CLEAN WATER EXPECTED IN EAST TENNESSEE
HARPETH CONSERVANCY
OBED WATERSHED COMMUNITY ASSOCIATION
TENNESSEE CHAPTER OF THE SIERRA CLUB
TENNESSEE CLEAN WATER NETWORK
TENNESSEE ENVIRONMENTAL COUNCIL
TENNESSEE RIVERKEEPER

July 25, 2019

BY E-MAIL

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

Re: Comments on Notice of Proposed Rulemaking Hearing with respect to Rule Chapters 0400-40-05, Permits, Effluent Limitations, and 0400-40-06, State Operating Permits, both dated May 2, 2019

Request for a Concise Statement of the Principal Reasons under Tennessee Code Annotated ("T.C.A.") § 4-5-205(b)

Dear Mr. Janjić:

Clean Water Expected in East Tennessee, Harpeth Conservancy, Obed Watershed Community Association, Tennessee Chapter Of The Sierra Club, Tennessee Clean Water Network, Tennessee Environmental Council, Tennessee Riverkeeper (collectively, "Commenters")[1] submit the following comments on the Tennessee Department of Environment and Conservation ("TDEC")'s Notice of Proposed Rulemaking for the Board of Water Quality, Oil, and Gas to amend Rule Chapter 0400-40-05 Permits, Effluent Limitations and Standards, or National Pollutant Discharge Elimination System ("NPDES") permits, and Rule Chapter 0400-40-06 State Operating Permits ("SOPs"), both dated May 2, 2019. Commenters jointly represent thousands of Tennesseans concerned with protecting clean water.

[1] Commenters (and especially Harpeth Conservancy, the principal author of these comments) acknowledge the substantial contributions of Matthew LaRue, a 2020 candidate for Juris Doctor at the Vanderbilt University School of Law, to these comments and thank him for his assistance with them. Responsibility for these comments remains with Commenters.

Further, please consider this letter a request for a concise statement of the principal reasons under T.C.A. § 4-5-205.[2]

The Purpose of the Tennessee Water Quality Control Act

Most importantly, Commenters urge that the proposed rules must recognize and implement the overriding purpose of the Tennessee Water Quality Control Act ("TNWQCA"),[3] the authority under which the new regulations are proposed:

(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.

(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.

(c) Moreover, ***an additional purpose of this part is to enable the state to qualify for full participation in the national pollutant discharge elimination system (NPDES)*** established under § 402 of the Federal Water Pollution Control Act, Public Law 92-500, codified in 33 U.S.C. § 1342.[4]

Through these requirements, the TNWQCA implements and incorporates the Clean Water Act's ("CWA") primary objectives by recognizing that it is the State of Tennessee's responsibility to prevent, reduce, and eliminate pollution;[5] that the integrity of Tennessee's waters is paramount;[6] and that Tennessee's full compliance with the NPDES is an integral part of keeping its waters free from pollution.[7]

TDEC, in response to comments on proposed changes to water quality standards, antidegradation and aquatic resource alteration permitting rules,[8] invoked its obligation that it cannot and does not issue permits that cause pollution alone or in combination with other conditions.[9] TDEC

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[2] "Upon adoption of a rule, the agency, if requested to do so by an interested person prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principal reasons for its action." T.C.A. § 4-5-205(b).
[3] T.C.A. § 69-3-101 *et seq*., the Tennessee Water Quality Control Act of 1977.
[4] T.C.A. § 69-3-102 (emphasis added).
[5] *See* Federal Water Pollution Control Act, 33 U.S.C. § 1251(b) (2018) (Commonly known as the CWA since it was amended in 1977) (CWA § 101 *et seq.*); T.C.A. § 69-3-102(a).
[6] *See* 33 U.S.C. § 1251(a); T.C.A. § 69-3-102(b).
[7] *See* 33 U.S.C. § 1342; T.C.A. § 69-3-102(c).
[8] https://www.tn.gov/content/dam/tn/environment/boards/documents/board-of-water-quality,-oil-and-gas/october/0400-40-03_and_0400-40-04%202018_Amendments_Redline_10-09-2018.pdf. *See, e.g.*, response to comments 168, 195, and 214, and elsewhere.
[9] T.C.A. § 69-3-108(g).

must explain how the proposed rules are not in contradiction to this statutory mandate in light of the many roll-backs in environmental protections in these proposed changes.

The Relationship Between SOPs and NPDES Permits

Commenters have significant concerns about how State Operating Permits ("SOPs") and NPDES permits will interreact following the simultaneous amendment to Rule 0400-40-05 and the proposed new Rule 0400-40-06. These concurrent proposals by TDEC explicitly and completely sever the rules governing NPDES permits and SOPs, and the application thereof.[10]

Neither the proposed amendment to 0400-40-05 nor TDEC's proposed new Rule 0400-40-06, governing SOPs, elaborate on the purpose of this proposed divide. The only reasoning offered by TDEC is that "The Department has determined that both the NPDES individual permit program and the SOP program would benefit from having separate rule chapters that better address the specific requirements of each program."[11] TDEC must explain these benefits.

SOPs, under Rule 0400-40-06, would authorize the operation of ***non-discharging*** treatment works and sewerage systems. However, there are still there are still specific ***restrictions on discharges*** from said treatment works or sewerage systems including "no discharge to any surface waters or to any location where it is likely to enter surface waters, except as separately authorized by an NPDES permit."[12] In effect, the division of NPDES permits from SOPs unnecessarily complicates the process and could lead to confusion when NPDES permits are still required.

Because, as noted, SOPs actually contemplate the discharge of water, which must be separately permitted, it is not appropriate for the proposed amendments to suggest that compliance with the NPDES system is excused.

Further, unless TDEC implements regulations requiring the inclusion of SOPs to the electronic filing of NPDES permits, the adequacy of the information submitted to the EPA will be diminished. This directly conflicts with federal regulations for the NPDES[13] and defeats the purposes of the CWA and the TNWQCA.[14]

[10] Notice of Rulemaking Hearing [hereinafter Rulemaking], 0400-40-05-.01 (proposed May 2, 2019). The proposed text now reads, "This chapter governs individual National Pollutant Discharge Elimination System (NPDES) permits only." *Id*. Note that the proposed amendment also changes the title from "Permits, Effluent Limitations and Standards" to "Individual National Pollutant Discharge Elimination System (NPDES) Permits."
[11] Rulemaking, 0400-40-06 (proposed May 2, 2019).
[12] Rulemaking, 0400-40-05-.05(4)(b).
[13] *See* regulatory requirements for "complete" records. 40 C.F.R. § 127.23(c)(3), *infra* note 21.
[14] *See* 33 U.S.C. § 1251(a)-(b), T.C.A. § 69-3-102(a)-(c), *supra* notes 3 to 8, and surrounding text.

Electronic NPDES Reporting Requirements

A central theme for the amendment to Rule 0400-40-05 is the implementation of an electronic reporting system in order to comply with federal regulations requiring electronic NPDES submissions beginning December 21, 2020.[15] However, the proposed amendment gives scant guidance and does not appear to implement any new system beyond referencing Rule 0400-01-40, TDEC's regulation for electronic reporting, and stating that "The Commissioner may make forms."[16]

TDEC must implement a more rigorous system and actively monitor the transition to electronic reporting in order to avoid getting backlogged, ensure the quality of the submitted NPDES information, and comply with the NPDES.[17] Further, TDEC needs to ensure a smooth transition to electronic reporting in order to maintain the integrity of Tennessee's waters.[18]

Under 40 C.F.R. § 127.23:

(a) Authorized state, tribe, and territory NDES programs must electronically transfer all NPDES program data that supports electronic reporting (e.g., facility information and permit information such as limits, permitted features, and narrative conditions) to EPA ***three months prior*** to the electronic reporting start dates in Table 1 in § 127.16(a) and maintain updates thereafter. These electronic data transfers must be ***timely, accurate, complete, and consistent.***

(b) According to the schedule set forth in § 127.16, the authorized NPDES program must electronically transfer to EPA the minimum set of NPDES data (as specified in Appendix A to this part).[19] These electronic data transfers to EPA must be ***timely, accurate, complete and consistent.***

The addition of paragraph (2) to Rule 0400-40-10.1 appears to require the submission of forms, but states only that "The Commissioner ***may*** make these forms available electronically and, if submitted electronically, then the electronic submission shall comply with the requirements of 0400-01-40." The implementation of electronic reporting will soon become mandatory and in

[15] *See* 40 C.F.R. § 127.16 (2019); Rulemaking, 0400-40-05-.07(1)(d) ("The Commissioner ***may*** make forms for making reports and submitting monitoring results available electronically and, if submitted electronically, that electronic submission shall comply with the requirements of Chapter 0400-01-40." (emphasis added)).
[16] *See* Tenn. Comp. R. & Regs. 0400-01-40-.01 *et seq*. (2015); Rulemaking, 0400-40-05-.07(1)(d).
[17] *See* T.C.A. § 69-3-102(c); 40 C.F.R. § 127.16. *See also* 40 C.F.R. § 127.22. "States, tribes, and territories that have received authorization from EPA to implement the NPDES program have the responsibility for the information that they electronically transfer to the EPA. Therefore, authorized states, tribes, and territories that electronically transfer data to EPA must use reasonable quality assurance and quality control procedures to ensure the quality of the NDES information." *Id*.
[18] See T.C.A. § 69-3-102(b).
[19] There is a proposed rulemaking on 40 C.F.R. § 127, App. A – Minimum Set of NPDES Data. *See* 84 Fed. Reg. 18200 (Apr. 30, 2019) (The proposed rule seeks to update, correct, and clarify reporting requirements).

order to comply with federal guidelines, the Department and the Commissioner must make electronic forms available and make them available soon.

