

July 25, 2019

BY E-MAIL

Tennessee Department of Environment and Conservation
Division of Water Resources
312 Rosa L. Parks Avenue, 11th Floor
Nashville, Tennessee 37243
Attn: Vojin Janjić

**RE: Comments on Proposed Rulemaking Amending
Chapter 0400-40-40-05 and 0400-40-06**



0400-40-05-.12 and 0400-40-06-.13 Appeals

The Proposed Rules adopt an unwise, confusing and unnecessary pleading requirement for appeal petitions for both NPDES permits and SOPs. Appellants, including ordinary persons affected by a permit would be required to “state a claim for relief based on an alleged violation of the Act or the rules promulgated thereunder,” and must also “specify facts sufficient to satisfy the criteria of paragraph (3) of this rule and otherwise have standing to appeal.” Proposed Rule 0400-40-05-.12(2); 0400-40-06-.13(2).

The authority for this pleading rule cites the entirety of the Tennessee water Quality Control Act and the entire chapter on adjudicatory appeals in the Administrative Procedures Act but no specific provision which authorizes the Board to impose conditions on the pleading of an appeal which could cause the Board to deny any administrative appeal when a timely request for appeal is first received rather than refer it to an administrative judge.

The result of the rejection of an appeal request on this basis of the proposed rule would be immediately available judicial review. At that point the Department is no longer a party, as the Attorney General would represent the Board, leaving TDEC and its staff and counsel out of any Chancery resolution of the appeal by allowing an amended appeal request or by invalidating the Board’s rejection of the appeal with instructions to the Board to either allow an amended petition to be filed or to refer the case to an Administrative Judge.

TDEC counsel is aware that Tennessee law and rules of court on notice of appeal says that an appeal notice is not required to delineate issues and does not define the scope of an appeal.

The Board would also be faced with requests for reconsideration and should follow the well established judicial rules and precedent that pro se litigants must always be afforded at least one chance to amend an initiating pleading.

We believe that the need for exhaustion of administrative remedies expressed in *Pickard v. Tennessee Water Quality Control Bd.*, 424 S.W.3d 511 (2013) and the entire proceeding before an Administrative Judge described in T.C.A 69-3-110 would be defeated by threshold rejections of appeal petitions by the Board.

As the TDEC counsel who assisted in the drafting of the proposed regulation well knows, incomplete pleading of an appeal petition, sometimes filed in a short email, is usually cured by the filing of an amended petition by counsel who is later retained.

The rule would have the effect of misleading and chilling the right of permit appeal recognized in the TWQA and will likely be challenged in court if adopted and applied.

Unfortunately the Board has no independent counsel to advise them in considering this effort by the Department's counsel to create an large stumbling block to administrative appeals initiated by citizens who may lack counsel but who have a right to proceed pro se or who may retain counsel but cannot do so within the time limit allowed for preparation and filing a an appeal petition.

As an alternative TDEC counsel should assist the petitioner to clarify the concerns on appeal or, more formally, to move for a restatement of the grounds for appeal as allowed by the rules for administrative appeals. We recognize that TDEC counsel finds pro se appeals to be a nuisance but due process requires that the door to Board review be open and we believe that any abrupt dismissal of a notice of appeal on the basis of restrictive pleading requirements will lead to an unnecessary court case in which the court system will disallow dismissals of threshold lay notice of appeal pleadings just as they allow pro se pleading in the court system.

0400-40-05-.14 Animal Feeding Operations

According to the "Additional Hearing Information" the proposed regulations were drafted in light of T.C.A. § 69-3-108(b)(7)(B) and (C).¹ The regulations in 0400-40-05-.14, Animal Feeding Operations purport to implement T.C.A. § 69-3-108(b)(10).² Thus the Individual Permit rules must be designed to implement the Federal Clean Water Act and allow TDEC to remain a state agency with delegated authority to issue NPDES permits and eligibility for federal grants for the operation of an NPDES permitting program.

CAFO and AFO operation have long presented problems requiring strict regulations and persistent enforcement to protect the environment and public health. See: "Understanding Concentrated Animal Feeding Operations and Their Impact on Communities" a 2010 report of the National Association of Local Boards of Health.

