



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
NASHVILLE, TENNESSEE 37243-0435

JAMES H. FYKE
COMMISSIONER

PHIL BREDESEN
GOVERNOR

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO. 7002 2030 0004 2441 6502

June 14, 2010

Ms. Anda Ray
Senior Vice President
Office of Environment and Research
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902-1499

RE: Commissioner's Order, Case No. OGC09-0001
In the Matter of: Tennessee Valley Authority

Dear Ms. Ray: *Anda*

Enclosed please find an Order issued by Commissioner James H. Fyke on behalf of the Tennessee Department of Environment and Conservation in the above referenced matter. Please read it carefully and pay special attention to the NOTICE OF RIGHTS section.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul".

Paul L. Sloan
Deputy Commissioner

PLS:cm

Enclosure

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF)	
)	
TENNESSEE VALLEY AUTHORITY)	
)	CASE NO. SWM 09-0014
RESPONDENT)	WPC 08-0290

COMMISSIONER'S ORDER

Comes now James H. Fyke, Commissioner of the Department of Environment and Conservation, and states that:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation.

II.

Tennessee Valley Authority (hereinafter "TVA") is a corporate agency and instrumentality of the United States Government pursuant to 16 U.S.C. Sections 831-831dd, the *Tennessee Valley Authority Act of 1933*. Service of process may be made on Tom Kilgore, President and CEO, Tennessee Valley Authority, 400 Summitt Hill Drive, Knoxville, Tennessee 37902-1499.

JURISDICTION

III.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the *Water Quality Control Act* (the “WPC Act”), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the WPC Act. Further, the Commissioner has authority to assess civil penalties against any violator of the WPC Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the WPC Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”).

IV.

When the Commissioner finds that provisions of the *Tennessee Solid Waste Disposal Act*, (hereinafter the “SWD Act”), Tennessee Code Annotated (T.C.A.) § 68-211-101 *et seq.* are not being complied with, he is authorized by T.C.A. § 68-211-112 to issue orders for correction to the responsible person. Further, T.C.A. § 68-211-117 gives the Commissioner, or his authorized representative, the authority to assess damages and civil penalties against any person who violates any provision of the SWD Act or any rule; regulation, or standard adopted pursuant to said SWD Act.

V.

Pursuant to T.C.A. § 68-211-107 the Department is authorized to exercise general supervision over the operation and maintenance of solid waste processing facilities and disposal facilities or sites. Such general supervision shall apply to all the features of operation or maintenance which do or may affect the public health and safety or the quality of the environment and which do or may affect the proper processing and disposal of solid wastes.

VI.

The Respondent is a "person" within the meaning of T.C.A. §68-211-103 and T.C.A. § 69-3-103(20).

FACTS

VII.

The Respondent owns and operates the Kingston Fossil Plant (hereinafter the "fossil plant") and an associated Class II landfill for the disposal of bottom ash and fly ash, all located on Swan Pond Road in Roane county (hereinafter the "site"). On October 1, 2003, the Division of Water Pollution Control (DWPC) issued NPDES Permit TN0005452 (hereinafter "the permit") to the Respondent for the operation of the fossil plant. The permit became effective October 1, 2003 and expires July 30, 2011. The permit authorizes the Respondent to discharge, in part; fly ash and bottom ash sluice water, ash system leakage, boiler bottom overflow, miscellaneous cooling and lubricating waters and station sump discharges through various outfalls. The permit sets out numeric

and narrative effluent limitations and monitoring requirements for these discharges. Additionally, the Respondent was issued a permit by the Division of Solid Waste Management (DSWM), on September 26, 2000, for the disposal of fly ash and bottom ash, generated from burning coal at the fossil plant. The permit number for the solid waste disposal facility (SWD facility) is IDL73-0094.” The SWD facility is located in Roane County at 714 Swan Pond Road, approximately 2 ½ miles southeast of Harriman, Tennessee at the base of the peninsula formed by the Clinch and Emory River embayments of Watt’s Bar Lake, about 2.7 miles above the confluence of the Clinch and Tennessee Rivers.

