

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

E. RON PICKARD & LINDA)
PICKARD, as Trustees of the Sharon)
Charitable Trust, and as Individuals,)

Petitioners,)

VS.)

NO. 09-2297-III

TENNESSEE DEPARTMENT OF)
ENVIRONMENT AND)
CONSERVATION, TENNESSEE)
WATER QUALITY CONTROL)
BOARD, and TENNESSEE)
MATERIALS CORPORATION,)

Respondents.)

AND

E. RON PICKARD & LINDA)
PICKARD, as Trustees of the Sharon)
Charitable Trust, and as Individuals,)

Petitioners,)

VS.)

NO. 09-2298-III

TENNESSEE WATER QUALITY)
CONTROL BOARD,)

Respondent.)

MEMORANDUM AND ORDER

These lawsuits arise out of a proposal of Tennessee Materials Corporation to operate a limestone quarry in Hardin County, Tennessee. The operation includes discharging treated wastewater and stormwater into an unnamed tributary to Horse Creek. That discharge

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requires application to the Commissioner of the Tennessee Department of Environment and Conversation ("TDEC") for a permit, TENN. CODE ANN. § 69-3-108, which Tennessee Materials did. On March 13, 2009, the Commissioner issued National Pollutant Discharge Elimination System ("NPDES") Permit TN 0079804 for operation of the quarry.

The petitioners are trustees of the nonprofit Sharon Charitable Trust that manages and maintains 2,500 acres of the Horse Creek Wildlife Sanctuary and Animal Refuge in Savannah, Tennessee. Two public camping facilities of the Sanctuary, used by local churches and boy scouts, are located on Horse Creek. One camping ground is downstream and the other upstream from the quarry discharge site.

The petitioners' grievance is their claim that in assessing whether the permit should have been issued, the Commissioner erred as a matter of law in construing TDEC regulations, with the result that the assessment of the impact that the quarry will have on Horse Creek failed to take into account the present biological and habitat impairment of the Creek. Petitioners cite to an earlier stream survey conducted in February of 2008 by a State biologist in accordance with TDEC's public guidelines for stream surveys that revealed that biologically Horse Creek is "slightly impaired" and its habitat is moderate bordering on severely impaired. The petitioners contend that these conditions, as a matter of law under the Water Board's Antidegradation Rule, are required to be taken into account by the Commissioner in assessing issuance of a permit. In particular, the petitioners challenge TDEC's legal conclusion that because Horse Creek does not meet the criteria as an

“Exceptional Tennessee Water,” as provided for at Rule 1200-4-3-.06, TDEC limited its impact assessment to whether the proposed discharge into Horse Creek would violate Tennessee’s water quality standard for solids. Because it is not an Exceptional Tennessee Water, Horse Creek, TDEC concluded, did not require TDEC as a matter of law to apply TDEC’s Antidegradation Rule that would broaden the assessment of the impact that the discharge will have on the biology and habitat of the Creek.

The petitioners assert that this issue of the scope of the Commissioner’s impact assessment of the quarry on Horse Creek is not hypothetical but has real consequences as the Tennessee staff biologist who performed the February 28 survey has testified that introduction of additional sediment, such as from the quarry discharge, could contribute to the impairment of Horse Creek.

These cases, however, are not yet before this Court on the merits of the issue of the applicability of the Antidegradation Rule. Instead, the cases are before the Court on a preliminary issue: whether the petitioners are deprived of the right of declaratory relief in a case that involves a discharge permit. The status of these cases and the issue that brings them before this Court is that the petitioners have attempted to file a claim for declaratory relief with the Board on the applicability of the Antidegradation Rule, and the Board has denied that claim, asserting that no right to declaratory relief exists in a case that involves a discharge permit.

