No. 18-___

IN THE

Supreme Court of the United States

STARLINK LOGISTICS INC.,

Petitioner,

v.

ACC, LLC; TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, establishes a nationwide system of preventing, remedying, and controlling the pollution of our waterways. Among other things, the Act flatly prohibits the discharge of specified pollutants from point sources into the navigable waters of the United States unless the discharge is authorized under the Act. The principal means of authorizing such a discharge is by issuing a permit pursuant to the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342. Such an "NPDES permit," *inter alia*, sets limits on the amount of pollutants that may be discharged and imposes monitoring and reporting requirements. 33 U.S.C. § 1342(b). Nearly all States implement the NPDES program within their borders pursuant to a delegation of authority under the Clean Water Act. The question presented is:

Whether a state law that authorizes a polluter to discharge covered pollutants from a point source into the navigable waters of the United States without obtaining an NPDES permit and in concentrations that exceed effluent limits established by the Clean Water Act is preempted by the Clean Water Act and the Supremacy Clause, U.S. Const. art. VI, cl. 2.

RULE 29.6 STATEMENT

Petitioner StarLink Logistics Inc. is an indirectly wholly owned subsidiary of Sanofi S.A. No publicly held corporation owns more than 10% of Sanofi S.A. stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner StarLink Logistics Inc. respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Court of Appeals.

OPINIONS BELOW

The opinion of the Tennessee Court of Appeals (Pet. App. 1a-20a) is not published in an official or regional reporter but is available at 2018 WL 637941. The Supreme Court of Tennessee's order denying permission to appeal (Pet. App. 21a-22a) is not published. An earlier opinion of the Supreme Court of Tennessee (Pet. App. 23a-49a) is reported at 494 S.W.3d 659. An earlier opinion of the Tennessee Court of Appeals (Pet. App. 50a-77a) is not published in an official or regional reporter but is available at 2015 WL 1186311. An opinion of the Chancery Court for Davidson County, Tennessee (Pet. App. 78a-98a) is not published in an official or regional reporter but is available at 2014 WL 7001397.

JURISDICTION

The judgment of the Tennessee Court of Appeals was entered on January 31, 2018. Pet. App. 1a. The Supreme Court of Tennessee denied permission to appeal on June 7, 2018. Pet. App. 22a. On August 28, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 2, 2018. No. 18A215. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant constitutional and statutory provisions are reproduced at Pet. App. 99a-110a.

INTRODUCTION

Every day, respondent ACC, LLC discharges highly toxic pollutants from point sources on its landfill into the navigable waters of the United States without a permit and in concentrations that far exceed the limits established by the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq*. Remarkably, the parties *and the court below* agree on that. But the Tennessee Court of Appeals held that ACC can continue to violate the CWA—and continue to pollute petitioner's private property—because the state law that implements the CWA can be interpreted to permit the violation of federal law. That holding is obviously incorrect and conflicts with decisions from every federal court of appeals and state court of last resort that has confronted the issue. The Supremacy Clause, U.S. Const. art. VI, cl. 2, the CWA, and common sense require that ACC cease its toxic discharges unless or until it obtains a discharge permit that complies with federal law. Tennessee cannot simply exempt itself from the requirements of federal law by pointing to a conflicting state law—particularly when that state law is supposed to implement the federal law. This Court should grant the petition for a writ of certiorari for plenary review or for summary reversal to bring the State of Tennessee into line with the rest of the country in this important area of environmental law.

STATEMENT

This case involves a direct conflict between state and federal laws governing point-source discharges of pollutants into the navigable waters of the United States. The state court held that the state law must

prevail in the face of such a conflict—*i.e.*, that the state law preempts the conflicting federal law.

1. a. The federal Clean Water Act is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301 of the CWA *prohibits* "the discharge of any pollutant" *except* "as in compliance with" specified provisions of the Act. *Id.* §§ 1311(a), 1362(12). The term "pollutant" is defined to include various types of waste (including chemical wastes, solid waste, and incinerator residue) "discharged into water," and the term "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(6), (12).

The CWA thus establishes a regime in which point-source discharges of covered pollutants are prohibited *unless* they are authorized by a permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency."). The CWA provides that the Administrator of the Environmental Protection Agency (EPA) "may, after opportunity for a public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding" the general prohibition on discharges in Section 1311(a), "upon condition that such discharge will meet" statutory criteria or criteria established by the Administrator. 33 U.S.C. § 1342(a)(1). A typical NPDES permit is issued after a public hearing, limits the type and amount of pollutants that may

be discharged, and imposes monitoring and reporting requirements on the discharger. *See ibid.*; *id.* § 1362(11). As this Court has explained, "[a]n NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the [CWA] provide[s] for direct administrative and judicial enforcement of permits." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

The CWA authorizes the EPA Administrator to delegate to a willing State the authority "to administer its own permit program for discharges into navigable waters within its jurisdiction," 33 U.S.C. § 1342(b), provided the Administrator determines that the proposed state program imposes discharge limits that are at least as stringent as those imposed by the CWA, *Int'l Paper*, 479 U.S. at 489-490. Any permit issued by a State under that delegated authority must "apply, and insure compliance with, any applicable requirements" of specified provisions of the CWA, including Section 1311. 33 U.S.C. § 1342(b)(1)(A). Forty-six States, including Tennessee, have opted to administer their own NPDES permitting programs pursuant to delegated CWA authority. *See* EPA, State Review Framework for Compliance and Enforcement Performance, https://www.epa.gov/compliance/state-review-framework-compliance-and-enforcement-performance (last updated Dec. 30, 2016).

Under the CWA's "regulatory 'partnership' between the Federal Government and" States that choose to accept delegated authority, EPA retains authority to block the issuance of any NPDES permit to

which it objects. *Int'l Paper*, 479 U.S. at 490; 33 U.S.C. § 1342(d). In particular, a State exercising delegated CWA authority must notify the EPA Administrator of every application for an NPDES permit and must give the Administrator 90 days in which to review, comment on, and potentially object to any permit the State plans to issue. 33 U.S.C. § 1342(d)(1)-(2). Although any State (whether exercising delegated authority or leaving that to EPA) "may require discharge limitations more stringent than those required by the Federal Government," *Int'l Paper*, 479 U.S. at 490, a State may not implement an NPDES program by imposing discharge limitations that are *less* stringent than those established pursuant to the CWA, *see* 33 U.S.C. § 1342(b)(1)(A).

b. The Tennessee General Assembly enacted the Water Quality Control Act of 1977 (WQCA), Tenn. Code Ann. § 69-3-101 *et seq.*, in part "to abate existing pollution of the waters of Tennessee, to reclaim polluted waters, [and] to prevent the future pollution of the waters." *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 518 (Tenn. 2013) (citation omitted). The legislature also intended with the enactment of the WQCA "to qualify for full participation in" the NPDES program. Tenn. Code Ann. § 69-3-102(c). In 1977, EPA authorized Tennessee to administer the NPDES program in the State. *See* Revision of the Tennessee National Pollutant Discharge Elimination System (NPDES) Program to Issue General Permits, 56 Fed. Reg. 21,376, 21,376 (May 8, 1991) (noting that Tennessee's NPDES permit program was approved in December 1977). Pursuant to federal regulation, any state-administered NPDES program "must prohibit all point source discharges of pollutants . . . except as

authorized by a permit in effect under the State program." 40 C.F.R. § 123.1(g)(1).

The WQCA established the Tennessee Water Quality Control Board (now known as the Tennessee Board of Water Quality, Oil, and Gas), which, *inter alia*, establishes water-quality standards and administers the State's NPDES permit system. *Pickard*, 424 S.W.3d at 519; Tenn. Code Ann. § 69-3-105(h)(1). The WQCA further provides that any person who discharges wastes into waters in Tennessee must do so pursuant to a permit issued by the Commissioner of the Tennessee Department of Environment and Conservation (TDEC). Tenn. Code Ann. § 69-3-108(a).

2. Petitioner owns a nearly 1,500-acre parcel of real property in Maury County, Tennessee. Pet. App. 2a-3a. Petitioner's property includes Arrow Lake and parts of Sugar Creek. *Id.* at 3a. Respondent ACC, LLC owns neighboring property on which it operated a landfill for more than a decade, pursuant to a landfill permit issued by TDEC. *Id.* at 2a. During the 13 years in which ACC actively operated the landfill, ACC disposed of waste from a nearby aluminum smelting plant—waste that included "salt cake slag" with high concentrations of sodium chloride and potassium chloride salts and other pollutants. *Ibid.* Because chloride salts are extremely soluble, they quickly dissolve and migrate into the environment when chloride-containing slag comes into contact with rain water or groundwater. Pet. C.A. Br. 4.[1] When water contacts slag like that in ACC's landfill, a chemical reaction releases

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[1] References to "Pet. C.A. Br." are to Petitioner's Superseding Brief filed in the Tennessee Court of Appeals on Aug. 31, 2016. Excerpts of this brief are also reproduced at Pet. App. 126a-130a.

ammonia that also migrates into the environment. *Ibid.* Polluted water containing chlorides and ammonia is known as "leachate." *Ibid.* Ammonia is considered by EPA to be one of the worst water pollutants because of its direct toxic effects on aquatic life. *Ibid.*

Within a few years of opening the landfill, ACC learned that it was leaching high levels of chloride and ammonia from the slag into the groundwater and surface water that drains into Sugar Creek and Arrow Lake (on petitioner's property). Pet. App. 3a. As a result of that leachate, Sugar Creek and Arrow Lake became extremely polluted, *ibid.*, leading to destruction of surrounding trees and surface vegetation and polluting the water to such a degree that no aquatic life survives in the upper portion of the lake, *Starlink Logistics Inc. v. ACC, LLC*, 2012 WL 2395199 (M.D. Tenn. June 25, 2012). Even after ACC closed the landfill, it has continued to pollute surrounding waters, including Arrow Lake and Sugar Creek. Pet. App. 23a-25a. During this litigation, a geologist testified that the concentration of ammonia flowing from ACC's landfill into Sugar Creek and Arrow Lake was at that time 158 times higher than the maximum that would be permitted by EPA in an NPDES permit. Pet. C.A. Br. 6. The concentration of chloride in the affected water was 74 times higher than the maximum that would be permitted by EPA in an NPDES permit. *Ibid.*

ACC has never applied for or obtained an NPDES permit for its leachate discharges to navigable waters.

3. As a result of the pollution from ACC's landfill, ACC was found to have violated the WQCA, Tenn. Code Ann. §§ 69-3-108(a) and (b) (2012), 69-3-114(a) and (b) (2012) and the Tennessee Solid Waste Disposal

Act[2] (SWDA), Tenn. Code Ann. § 68-211-104(1), (3), and (4). Pet. App. 3a & n.1. Between 2003 and 2011, ACC and TDEC engaged in various efforts to mitigate the contamination, but the now-closed landfill continues to contaminate the ground and surface water that flows into Arrow Lake and Sugar Creek. *Id.* at 5a-6a.

a. In 2011, ACC and TDEC entered into an Initial Consent Order that they then filed in the Davidson County Chancery Court, seeking to make it a judicial order. Pet. App. 6a. The Initial Consent Order acknowledged that ACC was in violation of the WQCA and the SWDA and set out certain requirements for ACC, in an attempt to address the ongoing pollution from its landfill. *Ibid.* The Initial Consent Order did not require ACC *either* to stop discharging leachate *or* to obtain an NPDES permit for its discharges—but it did purport to immunize ACC against third-party claims based on its discharges, which continue to far exceed federal limits. *See ibid.* Petitioner intervened and objected to the Initial Consent Order. *Ibid.*

When the parties were unable to resolve their differences, the chancery court remanded the Initial Consent Order to the Tennessee Solid Waste Disposal Control Board (Board), which generally oversees landfill matters. Pet. App. 6a. ACC and TDEC requested entry of a privately negotiated amended consent order (Amended Order) that would require ACC to take certain actions with respect to unauthorized discharge of leachate contamination into water that flows from the landfill into Arrow Lake and Sugar Creek. *Id.* at 6a-10a. The privately negotiated order is not an NPDES permit, is not enforceable as an NPDES permit would

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[2] Tenn. Code Ann. § 68-211-101 *et seq.*

be, and does not contain the effluent limitations that an NPDES permit would be required to contain. Because it is not an NPDES permit, it was not submitted to the EPA for review and potential veto. Petitioner objected to the agreement on several grounds, including that the Amended Order expressly authorized ACC to continue discharging untreated leachate into navigable waters without requiring ACC to obtain and comply with an NPDES permit for those discharges, in violation of the CWA and of the WQCA, which implements the CWA. *Id.* at 10a, 111a-112a. The Board entered an order approving the Amended Order. *Id.* at 10a.

b. Petitioner appealed the Board's decision to the chancery court, which affirmed the Board's decision approving the Amended Order, Pet. App. 10a, and rejected petitioner's argument that the CWA prohibits TDEC from authorizing ACC's discharges without issuing an NPDES permit, *see id.* at 113a-118a. Petitioner appealed that decision to the Tennessee Court of Appeals, which remanded on the ground that the Board failed to consider another feasible and potentially economically viable plan, *id.* at 10a, 76a-77a, but did not rule on petitioner's contention that ACC cannot continue to discharge pollutants without obtaining an NPDES permit, *id.* at 59a & n.7, 119a-125a. The Tennessee Supreme Court reversed, holding that the court of appeals applied the wrong standard of review for judicial review of agency decisions. *Id.* at 10a, 24a. The supreme court remanded to the court of appeals for consideration of the issues it pretermitted in its earlier decision, including whether ACC is required to obtain an NPDES permit. *Id.* at 49a & n.5.

c. On remand, the court of appeals affirmed the chancery court's decision upholding the Board's approval of the Amended Order. Pet. App. 1a-20a. The court of appeals rejected petitioner's argument that ACC and the Board must comply with the CWA, holding instead that the State was "not obligated to apply federal law" when it authorized ACC to continue discharging pollutants into navigable waters, in violation of the WQCA and CWA. *Id.* at 18a, 126a-132a.

The court of appeals first rejected petitioner's argument that the Amended Order violates the CWA—and the WQCA, which implements the CWA for Tennessee—by authorizing ACC to discharge pollutants from a point source into navigable waters without an NPDES permit. Pet. App. 12a-18a. Petitioner argued that, if Tennessee law were interpreted to be less stringent than federal law, "it would be preempted." *Id.* at 128a, 132a; *see id.* at 14a. The court noted that petitioner's "argument rest[ed] on the necessity to follow the federal Clean Water Act," and agreed that, "[u]nder the CWA, those with allegations of pollution must either stop the actions that are causing the pollution or obtain a [NPDES] permit to limit and monitor the amount of pollutant released into the waterway in question." *Id.* at 14a. But the court rejected petitioner's argument that, by approving a third option—*i.e.*, "permitting ACC to continue the harmful behavior of allowing the leachate to seep into Sugar Creek and Arrow Lake without the oversight of a NPDES permit"—the Amended Order violates the CWA and Tennessee's WQCA, which is supposed to implement the CWA. *Ibid.*

The court of appeals held that the CWA's requirement that a polluter either cease polluting or obtain

an NPDES permit is "non-binding" when interpreting what the state law requires, "even when the state and federal rules are identical." Pet. App. 15a (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011)). The court concluded that petitioner's "reliance on the federal law and interpretations of the federal CWA in this case was misguided" because the text of the state statute was sufficiently clear to justify the Board's contrary interpretation of that provision. *Id.* at 15a, 16a. The court thus concluded that, because it was not required "to follow the federal law" and was required (pursuant to the Tennessee Supreme Court's decision in this case) to give "deference" to "TDEC and the Board," the Board did not err in interpreting the text of Tennessee's WQCA to conflict with *and preempt* the more stringent federal CWA. *Id.* at 16a. In so holding, the court relied on the language of the WQCA, which provides that the "commissioner *may* grant permits authorizing the discharge[]" of pollutants, explaining that the statute's use of the word "may" "can be read to give leniency in granting permits, putting the decision in the hands of the Commissioner." *Ibid.*

The court of appeals also rejected petitioner's argument that Tennessee's Hazardous Waste Management Act (HWMA), Tenn. Code Ann. § 68-212-101 *et seq.*, cannot authorize either TDEC or the Commissioner to continue allowing discharge of pollutants without an NPDES permit. Pet. App. 18a-20a. The court held that "the Board had the latitude to exempt ACC from the typical requirement of the NPDES permit," and again rejected petitioner's argument that the Board is obligated to comply with the requirements of the CWA. *Id.* at 18a. The court held that "the Board

was not obligated to apply federal law and was not in error in applying the [conflicting] state law." *Ibid.* The court explained that petitioner's "reliance on" "federal law" "is misguided" because "[n]either the Board nor [the court of appeals is] obligated to follow such precedent when the similar state law can be interpreted using plain language and legislative intent." *Id.* at 19a.

d. Petitioner sought permission to appeal to the Tennessee Supreme Court, arguing both that the court of appeals' decision "create[d an] irreconcilable conflict between federal and state law" and that Tennessee cannot "impose less stringent or inconsistent requirements as they would be preempted by the CWA." Pet. App. 133a, 134a. On June 7, 2018, the Tennessee Supreme Court denied petitioner's application for permission to appeal. *Id.* at 22a.

ACC continues to discharge ammonia and chlorides from point sources into waters that flow onto petitioner's property without an NPDES permit, in violation of the CWA. And the Amended Order purports to authorize such discharges indefinitely.

REASONS FOR GRANTING THE WRIT

The federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, prohibits the discharge of pollutants into navigable waters unless the polluter obtains an NPDES permit that imposes effluent limits that are at least as stringent as those established under the CWA. Tennessee asserts that state law gives it discretion to *ignore* both the permit requirement and the minimum effluent limits established by federal law when it sees fit. The Tennessee Court of Appeals acknowledged that the State's interpretation of state law is directly

contrary to the federal Clean Water Act and to federal decisions construing the CWA. The court nevertheless held that the state agency's interpretation of the state law that purports to implement the CWA preempts the requirements of the federal CWA. That decision is plainly incorrect—and it conflicts with decisions of every federal court of appeals and state court of last resort to consider these issues. This Court should grant the petition for a writ of certiorari for plenary review or summary reversal.

I. The Decision Below Directly Conflicts With Decisions Of Multiple Federal Courts Of Appeals And State Courts Of Last Resort.

The Tennessee Court of Appeals held that a state law intended to implement the CWA preempts the requirements of the CWA itself when the state law provides *less* protection from pollution of the navigable waters of the United States. That decision is contrary to law and logic. It also conflicts with decisions from multiple federal courts of appeals and state courts of last resort. If the decision below is left undisturbed, the federal CWA—a statute that Congress enacted "to establish an all-encompassing program of water pollution regulation," *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)—will simply not apply to the State of Tennessee's delegated authority to implement the federal NPDES program. This Court's intervention is necessary to ensure that federal environmental mandates are not simply discarded in the State of Tennessee.

A. It is well settled throughout the Nation that the CWA prohibits the discharge of covered pollutants into the navigable waters of the United States from

point sources *unless* the discharger obtains a permit under the NPDES program and complies with the effluent limits and monitoring and reporting requirements set out in the permit. This Court has explained, for example, that under the CWA, "*[e]very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee*, 451 U.S. at 318 (footnote omitted); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("Section 301(a) of the Act, 33 U.S.C. 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency.").

Every federal court of appeals to address the issue has similarly held that the CWA prohibits the discharge of pollutants from a point source into the waters of the United States without an NPDES permit. *E.g.*, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 744 (9th Cir. 2018) ("[A] party violates the CWA when it does not obtain such a[n NPDES] permit and (1) discharges (2) a pollutant (3) to navigable waters (4) from a point source.") (internal quotation marks and brackets omitted), *petition for cert. pending*, No. 18-260 (filed Aug. 27, 2018); *Dubois v. USDA*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("Section 301(a) of the Clean Water Act prohibits the 'discharge of any pollutant' into navigable waters from any 'point source' without an NPDES permit."); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste,

with the quantity and quality of the discharge regulated."); *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) ("[T]he legislative history [of the CWA] makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a)."); *see*, *e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (same); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993) (same); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015) (same).

State courts of last resort agree. *E.g.*, *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1054-1055 (Ohio 1992) ("The guiding principle of the [CWA] is that discharge of pollutants into the waters of the nation is unlawful. As an exception to this general prohibition, the Act permits discharge where the point source possesses an NPDES permit authorizing the activity."); *Miotke v. City of Spokane*, 678 P.2d 803, 812 (Wash. 1984) (en banc) ("[T]he NPDES permit is the only way in which a waste discharge from a point source may avoid the total proscription of 33 U.S.C. § 1311(a)."); *see City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 869 (Cal. 2005) (explaining that the CWA "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law").

To be sure, States play a vital role in implementing the requirements of the CWA. Congress requires the EPA to delegate implementation of the NPDES system to a State that satisfies certain statutory criteria. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*,

551 U.S. 644, 663 (2007). And Congress authorized States to impose requirements that are *more* stringent (*i.e.*, more protective of water quality) than those imposed by the CWA and by EPA's implementing rules and regulations. 33 U.S.C. § 1342(b)(1)(A); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (noting that the CWA "created various federal minimum effluent standards"). But every federal court of appeals to address the question has held that "the CWA provides a federal floor, not a ceiling, on environmental protection"—*i.e.*, that it permits States to enact standards that are more protective than those in the CWA, but that it requires States to enforce standards that are at least as protective as the CWA's. *Dubois*, 102 F.3d at 1300; *accord Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015) ("[T]he CWA provides a federal floor, not a ceiling, on environmental protection.") (citation omitted); *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014) ("The CWA sets the minimum requirements that states must demand in their NPDES applications, *see* 40 C.F.R. § 122.21(a)(2)(iv), but states can, as Virginia has done here, exceed that minimum and require more stringent reporting requirements."); *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 617 (7th Cir. 2003) ("[T]he Clean Water Act's permitting provisions, like many federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation.").