The necessity of a smooth transition to electronic reporting can be understood by analogizing electronic reporting for NPDES with the overflow of problems in the listings required under CWA §303(d). The federal regulations governing the electronic reporting of NPDES data are designed to ensure "Proper collection, management, and sharing of the data and information."[20] As such, timely,[21] accurate,[22] complete,[23] and consistent[24] electronic reporting is a must, and Tennessee needs a more rigorous plan than a single paragraph that briefly discusses electronic reporting and what the Commissioner "may" do.

NPDES Reporting Requirements and TDEC's Distinction between Overflows and Releases

All pollution from points other than designated NPDES permit outfalls has been—and should continue to be—prohibited by Tennessee's regulations implementing the federal Clean Water Act and the state Water Quality Control Act, whether or not the pollution directly and immediately reaches our waterways. Such pollution is prohibited because (1) untreated waste can contain viruses, pathogens, or toxics harmful to human health and the environment,[25] (2) as explained in the attached brief filed by the United States in a case litigated in the Middle District of Tennessee, both "overflows and spills [*i.e.*, the release of pollution that does not reach waters] indicate improper operation and maintenance" of waste treatment systems,[26] and (3) properly designed and operated systems are essential to a functioning NPDES permitting regime.[27]

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[20] 40 C.F.R. § 127.1(d).

[21] "Timely" requires NPDES programs to electronically transfer the minimum set of NPDES data to the EPA within 40 days of completed activity or within 40 days of receiving an NPDES report from a permittee, facility, or other entity subject to this part. *See* 40 C.F.R. § 127.23(c)(1); *See also* § 127.1(a) (scope of NPDES requirements).

[22] "Accurate" requires that 95% or more of the NPDES data set in the EPA's data system are identical to the actual information on the copy of record (e.g., permit, notice, waiver, certification, report, enforcement order). *See* 40 C.F.R. § 127.23(c)(2).

[23] "Complete" requires that 95% or more of submissions for NPDES data groups are available in the EPA's national NPDES data system. *See* 40 C.F.R. § 127.23(c)(3).

[24] "Consistent" requires that data electronically submitted to the EPA, "by direct entry of information, data transfers from one data system to another, or some combination thereof, into EPA's designated national NPDES data system is in compliance with EPA's data standards as set forth in this part and in a form and measurement units which are fully compatible with EPA's national NPDES data system." *See* 40 C.F.R. § 127.23(c)(4).

[25] EPA, Sanitary Sewer Overflow (SSO) Frequent Questions, https://www.epa.gov/npdes/sanitary-sewer-overflow-sso-frequent-questions.

[26] *See* Attachment 1, Amicus Curiae Brief of the United States of America at p.11, *Harpeth River Watershed Association v. City of Franklin*, No. 3:14-cv-1743 (M.D. Tenn. Feb. 18, 2015) [hereinafter Amicus Brief] (setting forth legal framework for regulating pollution whether or not it reaches waters, distinguishing "what is necessary to require a NPDES permit (a discharge into waters of the United States . . .) with the scope of the terms that can be implemented through that permit)"). *Cf. S.D. Warren Co. v. Maine Bd. of Envtl. Prot*., 547 U.S. 370, 375 (2006) (reasoning that term "discharge" undefined, and only where it was used without qualification was it limited to a discharge of pollutants of navigable waters, and the term "discharge" must be broader, or else it would be "superfluous").

[27] 40 C.F.R. § 122.41(e) (requiring the "proper operation and maintenance" condition to be incorporated into all NPDES permits).

TDEC proposes to differentiate "releases" of pollution that do not reach waters from "overflows" (that is, the unpermitted addition of pollutants to waters other than through permitted outfalls).[28] In conjunction with this proposed change, TDEC would require more proof and fewer consequences for releases.[29] We object to TDEC's proposal that "releases" of pollution would be NPDES permit violations only when caused by improper operation and maintenance "based on the totality of the circumstances."[30]

All spills of pollution other than from a permitted outfall are necessarily evidence of improper operation and maintenance. By requiring a "totality of the circumstances test" and allowing releases in conjunction with ostensibly "proper" operation and maintenance, TDEC's proposal undermines the NPDES permitting program, which imposes strict liability to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.[31] The context of any given spill may be appropriate for determining the remedy for a NPDES permit violation, but not whether there is a violation.[32]

Similarly, TDEC's proposed new category of "releases" gives too much discretion to the permittee and does not address the fact that permittees would be incentivized to avoid reporting overflows, which constitute significant permit violations.[33] TDEC's explanation, in part, that the current system is "making us look bad"[34] is an insufficient justification.

Finally, TDEC's introduction to the proposed amendments to Rule 0400-40-05 discusses how the rule is being updated to reflect the EPA's revised reporting requirements – specifically, the electronic reporting requirements. Under 40 C.F.R. § 127.16, all NPDES permittees must electronically submit, *inter alia*, "sewer overflow event reports"[35] consistent with 40 C.F.R. §

[28] Definitions, Proposed Rule 0400-40-05-.02(28), (31), (76), (77), (100).
[29] "Releases would constitute permit violations only when caused by improper operation and maintenance." Proposed Rule Preamble, https://www.tn.gov/content/dam/tn/environment/water/water-public-notices/ppo_water_2019-05-02-rulemaking-hearing-0400-40-05-amendments-redline.pdf.
[30] Proposed Rule 0400-40-05-.07(2)(m).
[31] Congress included monitoring and reporting requirements in the Clean Water Act to "keep enforcement actions simple and speedy." *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 451–53 (D. Md. 1985) (granting motion for summary judgment on liability for all incidents not allegedly excused as upsets). The Clean Water Act's legislative history informs that, "One purpose of these requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S.Rep. No. 92–414 (1972). *See also* 44 Fed.Reg. 32,854, 32,863 (June 7, 1979) ("Congress intended that prosecution for permit violations be swift and simple.").
[32] *See* 33 U.S.C. § 1319(d) (listing factors for determining amount of civil penalties, including seriousness of violation and good-faith efforts to comply with applicable requirements); 40 C.F.R. § 122.41(n)(3) (providing that burden to establish affirmative defense of "upset" rests with permittee).
[33] *Cf. United States v. STABL, Inc.*, 800 F.3d 476, 485 (8th Cir. 2015) (agreeing with Third Circuit that evidence of overreporting can be relevant but party asserting laboratory error as a defense has "heavy burden" because " [t]o hold otherwise would give permit holders an incentive to employ lax laboratory techniques").
[34] Except of Video, Tennessee Board of Water Quality Oil & Gas (Apr. 16, 2019), https://web.nowuseeit.tn.gov/Mediasite/Play/b71dcf5e69744731abb83e6088b2d5df1d. *See also id.* ("It used to that everything was reported as an overflow and it made our municipalities look worse, so I'm really excited about this new language.").
[35] 40 C.F.R. § 127.16(b) (2019) ("NPDES permittees, facilities and entities subject to this part must electronically submit the information listed in Table 1 in § 127.16(a) in compliance with this part and 40 CFR part 3 (including, in all cases, subpart D to part 3)."); 40 C.F.R. § 127.16 Table 1 ("Sewer Overflow Event Reports [40 CFR 122.41(l)(6) and (7)] … December 21, 2020").

122.41.[36] Essentially, as of December 21, 2020, all NPDES permittees are required to "report ***any*** noncompliance which may endanger health or the environment" within twenty-four hours.[37] This includes sanitary sewer overflows and must include all unpermitted "releases" as well.