In general, when the Court uses the term “declaratory relief,” it is referring to the legal right of a party to obtain a determination of questions of construction or validity arising under instruments, statutes, ordinances, and contracts, and a declaration of the rights, status or other legal relations thereunder. W. Inman (rev.), GIBSON’S SUITS IN CHANCERY, Interpleader and Declaratory Judgments § 44.09 (8th ed. 2004). Although of relatively recent vintage, declaratory relief has made rapid progress in the United States as a reasonable and efficient tool in the law:

§ 44.09. Origin and History of Declaratory Judgments. — While the principle of declaratory judgments has in comparatively recent years made rapid progress in this country, it is not a novel theory in jurisprudence. At Common Law there could be no action in the absence of actual injury—someone must have been hurt. Thus parties are forced to commit overt acts in order to have the Courts adjudicate their rights. The Common Law courts offered remedies and curatives, but looked with a disdainful eye upon what we may term preventatives. This doctrine was a fitting part of the legal philosophy of our ancestors, but the spirit of the modern age looks askance at such unreasonable and costly restrictions on the usefulness of our Courts. The idea has been steadily gaining ground, for nearly a century, that the Courts should operate as preventative clinics as well as hospitals for the injured. It was in 1850 that this school of thought won its first victory with the passage of the English Declaratory Judgment Act, which, as amended in 1883, is still the law of England. Most American states and territories have enacted a statute authorizing the courts to render declaratory judgments. The Uniform Declaratory Judgments Acts adopted and recommended by the Conference of Commissioners on Uniform State Laws in 1922 has been adopted in many jurisdictions. It became a part of the law of Tennessee under the Acts in 1923, chapter 29.

Id. Some of the essential purposes of declaratory relief include, “(1) to afford a speedy and inexpensive method of adjudicating legal disputes; (2) to narrow the issues and, by doing so, to dispose of disputes in their initial stages, before they have become full-grown battles with

their accumulation of bitterness and impaired relations; . . . (6) to enable an issue of questioned status or fact, on which a whole complex of rights may depend, to be expeditiously determined; (7) to enable interdependent rights involving numerous parties to be settled in a single proceeding . . .” *Id.* at § 44.10.

Under Tennessee law, declaratory relief is provided to persons affected by a statute, rule or order of a state agency in the Uniform Administrative Procedures Act. An affected party obtains review of the application of an agency rule to specific circumstances (such as in this case as to the application of the Antidegradation Rule if Horse Creek is not classified as an Exceptional Tennessee Water) under Tennessee Code Annotated sections 4-5-223 through 4-5-225. Ordinarily the procedure the petitioners would follow to obtain a ruling as a matter of law on the scope of the Commissioner’s impact assessment of the quarry on Horse Creek would be to petition the Board under section 4-5-223. In this case, the petitioners did just that. When they filed their appeal to the Board of issuance of the permit by the Commissioner, pursuant to Tennessee Code Annotated section 69-3-105(i), they joined the appeal with a claim for declaratory relief pursuant to section 4-5-223: April 6, 2007 “Permit Appeal and Declaratory Order Petition.” As explained by the petitioners in ¶ 9 of the Petition For Judicial Review in Chancery Case 09-2297:

9. The Petition was properly pleaded to set out two distinct claim in one petition arising from one common nucleus of facts. The first claim was for a declaratory order to determine the appropriate interpretation and applicability of Rule 1200-4-3-0.03 *et seq.*, and to determine whether the Rule

violates a state statute, specifically, § 69-3-108(e). That claim is a direct challenge to the Board seeking a declaration of the validity of the rule under the statute. The second claim was for 'permit appeal' under recently authorized § 69-3-105(i). Amended in 2005, sub-part (i) was added to § 69-3-105 to provide a direct permit appeal right to aggrieved third-parties which had not previously been available to anyone other than the permit applicant. This second claim seeks review of the Commissioner's action in issuing the permit. The declaratory order claim did not seek review of the 'issuance or denial of the permit,' and, likewise, the permit appeal did not seek a determination of the rules or statutes. In the declaratory order allegations, Petitioners specifically pleaded that the Anti-Degradation rule in Chapter 1200-4-3-0.3 (promulgated by the Water Board as the rule-making authority) violated the state Water Quality Control Act (WQCA) including § 69-3-108(e) (now g).