(https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf)

¹ T.C.A. § 69-3-108(b)(7):

- (A) The construction, installation, or operation of a liquid waste management system supporting an animal feeding operation that stables or confines as many as, or more than, the numbers of animals specified by federal law defining a large concentrated animal feeding operation;
- (B) A state operating permit issued pursuant to this subdivision (b)(7) shall be enforceable only in regards to submission and maintenance of a current approved nutrient management plan;
- (C) Animal feeding operations that are not required under this subdivision (b)(7) to have a permit may apply for and be issued a state operating permit. An animal feeding operation issued a state operating permit pursuant to this subdivision (b)(7) is required to conduct such operations in accordance with the permit;

² T.C.A. § 69-3-108(b)(10):

- (A) Animal feeding operations that are required under the federal Clean Water Act (33 U.S.C. § 1251 et seq.), to have a permit for concentrated animal feeding operations. Such operations must be conducted in accordance with the conditions of a valid national pollutant discharge elimination system (NPDES) permit;
- (B) Animal feeding operations that are not required under the federal Clean Water Act to have a permit for concentrated animal feeding operations may apply for and, if eligible under federal law, be issued a NPDES permit. An animal feeding operation issued a NPDES permit pursuant to this subdivision (b)(10)(B) is required to conduct such operations in accordance with the permit.

Definitions

A threshold problem appears in the proposed definitions. TDEC's definition of "Animal Feeding Operation" (AFO) creates a loophole that allows operations to artificially reduce the size (number of animals) and thus escape the intended permit required of the larger CAFO operations. (This also applies to the SOP operations to artificially place them below the thresholds for CAFO Individual Permits.)

The definition of AFO says: "Two or more AFOs **under common ownership** are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes." (0400-40-05-.02 (5)) (Bold emphasis added)

A few years ago, as reported by Channel 5 (Metro-Nashville), a husband and wife simply divided two adjacent chicken house AFOs by asserting separate ownership, filing two deeds for two side-by-side poultry barns previously held in a single ownership. TDEC had no answer as to how this bypass of regulatory jurisdiction could be avoided.

TDEC should not reserve this loophole as it is necessary and invites defeat of environmental permit requirements.

The regulation need not refer to ostensibly separate legal ownership. Operations and all facilities which share any of the indicia of unified operation and unified (single facility) environmental impact should be covered by a single comprehensive Individual NPDES permit. The use of a common area or a system for the disposal of wastes, or submitted a single application for a CAFO Nutrient Management Plan (NMP). The Nutrient Management Plan (NMP) rules also should require a single permit to be in place for a facility, without regard to ostensible ownership of particular parts of the production arrangement. (There should, of course, be adequate identification of legally responsible persons in the permit application and the permit.)

Definition (25) declares: "The meaning of "degradation" shall be the same as defined in Rule 0400-40-03-.04."

But the antidegradation rule is seriously impaired by:

"(4) De Minimis degradation – Degradation of a small magnitude, as provided in this paragraph.

(a) Discharges and withdrawals

1. Subject to the limitation in part 3 of this subparagraph, a single discharge other than those from new domestic wastewater sources will be considered de minimis if it uses less than five percent of the available assimilative capacity for the substance being discharged.

(Note: Consistent with T.C.A. § 69–3–108, special consideration will be given to bioaccumulative substances to confirm the effect is de minimis, even if they are less than five percent (5%) of the available assimilative capacity.) . . ."

This de minimis bypass makes enforcement in the AFO context almost impossible. The rural streams and other Exceptional Tennessee waterbodies affected by discharges of waste have seldom had baseline characteristics recorded or recognized so there is no basis for the calculation of "assimilative capacity", or 7Q10 flow.

Moreover, the “special consideration” to be given to bioaccumulative substances disregards to the pollution from sediment and nutrients which arise from the land application of CAFO created waste which contribute to the so many of the rural stream segments, wetlands and lakes affected by agriculture which pollutes with animal waste and nutrients none of which are explicitly as a baseline for management plans. The impaired stream segments show up on the 303(d) list as they have for many years and are variously listed as impaired by “animal feeding operations”, “pasture grazing” or ,may lumped together with as pathogen, siltation and habitat impairment.

