

Harpeth Conservancy * Sierra Club Tennessee Chapter * Southern Environmental Law Center * Tennessee Clean Water Network * Tennessee Conservation Voters * Tennessee Environmental Council

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VIA EMAIL Vojin.Janjic@tn.gov

Vojin Janjic
Tennessee Department of Environment and Conservation
Division of Water Resources
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 11th Floor
Nashville, TN 37243

Re: Rulemaking to Rescind Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(c); Request for Concise Statement of Reasons under Tenn. Code. Ann. § 4-5-205(b)

Dear Mr. Janjic:

The Department has proposed rescinding Rule 0400-40-05-.08(1)(c), Tennessee's longstanding requirement that publicly owned treatment works (that is, municipal sewage treatment systems) use the "best practicable waste treatment technology" before discharging sewage into Tennessee's public waters. According to the notice for this rulemaking, the Department's basis for rescinding this rule is that the equivalent federal statutory requirement was repealed in 1981 and, therefore, the federal regulation requiring publicly owned treatment works (POTWs) to employ the best practicable waste treatment technology "has no legal effect." The rulemaking notice further indicates that, as a result, "secondary treatment" will serve as the basis for technology-based limits for POTWs in Tennessee.

On behalf of Harpeth Conservancy, Sierra Club Tennessee Chapter, Southern Environmental Law Center, Tennessee Clean Water Network, Tennessee Conservation Voters, and Tennessee Environmental Council, thank you for the opportunity to submit comments on the proposed rule change. Given that the "best practicable waste treatment technology" standard has been in effect in Tennessee for over 30 years, we respectfully submit the following comments and questions for your review.

In addition, pursuant to the Uniform Administrative Procedures Act, we also respectfully request that the Department issue a concise statement of the principal reasons for its action.¹

¹ Tenn. Code. Ann. § 4-5-205(b).

1. The concept of “best practicable” pollution control technology is a well-understood, integral part of the Clean Water Act and Tennessee Water Quality Control Act, and it should remain part of Tennessee’s POTW regulations.

- a. The term “best practicable *waste treatment* technology” may not be specifically defined in the Clean Water Act, but the Clean Water Act and Tennessee’s Water Quality Control Act employ the concept of “best practicable *control* technology” to limit pollution in other contexts.² This flexible standard has worked well for other industries for more than 40 years, and is flexible enough to continue to work well for POTWs.³
- b. In fact, existing sources of significant water pollution (other than POTWs) are—and will continue to be—required to apply “best practicable control technology”⁴ as part of the Department’s formulation of appropriate effluent standards and limitations, even after this rule rescission.
- c. Best practicable control technologies should remain an important part of the water pollution prevention toolkit for both POTWs and non-POTWs to avoid either *status quo* water quality impairment or a race to the bottom. As explained in the NPDES permit writers’ manual for non-POTWs: “Congress saw the creation of a single national pollution control requirement for each industrial category, based on the best technology the industry could afford, as a way to reduce the potential creation of pollution havens and to attain a high-level water quality in the nation’s waters. Consequently, EPA’s goal in establishing effluent guidelines is to ensure

² Cf. *CPC Int’l, Inc. v. Train*, 540 F.2d 1329, 1341 (8th Cir. 1976) (noting that “legislative history of the [Clean Water] Act indicates that the term ‘practicable’ is to limit the use of available technology only where the additional technology necessary to achieve a marginal level of effluent reduction is wholly out of proportion to the cost realized”).

³ See H. Rep. No. 92-911, Report of the Committee on Public Works, U.S. House of Representatives, with Additional and Supplemental Views, Federal Water Pollution Control Act Amendments of 1972, at 87–88 (Mar. 11, 1972) (“The term ‘best practicable waste treatment technology’ covers a range of possible technologies. . . . Particular attention should be given to treatment and disposal techniques which recycle organic matter and nutrients within the ecological cycle. . . . In defining ‘best practicable waste treatment technology’ for a given case, consideration must be given to new or improved treatment techniques which have been developed and are now considered to be ready for full-scale application.”).

⁴ See Tenn. Comp. R. & Regs. 0400-40-04-.08(1)(a); Tenn. Comp. R. & Regs. 0400-40-04-.02(14) (defining “best practicable control technology currently available”); 33 U.S.C. § 1311(b)(1)(A); 33 U.S.C. § 1314(b)(1)(B) (listing “[f]actors relating to the assessment of best practicable control technology currently available” to “include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate”); 40 C.F.R. § 35.2005(b)(7)(iii) (defining “Best Practicable Waste Treatment Technology” as “[t]he cost-effective technology that can treat wastewater, combined sewer overflows and nonexcessive infiltration and inflow in publicly owned or individual wastewater treatment works, to meet the applicable provisions of . . . 40 CFR 122.44(d)—more stringent water quality standards and State standards”).

that industrial facilities with similar characteristics will meet similar effluent limitations representing the best pollution control technologies or pollution prevention practices regardless of their location or the nature of the receiving water into which the discharge is made.”⁵

2. Regardless of Congress’ decision to repeal the POTW-specific requirement for “best practicable” pollution control technologies, Tennessee’s program can and does include more stringent requirements than the federal program.

