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**RE: TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION V.  
ACC, LLC, APD Case No. 04.04-204674J**

Enclosed is an *Initial Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division  
Tennessee Department of State

Enclosure(s)

**BEFORE THE TENNESSEE BOARD OF UNDERGROUND STORAGE TANKS  
AND SOLID WASTE DISPOSAL CONTROL**

**IN THE MATTER OF:**

**TENNESSEE DEPARTMENT OF  
ENVIRONMENT AND  
CONSERVATION,**  
*Petitioner,*

**v.**

**ACC, LLC,**  
*Respondent.*

**APD Case No. 04.04-204674J**

**INITIAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

Pursuant to TENN. CODE ANN. §§ 68-212-113, 4-5-301(a)(2), and 4-5-314(b) this contested case is pending before Administrative Judge Mary M. Collier, assigned by the Administrative Procedures Division (APD) to sit alone for the Tennessee Board of Underground Storage Tanks and Solid Waste Disposal Control (Disposal Board). The Tennessee Department of Environment and Conservation (TDEC) is the Petitioner and ACC, LLC (ACC) is the Respondent. Both parties are represented by legal counsel.

Since 2011, the parties have entered into multiple Consent Orders pertaining to the underlying dispute. The parties entered into Consent Orders in 2011, 2012 and November 23, 2016 (2016 Consent Order), pursuant to TENN. CODE ANN. § 68-212-224.<sup>1</sup>

This contested case was not filed with APD until December 16, 2020, after the Davidson County Chancery Court (Chancery Court) determined that the ACC March 1, 2019, NOTICE OF

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<sup>1</sup> Ex. A to NOTICE OF HEARING (NOH) filed by TDEC with APD on December 16, 2020 & Ex. 1 to ACC's NOTICE OF FILING IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT (the exhibits to ACC's NOTICE OF FILING IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT will hereinafter be identified as exhibits to the MOTION FOR SUMMARY JUDGMENT).

DISPUTE APPEALING NOTICE OF NONCOMPLIANCE dated January 31, 2019, “triggers a contested case hearing of the Disposal Board pursuant to Tennessee Code Annotated sections 68-212-215(d) and (e) and 68-212-113(a), (b), and (c),” and ordered that “this matter is remanded to the Disposal Board for that contested case hearing.”<sup>2</sup>

Pending before the undersigned Administrative Judge is ACC’s MOTION FOR SUMMARY JUDGMENT. Based upon a review of the Record and the written and oral arguments of counsel, it is determined that there are no material facts in dispute and that ACC is entitled to a judgment as a matter of law.

Accordingly, ACC’s MOTION FOR SUMMARY JUDGMENT is **GRANTED**.<sup>3</sup>

**UNDISPUTED MATERIAL FACTS**<sup>4</sup>

1. ACC owns an approximately 48.02 - acre parcel of land located immediately east of Arrow Mines Road south of Mount Pleasant in Maury County, Tennessee (“ACC Site”). There is a closed Class II (industrial) solid waste disposal facility known as the “ACC Landfill” or “ACC Site” located on the site.<sup>5</sup>

2. The ACC Landfill is a hazardous substance site within the meaning of TENN. CODE ANN. § 68-212-202(3).<sup>6</sup>

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<sup>2</sup> Dec. 4, 2020, Chancery Ct. Order, at pp. 4-5 (Ex. F to NOH & Ex. 6 to MOTION FOR SUMMARY JUDGMENT).

<sup>3</sup> Simultaneously with the filing of its MOTION FOR SUMMARY JUDGMENT, ACC filed a MOTION IN LIMINE. ACC’s MOTION IN LIMINE is DENIED as moot. TDEC’s pending MOTION TO RENDER DECISIONS is hereby GRANTED.

<sup>4</sup> Although TDEC proposed additional Material Facts, it is determined that none of those additional facts are material to the legal issue raised in ACC’s MOTION FOR SUMMARY JUDGMENT, and, as such, are not included herein. While those additional facts may have been relevant in a hearing on the merits, they are not material at the current posture of this case. In response to the MOTION FOR SUMMARY JUDGMENT, TDEC argues about the alleged underlying claims TDEC may have against ACC. These claims would only be valid against ACC if TDEC provided ACC with proper notice of the civil penalties in the NOTICE OF NONCOMPLIANCE. Because TDEC failed to do so, the underlying merits of the allegations are not at issue.

