

SOUTHERN ENVIRONMENTAL LAW CENTER

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April 16, 2021

VIA E-mail to David.Salyers@tn.gov

David Salyers
Commissioner, Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 11th Floor
Nashville, TN 37243

**RE: Request to Terminate or Revoke Volunteer Sand & Gravel NPDES Permit
TN0082236 for Cause**

Dear Commissioner Salyers:

The Southern Environmental Law Center (“SELC”), Harpeth Conservancy, Hurricane Mills Mining Opposition, Tennessee Scenic Rivers Association, Tennessee Clean Water Network, Tennessee Chapter Sierra Club, and Defenders of Wildlife (“Conservation Groups”) ask the Tennessee Department of Environment and Conservation (“TDEC” or “the Department”) to terminate or revoke National Pollutant Discharge Elimination System (“NPDES”) Permit TN0082236, issued to Volunteer Sand and Gravel, LLC (“Volunteer Sand and Gravel” or “the company”) for discharges at its sand and gravel mine sited adjacent to the Duck River. We make this request based on the company’s failure to comply with the conditions of its permit, failure to include relevant information in its initial permit application, and because the permitted activity endangers the environment and can only be regulated to acceptable levels by permit modification or termination.¹

I. The mining company’s permit should be terminated or revoked because recent foreseeable events demonstrate that the company has not and cannot comply with the terms of its NPDES permit.

Conservation Groups previously submitted comments to TDEC dated May 8, 2020, asking the Department to revise Volunteer Sand and Gravel’s draft NPDES permit to adequately account for discharges that will occur during and as a result of flood conditions on the Duck

¹ See NPDES Permit No. TN0082236, Part II.B.2.a (“This permit may be modified, revoked and reissued, or terminated for cause as described in 40 CFR 122.62 and 122.64”); 40 C.F.R. § 122.62 and 122.64 (describing grounds for termination and revocation).

River and to ensure the site's compliance with Tennessee's water quality standards, including the narrative Biological Integrity standard.²

Specifically, Conservation Groups highlighted the planned mine's location within a flood plain upstream of a biologically rich and sensitive stretch of the Duck River and analyzed how the draft NPDES permit was deficient in crucial ways, including: (1) unreasonably ignoring flood-related discharges which would violate the Biological Integrity narrative water quality standard and result in more than de minimis degradation; and (2) impermissibly seeking to exempt the mine site's total suspended solids discharges from numeric effluent limits.

Over the objections of Conservation Groups and many other concerned farmers, neighbors, citizens, and agencies—including the federal Fish & Wildlife Service—the Department granted Volunteer Sand and Gravel a NPDES permit on July 1, 2020. Although the company was required to obtain a Section 26a permit from the Tennessee Valley Authority, it never did so, and instead began illegally constructing the mine.³

The Lower Duck River has experienced frequent flood events in the last several years. As the Department is aware, Middle Tennessee has experienced heavy rainfall this spring which caused flooding throughout the State, including on the Duck River. Unfortunately but predictably, the Lower Duck once again flooded during the March 2021 storms. As the attached photos of the mine site taken during the spring flood event—on March 31, 2021 and April 3, 2021—clearly show, the flood waters from the rain events overtopped the berms that are intended to separate Volunteer Sand and Gravel's mine site from the Duck River, and a plume of discharge can be seen entering directly into the river.⁴ Based on this flood event and a complaint received by the Department, TDEC issued a Notice of Violation to Volunteer Sand and Gravel for violating a narrative water quality standard of its NPDES permit TN0082236, namely, for releasing wastewater discharge with an objectionable color contrast to the Duck River.

The Notice of Violation is an inadequate response to the harm being caused by this mine's demonstrated inability to comply with the terms of its NPDES permit. The recent flood event makes clear that the site's wastewater treatment system, a slurry pit, would offer zero

² Att. 1, Letter from S. Env't L. Ctr. et al. to Dennis Conger, Tenn. Dep't of Env't and Conservation, re: Volunteer Sand & Gravel NPDES Permit TN0082236 (May 8, 2020).

³ See Att. 2, Letter from S. Env't L. Ctr. et al. to Tenn. Valley Auth. (April 16, 2021) (describing illegal construction, cease and desist letter, and ongoing refusal of the mining company to comply with the TVA Act).

⁴ Att. 3, Photo of Volunteer site flooded (Mar. 29, 2021); Photo of flood waters receding at Volunteer site (Apr. 3, 2021).

prevention of similar discharges during and after flood events. Further, this stretch of the Duck River is an Exceptional Tennessee Water due to the presence of critical habitat for endangered mussels as well as the presence of other federal and state-listed mussel and fish species. It is difficult to see how the company will comply with the permit term requiring its discharges to “result in no other materials in concentrations sufficient to be hazardous or otherwise detrimental to humans, livestock, wildlife, plant life, or fish and aquatic life in the receiving stream.”⁵

The mining company's NPDES permit provides that “[t]his permit may be modified, revoked and reissued, or terminated for cause as described in *40 CFR 122.62* and *122.64*.”⁶ In turn, 40 C.F.R. §§ 122.62 and 122.64 authorize the Commissioner to terminate or revoke a permit based on “[n]oncompliance by the permittee with any condition of the permit.” TDEC's Notice of Determination for the Volunteer Sand and Gravel mine's NPDES permit states:

Failure to comply with permit effluent limitations or the terms and conditions of the NPDES permit would constitute a violation of applicable state and federal laws and is grounds for enforcement action, assessment of penalties, permit modification, permit termination, or denial of permit reissuance. TDEC [] could also require the permittee to modify the design plans to address the compliance issues.