All unpermitted noncompliance must be reported under the NPDES program; overflows, regardless of whether they reach waters and whether they originated from a publicly owned treatment work or an industrial discharger, are evidence of noncompliance with the standard operation and maintenance requirements in NPDES permits. TDEC should avoid proposed changes that create ambiguity on this point in order to fulfill the Water Quality Control Act's commitment "to enable the state to qualify for full participation in the national pollutant discharge elimination system (NPDES)."[38]

The Definition of New or *Increased* Discharge

TDEC's new defined term, "new or increased discharge,"[39] violates the CWA and the TNWQCA by creating an alternative, ambiguous term that will not protect the public health or welfare and will allow polluters to circumvent the permit requirements under Tennessee Law.[40] This deviation from "expanded" to "increased" has been part of a recent pattern throughout TDEC's amendments.[41]

CWA § 303(c)(2)(A) governs the state revision of water quality standards and requires that new standards "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter."[42] Further, the federal antidegradation policy and implementation methods under 40 C.F.R. § 131.12 state that "Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[43] Further, "Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located."[44]

In compliance with the CWA and its corresponding regulations, Tenn. Code § 69-3-108(e) states that "Applicants for permits that would ***authorize a new or expanded wastewater discharge*** into

[36] 40 C.F.R. § 122.41(l)(6)(i) (2019) ("The permittee shall report any noncompliance which may endanger health or the environment."). "Sanitary sewer overflows" are one of the noncompliance events listed. *See* 40 C.F.R. § 122.41(l)(6)-(7).
[37] *See* 40 C.F.R. § 127.16(b); 40 C.F.R. § 122.41(l) (emphasis added).
[38] *See* T.C.A. § 69-3-102(c).
[39] Rulemaking, 0400-40-05-.02(57).
[40] *See* 33 U.S.C. § 1313(c); T.C.A. § 69-3-108(e).
[41] *See, e.g.,* Rulemaking, 0400-40-03-.04 (19) (to be codified at 0400-40-03-.04 *et seq*.) (effective Sept. 11, 2019).
[42] 33 U.S.C. § 1313(c)(2)(A) (2018). "Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purpose, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."
[43] 40 C.F.R. § 130.12(1) (2019).
[44] 40 C.F.R. § 130.12(2)(ii).

surface waters shall include in the application consideration of alternatives."[45] However, TDEC's new term omits "expanded" from the permit requirements and replaces it with "increased" without clarifying any distinction between the two terms.[46]

The switch to increased discharge was seen previously, and heavily in the amendments to Rule 0400-40-03, governing water quality criteria.[47] There, just as in the proposed amendments to Rule 0400-40-05, the most plausible reason for this change is to allow those who apply for permits, whether an Aquatic Resource Alteration Permit ("ARAP") or an NPDES permit, to impermissibly bypass Tennessee's requirement to consider alternatives.[48] This not only violates the TNWQCA's section on permits, it is in direct contradiction to the CWA's and the TNWQCA's core purposes.[49]

Finally, TDEC uses and applies the term "new or expanded" to "wastewater discharge" in proposed Rule 0400-40-06-.10(1)(a) and to "reuse of reclaimed wastewater" in -(3)(a) but does not apply the term as required to surface waters as required by Tenn. Code § 69-3-108(e). TDEC must explain why it can employ the concept of "expanded" discharge in these contexts, but not where statutorily required in § 69-3-108(e).

The Omission of Volume

Under TDEC's proposed amendments to the NPDES permit application procedures of Rule 0400-40-05-.5, the consideration of "volume" has been removed inexplicably from the application:

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[45] Under the permit application procedures of Rule 0400-40-05-.05(3), the new regulations would require applicants who are proposing a new or increased discharge of pollutants to surface waters to include in the application the consideration of alternatives. Alternatives under § 69-3-108(e) include, but are not limited to, land application and beneficial reuse of the wastewater. Alternatives under Rule 0400-40-05-.05(e) include, but are not limited to, land application, beneficial reuse of the wastewater, and, for proposed increased discharges, *reduction of inflow and infiltration*. What if applicants only consider inflow and infiltration?

[46] Rule 0400-40-05-.02(57). A "new or increased discharge" is a new discharge of pollutants to waters of the state or an increase in the authorized loading of a pollutant above either (1) numeric effluent limitations established in a National Pollutant Discharge Elimination System permit for that discharge, or (2) if no such limitation exists, the actual discharges of that pollutant.

[47] *See* Rulemaking, 0400-40-03-.01 *et seq*. (to be codified at 0400-40-03-.01 *et seq*.) (effective Sept. 11, 2019).

[48] *See* T.C.A. § 69-3-108(e).

[49] *See* 33 U.S.C. § 1251(a)-(b), T.C.A. § 69-3-102(a)-(c), *supra* notes 3 to 8, and surrounding text. Commenters incorporate by reference the comments by Harpeth Conservancy, Obed Watershed Community Association, Public Employees For Environmental Responsibility, Richland Creek Watershed Alliance, Tennessee Chapter Of The Sierra Club, Tennessee Clean Water Network, Tennessee Conservation Voters, Tennessee Environmental Council, and Tennessee Scenic Rivers Association, Southern Environmental Law Center, The Nature Conservancy, and Mr. Brian Paddock, all dated on or about July 27-31, 2018 to proposed changes to Tennessee's water quality standard, antidegradation, and aquatic resource alteration permit regulations, Tenn. Comp. R. & Regs. Chapters 0400-40-03, 0400-40-04, and 0400-04-07. With respect to Rule 0400-40-05-.08(c), Commenters incorporate by reference the comments dated January 25, 2018 by Harpeth Conservancy, Sierra Club Tennessee Chapter, Southern Environmental Law Center, Tennessee Clean Water Network, Tennessee Conservation Voters, and Tennessee Environmental Council. With respect to proposed Rule Chapter 0400-40-06, State Operating Permits, dated May 2, 2019, Commenters incorporate by reference their comments of the same date.

> Completed applications for new ~~source~~ or increased discharges, or for substantial changes in the nature, ~~volume~~ or frequency of existing permitted discharges shall be submitted ….[50]

This leads to an inference that permits (and permit applications) for new or increased discharges do not necessitate the inclusion or consideration of volume.[51] However, the TNWQCA and the regulations implementing the water quality standards of the CWA thoroughly contemplate the necessity of considering volume.[52]

To comply with the CWA's state permitting program under the NPDES, the EPA is instructed to approve state programs unless it determines that the state does not have adequate authority "to insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to retirement standards …"[53] Federal regulations also specifically require the monitoring of volume.[54]

The TNWQCA has also adopted similar requirements under its section on permits:

> (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:
> …
> (3) ***The increase in volume*** or strength of any wastes in excess of the permissive discharges specified under any existing permit[55]

TDEC's proposed amendments to Rule 0400-40-05 strike volume from the requirements, regardless of the obvious and impermissible contradiction between the proposed regulations and Tennessee law and federal regulations. Further, the omission of volume from NPDES permits will directly undermine the purposes of the CWA and the TNWQCA by diminishing permitting procedures in a way that could lead to an escalation of unregulated pollution by permittees who believe that they don't need to consider volume, as well as a loophole that authorizes the unchecked amplification of pollutant discharges into Tennessee's waters.[56]

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[50] Rulemaking 0400-40-05-.05(4).

[51] *See also* Rule 0400-40-05-.06 Notice and Public Participation. ("For an individual application for a new or ~~expanded~~ increased discharge, the applicant shall notify the public of the application …."); Rule 0400-40-05-.08 (2) Effluent Limitations and Standards. ("The discharge of any pollutant more frequently than or at a level in excess of that ~~identified and~~ authorized by the permit shall constitute a violation of the terms and conditions of the permit.").

[52] *See* T.C.A. § 69-3-108(b)(3); 40 C.F.R. § 122.44; 40 C.FR. § 125.67.

[53] 33 U.S.C. § 1342(b)(8).

[54] *See, e.g.,* 40 C.F.R. § 122.44(i)(1)(ii) (monitoring requirements).

[55] T.C.A. § 69-3-108(e).

[56] *See* 33 U.S.C. § 1251(a)-(b), T.C.A. § 69-3-102(a)-(c), *supra* notes 3 to 8, and accompanying text.

Waters of the State

The ambiguity created by "new or increased discharges" is supplemented by the definition's focus on discharges to "waters of the state," rather than "waters of the United States." Full compliance with the NPDES demands that the jurisdiction reach all waters of the United States and it is unclear whether waters of the state meets this requirement. [57] TDEC needs to clarify the scope of waters of the state, particularly in the context of the NPDES, because there may be a set of circumstances where a loophole to escape compliance with the NPDES is created.

Under the TNWQCA, "wet weather conveyances" are an alternative to "waters of the state,"[58] and wet weather conveyances can be altered without notice or approval.[59] However, Tenn. Code. § 69-3-108(q) contemplates the inclusion of wet weather conveyances in the NPDES. TDEC must clarify its position on this issue.

