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RE: Proposed Establishment and Renewal of Tennessee’s Aquatic Resources Alteration Permits

Thank you for the opportunity to comment on TDEC’s plan to renew 15 existing General Aquatic Resource Alteration Permits (with revisions) and issue 2 new General Aquatic Resource Alteration Permits. The conservation organizations listed below submit the following comments.

COMMENTS APPLICABLE TO ALL PROPOSED RENEWALS AND ISSUANCES:

It is important to make sure that Tennessee’s general permitting system furthers the entire purpose of the Tennessee Water Quality Control Act (“TNWQCA”),¹ the authority under which general permits are issued. The purpose of the TNWQCA is to clean up and restore the waters of the state to “unpolluted” status:

(a) Recognizing that the **waters of Tennessee** are the property of the state and **are held in public trust for the use of the people of the state**, it is declared to be the public policy of Tennessee that the **people of Tennessee**, as beneficiaries of this trust, **have a right to unpolluted waters**. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.

¹ T.C.A. § 69-3-101 *et. seq.*

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(b) It is further declared that the purpose of this part is to **abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters**, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the **maintenance of unpolluted waters.**²

Permits are required whenever the physical, chemical, biological, or radiological properties of the state's waters are proposed for alteration.³ The Commissioner may authorize general permits when appropriate.⁴ Regardless of the type of permit issued, it is clear that **"Under no circumstances shall the commissioner issue a permit for an activity that would cause a condition of pollution either by itself or in combination with others."**⁵

The undersigned commenters have significant concerns about whether the proposed general permits comply with the requirement that no permit can be issued that would cause a condition of pollution by itself or in combination with others. We do not believe that any of the general permits adequately require consideration of cumulative impacts, as required by Tennessee law.⁶ The proposed general permits should be strengthened by the addition of adequate monitoring and data collection requirements to ensure that these important overarching principles of Tennessee law are promoted.

In particular, we believe the proposed general permits do not, but should, adequately address the situation where the permit will allow activities in waters listed as impaired under Clean Water Act section 303(d).⁷ We also believe that:

1. Every General Permit should include the following in the "Activities Covered" section:
 - a. A statement that General Permits are only available to activities with a *de minimis* impact,
 - b. A definition of *de minimis* that does *not* include the allowance of compensatory mitigation to achieve *de minimis* impact, and

² T.C.A. § 69-3-102 (emphasis added).

³ T.C.A. § 69-3-108 provides that:

(b) It is unlawful for any person, ..., to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

...

(3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;

(4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

⁴ T.C.A. § 69-3-108(l).

⁵ T.C.A. § 69-3-108(g)(2) (emphasis added). See also TN Comp. R. & Regs § 0400-40-10-.03 (1) and § 0400-40-03-.06 (Antidegradation Statement).

⁶ See, e.g., TN Comp. R. & Regs § 0400-40-10-.03 (2)(b)(1)(i), (v), (vii) (circumstances under which an individual permit may be required, in lieu of coverage under a general permit).

⁷ 33. U.S.C. §1313(d).

- c. A statement that activities having more than a *de minimis* impact may be rejected for a General Permit but may be eligible for an Individual Permit.
2. Every General Permit should include a provision for treatment of invasive plant species to allow for the re-establishment of a native plant community.
3. Provisions for inspections during or immediately following construction should be included and an expedited enforcement protocol needs to be put in place to ensure that all permit conditions were met. Issuing the permit with conditions is meaningless unless there is assurance that the conditions were met.
4. General Permits should not contain such subjective terms appear throughout the permits (e.g., the term “excessively” in the Bank Armoring and Vegetative Stabilization permit. Such subjective terms make it difficult for both permittees and the interested general public to make sure that the permits are both meaningful and applied consistently in all instances.
5. Unlike Individual Permits, General Permits have no provision for public comments or hearings, so they should be posted on the TDEC website the same day as issuance to allow for adequate monitoring.

COMMENTS REGARDING 15 PROPOSED RENEWALS:

1. Bank Armoring and Vegetative Stabilization

RE: Activities Covered

The addition of the word “excessively” describing actively eroding stream banks is confusing. If the intention is to convey the point that some minor erosion is a normal part of stream dynamics and does not need to be treated, this could be said if TDEC intends to deny permits if it deems existing erosion as unnecessary to treat. If this is the intention, then such a precondition for permitting should be stated. On the other hand, a treatment for an area which is “excessive” might extend to an adjacent area that is not “excessive,” but TDEC is unlikely to strictly limit the treatment to the “excessive” area only. For these reasons, adding the word “excessive” without further explanation does not convey any useful information.