Volunteer Sand and Gravel Mine Notice of Determination, Tennessee Department of Environment and Conservation at 11 (July 1, 2020).

Given Volunteer Sand and Gravel's violation of its NPDES permit, the high likelihood that a future similar flood event and violations of narrative water quality standards will occur, and the biological importance of the site's downstream waters, TDEC should immediately terminate or revoke the company's NPDES permit.

II. Volunteer Sand & Gravel's NPDES permit should be terminated or revoked because the company withheld relevant facts in its permit application to TDEC which demonstrated that the site would frequently flood.

Not only is Volunteer Sand and Gravel in violation of its NPDES permit, but it withheld relevant information from TDEC when applying for the permit in the first instance. The Department therefore did not have all of the relevant information when it decided to grant the permit.

⁵ NPDES Permit No. TN0082236, Part I.A.3.

⁶ NPDES Permit No. TN0082236, Part II.B.2.a. TDEC regulations also state that permits “may be modified, revoked and reissued, or terminated for cause,” including due to the “[v]iolation of any terms or conditions of the permit.” TDEC Rule Chapter 0400-40-05.07(2)(d).

On April 10, 2020—four months before TDEC granted the company's NPDES permit—the consulting firm Gresham Smith prepared a hydraulic and hydrologic study for Volunteer Sand and Gravel regarding its proposed mine.⁷ This study clearly states that the site is at risk of periodic flooding and would have no treatment capacity at least every two years.⁸

Despite receiving this clear and relevant information, Volunteer Sand and Gravel did not supplement its NPDES permit application to TDEC with this study. To SELC's knowledge, the company never alerted TDEC to this information throughout the duration of its NPDES permit application process.

40 C.F.R. §§ 12262 and 122.64 authorize the Commissioner to terminate or revoke a permit based on “[t]he permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts.”⁹ Volunteer Sand and Gravel did not disclose fully all relevant facts regarding the likelihood that the proposed berms at its mine site were at risk of flooding every two years. The recent storm event confirms that this Gresham Smith study was accurate in its assessment of the likelihood of frequent flooding and failure of treatment at the site. TDEC therefore should terminate or revoke the NPDES permit based on the company's failure to fully disclose all relevant facts.

III. TDEC should revoke Volunteer Sand and Gravel's NPDES permit because the permitted activity endangers the environment and can only be regulated to acceptable levels by permit modification or termination.

As Conservation Groups described in their comments on the draft NPDES permit, the Duck River downstream of the mine site has been designated a “Very High” or “High” Aquatic Habitat Priority under Tennessee's State Wildlife Action Plan, and it is critical habitat for federally and state-listed endangered and threatened species.

Previous data demonstrate that this mine site is prone to frequent flood events which will likely result in flood-related discharges, including data withheld from TDEC by Volunteer Sand and Gravel when it first applied for its NPDES permit. These foreseeable discharges have now occurred. Ecologically-sensitive species such as the federally-listed Clubshell, Pygmy Madtom,

⁷ Att. 4, Gresham Smith, Humphreys County Volunteer Materials Sand & Gravel Quarry at Duck River Hydraulic and Hydrologic Study (Apr. 10, 2020).

⁸ *Id.* at 10-11 ([T]he proposed berms hold the potential to overtop during the 2-year storm event, exposing the site.”).

⁹ TDEC regulations state that permits “may be modified, revoked and reissued, or terminated for cause,” including where a permit holder “[o]btain[ed] a permit by misrepresentation or failure to disclose fully all relevant facts.” TDEC Rule Chapter 0400-40-05.07(2)(d).

Birdwing Pearlymussel, and Oyster Mussel—and the wildlife that rely on these species for food and filtering—are bearing the consequences of a flawed permitting process for a reckless project. The Commissioner should find that the permitted activity endangers the environment—namely the habitat for federally and state-listed species downstream—and can only be regulated to acceptable levels by permit modification or termination.

The danger associated with this mine has not passed—it is almost guaranteed that this segment of the Duck River will experience more severe weather and flood events over the next few years. Because Volunteer Sand and Gravel cannot demonstrate that it can comply with the narrative water quality standards and other terms of its NPDES permit during these events, and because it withheld relevant facts when it first applied for its NPDES permit, SELC respectfully requests that TDEC revoke the company's NPDES permit TN0082236.

Sincerely,



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Southern Environmental Law Center

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Harpeth Conservancy

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List of Attachments

Attachments provided via ShareFile at
<https://southernenvironment.sharefile.com/d-s459ff77f683a4970a4d3844b754de89b>

- Att. 1, Letter from S. Env't L. Ctr. et al. to Dennis Conger, Tenn. Dep't of Env't and Conservation (May 8, 2020).
- Att. 2, Letter from S. Env't L. Ctr. et al. to Tenn. Valley Auth. (April 16, 2021).
- Att. 3, Photo of Volunteer site flooded (Mar. 29, 2021); Photo of flood waters receding at Volunteer site (Apr. 3, 2021).
- Att. 4, Gresham Smith, Humphreys County Volunteer Materials Sand & Gravel Quarry at Duck River Hydraulic and Hydrologic Study (Apr. 10, 2020).

Attachment 3