B. In a stark departure from that overwhelming weight of authority, the Tennessee Court of Appeals held *both* that Tennessee need not comply with the CWA's requirement that no pollutant may be discharged from a point source into navigable waters

without an NPDES permit *and* that state law allowed Tennessee to authorize discharges that exceed the effluent limits established by federal law. In other words, the Tennessee Court of Appeals held that state law governing clean-water standards *trumps* federal law governing the same, in direct contravention of the U.S. Constitution and decisions of every federal court of appeals and state court of last resort to address that question.

The court of appeals did not dispute that the federal CWA flatly prohibits discharge of pollutants into navigable waters from point sources unless the polluter obtains an NPDES permit. To the contrary, the court held that "[u]nder the CWA, those with allegations of pollution must either stop the actions that are causing the pollution or obtain a[n NPDES] permit to limit and monitor the amount of pollutant into the waterway in question"—and it acknowledged the "federal cases that focus on the necessity of a NPDES permit when a person or entity is in conflict with the CWA." Pet. App. 14a. The court further agreed that "any discharge permit issued by TDEC falls under the NPDES permit system." *Id.* at 14a n.9. But the court then refused to apply those principles in this case.

Following the Tennessee Supreme Court's instruction in this case that courts must defer to the Board's interpretation of how to apply the WQCA, Pet. App. 16a, 49a, the Tennessee Court of Appeals held that, although federal law prohibits a polluter from point-source discharges without an NPDES permit, that requirement does not apply in Tennessee because the "similar" state law (*i.e.*, the state law that purports to implement the federal CWA) can be construed to allow discharges that are not authorized by an NPDES

permit. *Id.* at 16a. The court of appeals expressly acknowledged—and did not contest—petitioner's argument that "the federal CWA cannot be read" to "give leniency in granting permits, putting the decision in the hands of the [state] Commissioner" whether or not to require an NPDES permit for ongoing discharges. *Ibid.* Citing "the lack of a necessity to follow the federal law," however, the court held that the state law that implements the CWA need not comply with the CWA's requirement that no discharges take place without a permit. *Ibid.* Indeed, the court could not have been more express about its rejection of ordinary federal preemption principles, stating that petitioner's "reliance on the federal law and interpretations of the federal CWA in this case was misguided." *Id.* at 15a.

The court of appeals did not stop there. Lest there be any ambiguity about the basis and effect of its holding, the court explained that "issuing a permit for" ACC's discharges "would actually be in direct conflict with the language of the statute"—because ACC's ongoing discharges are "causing a condition of pollution into Sugar Creek and Arrow Lake." Pet. App. 17a. In other words, under the conditions TDEC imposed on ACC, ACC's ongoing discharges cannot qualify for an NPDES permit because the level of pollution far exceeds any that could be authorized under the CWA. But instead of requiring TDEC to come up with conditions that *would* satisfy the CWA and qualify for an NPDES permit, the Tennessee Court of Appeals simply wrote off the CWA, holding that TDEC "had the latitude to exempt ACC from the typical requirement of the NPDES permit" because "[n]either [TDEC] nor th[e] Court are obligated to follow" the federal CWA

"when the similar state law can be interpreted using plain language and legislative intent." *Id.* at 18a-19a.

C. The Tennessee Court of Appeals' holding that the state law implementing the CWA preempts the federal CWA's minimum protections conflicts with the unanimous body of authority cited *supra* at pp. 13-16, holding that the CWA prohibits discharges that are not authorized by an NPDES permit and that the CWA prohibits States that implement NPDES programs from enforcing effluent limits that are less stringent than those established under the CWA. As explained above, every federal court of appeals and every state court of last resort to address those questions is in agreement. The Tennessee Court of Appeals' decision directly conflicts with those decisions.

To illustrate the starkness of the conflict, consider the California Supreme Court's decision in *City of Burbank v. State Water Resources Control Board*, *supra*. That court considered claims by operators of wastewater-treatment plants that the California law implementing the State's NPDES program required consideration of costs when imposing restrictions through NPDES permits—even when such considerations would require the permit conditions to be less protective than the CWA's standards. 108 P.3d at 864. The California Supreme Court rejected that argument, holding that, "because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." *Ibid.*; *id.* at 869 ("Because [state law] cannot authorize what federal law forbids, it

cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards."). That court correctly explained that, "[t]o comport with the principles of federal supremacy, California law cannot authorize [California's] regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law." *Id.* at 870. The Ohio Supreme Court has similarly rejected an interpretation of state law that would permit a state agency to authorize discharges that would violate the CWA. *Columbus & Franklin Cty. Metro. Park Dist.*, 600 N.E.2d at 1054-1055.

The Tennessee Court of Appeals held the exact opposite. The court held that state authorities were permitted to exempt ACC from the CWA's discharge limits because, *inter alia*, requiring ACC to obtain an NPDES permit that complied with the CWA would not be cost effective and because state law could be interpreted to give TDEC discretion whether or not to require an NPDES permit at all. Pet. App. 18a-20a. The boldness with which the Tennessee court dismissed conflicting federal law underscores the directness of the conflict between its decision and decisions of every federal court of appeals and state court of last resort to address these issues. This Court should intervene to restore federal supremacy principles to Tennessee's water-quality laws.

II. The Preemption Question Presented Is Important.

A. The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Tennessee Court of Appeals turned that provision on its head when it held that state law trumps conflicting federal law—even when the state law purports to implement the more stringent federal law.

This Court plays a vital role in policing federal preemption principles. In service of that role, the Court routinely grants petitions for a writ of certiorari when an outlier court erroneously holds that a state law is *not* preempted by a conflicting federal law. *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013). The Court should grant the petition in this case as well to bring Tennessee back into line with federal law and with every other major court to consider the question presented (not to mention every other State in the Union).

B. If left undisturbed, the Tennessee Court of Appeals' erroneous decision will seriously undermine Congress's goal of enforcing comprehensive nationwide water-quality standards. Through the cooperative regulatory regime established by the CWA, Congress trusted and empowered States to enforce water-quality standards by running the NPDES programs within their borders. But explicit in the CWA—backed up by the power of the Supremacy Clause—is the condition that States implement their programs by applying the federal standards and requirements at a *minimum*. States are not free to simply disregard the

CWA's minimum effluent standards and permit requirements. But that is exactly what Tennessee has done.

As this Court has explained, "Congress'[s] intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. Congress accomplished that goal by "occup[ying] the field" of setting minimum clean-water standards "through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317. The Court has emphasized that "[t]he major purpose of the [CWA] was to establish a *comprehensive* long-range policy for the elimination of water pollution," *id.* at 318 (internal quotation marks omitted), and has noted that "Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,'" *id.* at 325 (quoting S. Rep. No. 92-414, at 95 (1971)).

To be sure, Congress intended to include willing States in the implementation of the CWA's water-quality protections by granting to qualifying States the authority both to enforce their own NPDES programs and to enforce water-quality standards that are *more* stringent than those in the CWA. *Int'l Paper*, 479 U.S. at 489-490. States therefore enjoy a certain degree of flexibility in implementing the CWA within their own borders—but that leeway does *not* include discretion to simply disregard the CWA's requirements. To the contrary, under the CWA, EPA retains the right to veto any state-authorized NPDES permit that the EPA views as contrary to the CWA. *Id.* at 489. Under the scheme approved by the court below, however, EPA's oversight role (and potential veto

power) is entirely supplanted where, as here, the State opts to exempt a polluter from the requirement to obtain an NPDES permit, in conflict with the CWA. That usurpation of power contravenes the "regulatory 'partnership' between the Federal Government and the source State," *id.* at 490, that Congress envisioned. It also ignores the Constitution's Supremacy Clause. This Court has made clear that, consistent with ordinary preemption principles, a state law "is pre-empted if it interferes with the methods by which the [CWA] was designed to reach th[e] goal" of eliminating water pollution. *Id.* at 494; 33 U.S.C. § 1251(a)(1), (3) (describing Congress's "national goal that the discharge of pollutants into the navigable waters be eliminated" and its "national policy that the discharge of toxic pollutants in toxic amounts be prohibited").

The Tennessee Court of Appeals' inverse-preemption ruling has serious real-world consequences. Every day, ACC's now-defunct landfill discharges highly toxic pollutants into the ground and surface water that feeds Sugar Creek and Arrow Lake, bodies of navigable water on petitioner's property. The EPA strictly limits the discharge of those pollutants (ammonia and chloride) into our Nation's waters for good reason: in concentrations like those discharged from ACC's landfill, they are deadly to aquatic life and to acres of surrounding plant life. Pet. C.A. Br. 7.

Tennessee's decision to ignore national discharge limits also has adverse consequences for businesses. As noted, Congress intended with the CWA to establish *uniform* national limits on the discharge of pollutants into navigable waters. When Tennessee opts to ignore those limits, businesses operating within the State face serious uncertainty about what standard

their own discharges will be subject to. A business that believes it can take advantage of the lax approach adopted in this case may forego investment in cost-effective front-end pollution-control measures. And a business that understands that it must comply with federal effluent limits and permitting requirements will be at an unfair disadvantage vis-à-vis competitors like ACC to whom Tennessee has given a pass.

The Tennessee Supreme Court instructed the court of appeals to defer to the Board's views on how the WQCA should be implemented in this case. Pet. App. 49a. The court of appeals then deferred to the Board's view that it can unilaterally exempt polluters from the NPDES requirements of the CWA. *Id.* at 16a (explaining that its reverse-preemption holding is compelled by "deference given to TDEC and the Board [and] the lack of a necessity to follow the federal law").

ACC has been polluting navigable waters that flow into petitioner's private property for more than three decades. The Tennessee courts were wrong to permit ACC to continue do so in violation of federal law. This Court's intervention is vitally important.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted for plenary review. In the alternative, the Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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November 2, 2018

APPENDIX

APPENDIX A

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Appeal from the Chancery Court
for Davidson County No. 121435II
Carol L. McCoy, Chancellor

STARLINK LOGISTICS, INC.,

v.

ACC, LLC, ET AL.

Filed January 31, 2018, Clerk of the Appellate Courts
April 12, 2017 Session

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Davidson County, briefs filed on behalf of the respective parties, and argument of counsel. Upon consideration thereof, this Court is of the opinion that there is no reversible error in the trial court's judgment.

It is, therefore, **ORDERED** and **ADJUDGED** by this Court that the judgment of the trial court is affirmed. This case is remanded to the trial court for collection of costs assessed below. Costs on appeal are taxed to the appellant, StarLink Logistics, Inc.

PER CURIAM

In this case, several entities were attempting to address the pollution issues of Sugar Creek and Arrow Lake. An Amended and Restated Consent Order was approved. StarLink Logistics, Inc., a property owner, appealed. Initially, this court reversed. After an

appeal, the Supreme Court of Tennessee remanded for this court to review under the proper standard of review. We now affirm the trial court's decision to approve the Consent Order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, P.J., M.S., and W. NEAL MCBRAYER, J., joined.

* * *

OPINION

I. BACKGROUND

While the development of this case is complicated and intricate, the underlying facts are not in dispute between the parties. Even though most of the history of this suit involves ACC, LLC ("ACC") and the Tennessee Department of Environment and Conservation ("TDEC"), StarLink Logistics, Inc. ("StarLink") has no issues with or opinions of the history preceding its involvement.

In 1981, the State of Tennessee through TDEC issued ACC a permit to construct and operate a landfill in Maury County. The landfill was built on approximately 14 acres of a larger parcel owned by ACC. During the landfill's 13 years of active operation, ACC disposed of aluminum recycling waste from a nearby aluminum smelting plant. This waste included mostly bag-house dusts and "salt cake" slag, which contains high concentrations of sodium chloride and potassium chloride salts. ACC closed the landfill in 1993 and submitted a certification of completion of closure to

TDEC in 1995, which was approved with an acceptance of closure by TDEC in 1996.

Within a few years of beginning operation, ACC and TDEC learned that the landfill was leaching high levels of chloride and ammonia from the slag into the groundwater and surface water that drained into Sugar Creek and Arrow Lake, which is on 1,500 acres owned by StarLink. This leachate resulted in the pollution of those two bodies of water. Both ACC and TDEC worked to find a solution to the leaching, including various investigative and corrective efforts, but they were unsuccessful. As a result of this pollution, ACC was found to have violated Tennessee Code Annotated sections 69-3-108(a) and (b), 69-3-114(a) and (b), and 68-211-104(1), (3), and (4).[1]

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[1] Tennessee Code Annotated sections 69-3-108(a) and (b) (2012) provide under the Tennessee Water Quality Control Act:

> (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (1), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
>
> (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
>
> > (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

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(2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;

. . .

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters[.]

T.C.A. § 69-3-114(a) and (b) (2012) provide under the Tennessee Water Quality Control Act:

(a) It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-1031 unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

(b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any permits or orders issued pursuant to the provisions of this part; or to fail or refuse to file an application for a permit as required in § 69-3-108 . . . .

T.C.A. § 68-211-104(1), (3), and (4) provide under the Tennessee Solid Waste Disposal Act that it is unlawful to:

(1) Place or deposit any solid waste into the waters of the state except in a manner approved by the department or the Tennessee board of water, quality, oil and gas;

(3) Construct, alter, or operate a solid waste processing or disposal facility or site in violation of the rules, regulations, or orders of the commissioner or in such a manner as to create a public nuisance; or

(4) Transport, process or dispose of solid waste in violation of this chapter, the rules and regulations established under this chapter or in violation of the orders of the commissioner or board.

It was not until 2003 that TDEC requested that ACC provide a Corrective Action Plan ("the Plan") detailing the feasibility of various options for mitigating the release of contaminated leachate based on the information available. These options included waste removal from the landfill, leachate collection and treatment, and natural or enhanced site attenuation. However, the Plan ultimately concluded that there was no remedy that could satisfy the criteria in Tennessee Compilation of Rules and Regulations Chapter 1200-1-7-.04(7)(a)8(ii)[2] within the next two to three years. In 2004, TDEC did then approve ACC's plan to build a "Wetlands Treatment Alternative" that would retain and buffer leachate and improve the water quality and habitat of the affected waters. However, this system failed to stop the pollution into Arrow Lake and Sugar Creek.

After the wetlands failure, in 2008, TDEC requested that ACC submit a modified plan to address the increase in contaminants in the groundwater. Later that year, ACC submitted a modified plan ("the Modified Plan") that TDEC approved in 2010. This Modified Plan included a report that detailed ACC's efforts since April 2010. It also included a request that

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[2] "Remedies must: (I) Be protective of human health and the environment, (II) Attain the groundwater protection standard as specified pursuant to Rule 1200-01-07-.04(7)(a)1 of this rule, (III) Control the source(s) of releases so as to reduce or eliminate, to the maximum extent practicable, further releases of Appendix II constituents into the environment that may pose a threat to human health or the environment, and (IV) Comply with standards for management of wastes as specified in subpart (IV) of part 9 of this subparagraph."

TDEC clarify the corrective action goals, summarize the current site conditions, and other general actions. The Modified Plan led to a series of meetings and inspections in determining the best next steps for ACC to take in stopping the pollution from its landfill.

In June 2011, ACC and TDEC entered into an Initial Consent Order that acknowledged that ACC was in violation of the Tennessee Water Quality Control Act[3] ("WQCA") and the Tennessee Solid Waste Disposal Act[4] ("SWDA") and set forth ACC's obligations in moving forward to address the continued contamination. As specified in the order, ACC agreed to submit a new plan to reduce the contamination stemming from its landfill. This order gave the TDEC Commissioner permission to modify future plans and extend compliance deadlines for a show of "good cause." The civil penalty of $228,300 would only become due if ACC failed to file and implement the plans called for by the order. The order could also be waived in its entirety by the TDEC Commissioner for demonstrated good cause by ACC. This order was filed for entry as a judgment by consent in the Davidson County Chancery Court.[5] At this point, Star Link intervened and objected to the initial consent order.

After failing to resolve the issues themselves among the three parties, the Chancery Court remanded the order back to the Tennessee Solid Waste Disposal Control Board ("the Board") for further proceedings. StarLink was given specific notice that ACC

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[3] Tenn. Code Ann. §§ 69-3-101 to -148 (2011).

[4] Tenn. Code Ann. §§ 68-211-101 to -124 (2011).

[5] Pursuant to Tenn. Code Ann. § 68-212-114(e) (2011), § 68-212-215(f) (2011), and § 69-3-115(e) (2004 & Supp. 2011).

and TDEC would be asking for adoption of an Amended and Restated Consent Order ("the Amended Order") that had different orders and assessments from the Commissioner. In relevant part, ACC was ordered as follows:

> A. [ACC] shall take the following actions to prevent the unauthorized discharge of leachate contamination in water flowing from the [landfill] Site into the Arrow Lake impoundment of Sugar Creek:
>
> > 1. Within 120 days of the effective date of this Amended and Restated Consent Order, or as is otherwise agreed to by the parties, [ACC] shall construct a berm upgradient of the site to divert uncontaminated storm water away from the Landfill prior to the commencement of any corrective action activities on the Landfill.
> >
> > 2. As a part of the Corrective Action Plan [("CAP")] . . . [ACC] shall submit to the Commissioner for his review and comment or approval a modified Discharge Reduction Plan (hereinafter "DRP") that incorporates TDEC's comments and revisions to [ACC's] draft DRP that was submitted to TDEC in September 2011. The modified DRP shall significantly reduce, particularly during periods of low area surface water flow, the loading of contaminants that are currently discharging from the Site via surface waters. The modified DRP shall include a schedule for implementation.

3. The DRP shall contain a plan to divert surface water away from the landfill area and the current wetland system. The DRP shall eliminate, to the extent practicable, the potential for surface water to migrate from the surface into the landfill and eliminate the potential for surface water to enter the excavated area of the landfill once corrective action begins.

. . .

B. [ACC] shall remove from the current landfill all solid waste, to the extent practicable, that has the potential for future contact with ground or surface water. All waste removed will be located to a new landfill cell constructed on the Site or to a permitted off-site landfill.

1. Prior to the Commissioner's approval of the Corrective Action Plan . . . but after commencement of waste removal activities, [ACC] shall capture ground water entering the excavated area, analyze the ground water to determine its chemical characteristics, and then either (a) redirect the collected water back into the landfill or (b) discharge the collected ground water directly into Arrow Lake if the water is consistent with background concentrations as approved by TDEC [or] Tennessee water quality criteria[.]

2. After the Corrective Action Plan . . . has been approved by the Commissioner, a list of constituents, their concentrations,

and frequency of analysis shall follow the sampling plan contained in the approved Water Monitoring Plan as contained in the approved CAP[.]

3. As waste is removed from the Site, [ACC] shall capture ground water that is upgradient of the remaining waste and handle such ground water as described in the approved DRP, or as is otherwise required by the CAP. Treatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed.

C. Within one hundred and fifty (150) days of the effective date of this Amended and Restated Consent Order, [ACC] in general accordance with the ground water corrective action provisions of Rule 1200-01-07-.04(7), shall submit to the Department a Corrective Action Plan . . . which provides for the methods and schedule for removal of solid wastes that have been disposed of in the ACC Landfill which have the potential for future contact with surface or groundwater.

The Amended Order, which is the point of contention in this case, requires ACC to detail an estimate of the amount of waste to be removed daily and proposed methods of removal, a schedule for the removal and relocation of all impacted waste, the design of any landfill cell to be built on site, the development and implementation of a water monitoring and sampling plan for the leachate discharging from the landfill and for any ground water pumped from the worksite. As with the original order, the plan can be modified upon

written approval of the Commissioner and ACC, and the Commissioner may extend the compliance dates if ACC provides a written request. The Amended Order requires a civil penalty of $400,000 that comes due in $100,000 increments yearly if ACC fails to meet milestone deadlines established in the CAP for removing waste from the ACC Landfill.

At the contested hearing in front of the Board on August 7, 2012, TDEC and ACC asserted that diverting the storm water away from the site and subsequently removing the waste from the landfill was the only practical solution to solve the contamination. StarLink argued that the plan did not adequately address the leachate still leaking into Sugar Creek and StarLink's property. The Board entered an order approving the Amended Order two days later. After StarLink appealed by filing a petition for judicial review in the Chancery Court and subsequent oral argument, the court entered an order affirming the Board's decision approving the Amended Order.

On the initial appeal to this court, we found in favor of StarLink after deciding on an issue we raised: that the Board failed to fully consider another feasible and potentially economically viable plan. The Supreme Court reversed, finding that we did not properly apply the narrow standard of review required for judicial review of agency decisions. Accordingly, the case was remanded back to this court to properly apply the standard of review.

II. ISSUES ON APPEAL

On appeal and remand, StarLink asserts two related issues. First, we must address whether the Amended Order violates statutory provisions,

specifically by not requiring that ACC obtain a NPDES permit for its continued leachate discharges. Second, we must also decide whether this action is outside of the authority of both the TDEC and the Commissioner under the Tennessee Hazardous Waste Management Act.

