

2. Petitioners have standing to pursue this action.

3. Petitioner Tennessee Clean Water Network ("TCWN") is a nonprofit corporation organized under the laws of the State of Tennessee with its principal office at 123A South Gay St., P.O. Box 1521, Knoxville, TN 37901. TCWN was organized, among other reasons: to advocate for strong policies and programs that result in more effective protection and restoration of Tennessee waters; to educate organizations, decision-makers, and the public about important water resource issues; and to ensure the protection and restoration of Tennessee's waters. TCWN is a membership organization. TCWN has member(s) who own property and reside on or near Little Chatata Creek and/or Chatata Creek, in Bradley County, Tennessee, downstream from the proposed Airport.

4. Petitioner Erin Fuller, a TCWN member, lives at the property she owns at 865 Tasso Road NE, Cleveland, TN 37323. Her home is served by well water, which is currently not contaminated. She is concerned that construction of the proposed Airport will create a groundwater connection between her well and Little Chatata Creek, and that the well may be impacted by pollution from stormwater, including sediments and pathogens. Her home is approximately 100-150 yards from Little Chatata Creek. She avoids contact with Little Chatata Creek because she is aware of existing pollution, including sediments and pathogens, but her dog wades in the creek. She is concerned that stormwater runoff from the Airport will cause additional pollution impacts on Little Chatata Creek and Chatata Creek.

5. Petitioner John Moore lives at the property he owns at 1342 Dry Valley Rd. NE, Cleveland, TN 37312. He owns cattle, which pasture on, and drink water from,

Chatata Creek downstream from the proposed Airport. He is concerned that additional surface water pollution from the Airport's stormwater runoff will further pollute Chatata Creek and impact his cattle.

6. The aesthetic, recreational, and property interests of Petitioners are within the zone of interest contemplated by the legislature under Tenn. Code Ann. §§ 69-3-105.

BACKGROUND

7. The Tennessee Department of Environment and Conservation ("TDEC") Division of Water Pollution Control received a NPDES permit application on May 11, 2009 for the discharge of construction-related stormwater from a proposed new 278-acre municipal airport ("Airport") in Cleveland, Tennessee.

8. The land on which the Airport is proposed to be constructed has been used for cattle pasturing for many years. This use, in addition to natural sources, indicates that a high concentration of E. coli and other pathogens is likely to be present at the site and to be discharged in stormwater once the land is cleared for the purpose of construction.

9. The proposed Airport will discharge stormwater containing sediments and pathogens to Little Chatata Creek and to Rattlesnake Branch, both of which are immediate tributaries of Chatata Creek.

10. TDEC lists both Little Chatata Creek and Chatata Creek as water quality limited for sediments and pathogens pursuant to Section 303(d) of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1311(d).

11. Little Chatata Creek and Chatata Creek do not meet TDEC's water quality standards for sediments. Tenn. Comp. R. and Regs. 1200-4-3-.03(3)(d) requires that "[t]here shall be no turbidity, total suspended solids, or color in such amounts or of such

character that will materially affect fish and aquatic life. In wadeable streams, suspended solid levels over time should not be substantially different than conditions found in reference streams.”

12. Little Chatata Creek and Chatata Creek do not meet TDEC’s water quality standards for E. coli. Tenn. Comp. R. and Regs. 1200-4-3-.03(4)(f) imposes a limit of no more than 126 colony forming units of E. coli per 100 ml, as a geometric mean of at least five samples.

13. Little Chatata Creek and Chatata Creek have unavailable conditions for sediments and pathogens. *See* Tenn. Comp. R. & Regs. 1200-4-3-.06.

14. TDEC completed the *Total Maximum Daily Load (TMDL) for Pathogens in the Hiwassee River Watershed (HUC06020002)* on December 29, 2005 (“Pathogen TMDL”). The Pathogen TMDL requires an overall reduction of 87.2% in pathogens discharged to Little Chatata Creek and of 92.7% in pathogens discharged to Chatata Creek. Pathogen TMDL at xiii.