<sup>5</sup> ACC Statement of Undisputed Facts ¶1; Dec. 4, 2020, Chancery Ct. Order, at p. 1.

<sup>6</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 1.

3. After a contested case hearing before the Tennessee Solid Waste Board in 2012, ACC entered into a Consent Order with TDEC and began remediating the ACC Site.<sup>7</sup>

4. On November 23, 2016, ACC and TDEC entered into the 2016 Consent Order, which supplements the previous consent orders. The 2016 Consent Order governs the final phase of remediation of the ACC Site and addresses the improvement of surface water migrating from that site.<sup>8</sup>

5. Section XX of the 2016 Consent Order, entitled “Order,” contains nine (9) subsections lettered (A)-(I). Section XX(A) (“Corrective Action Objectives”) states that the objective of the 2016 Consent Order is for the surface water in the unnamed tributary draining the ACC Landfill to Sugar Creek and for Sugar Creek not to be impaired due to pollutants associated with the ACC Landfill. Further, this section states that the corrective action objective for surface water leaving the ACC Site is to meet the Tennessee Water Quality (TWQ) Criteria.<sup>9</sup>

6. On January 31, 2019, TDEC issued a NOTICE OF NONCOMPLIANCE to ACC.<sup>10</sup> In that NOTICE OF NONCOMPLIANCE, TDEC alleged, for the first time, that ACC violated the 2016 Consent Order by failing to “implement an interim measure approved by [TDEC], that prevents

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<sup>7</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 1.

<sup>8</sup> ACC Statement of Undisputed Facts ¶2; Dec. 4, 2020, Chancery Ct. Order, at pp. 1-2. TDEC disputes the language “final phase.” However, TDEC fails to provide any support for this dispute. TENN. RULE CIV. P. 56.03 requires that “[e]ach disputed fact must be supported by specific citation to the record.”

<sup>9</sup> ACC Statement of Undisputed Facts ¶3.

<sup>10</sup> Ex. 2 to MOTION FOR SUMMARY JUDGMENT & Ex. B to NOH. ACC refers to the NOTICE OF NONCOMPLIANCE as an “Initial Order” in the MOTION FOR SUMMARY JUDGMENT. Because the instant order is an INITIAL ORDER, and to avoid unnecessary confusion, the January 31, 2019, document issued by TDEC is referred to herein as a NOTICE OF NONCOMPLIANCE and not as an “Initial Order.” ACC agrees that the name of the document is not the issue; instead, the contents of the document are what ACC is challenging in the MOTION FOR SUMMARY JUDGMENT. (Transcript of Oral Arguments on ACC’s SUMMARY JUDGMENT MOTION, at p. 8).

surface water and leachate with concentrations of ammonia, chlorides, and/or total dissolved solids in surface water from leaving the property and polluting downstream waters . . .”<sup>11</sup>

7. The Chancery Court declared that the January 31, 2019, NOTICE OF NONCOMPLIANCE and attached invoice from Evan Spann, TDEC Project Manager Division of Remediation, to ACC, “asserting that TDEC was invoking the contingent penalty provision of the 2016 Consent Order, which is the procedure provided in the 2016 Consent Order, constituted an assessment of civil penalties under [TENN. CODE ANN. §§] 68-212-215 and 68-212-213 of the [Hazardous Waste Management Act of 1983] HWMA.”<sup>12</sup>

8. On March 1, 2019, ACC responded to the NOTICE OF NONCOMPLIANCE by filing a “Notice of Dispute Appealing Notice of Noncompliance dated January 31, 2019” (“NOTICE OF DISPUTE”) with TDEC’s Division of Remediation.<sup>13</sup>

9. The NOTICE OF NONCOMPLIANCE failed to include either “conclusions of law, the policy reasons thereof, and findings of fact for all aspects of the order, including the remedy prescribed” or “a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review” as required by TENN. CODE ANN. § 4-5-314.<sup>14</sup>

10. Section XX(B)(1) of the 2016 Consent Order states that “[ACC] shall implement an interim action approved by the Department that prevents surface water and leachate with

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<sup>11</sup> ACC Statement of Undisputed Facts ¶4, with revision to remove the nomenclature of “Initial Order” in reference to the NOTICE OF NONCOMPLIANCE. TDEC disputes the wording “for the first time.” However, TDEC fails to provide any support for this dispute. TENN. RULE CIV. P. 56.03 requires that “[e]ach disputed fact must be supported by specific citation to the record.”