TDEC's Reasonable Contemplation

The proposed Rules would add the requirement that, for each permit application, TDEC "shall prepare a rationale that includes or considers as appropriate: Identification of outfalls, pollutants, and the amount of pollutants disclosed by the permit applicant and within the Department's reasonable contemplation." Proposed Rule 0400-40-05-.06(3)(g). We understand that this provision is related to Section 69-3-108(v) of the Tennessee Code,[60] which provides, in relevant part:

> (1) Compliance with a national pollutant discharge elimination system (NPDES) permit issued under this section shall be deemed compliance [with enumerated provisions of the Tennessee Water Quality Control Act] except for any standard imposed under Section 307 of the Federal Water Pollution Control Act[61] for a toxic pollutant injurious to human health.
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> (2) Compliance includes the discharge of pollutants for which no standard or limit is set forth in the permit if: (A) The permit holder complies with applicable reporting and disclosure requirements under this part; and (B) The discharge of pollutants is disclosed to the department in such a manner that the discharge is within the reasonable

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[57] *See, e.g.,* 33 U.S.C. § 1342(b) (guidelines for the state implementation of the NPDES that uses "navigable waters" as the jurisdictional term); 33 U.S.C. § 1362 (7) (defining navigable waters as waters of the United States).
[58] *See* Tenn. Code §§ 69-3-103(45), 69-3-103(46).
[59] *See* Tenn. Code § 69-3-108(q)(1) ("The alteration of a wet weather conveyance, as defined by § 69-3-103, by any activity is permitted by this subsection (q) and shall require no notice or approval; provided, that it is done in accordance with the following conditions: …").
[60] *See* Preamble to Proposed Changes to Chapter 0400-40-05, page 3 https://www.tn.gov/content/dam/tn/environment/water/water-public-notices/ppo_water_2019-05-02-rulemaking-hearing-0400-40-05-amendments-redline.pdf (providing that rationales for draft permits should "include a list of pollutants and outfalls disclosed by the applicant and within the Department's reasonable contemplation at the time of permit issuance as provided by T.C.A. § 69-3-108(v)").
[61] 33 U.S.C. § 1317 (Toxic and pretreatment effluent standards).

contemplation of the department at the time of issuance of the final permit.

Tenn. Code Ann. § 69-3-108(v). This statute was added to the Tennessee Water Quality Control Act in 2018[62] and is akin to the federal Clean Water Act's "permit shield."[63]

As with its federal counterpart, Tennessee's new "permit shield" requires prospective permittees to disclose information to facilitate meaningful oversight by TDEC. *See Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., MD*, 268 F.3d 255, 268 (4th Cir. 2001) ("Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process, whether spills or otherwise, do not come within the protection of the permit shield.").

We support the proposed Rule's contribution to transparency: the public should know what permittees are seeking to discharge into our shared waterways and how TDEC chooses to limit or regulate such pollutants. Therefore, in order to justify the protection provided by the permit shield in exchange for permittees' disclosures, TDEC should clarify proposed Rule 0400-40-05-.06(3)(g) to ensure permit writers understand TDEC's duty to evaluate pollutant disclosures.

Specifically, because the permit shield covers the discharge of pollutants "for which no standard or limit is set forth in the permit," the draft permit rationale should expressly require the Department to explain why disclosed pollutants are not assigned standards or limits. A permit applicant should not be incentivized to expand the scope of their permits; it should be clear from the language of proposed Rule 0400-40-05-.06(3)(g) that it would be insufficient to recite the list of pollutants disclosed by the permittee.

We recommend substituting the following for proposed Rule 0400-40-05-.06(3)(g):

- "Identification of outfalls, pollutants, and the amount of pollutants disclosed by the permit applicant and the basis for declining to set a standard or limit for such outfalls, pollutants, or volumes."[64]
- Or, "Identification of outfalls, pollutants, and the amount of pollutants disclosed by the permit applicant and the basis for finding the outfall and pollutant discharge within the Department's reasonable contemplation."

Effluent Limitations and Standards

TDEC must explain the need for and intent of the changes to Rule 0400-40-05-.08(1)(h), which sets out a new schedule of compliance. TDEC has not explained how the proposed amendments

[62] 2018 Tennessee Laws Pub. Ch. 845 (effective Apr. 26, 2018).
[63] 33 U.S.C. § 1342(k).
[64] *See* Tenn. Com. R. & Regs. 0400-40-05-.02(77) [Proposed Renumbered Rule 0400-40-05-.02(75)] (defining permit rationale as the "technical, regulatory, and administrative basis for an agency's permit decision").

are different from the present rule and why this change is appropriate, particularly in light of the overriding purposes of the TNWQCA and the CWA.

Performance Standards and Effluent Limitations

TDEC's amendments to Rules 0400-40-05-.09 and 0400-40-05-.10, regarding Technology-Based Effluent Limitations ("TBELS") and Water Quality-based Effluent Limitations ("WQBELs"), significantly limit the effluent limitations for NPDES permits in violation of the CWA and the TNWQCA, eroding the purposes of both acts.[65]

Effluent limitations, standards, and other permitting controls, as required by the CWA,[66] are established under federal regulation:

> ***[E]ach NPDES permit shall include*** conditions meeting the following requirements when applicable.
>
> (a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, … on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter.
>
> …
>
> (d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitation guidelines standards under sections 301, 304, 306, 307, 318, and 405 of CWA as necessary to:
>
> (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.
>
> (i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.[67]

Similarly, the TNWQCA implements effluent limitations by ***requiring*** that NPDES permits ***include:***

> (4) In addition, the permits shall include:
>
> (A) The most stringent effluent limitations and schedules of compliance, either promulgated by the board, required to implement any applicable water quality standards, necessary to

[65] *See* 33 U.S.C. § 1311; T.C.A. § 69-3-108(g).
[66] *See, e.g.,* 33 U.S.C. § 1311.
[67] 40 C.F.R. § 122.44 (2019).

> comply with an area-wide waste treatment plan, or necessary to comply with other state or federal laws or regulations[68]

However, TDEC's proposed amendments weaken the current framework by rending a significant portion of TBELs from the rule and leaving only a questionable application of WQBELs as a backup. Completely deleting TBELs from the consideration does nothing to foster technological improvements, and the rule, as written, pays far more attention to concentration requirements than technology requirements, which contradicts the purposes of TBELs under the CWA,[69] and rolls back the implementation of effluent limitations, thus clashing with the purposes of the CWA and the TNWQCA.[70]

TDEC needs to explain why the former Rule 0400-40-05-.09 3., regarding non-discharging systems, is completely deleted. The specific TBEL requirements that remain in the rule will leave many pollutants uncovered. For example, facilities that treat municipal and/or domestic wastewater still need to be covered and limited "in terms of BOD5 and other pollutants such as NH3-N, NO3-N, and fecal coliform as necessary."

The proposed amendments to Rule 0400-40-05-.10(1) create confusion when WQBELs apply. However, this ambiguity is contrary to the purpose and use of WQBELs in both the CWA and the TNWQCA. WQBELs are "a hard backstop" for the maintenance of water quality.[71] TDEC's amendments on the implementation of WQBELs through the NPDES work in opposition to the overarching purposes of the CWA and the TNWQCA by implementing a policy contrary to that of the NPDES guidelines, and a policy that threatens Tennessee's water quality by directly diminishing water quality controls.[72]

At the same time, TBEL requirements are now completely removed by the deletion of the third paragraph which discussed best available technology ("BAT") and other treatment requirements.

TDEC needs to explain why Rule 0400-40-05-.10(3) has been completely stricken. Subsection (3) previously required effluent limitations to accompany the application of treatment processes greater than BAT or conventional unit treatment.[73] This effluent limitation would serve as another WQBEL backstop and by striking it from the rule, the Department greatly diminishes the efficacy of WQBELs and the legitimacy of TBELs. The proposed rule states that WQBELs shall be consistent with an established total maximum daily load ("TMDL") but gives no discussion for what requirements are in place for when there is no TMDL.

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[68] T.C.A. § 69-3-108(4)(A).
[69] *See* 33 U.S.C. § 1313(b)(2)(E).
[70] *See* 33 U.S.C. § 1251(a)-(b), T.C.A. § 69-3-102(a)-(c), *supra* notes 3 to 8, and surrounding text.
[71] *See, e.g.,* 40 C.F.R. § 131.12(a)(1), Antidegradation policy and implementation methods ("The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following: (1) existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained.").
[72] *See* 33 U.S.C. § 1251(a)-(b), T.C.A. § 69-3-102(a)-(c), *supra* notes 3 to 8, and surrounding text; 40 C.F.R. § 122.44(a) & (d).
[73] *See* Rule 0400-40-05-.10(3). The proposed rule completely strikes out: "When a treatment process greater than BAT or conventional unit treatment processes is required by application of these rules, a set of effluent limitations will be required in any permit which will completely describe expected results of such treatment process." *Id*.

Further, the proposed changes violate the framework of the CWA, to clean up the nation's waters with the goal of removing waters from a state's list of impaired waters. The CWA envisions a series of more stringent discharge limits until the waterbody in question meets water quality standards and the waterbody can be removed from the 303(d) list.