In the proceedings below, the Board dismissed the petition for declaratory order that was joined with the permit appeal. The latter was allowed to proceed but with the claim for declaratory relief removed. The reason for the dismissal below is that the Commissioner and the Board assert that in the area of Tennessee water quality control law related to issuance of permits, an aggrieved party is deprived of the remedy of a declaratory order on a question of law as to the validity or applicability of a statute or rule. That remedy, the respondents assert, has been dispensed with by Tennessee Code Annotated section 69-3-105(i). It provides as follows:

- (i) Upon receiving a petition for permit appeal, the board has the power, duty, and responsibility to hold a contested case hearing concerning the commissioner's issuance or denial of a permit. During this hearing, the board shall review the commissioner's permit decision and may reverse or modify the decision upon finding that it does not comply with any provisions of this part. A petition for permit appeal may be filed, pursuant to this subsection (i), by the permit applicant or by any aggrieved person who participated in the public comment period or gave testimony at a formal public hearing whose

appeal is based upon any of the issues that were provided to the commissioner in writing during the public comment period or in testimony at a formal public hearing on the permit application. Additionally, for those permits for which the department gives public notice of a draft permit, any permit applicant or aggrieved person may base a permit appeal on any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment. Any petition for permit appeal under this subsection (i) shall be filed with the board within thirty (30) days after public notice of the commissioner's decision to issue or deny the permit. Notwithstanding the provisions of §§ 4-5-223 or 69-3-118(a), or any other provision of law to the contrary, this subsection (i) and the established procedures of Tennessee's antidegradation statement, found in the rules promulgated by the department, shall be the exclusive means for obtaining administrative review of the commissioner's issuance or denial of a permit.

In support of their argument, from the foregoing text, the Commissioner and the Board cite to the last sentence of 69-3-105(i), particularly the text, "Notwithstanding the provisions of §§ 4-5-223," and the text, "this subsection (i) . . ." shall be "the exclusive means for obtaining administrative review of the Commissioner's issuance or denial of a permit." Thus, as best the Court can tell, it appears that the respondents' position is that the petitioners' remedy is to appeal the permit and in that appeal present the issue of the application of the Antidegradation Rule as one of the grounds of their appeal but not as a claim for a declaratory order from the Board.

As to whether the Board is required to address this aspect of the appeal, the respondents are vague. They state that because the Board is "obligated by law to explain the 'why' behind their decision, and that upholding issuance of a permit must be consistent with Board regulations, the Board will rule on the petitioners' question of law." See March 23,

2011 Defendant's Reply at 7. Noteworthy is that respondents' March 11, 2011 Memorandum does not state unequivocally that the Board in the section 69-3-105(i) appeal shall rule on petitioners' question of law. The respondents' assurance is a tentative one, "Contrary to Plaintiffs' fears, a permit appeal under Tenn. Code Ann. § 69-3-105(i) may indeed reach issues involving the proper interpretation and application of the Antidegradation Rule." Moreover, in that regard, if the permit issued by TDEC is any predictor of the scope of the administrative review that the Board will provide in the permit appeal process, the permit, the petitioners assert, skirts and avoids the legal issue they have raised. The permit states, as its premise, that the Antidegradation Rule does not apply to Horse Creek as it is not an Exceptional Tennessee Water. The permit, however, contains no rationale or legal analysis of that issue. The nonapplicability of the Antidegradation Rule is an assumption in the permit. If that assumption is used, again, on administrative review by the Board, without an examination and declaration as to the application of the Antidegradation Rule to permit approval for waters that are not Exceptional Tennessee Waters, the petitioners are deprived of a decision on this issue in these cases and, systemically, the Board has created circumstances capable of repetition yet evading review.

The question, then, for this Court to determine is whether section 69-3-105(i) deprives the petitioners of and dispenses with the right of declaratory relief.