<sup>12</sup> Dec. 4, 2020, Chancery Ct. Order, at pp. 11-12.

<sup>13</sup> ACC Statement of Undisputed Facts ¶5; Ex. 3 to MOTION FOR SUMMARY JUDGMENT.

<sup>14</sup> ACC Statement of Undisputed Facts ¶6, with revision to remove the nomenclature of “initial order” in reference to the NOTICE OF NONCOMPLIANCE.

concentrations of ammonia, chlorides and/or total dissolved solids exceeding the Tennessee Water Quality Criteria from leaving the ACC property and polluting downstream waters including Sugar Creek.”<sup>15</sup>

11. Sugar Creek, below ACC’s discharge point, as demonstrated by the sampling data submitted by ACC, has met the Tennessee Water Quality Criteria prescribed by TDEC for chloride, ammonia, and total dissolved solids (TDS) in all events since December 2018 to present.<sup>16</sup>

12. The Chancery Court determined that “the 2016 Consent Order is ambiguous on the procedure following an unsuccessful dispute resolution by the Commissioner’s designee.”<sup>17</sup>

13. The Chancery Court concluded “[i]n sum, then, the Court’s ruling on the *Amended Petition* is that this matter is remanded to the Disposal Board for a contested case hearing on TDEC’s assessment of civil penalties for the Petitioner allegedly noncomplying with the 2016 Consent Order.”<sup>18</sup>

14. The Chancery Court opined that the issue before the Disposal Board is ACC’s “claims, including but not limited to, that the January 31, 2019, assessment of penalties [herein referred to as NOTICE OF NONCOMPLIANCE] by TDEC does not comply with Tennessee Code Annotated section 4-5-314 and due process.”<sup>19</sup>

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<sup>15</sup> ACC Statement of Undisputed Facts ¶7, with a correction to the section of the 2016 Consent Order and the deletion of “or the surface water discharges from the Site are not toxic to fish and aquatic life according to the Division of Water Resources Standards” per the response filed by TDEC.

<sup>16</sup> ACC Statement of Undisputed Facts ¶8 – revised to include a reference to the sampling data submitted by ACC per the response filed by TDEC.

<sup>17</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 15.

<sup>18</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 22; see also TDEC response to ACC Statement of Undisputed Facts ¶9.

<sup>19</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 22; ACC Statement of Undisputed Facts ¶9 – TDEC argues that this is not the complete quotation and that an additional sentence should be added. That is not a valid dispute to this fact. However, for clarity, the sentence that TDEC references has been added above as a separate finding of fact.

## APPLICABLE LAW

ACC has moved for Summary Judgment on the grounds that the NOTICE OF NONCOMPLIANCE fails to state a claim upon which relief can be granted pursuant to TENNESSEE RULE OF CIVIL PROCEDURE 12.02, which provides:

Every defense, in law or fact, to a claim for relief in any pleading, ... **except that the following defenses may at the option of the pleader be made by motion in writing:** (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, **(6) failure to state a claim upon which relief can be granted,** (7) failure to join a party under Rule 19, and (8) specific negative averments made pursuant to Rule 9.01. ... **If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment** and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

TENN. RULE CIV. P. 12.02 (emphasis added). Accordingly, ACC has appropriately made a Motion for Summary Judgment pursuant to TENNESSEE RULES OF CIVIL PROCEDURE 12.02 and 56.

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” TENN. R. CIV. P. 56.04; *Rye v. Women’s Care Ctr. of Memphis*, 477 S.W.3d 235, 250-52, 264-65 (Tenn. 2015). The party seeking summary judgment has the burden of persuading the court that its motion satisfies the requirements of RULE 56. *Id.* When considering a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party’s favor. *Huggins v. McKee*, 500 S.W.3d 360, 364 (Tenn. Ct. App. 2016).