VIII.

On September 12, 2006, the Division of Solid Waste issued a permit to the Respondent for the lateral expansion of its SWD facility.

IX.

On or about December 22, 2008, there was a catastrophic failure of Respondent’s SWD facility and related structures, allowing an unauthorized release of coal ash waste to the environment, potentially endangering the public health and causing damage to the environment. The ash slide disrupted power, ruptured a gas line, caused one home to be knocked off its foundation and damaged others. Swan Pond Road and a local railroad track were covered and blocked by the ash. The ash inundated waters of the State, including but not limited to two inlets of the Emory River.

X.

Following this event, on January 12, 2009, the Commissioner issued an Emergency Order to the Respondent. The Order directed the Respondent to continue then ongoing emergency management efforts and to implement corrective actions to prevent the further movement of contaminated materials into waters of the state and, where feasible, minimize further down-stream migration of contaminated sediments. The Respondent was also ordered to perform a comprehensive evaluation of all of its coal ash impoundments located within the State of Tennessee and to report the findings of this evaluation to a Department Advisory Board, authorized by the Emergency Order. These and additional corrective actions are ongoing and the dredging removal of the accumulated coal ash waste from the affected reaches of the Emory River are projected to be substantially completed by May 31, 2010. The referenced Emergency Order requires the Respondent to reimburse the Department for all costs it expends to review and oversee activities required by that Order. To date, Respondent has reimbursed TDEC approximately Three Million Dollars (\$3,000,000.00) pursuant to this provision.

VIOLATIONS

XI.

By allowing the discharge of solid wastes into the waters of the State other than in accordance with the conditions of the NPDES Permit issued by the DWPC, the

Respondent has violated T.C.A. 69-3-108(b) (6), which states:

(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:

(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.

XII.

By allowing the release of solid waste to the environment and into the waters of the State, the Respondent has violated T.C.A. §§68-211-104(1), §§68-211-104 (3), and §§68-211-104(4). The failure of Respondent's SWD facility was also a violation of SWM Division Rule 1200-1-7-.04(2)(a)3.

T.C.A. §§ 68-211-104(1), (3), and (4) provide:

It is unlawful to:

- (1) Place of deposit any solid waste into the waters of the State except in a manner approved by the Department or the Tennessee water quality control board.
- (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 on 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 the provisions of this chapter or in violations of the orders of the Commissioner or board

Division Rule 1200-1-7-.04(2)(a)3 states:

- (a) Overall Performance Standard – The facility must be located, designed, constructed, operated, maintained, closed, and cared for after closure in such a manner as to minimize to the extent practicable:
 - (3) The potential for releases of solid wastes, solid waste constituents, or other potentially harmful materials to the environment except in a manner authorized by state and local air pollution control, water pollution control, and/or waste management control agencies.

ORDER AND ASSESSMENT

XIII.

WHEREFORE, PREMISES CONSIDERED, pursuant to the authority vested by T.C.A. § 68-211-112, §68-211-117, §69-3-109, §69-3-115 and §69-3-116, I, James H. Fyke, hereby ORDER that:

The Respondent is assessed a total Civil PENALTY in the amount of ELEVEN MILLION FIVE HUNDRED THOUSAND DOLLARS (\$11,500,000.00) to be paid to the Department as follows:

1. In recognition of the Respondent's payment of the Department's oversight costs pursuant to the above referenced Emergency Order, Respondent is hereby given credit for Three Million Dollars (\$3,000,000.00) of the above assessed penalty. The Respondent must continue to pay the Department oversight costs pursuant to the Emergency Order of January 12, 2009 which remains in full force and effect.