III. STANDARD OF REVIEW

Judicial review of an agency's action follows a more statutorily specific standard than the de novo standard of review that is typical of most civil cases. *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988). In reviewing an agency's decision, the court must follow Tennessee Code Annotated section 4-5-322(h). We may only reverse or modify the decision of the agency if the Board's finding is:

> 1. In violation of constitutional or statutory provisions;
>
> 2. In excess of the statutory authority of the agency;
>
> 3. Made upon unlawful procedure;
>
> 4. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> 5.(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its

> judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h)(1)-(5) (2011). This court has the same scope of review as the trial court, which is to "review findings of fact of the administrative agency upon the standard of substantial material and evidence." *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 129 S.W.3d 57, 63 (Tenn. Ct. App. 2003). Even if the administrative body could have found a different result, the reviewing court must still follow the agency as to the weight of the evidence. *Wayne Cnty.*, 756 S.W.2d at 279 (citing *Hughes v. Bd. of Comm'rs*, 319 S.W.2d 481, 484 (Tenn. 1958)).

IV. DISCUSSION

As previously noted, this is not a case debating the facts of the landfill owned by ACC polluting the surrounding land and waterways. Both parties involved acknowledge the violations under the Tennessee Water Quality Control Act. This suit, instead, handles the conflict surrounding the Amended Consent Order that was approved by the Tennessee Solid Waste Disposal Control Board detailing the necessary actions to be taken by ACC as a result of such violation.

A. NPDES Permit

In resolving the issues in this appeal, persuasive weight is given to the decision made by TDEC and the Board, as they are charged with enforcing the WQCA.[6]

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[6] *See Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998) ("[A] state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in

Only when the court determines an interpretation by the Board to be "erroneous" will the court be "impelled to depart from it."[7] The burden is on StarLink to prove that clear error as they are the party seeking relief.[8] In this case, the court finds that the Board's interpretation in creating the Amended Consent Order was not erroneous.

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determining legislative intent."); *Nashville Mobilphone Co. Inc. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976) ("[T]hey urged upon us the general rule that weight and importance are given by the Tennessee courts to the interpretation of the agency charged with the enforcement or administration of a particular act. We agree that such an interpretation is entitled to consideration and respect and should be awarded appropriate weight, and this is particularly true in the interpretation of doubtful or ambiguous statutes.").

[7] *Nashville Mobilphone*, 536 S.W.2d at 340 (quoting *Collins v. McCanless*, 169 S.W.2d 850,853 (Tenn. 1943)). *See also BellSouth v. Tennessee Reg. Auth.*, 79 S.W.3d 506,514 (Tenn. 2002) (quoting *Jackson Express, Inc. v. Tennessee Pub. Serv. Comm.*, 679 S.W.2d 942, 945 (Tenn. 1984) ("Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted).

[8] *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W.2d 515, 520 (Tenn. Ct. App. 1981) ("In administrative proceedings, the burden of proof ordinarily rests on the one seeking relief, benefits, or privilege. . . Further, it is well established in Tennessee case law that the burden of proof is on the party having the affirmative of an issue, and that burden does not shift." *See also Pack v. Royal-Globe Ins. Co.*, 457 S.W.2d 19 (Tenn. 1970); *Freeman v. Felts*, 344 S.W.2d 550 (Tenn. 1961).

StarLink's argument rests on the necessity to follow the federal Clean Water Act ("CWA") and the federal precedent surrounding the statute. Under the CWA, those with allegations of pollution must either stop the actions that are causing the pollution or obtain a National Pollutant Discharge Elimination System ("NPDES") permit to limit and monitor the amount of pollutant released into the waterway in question.[9] StarLink argues that the Amended Order ignores the only two options open to a pollutant by permitting ACC to continue the harmful behavior of allowing the leachate to seep into Sugar Creek and Arrow Lake without the oversight of a NPDES permit. StarLink bases this argument on several federal cases that focus on the necessity of a NPDES permit when a person or entity is in conflict with the CWA.[10] However, StarLink presents no evidence of any state cases dictating the same necessity.

In the case of similar federal and state laws, here the federal CWA and the WQCA, courts may adopt the interpretation of the federal statutes from federal

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[9] 33 U.S.C. § 1342. This statute also acknowledges that each state may also establish its own permit program in compliance with the NPDES. 33 U.S.C. § 1342(b). In *Pickard v. Tennessee Water Quality Control Bd.*, the Tennessee Supreme Court recognized that any discharge permit issued by TDEC falls under the NPDES permit system. 424 S.W.3d 511, 514 n.1 (Tenn. 2013).

[10] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981), *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976).

courts when considering the state statutes.[11] However, "although federal judicial decisions 'interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule,' they 'are non-binding even when the state and federal rules are identical.'"[12] The court must also take into account the legislative intent in the language of the statute itself, considering the words with the natural and ordinary meaning within the context of the statute, "presum[ing] that the General Assembly intended that each word be given full effect."[13] Therefore, "when the language of a Tennessee statute is clear and the statute can be interpreted and enforced as written, there is little need to consider or follow the federal courts' interpretation of similar federal provisions."[14] StarLink's reliance on the federal law and interpretations of the federal CWA in this case was misguided.

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[11] *Knox Cnty. ex rel. Envtl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511,524 n.33 (Tenn. 2011).

[12] *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011) (quoting *Harris v. Chem*, 33 S.W.3d 741, 745 n.2 (Tenn. 2000)). *See also Bowman v. Henard*, 547 S.W.2d 527,530 (Tenn. 1977) ("The Supreme Courts of the respective states are bound only by decisions of the Supreme Court of the United States when that Court holds that a given course of conduct is unconstitutional under the federal constitution. The opinions of the other courts of the federal system are persuasive, but not controlling.")

[13] *Knox Cnty.*, 350 S.W.3d at 524.

[14] *Id.* at 524 n.33.

StarLink fails to take into consideration the language of the similar state statute, the WQCA. This applicable statute provides:

> The commissioner *may* grant permits authorizing the discharges or activities described in subsection (b), including, but not limited to, land application of wastewater, but in granting such permits shall impose such conditions, including effluent standards and conditions and terms of periodic review, as are necessary to accomplish the purposes of this part, and as are not inconsistent with the regulations promulgated by the board. *Under no circumstances shall the commissioner issue a permit for an activity that would cause a condition of pollution either by itself or in combination with others*.[15]

The wording of this statute can be read to give leniency in granting permits, putting the decision in the hands of the Commissioner. While StarLink argues that courts have previously held that the similar language in the federal CWA cannot be read this way, there is no precedent from the Supreme Court of the United States nor courts in Tennessee interpreting this language of the WQCA. With the deference given to TDEC and the Board, the lack of a necessity to follow the federal law, and no direct state precedent in conflict with the decision, this Court finds that the Board's interpretation of the statute is not inconsistent with the regulation.

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[15] Tenn. Code Ann. § 69-3-108(g) (emphasis added).

The statute also places strict limits on the Commissioner in terms of the permitted activity causing or continuing to cause a condition of pollution. In this case, issuing a permit for the activity which StarLink claims is necessary (the leachate flowing from ACC's property into Sugar Creek and Arrow Lake) would actually be in direct conflict with the language of the statute. Without any mitigating efforts, the leachate would still be causing a condition of pollution into Sugar Creek and Arrow Lake. For this situation, the Board properly focused on minimizing the amount of storm water entering the landfill and removing the source of the pollution, the salt cake slag, from the landfill. By doing so, the Board attempted to reduce the amount of leachate leaving ACC's property by concentrating on a solution to the pollution rather than simply monitoring it with the permit. This plan of action was more in line with the legislation's purpose and intent in creating the WQCA.[16]

In addition, the Amended Order included a schedule for the removal of the salt cake slag as well as a time frame for subsequent reassessment of the actions needed once the source of the pollution has been removed. Despite what StarLink contends, the Amended Order does not allow for an indefinite discharge of leachate without any oversight. There is no statutory requirement for a timeframe in which ACC would be

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[16] Tenn. Code Ann. § 69-3-102. As a declaration of policy and purpose, the WQCA seeks 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." Tenn. Code Ann. § 69-3-102(b).

required to treat the discharged leachate. As discussed in the hearing before the Board, there was no practical or cost effective option to treat the sodium chloride and potassium chloride leaching from the landfill before removing the salt cake slag. The Amended Order does address the possibility for the remaining leachate to be treated once the cause of the pollution has been removed from the site, and it is more economically practical.

StarLink also emphasizes the publication aspect of the NPDES permit as a necessity of the process. However, the Amended Order was published in the local newspaper, which would fill the same role of notification as the publication of the NPDES permit. StarLink does not even dispute that it had notice of the Amended Order and the opportunity to participate in the hearing surrounding it.

B. Authorization of the Commissioner and TDEC

StarLink further argues that the Commissioner and subsequently TDEC do not have the authority under the Tennessee Hazardous Waste Management Act ("HWMA") to implement the remedy provided in the Amended Order. This argument again relies on the necessity of a NPDES permit as determined by the federal interpretation of the CWA. Instead, as discussed previously, the Board was not obligated to apply federal law and was not in error in applying the state law of the WQCA, the HWMA, and the SWDA.

Specifically, the Board had the latitude to exempt ACC from the typical requirement of the NPDES permit. One of the main requirements of the permit is to include technology-based effluent limits based on the water quality standards as well as the monitoring and

reporting requirements to keep those limits in check.[17] However, based on testimony by George Garden presented during the initial phase of this litigation, it would not be feasible to impose such limitations on the ACC landfill due to the high salt content.[18] ACC would not be able to meet the effluent limit requirements of the permit without first removing the salt cake slag. The HWMA allows the Commissioner to "[i]ssue an order to any liable or potentially liable party requiring such party to contain, clean up, monitor and maintain inactive hazardous substance sites" in taking into consideration the technological feasibility and cost-effectiveness of each alternative in selecting containment and clean up actions.[19] The SWDA also authorizes the Commissioner to issue "order for corrections" when the Act is being violated.[20] Combined with the language of the WQCA allowing the discharge of a substance if "such action has been properly authorized,"[21] the Board was not in violation of Tennessee Code Annotated section 69-3-108 in requiring a permit nor the HWMA, because it is properly authorized.

While StarLink's argument relying on federal law may have been persuasive, their reliance on such law is misguided. Neither the Board nor this Court are obligated to follow such precedent when the similar state law can be interpreted using plain language and legislative intent. Based on the language of the

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[17] 33 U.S.C. §§ 1311 and 1318.

[18] AR II, p. 142, lines 10-18; AR II, p. 144, lines 2-17.

[19] Tenn. Code Ann. § 68-212-206(a)(3) and (d)(1).

[20] Tenn. Code Ann. § 68-211-112.

[21] Tenn. Code Ann. § 69-3-114(a).

various statutes, the Board and the Chancery Court had the authority and were not in error in approving the Amended Consent Order without the requirement of a NPDES permit.

V. CONCLUSION

The judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, StarLink Logistics, Inc.

s/____________________________

JOHN W. MCCLARTY, JUDGE

APPENDIX B

SUPREME COURT OF TENNESSEE
AT NASHVILLE

No. M2014-00362-SC-R11-CV
Chancery Court for Davidson County No. 121435II

STARLINK LOGISTICS, INC.,

v.

ACC, LLC, ET AL.

Date Printed: June 7, 2018
Notice/Date Filed: June 7, 2018

NOTICE – Case Dispositional Decision – TRAP 11 Denied

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner

Clerk of the Appellate Courts

SUPREME COURT OF TENNESSEE
AT NASHVILLE

No. M2014-00362-SC-R11-CV
Chancery Court for Davidson County No. 121435II

STARLINK LOGISTICS, INC.,

v.

ACC, LLC, ET AL.

Filed June 7, 2018, Clerk of the Appellate Courts

ORDER

Upon consideration of the application for permission to appeal of StarLink Logistics Inc. and the record before us, the application is denied.

The opinion of the Court of Appeals is designated "Not For Citation" in accordance with Supreme Court Rule 4, § E.

PER CURIAM

Page, Roger A., J., not participating.

APPENDIX C

SUPREME COURT OF TENNESSEE
AT NASHVILLE

No. M2014-00362-SC-R11-CV
Chancery Court for Davidson County No. 121435II

STARLINK LOGISTICS, INC.,

v.

ACC, LLC, ET AL.

February 10, 2016 Session
Filed May 9, 2016

Appeal by Permission from the Court of Appeals, Chancery Court for Davidson County, No. 121435II, Carol L. McCoy, Chancellor

* * *

SHARON G. LEE, C.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, JEFFREY S. BIVINS, and HOLLY KIRBY, JJ., joined.

OPINION

SHARON G. LEE, C.J.

After its closure, a Class II landfill continued to discharge contaminants into a creek that flowed into a lake located on adjoining property. Following years of investigations and multiple failed remedial measures, the landfill owner and the state agency with authority to direct landfill cleanup operations agreed that the most feasible, practical, and effective way to abate the discharge was for the landfill owner to divert water from entering the landfill and, over a four-year period, to remove and relocate the landfill waste. The neighboring landowner of the property on which the lake affected by the discharge was located objected to the

plan, arguing that the landfill owner should also be required to treat or divert water leaving the landfill site. The Tennessee Solid Waste Disposal Control Board ("the Board") heard the case and approved the landowner's plan of action and did not require diversion of the water leaving the landfill. The neighboring landowner appealed, and the trial court affirmed the Board's decision. The Court of Appeals, dissatisfied with the ruling, remanded the case to the Board to take additional proof on whether the neighboring landowner was willing to pay for the costs of diverting the discharge, the costs of implementing the diversion option, and the landfill owner's ability to pay for the diversion plan. We granted the Board's application for permission to appeal. We hold that the Court of Appeals failed to properly apply the judicial review provisions of Tennessee Code Annotated section 4-5-322(h) (2011) and substituted its judgment for that of the Board. The judgment of the Court of Appeals is reversed.

I.

In 1981, the Tennessee Department of Environment and Conservation ("TDEC") issued ACC, LCC ("ACC") a permit to construct and operate a Class II landfill in Maury County.[1] The landfill was located on

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[1] When the permit was issued, TDEC was known as the Tennessee Department of Public Health and ACC was known as Associated Commodities Corporation. The facts and procedural history in the opinion are taken from the Amended and Restated Consent Order as presented by TDEC and ACC to the Davidson County Chancery Court for approval. Starlink did not take issue before the Tennessee Solid Waste Disposal Control Board with any of the facts stated in the proposed Amended and Restated Consent Order.

approximately fourteen acres of the 48.02 acre parcel owned by ACC. ACC disposed of aluminum recycling wastes from Smelter Service Corporation's local aluminum smelting plant. The waste consisted almost exclusively of bag-house dusts and "salt cake" slag. The salt cake slag contained high concentrations of highly soluble sodium chloride and potassium chloride. ACC operated the landfill from 1981 to 1993. In July 1995, ACC submitted a certification of completion of closure to TDEC, and in April 1996, TDEC issued an acceptance of closure to ACC.

TDEC and ACC learned, within a few years of when the landfill became operational, that high levels of chlorides and ammonia were being discharged from the landfill into groundwater and surface water that drained into Sugar Creek and Arrow Lake. The leaching of chloride and ammonia continued after the landfill's closure and caused areas west of the landfill, including Sugar Creek and Arrow Lake, to become polluted. ACC worked with TDEC to identify and remedy the leaching. ACC performed extensive investigative efforts to determine the cause of the leaching and performed multiple remedial measures but was unsuccessful in abating the pollution.[2] In December 2003,

[2] Remedial measures included application of daily cover material to divert rainfall from the wastes; construction of ditches to reroute surface water around the landfill; construction of multiple settling ponds and drainage control ditches; attempted sealing of springs and seeps; installation, development, and maintenance of a system of groundwater monitoring wells to delineate the nature and extent of groundwater contamination; collection and analysis of surface and groundwater samples; soil boring/rock coring with installation of piezometers along the landfill

at TDEC's request, ACC submitted a Corrective Action Plan ("the Plan") that evaluated available data, described the limitations of available options due to the site conditions, and identified three remaining options to mitigate the release of contaminated leachate from the landfill: clean closure/waste removal, leachate collection/treatment, and natural or enhanced site attenuation. The Plan presented an assessment of the feasibility and potential effectiveness of these options and concluded that a remedy that fulfilled all criteria in Tennessee Compilation of Rules and Regulations Chapter 1200-1-7-.04(7)(a)8(ii)[3] within two to three years was not technically and economically practical. After a January 2004 public meeting, TDEC approved ACC's plan to build a wetlands system downgradient

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perimeter and test pit/trench excavations within the landfill to evaluate groundwater flow into the landfill; performance of dye tracer studies to define groundwater flow and karst impact near the landfill; investigation of landfill area for karst conditions; performance of electrical resistivity and microgravity surveys of the landfill to define water flow paths beneath the landfill; and geoprobe and rotary auger investigations to evaluate depth to bedrock and groundwater conditions.

[3] These criteria required corrective measures to:

(I) Be protective of human health and the environment,

(II) Attain the groundwater protection standard as specified pursuant to Rule 1200-01-07-.04(7)(a)1 of this rule.

(III) Control the source(s) of releases so as to reduce or eliminate, to the maximum extent practicable, further releases of Appendix II constituents into the environment that may pose a threat to human health or the environment; and

(IV) Comply with standards for management of wastes as specified in subpart (iv) of part 9 of this subparagraph.

Tenn. Comp. R. & Regs. 1200-1-7-.04(7)(a)8(ii) (2003).

of the site to retain and buffer leachate and improve water quality and habitat. The wetlands system was constructed but was not successful.

In June 2008, TDEC requested that ACC submit a modified plan because the rate of discharge of contaminants from groundwater was increasing. In August 2008, ACC submitted a modified plan ("the Modified Plan") that TDEC approved in April 2010. The Modified Plan acknowledged that the discharge problem stemmed from a failure to accurately characterize the landfill's hydrogeology features during the permitting and development process, identified options for reducing the release of chlorides from the landfill and for removal of the contaminated material, and provided a strategy and schedule to evaluate, select, and implement ways to address the contaminated discharge. The first step was a preliminary evaluation of potential corrective action options, followed by a report to TDEC that would identify options as not feasible or potentially feasible, provide additional information for a more complete evaluation of potentially feasible options, and describe the field investigations or other efforts necessary to gather the additional information.

Under the Modified Plan, ACC submitted a preliminary report to TDEC in August 2010, detailing ACC's efforts since April 2010. The report requested that TDEC clarify its corrective action goals, summarized current site conditions, identified corrective action alternatives, summarized planned additional data gathering efforts to evaluate the feasibility of remaining alternatives, described the future corrective action plans, and recommended a meeting to discuss prioritization and timing of additional necessary efforts.

In January 2011, representatives of ACC and TDEC's Divisions of Solid Waste Management and Water Pollution Control met to discuss the necessary level of contaminant reduction for Sugar Creek. ACC discussed the potential remedy of removing the waste from the landfill and planned to do test excavations of waste material to assess the feasibility of the remedy.

In February 2011, TDEC personnel inspected the landfill and took water samples at points along Sugar Creek that confirmed that discharge from the landfill caused high levels of chlorides, ammonia, and dissolved solids in Sugar Creek downstream of the landfill.

In June 2011, ACC and TDEC entered into an administrative consent order stating that the release of contaminated discharge from the landfill constituted violations of the Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148 (2011), and the Tennessee Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to -124 (2011). The proposed order provided for remedial actions to address the continuing discharge from the landfill. ACC agreed to submit a discharge reduction plan to significantly reduce the amount of contamination flowing from the landfill site in surface water and to develop and implement a plan to effectively and permanently prevent the release of landfill waste to the groundwater. The consent order was filed in the Davidson County Chancery Court, under Tennessee Code Annotated sections 68-212-114(e) (2011), 68-212-215(f) (2011), and 69-3-115(e) (2004 & Supp. 2011).

StarLink Logistics Inc. ("StarLink"), which owns approximately 1500 acres immediately west of the landfill and on which Arrow Lake is located,

intervened and objected to the consent order. After the parties could not reach an agreement, the Davidson County Chancery Court remanded the matter to the Board for a contested hearing. On remand, ACC and TDEC negotiated an Amended and Restated Consent Order ("Amended Order"), which was presented to the Board for approval.

The proposed Amended Order required ACC, among other things, to:

> 1. Within 120 days of the effective date of the proposed Amended Order and before the commencement of any corrective action, construct a berm upgradient from the site to divert uncontaminated storm water away from the site; and
>
> 2. Within four years or less from the effective date of the proposed Amended Order, remove from the landfill site, to the extent practicable, all solid waste that has the potential for future contact with ground or surface water. All waste must be removed to an approved landfill cell on ACC's property or to a permitted off-site landfill. After ACC begins removal of the waste, it must capture groundwater entering the excavated area, analyze its chemical characteristics, and redirect it back into the landfill or discharge it into Arrow Lake if the water meets certain water quality criteria.

To promote compliance, the proposed Amended Order assessed a $400,000 penalty to ACC due and payable in four yearly installments of $100,000 if ACC

failed to meet yearly milestones for the removal of waste.

On August 7, 2012, the Board held a contested hearing regarding approval of the proposed Amended Order. TDEC and ACC urged the Board to approve the proposed Amended Order, contending that the only way to remedy the contamination coming from the closed landfill was to divert storm water away from the landfill site and to remove the waste from the landfill. StarLink objected to the proposed Amended Order, asserting, among other things, that the proposed plan did not adequately address the continued discharge of leachate into Sugar Creek and onto StarLink's property.

