

**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: Britton Dotson

Re: Comments on Notice of Proposed Rulemaking Hearing with respect to Rule
Chapter 0400-40-06, State Operating Permits, 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. Dotson:

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”) 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 propose Rule Chapter 0400-40-06 State Operating Permits (“SOPs”), dated May 2, 2019. Commenters jointly represent thousands of Tennesseans concerned with protecting clean water.¹

¹ As an initial matter, Commenters incorporate by reference their comments on Rule Chapters 0400-40-05, Permits, Effluent Limitations, of the same date. Commenters (and especially Harpeth Conservancy, the principal author of these comments), also acknowledge the contributions of Matthew LaRue, a 2020 candidate for Juris Doctor at the

Further, please consider this letter a request for a concise statement of the principal reasons under T.C.A. § 4-5-205.²

Rationale for Rulemaking

The “Additional Hearing Information” preface to the proposed rules states that:

The land application rule would resolve compliance issues experienced by a number of decentralized wastewater systems around the state. Some of these problems have resulted in illegal discharges to streams, leading to enforcement orders and litigation. The proposed paragraph addressing ponding would resolve several pending permit appeals, and reflect a middle ground position that is protective of water quality while also reflecting common design practices.

TDEC has not explained what these “compliance issues” are, or provided the enforcement orders, any pleadings in the referenced litigation or permit appeals, or any citations to or other information about “common design practice.” TDEC must provide this information so that Commenters and others can review whether the proposed rules are justified in light of the issues encountered.

Permit Application Issues

To protect Tennessee’s waters, the proposed rules³ rely heavily on very technical definitions, such as “agronomic application rate,” “complete hydraulic infiltration within the soil profile,” “full utilization of the land application area,” “reuse of reclaimed wastewater” and similar terms. Further, compliance with proposed Rule 0400-40-60-.06 (and numerous other sections of the proposed rules) requires the application of numerous technical details.⁴

Notwithstanding these highly technical issues, there is no requirement that any application for a permit (or any subsequent report) be accompanied by documents stamped by a professional engineer, professional geologist, agronomist, or any other licensed professional. Only in passing does proposed Rule 0400-40-06-.03(2) reference “...engineering reports... as are required” but

Vanderbilt University School of Law, to these comments and thank him for his assistance with them. Responsibility for these comments remains with Commenters.

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 Proposed Rule 0400-40-06-.02.

⁴ See also proposed Rule 0400-40-06-.02, which distinguishes “dry-weather intermittent ponding” from “dry-weather persistent ponding” in that the former “does not last longer than the rest period between dosing cycles” while the latter does. However, TDEC does not clarify what the “rest period between dosing cycles” is. If there is no schedule, this dichotomy could be more easily exploited, e.g., permittees could simply say that there is still ponding because the cycle isn’t over. Accordingly, TDEC needs to create a more specific schedule or explain why this is not possible or desirable.

does not specify what is required. Applications are required only to be signed by a “responsible corporate officer” or similar person under proposed Rule 0400-40-06-.03(4)(a)-(c).

TDEC must require that permit applicants bring to bear the appropriate licensed technical personnel necessary to protect the State’s waters, but has yet to do so in these proposed rules.

General Permit Terms and Conditions

Under 0400-40-06-.05, General Terms and Conditions, “Permits *may* require best management practices to carry out the purposes and intent of the Act.” TDEC must explain why it is not requiring best management practices in all circumstances, including in which circumstances they would not be necessary.

Land Application and Other Uses of Wastewater

Proposed Rule 0400-40-06-.06 states that:

- (1) In addition to any applicable general conditions identified in Rule 0400-40-06-.05, the following special conditions apply to permits authorizing land application of treated wastewater....

The proposed rules provide no “special conditions” for other uses of wastewater or explanation of why special conditions are not required for such other uses. TDEC must provide such explanations.

Commenters further note that there is no limitation in proposed Rule 0400-40-06-.06(1)(a) on nutrients (e.g., nitrogen and/or phosphorus) in wastewater to be land applied. TDEC must explain why such omissions are justified in light of Tennessee’s significant nutrient pollution problems as referenced above.

TDEC must also explain why the rates in such proposed rules as Rule 0400-40-06-.06(2)(b) and (4) are appropriate and protective of the State’s waters.

Non-Potable Reuse

“New or Expanded”

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).