2. Respondent may elect to perform Supplemental Environmental Projects (SEPs) with a value of at least Two Million Dollars (\$2,000,000.00) and receive credits against the above assessed penalty of up to Two Million Dollars (\$2,000,000.00). To receive such credits, Respondent must propose SEPs that are acceptable to the Commissioner and otherwise meet the Department's criteria as acceptable SEPs. If SEPs are not proposed and approved, that have a value of at least Two Million Dollars (\$2,000,000.00), by December 31, 2010, Respondent must pay any remaining balance of this portion of the assessed penalty to the Department upon written demand.

3. Two Million Five Hundred Thousand Dollars (\$2,500,000.00) of the assessed penalty shall be paid to the Department on or before July 15, 2010. Fifty percent (50%) shall be credited to Water Pollution Control's EPF fund and fifty percent (50%) shall be credited to Solid Waste Management's EPF fund.

4. Two Million Dollars (\$2,000,000.00) of the assessed penalty shall be paid to the Department on or before July 15, 2011. Fifty percent (50%) shall be credited to Water Pollution Control's EPF fund and fifty percent (50%) shall be credited to Solid Waste Management's EPF fund.

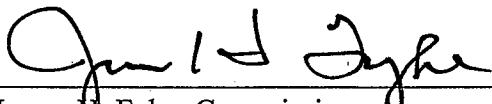
5. Two Million Dollars (\$2,000,000.00) of the assessed penalty shall be paid to the Department on or before July 15, 2012. Fifty percent (50%) shall be

credited to Water Pollution Control's EPF fund and fifty percent (50%) shall be credited to Solid Waste Management's EPF fund.

RESERVATION OF RIGHTS

The civil penalty assessed herein constitutes the total civil penalty to be assessed to the Respondent for the discharge of solid waste to and the placement of solid waste in the waters of the State as a result of the events of December 22, 2008. However, nothing in this ORDER is to be construed as waiving any right or authority available to the Commissioner to further assess the Respondent for costs, expenditures, or damages of any kind, including without limitation Natural Resource Damages that have been and/or are being incurred as a result of the catastrophic failure of Respondent's SWD facility and related structures described hereinabove. Further, as noted hereinabove the Commissioner's Emergency Order issued January 12, 2009 remains in full force and effect. The Commissioner's right to order further investigation, remedial action and/or monitoring and maintenance is also specifically reserved.

Issued this 14th of June, 2010, by the
Commissioner of the Tennessee Department of Environment and Conservation.


James H. Fyke, Commissioner
Tennessee Department of
Environment and Conservation

NOTICE OF RIGHT TO APPEAL

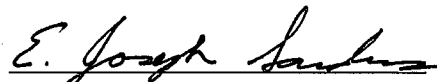
Tennessee Code Annotated §§69-3-109, §§69-3-115, and §§68-211-113 provide the Respondent with the right to secure review (appeal) of this Order. To do so, a written petition setting forth the grounds (reasons) for requesting a hearing must be RECEIVED by the Department within THIRTY (30) DAYS of the date the Respondent received this Order or it will become final (not subject to review). Failure to appeal is not an admission of the factual allegations or alleged violations of law contained in this Commissioner's Order, and would not preclude Respondent from contesting said factual allegations and alleged violations in any proceeding other than a proceeding brought by the Commissioner to enforce this Order

Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot carry-on the practice of law. They may secure review (appeal) only through an attorney licensed to practice law in Tennessee. Natural Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Any hearing of this matter will be a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. Such hearings are in the nature of a trial before a Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses to testify.

At the conclusion of a hearing, a Board has the authority to affirm, modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines. Furthermore, a Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to: Appeal of an Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548. Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services - Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence shall be sent to E. Joseph Sanders, General Counsel, Tennessee Department of Environment and Conservation, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243. Please include the case number on all correspondence regarding this matter.



E. Joseph Sanders, BPR #006691
General Counsel
Tennessee Department of
Environment & Conservation
20th Floor L & C Tower
401 Church Street
Nashville, Tennessee 37243
(615) 532-0131