The definition of “hard armoring” includes the treatment “stacked stone” without further description. Clearly, the height of such stacking separates the use of stacked stone from hard armoring from bioengineering. It is not uncommon in rock substrate streams to have rocks from the base of the bank underwater to the normal high water (not flood or bank full) mark. Efforts that use stacked stone to replicate this level of bank protection should not be considered hard armoring as plants can grow through the gaps between rock and the spaces between rocks underwater provide habitat for aquatic species. This distinction becomes important when treatment distances are listed under special conditions.

RE: Special Conditions

It needs to be clear when talking about linear treatment length that this refers to treatment area. For example, a project site could cover 1000 feet of stream which contains three different 100-foot sections of hard armoring (not opposite) and still be eligible under this permit, or a 5,000-foot site could include many treatment areas that don't exceed a total of 1,000 treated feet with bioengineering.

[1] Hard armoring limitations are appropriate but the discrimination about the use of stacked rock should be made clear here.

[2b] The discussion of stone toe protection is good, but should be clarified by noting that the bed-bank interface may well be underwater even at normal flows and the stone protection would be allowed to extend one layer above that normal level regardless of the portion of bank height this entails.

[3] The in-stream structures discussion has a couple of confusing or inappropriate rules. The first is the statement that the treatment lengths must be part of the cumulative treatment lengths. It provides no guidance in how the treatment lengths should be calculated. For example, for a rock vane, is the treatment length the length of the bank where the vane is keyed in, the length of the backfill that will accumulate upstream of the vane, or the distance from the point of contact where it is keyed into the bank to the perpendicular point on the bank to the end of the vane in the stream?

[3b] The second problem is the limitation of five in-stream structures. Since the point of General Permits is to cover projects with *de minimis* impacts, such a numerical limitation does not make sense. The use of heavy equipment in the stream is already excluded from the permit, so large structures are not going to be an issue. In a headwater stream with a gravel/cobble substrate (not to mention sand/silt substrates), multiple small vanes may be the only way to provide lateral stability. If all other conditions are met to meet the *de minimis* standard, there should not be a numeric limitation on number of structures.

[5] Notification of commencement of work is a new requirement. Will such information become public, i.e., will interested third parties be able to know that the project has begun?

[9] See the discussion above on 3b about in-stream structures. The fact that a stream has a protective designation should not limit opportunities for stabilization that have *de minimis* or positive impacts on ecological functioning.

[14] There is one not-uncommon material found in streams that could be used for stabilization which this provision prohibits: concrete. Whether from failed attempts at bank stabilization, old bridge abutments or piers, culvert protections, etc., concrete, which is "unnatural" has been permitted to be used in streams but salvaging such materials for use in stabilization is prohibited. Requiring such material to be removed and disposed of off-site simply adds to the cost of the project. Recycling and reusing limestone rip-rap which may be quite abnormal for a particular stream is not prohibited. What is the rationale? Obviously, there are limitations as to the amount of such material that could be reused, or it will fit into the scope of hard armoring and its limitation.

RE: General Conditions

[1] This is a new provision which seems strangely inappropriate. The mention of fill and stream channel modification would normally not be part of work under this General Permit.

[2] If you chose to drop the reference to penalties under section TCA 69 3 115, what is the plan for non-compliance with the permit conditions?

[4] This section does not, but should, make reference to invasive plant removal. Requiring the re-establishment of native riparian vegetation is not possible in areas dominated by aggressive invasive plants such as privet and bush honeysuckle without removing those plants from the area. Both of these

invasive plant types are greatly inferior in preventing bank erosion to their native plant alternatives, but their roots do provide some structure to easily erodible soils. Cut and paint techniques are therefore the least disruptive.

2. Emergency Infrastructure Repair

RE: Activities Covered

Unlike other General ARAP Permits, this one does not refer to the requirement of *de minimis* impact on streams and wetlands, which should be included here. It is understood that previous infrastructure work may have caused impacts that are ongoing, and it is to this point that the statement “restore to pre-existing conditions” should apply. For example, the preceding phrase “where feasible” should not allow the replacement of an inadequately sized culvert by the same size or smaller simply because that size was immediately available, and a larger size was not. It is this kind of emergency infrastructure repair – the washing out of a culvert and the road that crosses it – that is not uncommon. There is understandable public pressure (hence “emergency”) to get the road back in service, but multiple wash-outs coating the stream bottom with rip rap for a half mile downstream creates an impact that is not *de minimis*. The General Permit should expressly prohibit such degrading repairs.

RE: Special Conditions

[1,2] See note above. The invocation of an emergency allows repairs to be made without authorization, allowing precisely the kind of degradation referred to above. If a prohibition to degradation is included in the “Activities Covered” section, it should be referenced here.