15. TDEC completed the *Total Maximum Daily Load (TMDL) for Siltation and Habitat Alteration in the Hiwassee River Watershed (HUC06020002)* (“Sediment TMDL”) on January 1, 2006. The Sediment TMDL requires an overall reduction of 51.2% in sediment from all sources, and a 53.6% reduction in sediment from the municipal separate storm sewer system and construction sites in the applicable subwatershed. Sediment TMDL at ix. The Sediment TMDL imposes a target load of no more than 399.8 pounds of sediment per acre per year be discharged in this subwatershed. *Id.* at 24 (Table 8).

16. TDEC issued Public Notice Number MMIX-013 on July 13, 2009, seeking public comment for draft NPDES Permit Number TN0080934 for the Cleveland Municipal Airport.

17. TCWN submitted written comments to TDEC regarding the draft permit on July 20, 2009. These comments addressed the draft permit's failure to implement the Sediment TMDL, violation of TDEC's antidegradation rules, failure to impose water-quality based effluent limits ("WQBELs") sufficient to protect water quality, and failure to impose numeric effluent limits for total suspended solids ("TSS") and turbidity.

18. The Division held a public hearing on August 11, 2009. Renée Hoyos, Executive Director of TCWN, and Erin Fuller, a member of TCWN, each gave testimony at this hearing regarding the draft permit.

19. Erin Fuller, Richard Fisher, and John Moore submitted joint written comments through their counsel, Rebecca Verneti of Gary A. Davis & Associates, in addition to coliform sampling data and two expert evaluations, to TDEC on September 16, 2009. These comments addressed the draft permit's failure to impose numeric effluent limits sufficient to prevent a condition of pollution, failure to implement the Sediment TMDL, failure to implement the Pathogen TMDL, violation of TDEC's antidegradation rules, failure to impose numeric effluent limits for TSS and turbidity, failure to ensure that polyacrylamide ("PAM") would not be discharged, and holding a public meeting without first making correct information available to the public. These comments included detailed criticisms of the SWPPP.

20. Prior to the close of the comment period, Erin Fuller submitted separate written comments to TDEC raising additional concerns.

21. The Final Permit (including the Rationale) and the Notice of Determination (“NOD”) were issued on September 30, 2009. TCWN received these documents by electronic mail on that date.

22. The Final Permit contains no numeric effluent limits. Final Permit at R-2. The Rationale states that if the results of monitoring “so dictate,” then TDEC “maintains the authority” to impose numeric effluent limits, *id.* at R-3, but does not identify the conditions that would trigger the imposition of such limits. TDEC concluded that “if the BMPs described in the SWPPP are properly implemented” then the potential for degradation would be “negligible.” *Id.* at R-4. TDEC concluded that the Final Permit complies with the Sediment TMDL. *Id.* TDEC also stated that the Final Permit complied with the Pathogen TMDL, *id.*, while also representing that this TMDL did not need to be addressed because coliforms are not likely to be present in the discharge, NOD-21. *Id.* In addition, TDEC stated on the record that “[w]e think that the SWPPP that has been prepared for this construction project is protective of designated uses of the receiving stream.” NOD-21.

23. TDEC has not made a determination on the record of whether the discharge will cause, or will have the reasonable potential to cause or contribute to, an excursion above state water quality standards for sediments or pathogens in Chatata Creek or Little Chatata Creek. TDEC has presented no evidence in the record that it has conducted *any* water quality modeling for this permit review to determine the potential impact of this new source discharge to water-quality limited water bodies.

24. Although the SWPPP calls of the use of treatment with PAM as a flocculant to reduce sediment discharges, the Final Permit does not require monitoring

for PAM or its constituents, and does not impose narrative conditions sufficient to ensure that PAM does not become a pollutant discharged to surface waters.

ALLEGATIONS

25. Issuance of the Final Permit violates Tenn. Code Ann. § 69-3-108(e) because it (1) approves an activity that would cause a condition of pollution, and (2) fails to include the most stringent effluent limits necessary to implement applicable water quality standards for sediments and pathogens in Chatata Creek and Little Chatata Creek. Specifically, the permit failed to impose numeric WQBELs for TSS, turbidity, or E. coli.