The Court's analysis begins with its observation that there is no indication in sections 69-3-101 *et seq.* or any reason apparent to the Court why persons aggrieved by an issue of the validity or applicability of water quality statutes and rules would be deprived of the explicit right, given to all other persons aggrieved by state agency statutes and rules, of obtaining declaratory relief. In the area of discharge permits there exists, as in other areas of the law, the policies noted *supra* at 4-5 of a need for a speedy and inexpensive method of adjudicating legal disputes and narrowing issues, and by doing so, disposing of disputes at their initial stages.

As to textual analysis, section 69-3-105(i) appears to allow, if indeed it does not contemplate, joining a petition for declaratory order by an aggrieved party with a permit appeal in the provision of the section that a party "may" file a permit appeal on "any of the issues" that were raised during the permitting process. This provision of section 69-3-105(i) appears to open the appeal process to allow requests for section 4-5-223 declaratory relief to be raised with the permit appeal.

Next, there is the practical consideration of flexibility. In some permit cases, the issues will be exclusively or predominantly factual ones requiring expertise of the Board to decide. Other cases will contain mixed questions of fact and law. Lastly there are cases, such as the petitioners' claim in this matter, which have dispositive or predominant questions of law. Another variable is timing. In some cases, if the question of law is dispositive, or

if the question of law is informed by the facts, it makes sense to allow an aggrieved party to join a petition for declaratory relief with an appeal of the permit.

Given this variety, it is sensible to provide, as the circumstances of each case dictates, the ability to combine the appeal of permit issues with declaratory order questions of law by allowing the aggrieved person to file a permit appeal based on issues, including declaratory order questions of law, that were raised by the aggrieved person during the permit process, as the petitioners attempted below. This also maintains the Board's power under 4-5-223(a)(2) to refuse to consider a petition for a declaratory order if the timing of the permit appeal would not lend itself to a consolidation with the declaratory order question or if the declaratory order question is not predominant enough to be combined with the permit appeal, and to pass the legal question on to the chancery court as per section 4-5-225.

Lastly, these different claims for relief are susceptible to joinder. The standards of review and procedures for a section 69-3-105(i) appeal are the same as a section 4-5-223 petition for declaratory order. Both the permit appeal and a petition for declaratory order are filed with the Board, and both claims proceed by means of a contested case hearing.

In sum, then, the Court's construction of the interplay between section 69-3-105(i) and sections 4-5-223 through 225 is that a petition for declaratory relief pursuant to section 4-5-223 related to the issuance of a permit may be requested by an aggrieved party in a permit appeal under section 69-3-105(i). This construction is based on: (1) the flexible and expansive text of section 69-3-105(i) that "any of the issues" raised during the permitting

process “may” be presented in the appeal; (2) the need to assure that the right of an aggrieved party to obtain a ruling as a matter of law regarding the validity or application of a water quality statute or regulation is maintained for the reasons, stated *supra* at 4, that declaratory relief has become such a hallmark in the law; and the same standard of review and contested case procedure are used in the permit appeal and petition for declaratory order.

For these reasons, the Court concludes that the Board erred in Case 09-2297-III when it refused to allow the petitioners to file and join with their permit appeal a petition for a declaratory order. The Court concludes that section 69-3-105(i) does not deprive an affected party of the declaratory relief provided under section 4-5-223. Instead, section 69-3-105(i) allows for an aggrieved party to present a petition for a declaratory order in conjunction with its section 69-3-105(i) permit appeal. Moreover, there is nothing in section 69-3-105(i) that removes or dispenses with the Board’s right under section 4-5-223(a)(2) to refuse to issue a declaratory order, in which event the permit appeal would proceed before the Board and the petition for declaratory relief would proceed to chancery court under section 4-5-225.

With the foregoing determination of law in place, the Court now turns to the unusual procedural posture of these matters and the motions that bring these matters before the Court.

As to case 09-2298, it is the petitioners’ appeal of a January 14, 2009 petition for declaratory order that the petitioners filed with the Board before the permit was issued. The Board “declined” to consider the petition “pursuant to Tennessee Code Annotated section

4-5-223(a)(2)” because the permit had not been issued, i.e. the petition for declaratory order was not ripe.