In response to preliminary questions from Board members, Nancy Sullivan, a professional engineer with Triad Environmental Consultants ("Triad"), explained that at least 250,000 cubic yards of waste would need to be removed from the site. Chris Scott, a professional geologist with Triad, explained that he had been working on the landfill site for several years and that after failed attempts to address surface water contamination, it became clear that groundwater was the major source of the problems with the landfill. Mr. Scott explained that groundwater had been entering the landfill from the north and east sides of the landfill, and the first phase of the proposed plan was removal of waste from the landfill's northern side. George Garden, an engineer with the engineering firm Barge, Waggoner, Sumner & Cannon, stated that based on his measurements of the water flow rate and contaminant concentrations of the landfill for the past year, there was no single point of contact between the landfill waste and groundwater. Although he had

studied ways to remove contaminant materials from the water as it left the landfill area, Mr. Garden was of the opinion that the only way to permanently address the problem was removal of the waste to another location. According to Mr. Garden, the cost of treating the discharge would be high and roughly equal to the cost of removing some of the waste material. From an economic standpoint, Mr. Garden opined that it would be better to focus ACC's resources on removing the landfill's waste material as opposed to treating discharge that leaves the landfill area.

StarLink called as its first witness, Dennis Schucker, a professional geologist and associate director with BHE Environmental, who prepared an investigation work plan report for the StarLink property that indicated elevated levels of chloride and ammonia in ground and surface water and soil samples. Mr. Schucker expressed concern that during the time the waste was being removed, the site would continue to leach chloride and ammonia into the streams. He presented no alternative plan to remedy the groundwater or surface water issue.

StarLink's next witness was Michael Bogdan, Director of Retained Environmental Matters with Sante Fe, a healthcare company, of which StarLink was an indirect subsidiary. Mr. Bogdan testified that he agreed with the proposed Amended Order's requirement that a berm be constructed, but insisted that it should have been done many years ago and should be installed sooner than 120 days. He took issue with the proposed Amended Order's requirement that the plan "significantly reduce[ ]" the discharge of contaminants via surface water and instead should have required a definitive amount of reduction. He also stated that the

proposed Amended Order should not provide for reductions in discharge "to the extent practicable" but instead should have specific requirements for ACC to meet. He then stated that the proposed Amended Order should apply Tennessee water quality criteria to water leaving ACC's property in addition to the water entering the landfill excavation area.

Mr. Bogdan testified that the crux of StarLink's complaint with the proposed Amended Order was that it allowed ACC to continue releasing untreated discharge into Sugar Creek and onto StarLink's property for at least four more years while the waste is being removed. When asked about alternative remedies, Mr. Bogdan asserted that simply removing the waste material would not solve the groundwater contamination on StarLink's property. He further stated that StarLink wanted the release of contaminated discharge onto StarLink's property to stop immediately and for any discharge leaving ACC's property to meet the Tennessee water quality criteria as outlined in the proposed Amended Order. When asked about the specific technology StarLink was proposing to meet these goals, Mr. Bogdan suggested that ACC construct a slurry wall around its property line and extract and treat groundwater from behind the wall. When asked by a Board member if there are karst[4] formations on the property, Mr. Bogdan responded that although karst formations existed on the property, he had not observed any in the particular area of discussion. Mr.

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[4] Karst is defined as "an irregular limestone region with sinkholes, underground streams, and caverns." *Karst*, Mirriam-Webster, http://www.merriamwebster.com/dictionary/karst (last visited April 12, 2016).

Bogdan stated that the capture of some groundwater was possible and indicated that he thought contaminated discharge was leaving ACC's property through a retention pond.

Dr. Schucker was recalled to testify and explained that bedrock formations existed six to twenty feet below the surface, and it was unknown whether groundwater existed below that level of bedrock. Based on the depth of bedrock, Dr. Schucker opined that groundwater existing less than twenty feet below the surface of the bedrock could be captured with a slurry wall, but Dr. Schucker had not performed a feasibility analysis on that option. The cost was also unknown.

ACC presented the testimony of Tom Grosko, who was employed by Smelter Service, an aluminum recycling company in Maury County that is the sole member of ACC's limited liability corporation. Mr. Grosko testified that ACC's objective was to correct the situation by removing the waste from the landfill and stopping the contaminated water from crossing the property line. He stated that ACC was not financially able to remove the waste from the landfill and also treat water discharging from the landfill. Therefore, ACC decided it was best to focus on the root cause of the contamination by removing the waste. Counsel for StarLink asked Mr. Grosko if there had ever been a proposal to pipe the water from the waste disposal site to other property owned by ACC and if StarLink had offered to pay for the pipe. Mr. Grosko responded that he had heard of the proposal, did not personally reject the idea, and did not recall who had rejected it. Mr. Grosko later stated that no net environmental benefit would result from piping the contaminated discharge from one area to another.

ACC next presented the testimony of Mike Apple, retired director of the Tennessee Division of Solid Waste Management, who had many years of experience dealing with solid waste disposal facilities. Mr. Apple had reviewed the proposed Amended Order and, in his opinion, the corrective action in the proposed Amended Order would abate the problem, was reasonable, and was in the best interest of the public. Mr. Apple testified that when ACC investigated potential solutions to the discharge problem, it could not find the source of the water infiltrating the landfill. Mr. Apple stated that the flow of groundwater, its direction, and its depth are all unknowns, which is the reason the proposed Amended Order did not address water infiltration.

ACC then presented further testimony from Ms. Sullivan. Ms. Sullivan testified that under the first phase of ACC's waste removal plan, ACC would work to redirect groundwater infiltrating the landfill, which, if at least partly successful, would immediately improve the quality of discharge leaving the landfill. This, combined with a downgradient surface water impoundment, would improve the quality of the water flowing into Arrow Lake. Ms. Sullivan admitted that the proposed Amended Order did not provide for the evaluation of water entering Arrow Lake and any subsequent remedial action based on such an evaluation. Ms. Sullivan also admitted that the proposed Amended Order provided for the sampling and testing of discharge from the landfill, but did not provide for any specific action based on the results of these tests. Ms. Sullivan further acknowledged that the proposed Amended Order did not provide for specific criteria to determine the success of the proposed Amended

Order. Upon examination by TDEC, Ms. Sullivan explained that any plans called for by the proposed Amended Order could be modified in the future.

Upon further examination by StarLink, Ms. Sullivan stated that the proposed Amended Order focused on capturing the water entering the landfill because it would be more cost-effective than capturing the water leaving the landfill. Ms. Sullivan explained that if the proposed Amended Order permitted water to enter the landfill area, the water would have to be treated. The water, however, would not have to be treated if it was captured before it entered the landfill. The proposed Amended Order contemplated that the money saved by not treating the water entering the landfill would be used to remove the landfill waste material.

ACC's last witness was Mr. Garden. ACC hired Mr. Garden's employer, Barge, Waggoner, Sumner & Cannon, to explore the most cost-effective way to treat the water. Mr. Garden stated there was no possible way to completely remove both the ammonia and salt content from the landfill discharge so as to comply with water quality standards without taking all of the salt out of the water. The complete removal of the salt from the discharge would leave a high saline water residue, requiring the residue to either be dumped into a very large source of water or forced to evaporate. Mr. Garden testified that ACC could not legally dump the residue and that high levels of heat would be needed to evaporate the residue. Mr. Garden explained that he had explored ways to generate heat sufficient to evaporate the residue, but all were too dangerous to justify. Moreover, the cost to build a plant to treat the salt in the discharge would be the same whether built before or after removing the waste material from the

landfill. Even if such a plant were built, it could only lower the level of salt leaving the landfill site by single percentage points, which would make Mr. Garden unlikely to detect any impact from the plant on Arrow Lake. Mr. Garden could not specify exactly when the benefit from removing the waste might materialize.

Upon examination by StarLink, Mr. Garden testified that there are multiple points at which contaminated discharge leaves ACC's property and enters StarLink's property. He believed that the volume of salt in the water leaving the landfill would exceed the ability of the local wastewater treatment plant in Mt. Pleasant to handle and discharge the water. Mr. Garden estimated the cost of a plant to treat 30,000 gallons of the most concentrated discharge—a small portion of the flow—would cost about $5 million to construct and about $700,000 annually to operate, depending on how the facility was managed. Mr. Garden explained that the only facility known to him and ACC able to handle the anticipated volume of discharge was in New Jersey.

During closing arguments, StarLink's counsel mentioned the earlier proposal by StarLink to pay to pipe discharging water away from Arrow Lake. Before the Board began deliberations, the administrative law judge charged the Board members to make their decision based on the sworn testimony of witnesses and exhibits introduced as evidence.

During deliberations, Board members discussed the pros and cons of the proposed Amended Order. Board member Elaine Boyd commented that it would not make sense for ACC to focus its financial resources on treating the symptom of contaminated discharge when doing so would prohibit ACC from allocating its

resources to the root cause of the problem—the waste material. Board member Glenn Youngblood commented that until the waste material in the landfill is addressed, all parties involved would just be "spinning [their] wheels" and later commented that a consent order that bankrupts ACC would benefit no one. Board member Michael Atchison echoed Board member Youngblood's concern. Board member Jared Lynn stated that even if a strategy was implemented piping surface water discharge to another location, this would not affect the continuing groundwater discharge and that removing the waste materials would be the most effective use of ACC's resources. Board member Mark Williams noted that nothing in the proposed Amended Order eliminated TDEC's ability to continue enforcement actions. Board member Franklin Smith questioned why the proposed Amended Order could not provide for a combination of remedies, combining the terms in the consent order and StarLink's proposal to pay to pipe discharging water to another location. In response, Board member Boyd said that given the subsurface geological conditions, she thought that there would be some complexity in capturing groundwater leaving the site given all of the points of discharge. Board Chairman Ken Donaldson noted that StarLink was willing to pay for the proposal to divert discharging water. Board member Atchison responded that while it appeared StarLink offered to do so in the past, it was unclear whether that offer still stood at the time of the hearing. Board member Boyd commented that if the Board brought StarLink on as a party to the proposed Amended Order for more negotiation, further delay would occur before the root source of the problem—the waste material—was addressed. Upon a question by Board member Youngblood, the admin-

istrative law judge informed the Board that StarLink had a private right of legal action against ACC. The judge also informed the Board it could reopen the record to hear further evidence if it wished to do so.

The Board voted to approve the proposed Amended Order, stating in its Order that "remediation of the ACC Landfill in the manner specified in the [proposed Amended Order] is necessary to protect the health, safety and welfare of the public." StarLink appealed the Board's decision to the Chancery Court for Davidson County. On January 29, 2014, the Davidson County Chancery Court affirmed the Board's approval of the proposed Amended Order. StarLink appealed.

In the Court of Appeals, StarLink asserted that the Davidson County Chancery Court erred in affirming the Board's approval of the proposed Amended Order, raising four issues. On its own, the Court of Appeals raised the issue of "whether the Board's adoption of the [Amended] Order was in error where the Board failed to fully consider a feasible and potentially economically viable plan that would contain the leachate contamination from the landfill site from continued discharge into Sugar Creek and Arrow Lake[.]" *Starlink Logistics Inc. v. ACC, LLC*, No. M2014-00362-COA-R3-CV, 2015 WL 1186311, at *4 & n.7 (Tenn. Ct. App. March 11, 2015); *see also* Tenn. R. App. P. 13(b). The Court of Appeals reversed the Davidson County Chancery Court's decision, "find[ing] the Board's decision to be arbitrary and capricious inasmuch [as] it failed to fully consider the range of remedial options which were available and discussed at the hearing before the Board." *Starlink Logistics Inc.*, 2015 WL 1186311, at *7. The intermediate appellate court remanded the matter for further proceedings. *Id.* at *10.

We granted the Board's application for permission to appeal. The issue before us is whether the Court of Appeals properly applied the narrow standard of review required for judicial review of agency decisions under Tennessee Code Annotated section 4-5-322(h).

II.

It is not disputed that the Commissioner of TDEC had the authority to enter into a consent order with ACC to remediate the closed landfill site. *See* Tenn. Code Ann. § 68-212-224(a)(1) (2011). Tennessee Code Annotated section 68-212-224(e) requires the terms of such a consent order to be based on the criteria established in Tennessee Code Annotated section 68-212-206(d). Those criteria provide:

> (1) In selecting containment and clean up actions, including monitoring and maintenance, . . . the commissioner shall evaluate reasonable alternatives and select those actions which the commissioner determines are necessary to protect public health, safety, and the environment. The goal of any such action shall be clean up and containment of the site through the elimination of the threat to the public health, safety, and the environment posed by the hazardous substance. In choosing the necessary actions at each site, the commissioner shall consider the following factors:
>
> (A) The technological feasibility of each alternative;
>
> (B) The cost-effectiveness of each alternative;

> (C) The nature of the danger to the public health, safety, and the environment posed by the hazardous substance at the site; and
>
> (D) The extent to which each alternative would achieve the goal of this subsection (d).

Tenn. Code Ann. § 68-212-206(d) (2011).

TDEC and ACC reached an agreement, contained in the proposed Amended Order, for the cleanup of the landfill site. StarLink intervened and objected to the plan. Following a contested hearing, the Board approved the proposed Amended Order. StarLink, aggrieved by the Board's decision, sought judicial review under Tennessee Code Annotated section 4-5-322.

The Uniform Administrative Procedures Act ("the Act"), Tenn. Code Ann. §§ 4-5-101 to -404 (2011), sets forth the extent of judicial authority to review agency decisions. *See* Tenn. Code Ann. §§ 4-5-301 to -325. Pursuant to Tennessee Code Annotated section 4-5-322(b)(1)(A), StarLink filed a petition for judicial review in the Chancery Court for Davidson County. StarLink alleged no procedural irregularities; therefore, under section 4-5-322(g), the Davidson County Chancery Court's review was confined to the record, and no new proof was taken.

The reviewing court's standard of review is narrow and deferential. *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988). The decision of the agency may be reversed or modified if the decision is shown to be:

> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

This narrow standard of review, as opposed to the broader standard of review applied in other appeals, reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. *Tenn. Envtl. Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 401-02 (Tenn. Ct. App. 2007) (citing *Willamette Indus., Inc. v. Tenn. Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999); *Wayne Cnty.*, 756 S.W.2d at 279; *CF Indus. v. Tenn. Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980); *Metro. Gov't of Nashville v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977)). Courts do not review questions of fact de novo and, therefore, do not second-guess the agency as to the weight of the evidence. *Humana of Tenn. v. Tenn. Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn.

1977); *Grubb v. Tenn. Civil Serv. Comm'n*, 731 S.W.2d 919, 922 (Tenn. Ct. App. 1987) (citing Tenn. Code Ann. § 4-5-322(h); Tenn. Code Ann. § 4-5-323; *Reece v. Tenn. Civil Serv. Comm'n*, 699 S.W.2d 808, 809 (Tenn. Ct. App. 1985)). This is true even if the evidence could support a different result. *Wayne Cnty.*, 756 S.W.2d at 279 (citing *Hughes v. Bd. of Comm'rs*, 204 Tenn. 298, 319 S.W.2d 481, 484 (1958)).

The Act makes clear that a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Tenn. Code Ann. § 4-5-322(h)(5)(B). An appellate court applies the same limited standard of review as the trial court. *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 264 (Tenn. 2009); *Ware v. Greene*, 984 S.W.2d 610, 614 (Tenn. Ct. App. 1998).

A decision of an administrative agency is arbitrary or capricious when there is no substantial and material evidence supporting the decision. *Pittman v. City of Memphis*, 360 S.W.3d 382, 389 (Tenn. Ct. App. 2011); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n.*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). The statute does not define "substantial and material evidence," but it is less than a preponderance of the evidence, *Wayne Cnty.*, 756 S.W.2d at 280 (citing *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)), and more than a "scintilla or glimmer" of evidence, *id.* (citing *Pace v. Garbage Disposal Dist.*, 54 Tenn. App. 263, 390 S.W.2d 461, 463 (1965)). A decision with evidentiary support can be arbitrary or capricious if it amounts to a clear error in judgment. *City of Memphis v. Civil Serv. Comm'n*, 216 S.W.3d 311, 316 (Tenn. 2007) (citing *Jackson Mobilphone Co.*, 876 S.W.2d at 110). A

decision is arbitrary or capricious if it "is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Civil Serv. Comm'n*, 216 S.W.3d at 316 (quoting *Jackson Mobilphone Co.*, 876 S.W.2d at 111). "If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached." *Bowers v. Pollution Control Hearings Bd.*, 103 Wash. App. 587, 13 P.3d 1076, 1083 (2000) (citing *Buechel v. Dep't of Ecology*, 125 Wash.2d 196, 884 P.2d 910, 915 (1994) (en banc)) (explaining the "arbitrary or capricious" standard under Washington's version of the Uniform Administrative Procedures Act). The "arbitrary or capricious" standard is a limited scope of review, and a court will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency's ultimate conclusion. *See id.* (citing *Buechel*, 884 P.2d 910 at 915).

Applying this limited standard of review to the Board's decision, we hold that the decision was not arbitrary or capricious. The Board, relying on its expertise and experience, carefully considered the evidence presented to it. The Board's decision was fully supported by substantial and material evidence. It was based on reasoning and exercise of judgment and did not disregard any facts, without some basis, that would lead a reasonable person to reach the same result. While the Board may have chosen other remedies, its decision was sound, well-reasoned, and

supported by the evidence. The Board's decision was not arbitrary merely because the reviewing court might have reached a different decision.

For more than eight years, TDEC and ACC wrestled with the problem of contaminated water leaving the landfill site and entering Sugar Creek and Arrow Lake. ACC thoroughly investigated the condition of the landfill and its hydrogeology features, compiled data on the landfill site and remedial options, prepared and submitted reports to TDEC, reviewed the feasibility and effectiveness of various remediation options, and unsuccessfully attempted multiple remediation efforts. The issue of leachate flowing out of the landfill was clearly a difficult problem to resolve. In 2011, TDEC and ACC arrived at a solution that they considered to be reasonable, feasible, cost-effective, and practical. In simple terms, the agreement required ACC to divert water from entering the landfill site and, over a four-year period, remove all of the waste from the landfill and relocate it to an approved landfill cell on its property or to a permitted off-site location. This plan of action was supported by expert testimony. StarLink's primary bone of contention was that the proposal did not require ACC also to divert or treat water leaving the landfill site during the waste removal process. StarLink, arguing that more should be done to prevent contaminated water from flowing into Arrow Lake, offered no other feasible alternative plan. During the Board hearing, StarLink's counsel referenced a diversion option during cross-examination of ACC's witness, Mr. Grosko:

> Q: And so what I'm asking you now is, why aren't we focusing on diverting the water below?

A: Around what? If it's already been through the landfill, I don't understand.

Q: There is polluted water coming out the other side.

A: Yes, sir.

Q: Would there be a way to divert the water coming out the other side?

A: To?

Q: I guess, has there ever been a proposal to pipe the water to other property that you own?

A: I believe so, yes.

Q: And did [StarLink] not propose paying for that pipe so that the water could be diverted to other land that you own?

A: I've heard that, yes.

Q: And so that proposal was rejected, because you don't want that polluted water any more than [StarLink] does, do you?

A: I personally didn't reject it, no.

Q: So who rejected it?

A: I don't recall.

Q: So no cost solution that would have moved the polluted water away from Arrow Lake to your property was rejected?

A: I don't recall.

When subsequently questioned by TDEC, Mr. Grosko testified that no net environmental benefit would result from piping discharge away from Arrow Lake to another location. Upon inquiries by two Board

members, Mr. Grosko reiterated that he could not recall the details of StarLink's piping proposal and that the landfill waste would still have to be addressed. StarLink's counsel mentioned the proposal during closing arguments and suggested that ACC construct a seepage-proof retention pond and divert discharging water to that location in addition to treating the water. This, however, was merely argument and not evidence on which the Board could base its decision. *See Oakes v. Oakes*, 235 S.W.3d 152, 158 (Tenn. Ct. App. 2007) (citing *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)) (explaining that arguments and statements by counsel during a hearing are not evidence).

ACC presented proof that it could not afford to remove the waste material and also divert or treat the water flowing out of the landfill. Mr. Apple, the former director of the Division of Solid Waste Management, explained that the proposed Amended Order did not address the issue regarding water flowing out of the landfill because the flow, direction, and depth of the groundwater were not known. Mr. Garden testified that contaminated discharge leaves ACC's property at multiple points, and there was no single point of contact between the landfill waste and groundwater. He discounted the feasibility and effectiveness of treating the water leaving the landfill. Ms. Sullivan testified that the proposed plan focused on capturing the water entering the landfill because it would be more cost-effective than capturing the water leaving the landfill.

The record reflects that the Board gave fair consideration to the diversion option. Two Board members made inquiries in response to StarLink's counsel's cross-examination questions regarding

StarLink's purported proposal to pay for piping. During deliberations, Board members commented that piping off surface water would not address groundwater discharge, that capturing and piping water would be complex given subsurface geological conditions, and that negotiating a piping proposal would add further unnecessary delay to addressing the problem. Board member Smith suggested that the ideal solution would be to perform actions in the proposed Amended Order and divert discharge elsewhere through pipes at StarLink's expense. After discussion, the Board voted to approve the proposed Amended Order. The Board decided it was necessary to address the root cause of the problem, avoid unnecessary delay, and that the geological conditions would make any piping proposal difficult to implement or, at best, only partially effective. The Board also noted that it would be in no one's interest to bankrupt ACC by requiring it to divert and treat the water. The Board did not spend a great deal of time discussing the diversion option primarily because StarLink failed to present any evidence that the piping alternative was feasible or would be effective. During oral argument before this Court, counsel for StarLink acknowledged that StarLink was not advocating for the piping diversion remedy. Clearly, the Board considered the evidence and made a reasonable decision.