26. The Final Permit violates TDEC's antidegradation policy, Tenn. Comp. R. & Regs. 1200-4-3-.06(2), because it allows a new discharge of sediments and pathogens to Little Chatata Creek and Chatata Creek. Little Chatata Creek and Chatata Creek both have unavailable conditions for sediments and pathogens.

27. The Final Permit violates Tenn Comp. R. & Regs. 1200-4-5-.04(g) because it allows a new source discharge of sediments and pathogens that will cause or contribute to a condition of impairment for sediments and pathogens in Little Chatata Creek and Chatata Creek.

28. The Final Permit violates the Clean Water Act and Tenn. Comp. R. & Regs 1200-4-5-.04(f) by allowing a new source discharge of sediments and pathogens into Little Chatata Creek and Chatata Creek, both of which TDEC has designated as water-quality limited for these pollutants. The CWA prohibits the issuance of permits for new source discharges that will cause or contribute to the violation of water quality standards, with a narrow exception that has not been satisfied here. 40 C.F.R. § 122.4(i). Specifically, although TDEC has prepared EPA-approved TMDLs for sediments and

pathogens, the Cleveland Municipal Airport has not demonstrated before the close of the comment period that (1) there are sufficient remaining pollutant load allocations to allow for the discharge, *and* (2) the existing discharges into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. *Id.*; *Friends of Pinto Creek v. United States Env'tl. Prot. Agency*, 504 F.3d 1007, 1011-12 (9th Cir. 2007).

29. The Final Permit violates Sections 402 and 302 of the Clean Water Act, 33 U.S.C. §§ 1342(b)(1)(A) and 1312(a), and Tenn. Comp. R. & Regs 1200-4-5-.04(f) because TDEC has not made a determination of whether the sediments and pathogens to be discharged from the Airport will cause, or have the reasonable potential to cause or contribute to, an excursion above state water quality standards for these pollutants using the procedures mandated by the Environmental Protection Agency. 40 C.F.R. §§ 122.44(d)(1)(i) & (ii), and 123.25. Specifically, TDEC has not followed procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, or the dilution of the effluent in the receiving water. 40 C.F.R. §§ 122.44(d)(1)(ii).

30. The Final Permit violates Sections 402 and 302 of the federal Clean Water Act, 33 U.S.C. §§ 1342(b)(1)(A) and 1312(a), and Tenn. R. and Regs 1200-4-5-.04(f) by failing to impose effluent limits that are sufficiently stringent to attain and maintain applicable water quality criteria for sediments and pathogens. *See also* 40 C.F.R. §§ 122.44(d)(1)(vii)(A) and 123.25.

31. TDEC's conclusion that the potential for degradation to the receiving streams is negligible is not supported by substantial evidence.

32. TDEC's conclusion that the SWPPP is protective of designated uses of the receiving stream is not supported by substantial evidence.

33. TDEC's statement that the permit complies with the wasteload allocations of the Sediment TMDL and of the Pathogen TMDL is not supported by substantial evidence.

34. TDEC has failed to protect water quality by imposing monitoring requirements, effluent limits, or narrative conditions sufficient to prevent the discharge of PAM into the receiving waters.

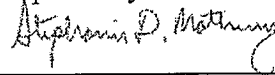
35. The August 11, 2009 public hearing was insufficient because the public did not have a chance to review the correct documents before the hearing. Specifically, different versions of the draft permit were distributed prior to the hearing and the public did not have the correct SWPPP to prior to the hearing.

36. Petitioners request a contested case hearing before the Water Quality Control Board to hear this petition and make findings of fact and conclusions of law. Petitioners also request discovery.

Accordingly, Petitioners seek a stay of the permitted activities and revocation or modification of the permit consistent with proper application of the law and rules.

Date: October 29, 2009

Respectfully Submitted,



Stephanie D. Matheny (BPR# 027783)

Tennessee Clean Water Network

P.O. Box 1521

Knoxville, TN 37901

865-522-7007 x 102

Fax 865-525-4988

stephanie@tcwn.org

Counsel for Petitioners