At a minimum, all dischargers must employ technology based effluent limits ("TBELs").[74] If these are insufficient, then water quality-based effluent limits ("WQBELs") must be imposed.[75] This can be done through a TMDL,[76] but TDEC cannot wait for a TMDL to be completed. TDEC is not allowed, for example, to delay including a water quality-based effluent limit in a permit based on the fact that it is preparing a TMDL.[77] Permits are required to include "any more stringent limitation, including those necessary to meet water quality standards."[78]

Commenters are particularly concerned in light of TDEC's apparent refusal to enforce and otherwise comply with the requirements of the CWA and TNWQCA, as demonstrated in the case of nutrient pollution,[79] a major national and Tennessee pollution issue.[80]

Incorporation of Comments by Others

Commenters also join in and incorporate by reference the comments on these rules of on or about the same date by the following:

Southern Environmental Law Center

Tennessee Clean Water Network and Mr. Brian Paddock re: Animal Feeding Operations Rules

Tennessee Environmental Council re: Stormwater Rules

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[74] 33 USC § 1311.
[75] 33 USC §§ 1311(b)(1(C), 1312(a), 1313(e)(3)(A), 40 CFR § 122.44(d).
[76] *See* 33 USC § 1313(d)(1)(C), 40 CFR § 130.7(c)(1).
[77] *Upper Blackstone Water Pollution Abatement District v. U.S. EPA*, 690 F.3d 9, n 8. (1st Cir. 2012); *City of Taunton Dept. of Public Works*, 17 EAB (Env. Appeals Board 5/3/2016); 40 CFR § 122.44(d); *American Paper Institute v. U.S. EPA,* 996 F.2d 346, 350 (D.C. Cir. 1993). *Upper Blackstone Water Pollution Abatement District*; *Prairie Rivers Network v. Illinois Pollution Control Board*, 2016 IL App (1st) 150971 ¶¶29-33, 38 (Ill. App. Ct. 2016); *Ala. Dept. of Env. Mgt. v. Ala. Rivers Alliance, Inc*. 14 So. 3d 853, 866-68 (Ala. Civ. App. 2007).
[78] 33 USC § 1311(b)(1)(C).
[79] *See* Mississippi River Collaborative, DECADES OF DELAY, esp. pps 61-61, available at http://www.msrivercollab.org/wp-content/uploads/Decades-of-Delay-MRC-Nov-2016.pdf (accessed July 3, 2019).
[80] *Id*., and s*ee, e.g*., https://www.epa.gov/nutrientpollution.

Summary

In summary, Commenters have significant concerns about the proposed regulations and believe that significant clarifications and changes may be necessary. The proposed rules appear to be in violation of both the letter and spirit of the Tennessee Water Quality Control Act and the Clean Water Act and implementing regulations. The changes are not designed to further the overriding purposes of either the Clean Water Act, or the Tennessee Water Quality Control Act, which are to "**abate existing pollution of the waters of Tennessee, to reclaim polluted waters, [and] to prevent the future pollution of the waters…"** of our State.

Sincerely yours,

Clean Water Expected in East Tennessee

/s/_____
By: Deborah Bahr

Harpeth Conservancy

_____
By: James M. Redwine, Esq.
VP & COO

Obed Watershed Community Association

/s./_____
By: Dennis Gregg,
Restoration Director

Tennessee Chapter Of The Sierra Club

/s/_____
By: Axel Ringe,
Conservation Chair

Tennessee Clean Water Network

/s/_____
By: Kathy Hawes
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Tennessee Environmental Council

/s/_____
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Staff Attorney

Tennessee Riverkeeper

/s/_____
By: David Whiteside
Executive Director

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

HARPETH RIVER WATERSHED ASSOCIATION, Plaintiff, v. THE CITY OF FRANKLIN, TENNESSEE Defendant.	No. 3:14-1743 Judges Sharp and Bryant

AMICUS CURIAE BRIEF OF THE UNITED STATES OF AMERICA

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GLOSSARY

CWA:	Clean Water Act
EPA:	United States Environmental Protection Agency
FAC:	First Amended Complaint
MTD:	Defendant's Motion to Dismiss
NPDES:	National Pollution Discharge Elimination System
O&M:	Operation and Maintenance
POTW:	Publicly-Owned Treatment Works
RCRA:	Resource Conservation and Recovery Act

INTERESTS OF THE UNITED STATES

Harpeth River Watershed Association ("Plaintiff") has filed Clean Water Act ("CWA") citizen suit claims against the City of Franklin, Tennessee ("the City"), owner and operator of a Publicly-Owned Treatment Works ("POTW"). First Amended Complaint ("FAC") ¶¶ 2, 17. Plaintiff alleges that the City has violated the terms of a National Pollution Discharge Elimination System ("NPDES") permit issued by the State of Tennessee under a program approved by the United States Environmental Protection Agency ("EPA").

EPA administers and enforces the CWA, 33 U.S.C. § 1251 *et seq.* Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, except as authorized by the Act, the "discharge of any pollutant," i.e., "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12). Section 402 establishes the NPDES discharge permit program, which is a critical element of federal water pollution control. EPA, or states under EPA-approved programs, may issue a NPDES permit for the discharge of any pollutant to navigable waters so long as the discharge meets the applicable requirements of the Act. 33 U.S.C. § 1342(a)(1). Pursuant to 33 U.S.C. § 1342 (a)(2) and (b)(1), EPA has promulgated NPDES permit regulations. These regulations include approval requirements for state NPDES programs and specific requirements that must be included in all EPA or state-issued permits. Compliance with NPDES permits by POTWs is an important component of achieving CWA objectives.

In this action Plaintiff seeks to enforce permit provisions that deal with: sewage overflows (Count 1); requirements for a nutrient management plan (Count 2); requirements to conduct instream monitoring (Count 3); specific effluent limitations (Counts 4-5); and flow monitoring (Count 6). The City argues that the permit requirements forming the basis of

Plaintiff's first three claims are outside the scope of the federal NPDES program, and are thus unenforceable under the CWA's citizen suit provisions. The City also argues that sewage overflows that violate the terms of a NPDES permit are not enforceable unless Plaintiff demonstrates that such overflows reach waters of the United States.

NPDES permits routinely contain both effluent limitations restricting discharges, terms and conditions relating to the operation and maintenance of permitted facilities to ensure compliance with discharge requirements, monitoring requirements, and to avoid unlawful discharges. 40 C.F.R. § 122.41(e). Such permit terms implement the Act's requirements for appropriate technology-based and water-quality based effluent limitations, and the Act's grant of authority for permits to contain terms and conditions that the Administrator determines are necessary for carrying out the provisions of the Act. In addition, permits must include required monitoring provisions to ensure compliance with permitting limits and to inform future permitting decisions. 33 U.S.C. 1342(a)(2); 40 C.F.R. §§ 122.41(h), 122.44(i), 122.48. The City has asserted that the overflow provisions, nutrient management plans, and monitoring provisions at issue in this case are "beyond the scope" of the CWA, assertions that implicate the United States' interests in the nationwide operation of the NPDES permitting system.

INTRODUCTION

The United States submits this brief to provide the Court with its views regarding the scope of the federal NPDES program, an issue raised in the City's Motion to Dismiss with respect to Plaintiff's first three claims. Contrary to the City's argument, the permit provisions at issue in each of these claims are squarely within the scope of the federal NPDES program and

enforceable in a citizen suit under 33 U.S.C. § 1365(f). That section of the Act authorizes citizen suits for an effluent limitation or other limitation under 33 U.S.C. § 1311 or a permit or permit condition under 33 U.S.C. § 1342. 33 U.S.C. § 1365(f)(2), (f)(6). Overflow prohibitions are an "other condition" or "other requirement" under section 33 U.S.C. § 1342 (a)(2) designed to ensure proper operation and maintenance of the Franklin Sewage Treatment Plant, which is the City's POTW. Permit provisions requiring a nutrient management are effluent limitations necessary to meet state water quality standards. *See* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d). The Permit's monitoring requirement is appropriate both to ascertain compliance with permit terms and to ensure that the existing permitted requirements are necessary and sufficient, and may be enforced as an "other requirement" of the permit under 33 U.S.C. § 1342(a)(2). Such Section 1342 permit requirements are effluent standards or limitations for purposes of Section 505 of the Act, 33 U.S.C. § 1365.

The United States takes no position on the underlying merits of Plaintiff's claims against the City.

BACKGROUND[1]

I. Statutory and Regulatory Background

The CWA aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA prohibits the discharge of pollutants except under prescribed conditions, including a permit under section 402. 33 U.S.C. § 1311(a). The CWA affords States a significant role in protecting their own natural resources,

[1] Defendant has adequately recited the motion to dismiss standard, and the United States does not restate that standard here. MTD 2.

and the federal government may approve a State to administer the NPDES program with respect to point sources located within the State so long as the proposed state program complies with the requirements prescribed at 33 U.S.C. § 1342(b). 33 U.S.C. § 1251(b). EPA regulations concerning the NPDES program and requirements for approval of state programs are set forth at 40 C.F.R. Parts 122 through 125. On December 28, 1977, EPA approved Tennessee's request for approval to administer a State NPDES permit program.

The CWA citizen-suit provision authorizes any citizen to commence a civil action on his own behalf against any person who is "alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). Pursuant to CWA section 505, "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation. . . ." 33 U.S.C. § 1365(a). CWA section 505 specifically defines the term "effluent standard or limitation" to include, among other things, "(2) An effluent limitation or other limitation under section [301 or 302]; . . . (6) A permit or condition thereof issued under [section 402] which is in effect under this chapter. . . ." 33 U.S.C. § 1365(f)(2), (6).