The Court of Appeals, in rejecting the Board's decision and remanding the case to the Board to explore more options, misapplied the arbitrary or capricious standard and instead substituted its judgment for that of the Board. The Court of Appeals determined that the Board's decision "failed to give any significant consideration to an option that would divert the flow of

pollutants from discharge into waters of the [S]tate." *Starlink Logistics Inc.*, 2015 WL 1186311, at *6. This, according to the Court of Appeals, rendered the Board's decision arbitrary, capricious, and "a clear error in judgment." *Id.* at *10. The primary "option" the intermediate appellate court determined the Board should have more carefully considered was the diversion of water before it entered Sugar Creek by piping the water elsewhere. The evidence relied on by the Court of Appeals was a reference by StarLink's counsel to a piping proposal while cross-examining ACC's representative, Mr. Grosko, wherein Mr. Grosko acknowledged hearing about a proposal by StarLink to pay for the piping. From the brief exchange, the Court of Appeals concluded:

> Assuming StarLink is still willing to pay for the pipe(s) necessary to divert the water, it would be unreasonable to not implement the diversion plan, under which leachate would be contained on ACC's property rather than continually polluting the waters of the [S]tate. ACC has sufficient remaining acreage outside of the landfill that could host a retention pond or other storage for the leachate, and this should not be ignored at the expense of continued pollution to waters of the [S]tate.

Id. at *9.

Calling the piping option a "feasible and potentially economically viable complement to the plan," the Court of Appeals remanded the case back to the Board to hear proof on StarLink's willingness to pay for the pipe, the estimated costs of implementing the plan, and ACC's economic ability to implement the piping plan. *Id.* at *10. Respectfully, this search for a

solution was not within the province of the Court of Appeals. The Board did not ignore the testimony regarding the piping option, but considered and rejected it as a viable solution.

III. Conclusion

The Court of Appeals failed to properly apply the judicial review provisions of Tennessee Code Annotated section 4-5-322(h) and substituted its judgment for that of the Board. We reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of the issues it pretermitted.[5] Costs of this appeal are taxed to StarLink Logistics Inc. and its surety, for which execution shall issue if necessary.

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[5] Amici Curiae argue before this Court that the Board's approval of the Amended Order was arbitrary and capricious because the Amended Order does not require ACC to obtain a National Pollutant Discharge Elimination System ("NPDES") permit. Amici contend that an NPDES permit requirement would ensure opportunity for the public to comment and participate in the development of plans to address the discharge of pollutants into Arrow Lake. Because we remand this matter to the Court of Appeals for review of pretermitted issues, we do not reach the issue raised by the Amici.

APPENDIX D

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Appeal from the Chancery Court
for Davidson County No. 121435II
Carol L. McCoy, Chancellor

STARLINK LOGISTICS, INC.,

v.

ACC, LLC, ET AL.

Assigned on Briefs December 4, 2014

March 11, 2015

Application for Permission to Appeal Granted by
Supreme Court August 21, 2015

*   *   *

Arnold B. Goldin, J., delivered the opinion of the Court, in which J. Steven Stafford P.J., W.S. and Kenny Armstrong, J. joined.

OPINION

Arnold B. Goldin, J.

This appeal stems from an environmental dispute involving the Appellant, StarLink Logistics Inc. ("StarLink"), the Tennessee Department of Environment and Conservation ("TDEC"), and Appellee ACC, LLC ("ACC"). StarLink appeals the trial court's affirmance of an order of the Tennessee Solid Waste Disposal Control Board ("Board"), which had adopted a consent order entered into between TDEC and ACC. We affirm in part, and remand the case to the trial

court for further remand to the Board for further proceedings consistent with this Opinion.

I. Background and Procedural History

Although the history leading up to the present appeal is both detailed and complicated, the basic facts forming the controversy are not in dispute.[1] In 1981, the State of Tennessee issued ACC a permit to construct a landfill south of the City of Mt. Pleasant in Maury County, Tennessee. ACC disposed wastes at the site from 1981 until September 1993. The landfill, which is a Class II solid waste disposal facility[2], encompasses approximately 14 acres of land on a larger parcel of 48.02 acres which is owned by ACC. During its period of active use as a landfill, the site was used for the disposal of aluminum recycling wastes from a smelting plant located in Mt. Pleasant. These wastes consisted almost entirely of "salt cake" slag[3] and baghouse dusts from the nearby plant's smelting operations. After ACC ceased using the landfill for the disposal of wastes, it performed final closure of the facility in accordance with the Closure/Post-closure Care

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[1] We note that much of the history in this case concerns the relationship between TDEC and ACC. According to the administrative record which we have reviewed in this case, we note that a witness on behalf of StarLink testified that StarLink "ha[s] no issues" and "neither agree[s] or disagree[s] with what's been ongoing and recorded . . . between ACC and TDEC over the last 30 years[.]"

[2] The specific requirements for a Class II facility are found at Tenn. Comp. R. & Regs. 1200-01-07-.04.

[3] Salt cake contains high concentrations of sodium chloride and potassium chloride salts.

and Corrective Action Plans that were approved by the State. TDEC certified completion of the closure in 1996.

Within a few years after the landfill had begun operations, both ACC and TDEC recognized that unacceptable levels of chlorides and ammonia were leaching out of the wastes and into the underlying groundwater and down-gradient surface water that drained into nearby Sugar Creek and Arrow Lake.[4] Various efforts were taken by TDEC and ACC to investigate and correct the leaching, but the problem was never resolved. It continued after final closure of the facility and unfortunately persists to this day.

In light of the continued leaching of contaminants at the site, TDEC contacted ACC in the summer of 2003 and requested that ACC submit a corrective action plan pursuant to Tenn. Comp. R. & Regs. 1200-01-07-.04(7)7 and 8. ACC submitted a plan meeting the regulatory requirements in December 2003. In its plan, ACC presented an assessment of the feasibility of the options available for the mitigation of the release of leachate and ultimately recommended that a

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[4] These bodies of water are separated from ACC's land by Arrow Mines Road. Whereas ACC's property is located immediately east of the road, the Arrow Lake impoundment of Sugar Creek lies immediately to the west. As "waters of the state," Sugar Creek is protected from pollution by both the Water Quality Control Act and the Tennessee Solid Waste Disposal Act. *See*, *e.g.*, Tenn. Code Ann. § 69-3-114(a) (2012); Tenn. Code Ann. § 68-211-104 (2013). The Arrow Lake impoundment of Sugar Creek is located on the property of the Appellant, StarLink. As represented in StarLink's brief and in statements before the Board at the contested case hearing, Arrow Lake was used in the past by residents of the Mt. Pleasant area.

"Wetlands Treatment Alternative" be pursued in order to enhance attenuation of releases and impacts. After a public hearing on the matter, TDEC allowed ACC to pursue the wetlands treatment pending the acquisition of an Aquatic Resource Alteration Permit.

On April 2, 2004, ACC submitted a remedial plan for a "Constructed Wetland System" down-gradient of the landfill that it asserted would not only retain and buffer leachate, but also improve the habitat and water quality of Sugar Creek and Arrow Lake. The wetland system was proposed to offer several benefits to the environment, including the reduction of surges of salt concentration downstream and the improvement of water quality by the reduction of erosion and breakdown of nutrients and organic matter. On May 4, 2004, TDEC's Division of Water Pollution Control issued public notice of its intent to issue an Aquatic Resource Alteration Permit to allow the proposed wetland restoration. TDEC's Division of Solid Waste Management approved the plan on June 2, 2004. Although the wetland system was subsequently built, site and drought conditions prevented the full development of the communities of salt-tolerant vegetation that were planned.

A compliance review meeting took place between TDEC and ACC in April 2008. Shortly thereafter, in a letter dated June 12, 2008, TDEC requested that ACC submit modifications to the original corrective action plan in light of ACC's failure to satisfy the previous remedial objectives. ACC submitted the required modified corrective action plan to TDEC approximately two months later. TDEC approved the modified plan for implementation on April 19, 2010.

In February 2011, three inspections conducted by TDEC personnel revealed that leachate containing high levels of chlorides and ammonia continued to flow into Sugar Creek. As a result of this discovery, TDEC and ACC entered into a consent order on June 6, 2011, which set forth ACC's obligations in addressing the continued contamination. In addition to describing the historical problems leachate contamination had posed at the ACC landfill site, the order found ACC to be in numerous violations of the Water Quality Control Act and the Tennessee Solid Waste Disposal Act. In particular, ACC was cited for "causing or allowing unauthorized discharges to waters of the state," in addition to "allowing the release of solid waste or solid waste constituents to the waters of the State." The order mandated that ACC develop plans to reduce leachate contamination on the site but stated that the plans which were developed and approved could be modified in the future upon the written approval of the TDEC Commissioner. In addition, the order stated that the Commissioner could extend compliance dates for the plans developed "for good cause shown[.]" Although the order assessed a civil penalty against ACC in the amount of $318,300.00, ACC was provided a means by which it could receive a credit in the amount of $90,000.00 against the penalty if it proposed certain "Supplemental Environmental Projects." The remaining $228,300.00 penalty was due and payable only if ACC failed to submit and implement the plans called for by the order. Moreover, the order provided that the Commissioner could waive ACC's noncompliance for demonstrated good cause. Shortly after this order was entered into, it was filed for entry as a judgment by consent in the Davidson County Chancery Court pursuant to Tennessee Code Annotated § 68-212-114(e),

Tennessee Code Annotated § 68-212-215(f), and Tennessee Code Annotated § 69-3-115(e). StarLink, whose property adjoins the landfill, subsequently intervened in the case.

When TDEC, ACC, and StarLink were unable to resolve the issues among them, the Chancery Court remanded the matter for further proceedings before the Board as a contested case pursuant to the Tennessee Uniform Administrative Procedures Act. On May 17, 2012, TDEC gave written notice to StarLink that a hearing before the Board was set for August 7, 2012. Specific notice was given that ACC and TDEC would be asking the Board to adopt an Amended and Restated Consent Order which would supersede the June 2011 consent order. Although the Amended and Restated Consent Order ("Consent Order") found that ACC committed the same violations of the Water Quality Control Act and the Tennessee Solid Waste Disposal Act that were cited in the original consent order, the Commissioner's orders and assessments differed. In outlining a detailed remediation plan, the Commissioner ordered that ACC take several steps to improve conditions at the landfill site. In relevant part, ACC was ordered as follows:

> A. [ACC] shall take the following actions to prevent the unauthorized discharge of leachate contamination in water flowing from the Site into the Arrow Lake impoundment of Sugar Creek:
>
> 1. Within 120 days of the effective date of this Amended and Restated Consent Order, or as is otherwise agreed to by the parties, [ACC] shall construct a berm upgradient of the site to divert uncontaminated storm water away

from the Landfill prior to the commencement of any corrective action activities on the Landfill.

2. As part of [a] Corrective Action Plan . . . [ACC] shall submit to the Commissioner for his review and comment or approval a modified Discharge Reduction Plan . . . that incorporates TDEC's comments and revisions to [ACC's] draft DRP that was submitted to TDEC in September 2011. The modified DRP shall significantly reduce, particularly during periods of low area surface water flow, the loading of contaminants that are currently discharging from the Site via surface waters. The modified DRP shall include a schedule for implementation.

3. The DRP shall contain a plan to divert surface water away from the landfill area and the current wetland system. The DRP shall eliminate, to the extent practicable, the potential for surface water to migrate from the surface into the landfill and eliminate the potential for surface water to enter the excavated area of the landfill once corrective action begins.

* * * *

B. [ACC] shall remove from the current landfill all solid waste, to the extent practicable, that has the potential for future contact with ground or surface water. All waste removed will be relocated to a new landfill cell constructed on the Site or to a permitted off-site landfill.

1. Prior to the Commissioner's approval of the Corrective Action Plan . . . but after commencement of waste removal activities, [ACC] shall capture ground water entering the excavated area, analyze the ground water to determine its chemical characteristics, and then either (a) redirect the collected water back into the landfill or (b) discharge the collected ground water directly into Arrow Lake if the water is consistent with background concentrations as approved by TDEC[.]

* * * *

2. After the Corrective Action Plan . . . has been approved by the Commissioner, the list of constituents, their concentrations, and frequency of analysis shall follow the sampling plan contained in the approved Water Monitoring Plan as contained in the approved CAP[.]

3. As waste is removed from the Site, [ACC] shall capture ground water that is upgradient of the remaining waste and handle such ground water as described in the approved DRP, or as is otherwise required by the CAP. Treatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed.

C. Within one hundred and fifty (150) days of the effective date of this Amended and Restated Consent Order, [ACC] . . . shall submit to the Department a Corrective Action Plan . . . which provides for the methods and schedule for removal of solid

> wastes that have been disposed of in the ACC Landfill which have the potential for future contact with surface or groundwater.

Under the Corrective Action Plan called for in the Consent Order, which is the plan at the center of this appeal, ACC is required to include an operation plan concerning the amount of waste it proposes to remove daily and a schedule for removal and relocation of all impacted waste "which has the potential for future contact with surface or ground water within four (4) years or less[.]" In addition, ACC is required to develop and implement a monitoring and sampling plan for the leachate discharging from the landfill and for any groundwater pumped from the worksite. The Consent Order further provides that the Commissioner can extend the compliance dates stated therein. Although the order also assesses a civil penalty in the amount of $400,000.00, this penalty only comes due and payable in $100,000.00 increments if ACC fails to meet yearly milestones relative to the Corrective Action Plan's deadlines for waste removal. Moreover, despite stating that the Commissioner does not implicitly or expressly waive any provisions of the Water Quality Control Act or the Tennessee Solid Waste Disposal Act, the Consent Order notes that compliance with its provisions can be considered as a mitigating factor in determining the need for future enforcement actions.

On July 30, 2012, StarLink formally moved the Board to intervene in the contested case hearing. The Board granted its motion on August 2, 2012, and the hearing before the Board took place as noticed on August 7, 2012. The Board entered an order approving

the Consent Order on August 9, 2012.[5] On October 5, 2012, StarLink appealed by filing a Petition for Judicial Review in the Chancery Court for Davidson County.[6] Oral argument on the Petition was held on May 23, 2013, and on January 29, 2014, the Chancery Court entered an order affirming the Board's decision to approve the Consent Order. StarLink then commenced this timely appeal.

II. Issues on Appeal

On appeal, StarLink asserts that the Chancery Court erred by upholding the Board's adoption of the Consent Order and raises four issues for our review. Having reviewed the parties' briefs and the record transmitted to us, we find that there are two issues for this Court to address at this juncture. As we perceive it, the essence of the issues on appeal are twofold: 1) whether the Board's adoption of the Consent Order was in error where the Board failed to fully consider a feasible and potentially economically viable plan that would contain the leachate contamination from the landfill site from continued discharge into Sugar Creek and Arrow Lake;[7] and 2) whether StarLink's

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[5] We note that two provisions from the originally proposed Consent Order were struck by TDEC and ACC at the beginning of the administrative hearing before the Board. The order actually approved by the Board reflects this fact.

[6] An amendment to its Petition for Judicial Review was filed on October 9, 2012.

[7] Although StarLink primarily phrases the issue on appeal as one relating to the permit requirements outlined in Tennessee Code Annotated § 69-3-108, the substantive underlying question raised on appeal is whether the Board erred in adopting a remediation scheme that sanctions ACC's pollution indefinitely where

assertion that the Consent Order is deficient in that it fails to assess significant monetary penalties against ACC despite over thirty years of knowing environmental violations.

III. Standard of Review

Judicial review of an agency's action follows the statutorily defined standard contained in Tennessee Code Annotated § 4-5-322(h) rather than the broad standard of review generally applicable to civil appeals. *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988) (citations omitted). The trial court may reverse or modify the decision of the agency only if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;

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the Board failed to fully consider a plan that could contain the leachate contamination. Tennessee Rule of Appellate Procedure 13(b) "expressly grants the appellate courts authority to consider issues not brought up for review by any party." *Panzer v. King*, 743 S.W.2d 612, 616 (Tenn. 1988), *abrogated on other grounds by Lacy v. Cox*, 152 S.W.3d 480 (Tenn. 2004)). In this case, to the extent that we address an issue not specifically raised by the parties, we invoke our authority under Rule 13(b) in order "to prevent injury to the interests of the public," one of the reasons expressly stated by the Rule. Tenn. R. App. P. 13(b).

> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) (5) Unsupported by evidence that is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(h)(1)-(5) (2011). The trial court may not substitute its judgment concerning the weight of the evidence for that of the agency, and the same limitations apply to the appellate court. *Tenn. Envtl. Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 402 (Tenn. Ct. App. 2007) (citations omitted). "The scope of review in this Court is the same as in the trial court[.]" *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison County Gen. Hosp. Dist.*, 129 S.W.3d 57, 63 (Tenn. Ct. App. 2003). Therefore, in this Court's review of an administrative agency's decision, we are tasked with determining whether the trial court properly applied the standard of review found at Tennessee Code Annotated § 4-5-322(h). *Roy v. Tenn. Bd. of Med. Exam'rs*, 310 S.W.3d 360, 364 (Tenn. Ct. App. 2009) (citation omitted).

Substantial and material evidence "requires something less than a preponderance of the evidence . . . but more than a scintilla or glimmer." *Wayne County*, 756 S.W.2d at 280 (citation omitted). Although appellate courts "generally defer" to agency decisions on highly technical matters, "the court's deference to an agency's expertise is no excuse for judicial inertia." *Id.* The substantial and material evidence standard "requires a searching and careful inquiry that subjects the agency's decision to close scrutiny." *Id.* (citations omitted).

Agency decisions may be considered "arbitrary and capricious if caused by a clear error in judgment." *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993) (citations omitted). "An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment . . . or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* at 111 (citations omitted).

IV. Discussion

As observed at the outset of this Opinion, the dispute in this case is not predicated on a factual controversy among the parties. There is no question that the landfill operated by ACC is leaking contaminants and polluting the land and waters of Tennessee. Indeed, the consent order approved by the Board specifically acknowledges that ACC has violated Tennessee Code Annotated § 69-3-108(a) and (b), Tennessee Code Annotated § 69-3-114(a) and (b), and Tennessee Code Annotated § 68-211-104(1),(3), and (4).[8] Further, there is

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[8] Tennessee Code Annotated § 69-3-108(a) (2012) provides as follows:

> Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (l), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

Under Tennessee Code Annotated § 69-3-108(b) (2012):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;

* * * *

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters[.]

Under Tennessee Code Annotated § 69-3-114(a) (2012):

It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103, unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

Under Tennessee Code Annotated § 69-3-114(b) (2012):

[I]t is unlawful for any person to act in a manner or degree that is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to this part; or to fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

no question that the leachate contamination that caused these violations persists today. This dispute focuses not on whether an environmental violation exists, but on the appropriate remediation effort and environmental law enforcement. Simply put, the question in this case is whether the Board erred in adopting the remediation plan agreed to by TDEC and ACC in the Consent Order where that plan fails to address the flow of leachate from the landfill site into Arrow Lake and Sugar Creek.

We note that, in its brief, StarLink specifically challenges the validity of the Consent Order due to the fact that the Consent Order does not mandate ACC to obtain a permit under Tennessee Code Annotated § 69-3-108 to bring its discharge of pollutants into compliance with the Tennessee Water Quality Control Act and the federal Clean Water Act. We further note that ACC's discharge of pollutants without a permit is also at issue in a stayed federal action brought by StarLink against ACC in the United States District Court

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Under Tennessee Code Annotated § 68-211-104 (2013), it is unlawful to:

(1) Place or deposit any solid waste into the waters of the state except in a manner approved by the department or the Tennessee board of water, quality, oil and gas;

* * * *

(3) Construct, alter, or operate a solid waste processing or disposal facility or site in violation of the rules, regulations, or orders of the commissioner or in such a manner as to create a public nuisance; or

(4) Transport, process or dispose of solid waste in violation of this chapter, the rules and regulations established under this chapter or in violation of the orders of the commissioner or board.

for the Middle District of Tennessee. Given our disposition herein, which remands the case to the Board for further proceedings, we find that this issue and all other issues raised by StarLink which are not directly addressed herein, are pretermitted as advisory. As will be further explained in this Opinion, the Board acted capriciously in the manner that it failed to give any significant consideration to an option that would divert the flow of pollutants from discharge into waters of the state. Because this diversion option could potentially eliminate ACC's unlawful discharges if it is adopted and implemented on remand, the issue of a discharge permit could ultimately be mooted.

Sufficiency of the Assessed Civil Penalties

Before addressing the Board's failure to fully consider this diversion option, we first consider StarLink's assertion that the Consent Order is deficient because it fails to impose civil penalties against ACC for environmental violations that have been occurring for over the past thirty years. In addition to complaining about the State's failure to impose significant penalties for past violations, StarLink notes that the $400,000.00 that can be imposed as civil penalties is only due and payable under the Consent Order if ACC fails to meet future deadlines relative to the ordered remediation scheme. On appeal, our review of an agency's sanctions is subject to "very limited judicial review." *Armstrong v. Metro. Nashville Hosp. Auth.*, No. M2004-01361-COA-R3-CV, 2006 WL 1547863, at *3 (Tenn. Ct. App. June 6, 2006) (citation omitted). The appropriateness of a sanction is peculiarly within the discretion of the agency, *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996), and we will only review whether the sanction is

"unwarranted in law" or "without justification in fact." *Rawdon v. Tenn. Bd. of Med. Exam'rs*, No. M2012-02261-COA-R3-CV, 2013 WL 5874779, at *2 (Tenn. Ct. App. Oct. 30, 2013). In its brief on appeal, the State generally argues that the emphasis in the Consent Order is on compliance rather than retribution; as it puts it, the focus is on "expending resources for remediation, rather than on filling the Department's coffers." We agree with this characterization of the Consent Order, and we find that the Board did not abuse its discretion in adopting an order that assesses penalties against ACC with such remediation efforts in mind. Although the rampant pollution that the landfill site has generated over the years certainly warrants stringent state enforcement, the State's focus on preserving ACC's resources for remediation of the site is a reasonable one. The Board was not without justification when it made the civil penalties provided for in the Consent Order contingent upon ACC's failure to comply with the ordered remediation activities. The sufficiency of the remediation efforts actually required by the Consent Order, however, is another question.