[6,7] In 6, it should be clarified that pre-existing conditions refers to stream conditions, not infrastructure condition. In 7, the prohibition against enlargements or realignments should be replaced with more flexible language in the case of road crossings to allow a larger diameter culvert or box culvert to replace an undersized round culvert, or to correct a previously mis-aligned culvert. There are many road crossing culverts that were improperly sized, improperly bedded, improperly sloped, or improperly aligned (being aligned perpendicular to the road rather than in-line with the stream channel.) Because of these initial installation errors, they are more likely to fail in flood conditions and corrections should be made at the time of replacement, not repeated because it is an emergency.

RE: General Conditions

[2] This provision is meaningless since this General Permit allows the repairs to be made prior to submitting the ARAP (Special Condition 2).

[6] This provision is clear but must be emphasized that it overrides the provision of “restoring to pre-existing conditions” where the pre-existing condition included a hanging culvert or other barrier to fish passage.

[9] This provision is meaningless as “emergency” situations bypass such reviews, especially when this General Permit allows the work to proceed prior to submitting a permit.

[11] Without explicitly discussing the use of rip-rap or other hard armoring, this provision implicitly encourages hard armoring over bioengineering approaches. Dropping the provision that calls for returning contours supports this interpretation.

[15] It is not clear what the meaning of this provision is within the context of this General Permit. By definition, emergency repairs will happen right away, if possible, regardless of stream flow conditions. One would expect emergency repairs to be of short duration. Rather than just using this provision lifted as a whole from other permits, a section drafted with the idea of emergency repairs should be drafted for this permit.

RE: Obtaining Permit Coverage

Step #1. The timing provisions are in conflict with Special Conditions 1 and 2. In this section, a detailed proposal is required with the initial email, but not in the special conditions section. A conditional approval is required here before commencing work while no such approval is required in the "Special Conditions" section. In both this section and in "Special Conditions," an exception allowing immediate repairs without communication with TDEC is allowable to protect immediate threats to human safety and welfare. Such conditions should be spelled out. Is being cut off from access to police, fire, and ambulance enough of a threat?

Step #2. The listing of required information to be submitted in part exceeds the authority under a General Permit and conflicts with earlier requirements in this permit.

- Under what conditions would Item 2 apply (existing CGP and ARAP permits)? And if there were existing permits, why would an emergency permit be needed?
- Item 4 requires knowledge from previous permits when the infrastructure was originally built, but information about species changes over time. Can that information and TWRA review occur reliably within 10 days?
- Items 10 and 11 suggest a disruption beyond *de minimis*, requiring a response that would extend beyond the emergency repair of infrastructure. It suggests that there should be a linkage between coverage under this General Permit for Emergency Infrastructure Repair and another ARAP for Stream Restoration.
- Item 12 extends this argument by including a plan for stream remediation. While there is a certain logic to including both the immediate emergency response (let's get a culvert back in and the road fixed) and the longer-term needs (let's get all the rock and debris out and restore the channel) into one document, the emergency timeline and processes do not fit both needs well. If the stream channel has been disrupted for more than 300 feet, the two cannot be combined in this General Permit anyway, but more importantly, the skills and experience necessary to getting the culvert back in and the road repaired are not the same skills required for stream restoration and it may not be possible to come up with the best plan for restoration within the emergency timeline when access to the site may be impaired.

This point is further underlined by the following paragraph that describes NOC and length of coverage. If this is an emergency permit designed to cover immediate work, the timeline for the work should be necessarily short, something which should be addressed in this permit. If the work is going to take a year, surely emergency procedures are not needed to review the work. A time limit of 30 days would be appropriate for emergency work. Work that will extend beyond that time should be covered under a normal review process which takes no more than 30 days by rule.

In addition, this paragraph should be rewritten to remove any generic wording that does not apply to the conditions of this permit. For example, an emergency permit would never be re-issued. Using generic language should be avoided where possible as it may lead to inappropriate interpretations.

3. Gravel Removal

There is a major problem with this General Permit that has not been addressed in this revision. For the most part, removing bed material from a stream is a destructive activity and should be avoided. There are, however, a limited number of streams and stream sections where there is a large amount of mobile stream sediments of a size that could be harvested, within limits, without detriment to the stream. TDEC should maintain a list of such streams for which this General Permit is applicable and should create a process by which additional streams or stream segments could be added to this list.