When the movant files a properly supported Rule 56 Motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Conclusory

allegations and generalizations in opposition to a properly supported Rule 56 Motion are insufficient and will not create a material factual dispute sufficient to prevent the trial court from granting a summary judgment. *Psillas v. Home Depot, U.S.A., Inc.*, 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001); *Davis v. Campbell*, 48 S.W.3d 741, 747 (Tenn. Ct. App. 2001). Such opposition must be made by identifying evidence in the record which indicates disputed material facts. *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

For facts to be considered at the summary judgment stage, they must be included in the Record pursuant to Rule 56 and they must be admissible in evidence. *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009). When ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment. *Huggins*, 500 S.W.3d at 364.

Summary judgment should therefore be granted only if the uncontroverted facts presented and conclusions to be drawn from the facts make it so clear that a reasonable person can reach only one conclusion. *Yount v. FedEx Express*, No. W2015-00389-COA-R3-CV, 2016 WL 1056958, at \*3 (Tenn. Ct. App. March 17, 2016). Summary judgment is a preferred vehicle for disposing of purely legal issues. *See Byrd v. Hall*, 847 S.W.2d 208 (Tenn.1993); *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31 (Tenn. 1988).

Pursuant to TENN. CODE ANN. § 4-5-306(b) the undersigned Administrative Judge is authorized to consider argument or evidence and to issue an initial order on the question of law presented in ACC's MOTION FOR SUMMARY JUDGMENT.

## **ANALYSIS and CONCLUSIONS OF LAW**

This is not a typical TDEC contested case given that this case has a lengthy procedural, litigation, and documentary history. In addition to the multiple Consent Orders entered into between the parties in 2011, 2012, and 2016, both parties filed actions with the Davidson County Chancery Court *prior to* TDEC filing the NOTICE OF HEARING (NOH) with APD on December 16, 2020, to initiate this contested case proceeding. As ACC correctly argues, had TDEC disagreed with the findings of the Chancery Court, TDEC could have appealed the Chancellor's decisions. Accordingly, because neither party appealed the Chancellor's decisions, the parties are bound by those decisions.

Also prior to TDEC filing the NOH with APD, the parties engaged in a lengthy informal dispute resolution proceeding before the TDEC Commissioner's Designee between November 2019 and July 2020. Despite Chancellor Lyle clearly holding that those proceedings before the Commissioner's Designee constituted a TENN. CODE ANN. "section 4-5-105 informal dispute resolution and not a final appealable order,"<sup>20</sup> TDEC chose to file the Designee's July 20, 2020, informal resolution decision with APD.<sup>21</sup> Chancellor Lyle specifically "declar[ed] that because it was unsuccessful, the July 2020 decision of the Commissioner's designee, like any informal settlement procedure, is non-binding, is not an order, and returns the parties to the status quo."<sup>22</sup> Therefore, the July 20, 2020, informal dispute resolution "decision" of the TDEC Commissioner's Designee is hereby disregarded.<sup>23</sup> Similarly, the April 1, 2019, letter from TDEC to the

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<sup>20</sup> Dec. 4, 2020, Chancery Ct. Order, p. 13; *see also id.* at p. 15.

<sup>21</sup> Ex. E to NOH.

<sup>22</sup> Dec. 4, 2020, Chancery Ct. Order, p. 13.

<sup>23</sup> Although it is part of the Technical Record in this contested case, this informal dispute resolution document should also not be considered by the Disposal Board during any appeal of this INITIAL ORDER.

Commissioner's Designee relating to the informal dispute resolution proceeding<sup>24</sup> is also disregarded.<sup>25</sup> In the future, TDEC shall not file informal dispute resolution documents with APD.

On January 31, 2019, TDEC issued a NOTICE OF NONCOMPLIANCE to ACC.<sup>26</sup> On March 1, 2019, ACC responded to the NOTICE OF NONCOMPLIANCE with the "ACC Notice of Dispute Appealing Notice of Noncompliance Dated January 31, 2019, Invoice No. and [sic]." The Chancery Court found ACC's filing to be "a timely 30-day filing of an appeal under TENNESSEE CODE ANNOTATED section 68-212-113(a), which is the statute the HWMA routes to in section 68-212-215(d) and (e) wherein appeals from penalty assessments are provided for."<sup>27</sup>