Sufficiency of the Ordered Remediation Efforts

As we have already noted, the Consent Order broadly addresses the remediation efforts ACC is required to fulfill at the landfill site. Although its provisions are both varied and detailed, its terms obligate ACC to perform two primary tasks. First, ACC is required to take steps to divert water upgradient of the site so that the water does not enter the waste-ridden landfill area. Second, ACC is required to excavate the landfill and remove all solid waste, "to the extent practicable," that has the potential for future contact with surface or groundwater. The order requires the

removed waste to be relocated to a new landfill cell constructed on site or to a permitted off-site landfill. This waste removal process is contemplated to occur over a four year period.

Noticeably absent from the Consent Order is any mandate that ACC treat or otherwise divert the leachate before it discharges into Sugar Creek. Although ACC is required to develop and implement a water monitoring plan, the adopted consent order expressly states that "[t]reatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed." On appeal, StarLink generally contends that the absence of such a requirement invalidates the appropriateness of the Consent Order in light of our state's environmental laws and policies.

As is evident from the administrative record, the Board's decision to adopt the Consent Order was grounded in a belief that ACC's funds would be applied most efficiently in removing waste from the landfill site. During deliberations on the date of the contested case hearing, one Board member commented, "[I]t doesn't make sense to spend a lot of money on the symptoms and divert that money away from addressing the root cause. It's a waste of funds, in my opinion." This view was echoed by several other Board members, including one who stated as follows:

> If you try to just treat the system and not go ahead of the stream, then if you just try to treat it, if you do that in a manner that you bankrupt the company, that does neither party in this matter any good if you bankrupt them. They've got to remediate that site, if they ever get started. Then, hopefully, they'll

> have something to measure to see if it's getting better or worse.

These comments were in response to testimony from ACC's wastewater engineering consultant, George Garden ("Mr. Garden"). When before the Board, Mr. Garden testified that treating the discharged leachate, although technically possible, would be expensive and of little impact:

> We costed out 30,000 gallons of the most concentrated waste that we could collect. And a plant to do that would probably cost—and I say a plant to do that, using the most efficient technologies that we could come up with, going all the way to salts, taking that salt and dumping it in somebody else's stream, was probably $5 million. And that is a mall [sic] percentage of the flow when you have a good bit of wet weather flow from groundwater coming out as surface water from the landfill. So we're talking about, at the best of times, only removing about 45 percent of the salt leaving the site. That's the best day. Any other day in the year it's probably going to be much less than 45 percent and, in fact, overall it's probably less than 10 percent in a year.

Mr. Garden estimated that in addition to the five million dollar cost needed to build the required plant, the operational costs would be nearly $700,000.00 each year.

Although concerns of economic efficiency may have been the impetus for the Board's action in adopting the Consent Order, this Court finds the Board's decision to be arbitrary and capricious inasmuch it failed

to fully consider the range of remedial options which were available and discussed at the hearing before the Board. Having reviewed the testimony before the Board, we note that sufficient evidence of a feasible complement to the Board-approved plan exists. This complement, which involves diversion of leachate contamination before it enters Sugar Creek rather than direct treatment of the leachate, would help preserve the integrity of our state's waters.

That this diversion option was discussed before the Board cannot be disputed. During the contested case hearing, StarLink's counsel specifically questioned a representative of ACC, Tom Grosko ("Mr. Grosko"), on why remediation efforts had focused on the removal of waste from the landfill site instead of the continued discharge of leachate into Sugar Creek:

> Q: And so what I'm asking you now is, why aren't we focusing on diverting the water below?
>
> A: Around what? If it's already been through the landfill, I don't understand.
>
> Q: There is polluted water coming out the other side.
>
> A: Yes, sir.
>
> Q: Would there be a way to divert the water coming out the other side?
>
> A: To?
>
> Q: I guess, has there ever been a proposal to pipe the water to other property that you own?
>
> A: I believe so, yes.

> Q: And did [StarLink] not propose paying for that pipe so that the water could be diverted to other land that you own?
>
> A: I've heard that, yes.
>
> Q: And so that proposal was rejected, because you don't want that polluted water any more than [StarLink] does, do you?
>
> A: I personally didn't reject it, no.

Immediately following the above exchange, ACC's counsel questioned Mr. Grosko on the proposal that contaminated leachate be diverted onto ACC's lands instead of being allowed to discharge into the waters:

> Q: Were you a party to any of these so-called offers of piped water? Was that during your tenure with the company, or is that something that you have heard of or about?
>
> A: I believe it was last year.

When the Board deliberated the case at the conclusion of the parties' proof, one Board member questioned why StarLink's proposed offer of diversion should not be implemented:

> Starlink indicated that they would pay for catching the water after it runs through the landfill and apply it to another location on the site. All right. The State and ACC have proposed berms to slow down the water running into the landfill and excavating the landfill. Why don't we do a combination of the three, if they're still willing to do that, if that's possible. And if they want to be a party to the consent order, then everybody is participating in it. We're catching as much water as we can

> catch before it gets into the landfill. We're excavating the landfill, and then we're catching whatever water goes through it and applies it to another location on the 48 acres at no cost to ACC, as I heard it. To me, I see that as a much better resolution to the problem than just part of trying to resolve part of the problem.

Although the Board members briefly discussed the merits of this proposed diversion of contaminated leachate, they were ultimately dismissive of the option as a complement to the remediation scheme outlined in the Consent Order. The Board's cursory discussion included an unresolved query into the extent to which the leachate could be captured before entering the waters and concerns regarding a possible delay in order to make StarLink a party to the consent order.

We find that the Board's disregard of the proposed complement to the remediation scheme was in error. First, notwithstanding some testimony that the direction of the flow was unknown with respect to some of the groundwater that eventually discharged, other testimony indicated several identifiable points of discharge of the leachate. For example, as Mr. Garden stated:

> Well, as you all have pointed out, there isn't just one point. Most of the water right now that is contaminated goes over the weir that's at that second pond. The vast mass of contaminant goes over that way. There's also a little bit that goes around it that goes out through the same culvert underneath Arrow Lake Road[.]

To the extent the Board chose not to require diversion of the leachate on the basis that some of the contaminated water might escape capture, such reasoning is arbitrary and capricious. If feasible to divert the water, it would be unreasonable in light of our environmental statutes to neglect to capture and redirect the contaminated water that is discernible.

Second, we find that it was arbitrary and capricious for the Board to dismiss the diversion option simply on the basis of possible delay. We note that when some of the Board members expressed uncertainty as to whether StarLink was still willing to pay for the costs of diverting the water from points of discharge to elsewhere on ACC's property, the Board neglected to explore the matter further or seek additional clarification. Rather, a Board member suggested that involving StarLink would only delay remediation of the site, and soon thereafter, the Board voted to approve the Consent Order. Certainly, time is of the essence, and we commend the Board for its concern that the landfill site be remediated as quickly as possible. Respectfully, however, we find that the Board's decision was arbitrary and capricious inasmuch it ignored the viability of a plan that proposed diverting contaminants before discharge. Assuming StarLink is still willing to pay for the pipe(s) necessary to divert the water, it would be unreasonable to not implement the diversion plan, under which leachate would be contained on ACC's property rather than continually polluting the waters of the state. ACC has sufficient remaining acreage outside of the landfill that could host a retention pond or other storage for the leachate, and this should not be ignored at the expense of continued pollution to waters of the state. The Water Quality

Control Act provides that the people of Tennessee "have a right to unpolluted waters" and obligates the government "to take all prudent steps to secure, protect, and preserve this right." Tenn. Code Ann. § 69-3-102 (2012). The statute further declares that its purpose 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." *Id.* Moreover, under the statement of policy included at the opening of the Tennessee Solid Waste Disposal Act, the State is charged to "protect the public health, safety and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, [and] enhance the beauty and quality of our environment[.]" Tenn. Code Ann. § 68-211-102 (2013). These considerations simply cannot be ignored, and any delay occasioned by gauging StarLink's willingness to pay for the costs of diversion would certainly be justified by future abatement of leachate discharges.[9]

Regardless of whether StarLink is still willing to pay for the costs necessary to divert the leachate, however, the diversion plan should be further explored in light of the statutory mandates. As outlined in the policy statements issued as part of the Water Quality Control Act and the Tennessee Solid Waste Disposal

[9] Moreover, although this Opinion remands this case to the trial court for further remand to the Board so that the Board can fully consider the viability of a diversion plan, we see no reason why the rest of the remediation plan cannot be initiated in the meantime.

Act, protecting our environment and state waters remains an important goal of the State. *See* Tenn. Code Ann. § 69-3-102 (2012); Tenn. Code Ann. § 68-211-102 (2013). It would be unreasonable to not consider the diversion plan further given the threat that the continued discharge of contaminants poses to the waters of the state. We note that when the Board decided to adopt the Consent Order, the proof before the Board was that *treatment* of the water would be expensive and costly. There simply was no proof that ACC could not economically carry on waste removal activity in addition to *diverting* contaminated water before its discharge into Sugar Creek and Arrow Lake. In fact, the only evidence before the Board relative to the cost of the proposed water diversion was that StarLink had offered to pay for the pipe required to effectuate the diversion.

To adopt a remediation plan that permits continued contamination of state waters despite being aware of a feasible and potentially economically viable remedial complement to the adopted order was arbitrary and capricious in light of the environmental polices of this State. The Board was aware of a potential complement to the Consent Order that would help directly combat the discharge of pollutants into the waters of the state, and yet the record shows that the Board did not give it any significant consideration. The Board's error lies in this lack of consideration. "In its broadest sense, the [arbitrary and capricious] standard requires the court to determine whether the administrative agency has made a clear error in judgment." *Mobilecomm of Tenn., Inc. v. Tenn. Pub. Serv. Comm'n*, No. 01-A-01-9303-BC-00138, 1994 WL 69590, at *3 (Tenn. Ct. App. Mar. 4, 1994). Here, we hold that it

was a clear error in judgment for the Board to dismiss the diversion option without fully considering its viability. The proof before the Board established that some points of leachate discharge were discernible, and as such, the practical feasibility of implementing a diversion plan should not be in question.[10] Moreover, the only evidence with regard to the cost of the diversion plan was that StarLink had once been willing to pay for it. Under these circumstances and in light of the environmental policies of this State, it simply was arbitrary and capricious for the Board to adopt the Consent Order without conducting further inquiry into a water diversion plan such as that initially proposed by StarLink. Although we applaud the Board's actions requiring ACC to conduct extensive waste removal activities, we must emphasize again that the adopted remediation plan effectively sanctions what are ongoing pollution violations. That this ongoing pollution is a significant concern cannot be stressed enough.

In the midst of the Board's discussion, we note that the administrative law judge presiding at the hearing specifically noted that the Board could reconvene on the record to explore the diversion option further. Rather than conduct further inquiry into a plan which would help decrease the ongoing pollution of state waters, however, the Board proceeded to adopt the Consent Order without amendment. We find this action of the Board to be arbitrary and capricious

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[10] Again, the fact that some groundwater might escape capture is not a reasonable reason to take no efforts to divert contaminated water that is discernible.

given the information it had before it; it is not reasonable to adopt a plan permitting ongoing pollution without further inquiry[11] when there is evidence that a feasible and potentially economically viable complement to the plan exists that would help curb the pollution. Put another way, in the context of its enforcement of state environmental laws, it was arbitrary and capricious for the Board to allow ACC to continue to effectively violate those laws, while only giving cursory consideration to a feasible plan that would counteract the very pollution that compelled state enforcement in the first place. We accordingly remand this matter to the trial court for further remand to the Board for further proceedings consistent with this Opinion, which may include, but are not limited to, proof on (a) Starlink's willingness to pay for the costs of diverting contaminated leachate that would otherwise discharge into the Sugar Creek and Arrow Lake, and if necessary, (b) the estimated costs of implementing a plan which diverts contaminated water from points of discharge to another location on ACC's property and (c) ACC's economic ability to implement such a diversion plan while still conducting the waste removal activities outlined in the Consent Order.

V. Conclusion

Although we discern no error in the Board's approval of the monetary civil penalties provided for in

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[11] Although the Board may have had concerns that StarLink was no longer willing to pay for the diversion plan, it should have asked for clarification on this matter in light of the continued threat of pollution to Sugar Creek and Arrow Lake. StarLink's counsel was present at the hearing, and the Board should have reconvened on the record to conduct further investigation into the issue.

the Consent Order, we find that the Board erred in the manner it failed to give full consideration to a diversion option that would counteract the pollution discharging from the landfill site. This matter is affirmed in part and remanded to the trial court for further remand to the Board for further proceedings consistent with this Opinion. Costs on appeal are assessed against the Appellees, ACC, LLC, and the Tennessee Solid Waste Disposal Control Board.

APPENDIX E

CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE, AT NASHVILLE

No. 12-1435-II

STARLINK LOGISTICS, INC., PETITIONER

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD, RESPONDENT.

Filed January 29, 2014

MEMORANDUM AND ORDER

Starlink Logistics, Inc. ("Starlink") seeks judicial review[1] of an order of the Tennessee Solid Waste Disposal Board ("foe Board") that approved a consent order negotiated between ACC, LLC ("ACC") and the Commissioner of the Tennessee Department of Environment and Conservation ("TDEC").

Summary of the Facts

ACC owns a closed Class II (industrial) solid waste disposal facility located on 14 acres of land immediately east of Arrow Mines Road, south of the City of Mt. Pleasant in Maury County, Tennessee. Starlink owns property adjacent to ACC's landfill site.

On July 1, 1981, TDEC's predecessor, the Tennessee Department of Health & Environment, issued a "registration" or "permit" to ACC (in its original corporate form of Associated Commodities Corporation) to construct the landfill to dispose of aluminum recycling wastes, primarily salt cake slag and bag house dusts,

[1] Starlink brings this action pursuant to Tenn. Code Ann. § 4-5-322.

generated by Smelter Services Corporation ("SSO, a secondary aluminum smelting plant located at 400 Arrow Mines Road in Mt. Pleasant, Tennessee.

Prior to issuance of a permit, on February 23, 1981, the Department issued ACC a conditional hydrogeologic approval of the landfill.[2] After the approval, and in accordance with the then-applicable regulations, ACC submitted plans for construction and operation of the landfill; these plans were approved by TDEC with the issuance of the registration/permit. TDEC assigned the landfill number IDL 60-0032. On or about August 1981. ACC began disposing of SSC's aluminum wastes in the landfill and continued doing so until September 1, 1993.

SSC's aluminum slag is an industrial waste from its aluminum recycling furnaces that has extremely high levels of sodium chloride and potassium chloride. These chloride salts are very soluble and quickly dissolve when the slag comes in contact with rainwater or groundwater. When water contacts the slag, a chemical reaction occurs that generates water soluble ammonia. Once dissolved in the water, the chlorides and ammonia arc released from the slag into the water and air. The polluted water is called "leachate."

The leachate flows through culverts that lie under Arrow Mines Road (which is the property boundary

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[2] Under The regulations in effect at the time, the Department (now TDEC) performed the hydrogeologic evaluation of proposed landfill sites and either approved, with conditions, or disapproved such sites (or portions thereof) for use as landfills.

between ACC and Starlink) and into Sugar Creek and Arrow Lake,[3] which are located on Starlink's property.

When ACC began final closure of the landfill, it performed in accordance with Closure/Post Closure Care and Corrective Action Plans approved by TDEC, which principally involved establishing a final soil cover system over the waste deposits. The Plans met the then-current requirements of Term. R. & Reg. 1200-1-7-.04(8)(c)3, with surface water controls as necessary to minimize and control erosion and sedimentation.

On July 18, 1995, ACC submitted to TDEC a certification of completion of closure after implementing a number of improvements to the final cover and reconstruction of the perimeter surface water drainage ditches around the landfill. On April 8, 1996, TDEC issued ACC an Acceptance of Closure.

After the official closure of the landfill in 1996, TDEC and ACC found unacceptably high levels of chlorides leaching out of the waste deposits into ground water and surface water that drained into nearby Arrow Lake. While the leaching continued unabated and regulations and technologies evolved, ACC worked with TDEC to identify why the leaching was occurring. ACC undertook various investigative and corrective actions, including, but not limited to, the following:

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[3] Jo the early 1900s, Sugar Creek – an approximately 15-foot wide stream – was dammed to form Arrow Lake. The lake was created to provide a water source for washing and processing phosphate ore that was mined/processed on the property now owned by Starlink.

- Application of daily cover material to divert rainfall from the wastes;
- Construction of lengthy ditches to re-route surface water around the landfill;
- Construction of multiple settling ponds and associated drainage control ditches;
- Attempted sealing of springs and seeps;
- Installation, development, and maintenance of a system of ground water monitoring wells to delineate the nature and extent of ground water contamination;
- Collection and analysis of surface water and ground water samples at multiple locations, including routine periodic monitoring at selected locations, in accordance with plans approved by the Department;
- Soil boring/rock coring with installation of piezometers along the landfill perimeter, and test pit/trench excavations within the landfill to evaluate ground water flow into the landfill;
- Two separate Dye Tracer Studies to try to define ground water flow and Karst impacts in the vicinity of the landfill;
- Investigation of landfill vicinity for Karst conditions that may control ground water flow;
- Electrical resistivity and microgravity surveys of the landfill to try to define ground water flow paths beneath the landfill; and
- Geoprobe/rotary auger investigations to evaluate depth to bedrock and ground water conditions.

In a letter dated June 27, 2003, the Department (1) recognized that the final closure of the landfill had

not significantly reduced the release of contaminated leachate, (2) acknowledged the extensive hydrogeologic investigations that ACC had performed at the site to identify the nature of the leachate release (including the mechanism by which ground water interacts with the waste) and the knowledge gained, and (3) called for the development and submission of a ground water corrective action plan pursuant to Tenn., R. & Reg. 1200-1-7-.04(7)7 and 8.

On December 30, 2003, ACC submitted a Corrective Action Plan ("CAP") meeting the regulatory requirements. The CAP assessed the feasibility and potential effectiveness of the available options and concluded that "selection of a remedy that fulfills all the criteria established by Tenn. R. & Reg. 1200-l-7-.04(7)(a)8(ii) in the next two or three years is technically and economically impractical." The CAP recommended pursuing a Wetlands Treatment Alternative to enhance attenuation of releases and impacts at the site. In January 2004, ACC held a public meeting to obtain public comments on the CAP and on the proposed Aquatic Resource Alteration Permit ("ARAP"). Afterwards, TDEC allowed ACC to pursue its recommended treatment alternative pending the acquisition of the necessary ARAP.

On April 2, 2004, ACC submitted to TDEC a Remedial Plan for a Constructed Wetland System downgradient of the landfill in an effort to retain and buffer leachate and to improve water quality and habitat in Sugar Creek and Arrow Lake. ACC stated that its Remedial Plan would benefit the local environment by: (1) reducing surges of salt concentration downstream of the Site; (2) improving aesthetic values of the site by removal of stressed vegetation and planting vegeta-

tion that would flourish, (3) improving wildlife habitat, particularly for wetland species (i.e., waterfowl, shorebirds, aquatic invertebrates and amphibians): and (4) improving water quality by the reduction of erosion and breakdown of nutrients and organic matter.

On May 4, 2004, TDEC's Division of Water Pollution Control issued public notice of its intent to issue an ARAP to allow ACC's wetland restoration effort to proceed. On June 2, 2004, TDEC's Division of Solid Waste Management approved ACC's Remedial Plan. The Constructed Wetlands System was subsequently built, but site and drought conditions over the next several years hindered the full development of the vigorous communities of salt-tolerant vegetation that were planned. On August 15, 2008, ACC submitted the required Modified Corrective Action Plan ("MCAP") to the Department. By letter dated April 19, 2010, the Department approved implementation of the MCAP. Following three inspections in February 2011, TDEC and ACC entered into a Consent Order dated June 2011 outlining a plan to address the contaminated leachate. Starlink's intervention into the 2011 Initial Order was the genesis for the Amended and Restated Consent Order subsequently approved by the Board on August 7, 2012.

Procedural History

In June of 2011, the Department and ACC entered into a Consent Order. That Consent Order was filed on June 9, 2011 in the Chancery Court of Davidson County under provisions of Part Two of the Hazardous

Waste Act[4] and the Water Pollution Control Act,[5] which allowed an Administrative Order to be filed in court and become enforceable as a Court Order.[6]

In the Consent Order, ACC obligated itself to develop a "Discharge Reduction Plan" to "significantly reduce" the amount of contamination flowing from the ACC Landfill. The Order allowed ACC time to conduct a "Field Investigations Plan" describing in detail the efforts to be pursued in gathering information for an effective assessment and designing potential corrective measures. After the Plan was completed and TDEC had conducted its review, ACC would submit a new Corrective Action Plan ("CAP").

On July 21, 2011, Starlink moved to intervene in ACC's petition to the Chancery Court. On November 14, 2011, the Chancery Court entered a Joint Agreed Order that (1) granted the Motion to Intervene, (2) stayed the Proceedings, (3) remanded Order No. SWM11-006 and WPC11-0024 to the TDEC, (4) called for a Telephonic Status Conference[7] and (5) remanded the matter to the Tennessee Solid Waste Disposal Board as a Contested Case Matter. The parties were instructed to file a notice with the Court, on or before December 20, 2011, as to whether the matter had been resolved. In the event the parties failed to reach an agreement, they were to file a proposed order remand-

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[4] Tenn. Code Ann. §§ 68-212-114(e) and 63-212-215(f)

[5] Tenn. Code Ann. § 69-3-115(e)

[6] The case was assigned to Purl III of the Davidson County Chancery Court, Case No. 11-769-III.