Aside from the major objection noted above, this General Permit contains mostly minor changes, but there is a key provision that should not be permitted as written: the provision that allows activities covered under this permit to proceed without an ARAP permit or even written notice to the appropriate TDEC office. This permit authorizes the use of heavy equipment within the stream channel (though not the wetted channel) to remove stone material for use on the landowner's property. The term "gravel" is used in the permit, but the size of the stone referred to is not included anywhere in the permit. If there is an intention to limit the removal to small stone as might commonly be referred to as "gravel," such limitations should be specified. If no such limitation is intended, then the title of the General Permit should be changed to "Stone and Bed Material Removal."

There are other deficiencies in the way the permit is written. While the permit requires that a dry buffer be maintained between the extraction area and the flowing stream, it does not specify the depth at which material can be excavated except below the water level at the time, setting up conditions for potential channel re-alignment during future high-water events.

The lack of required permit or notice makes the conditions specified under "General Conditions" or "Special Conditions" meaningless. If TDEC doesn't even know that excavation within the stream channel is occurring, how can it assure that the operator is conforming to appropriate standards?

Use of boiler-plate language from other General Permits should be avoided. Item 16 of "General Conditions" is a perfect example. Harvesting of bed material should *never* be conducted except in the dry as Special Condition 2 states. We strongly urge that someone with experience in this area or with the legal implications of General Permits review this final draft. Item 19 is another inappropriate General Condition. Streams large enough to have gravel bars large enough to harvest would not use temporary stream crossings but would instead involve equipment crossing the stream bed which is prohibited in Special Condition 2.

Barring the need for a permit or even notification, how can enforcement and oversight occur to ensure that the waters of the state are being protected and that the impact is *de minimis*? What is to prevent a landowner from removing more than 50 cubic yards, or another from taking 50 cubic yards in December and another 50 cubic yards in January while claiming that this action did not exceed the requirement of no more than 50 cubic yards "annually." How would TDEC know if the material was used on that property or sold off the property?

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At a minimum, written notice should be given with a description of the work to be done and the time period, much like that used for “emergency” measures under that permit, so that TDEC can ensure that the impact will indeed be *de minimis*.

4. Construction of Intake and Outfall Structures

RE: Special Conditions

[5] This new provision is inappropriate as it is arbitrary and does not take into account the size of the stream impacted, nor does it specify the size of the project area. On a large river, having 10 intake or outfall structures might be possible without significant impact, but it is hard to imagine how that could be true for a small stream or one with significant seasonal flow variability. TDEC should be able to evaluate the proposal for intake or outfall structures and make a science-based judgement about the degree of impact. There is no shortcut here by using an arbitrary number of structures. The volume and velocity of the stream must be assessed in relation to the volume and velocity of the intake or outfall, combined with the characteristics of the stream substrate and banks to determine whether a *de minimis* impact is possible.

5. Maintenance Activities

RE: Activities Covered by this Permit

There is a definite contradiction in this section that has not been resolved by the few modifications proposed. “Rebuilding of the structure is not covered” is a new provision in this section but contradicts the first two provisions which allow reconstruction of headwalls and replacement of culverts. How is removing an old culvert and replacing it with a new and possibly larger culvert not considered “rebuilding?”

RE: Obtaining Permit Coverage

The first provision allowing maintenance activities without a permit is not clear as it includes two different kinds of activities with different possible impacts. Removing excess sediment and debris should certainly be allowable without a permit. However, the process of adding “rock fill” is not clear. In the “Activities Covered” section, the term “rock fill” is used, but in the “Special Conditions” section, the term “rip rap” is used. Are these the same thing or different? If different, describe the differences. Because Special Condition 5 describes the process of properly bedding rip-rap, particularly upstream of a structure to prevent or stop flows underneath the structure, and recognizes that this process takes some special care in order to effectively accomplish its goals, it does not seem prudent to allow this kind of activity to proceed without a permit. There are certainly situations where simply placing additional rip rap may improve stability and could be allowed without a permit. A description of how to determine the difference between these situations should be included.

In addition, while removing sediment is allowed without a permit and adding rip rap is proposed to be allowed, there is no requirement to remove displaced rip rap from the stream channel anywhere in this permit. It is not

uncommon in many streams to have the gravel in the stream bottom substrate to be dominated by gravel and rip rap associated with stream crossings of roads and driveways. This is a cumulative impact that can be substantial, especially when the limestone gravel or rip rap does not match the normal rock composition in the stream and can alter the stream chemistry.

6. Minor Dredging in Reservoirs and Ponds

RE: Activities Covered by this Permit

Because this section specifies that it does not apply to flowing water systems, it needs to clarify how the interface between the feeder stream and the reservoir is calculated and treated. Where a stream enters an impoundment, there may be considerable flow and the amount of flow will also be affected by the amount of through-put of the reservoir which depends on both rainfall amounts and the size of the reservoir. While TVA's conditions of no permit address this by only allowing for dredging during draw-down times when the substrate is exposed, this permit does not address equivalent conditions as desirable.