While the Chancery Court remanded the matter to the Disposal Board, the Chancellor also held that the issue of whether the NOTICE OF NONCOMPLIANCE satisfied due process remained to be determined in the contested case. The Chancery Court opined that the issue before the Disposal Board is ACC's "claims, including but not limited to, that the January 31, 2019, assessment of penalties [NOTICE OF NONCOMPLIANCE] by TDEC does not comply with Tennessee Code Annotated section 4-5-314 and due process."<sup>28</sup>

As found by the Chancery Court, the NOTICE OF NONCOMPLIANCE is TDEC's order assessing civil penalties that initiated this administrative proceeding. ACC challenges the NOTICE OF NONCOMPLIANCE as failing to state a claim upon which relief can be granted. While the NOTICE OF NONCOMPLIANCE may not need to contain all the parts of an "initial order" under the UAPA to

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<sup>24</sup> Ex. D to NOH.

<sup>25</sup> Although it is part of the Technical Record in this contested case, this informal dispute resolution document should also not be considered by the Disposal Board during any appeal of this INITIAL ORDER.

<sup>26</sup> Ex. 2 to MOTION FOR SUMMARY JUDGMENT & Ex. B to NOH.

<sup>27</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 22.

<sup>28</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 22 & ACC Statement of Undisputed Facts ¶9.

meet due process, ACC is correct that, because the NOTICE OF NONCOMPLIANCE is a civil penalty order, certain portions of an “initial order” must be included for TDEC both to provide ACC with notice of the claims against ACC in this contested case and to comply with due process. TDEC acknowledges that the NOTICE OF NONCOMPLIANCE “isn’t as detailed as [TDEC’s] civil penalty orders normally are.”<sup>29</sup> That acknowledgement does not excuse TDEC from providing adequate notice in the NOTICE OF NONCOMPLIANCE.

Specifically, the NOTICE OF NONCOMPLIANCE must comply with the requirements of TENN. CODE ANN. § 68-212-111 to give ACC notice of the action against it. TENN. CODE ANN. § 68-212-111 provides that Correction of Violations may be issued by the Commissioner of TDEC as follows:

(a) When the commissioner finds upon investigation that any provisions of this part are not being carried out, the **commissioner may issue an order for correction** to the responsible person, and **this order shall be complied with within the time limit specified in the order.** Such order shall be served by personal service or shall be sent by certified mail, return receipt requested. Investigations made in accordance with this section may be made on the initiative of the commissioner or board. Prior to the issuance of any order or the execution of any other enforcement action, the commissioner may request the presence of the alleged violator of this part at a meeting to show cause why enforcement action ought not to be taken by the department.

(b) Whenever the commissioner finds that any person is engaging in an unauthorized activity which is endangering or causing damage to the public health or environment, the commissioner may, without prior notice, **issue an order reciting the existence of such unauthorized activity and requiring that such action be taken as the commissioner deems necessary.**

TENN. CODE ANN. § 68-212-111 (emphasis added). ACC correctly argues that the NOTICE OF NONCOMPLIANCE fails to comply with TENN. CODE ANN. § 68-212-111 because it does not include the statutorily-mandated requirements for issuance of an order of correction. Likewise, ACC correctly argues that the NOTICE OF NONCOMPLIANCE fails to identify the date of each alleged noncompliance activity, to identify a time limit for compliance, to specify how and when the fines

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<sup>29</sup> Transcript of Oral Arguments on ACC’s MOTION FOR SUMMARY JUDGMENT, at p. 33; *see also* p. 30.

could be suspended or cease, to identify any action that the commissioner deems necessary, or to notify ACC of how to appeal the NOTICE OF NONCOMPLIANCE. ACC correctly argues that these failures in the charging document – the NOTICE OF NONCOMPLIANCE – deprive ACC of its due process rights to adequate notice of these contested case proceedings as a matter of law. TDEC exceeded the TDEC Commissioner’s delegated authority by issuing the NOTICE OF NONCOMPLIANCE in direct conflict with TENN. CODE ANN. § 68-212-111.

While the NOTICE OF NONCOMPLIANCE summarily refers to “recent correspondence and discussions,” it does not identify the specific instances of noncompliance. As discussed *infra*, TDEC’s statement in the NOTICE OF NONCOMPLIANCE that “ACC has not successfully implemented an approved interim measure” or implemented a Corrective Action Work Plan (CAWP) is circular given that TDEC has not approved any of the plans submitted by ACC. TDEC’s statement neither satisfies the requirements of TENN. CODE ANN. § 68-212-111 to recite the unauthorized activity, nor provides ACC with an identification of the dates of each alleged noncompliance activity.

