

**IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
	)	
<b>RULEMAKING TO REVISE TRA</b>	)	<b>DOCKET NO. 16-00112</b>
<b>WASTEWATER RULES, 1220-04-13</b>	)	

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**COMMENTS OF THE CONSUMER ADVOCATE**

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Comes Herbert H. Slatery III, the Attorney General and Reporter, through the Consumer Protection and Advocate Division of the Office of Attorney General (hereinafter "Consumer Advocate"), and hereby files written comments.

In the proposed draft rule, subparagraph (e) of 1220-04-13-.04(1) requires a public wastewater utility to file "any correspondence related to a notice of violation from TDEC within seven (7) days of the utility's notice or receipt of such correspondence." The term "notice of violation" is not defined in the existing or proposed rules. In determining the meaning of this term, one can look to part 4. of 1220-04-13-.17(2)(d) of this draft rule which requires applicants to provide "[a] list of complaint(s), notices of violations or administrative action filed with or issued by a regulatory agency." Since administrative actions are listed separately from notices of violations, it appears the term "notice of violation" may not clearly encompass an administrative action such as a director's or commissioner's enforcement order. It also would follow that any judicial action by a regulatory agency would not fall within the term "notice of violation."

If the purpose of subparagraph (e) of 1220-04-13-.04(1) is for the Tennessee Regulatory Authority ("TRA") to be fully informed of alleged non-compliance with environmental statutes and regulations, requiring that only "notices of violations" be filed would severely limit the TRA's ability to be fully informed on any escalation in enforcement actions regarding systems. This is especially important in light of the fact that director's orders, commissioner's orders or judicial complaints may include the assessment of civil penalties and damages in addition to the

requirement of corrective action. The potential impact such litigation may have on a utility's customers would be of concern to both the TRA and to the Consumer Advocate.

In addition to the concern about the possible limitation of the term "notice of violation" in subparagraph (e) of 1220-04-13-.04(1), this subparagraph is also limited by the phrase "from TDEC." This phrase does not take into account any actions by the Environmental Protection Agency ("EPA") or by citizens. Although the Tennessee Department of Environment and Conservation ("TDEC") administers the National Pollutant Discharge Elimination System ("NPDES") program as authorized by the EPA<sup>1</sup>, the EPA may decide to pursue its own enforcement action if it decides that a state's approved program has failed to take appropriate enforcement action.<sup>2</sup> Under the *Tennessee Water Quality Control Act*, any person may file a complaint against any person allegedly violating the Act. This is commonly referred to as a 118(a) Complaint since it is found at Tenn. Code Ann. § 69-3-118(a)(1). There is also a corresponding citizen suit provision under the federal *Clean Water Act* at 33 U.S.C. §1365(b). As EPA and citizen suits are avenues for litigation alleging non-compliance with environmental statutes and regulations against utilities, the potential impact such litigation may have to a utility's customers would be of concern to both the TRA and to the Consumer Advocate.

Part 4. of 1220-04-13-.17(2)(d) of this draft rule was previously discussed in relation to the term "notice of violation." This paragraph of the draft rule 1220-04-13-.17 deals with the process for an applicant to demonstrate it has sufficient technical ability when requesting a new or expanded Certificate of Convenience and Necessity. Although this part does not limit submittals to just notices of violations but also includes administrative actions, the rule does leave out judicial actions. Unlike subparagraph (e) of 1220-04-13-.04(1), the language "filed

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<sup>1</sup> A copy of the Memorandum of Agreement between the State of Tennessee and the United States Environmental Protection Agency on the NPDES program may be found at <https://www.epa.gov/sites/production/files/2013-09/documents/tn-moa-npdes.pdf>. According to EPA's website, Tennessee is an authorized State NPDES permit program, authorized to regulate Federal Facilities, an authorized state pretreatment program and an authorized general permits program. <https://www.epa.gov/npdes/npdes-state-program-information>.