RE: Special Conditions

This is acceptable as written with need to allow for invasive plant removal.

RE: General Conditions

[5] This is another example of not properly modifying boiler-plate provisions to meet the specific General Permit. As most reservoirs are, in fact, stream channels, dredging will increase the cross-sectional volume of the channel. Do you intend to say that the ordinary high-water width shall not be widened?

[6] This does not seem to apply to this permit at all. How would dredging do this?

[12] When would there be any backfill activities in association with this permit? If there are some you can anticipate, specify them.

[16] This should be re-written to match the actual conditions of this General Permit. Either talk about doing the work during draw-down conditions, creating barriers and pumping, or discuss installing silt and sediment curtains to allow work under water, for example.

[18] How does this apply to this permit?

7. Construction or Removal of Minor Road Crossings

RE: Activities Covered by this Permit

There are two provisions that should be added to this section. The first concerns maintenance and should inform the permittee that road crossings are unavoidable restrictions to the flow of water and as such must be able to allow water to flow down the channel at various flow regimes as well as before the crossing was

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installed. They should be reminded that debris may become caught on the culvert and maintenance to remove it will be required to prevent water from seeking to erode a channel around the culvert.

Second, applicants should be warned that typically road crossings last 20 years or more, but stream channels can widen and deepen if upstream development increases stormwater run-off. They should anticipate increased future flow in properly sizing the culvert(s) and know there are ways to anticipate a future widening without widening the existing base flow channel.

RE: Special Conditions

[11] We strongly support this provision as meeting the real definition of “minor” – a single lane road. Acceptable as written with need to allow for invasive plant removal.

8. Public Access Structures and Boat Ramps

RE: General Conditions

Section 6 and 11 do not seem to apply to this permit.

RE: Obtaining Permit Coverage

The section regarding small access structures has an inconsistency and a place needing clarification. The inconsistency regards “private structures” yet this General Permit is for Public Access. It seems quite irregular to grant private landowners exemptions from permitting requirements in this General Permit, but if so, it should be stated in “Activities Covered.”

The second issue is clarification regarding heavy equipment. For canoe and kayak access trails requiring ADA-compliant slopes and widths, small treaded machines with attachments are often used to cut the trail into a slope and spread the fill material to build the trail. If TDEC does not intend to ban such equipment, it should specify by size or weight the kind of equipment it intends to prohibit.

9. Recreational Prospecting

RE: Class I Special Conditions

[1] This section is in direct violation of the Endangered Species Act, Section 9(a) which prohibits take of federally endangered or threatened species by any person subject to the jurisdiction of the United States. The removal of stream bottom sediments and subsequent processing for gold extraction will inevitably result in the mortality of fish eggs and other small non-mobile aquatic organisms.

[2] We do not agree that private landowners should be exempt from this requirement. If the purpose of the permit is to protect the aquatic resources of the state, the fact that the aquatic resource, i.e., water of the state,

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happens to cross someone's private property does not give that landowner license to degrade the aquatic resource.

RE: General Conditions

[13] This section should include the requirement that a copy of the permit must be posted prominently and visibly in direct proximity to the activity, including contact information for the relevant TDEC official with authority over the permit.

10. Sediment Removal and Stream Remediation

RE: Activities Covered by this Permit

While the "Activities Covered" section suggests that certain events would be too large to be covered under this General Permit, no specific guidance is given in either the Special Conditions or General Conditions. It should be stated by volume. TVA's coal ash disaster in Kingston comes to mind as a sediment dam breach, but other kinds of dam breaches could also contribute amounts of sediment beyond what should be allowed under a General Permit.

As this section lists dam breaches as a mechanism by which sediments could be deposited, where does major flooding caused by excessive rains fit in, aside from the question of liability? Would a city use this permit to clear sediment from a stream through a park after heavy flooding? How would TDEC distinguish between this activity and clearing sediment for flood control which this permit prohibits?

RE: Special Conditions

In addition to the conditions given, there needs to be a provision that prohibits the use of this permit for certain types of sediment. Sediments containing toxic materials, including heavy metals, and/or those likely to cause a fish kill, such as coal mining wastes, radioactive wastes, high-nutrient sources, such as animal waste lagoons, or concrete plant settling ponds should all be excluded from this General Permit. The same logic that says this permit cannot be used if there is suspicion of dangerous substances in the stream substrate should apply to the composition of the sediment that has been released into the stream.

An additional Special Condition should be added to state that the permission to remove sediment under this permit does not release the applicant from any enforcement actions that TDEC may take in response to the release of sediment into the waters of the state.