[7] The Court modified the Order so that no telephonic status conference was required.

ing the action for further proceedings before the Tennessee Solid Waste Disposal Board.

On January 19, 2012, ACC filed a Notice of Failure to Resolve This Matter by the Parties and a proposed Order of Remand for Contested Case Hearing Before the Tennessee Solid Waste Disposal Control Board. Starlink and TDEC jointly filed a proposed Order of Dismissal on January 20, 2012.

Also on January 20, 2012, Starlink filed a complaint against ACC in the U.S. District Court for the Middle District of Tennessee. ACC moved to dismiss Starlink's federal complaint on February 15, 2012, arguing that TDEC was "diligently prosecuting" ACC. ACC asserted that the federal environmental laws

> [s]tate that a "citizens suit" should only be brought if the environmental regulatory agencies are not acting. The State of Tennessee has ordered ACC to perform remedial activities and has assessed civil penalties against ACC; said matter is currently pending in Davidson County Chancery Court Case No. 11-0769-III. The Plaintiff intervened in the Chancery Court matter and is currently participating as a citizen in the Davidson County Chancery Court.

The federal Court denied ACC's motion to Dismiss on June 25, 2012.

On March 21, 2012, after Starlink, ACC and TDEC failed to resolve the compliance and migration issues through negotiation, the Chancery Court[8] dismissed ACC's petition seeking approval of the Consent

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[8] See footnote 6.

Order and remanded the matter to the Board for a contested case hearing.

On May 17, 2012, TDEC issued written notice to Starlink that the matter was set for hearing before the Board on August 7, 2012, and that TDEC and ACC would be submitting an Amended and Restated Consent Order for Board approval. On July 30, 2012, Starlink filed a Petition to Intervene in the Board proceeding "to determine the adequacy of the remedies and penalties proposed in the draft Amended and Restated Consent Order." The Petition to Intervene was granted by the Board on August 2, 2012.

The Board convened a contested case hearing on August 7,2012. On August 9,2012, the Board filed the "Board Approval of Amended and Restated Consent Order" ("the Consent Order"), which contained its findings of fact and conclusions of law. The Board concluded that the Consent Order appropriately recognized that the only way to stop contaminant migration from the landfill and its impact to ground and surface water was to remove all the waste on site that had the potential to be in contact with water into a new cell that would meet current landfill design requirements. The Board also determined that neither it nor TDEC had statutory authority to redress Starlink's private nuisance claims. The Board adopted the Consent Order and required ACC to comply with its terms and conditions. On October 5, 2012. Starlink filed this appeal with the Davidson County Chancery Court. Starlink did not seek a stay of the Board's decision before the Board or in Chancery Court.

On November 30, 2012, ACC moved the federal court to stay Starlink's federal case pending the outcome of this appeal. On January 17, 2013, the federal

court granted in part and denied in part ACC's motion, staying Starlink's claims under the federal Clean Water Act and Resources Conservation and Recovery Act ("RCRA") pending the final adjudication of this appeal.

This Court heard oral arguments on May 23, 2013. After consideration of the applicable law, the arguments of counsel, the briefs and the entire record, the Court is now ready to rule.

Standard of Review

The standard for reviewing administrative agency decisions in contested cases under the Administrative Procedures Act ("APA") is set out in Tenn. Code Ann. § 4-5-322. Generally, a court may reverse or modify an agency decision if that decision is arbitrary or capricious, is characterized by an abuse or a clearly unwarranted exercise of discretion, is unsupported by substantial and material evidence, or if the decision violates constitutional or statutory provisions or exceeds the statutory authority of the agency. Tenn. Code Ann, § 4-5-322(h); *Sanifill of Tennessee Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *Tennessee Cable Television Ass'n. v. Tennessee Pub. Serv. Comm'n.*, 844 S.W.2d 151, 163 (Tenn. Ct. App. 1992).

This is not a broad, de novo review; it is restricted to the record, and courts should not substitute their judgment for that of an agency as to the weight of the evidence on factual issues. *Sanifill*, 907 S.W.2d at 810. Substantial and material evidence requires "something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Mosely v. Tennessee Dept. of Commerce and Ins.* 167 S.W.3d 308, 316 (Tenn. Ct. App. 2004) (quoting *Wayne County v.*

Tennessee Waste Disposal Control Bd., 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988)). Further, this Court may not reverse an administrative decision supported by substantial and material evidence solely because the evidence could also support another result. *Martin v. Sizemore*, 78 S.W.3d 249,276 (Tenn. Ct. App. 2001).

In *Jackson Mobilphone Co., Inc. v. Tennessee Public Service Comm'n.*, the Tennessee Court of Appeals discussed the application of this standard of review:

> The standards of review in Tenn. Code Ann. § 4-5-322(h)(4) and Tenn. Code Ann. § 4-5-322(h)(5) are narrower than the standard of review normally applicable to other civil cases. They are also related but are not synonymous. Agency decisions not supported by substantial and material evidence are arbitrary and capricious. However, agency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment.
>
> A reviewing court should not apply Tenn. Code Ann. § 4-5-322(h)(4)'s "arbitrary and capricious" standard of review mechanically. In its broadest sense, the standard requires the court to determine whether the administrative agency has made a clear error in judgment. An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.

> Likewise, a reviewing court should not apply Tenn. Code Ann. § 4-5-322(h)(5)'s "substantial and material evidence" test mechanically. Instead, the court should review the record carefully to determine whether the administrative agency's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." The court need not reweigh the evidence, and the agency's decision need not be supported by a preponderance of the evidence. The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

Jackson Mobilphone Co., Inc. v. Tennessee Public Service Comm'n., 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993) *cert. denied* May 2, 1994 (internal citations omitted).

Analysis

This case arises within the context of a proposed cleanup plan for a closed landfill site. Pursuant to Term. Code Ann. § 68-212-224 of the Hazardous Waste Management Act ("HWMA") of 1983, as amended, the Commissioner is authorized to enter into a Consent Order with a party who is willing and able to conduct an investigation and remediation of a hazardous substance site, ACC, Starlink and TDEC all agree that the discharge of contaminated water from ACC's property onto Starlink's property must be stopped. In August of 2012, the Board approved and the Commissioner signed the Amended and Restated Consent Order between TDEC and ACC, which sets forth a Corrective Action Plan ("CAP").

Starlink complains that the Board's decision approving the TDEC Consent Order violates statutory provisions, exceeds the agency's statutory authority, and is arbitrary, capricious and a clearly unwarranted exercise of discretion.

First, according to Starlink, since Sugar Creek and Arrow Lake are "waters of the state," and ACC's leachate-contaminated ground and surface water flows into the creek and Jake, the Board's approval of the Consent Order "violate[s] clear mandates of the Tennessee Water Quality Control Act." The Consent Order, Starlink contends, does not require ACC to apply for a National Pollutant Discharge Elimination System ("NPDES") permit for its continued leachate discharge nor does it require ACC to treat the leachate until after ACC's CAP is completed.

Starlink asserts that ACC must obtain a permit pursuant to Tenn. Code Ann. § 69-3-108 of TWQCA to legitimize the discharge coming from its property. Starlink makes this assertion without a statutory foundation. Tenn. Code Ann. § 69-3-108(g) of TWQCA is written in conditional language, stating that:

> The commissioner *may* grant permits authorizing the discharges or activities described in subsection (b), including, but not limited to, land application of wastewater, but in granting such permits shall impose such conditions, including effluent standards and conditions and terms of periodic review, as are necessary to accomplish the purposes of this part, and as are not inconsistent with the regulations promulgated by the board. Under no circumstances shall the commissioner issue a permit for an activity that would cause a

condition of pollution either by itself or in combination with others.

(Emphasis added).

The Board's interpretation of the language in Term. Code Ann. § 69-3-10(g) gives the Commissioner the discretion to grant a permit or to authorize a discharge in another way. Starlink's assertion that 108(g) is a mandate to the Commissioner to issue a permit does not give full and effective meaning to every word in the statute. Court must ascertain and give effect to legislature's purpose and intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *State v. Hawkins*, 406 S.W.3d 121, 131 (Tenn. 2013). To ascertain a statute's purpose, a court initially focuses on the statute's words, giving them their natural and ordinary meaning in light of the context in which they are used, without a forced interpretation. *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405,420 (Tenn. 2013).

TWQCA does not mandate that the Commissioner issue permits when directing a cleanup or a removal action pursuant to HWMA.[9] Starlink attempts to create a conflict between TWQCA and HWMA, but docs not cite any caselaw that supports such a proposition and none can be found.

[9] Seeking a permit would also be contrary lo the purpose of the Consent Order, which is to clean-up the landfill. Issuance of a permit would itself be a violation of TWQCA. Tenn. Code Ann. § 69-3-108(g) ("Under no circumstances shall the commissioner issue a permit for an activity that would cause a condition of pollution either by itself or in combination with others.")

TWQCA provides that

> *(a)* It is unlawful for any person to discharge any substance into water of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages defined in § 69-3-103, unless such discharge shall be due to an unavoidable accident *or unless such action has been properly authorized. . .*

Tenn. Code Ann. § 69-3-114(a) (emphasis added).

When a statute is subject to construction, interpretations by the agency charged with administering the statute are entitled to persuasive weight." *Estrin v. Moss*, 430 S.W.2d 345, 351, 221 Tenn. 657, 671 (1968); *National Council on Compensation Ins. v. Gaddis*, 786 S.W.2d 240, 242 (Tenn. Ct. App. 1989), *appeal denied* (Tenn. March 5, 1990). While an agency's interpretation of its controlling statutes is not binding on the courts, its interpretation is "entitled to consideration and respect and should be awarded appropriate weight," particularly in regard to "doubtful or ambiguous statutes." *Nashville Mobilphone Co. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976).

The Legislature authorized TDEC to direct the cleanup of an inactive hazardous waste site such as ACC's landfill. Tenn. Code Ann. § 68-212-206. In so doing, TDEC must consider all reasonable plans of action, weighing cost effectiveness, available technology, the extent to which each alternative would achieve the goal, and the effect on public health, safety and the environment. Tenn. Code Ann. § 68-212-206(d). To the extent a discharge occurs during ACC's removal

action, the Commissioner, under HWMA, has authorized the removal action and any discharge, unavoidable or carried out pursuant to TDEC approval, does not violate TWQCA.

Starlink also complains that the Amended and Restated Consent Order violates statutory provisions because it does not direct ACC to immediately begin treating the contaminated water flowing from the landfill property and defers any treatment, transport or disposal of the contaminated water until the TDEC-approved CAP has been completed by ACC. Starlink's argument does not take into account the Consent Order's first proposed action – removing the landfill waste so that groundwater and surface water will no longer become contaminated. ACC's removal of the waste is meant to reduce the need for water treatment by addressing the problem on the front end.

At the August 7, 2012 hearing, the Solid Waste Disposal Control Board considered the Consent Order between TDEC and ACC. Chris Scott, P.G.,[10] of Triad Environmental Consultants, testified that he had been working on the site for 6 years, or since about 2008. He stated that numerous investigations had been conducted since the late 1980s to find the source of the contaminated water that was flowing into the lake. He explained that

> the original idea was that it was coming in from the surface, that it was storm water running off the ground, getting into the waste. And a lot of effort was expended trying to repair the cap for the landfill once it had been

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[10] Professional Geologist

> closed, to try to prevent that runoff. As the problems continued after that time, it became more evident that something else was happening and groundwater became a greater issue of concern. [T]he conclusion . . . that has been reached in the last several years is that water is entering the landfill from the subsurface, groundwater from both the east end of the landfill and from the north side, primarily.

Triad employee George Garden, ACC's waste water engineering consultant, testified that Triad had been hired to propose the most cost effective way to handle the leachate problem. He stated that they considered treating the water as surface water leaving the site, but determined that due to the high ionic content, "there was so much salt that it effectively binds the ammonia and there is really no way to completely remove the salt from the water." Garden further testified that Triad

> [had] been measuring continuously now for almost a year, both the flow rate and the concentrations. And basically, as the groundwater flow increases, the concentrations, the volume of salt that's coming out of the landfill increases. Unfortunately, it doesn't dilute it very much, which is an indication to me that we need to get the material out of contact with the water as a priority. . . So while we studied ways to essentially separate and evaporate water to get at the salt and remove it from the stream, the head of this beast is the contact of the mass in the landfill with the groundwater. And we're whistling in the wind pretty much

> until we can kill that, lop that head off it looks like. The expense of treating the water, even to a small degree, and the amount degree [sic] which would impact the discharge of salt into the rest of the water shed is pretty incredible. It would probably be equal to the cost of removing one of those phases. So that was the reason that we [decided]. . . from an economic standpoint to go after the head of the beast instead of nibbling around the edges.

Mr. Garden testified that sending the waste water to the nearest treatment facilities, in Mt. Pleasant and Columbia, was not an option, as the volume of the salt in the wastewater "would exceed rapidly Mt. Peasant's and Columbia's ability to discharge and not use up all the assimilative capacity of that NPDES permit into those bodies of water."

A review of the Consent Order shows that after the commencement of waste removal activities, ACC must

> capture ground water entering the excavated area, analyze the ground water to determine its chemical characteristics, and then either (a) redirect the collected water back into the landfill or (b) discharge the collected ground water directly into Arrow Lake if the water is consistent with background concentrations as approved by TDEC, Tennessee water quality criteria, or the water quality described below: (table omitted).

The Order sets out a water monitoring and sampling plan for the leachate discharging from the landfill and ground water pumped from the worksite, detailing the

tests to be performed, test methodologies, testing frequencies, compilation of reports, etc.

To remediate this hazardous waste landfill, the Commissioner is authorized under Term. Code Ann. § 68-212-224 of HWMA to enter into a Consent Order to accomplish the cleanup of the site. He has discretion over the methods and technologies employed and the overall plan of action. The hearing testimony established that removing the contaminated material from the landfill was the most effective way to reduce/eliminate the leachate. The Board has deemed that, at this juncture, treatment of the leachate is not a feasible option, and Starlink has failed to show that TWQCA requires immediate implementation of an alternative plan focused on treating the leachate.

Second, Starlink contends that TDEC exceeded its statutory authority by waiving the requirement that ACC obtain and comply with an NPDES permit. As explained above, the Commissioner is authorized under HWMA to enter into a Consent Order to accomplish the cleanup of the ACC landfill site.

Third, Starlink asserts that TDEC's waiving of the NPDES requirements was arbitrary and capricious and a clearly unwarranted exercise of discretion. However, TWQCA does not mandate that the Commissioner issue permits when directing a clean-up or a removal action pursuant to HWMA. Starlink does not cite any caselaw to support such a proposition and this Court has not located any such caselaw.

Further, Starlink's dissatisfaction with the CAP does not render the actions of TDEC arbitrary or capricious. Based on the record, TDEC found that the discharge of the leachate is improper and required

ACC to remediate it. The Board reviewed the proposed CAP and authorized ACC to implement it. In light of the experts' testimony, anything less than total removal of the waste material will not achieve cessation of the flow of contaminated water from ACC's land into Sugar Creek and Arrow Lake.

Starlink's insistence that higher civil penalties be imposed ignores the Board's statutory authority to exercise discretion in such matters. Tenn. Code Ann. § 69-3-115; Tenn. Code Ann. § 68-211-117. The Consent Order assesses a civil penalty in the amount of four hundred thousand dollars ($400,000) against ACC, payable in one hundred thousand dollar ($100,000) increments on a yearly basis when or if ACC fails to meet the milestone deadline set for that year. The Board assessed multiple factors in arriving at this assessment, including that fact that over the last several decades, ACC's actions were approved by former TDEC authorities. The present TDEC Commissioner has considered the factual background, the actions taken by ACC, the CAP proposed by ACC and the remediation efforts already expended by ACC, and has determined the amount of civil penalties to be imposed in the future should ACC fail to meet the deadlines set forth in the Consent Order.

An arbitrary or capricious decision is "one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *City of Memphis v. Civil Serv. Comm'n*, 216 S.W.3d 311, 316 (Tenn. 2007) (quoting *Jackson Mobilphone Co.*, 876 S.W.2d at 111) (internal citations omitted). Given the reasoning behind the Board's approval of

the Consent Order, Starlink has failed to show how the Board's decision is arbitrary.

Conclusion

Both the Solid Waste Disposal Act and the Water Quality Control Act expressly authorize the Commissioner of TDEC to issue "orders for correction" to responsible persons when provisions of either Act are not being carried out. Tenn. Code Ann. §§ 68-211-112 and 69-3-109a. The Hazardous Waste Management Act authorizes the Commissioner to issue orders for clean-up and remediation of inactive hazardous substance sites. Tenn. Code Ann. § 68-212-206. These statutes provide a sound legal basis to support the Commissioner's decision to approve the Restated and Amended Consent Order.

The hearing testimony shows that addressing the source of the leachate by removing the waste from the landfill, so that it no longer comes in contact with water, and diverting uncontaminated water away from the waste, could be seen as more reasonable than issuing an NPDES permit for surface water discharge and attempting to treat leachate, with a smaller overall impact on the discharge. A reasonable person could therefore conclude that the Consent Order should be approved. Having met that standard upon review, the Board's decision to approve the Restated and Amended Consent Order is affirmed. Costs are taxed to the Petitioners.

It is so ORDERED.

s/________________________________

CHANCELLOR CAROL L. MCCOY

* * *

APPENDIX F

U.S. Const. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

33 U.S.C. § 1311 provides in relevant part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1342 provides in relevant part:

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317,

1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the

objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted

program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) 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 pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to

section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section

and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit

application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

* * *

Tenn. Code Ann. § 69-3-102 provides:

§ 69-3-102. Purpose; public policy

(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.

(d) Additionally, it is intended that all procedures in this part shall be in conformity with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

Tenn. Code Ann. § 69-3-108 provides in relevant part:

§ 69-3-108. Licenses and permits

(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (*l*), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

(b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;

(3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;

(4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter

the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

* * *

(g) The commissioner may grant permits authorizing the discharges or activities described in subsection (b), including, but not limited to, land application of wastewater, but in granting such permits shall impose such conditions, including effluent standards and conditions and terms of periodic review, as are necessary to accomplish the purposes of this part, and as are not inconsistent with the regulations promulgated by the board. Under no circumstances shall the commissioner issue a permit for an activity that would cause a condition of pollution either by itself or in combination with others. In addition the permits shall include:

(1) The most stringent effluent limitations and schedules of compliance, either promulgated by the board, required to implement any applicable water quality standards, necessary to comply with an areawide waste treatment plan, or necessary to comply with other state or federal laws or regulations;

(2) A definite term, not to exceed five (5) years, for which the permit is valid. This term shall be subject to provisions for modification, revocation or suspension of the permit;

(3) Monitoring, recording, reporting, and inspection requirements; and

(4) In the case of permits authorizing discharges from publicly owned treatment works, terms and conditions requiring the permittee to enforce user and cost recovery charges, pretreatment standards, and toxic effluent limitations applicable to industrial users discharging into the treatment works.

* * *

APPENDIX G

STATE OF TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD

APD Docket No. 04.27-116746A

IN THE MATTER OF: ACC, LLC,
Respondent

TRANSCRIPT OF PROCEEDINGS
VOLUME I OF II

August 7, 2012 9:00a

BEFORE: The Honorable Kim Summers
Administrative Judge

* * *

[49] The fundamental problem we have with the Order is the Order doesn't deal with the water, it doesn't require a permit, it doesn't require discharge limits on the surface water discharge on our property. Yes, it requires them to remove waste. That issue we don't object to. Our issue is how much longer do we have to wait and deal with the discharge of the leachate onto our property without some action being taken. And that's the essence of our matter.

* * *

[81]

* * *

. . . Our issue is there's a Clean Water Act that says certain things about discharges of pollutants to waters of the state, that there is no permit for this discharge. It discharges, it's causing significant impact to Sugar Creek, to our land, to waters of the state, to

Arrow Lake, and this Order does not require them to meet discharge limits that would typically be found in a discharge permit.

* * *

[82]

* * *

. . . And in our view there's a regulatory and statutory requirement to not discharge pollutants without a permit. That's our position.

* * *

CHANCERY COURT FOR THE
STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT,
DAVIDSON COUNTY

No. 12-1435-II

CAROL L. McCOY
Chancellor

STARLINK LOGISTICS, INC.,
PETITIONER,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE
DISPOSAL CONTROL BOARD,
RESPONDENTS.

[Filed February 15, 2013]

MERIT BRIEF OF PETITIONER STARLINK LOGISTICS INC.

* * *

. . . As noted above, U.S. EPA has delegated implementation and enforcement of the federal Clean Water Act's NPDES permit program in Tennessee to TDEC and the Federal Court has yielded to this Court with respect to the NPDES permit question. TDEC and the Board have cited no federal or State statutory authority, and indeed none exists, to waive the cornerstone of the federal Clean Water Act and Tennessee Water Quality Control Act: the mandates that every discharger must obtain and comply with an NPDES permit if it intends to discharge pollutants to waters of the State.

* * *

CHANCERY COURT FOR THE
STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT,
DAVIDSON COUNTY

No. 12-1435-II

CAROL L. McCOY
Chancellor

STARLINK LOGISTICS, INC.,
Petitioner,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE
DISPOSAL CONTROL BOARD,
Respondents.

[Filed April 8, 2013]

REPLY BRIEF OF PETITIONER STARLINK LOGISTICS INC.