<sup>2</sup> Organ, Jerry, *The History of Overfiling under RCRA, the CWA, and the CAA Prior to Harmon, Smithfield, and CLEAN* (Environmental Federalism Part 1), 30 Env'tl. L. Rep. 10,615, 10,616 (2000).

with or by a regulatory agency” in this part would appear to encompass actions taken by the EPA under the wording of “by a regulatory agency” and 118(a) citizen complaints under state law since such complaints are filed with TDEC<sup>3</sup> due to the “filed with” wording. However, a citizen suit filed under federal law does not appear to fit the parameters set out under this draft rule. Again, it is important for the TRA to be fully informed on any enforcement actions regarding an applicant.

The Consumer Advocate also proposes the following changes and improvements to the proposed draft rules:

- (a) Proposed draft rule 1220-4-13-.06(2) – include the concept of operating a “secure” as well as “safe” facility.
- (b) Proposed draft rule 1220-04-13-.07(7) – clarify that before funds can be used from a reserve or escrow account for a purpose other than reimbursement for extraordinary expenses of the utility or for approved capital projects, the other purpose must be approved by the TRA prior to removing said funds from the account.
- (c) Proposed draft rule 1220-4-13-.07(8) – again clarify that the TRA must approve before the rule can be waived or modified.
- (d) Proposed draft rule 1220—13-.09:

2(b)(4) and (5) – add “or” before the word “substantial” and clarify that the TRA is not required to give an opportunity to achieve compliance if the TRA determines the health and safety of the public requires immediate action;

(3) – consider including as a factor whether the public wastewater utility has had

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<sup>3</sup> Tenn. Code Ann. § 69-3-118 provides:

(a)(1) Any person may file with the commissioner a signed complaint against any person allegedly violating any provisions of this part. Unless the commissioner determines that such complaint is duplicitous or frivolous, the commissioner shall immediately serve a copy of it upon the person or persons named in the complaint, promptly investigate the allegations contained in the complaint, and notify the alleged violator of what action, if any, the commissioner will take. In all cases, the commissioner shall notify the complainant of the action or determination within ninety (90) days from the date of the commissioner's receipt of the written complaint.

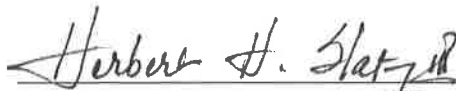
prior violations of TRA, state, local or federal laws, regulations and rules.

(5)(e) – consider including the concept of requiring the operations be “safe” and “secure.”

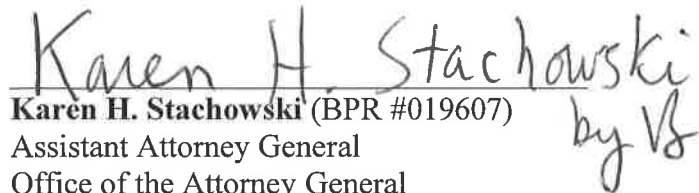
(7) and (8) – consider indicating the TRA can set a time shorter than three years for completion and requiring completion by that date. This would also need to be addressed in the proposed draft rule 1220-04-1-.16(f)(6) of the minimum rate filings section so it is clear the TRA can require an entity to construct in less than two years and require completion by a shorter time period if it deems it appropriate.

The Consumer Advocate requests that proposed draft rule 1220-4-13 be amended to reflect the concerns expressed here that submittals regarding non-compliance with environmental statutes and regulations as alleged by a state or federal regulatory agency or citizen complete and accurate. The Consumer Advocate also requests the TRA’s consideration of the other improvements recommended herein. For the TRA to meet its obligations and the challenges of a changing utility environment, it needs to be fully informed on a utility’s regulatory history and current regulatory status.

RESPECTFULLY SUBMITTED,



**HERBERT H. SLATTERY III** (BPR #09077)  
Attorney General and Reporter  
State of Tennessee

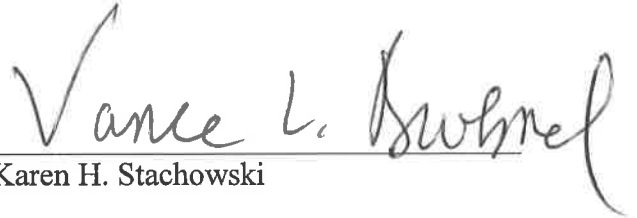
  
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail on October 27, 2016.

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