11. Stream and Wetland Enhancement

RE: Activities Covered by this Permit

This section's description of covered activities does not match the activities described in the Special Conditions. For stream, it describes buffer enhancement, *vegetative* bank stabilization, in-stream habitat structures and

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removal of small obstructions in the channel. The Special Conditions in addition allow physical modification of the banks and floodplain or flood benches.

RE: Special Conditions

[13] Because of the different criteria for categorizing streams used in Tennessee, a stream can be both an Exceptional Tennessee Water and impaired on the 303(d) list. Provisions for working on impaired waters within these protected categories should be allowed. The sentence itself should be reworked to separate the prohibitions on wetland work from the prohibitions on stream work.

RE: General Conditions

[7] As noted in other comments on other Permits, the term “component” of National Wild and Scenic River System or Outstanding National Resource Waters needs to be defined.

12. Minor Stream Grade Stabilization

RE: Activities Covered by this Permit

While there are excellent historical reasons that this General Permit targets the streams of Western Tennessee, there are other streams in Tennessee where similar dynamics of unconsolidated bedload subjects the stream to significant head-cutting, often leaving the channel incised as much as 10 feet from the top of the bank and thus cut off from its floodplain. Because these streams may still be cutting down to bedrock the process of over-widening may not yet have occurred, but the shifting bedload can lead to blow-outs where a section of stream can become over 150 feet wide while the channel above and below is at 34 feet. Grade control structures have proved highly effective in these streams, but the fact that they are not located in West Tennessee should not prevent the use of this General Permit for these kinds of stabilization efforts. Because such stream systems are limited in the rest of the state, TDEC could include a listing of such streams as part of this section of the permit.

It is also important to note that this is the only permit that does not prohibit the use of heavy equipment within the stream channel, a normal trigger that requires an Individual Permit. There is no question that in all but the smallest streams, heavy equipment is required to install a stable grade control structure. Is this General Permit consistent with the ARAP rules that discriminate between General and Individual Permits? If grade structures installed with heavy equipment are acceptable under this General Permit, why not allow heavy equipment and grade structures in other General Permits seeking to stabilize stream channels?

RE: Special Conditions

If this General Permit is expanded to other parts of the state, Items 1 and 3 should be modified. Item 1 should be expanded to 1000 feet as with other stabilization General Permits, and Item 3 should allow grade control structures to be combined with vanes above or below the grade structure to allow successful installation of a grade structure on streams that have meanders.

RE: General Conditions

[13] It is unclear how this provision is to be applied to the activities under this General Permit. A grade control structure, keyed into both banks and spanning the channel completely, cannot be installed without at least some portion of it occurring in flowing water. Scheduling the work for the driest time of the year and installing on the dry parts of the channel first can minimize but not eliminate the need to work in the water.

13. Surveying and Geotechnical Exploration

RE: Activities Covered by this Permit

The purpose of this permit is fairly well spelled out, though limitations are unclear and the Special Conditions as well as the General Conditions included in this permit suggest permissible activities could be impactful to the resources. There is no limitation on the use of heavy equipment which might be used for deep core samples and seismic explorations and “water quality improvement devices and structures” are not defined. It has long been TDEC policy that water quality improvement devices cannot be constructed or used in-stream, i.e., the stream cannot be the treatment facility. If such a device is allowed to be installed as part of a scientific experiment without a detailed permit application, there needs to be limitations on size of the structure and duration of the experiment.

In addition, the final sentence about notification should conform with Special Condition 5, indicating that the notifications must include a full description of the activities.

RE: Special Conditions

[2] “Long term” should be defined. Is this one month, six months, one year, ten years?

[3] Is excavating a stream bank or wetland covered under this permit? Does this permit cover archeological exploration of such areas? If so, such coverage should be explicit. If this provision is primarily to allow access to stream and wetland areas, the type of impacts allowed should be specified since a written permit where the permittee presents detailed plans is not required.

[13] While this provision makes complete sense for a construction project, there should be an allowance for reuse of large-sized concrete rubble from a demolition project if there is a simultaneous bank stabilization need adjacent to the project site. It cannot fairly be argued that it is acceptable to introduce concrete structures into a stream and then argue that concrete chunks cannot be used as rip-rap for bank stabilization or as fill for a reconstructed bank.

RE: General Conditions

It is unclear why this long list of boiler plate conditions are included here as the “Activities Covered” and “Special Conditions” limit activities in ways that many of these provisions should not come into play, specifically, numbers 1, 2 (there is no application), 3, 5, 7, 8, 10, 11, 12, 15, 17, and 19.

