this matter because the water was not turned off until March 29, 2022,[32] which was after the time frame covered by the DIRECTOR'S ORDER AND ASSESSMENT. Likewise, the Respondent's argument that toilet water is not for human consumption is also irrelevant to the ruling in this matter because the water was not turned off in the Hydra Pools sinks until March 29, 2022, which was after the time frame covered by the DIRECTOR'S ORDER AND ASSESSMENT.

Even if this matter could be considered moot under ordinary circumstances, the Respondent's attempt to reduce its workforce to evade the consequences of its noncompliance with the SDWA proves fatal to mootness in this context. TDEC correctly relies upon *Friends of the Earth, Inc. v. Laidlaw*, in which the United States Supreme Court held that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." 528

[31] Whether the Respondent is subject to the SWDA in the future is not at issue in this contested case. Further, the Petitioner does not claim that the DIRECTOR'S ORDER AND ASSESSMENT applies to any violations that may or may not have happened after March 22, 2022. During oral arguments, counsel for the Petitioner explained that "any violations that happened after the order's issuance would need to fall under a new enforcement order …." TR. at 9.

[32] AFFIDAVIT OF JAMES JEFFERSON BEENE, II, ¶ 8; TR. at 14-15, 17-18, 45 & 53.

U.S. 167, 174 (2000). The Court in *Friends of the Earth* recognized a very high bar for mootness, stating "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190 (citation omitted) (emphasis added). In the present case, the Respondent has admitted that it employed 52 employees per day in 2019, 52 employees per day in 2020, 38 employees per day in 2021, 38 employees per day in 2022, and 38 employees until June 23, 2023, after which the number of employees dipped below the SDWA's 25-person threshold. The Respondent has not made it "absolutely clear" that the Respondent will not hire more employees in the future, meaning the wrongful behavior *could* be reasonably expected to recur. And even if the Respondent had done so, the questionable context here makes clear that any promises not to increase its workforce would certainly not be subject to special solicitude. Therefore, the Respondent's argument that the DIRECTOR'S ORDER AND ASSESSMENT is now moot based on the 2023 reduction of the number of employees to below 25 fails.

The Respondent also argues that because it posted non-potable water signs on the sinks on or about July 22, 2021, it complied with a corrective action contained in the DIRECTOR'S ORDER AND ASSESSMENT. The Respondent therefore argues that because TDEC only regulates water systems where the water is used for human consumption, TDEC no longer (as of the signage posting on July 22, 2021) regulates the Hydra Pools water system. The Respondent's argument is inapposite. While the posting of non-potable water signs was part of a specific corrective action required by the DIRECTOR'S ORDER AND ASSESSMENT,[33] this single step of posting non-potable

[33] "The Respondent shall perform all required public notifications and have sinks and water fountains posted as non-potable water until such point as disinfection has been installed and the weekly monitoring results for the first month the treatment has been in operation have returned negative total coliform and *E. coli* sample results." DIRECTOR'S ORDER AND ASSESSMENT p. 12, ¶ (10).

water signs does not erase the violations of the SDWA that occurred before and after the signs were posted. Nor does the mere posting of these required non-potable water signs bring the water system into compliance with the SDWA. Significantly, the signage posting did not make the water system unavailable for human consumption.[34] Likewise, the posting of the non-potable water signs in compliance with the DIRECTOR'S ORDER AND ASSESSMENT did not remove the Hydra Pools water system from regulation by TDEC. Hence, even though the signage was part of a corrective action required by the DIRECTOR'S ORDER AND ASSESSMENT, the posting of the signage by the Respondent was not the sum-total of corrective action required and it did not cure the remainder of violations in question. The Respondent admitted to these violations in response to the MOTION FOR SUMMARY JUDGMENT.

As part of the response to the MOTION FOR SUMMARY JUDGMENT, the Respondent filed a MOTION TO STRIKE portions of the AFFIDAVIT OF JONATHAN BECK and the AFFIDAVIT OF JESSICA RADAR. During oral arguments, counsel for TDEC withdrew the AFFIDAVIT OF JONATHAN BECK.[35] Accordingly, the MOTION TO STRIKE is **GRANTED** with regard to the AFFIDAVIT OF JONATHAN BECK.

With regard to the AFFIDAVIT OF JESSICA RADAR, the Respondent requests that paragraph 19 be stricken. This paragraph reads:

> The SDWA and implementing regulations contain many public notice requirements after knowledge of a public water system's violations. *See* TENN. CODE ANN. 68-221-708; TENN. COMP. R. & REGS. 0400-45-01-.19. However, posting public notices of drinking water violations or non-potable water signage above water distribution points (e.g., fountains, sinks) does not remove a public water system from its responsibilities and compliance obligations under the SDWA or associated regulations.

[34] The Respondent's Response brief goes into detail about a Hydra Pools company policy that effective July 22, 2021, the employees were not to use the sink water. As is clear by Hydra Pools later action on March 29, 2022, of cutting off the water to the sinks, this "company policy" did not make the sink water unavailable for human consumption.

[35] TR. at 47.

AFFIDAVIT OF JESSICA RADAR, ¶19. TDEC is correct that Ms. Radar's opinion in this regard is admissible as she is a subject matter expert with regard to the SDWA and its rules, and she has personal knowledge of the Respondent's public water system and facility. The MOTION TO STRIKE paragraph 19 of the AFFIDAVIT OF JESSICA RADAR is **DENIED**. Accordingly, the Respondent's MOTION TO STRIKE is **GRANTED *in part* and DENIED *in part***.

It is **CONCLUDED** that the Department has demonstrated that it is entitled to summary judgment as a matter of law. The Respondent was subject to the jurisdiction of the SDWA and its implementing rules because it owned, operated, or controlled a public water system as defined by the SDWA, at all times relevant to the DIRECTOR'S ORDER AND ASSESSMENT. The Petitioner properly issued the DIRECTOR'S ORDER AND ASSESSMENT against the Respondent for violations of the SDWA and its implementing rules, requiring corrective action and assessing civil penalties and damages. The Respondent admitted that it committed the alleged violations that led to the issuance of the DIRECTOR'S ORDER AND ASSESSMENT. The Respondent did not present facts or a prevailing legal argument to either show that it did not have to correct the violations within the time allowed by DIRECTOR'S ORDER AND ASSESSMENT or that it did correct the violations within the time allowed. The Respondent did not otherwise raise any argument contesting the calculation of the amount of penalties or damages assessed.

DETERMINATION

Therefore, it is determined there are no genuine issues of material facts and the Petitioner's MOTION FOR SUMMARY JUDGMENT is well taken and hereby **GRANTED**.

The Respondent is **ORDERED** to pay the $28,128.00 in civil penalties and $1,084.87 in damages assessed in the DIRECTOR'S ORDER AND ASSESSMENT.

POLICY REASONS FOR DECISION

The policy reasons for this decision are to protect the safety and wellbeing of the public and the citizens of the State of Tennessee as well as to ensure compliance with the laws and requirements regarding and relating to the Board of Water Quality, Oil and Gas.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **21st day of March, 2024**.

MARY M. COLLIER
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 **21st day of March, 2024.**

IN THE MATTER OF: **APD CASE No. 04.30-225204J**
TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION V. HYDRA POOLS, INC.

NOTICE OF APPEAL PROCEDURES

REVIEW OF INITIAL ORDER

The Administrative Judge's decision in your case **BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL AND GAS (the Board)**, called an Initial Order, was entered on **March 21, 2024.** 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 **April 5, 2024.** 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 **April 22, 2024.** 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.**

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[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 **March 28, 2024**. *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, 6th Floor
Nashville, TN 37243-1102