Instead of providing ACC with a time limit for compliance in the NOTICE OF NONCOMPLIANCE, as required by TENN. CODE ANN. § 68-212-111, TDEC only provided ACC with the “opportunity to attend a show cause meeting with the Commissioner’s Designee to resolve the dispute.” The Chancery Court has determined that the show cause meeting was an informal dispute resolution proceeding pursuant to TENN. CODE ANN. § 4-5-105. This does not satisfy the requirements of TENN. CODE ANN. § 68-212-111.

Similarly, by failing to specify how and when the civil penalties could be suspended or cease, TDEC has failed to provide ACC with due process in the NOTICE OF NONCOMPLIANCE. In contravention of the requirement to specify how and when the civil penalties could be suspended

or cease, in the NOTICE OF NONCOMPLIANCE, TDEC imposes the following never-ending civil penalty upon ACC:

**TDEC is invoking the contingency penalty provisions in the Consent Order and assessing you with a contingent penalty of \$500.00 per day for calendar dates one (1) through seven (7) from the date of this notice, and one thousand dollars (\$1,000.00) per day for day eight (8) and each day thereafter, from the date of this letter.** Attached hereto is an invoice for this prospective civil penalty.

NOTICE OF NONCOMPLIANCE at p. 2 (emphasis added). The attached invoice merely restates the same indeterminable civil penalty language. ACC correctly argues that this civil penalty is “an unending civil penalty for every day following the date of the [NOTICE OF NONCOMPLIANCE] with no end or mechanism to stop the accruing penalty.”<sup>30</sup> ACC also correctly argues that the TDEC NOTICE OF NONCOMPLIANCE “failed to include any provision that would stop the ongoing civil penalties being assessed by the TDEC.”<sup>31</sup>

TDEC attempts to counter this argument by stating that the State informed ACC:

that TDEC is **putting a pause** on the contingent civil penalty assessment **recently upheld in the decision by Paula Mitchell** on July 20, 2020. We are essentially **stopping the clock** on that daily assessment during the pendency of your chancery court action and will continue to stop the clock even if the matter goes back to a regulatory board for further administrative proceedings.

TDEC’s RESPONSE to ACC’s MOTION FOR SUMMARY JUDGMENT, at fn.19 (emphasis added). TDEC’s argument is without merit. First, TDEC’s assertion presumes that the civil penalty was upheld “in the decision by Paula Mitchell,” which was clearly found by the Chancery Court to be a non-binding, non-appealable, informal settlement procedure. Second, if TDEC had wished to “stop the clock” on the penalty, then TDEC could have rescinded the NOTICE OF NONCOMPLIANCE or perhaps issued an *Amended Notice of Noncompliance*. Instead, TDEC claims that the penalty

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<sup>30</sup> ACC’s MEMORANDUM in support of MOTION FOR SUMMARY JUDGMENT at p. 7.

<sup>31</sup> *Id.* at p. 8.

provisions of the NOTICE OF NONCOMPLIANCE have been invalidated through the statements of an undated email<sup>32</sup> from Senior Assistant Attorney General Lisa McCarter to counsel for ACC. While the Tennessee Attorney General's Office represented TDEC in the Chancery Court proceedings, TDEC provides no legal authority for this email communication to serve as a means to eradicate the civil penalty provision of the NOTICE OF NONCOMPLIANCE, which is the basis for the instant contested case.

TDEC also argues that TDEC “was never primarily interested in securing contingent penalties from ACC.”<sup>33</sup> If that were the case, TDEC could have omitted the civil penalties in the NOTICE OF NONCOMPLIANCE. TDEC's contention that ACC somehow forced TDEC to assess unending civil penalties against ACC, via arguments raised in response to the temporary injunction proceedings TDEC brought against ACC in Chancery Court, is disingenuous. TDEC's argument that by virtue of entering into the 2016 Consent Order ACC agreed to the never-ending penalties is similarly disingenuous. As TDEC admits, pursuant to the 2016 Consent Order, ACC has submitted numerous CAWPs, all of which TDEC has failed to approve. It is illogical to argue that ACC agreed to the never-ending penalties by entering into the 2016 Consent Order when ACC has repeatedly attempted to comply with the 2016 Consent Order.