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RE: Obtaining Permit Coverage

Substituting a notification requirement for a formal permit is acceptable if additional limitations are spelled out above to ensure that impacts are truly *de minimis*. Does this alternative notification process also avoid permit fees? If so, this principle should be applied to other projects under General Permits that have *de minimis* impacts, or an additional nominal fee structure should be created for these no-impact (or positive-impact) projects.

However, this notification in lieu of a formal permit raises another important issue. Violating the terms of a permit subjects an applicant to an enforcement action and penalties. Is notification under this permit the same as acceptance of the terms of the permit in regard to enforcement actions against violators?

14. Utility Line Crossings

RE: Activities Covered by this Permit

This permit, because it truly covers routine activities, does a very good job of defining what is allowed and covered with one exception. It does not address overhead electric, phone, and cable crossings. The construction of such overhead lines can have substantial impacts on riparian zones as well as where equipment crosses the stream, and maintenance of the right of way can have continued impacts on streambank stability. This is an area that needs to be addressed and this General Permit seems like the most appropriate place to do so.

RE: Special Conditions

These are clear specifications and the new ones on trench plugs will have a positive impact on water quality as lines are replaced and trench plugs are installed with the new lines.

15. Minor Alterations to Wetlands

RE: Activities Covered by this Permit

The opening sentence is problematic given that General Permits are only to be used for impacts that are *de minimis*. It is impossible to permanently alter (which usually means filling) a wetland and claim *de minimis* impact. (See Special Condition 6 for the standard.) Under current policy, mitigation has been required even for such small wetlands as are covered under this permit. If the alteration is temporary, then it could be covered under a General Permit.

We support the new language referencing both permanent and temporary wetlands. It might be well to define "ephemeral" wetlands and use it instead of "temporary" as temporary might imply a wetland created by a temporary obstruction to surface flow, rather than the kind of subsurface conditions generally associated with wetlands.

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Because this section refers to “moderate” and “low” resource values, these terms or conditions should be defined. It should also be stated that TDEC will consider management practices in making these determinations. For example, a wetland that is mowed annually during drought conditions will not be automatically considered “degraded” for purposes of this permit since it is the landowner causing the degradation.

RE: Special Conditions

[1] It is important to further explain what is meant by “located in a component” of the listed high-quality waters. It should include both riparian wetlands along the listed streams and their tributaries as well as in-stream wetlands on any tributaries.

RE: General Conditions

[11] This is another example of not properly modifying boiler-plate provisions to meet the specific General Permit. The permit is about wetlands, so it is assumed that conditions will be wet. The objective is to conduct the work during the driest time of the year and to limit, if possible, surface water from entering the wetland during the time of construction. This section needs to be rewritten in consultation with TDEC’s wetland experts.

COMMENTS REGARDING 2 NEW RENEWALS:

16. Structural Discharges

RE: Activities Covered by this Permit

The coverage proposed under this General Permit is overly broad in its diversity and should not include both installation and removal under the same permit. The question of liability for these permanent structures is not addressed nor the responsibility for their maintenance or removal after installation. The conditions that would create ineligibility for the use of this General Permit are not adequately spelled out in Special Conditions. Each of these points will be discussed.

First, installation and removal processes can be quite different, particularly for large structures that this permit apparently covers. Diverting the flow or using a waterproof form and pouring the concrete after some bottom excavation is quite different from having to break up concrete pylons from a former railroad trestle, for example. While the idea of tying the installation of such permanent structures to their removal would be ideal, there are lots of structures from the past whose removal would enhance the streams they were once part of.

Second, the permit is too broad in its application. It does not distinguish between structures in streams, large rivers, ponds, or reservoirs. Nor does it distinguish between a concrete mooring for a boat at the bottom of a lake and a bridge piling extending above the high-water line.

The liability issue occurs primarily in flowing waters but could be an issue in reservoirs and ponds during draw-down. Does the permitting process shift liability of navigational obstruction to the State from the individual? Is the owner of a bridge or boat house responsible for clearing floating debris so that it doesn’t become a

navigational hazard? If the boat house itself is swept away during flood conditions and blocks the channel, is the owner liable? If the bridge is abandoned or the property with the boat house or moorings sold, who is responsible for maintaining or removing these concrete structures?

Where are limitations to this permit spelled out? Aside from impacting water quality directly, the only other limitations are National Wild and Scenic Rivers and Outstanding National Resource Waters. So a new 12-lane highway bridge's support pylons can be built under this General Permit? Only Special Condition 15 might be a limitation if the stream was small enough and the bridge needed more than one row of pylons. A bridge over the Tennessee or the Cumberland with two pylons would not substantially impact hydrology. Finally, the prohibition against using heavy equipment in the stream in order to use a General Permit is explicitly allowed here. That fact that this permit requires restoration of substrate after construction is complete does not negate the impact on aquatic organisms or substrate stability.