* * *

The Respondents point to no provision of the law creating a clear exemption from the NPDES permit requirement. Rather they first contend that because Tenn. Code Ann. §69-3-108(g) provides that TDEC's Commissioner "may" issue such permits, he also has discretion not to do so. That argument disregards the entire purpose and framework of the CWA and is contrary to the holdings of courts that have considered the issue. The NPDES requirements are set forth in the federal CWA and the Tennessee WQCA was essential to U.S. EPA delegating the implementation of this federal program to the State. As such, TDEC is obligated to implement and enforce a program that is at least as

stringent as the federal program.[14] Thus, federal decisions interpreting the need for NPDES permits in the context of the CWA are entirely applicable here.

First, as the U.S. Supreme Court observed:

> The [CWA] established a new system of regulation under which *it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit.* To the extent that the Environmental Protection Agency, charged with administering the Act, has promulgated regulations establishing specific effluent limitations, those limitations are incorporated as conditions of the permit. Permits are issued either by the EPA or a qualifying state agency.

As the Court explained in a later case:

> Section 301(a) of the [CWA], 33 U.S.C. § 1311(a), *generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES*

---

[14] Section 402(6) of the CWA, 33 U.S.C. § 1342(b), requires U.S. EPA to approve a state NPDES permit program unless the Administrator of U.S. EPA determines that adequate statutory authority does not exist to, among other things, (i) issue permits that ensure compliance with CWA requirements, (ii) ensure the public receives notice and an opportunity for public hearing on all permit applications before ruling on such applications, and (iii) abate violations of the permit or the permit program including civil and criminal penalties and other ways and means of enforcement. The Administrator, having determined that the Tennessee's NPDES permit program satisfied these requirements, approved the Tennessee NPDES program on December 28, 1977. *See* U.S. EPA's website at http://cfpub.epa.gov/npdes/statestats.cfm?view=specific (April 8, 2013).

> *permit from the Environmental Protection Agency* (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

The Court may wonder why SLLI is so insistent that ACC obtain an NPDES permit in addition to the consent order. The Supreme Court answered thet very question stating "the principal means of enforcing the pollution control and abatement provisions of the [CWA] is to enforce compliance with a permit." With no NPDES permit, this Court and SLLI can be well assured that ACC will not be complying with the pollution control and abatement provisions of the CWA since it has not done so for the past 30 years and apparently has no impending plans to do so.

There are detailed provisions in the CWA for enforcement of an NPDES permit — including civil and criminal penalties and the threat of citizen suits. Those legal protections of the environment and deterrents that exist with an NPDES permit are wholly absent in the "settlement." Unfortunately, SLLI cannot help but be skeptical of TDEC's ability to stop what its staff long ago called "unpermitted" and "illegal" discharges given that ACC's discharges have been occurring unpermitted and uncontrolled with TDEC's full knowledge for decades. But there is no mechanism in Tennessee law by which SLLI could bring suit to enforce the "settlement" even though Congress created a clear cause of action for citizen enforcement of the CWA in just this very case. In other words, ACC is thus far very effectively endeavoring to use its settlement with TDEC to insulate itself from the consequences of its decades of noncompliance.

In 1977, the U.S. Court of Appeals for the D.C. Circuit categorically rejected the very same argument that the Respondents make today when U.S. EPA argued that the word "may" in § 402 of the CWA — the identical federal provision to Tenn. Code Ann. § 69-3-108(g) — gave the Agency discretion to exempt certain dischargers from the NPDES permit requirements. The D.C. Circuit held:

> The EPA argues that since § 402 provides that "the Administrator *may* . . . issue a permit for the discharge of any pollutant" (emphasis added), he is given the discretion to exempt point sources from the permit requirements altogether. This argument, as to what Congress meant by the word "may" in § 402, is insufficient to rebut the plain language of the statute and the committee reports. . . . The use of the word "may" in § 402 *means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301. This is the natural reading, and the one that retains the fundamental logic of the statute.*
>
> Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the [CWA]. This is a result that the legislators did not intend. Rather they stressed that the [CWA] was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type. . . .
>
> *Even when infeasibility arguments were squarely raised*, the legislature declined to abandon the permit requirement . . .

> The wording of the statute, legislative history, and precedents are clear: *the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402.*

And if U.S EPA cannot exempt discharges from permitting requirements, certainly TDEC, the agency to which U.S. EPA has delegated the NPDES program, lacks any such authority.

* * *

[citation footnotes omitted]

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Rule 3 Appeal from the Memorandum and Order of the Chancery Court for Davidson County
No. 12-1435-II

STARLINK LOGISTICS INC.,
APPELLANT,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,
APPELLEES.

[Filed August 11, 2014]

BRIEF OF APPELLANT STARLINK LOGISTICS INC.

* * *

Under the federal Clean Water Act[66] and TWQCA, polluters like ACC have just two options — stop discharging or obtain and comply with an NPDES permit. The Tennessee General Assembly was clear in its mandate in the TWQCA that every person who is

[66] Federal decisions are entirely on point in this case but were ignored by the Chancery Court. The NPDES requirement flows directly from the federal Clean Water Act and a State that has a delegated NPDES program must uphold those federal requirements. *See* 33 U.S.C. § 1342(b). The Tennessee General Assembly's adoption of the TWQCA with NPDES permit requirements was essential to U.S. EPA delegating the implementation of the NPDES program to the State of Tennessee in 1977. *See* Tenn. Code Ann. § 69-3-102(c) and http://cfpub.epa.gov/npdes/statestats.cfm?view=specific (April 8, 2013).

discharging pollutants to waters of the state "***shall file*** an application for a permit with the commissioner" and that it "***shall be unlawful***" for any person to discharge industrial wastes except in compliance with the terms of the permit. This mirrors the federal Clean Water Act. The Amended Order is unlawful because, despite acknowledging ACC's violations of the TWQCA, it fails to require ACC to apply for a permit and then expressly authorizes the untreated discharges of leachate stating "treatment, transport or disposal of water ***is not required pursuant to this Order*** . . ."

* * *

. . . ACC has only two options — discharge no pollutants *or* discharge in compliance with an NPDES permit. The Chancery Court's holding *creates* a third option with no statutory basis — discharge uncontrollably and indefinitely pursuant to a privately-negotiated TDEC settlement agreement.

Because there is an "absolute prohibition" on discharges of pollutants, the language of Tenn. Code Ann. § 69-3-108(g) was necessary to grant the Commissioner authority to allow nonharmful discharges to occur, but *only subject to a permit* and compliance with the TWQCA. The Chancery Court's interpretation gives the Commissioner far broader power to arbitrarily authorize anyone to discharge pollution uncontrollably as he wishes.

The U.S. Supreme Court is directly at odds with the Chancery Court:

> The [CWA] established a new system of regulation under which *it is illegal for anyone to discharge pollutants into the Nation's waters*

> *except pursuant to a permit.* To the extent that the Environmental Protection Agency, charged with administering the Act, has promulgated regulations establishing specific effluent limitations, those limitations are incorporated as conditions of the [NPDES] permit. Permits are issued either by the EPA or a qualifying state agency.

As the U.S. Supreme Court explained in a later case:

> Section 301(a) of the [CWA], 33 U.S.C. § 1311(a), *generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency* (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

Thus, the U.S. Supreme Court has clearly stated: "the principal means of enforcing the pollution control and abatement provisions of the [Clean Water Act] is to enforce compliance with a permit." As the *Velsicol* court observed, the Clean Water Act:

> is broad and remedial. It represents a marked departure in federal water pollution control policy from a water quality standards control mechanism *to a discharge control mechanism.* Its objective is to restore and maintain the natural chemical, physical, and biological integrity of the nation's waters and to eliminate the discharge of pollutants into navigable waters by 1985.

This interpretation is not limited to the federal Clean Water Act, but is consistent with the Tennessee General Assembly's declarations in the TWQCA that:

> waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state [and therefore] the public policy of Tennessee [is] 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.

To that end, the General Assembly required that as to statutory construction, "[a]ll sections in this part shall be liberally construed for the accomplishment of its policy and purpose." The NPDES permit — not a privately negotiated settlement — is the mechanism that Congress and the Tennessee General Assembly mandated be used to correct ACC's pollution of Sugar Creek and Arrow Lake.

* * *

[citation footnotes omitted]

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Rule 3 Appeal from the Memorandum and Order of the Chancery Court for Davidson County
No. 12-1435-II

STARLINK LOGISTICS INC.,
APPELLANT,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,
APPELLEES.

[Filed September 24, 2014]

REPLY BRIEF OF APPELLANT STARLINK LOGISTICS INC.

* * *

1. <u>Federal Law Controls the Outcome of this Case, Because the TWQCA must be Interpreted Consistent with the Federal CWA as Part of the State's Delegated NPDES Permitting Program.</u>

Appellees improperly downplay the mandatory character of the CWA and the cases interpreting it that SLLI has cited to this Court. The Board contends that SLLI's reliance on the language of the CWA and federal cases is "misplaced," while ACC contends it is "misguided." The State goes so far as to say it "was not obligated to apply federal law." These statements are simply wrong.

First, the question before this Court is whether or not ACC must obtain a *National* Pollutant Discharge Elimination System permit, regardless whether it is called a *Tennessee* Pollutant Discharge Elimination System permit. The NPDES permit was created by Congress, which stated that its "objective" was "to restore and maintain the chemical, physical, and biological integrity of the ***Nation's*** waters." Congress did not exempt waterways from Tennessee or from any other state from the protections afforded under the CWA. Instead, as explained in greater detail below, Congress *did* allow for the states to petition the U.S. EPA for delegated authority to implement the federal CWA programs within their jurisdictions.

To allow TDEC to obtain delegated authority from U.S. EPA to implement the federal CWA program in Tennessee, the General Assembly enacted the TWQCA, stating that one purpose of the TWQCA was "to enable the state to qualify for fill 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." Thus, the TWQCA was enacted for the express purpose of "enabling" TDEC to administer the CWA's NPDES program in Tennessee.

After the General Assembly enacted the TWQCA, U.S. EPA granted TDEC responsibility for the NPDES permitting program in Tennessee pursuant to a federal regulation requiring that "the State program ***must prohibit all point source discharges of pollutants*** . . . entering into any waters of the United States within the State's jurisdiction ***except as authorized by a permit in effect under the State program or under section 402 of CWA***." Then, in its

delegation agreement with U.S. EPA, TDEC specifically agreed that it was "responsible" for ensuring that "the State NPDES program is consistent with all requirements" of the rules under the federal CWA.

* * *

. . . TDEC and the Board lack any authority to exempt ACC from the federal NPDES requirements because, as a matter of law, Tennessee's program must be consistent with the federal program. . . .

* * *

SLLI's reliance on federal law is not "misplaced," merely "interesting," or "not the proper starting point for construing Tennessee statutes," as Appellees contend in their briefs. U.S. EPA delegated to TDEC the authorization to implement a *federal* NPDES permitting program consistent *with federal* law, and along with that delegation came an obligation to uphold and comply fully with *federal* law, using Tennessee's TWQCA in the same manner, and under the same construction, as if the federal CWA were being used. In short, TDEC has absolutely no authority to deviate from federal law and grant waivers to ACC from the CWA's NPDES permitting requirements.

* * *

[citation footnotes omitted]

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Rule 3 Appeal from the Memorandum and Order of the Chancery Court for Davidson County
No. 12-1435-II

STARLINK LOGISTICS INC.,
APPELLANT,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,
APPELLEES.

[Filed August 31, 2016]

SUPERSEDING BRIEF OF APPELLANT STARLINK LOGISTICS INC.

* * *

a. The requirement that ACC obtain a valid NPDES permit in order to continue discharging leachate into Sugar Creek and Arrow Lake is mandatory, not optional.

Under the federal CWA[78] and TWQCA, polluters like ACC have just two options: either stop discharg-

---

[78] Federal decisions are entirely on point in this case but were ignored by the Chancery Court. The NPDES requirement flows directly from the federal Clean Water Act and a State that has a delegated NPDES program must uphold those federal requirements. *See* 33 U.S.C. § 1342(b). The Tennessee General Assembly's adoption of the TWQCA with NPDES permit requirements

ing, or obtain and comply with a NPDES permit. There is no third option to do what TDEC did in this case — agree to an Amended Order that waives the requirements of the TWQCA and federal CWA and stifles SLLI's attempts to protect the waters of the State through a federal citizen suit. The Tennessee General Assembly's mandate in the TWQCA is clear. Every person who is discharging pollutants to waters of the State "***shall file*** an application for a permit with the commissioner," and it "***is unlawful***" for any person to discharge industrial wastes except in accordance with the terms of a valid permit. This mirrors the federal CWA and is the primary reason why EPA delegated implementation and enforcement of the program to TDEC.

* * *

The U.S. Supreme Court has been clear that this obligation to obtain and comply with a NPDES permit is not optional:

> The [CWA] established a new system of regulation under which *it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit.* To the extent that the Environmental Protection Agency, charged with administering the Act, has promulgated regulations establishing specific effluent limitations, those limitations are incorporated as conditions of the [NPDES]

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was essential to U.S. EPA delegating the implementation of the NPDES program to the State of Tennessee in 1977. *See* Tenn. Code Ann. § 69-3-102(c) and http://www.epa.gov/national-pollutant-discharge-elimination-system-npdes/npdes-state-program-information (Aug. 15, 2016).

> permit. Permits are issued either by the EPA or a qualifying state agency.

As the U.S. Supreme Court explained in a later case:

> Section 301(a) of the [CWA], 33 U.S.C. § 1311(a), *generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency* (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

* * *

As set forth above, the TWQCA and federal CWA are in accord on this issue. However, throughout the history of this case, the Board and ACC largely have ignored the well-developed federal case law directly addressing this issue, and instead have treated this basically as an issue of first impression. Indeed, in its briefing before the Court of Appeals prior to remand by the Supreme Court, the Board went so far as to say it "was not obligated to apply federal law." This statement is simply wrong. Tennessee law is identical to federal law in this respect, and if it was not at least as stringent as federal law it would be preempted.

The question before this Court is whether or not ACC must obtain a *National* Pollutant Discharge Elimination System permit, regardless of whether it is called a *Tennessee* Pollutant Discharge Elimination System permit. The NPDES permit was created by Congress, which stated that its "objective" was "to restore and maintain the chemical, physical, and biological integrity of the *Nation's* waters." As recognized by the Tennessee Supreme Court, a discharge permit

issued by TDEC "is technically a National Pollutant Discharge Elimination System (NPDES) permit. NPDES permits must comply with the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012)." Congress did not exempt waterways in Tennessee or any other state from the protections afforded under the CWA. Instead, as explained in greater detail below, Congress *did* allow states to petition the U.S. EPA for delegated authority to implement the federal CWA programs within their jurisdictions.

To allow TDEC to obtain delegated authority from U.S. EPA to implement the federal CWA program in Tennessee, the General Assembly enacted the TWQCA, stating that one purpose of the TWQCA was "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." Thus, the TWQCA was enacted for the express purpose of "enabling" TDEC to administer the *federal* CWA's NPDES program in Tennessee.

After the General Assembly enacted the TWQCA, U.S. EPA granted TDEC responsibility for the NPDES permitting program in Tennessee pursuant to a federal regulation requiring that "the State program ***must prohibit all point source discharges of pollutants*** . . . entering into any waters of the United States within the State's jurisdiction ***except as authorized by a permit in effect under the State program or under section 402 of CWA***." Then, in its delegation agreement with U.S. EPA, TDEC specifically agreed that it was "responsible" for ensuring that "the State NPDES program is consistent with all requirements" of the rules under the federal CWA.

This mandate is unambiguous, and its importance cannot be overstated. To take over administering the CWA's NPDES program from U.S. EPA, TDEC ***agreed*** to either prohibit discharges like ACC's completely or to issue a NPDES permit for them. This was the *quid pro quo* for allowing Tennessee to manage the primary enforcement of federal water pollution control requirements within its borders. There is no middle ground, no mention of "some latitude," and no mention of granting waivers of permit requirements through privately negotiated Amended Orders.

* * *

. . . TDEC and the Board lack any authority to exempt ACC from the federal NPDES requirements because, as a matter of law, Tennessee's program must be consistent with the federal program. . . .

U.S. EPA delegated to TDEC the authorization to implement a *federal* NPDES permitting program consistent with *federal* law, and along with that delegation came an obligation to uphold and comply fully *with federal* law, using Tennessee's TWQCA in the same manner, and under the same construction, as if the federal CWA were being used. In short, TDEC has absolutely no authority to deviate from federal law and grant privately-negotiated waivers to ACC from the CWA's NPDES permitting requirements.

* * *

[citation footnotes omitted]

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2014-00362-COA-R3-CV

Rule 3 Appeal from the Memorandum and Order of the Chancery Court for Davidson County
No. 12-1435-II

STARLINK LOGISTICS INC.,
APPELLANT,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,
APPELLEES.

[Filed October 21, 2016]

SUPERSEDING REPLY BRIEF OF APPELLANT STARLINK LOGISTICS INC.

* * *

B. Tennessee agreed that its NPDES program would uphold all of the requirements of the federal NPDES program as part of the U.S. EPA's agreement to delegate implementation of the NPDES program to the State of Tennessee; accordingly, the settled federal law cited by SLLI is on point and dispositive of this appeal.

In reaching its decision, the Chancery Court ignored federal decisions cited by SLLI that were entirely on point. The Board argues that the Board and this Court are not obligated to apply federal law in this case. Board's Brief, at 12. Similarly, ACC contends that federal judicial decisions interpreting statutory provisions in the federal CWA identical to those found

in the TWQCA are merely persuasive, non-binding authority. ACC's Brief, at 17. Whatever merit generally exists in the argument that federal case law interpreting federal statutes is merely persuasive authority when a state court interprets similar state statutes, that merit does not exist in the specific context of this case. Here, the TWQCA is identical to the federal CWA in all relevant aspects, and if the TWQCA were to be interpreted as any less stringent than the federal CWA, then the TWQCA would be preempted by federal law.

As set forth in SLLI's Superseding Brief, Tennessee enacted the TWQCA to enable the State to operate the federal NPDES program. The U.S. EPA delegated authority to TDEC to administer the NPDES program in Tennessee under an agreement requiring that the Tennessee NPDES program be consistent with all requirements of the federal CWA. As such, the Tennessee NPDES program under the TWQCA must be interpreted at least as stringently as the federal CWA as a matter of law. *See* SLLI's Superseding Brief, at 26-29.

* * *

SUPREME COURT OF TENNESSEE
No. M2014-00362-SC-R11-CV
On Appeal from the Court of Appeals
No. M2014-00362-COA-R3-CV
Chancery Court for Davidson County No. 12-1435-II

STARLINK LOGISTICS, INC.,
APPELLANT,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE
DISPOSAL CONTROL BOARD,
APPELLEES.

[Filed April 2, 2018]

APPLICATION FOR PERMISSION TO APPEAL BY STARLINK LOGISTICS INC.

* * *

This appeal gives the Court the opportunity to resolve a conflict between Tennessee and federal law . . . .

A. The lower courts' interpretation of the TWQCA, which allows ACC to discharge without an NPDES permit, runs afoul of the legislative intent behind the CWA and the TWQCA, creating irreconcilable conflict between federal and state law and among different provisions of the TWQCA.

* * *

The CWA authorizes the federal government to delegate the authority to administer the NPDES program to a state, if the U.S. EPA determines that the state program complies with the requirements of 33 U.S.C. §1342(d). Accordingly, the CWA establishes a "regulatory partnership" and "cooperative federalism"

framework between the federal government and qualifying states. In 1977, the U.S. EPA authorized the State of Tennessee to issue NPDES permits. Under this construct, Tennessee is "free to treat the EPA's pollution limits as a floor and impose more stringent requirements." It cannot, however, impose less stringent or inconsistent requirements as they would be preempted by the CWA. This prohibition, to adopt or enforce limitations or standards less stringent than the CWA, also applies to state courts.

* * *

The Court of Appeals erred when it held that neither it nor the Board was "obligated to apply federal law" and thus refused to consider the federal authority cited by SLLI that interprets the very federal program (the NPDES) TDEC is delegated to enforce through the enactment of TWQCA. Furthermore, the Board's action and the Court of Appeals' decision jeopardizes TDEC's authority to administer the program. The CWA and TWQCA are inextricably linked. Once a state has assumed NPDES permitting authority, the EPA's role becomes "supervisory." "However, a state that is so authorized **must comply with federal standards**." "If the EPA determines that a state is not administering the program in compliance with federal standards, the EPA must provide an opportunity to cure, and if the deficiency continues, the EPA must withdraw the state's authorization." Accordingly, SLLI's reliance on federal law was not "misguided" and the Court of Appeals' failure to consider the federal authority cited by SLLI, particularly in light of the "regulatory partnership" and "cooperative federalism" framework that exists between the U.S. EPA and Tennessee, has led to the creation and endorsement of

a loophole in the NPDES permitting process that is not contemplated or authorized by the CWA or the TWQCA.

* * *

. . . TDEC and the Board lack any authority to exempt ACC from the federal NPDES requirements because, as a matter of law, Tennessee's program must be consistent with the federal program. . . .

The U.S. EPA delegated to TDEC the authority to implement a *federal* NPDES permitting program consistent with *federal* law, and along with that delegation came an obligation to uphold and comply fully *with federal* law, using Tennessee's TWQCA in the same manner, and under the same construction, as if the federal CWA were being used. In short, TDEC has absolutely no authority to deviate from federal law and grant to ACC privately-negotiated waivers from the CWA's NPDES permitting requirements. The Court of Appeals erred by failing to consider federal precedent and thus created a conflict between the CWA and the TWQCA when it upheld the Amended Order, thus effectively waiving the requirement to obtain an NPDES permit.

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[citation footnotes omitted]