TDEC further argues that ACC could have stopped the penalties from accruing by implementing a TDEC-approved interim corrective action plan. However, TDEC acknowledges that TDEC has failed to approve any such plan. TDEC argues that ACC never submitted an interim corrective action plan. However, the CAWP was *an option* that ACC could take advantage of in

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<sup>32</sup> In fn. 19 of the RESPONSE, TDEC states that this communication was on September 20, 2020, but the email attached to the filing is undated. TDEC also includes this date in TDEC's proposed Statement of Additional Material Facts ¶18. However, the email filed by TDEC with APD is not dated.

<sup>33</sup> TDEC's Response to ACC's MOTION FOR SUMMARY JUDGMENT at p. 7.

the 2016 Consent Order. And, ACC argues, and TDEC agrees, that ACC has repeatedly opted to do so by submitting multiple CAWPs to TDEC. Once ACC opted to follow the CAWP provisions of the 2016 Consent Order, the fact that the CAWP was optional does not relieve TDEC of its responsibility to follow its obligations toward ACC with regard to the CAWPs allowed in the 2016 Consent Order.<sup>34</sup> In sum, it is tautological for TDEC to argue that ACC could stop the civil penalties from accruing by complying with an interim action plan that TDEC has failed to approve. Similarly, given that TDEC included the words “Corrective Action Work Plan” in the re: line of the NOTICE OF NONCOMPLIANCE, it is disingenuous for TDEC to argue that the CAWP was not an option for ACC in the 2016 Consent Order.

ACC’s argument is that the plain language of the NOTICE OF NONCOMPLIANCE provides for unending civil penalties in violation of ACC’s due process rights, and therefore exceeds TDEC’s Commissioner’s authority under TENN. CODE ANN. § 68-212-111. It is determined that the plain language of the NOTICE OF NONCOMPLIANCE does in fact provide for unending civil penalties and violates ACC’s due process rights.

ACC’s argument that the NOTICE OF NONCOMPLIANCE fails to comply with TENN. CODE ANN. § 68-212-111 by failing to recite the existence of unauthorized activity and failing to require that ACC take some action that the commissioner deems necessary is also well taken.

Finally, the plain language of the NOTICE OF NONCOMPLIANCE fails to provide ACC with notice of how to appeal the NOTICE OF NONCOMPLIANCE. Specifically, the NOTICE OF NONCOMPLIANCE provides “[i]f you dispute the civil penalty, you will be given the opportunity to attend a show cause meeting with the Commissioner’s Designee to resolve the dispute.” As the Chancery Court held, this provided for an informal dispute resolution proceeding before the

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<sup>34</sup> The merits of the CAWPs are not reached in this INITIAL ORDER because the NOTICE OF NONCOMPLIANCE is found herein to fail to state a claim.

Commissioner's Designee, which occurred between November 2019 and July 2020. Nowhere in the NOTICE OF NONCOMPLIANCE does TDEC provide ACC with notice of how to appeal the noncompliance determination to the Disposal Board for a contested case hearing. Similarly, the Chancery Court determined that "the 2016 Consent Order is ambiguous on the procedure following an unsuccessful dispute resolution by the Commissioner's designee."<sup>35</sup> This failure by TDEC is part of the reason that these proceedings had to first go to Chancery Court for the Chancellor to determine that the appeal procedure for the NOTICE OF NONCOMPLIANCE should be a contested case before the Disposal Board. It was only after the Chancellor's determination that this contested case was filed with APD. By failing to include the appeal procedures, the NOTICE OF NONCOMPLIANCE failed to provide ACC with due process.

It is DETERMINED that there are no material facts in dispute and that ACC is entitled to a judgment as a matter of law.

Accordingly, for the foregoing reasons, ACC's MOTION FOR SUMMARY JUDGMENT is hereby **GRANTED**. This contested case is **DISMISSED** based upon TDEC's failure to state a claim in the NOTICE OF NONCOMPLIANCE.<sup>36</sup>

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **1st day of March, 2022**.

  
\_\_\_\_\_  
MARY M. COLLIER  
ADMINISTRATIVE JUDGE  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

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<sup>35</sup> Dec. 4, 2020, Chancery Ct. Order, at p. 15.