II. The City's Permit Requirements and Plaintiff's Allegations

This case is a citizen suit enforcement action seeking to enforce the terms of NPDES Permit No. TN0028827, issued to the Franklin Sewage Treatment Plant through Tennessee's EPA approved NPDES program.[2] FAC ¶ 12. Plaintiff alleges that the City has violated the terms of its NPDES permit and the CWA by:

(1) Allowing sewage overflows and allowing sewage to bypass its treatment plant (Count 1, FAC ¶¶ 108-156);
(2) Failing to develop or implement a nutrient management plan (Count 2, FAC ¶¶ 157-178);
(3) Failing to conduct continuous instream monitoring and receiving stream investigations (Count 3, FAC ¶¶ 179-196);
(4) Discharging effluent that failed toxicity tests (Count 4, ¶¶ 197-216);
(5) Discharging excess ammonia as nitrogen (Count 5, ¶¶ 217-226); and,
(6) Inaccurate flow measurement and monitoring (Count 6, ¶¶ 227-243).

This amicus brief focuses on the City's challenges to Plaintiff's first, second and third claims and the argument that certain permit conditions are outside the EPA's CWA authority.

The City's currently-effective NPDES permit prohibits "overflows." Permit § 2.3.3(b). "Overflow" is defined as "any release of sewage from any portion of the collection, transmission, or treatment system other than through permitted outfalls." Permit § 2.3.3(a). As the "Overflow and Bypass Reporting" provision of the permit Rationale explains:

> For the purposes of demonstrating proper operation of the collection, transmission, and treatment system, the permit defines overflow as any release of sewage other than through permitted outfalls. This definition includes, but is not necessarily limited to, sanitary sewer overflows and dry weather overflows. . . . Any unpermitted release, however, potentially warrants permittee mitigation of human health and/or water quality impacts via direct or indirect contact and demonstrates a hydraulic problem in the system that needs permittee consideration as part of proper operation and maintenance of the system.

Permit Rationale R7.13.

The permit also requires the Franklin Sewage Treatment Plant to develop and implement a Nutrient Management Plan consistent with specific requirements, Permit § 3.8, and requires the City to "complete the receiving stream monitoring/reporting" consistent with its terms, Permit § 3.7. Discharge Monitoring Reports and Monthly Operating reports must be filed to show compliance with permit terms. Permit §§ 1.3.1, 1.3.4, 2.3.1. Any instances of non-compliance

[2] Franklin's current NPDES permit is attached as Exhibit 3 to Plaintiff's FAC.

must be reported in its Discharge Monitoring Reports, Permit § 2.3.2, and operation and maintenance of all facilities and systems must be sufficient "to achieve compliance with the terms and conditions of this permit," Permit § 2.1.4.

ARGUMENT

The City discharges pollutants into waters of the United States and is prohibited from doing so except in compliance with the terms of its NPDES permit. *See Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 470 (6th Cir. 2008). Failure to comply with permit conditions subjects the permit holder to a possible enforcement action. 33 U.S.C. § 1365(a)(1); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987). As the Supreme Court has explained the "the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations" under the CWA. *U.S. Envtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). NPDES permit enforcement is therefore a fairly straightforward process. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 174 (2000) ("Noncompliance with a [NPDES] permit constitutes a violation of the Act.").

The City tries to shift the focus of this case from the terms of its permit to the scope of the CWA, but these arguments lack merit. The permit provisions at issue in Counts 1-3 of the FAC are enforceable effluent standards or limitations under the CWA's citizen-suit provision. In deciding this case, this Court need not address the larger question of whether the citizen suit provision does or does not authorize the enforcement of any and all conditions in a lawfully issued NPDES permit because the three provisions in question are indisputably enforceable in this case. A NPDES permit is a powerful enforcement tool precisely because it functions to

clarify a discharger's obligations. The City's attempt to undermine that function should fail.

I. The Permit Requirements at Issue in Plaintiff's First Three Claims Constitute Effluent Standards or Limitations or Permit Conditions Subject to Citizen Enforcement.

As noted, the CWA citizen suit provision provides that citizens may bring suit against any person alleged to be in violation of "an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). An effluent standard or limitation is defined to include an effluent limitation or other limitation under section 301 of the CWA, 33 U.S.C. § 1311, or a NPDES permit or permit condition "which is in effect . . . under this chapter."[3] 33 U.S.C. § 1365(f). The key question in this case is whether each permitting provision that Plaintiff alleges has been violated is an "effluent standard or limitation" in a permit in effect under the CWA for purposes of section 505. 33 U.S.C. §§ 1365(a)(1) & (f). They clearly are.[4]

A. The Overflow Prohibition Is an "Effluent Standard or Limitation" Enforceable in a Citizen Suit

The prohibition on overflows is an "other requirement" under section 33 U.S.C. § 1342(a)(2) designed to ensure proper operation and maintenance of the City's POTW and to

[3] 33 U.S.C. 1365 is part of Chapter 26, titled Water Pollution Prevention and Control. This chapter consists of the entirety of the CWA, 33 U.S.C. §§ 1251-1387.

[4] The City's arguments can also be viewed as collateral challenges to its NPDES permit. A NPDES permit issued by Tennessee must be challenged upon issuance directly, not collaterally. *See* Tenn. Code Ann. § 69-3-111. *See generally, General Motors Corp. v. EPA*, 168 F.3d 1377, 1381-83 (D.C. Cir. 1999) (rejecting challenge to state permit in federal enforcement proceeding); *Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 78 (3d Cir. 1990) ("By failing to challenge a permit in an agency proceeding, [defendant] has lost forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties." (internal citations omitted)). There are good reasons for such a rule. EPA and the States base NPDES permitting decisions on the assumption that all of the terms in a permit, including the standard operation and maintenance conditions at issue here, will be enforceable. If one permit term is found invalid, the permitting authority may need to adjust other permit terms to compensate, and this can be done in a timely manner only if permit holders are required to utilize the statutory mechanisms for challenging permit terms. The City's challenges here, though framed as jurisdictional challenges, amount to nothing more than a collateral attack on permitting terms. Plaintiff's right to enforce these conditions does not depend on whether the violation of the permit condition resulted in a spill to the ground, a spill to the waters of the United States, or no spill at all, and the City's collateral attack to the permit it has now accepted, should be rejected.

protect human health and the environment. The CWA expressly requires all NPDES discharge permits to meet the requirements of section 301 and any additional requirements deemed appropriate. *See* 33 U.S.C. § 1342(a)(2) (the Administrator "shall prescribe conditions for such permits to assure compliance . . ., including conditions on data and information collection, reporting, ***and such other requirements as he deems appropriate***") (emphasis added). This provision has been recognized as a broad grant of power to the Administrator to impose such conditions as deemed appropriate to achieve compliance with the CWA. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). Acting under this authority, EPA has adopted regulations that mandate inclusion of a condition in NPDES permits: (1) requiring the permittee to "take all reasonable steps to minimize or prevent any discharge . . . which has a reasonable likelihood of adversely affecting human health or the environment" and (2) requiring proper operation and maintenance ("O&M") of "all facilities and systems of treatment and control" installed to achieve compliance with the terms of the NPDES permit. 40 C.F.R. §§ 122.41(d) & (e).

The City's permit includes the required O&M condition and the duty to mitigate condition prescribed by the EPA regulations. The permit also includes a particularized O&M condition – the overflow prohibition – designed to implement the more general requirements. In addition to directly prohibiting overflows, the overflow provision requires the "permittee to operate the collection system so as to avoid overflows." Permit § 2.3.3.c. The overflow provision serves two functions. The provision prohibits immediate discharges to jurisdictional waters as well as requiring the City to operate the collection system in a manner that avoids *the creation of conditions that may result in prohibited discharges.* The overflow prohibition requires the City to protect the integrity of the POTW system as a whole and the system's ability

to function as designed. Overflows are themselves indications of improper operation and maintenance of a treatment facility.

Sewage overflows at a POTW may adversely affect POTW operation in several ways. POTWs such as the Franklin Sewage Treatment Plant typically treat wastewater from residential, commercial, and industrial consumers. The Franklin plant serves a sanitary sewer collection systems that conveys wastewater flows to the plant. If a sanitary sewer system overflows before it reaches the POTW treatment plant, the overflow will contain the same raw sewage the POTW should be treating, exposing the community at the point of overflow to the public health hazard associated with the untreated sewage. Rain or snow can result in significant increases in flow entering the treatment facility. These increased flows can reduce treatment efficiencies, damage treatment units and cause unauthorized untreated discharges. EPA has treats such overflows as CWA permit violations, and overflows that reach a water of the United States also violate the discharge prohibition of the CWA, 33 U.S.C. § 1311(a).