- a. Even if the “best practicable” technology will no longer be required for POTWs, POTWs must use advanced treatment to meet water quality standards and comply with permit-specific water quality-based effluent limits.⁶
- b. According to Clean Water Act’s legislative history, the concept of “secondary treatment” was intended to serve as a technology “floor”; Tennessee may, of course, supplement the minimum requirements of such federal legal “floors” by using its laws or individual permits to impose “any more stringent limitation . . . necessary to meet water quality standards [or] treatment standards.”⁷
- c. Notably, compliance with a technology-based effluent limitation does not excuse superseding requirements for states to develop and impose water quality standards. *See, e.g.*, 40 C.F.R. § 122.44(d).
- d. Tennessee has used its authority to expressly impose more stringent waste treatment requirements than the federal government has required.⁸ For example, Tennessee’s waterbodies must comply with the Clean Water Act, as explicitly recognized in Tenn. Comp. R. & Regs. 0400-40-10-.03(c)3, which requires pollution treatment that insures compliance with both permit terms and any more stringent effluent limitations required to meet water quality or treatment standards.

⁵ NPDES Permit Writers’ Manual, Chapter 5, Section 5.2.1, available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_05.pdf.

⁶ Clean Water Act § 301(b)(1)(C); 40 C.F.R. §§ 122.4(d), 122.44(d)(1)(vii)(A); *id.* § 123.25 (applicable to the states).

⁷ 33 U.S.C. § 1311(b)(1)(C); NPDES Permit Writers’ Manual, Chapter 5, available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_05.pdf. Likewise, the Administrator may prescribe requirements where no national standards exist. *See NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977); *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 586 (D.C. Cir. 1980).

⁸ *See* Tenn. Comp. R. & Regs. 0400-40-10-.03(c)3 (“All pollutants shall receive such treatment or corrective action so as to insure compliance with the terms and conditions of the issued permit and with the following, whenever applicable: more stringent effluent limitations may be required as deemed necessary by the Director (i) to meet any existing Federal laws or regulations, or (ii) to insure compliance with any applicable State water quality standards, effluent limitations, treatment standards, or schedule of compliance.”).

- e. Many other states continue to include some form of “best practicable waste treatment technology” requirements, definition, or reference in their water pollution regulations: *e.g.*, Alaska,⁹ Arkansas,¹⁰ Hawaii,¹¹ Illinois,¹² Kansas,¹³ Louisiana,¹⁴ Maine,¹⁵ Massachusetts,¹⁶ Mississippi,¹⁷ Missouri,¹⁸ Montana,¹⁹ Nebraska,²⁰ Nevada,²¹ New Jersey,²² North Carolina,²³ and South Carolina.²⁴
- f. Stricter effluent standards applicable to POTWs are envisioned by the Clean Water Act. *See* 33 U.S.C. § 1311(b)(1)(C). Technology sufficient to achieve these standards is promoted by the federal grant program under Section 201 of the Clean Water Act, 33 U.S.C. § 1281(g)(2)(A).

⁹ Alaska Admin. Code tit. 18, § 76.030.

¹⁰ Code Ark. R. 138.00.5-16.103.

¹¹ Haw. Code R. 11-55-15(b)(1)(B) (Weil).

¹² Ill. Admin. Code tit. 35, § 360.203(f)(4).

¹³ Kan. Admin. Regs. 28-16-110(a); Kan. Admin. Regs. 28-16-118(a)(1).

¹⁴ 33 La. Admin. Code Pt IX, 3705(A)(1).

¹⁵ Code Me. R. tit. 06-096 Ch. 524, § 2(a)(1)(ii); Code Me. R. tit. 06-096 Ch. 595, § A.

¹⁶ 314 Mass. Code Regs. 4.02 (“Highest and Best Practical Treatment (HBPT). The best practicable waste treatment technology for publicly owned treatment works that is the most appropriate means available on a regional basis for controlling the direct discharge of toxic and nonconventional pollutants to navigable waters. HBPT effluent limitation guidelines reflect the best performance technologies for a particular pollutant or group of pollutants that are economically achievable.”).

¹⁷ Code Miss. R. 11-6:4.1.

¹⁸ Mo. Code Regs. Ann. tit. 10, § 20-4.040.

¹⁹ Mont. Admin. R. 17.30.1203.

²⁰ 131 Neb. Admin. Code Ch. 4, 004.

²¹ Nev. Admin. Code 445A.688.

²² N.J. Admin. Code § 7:22-3.4.

²³ 15A N.C. Admin. Code 2B.0403.

²⁴ S.C. Code Ann. Regs. 61-9.125.3.

3. The proposed regulatory rescission cannot excuse POTWs from other requirements of Tennessee and federal law to achieve water quality standards on a timely basis.