<sup>36</sup> It is not necessary to reach ACC's mootness argument because the NOTICE OF NONCOMPLIANCE fails to state a claim upon which relief can be granted.

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the  
**1st day of March, 2022.**



**STEPHANIE SHACKELFORD, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE**

**NOTICE OF APPEAL PROCEDURES**

**REVIEW OF INITIAL ORDER**

The Administrative Judge's decision in your case **BEFORE THE TENNESSEE BOARD OF UNDERGROUND STORAGE TANKS AND SOLID WASTE DISPOSAL CONTROL (the Board)**, called an Initial Order, was entered on **March 1, 2022**. The Initial Order is not a Final Order but shall become a Final Order unless:

1. **A Party Files a Petition for Reconsideration of the Initial Order:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must **receive** your written Petition no later than 15 days after entry of the Initial Order, which is no later than **March 16, 2022**. A new 30 day period for the filing of an appeal to the Board (as set forth in paragraph (2), below) starts to run from the entry date of an order ruling of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued. Filing instructions are included at the end of the document.<sup>1</sup>

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied you may file an appeal, which must be **received** by APD no later than 30 days after the date of denial of the Petition. *See* TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **A Party Files an Appeal of the Initial Order and/or Other Earlier Orders:** You may appeal the decision, together with any earlier order issued by the Administrative Judge you specifically choose to appeal, to the Board, by filing an Appeal of the Initial Order with APD. An Appeal of the Initial Order should include your name and the above APD case number and state that you want to appeal the decision to the Board, specifying any earlier order(s) issued by the Administrative Judge that you also want to appeal, along with the specific reasons for your appeal. APD must **receive** your written Appeal no later than 30 days after the entry of the Initial Order, which is no later than **March 31, 2022**. The filing of a Petition for Reconsideration is not required before appealing. *See* TENN. CODE ANN. § 4-5-317.
3. **The Board Decides to Review the Initial Order:** In addition, the Board may give written notice of its intent to review the Initial Order within the longer of 30 days or 7 days after the first board meeting to occur after entry of the Initial Order. No later than 7 days after the entry of an Initial Order, TDEC shall file, and serve, a Notice of Filing containing the date of the next Board meeting. No later than 7 days after the next Board Meeting, TDEC shall file, and serve, a Notice of Filing setting forth what action, if any, the Board took with respect to the Initial Order.

If either of the actions set forth in paragraphs (2) or (3) above occurs prior to the Initial Order becoming a Final Order, there is no Final Order until the Board renders a Final Order affirming, modifying, remanding, or vacating the administrative judge's Initial Order.

If none of the actions in paragraphs (1), (2), or (3) above are taken, then the Initial Order will become a Final Order. **In that event, YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER.**

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<sup>1</sup> See TENN. CODE ANN. §§ 68-201-108 (Air Pollution Control Board); 68-211-113, 68-212-113, 68-212-215, 68-215-115, 68-215-119 (Underground Storage Tanks and Solid Waste Disposal Control Board); TENN. CODE ANN. §§ 60-1-401, 69-3-110, 68-221-714 (Board of Water Quality, Oil & Gas).

**NOTICE OF APPEAL PROCEDURES**

**STAY**

In addition, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Initial Order. A Petition for a stay must be **received** by APD within 7 days of the date of entry of the Initial Order, which is no later than **March 8, 2022**. See TENN. CODE ANN. § 4-5-316. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

**REVIEW OF A FINAL ORDER**

When an Initial Order becomes a Final Order, a person who is aggrieved by a Final Order in a contested case may seek judicial review of the Final Order by filing a Petition for Review “in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person’s discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County,” within 60 days of the date the Initial Order becomes a Final Order. See TENN. CODE ANN. § 4-5-322. The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.

**FILING**

Documents should be filed with the Administrative Procedures Division by email *or* fax:

Email: [APD.Filings@tn.gov](mailto:APD.Filings@tn.gov)

Fax: 615-741-4472

In the event you do not have access to email or fax, you may mail or deliver documents to:

Secretary of State  
Administrative Procedures Division  
William R. Snodgrass Tower  
312 Rosa L. Parks Avenue, 8<sup>th</sup> Floor  
Nashville, TN 37243-1102