As EPA has explained, overflows from sanitary sewer systems and POTW treatment facilities reflect poor system maintenance. *See e.g.* U.S. Env't Prot. Agency, EPA-833-K-10-001, *NPDES Writers' Manual* § 9.1.2-9.2.4 (2010) (Attached as Ex. A); U.S. Env't Prot. Agency, EPA-832-K-96-001, *Sanitary Sewer Overflows What are they and how do we reduce them?* at 1 (Summer 1996) (Attached as Ex. B).[5] Overflows have significant public health and welfare consequences. *See, e.g.* U.S. Envtl. Prot. Agency, *Why Control Sanitary Sewer Overflows* (Mar. 1, 2011) (Attached as Ex. C) (EPA fact sheet explaining the impact of sanitary

[5] Judicial notice of EPA's CWA interpretations as set out in regulations and guidance documents is appropriate because such interpretations "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *In re Omnicare, Inc. Securities Litigation*, 769 F.3d 455, 465-66 (6th Cir. 2014).

sewer overflows on human health (as a result of drinking or swimming in contaminated water or eating contaminated fish or shellfish) as well as natural resource impacts on downstream waters.). As background on the scale of issues associated with sewage overflow, a review of reported overflows in only 18 states in the year 2000 indicates an estimated 1.2 billion gallons of sewage overflows were reported that year. Ex. C at 3. EPA has considered overflows from various points in a municipal wastewater system as subject to regulation under the CWA, and the primary tool used to control these overflows has been the NPDES program. *See* U.S. Envtl. Prot. Agency, EPA-833-R-04-001, *Report to Congress on the Impacts and Control of CSOs and SSOs*, §§ 7-1 – 7-7 (August 26, 2004) (Attached as Ex. D).

As explained above, EPA's regulation requires that NPDES permits include provisions requiring permittees to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment and for requiring proper operation and maintenance of "all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." 40 C.F.R. §§ 122.41(d), (e). Overflow provisions are a more specific form of these required conditions designed, in part, to ensure proper operation and maintenance of a discharging facility. EPA has recognized that proper operation and maintenance is critical to controlling overflows, and courts have entertained lawsuits seeking to enforce such conditions. *See Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), *aff'd*, 644 F.2d 995 (3d Cir. 1981) (allowing citizen enforcement of sewage system maintenance terms).

In including the specialized O&M condition prohibiting overflows in the City's permit,

the State specifically acknowledged the potential adverse consequences of overflows. While violations of O&M conditions may not result in discharges to waters of the United States, the permit recognizes that overflows and spills indicate improper operation and maintenance and identifies the backup of raw, untreated sewage into buildings from sewage overflows as a "hydraulic problem" that requires mitigation. *See* Permit Rationale at R7.13. The NPDES program does not tolerate the use of private property as auxiliary storage of raw sewage.

The Ninth Circuit has explicitly rejected a city's argument that citizens may not enforce permit conditions prohibiting overflows that do not reach navigable waters. *Nw. Envt'l Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). There the court rejected the argument that only numerical effluent limitations are enforceable in a citizen suit and identified other types of permit conditions that citizens may enforce under section the CWA citizen suit provision, including, for example, discharges that may never reach navigable waters. *NW Envt'l Advocates*, 56 F.3d at 988 (*citing Conn. Fund for Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986) (allowing citizen enforcement of permit limitation on discharges to lagoons that may not reach navigable waters)). *See generally Citizens Coal Council v. EPA*, 447 F.3d 879, 896 (6th Cir. 2006) (recognizing that best management practices can be considered an effluent limitation); *Sierra Club v. City and County of Honolulu*, CV No. 04-00463 DAE-BMK, 2008 WL 3850495, at *10 (D. Haw. Aug. 18, 2008) ("To the extent CCH argues that it cannot be found liable for any spills because there is no evidence of the actual volume of spill that reached a receiving water, that argument lacks merit."); *Stephens v. Koch Foods, LLC*, 667 F. Supp. 768, 783 (E.D. Tenn. 2009) (citing *Honolulu* to support its holding that citizens had standing to enforce a permit violation).

O&M requirements play a key role in advancing the CWA's core objectives. Even if the failure to properly operate and maintain a facility does not result in a direct discharge to the waters of the United States, overflow may be evidence of defects in the operation and maintenance of the collection or treatment system that may result in a spill or create a risk of spills to such waters or untreated discharges by the system. *See e.g. NPDES Permit Writers' Manual* §§ 9.1.2; 9.2.4 (Ex. A); *Sanitary Sewer Overflows* at 1 (Ex. B). The D.C. Circuit, for example, has specifically upheld EPA's bypass regulation, which is required to be included in all NPDES permits prohibiting "bypass" of treatment systems where the bypass does not result in a violation of an end-of-pipe discharge limitation. *NRDC v. EPA*, 822 F.2d 104 123-125 (D.C. Cir. 1986). Sewage overflows may also contain viruses, pathogens and other disease causing organisms, and the CWA contains emergency powers to prevent endangerment posed through such overflows – allowing permit provisions that help to avoid such cleanups is consistent with the purpose of the CWA. 33 U.S.C. § 1364.

The City's argument focuses on the fact that some overflows may not reach waters of the United States. MTD 9-11. This argument confuses what is necessary to require a NPDES permit (a discharge into waters of the United States, and here, the City has such discharges, thus requiring the City to obtain a permit) with the scope of the terms that can be implemented through that permit. NPDES permittees receive permission to discharge so long as they, in turn, undertake various obligations to prevent unpermittable discharges such as overflows and spills. The City here attempts to subvert this bargain by challenging the enforceability of its assumed obligations to properly operate and maintain its treatment system. Here, the applicable permit authorizes discharges to the Harpeth River in accordance with its terms. As described above,

overflow provisions are well within the scope of permissible, and enforceable, NPDES permitting provisions. Multiple CWA provisions work together to show that NPDES provisions prohibiting the overflow of sewage are part of the federal program, and are properly enforceable through a citizen suit claim.

Finally, to the extent that the City asserts that prohibitions on overflows that do not reach water of the United States not authorized under the CWA, the City is collaterally attacking the existing regulations, 40 C.F.R., §§ 122.41(d),(e), that require proper operation and maintenance of the facility and systems. *See supra* fn. 4. Any such challenge is untimely and in the wrong court. Under section 509(b)(1) of the CWA, any petition for review of this provision would have had to be filed in a U.S. Court of Appeals within 120 days of the EPA promulgation – a date that has long passed. 33 U.S.C. § 1369(b)(1).

B. Permit Provisions Mandating Nutrient Management Plans are Within the Scope of the NPDES Program.

The City's POTW discharges into the Harpeth River, which is impaired for dissolved oxygen and phosphorus. FAC § 159. The City's discharges, if not properly controlled, contain pollutants that make this problem worse.[6] *Id.* Under the terms of its NPDES permit, the City must implement a nutrient management plan that addresses the amount of total nitrogen and phosphorus in its wastewater, thus leading to improved levels of nutrients and dissolved oxygen in the receiving waters. FAC ¶ 159, Permit § 3.8. The permit, on its face, requires the City to develop a nutrient management plan, and Plaintiff alleges that the City has failed to meet that

[6] The increase in nutrients in a waterbody can lead to excessive plant growth, which results in dissolved oxygen declines. Thus permit provisions targeted at reducing the discharge of nutrients such as nitrogen and phosphorus (nutrients essential for plant growth) are intended to alleviate dissolve oxygen issues. *See generally American Farm Bureau Federation v. EPA*, 984 F. Supp.2d 289, 300 fn. 5 (M.D. Pa. 2013) ("The goal of nutrient (nitrogen and phosphorus) reduction is to increase dissolved oxygen levels in Bay waters.").

requirement. Thus, this permit's nutrient management plan requirement is enforceable in a citizen suit.

The Act and EPA's NPDES regulations require permit conditions that include any limitations necessary to ensure that the receiving waters comply with State water quality standards. 33 U.S.C. § 1311(b)(1)(c); 40 C.F.R. § 122.44(d). In other words, the nutrient management plan at issue in the City's second claim is not only authorized but is required in order to meet state water quality standards. In addition, EPA regulations at 40 C.F.R. § 122.44(k) specifically authorize inclusion of effluent limits expressed in terms of "best management practices" (such as the nutrient management plan at issue in this case) in a variety of circumstances.[7] These include when "the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA." *Id.* The inclusion of a nutrient management plan requirement in the Franklin NPDES permit is a reasonable measure to achieve nutrient discharge reductions and address excessive nutrient discharges from the facility that may cause or contribute to violations of water quality standards. As such, this provision satisfies CWA requirements set out in 33 U.S.C. § 1311(b)(1)(C), and its implementing regulations that require permits to contain limitations necessary to meet water quality standards. 40 C.F.R. §§122.44(d), (k).

EPA guidelines have long recognized the implementation of best management practices through NPDES permitting terms. *See* U.S. Envtl. Prot. Agency, EPA-833-B-87-203, *Training Manual for NPDES Permit Writers*, 1, 69 (May 1987), available at http://www.epa.gov/nscep/index.html; *NPDES Permit Writers' Manual*, Chapter 9, September

[7] Again, to the extent that the City challenges EPA's regulation authorizing a permit to require best management

2010 (Ex. A). The Sixth Circuit has similarly recognized that numerical effluent limitations are not the only effluent terms authorized by the NPDES program – EPA is given "considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges." *Citizens Coal Council*, 447 F.3d at 896 citing *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369 (D.C.Cir.1977). In the same case, the Sixth Circuit also recognized that EPA's NPDES permit regulations "reflect the EPA's longstanding interpretation of the CWA as allowing [Best Management Practices] to take the place of effluent limitations under certain circumstances," and expressly rejected Petitioners' argument that permit terms containing Best Management Practices were contrary to the CWA. *Id.* at 896 n.18, 900. In other words, EPA regulations allow for effluent limitations requiring best management practices, including nutrient management plans. The nutrient management plan also helps develop information that will inform future permitting decisions and, as discussed below related to monitoring provisions, gathering such information is necessary to the proper functioning of the NPDES program.[8]

The Sixth Circuit has recognized and enforced similar conditions, and citizen enforcement of such permit terms should be recognized by this Court. The absence of any specific regulatory requirements mandating inclusion of this type of best management practice in an NPDES permit creates no legal impediment to their inclusion as an "effluent limitation" in an NPDES permit or enforcement in a citizen suit.