Permitting

The permit requirements for Nutrient Management Plans (0400-40-05-.14(9) substantive provisions are out of date and far too vague. For example the “USDA-NRCS Animal Agricultural Waste Management Handbook (April 1992)” fails to recognize the decade of severe precipitation events and the flooding which has released millions of gallons of animal waste into rivers and streams.³

This failure to have design standards that incorporate the lessons of severe weather from climate change further undercut the proposed distinction in types or causes of the release of pollutants from liquid waste ponds. Definition (89) is vague and unhelpful when design standards are out-of-date or otherwise defective.⁴

It is vague and improper to declare in “Nutrient Management Plan (0400-40-05-.14(9)(a)7(ii) that: “Manure, litter, and process wastewater shall be applied no closer than 100 feet for any potable well, public or private, **or as recommended by the University of Tennessee Extension**; ...” (Bold emphasis added) A vague and unauthorized delegation of a well buffer size to a non-regulatory agency that has no legally specified role in water quality protection or permit regulation should be deleted.

The regulation of open manure store should be revised. For liquid waste storage minimum liner requirements should specified. TDEC has standards for liners for solid waste landfills and for waste discharges from oil and gas drilling. Please develop clear minimum standards for AFO ponds.

For liquid waste storage the pumping and volume reduction usual schedule should be supersede when there are obvious threats. Ponds should be pumped preemptively when storms approach and when the National Weather Service predicts heavy precipitation event that may cause flooding.

The observation that liquid ponds proposed to be located over karst may require “deeper investigation” is hopelessly inadequate. A waste pond break into an unidentified sinkhole pollute ground water including springs and well used for drinking water. TDEC has available experts on waste insolation in karst and their expert advice should be written in firm standards for the isolation of CAFO and AFO liquid waste in karst areas.

The 30 year average information for severe weather events and precipitation amounts is obviously inadequate in light of our ever more frequent severe storms and floods that we have experienced in the

³ See: “Tennessee Floods Swamp Agriculture” (2010)

https://www.agweb.com/article/Tennessee_Floods_Swamp_Agriculture_192958 “Gov. Bill Lee tours West Tennessee Flood damage” <https://www.wmcactionnews5.com/2019/07/17/gov-bill-lee-touring-flood-affected-areas-west-tennessee/>

⁴ (89)“Upset” means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

last 10 years. If fact, the week these comments are filed has seen Tennessee suffer flooding for the a hurricane residual.

Public Participation and Monitoring and Enforcement

The spreading of manure and bedding across the landscape perhaps is the largest environmental impact on residents and facilities within the “management” plan area. The details of the management plan should be fully described in the notices for public participation.

Neighbors have a right to know of the large volumes of waste that are proposed to be placed on properties proximate to their homes, schools, and recreation areas including access points for water based recreation – the proverbial swimming and fishing. Water related recreation is one of the opportunities rural counties use to attract visitors and tourist dollars and manure nearby or in the creek may have adverse economic consequences well beyond the initial release of pollution..

Change in management plans should be treated as major permit modifications and should be subject to public notice and comment.

Following the grant of permit Notices to the public and to local government, including elected official on how to file complaints with the Department of nuisance or environmental injury, including water pollution, for the spreading of dry waste or the release of liquid waste.

The effort to calibrate the amount of waste spread to perceived needs for crop nourishment and the provision for buffer zones and conditions under which managed waste may be spread are all for naught without compliance and, failing compliance, monitoring and enforcement. TDEC relies on citizen complaints to protect waters from illegal and harmful discharges of pollution and Section 118(a) of the Water Quality Control Act demonstrates a special concern to assure that complaints will be properly recognized and adequately enforced and pollution will be corrected.

Additionally we urge:

(1) the records showing the actual distribution locations, times, amounts and weather conditions should be open to public inspect and copying during regular business hours at the AFO or should be duplicated and filed with the Department and open to public inspection.

(2) AFOs should be required to post large and readable signs telling their permit number and where inquiries or complaints about their operations may be filed with the nearest Environmental Field office.

(3) Assure that all Annual Reports are timely filed and posted to the dataviewer.

The Tennessee Chapter agrees with with comments of Harpeth Conservancy, Southern Environmental Law Center, and Tennessee Clean Water Network and reserves the right to seek judicial review of new, revised and readopted regulations and to request EPA review or rejection of any position or provision of the these regulations if and when they may be approved by the Board of Water Quality, Oil & Gas.

Sincerely,

Scott Banbury, Conservation Program Coordinator
Tennessee Chapter of the Sierra Club