TDEC must also explain why the minimum standards and reporting frequencies in proposed Rule 0400-60-.10(4)(c) are protective of the State's waters.

The SOP regulations do not clarify when the requirement to consider alternatives to discharge under T.C.A. § 69-3-108(3) apply to the non-potable reuse of reclaimed wastewater.

Five Percent Reduction

Proposed Rule 0400-40-06-.10(1)(a) states that TDEC reserves the right to limit the use of non-potable reuse of reclaimed wastewater that causes a greater than five percent reduction of the 7Q10 flow of the receiving stream. It is unclear whether this potential limitation can be imposed at any time, or whether it is triggered only when 7Q10 flow levels are reached, and TDEC should clarify the intent of the proposed rule or modify it. Commenters further believe that TDEC must clarify the relationship between this proposed limitation, and the ARAP Rules⁵ and antidegradation rules.⁶

We further note that TDEC does have models for reasonable limitations on water withdrawals, such as with respect to the City of Franklin's drinking water plant, for which water withdrawals: cannot exceed 20 percent of the river's flow or reduce flow below ten cubic feet per second; and stopping withdrawals if dissolved oxygen levels reach 5.0 parts per million or below, and adding requirements for monitoring and installation of a flow gage.⁷

Alternatives to Discharge

According to the language of 0400-40-06-.10(1)(a), the requirement for applicants to consider alternatives to discharge under T.C.A. § 69-3-108(e) "governs non-potable reuse of reclaimed water, and *may* be applied as a stand-alone SOP, as an amendment to an existing SOP, or as a component of a NPDES permit.

TDEC needs to clarify when the consideration of alternatives to non-potable reuse of reclaimed wastewater are applicable. Further, TDEC needs to clarify what alternatives are acceptable when an alternative is required.

Environmental Reuse

The SOP regulations appear to prohibit environmental reuse. (See 0400-40-06-.10(1)(c) 5.) Environmental reuse is defined as "The use of reclaimed wastewater to create, enhance, sustain or augment water bodies including wetlands, aquatic habitats, or stream flow; receiving waters

⁵ Tn. Comp & Regs. 0400-40-07 *et seq.*

⁶ Tn. Comp & Regs. 0400-40-03-.06 *et seq.*

⁷ See TDEC press release dated July 6, 2015, available at

http://www.harpethconservancy.org/resources/sm_files/070615%20TDEC%20Franklin%20HRWA%20ARAP%20final%20press%20release.pdf.

included in the NPDES provisions of Chapter 0400-40-05 are not eligible for coverage under this rule.”

TDEC needs to explain why it is prohibiting the environmental reuse of non-potable reclaimed water and why there is a distinction from waters included in NPDES provisions.

Reclaimed Wastewater Management Plan (RWMP)

Under 0400-40-06-.10(3)(b), “[a]n applicant for renewal of a permit for reuse of reclaimed wastewater shall submit an updated RWMP if there is a **material change in end user** requirements from the prior submission.” There is no definition of what constitutes a “material change,” leaving considerable discretion to TDEC. Further, the wastewater could “change hands” more than once before reaching the end user. In such a case, it is unclear who needs to update their RWMP and when. TDEC needs to clarify what constitutes a “material change” and write this in a way that checks every stage “from cradle to grave.”

Demonstrated Availability of Alternatives to Reuse

Under 0400-40-06-.10(3)(d), applicants need to demonstrate the availability of alternatives in case the reuse activity becomes unavailable. However, going by the language of the regulations, the only alternatives are land application permitted by an SOP or a NPDES-permitted discharge to surface waters. TDEC needs to explain why it is limiting alternatives to only these two options. Alternatively, if that’s not the intention of TDEC, TDEC needs to incorporate some language like, “alternatives include, but are not limited to”

Summary

In summary, Commenters support the need for rules to govern the reuse of wastewater throughout the State, and we commend TDEC for undertaking the effort. However, TDEC must also justify why and how the proposed rules fulfill TDEC’s obligations to “**abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters,**” so that Tennesseans can enjoy their “**rights**” to “**unpolluted waters.**”⁸

Sincerely yours,

Clean Water Expected In East Tennessee

/s/ _____
By: Deborah Bahr

⁸ T.C.A. § 69-3-102 (emphasis added).

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
Executive Director

Tennessee Environmental Council

/s/ _____
By: Shelby Ward
Staff Attorney

Tennessee Riverkeeper

/s/ _____
By: David Whiteside
Executive Director