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Comment on NRS14.305 Anti-degradation Determination

November 18, 2015

This comment is made on behalf of the Tennessee Chapter of the Sierra Club (Sierra Club).

The Sierra Club is a national nonprofit organization of approximately 633,000 members and the Tennessee Chapter has about 7,000 members in Tennessee. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Club's particular interest in this appeal and the issues which the appeal addresses stem from the Sierra Club's concern for effective enforcement of the Clean Water Act, including the Anti-degradation rules and particularly in Tennessee, the protection of groundwater and wetlands in the karst terrane typical of much of the State.

The Sierra Club agrees with the TDEC staff determination that the wetlands sought to be filled and destroyed by the proposed shopping center development are Exceptional Tennessee Waters (ETW). We agree that the proposed degradation, actually total destruction, is not "de minimis". We agree with the staff determination that a full anti-degradation analysis and determination must be made notwithstanding the contingent offer of a mitigation sites in another county and watershed. We agree that State regulations require this wetland and sinkhole site, as Exceptional Tennessee Waters, be subject to an Anti-Degradation determination first by TDEC staff which is then subject to appeal and review by the Water Quality, Oil and Gas Board.

We do **not** agree that the permit Applicant has satisfied the requirements that would allow the destruction of the wetland. We believe that the TDEC Anti-degradation Determination is incomplete and in error on both substantive and procedural grounds.

We are not addressing mitigation in these comments because TDEC has determined that the project

proposes degradation and that the proffered mitigation does not support a finding that the total loss of the wetlands is “de minimis” because significant mitigation has been described as possible. Even with the proffered mitigation there would be a net loss of total ETW wetlands. We note the Permit Applicant’s admission that “No active wetland mitigation banks or wetlands developed for mitigation through the In-Lieu-Fee Program exist within the watershed. This reinforces the Department’s determination that this last remaining wetland in Cookeville’s area of development along Interstate 40 is Exceptional Tennessee Waters that should be protected and preserved.

Unfortunately the Water Resources Division Notice of the anti-degradation determination has only this conclusory statement:

“The applicant has submitted an alternative analysis and social and economic justification for the proposed impacts. The department has reviewed this information and determined that the proposed activity is necessary to accommodate important economic or social development in the area.”

The Notice of the Public Hearing related to NRS14.305 declares:

FACTORS CONSIDERED: In deciding whether to issue or deny a permit, the department will consider all comments of record and the requirements of applicable federal and state laws. In making this decision, a determination will be made regarding the lost value of the resource compared to the value of any proposed mitigation. The department shall consider practicable alternatives to the alteration. The department shall also consider loss of waters or habitat, diminishment in biological diversity, cumulative or secondary impacts to the water resource, and adverse impact to unique, high quality, or impaired waters.

None of the specifics that are to be included in the Determination are in fact addressed in any document yet released by TDEC.

Without the specifics as to why the Permit Applicant’s assertions concerning its satisfaction of the requirements to allow degradation were accepted, it is impossible to offer pointed and effective comments and supporting information to contest the conclusory determination that degradation should be allowed. The anti-degradation rules require that the Permit Applicant “demonstrate” his position that degradation should be allowed. The Department has offered no rationale or explanation that the arguments or alleged information received “demonstrates” a need for degradation and the permanent loss of the ETW wetland.

The permit writer's November 24, 2014 Notice of Deficiency letter which identified several concerns which were never adequately addressed.

The first item in the Notice of Deficiency was "Further justification is needed of why this development must occur on this property and no other available location in Cookeville." This question has been answered with vague assertions that one or two unidentified "national retailers" insist that they must have stores only at this site.¹ None of the factors, for example visibility of the site from the Interstate, is unique to this location. The Permit Applicant admits that there have been several prior reviews of this site for potential development but none, so far as can be ascertained, resulted in an ARAP application. Obviously less picky developers found other sites and concede the need for preservation of the wetlands.

The Applicant has expressed simply a preference for a site based upon instructions from unidentified clients – this does not constitute evidence of a lack of alternatives.

The Applicant asserts that the project is not economically viable unless the shopping center attracts many shoppers from 15 surrounding counties. A careful look at the dollar amount proposed to be spent per person or household conflicts with the assertion of the low economic conditions, low incomes and distressed employment levels in the poorer surrounding counties. There is no information offered which demonstrates an economic benefit to the outlying counties from the so called "regional" shopping center.

The reliance on purchases at the proposed shopping center from the 15 surrounding counties also conflicts with the assertion of the need for a site visible for Interstate 40. Most of the highway and major thoroughfare connection to the site from counties to the north and south do not require any travel on I-40. Visibility and signage on I-40 will do nothing to attract patronage from the northern tier counties as an examination of a road and street map and knowledge of local Cookeville travel patterns will show.

Nor is there any social benefit demonstrated by the Applicant. Neither local government nor networks of neighbors or civic organizations are benefitted when patronage and resulting profits or sales tax revenues are delivered to the City of Cookeville and Putnam County to the exclusion of the residents and institutions in the outlying counties.

¹ Addendum to Proposed Drive retail Development Aquatic Resource Permit - Additional Information (November 14, 2014)

Apparently the Industrial Development Board, in a very low visibility action, is attempting to make available tax increment financing for some development projects. If this should be applied to the development here it would provide a taxpayer subsidy to the developer and significantly reduce the claimed amounts of revenue to the local schools which would be a net loss of social benefit to our young people and their teachers.

There has been no dye tracing which establishes where the swallets adjacent to the existing wetlands discharge. There is no way to know the volume, discharge rate, or water quality of the stormwater sourced water that the Permit Applicant proposes to inject into the karst terrane and its effects at the discharge point. The proposed project would collect stormwater not only from the impermeable surfaces of the shopping center roads, parking area, and building roofs but would also receive stormwater from the surrounding area. This area includes both the adjacent developed parcels and the heavy run off from the compacted area of the County Fair Grounds. The Anti-degradation Determination and the social and economic benefits and costs related to that determination appear to have completely omitted evaluation of the impacts of increased and concentrated stormwater discharges.

The notices and procedure used here are conflicting and nonsensical. The deadline to petition for an appeal is the same as the comment period. Note that the Public Hearing is set for December 3, 2015, a date after the deadline for filing an appeal petition under both the web posted and newspaper printed notice of the Determination (whose texts are identical), effectively excluding persons who wish to make oral comments and those whose only notice of the Anti-degradation Determination is the November 1, 2015 local newspaper published notice of the Anti-degradation Determination and the separate Notice of Public Hearing.

We ask that the Anti-degradation Determination be revised and published with a detailed and specific rationale in support of degradation, if in fact a careful analysis supports such a determination. We ask that a response to these comments be made before any draft permit is put on notice.

Respectfully submitted,

Brian Paddock, Esq.

Legal Chair, Tennessee Chapter Sierra Club