- a. *See, e.g.*, Tenn. Code Ann. § 69-3-103(38) (defining “standard of performance” to reflect the greatest degree of effluent reduction that the commissioner determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants); Tenn. Comp. & Regs. 0400-40-05-.02 (same); Tenn. Comp. & Regs. 0400-40-03-.06 (confirming anti-degradation principal); Tenn. Comp. & Regs. 0400-40-05-.04 (prohibiting permits that do not “provide for compliance” with the Clean Water Act or Tennessee Water Quality Control Act); Tenn. Comp. & Regs. 0400-40-03-.02(4) (providing that, “In order to permit the reasonable and necessary uses of the Waters of the State, existing pollution should be corrected as rapidly as practicable, and future pollution prevented through the best available technology economically achievable or that greater level of technology necessary to meet water quality standards; i.e., modeling and stream survey assessments, treatment plants or other control measures); Tenn. Comp. & Regs. 0400-40-03-.05 (describing water quality criteria and providing that “discharges of sewage, industrial waste, and other waste shall receive the degree of treatment or effluent reduction necessary to comply with water quality standards”); Tenn. Comp. & Regs. 0400-40-05-.08 (outlining formulation of effluent standards and limitations).

4. We request TDEC include a concise statement explaining its position as to whether the anti-backsliding principal applies to this rulemaking.²⁵

- a. Under the Clean Water Act and Tennessee’s regulations, a permit cannot be renewed, reissued, or modified with effluent limitations which are less stringent than the comparable effluent limitations in the prior permit.²⁶
- b. If the “best practicable” requirement is rescinded, how will TDEC ensure that effluent limits based on treatment beyond “secondary standards” be maintained in the permits?

²⁵ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an administrative action is “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem”); *Fox*, 556 U.S. at 515-16 (“Sometimes . . . [an agency] must [provide a more detailed justification than what would suffice for a new policy created on a blank slate]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. . . . It would be arbitrary or capricious to ignore such matters. In such cases . . . [,] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *N.C. Growers’ Ass’n v. United Farm Workers*, 702 F.3d 755, 769–70 (4th Cir. 2012).

²⁶ 33 U.S.C. § 1342(o); Tenn. Comp. R. & Regs. 0400-40-05-.08(1)(j)(1).

- c. For example, how will TDEC ensure that nutrient pollution reduced based on “best practicable waste treatment technology” is not relaxed, even in waterbodies not subject to water quality-based effluent limits? For instance, in 2015, EPA made the following “critical finding” regarding nutrients in its review of Tennessee National Pollutant Discharge Elimination System (NPDES) permits: “Since all [wastewater treatment plants] discharge nutrients, it is recommended that TDEC modify their practices and conduct a [reasonable potential analysis] for nutrients in all POTW permits. For those facilities where [reasonable potential] exists for nutrients, TDEC should establish a plan for assigning [water quality-based effluent limitations] in the permits within a certain timeframe (e.g., two permit cycles).”²⁷

5. The “excessively high cost of implementation” referenced in TDEC’s stated basis for repealing the rule requires additional explanation.²⁸ In particular, given the advancements in treatment and the advances that Tennessee POTWs have made beyond mere “secondary treatment” over the last 40 years, the Department’s claim that the rule is economically burdensome is unsubstantiated.

- a. According to EPA, more than 30% of wastewater treatment facilities provide greater levels of treatment than secondary treatment,²⁹ which shows that advanced treatment is not only technologically but also economically feasible.
- b. Of the 411 POTWs in Tennessee,³⁰ EPA has found that representative POTW permit limits are “largely water quality-based” and in “nearly all cases the POTW permit limits for [biochemical oxygen demand], [total suspended solids] and pH are more stringent than required by secondary

²⁷ *Final Region 4 NPDES Permit Quality Review Tennessee*, at 16 (EPA 2015), available at https://www.epa.gov/sites/production/files/2016-08/documents/final_tn_pqr_report.pdf.

²⁸ *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (holding that “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy” of an agency).

²⁹ *Primer for Municipal Wastewater Treatment Systems* (EPA 2004), available at <https://www.epa.gov/sites/production/files/2015-09/documents/primer.pdf>. “Advanced treatment technologies can be extensions of conventional secondary biological treatment to further stabilize oxygen-demanding substances in the wastewater, or to remove nitrogen and phosphorus. Advanced treatment may also involve physical-chemical separation techniques such as adsorption, flocculation/precipitation, membranes for advanced filtration, ion exchange, and reverse osmosis. In various combinations, these processes can achieve any degree of pollution control desired. As wastewater is purified to higher and higher degrees by such advanced treatment processes, the treated effluents can be reused for urban, landscape, and agricultural irrigation, industrial cooling and processing, recreational uses and water recharge, and even indirect augmentation of drinking water supplies.”

³⁰ *Final Region 4 NPDES Permit Quality Review Tennessee*, at 3 (EPA 2015), available at https://www.epa.gov/sites/production/files/2016-08/documents/final_tn_pqr_report.pdf.

treatment standards.”³¹ In other words, Tennessee seems to out-perform even the national average, again showing that advanced treatment is not only technologically but also economically feasible.

Thank you, again, for the opportunity to comment on this proposed rulemaking. Please let us know if you have any questions.

Sincerely,



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³¹ *Id.* at 9, 25.