C. Plaintiff May Enforce the Permit's Monitoring Requirements

The CWA enforcement scheme is primarily based on self-monitoring and self-reporting

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practices, the challenge is both not timely and not properly before this court. 33 U.S.C. § 1369(b).

[8] *See e.g.* Permit Rationale R28 (The nutrient management plan "provides a basis for the permittee to conduct additional evaluations/implement effective methods for enhanced wastewater nutrients (total nitrogen and phosphorus) removal by modifying its treatment facilities operation.").

rather than independent agency investigation of potential violations. In establishing this framework, Congress intended that permittees take responsibility for monitoring and ensuring their own compliance in the first instance. A failure to monitor is therefore a core violation of the statutory framework. The plaintiff may enforce the permit's monitoring requirement as an "other requirement" of the permit under 33 U.S.C. § 1342 (a)(2). Monitoring is appropriate both to ascertain compliance with permit terms and to ensure that the existing permit requirements are necessary and sufficient. Monitoring requirements, such as those Plaintiff seeks to enforce in its third claim, are federal requirements.

EPA's regulations require the permit writer to include permit conditions "on data and information collection, reporting, and other requirements as he deems appropriate." 33 U.S.C. § 1342(a)(2). EPA is also authorized, *inter alia*, to require an owner or operator of a point source, such as the City, to establish records, make reports, and use and maintain monitoring equipment in order to develop or assist in the development of any effluent limitation or to determine when any person is in violation of an effluent limitation. 33 U.S.C. § 1318(a). *See Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Com'n*, 389 F.3d 536, 539 (6th Cir. 2004) (recognizing that permit-holders can be required to monitor and report their effluent discharge). The instream monitoring requirement set out in section 3.7 and Attachment 1 of the City's permit is an appropriate condition under these provisions, and authorized State programs must be able to require monitoring to the same extent as EPA. 33 U.S.C. § 1342(b)(2)(B). NPDES regulations require a permittee to provide any information necessary to determine compliance with the permit and whether the permit should be modified. *See* 40 C.F.R. § 122.41(h), applicable to Tennessee through 40 C.F.R. § 123.25(a)(12). NPDES permits include receiving stream

monitoring requirements, and EPA has recommended a wide range of monitoring measures and methods in Chapter 8-9 of its NPDES Permit Writers' Manual. Ex. A, E.

EPA's NPDES regulations require monitoring to assure compliance with permit limitations and authorize the permit writer to require provision of information to determine whether a permit should be modified, revoked and reissued, or terminated. 40 C.F.R. §§ 122.41(h) and 122.44(i). In addition, the regulations require the permit writer to specify requirements concerning the proper use, installation and maintenance of monitoring equipment. 40 C.F.R. §122.48(a). As explained above, a NPDES permits must include any more stringent effluent limitations required to comply with state water quality standards. Determination of when to develop such a limitations requires the permit writer to evaluate the reasonable potential for any pollutant to cause or contribute to an in-stream excursion above a narrative or numeric criteria within a State water quality standard. 40 C.F.R. §122.44(d). In-stream monitoring may be essential to this evaluation and is authorized by the regulations noted above.[9] It is apparent then that the permit conditions requiring instream monitoring at issue in this case, including the requirements in section 3.7 and Attachment 1 of the City's permit, are consistent with EPA regulations and are properly the subject of a CWA citizen enforcement action.

The permit "Rationale" and "Addendum to Rationale" sections explain the need for particular permit terms. These sections state that the instream monitoring provisions are necessary to inform future permitting decisions regarding appropriate effluent limits and

[9] In guidance, EPA has suggested that monitoring may be necessary to "establish a basis for enforcement actions, assess treatment efficiency, characterize effluents and characterize receiving waters." Ex. E, § 8.1.1. EPA further recommends that a NPDES permit should specify the appropriate monitoring location to both ensure compliance with permit limitations and to provide necessary data to determine the effects of an effluent on the receiving water. Ex. E, § 8.1.2. Guidance also suggests instances in which influent and source water may appropriately be monitored through a NPDES permit. Ex. E, § 8.1.2.1.

operational requirements to meet water quality standards – reasons consistent with EPA's NPDES permit regulations.[10] Franklin's NPDES permit also contains a narrative effluent limit.[11] EPA's regulations require the inclusion of a requirement to monitor ambient stream conditions to ensure compliance with this narrative limitation. Permit § 3.7 represents an appropriate response to the regulatory requirement and may be enforced through CWA citizen suit provisions.

II. The City Relies on Inapplicable Authority

The City argues that the three permit conditions discussed above are beyond the scope of the CWA, and therefore not subject to citizen enforcement. To support this argument, the City pointed to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.* and a district court decision in an enforcement action under RCRA. MTD 6-9, Reply 6-14. The argument is erroneous for several reasons. First, as EPA has shown, the three permit conditions are clearly within the scope of EPA CWA authority and flow directly from the statute and its implementing regulations. Second, because the permit conditions are directly tied to the CWA, EPA has answered the question about whether the conditions are beyond the scope of the CWA. As result, the City's argument discussing RCRA and a district court case concerning whether certain provisions in a state RCRA permit were federally enforceable is irrelevant.

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[10] *See e.g.* Addendum to Rationale AD-3 (future permit modifications are based on monitoring data); AD-7 (instream monitoring necessary to identify receiving streams characteristics); AD-9 (permit requirements were included to better understand "the nature of the receiving stream's dissolved oxygen encumbrances and enhancement opportunities"); AD-10 (monitoring required "to identify actual effective measures for defining dissolved oxygen improvements); AD-11 (the impacts from the discharge can be assessed in light of the variation in upstream and downstream variation in dissolved oxygen); Rationale R-2 (additional data/instream information necessary to investigate/implement treatment plant performance enhancements), R-8 (monitoring provides empirical information to assess shortcomings and make improvements).

[11] This limit provides that "[t]he wastewater discharge shall not contain pollutants in quantities that will be hazardous or otherwise detrimental to humans, livestock, wildlife, plant life, or fish and aquatic life in the receiving stream." Permit § 1 at page 4 of 40.

The essence of the City's RCRA argument is that similar regulatory language applicable to an entirely separate statutory program must, somehow, be binding on the scope of the federal NPDES program. This is flatly incorrect. The CWA and its interpreting regulations and guidelines are most relevant to determining the scope of the NPDES program, and, as shown above, those interpretative tools demonstrate that the permit provisions at issue in this case are within the scope of the CWA and therefore federally enforceable. The City's reliance on RCRA is misplaced.

In any event, the Court need not determine whether EPA's RCRA guidance is applicable here. The City's RCRA argument depends on the conclusion that state requirements are "greater in scope" than federal regulations where "no counterpart can be found in the federal requirements." MTD at 7. As discussed above, the permit terms challenged in Plaintiff's first three claims are well within, and consistent with, the CWA and its implementing regulations and guidelines, so there is no issue here of the State requirements being "greater in scope" than the federal requirements.

The City cites *Atl. States Legal Found., Inc. v. Kodak*, 809 F. Supp. 1040 (W.D. N.Y. 1992) to support its proposition that 40 C.F.R. § 123.1(i)(2) somehow compels a narrow interpretation of the scope of the CWA. MTD at 4. *Atlantic States*, however, was based on the Court's finding that the permit at issue mandated "a greater scope of coverage than that required" by the federal CWA. 12 F.3d at 359. Even assuming, *arguendo*, that *Atlantic States'* correctly concluded a court would divide a NPDES permit into State and Federal conditions, that proposition is irrelevant here because, as discussed above, each of the permit provisions challenged through Plaintiff's first three claims are squarely within the scope of the federal

NPDES permitting program. The City similarly relies on *Long Island Soundkeeper Fund v. New York City Dep't of Envtl. Protection*, 27 F. Supp. 2d 380 (E.D.N.Y. 1998), but that case relies on the fact that "Plaintiffs do not dispute that New York law expands the scope of current federal limits." 27 F.Supp. 2d at 385, N.3. MTD at 5. No such concession has been made (or could properly be made) here.

CONCLUSION

For the foregoing reasons, to the extent the City relies on arguments that certain of its NPDES permit provisions are beyond the scope of the federal NPDES program, those arguments fail.

Respectfully submitted,

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Date: February 18, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of February, 2015, a copy the **AMICUS CURIAE BRIEF OF THE UNITED STATES OF AMERICA** has been served via electronic mail to:

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