The other chancery court case, 09-2297, is an appeal from the December 4, 2009 order of the Board dismissing the petitioners’ April 6, 2009 petition for a declaratory order that was joined with a permit appeal filed by the petitioners: “Permit Appeal and Declaratory Order Petition.” The permit appeal was allowed to proceed pursuant to section 69-3-105(i) and is pending before the Board. The petition for declaratory order, that was joined with the permit appeal, was dismissed on October 6, 2009 by the Administrative Law Judge on the grounds that section 69-3-105(i) is the exclusive remedy for “challenging a permit decision and disallows a Petition for a Declaratory Order to challenge a permit issuance or denial.”

The procedural posture of these matters before this Court is that in case 09-2298-III and 09-2297-III the Board has filed motions to dismiss.

With respect to the Board’s motion to dismiss case 09-2298-III, the Board asserts that it was correct in its conclusion that the petition for declaratory order filed below was not ripe as it was filed prior to issuance of the permit. Accordingly, the Board argues that this matter is not ripe before this Court and must be dismissed. The Board also argues that the petitioners have to exhaust administrative remedies under section 69-3-105(i) before this Court has jurisdiction since, it is the Board’s position, that section 69-3-105(i) is the

exclusive, mandatory provision for the petitioners to process their claims, and sections 4-5-223 through 225 is not an available means for an aggrieved party.

There are a number of issues imbedded in the motion to dismiss case 09-2298: (1) whether the matter was ripe when it was filed before the Board before the permit was issued; (2) whether the Board's refusal to consider the petition for declaratory order pursuant to section 4-5-223(a)(2) thereby provides this Court jurisdiction under section 4-5-225, or whether the Board's declination was actually a dismissal for lack of ripeness in which case this Court would lack jurisdiction to consider the matter. As to ripeness, the Court concludes that the declaratory order filed by the petitioners below was a ripe controversy even though the permit had not been issued because the draft permit did not apply the Antidegradation Rule and therefore manifested the issue of TDEC's position that it is not required, as a matter of law, to apply that regulation. Nevertheless, whether the issue was ripe or not below, it is not necessary for this Court to make that determination. Case 09-2298-III is rendered moot by the filing by the petitioners of a petition for a declaratory order below in case 09-2297 after the permit was issued and in conjunction with their permit appeal. Case 09-2298-III, therefore, shall be dismissed on the grounds of mootness.


As to the Board's motion to dismiss case 09-2297-III on the ground that a claim for a declaratory order can not be filed along with a permit appeal, above the Court has already analyzed these arguments and determined, contrary to the determination of the Administrative Law Judge, that section 69-3-105(i) does not dispense with the right of an

aggrieved party to obtain declaratory relief on questions of law related to issuance of a permit. The Court holds that the ALJ erred when he dismissed the petition for declaratory order that was joined with the petitioners' permit appeal. Accordingly, the Board's motion to dismiss case 09-2297-III is denied.

Lastly, to the extent the respondents are asserting that the petitioners lack standing due to the absence of a stake in the controversy, the Court dismisses the respondents' claims based upon paragraphs 1-2 of the December 4, 2009 Petition For Judicial Review of Case 09-2297 which the Court concludes state sufficient allegations to establish standing.

It is therefore ORDERED that Case 09-2298-III is dismissed as moot. It is additionally ORDERED that Case 09-2297-III remains pending, the Court having denied the respondents' motion to dismiss. It is further ORDERED that counsel in Case 09-2297-III shall attend a hearing on Friday, April 29, 2011, at 10:00 a.m. to determine whether there are other issues pending before this Court which remain to be decided, or whether Case 09-2297-III shall be remanded to the Board for it to determine, under section 4-5-223(a)(1), whether it shall include the petition for declaratory order in the contested case hearing it shall convene on the permit appeal, or whether the Board shall exercise its right under section

4-5-223(a)(2) to refuse to issue a declaratory order and have the matter determined by
chancery court.


ELLEN HOBBS LYLE
CHANCELLOR

cc: W. David Bridgers
Robert Peal
Elizabeth Murphy
R. Stephen Jobe
Ashley Lowe
LeAnn Mynatt