RE: Special Conditions

[7] This provision is not fully developed. If the stream is navigable by paddle crafts and/or fishing boats, this limitation should not be limited to the actual structure itself but also its potential to become a place where floating debris, especially large logs, could create a debris dam and a hazard for boaters.

[9] This provision appears to be a violation of the *de minimis* intent of General Permits. Altering wetlands, regardless of size or classification, requires mitigation and is excluded from the use of a General Permit.

[13] While this provision makes complete sense for a construction project, there should be an allowance for reuse of large-sized concrete rubble from a demolition project if there is a simultaneous bank stabilization need adjacent to the project site. It cannot fairly be argued that it is acceptable to introduce concrete structures into a stream and then argue that concrete chunks cannot be used as rip-rap for bank stabilization or as fill for a reconstructed bank.

RE: General Conditions

[6] As the normal prohibition against heavy equipment in the stream is missing, why is this prohibition included without modification? Underwater blasting in a deep channel – which is allowed – assumes that such blasting will not change the benthic zone interface, while perhaps in a smaller stream it might affect the bedrock and change the amount of surface water. But in the case of demolition of a bridge pylon, it might be less disruptive to the stream to blast the pylon instead of using heavy equipment to break the concrete. It should be allowed under these conditions with a blast blanket used to prevent dispersion of the pieces.

RE: Obtaining Permit Coverage

The waiving of the permit or notification requirement for private boat houses should not be allowed for boat houses on navigable rivers because of safety and liability issues.

17. Minor Water Withdrawals

RE: Special Conditions

While this General Permit has two sets of Special Conditions for Class 1 and Class 2 withdrawals defined in the permit, there is not a provision in this permit for calculating and regulating cumulative impacts by multiple permittees. This authority of TDEC to limit cumulative impacts needs to be included in the limitations language here. For example, no Class 1 user can use more than 15% of the instantaneous flow of a stream, but what if there are ten users each using 10%? The same would be true for multiple Class 2 users on the same stream or reservoir, especially if there were a municipal and/or industrial user already withdrawing water from the resource. Because of the variability of the Class 2 resources, it may not be possible to publish a rule that would allocate water usage under this permit, but a clear statement of TDEC's authority to deny permits due to prior permittee's potential demands should be stated.

RE: Class 1 Special Conditions

[4] While TDEC may wish to avoid the paperwork involved in a formal application process, notification of the TDEC office should be required. Upon notification, a copy of this permit with its limitations should be provided to the permittee. Such notification is the only way that TDEC can monitor withdrawals to ensure that the volumes do not exceed those specified in this permit, and to adjudicate, if necessary, allocation of rights for withdrawal. In addition, TDEC should conduct an annual public information campaign in the spring and summer to inform citizens of the rights and limitations outlined in this permit.

RE: Class 2 Special Conditions

In addition to the four proposed conditions there needs to be two more. The first would declare a total limit for combined withdrawals from a waterbody, much as the 5% of the 7Q10 is the limit for an individual permittee. The second would state that TDEC may authorize less than the permittee requests in order to keep total withdrawals within the overall limit set to protect the resource.

RE: General Conditions

[2] Because every pond or lake in Tennessee is a reservoir with the exception of Reelfoot, limitations should be included for reservoirs on streams whose flow is not dam-controlled in order to assure stream flow even during low-flow conditions. The standard could be based on surface acres or flow.

[3] This provision is problematic because the public might know whether a stream is a trout stream but is unlikely to know whether a stream has been designated either Exceptional Tennessee Waters or of recreational value. If permitting is not required as with Class 1, when would they learn that their withdrawal is not allowed?

[5] How would a Class 1 user know this?

[8] How would a Class 1 user know this?

[16] How would a Class 1 user know if they are in compliance with this?

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RE: Obtaining Permit Coverage

The lack of formal permitting for Class 1 users prevents TDEC from performing its duty to protect the resource as it cannot monitor usages and activities it is unaware of. As it has proposed with a number of other General Permits, a minimum of formal notification of TDEC with enough details of the proposed activities could allow TDEC to perform its regulatory functions without abrogating its responsibilities to protect the resource.

Again, the conservation groups below appreciate the opportunity to submit the above comments and make themselves available to you for any questions or comments.

Sincerely,

Dennis Gregg, Restoration Director
Obed Watershed Community Association

and

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Clean Water Expected in East Tennessee

Kat Diersen, Southeast Representative
Defenders of Wildlife

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Tennessee Clean Water Network

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