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TENNESSEE BOARD OF WATER QUALITY, OIL & GAS

IN THE MATTER OF:)	
ARAP NO. NRS22.320)	
)	DIVISION OF WATER
)	RESOURCES
TENNESSEE WILDLIFE)	
FEDERATION,)	Case No.: _____
<i>Petitioner,</i>)	
)	Docket No.: _____
v.)	
)	
TENNESSEE DEPARTMENT OF)	
ENVIRONMENT AND)	
CONSERVATION,)	
<i>Respondent.</i>)	

PETITION FOR PERMIT APPEAL

Pursuant to Tenn. Code Ann. §§ 69-3-105(i) and 69-3-110(a) and Tenn. Comp. R. & Regs. 0400-40-07-.04(9), the Tennessee Wildlife Federation hereby appeals certain terms and conditions imposed by the Tennessee Department of Environment and Conservation (“TDEC” or “the Department”) Division of Water Resources (“the Division”) in Aquatic Resource Alteration Permit (“ARAP”) No. NRS22.320 (“the Permit”) which was issued to Bedford County Utility District (“BCUD” or “the Permittee”) on March 15, 2024. The Permit authorizes BCUD to withdraw 4.07 million gallons per day (“MGD”) of water from the Duck River near river mile (“RM”) 200.¹

¹ Under the section “Authorized Work” the Permit states that BCUD is authorized to withdraw up to 4.07 MGD of water from the Duck River. Permit at 1. However, the “Authorized Activity” section of the Permit Rationale states that BCUD is authorized to withdraw up to 4.5 MGD of water from the Duck River. Permit at 10. While noting this discrepancy, Tennessee Wildlife Federation will refer to BCUD’s authorized withdrawal amount as 4.07 MGD, as this is the amount authorized in the Permit itself.

I. THE DUCK RIVER: AN INVALUABLE WATERWAY AT RISK



The Duck River is one of the most beautiful and aquatically vibrant rivers in North America and an incredibly important Tennessee waterway. Running 284 miles, the river flows through parts of seven Middle Tennessee counties. The Duck is a crown jewel of the Tennessee River system from a biological, recreational, and economic standpoint. The river supports a thriving sport fishery, including smallmouth, largemouth, spotted and rock bass, catfish, and several species of pan fish. In addition, the Tennessee Wildlife Resources Agency stocks rainbow trout in the upper reaches of the Duck. The river serves as a focal attraction for local businesses, anglers, and paddlers, generating millions of dollars in recreational economic benefits for Middle Tennessee communities.

The Duck River is at a critical juncture in its history. Currently, Middle Tennessee is experiencing explosive industrial and residential growth. State and local governments are under

significant pressure to accommodate that growth, and they are looking towards the Duck, a finite resource of limited capacity, to meet their burgeoning water demands. In the face of that significant development pressure, TDEC issued or proposes to issue eight water withdrawal permits authorizing water utilities to dramatically increase the amount of water they pump from the Duck River each day.

Currently, water utilities along the Duck pump approximately 54.13 million gallons per day (“MGD”) of water from the river. TDEC proposes to and is in the process of authorizing utilities to increase their withdrawals to approximately 73.1 MGD. That increase of 19 MGD constitutes an approximately 35% increase in human water consumption from the river.

TDEC has a vital role to play in balancing the multiple uses of the Duck River and protecting the river’s long term, sustainable use and enjoyment. TDEC is the entity responsible for “all matters pertaining to conservation, protection and development of the water resources of the state.” Tenn. Code Ann. § 69-7-102. That responsibility includes the power and duty to “[i]mplement the basic water resource policy of the state by creating and defining the rights of respective competing users of the water resources of the state.” Tenn. Code Ann. § 69-7-103(4).

TDEC took initial steps to coordinate its evaluation of increased withdrawals from the Duck River by convening a Duck River Pilot Project. The Department then synchronized its issuance of draft ARAPs for seven of the eight Duck River utilities by publishing them all within approximately two weeks of each other last fall.² The Department additionally combined the public

² TDEC issued a draft ARAP to Columbia Power & Water Systems on September 12, 2023. Draft ARAPs for the Duck River Utility Commission; Shelbyville Power, Water, and Sewerage Systems; BCUD; Lewisburg Water and Wastewater; City of Spring Hill; and Maury County Water Systems (“Upper Duck Water Utilities”) were all issued approximately two weeks later on September 25, 2023. The only Duck River water utility whose ARAP was not included in TDEC’s coordinated permitting effort was the Marshall County Board of Public Utilities, which received an ARAP from TDEC authorizing its water withdrawal in 2022.

hearing on the six Upper Duck Water Utility ARAPs, accepted combined public comments on all six permits, and recently issued a combined Response to Comments.

In spite of those coordinated efforts, TDEC's lax approach to protecting the Duck River falls far short of basic legal requirements. Instead of imposing protective permit conditions to safeguard the Duck River, TDEC attempts to unlawfully delegate its responsibilities by passing them off to another entity with no authority to oversee water quality in Tennessee. The Department also fails to require the utility to undertake robust water conservation measures and curtail water use when river levels drop precipitously low. Ultimately, TDEC fails to engage in comprehensive, holistic watershed management planning, and the Department ignores the cumulative impacts of all Duck River water withdrawals. TDEC's actions are insufficient, unlawful, and place the future of the Duck River at risk. Accordingly, this permit appeal follows.

II. RIGHT OF APPEAL

1. As recognized by the Tennessee Water Quality Control Act, Tenn. Code Ann. § 69-3-101 *et seq.*, ("TWQCA"), the waters of Tennessee are held in public trust by the State of Tennessee for the benefit of the people of Tennessee. Tenn. Code Ann. § 69-3-102(a). Tennesseans—as beneficiaries of that trust—have a right to unpolluted waters, and the government of Tennessee—as the holder of that public trust—is obliged to take all prudent steps to secure, protect, and preserve that right. Tenn. Code Ann. § 69-3-102(a).

2. Under the TWQCA, the Commissioner of TDEC has the power, duty, and responsibility to exercise general supervision and control over the quality of state waters as well as to administer and enforce all laws, rules, and regulations relating to pollution of state waters. Tenn. Code Ann. § 69-3-107(1). As part of his authority, the Commissioner may delegate the power, duty, and responsibility for water quality control—including the issuance of permits—to

the Director of the Division of Water Resources (“the Division”). Tenn. Code Ann. §§ 69-3-107(13) and (14). The Division issued the Permit under its duly delegated authority. *See* Tenn. Code Ann. § 69-3-108(g).

3. An aggrieved person who participated in the public comment period or who gave testimony at a formal public hearing and whose appeal is based upon issues that were provided to the Commissioner during the public comment period is entitled to file a petition for permit appeal. Tenn. Code Ann. § 69-3-105(i); Tenn. Comp. R. & Regs. 0400-40-07-.04(9). That appeal must be filed with the Board of Water Quality, Oil & Gas (“the Board”) within thirty days after public notice of the Commissioner’s decision to issue or deny the permit.

4. As confirmed by TDEC, the public notice date for the subject Permit was March 26, 2024, and the appeal deadline was Thursday, April 25, 2024. *See* Email of Emily B. Vann, Senior Associate Counsel for TDEC, Exhibit A attached.

5. An “aggrieved person” under Tenn. Code Ann. § 69-3-105 includes conservation groups and other interested parties who participated in the public comment period or gave public testimony at a formal public hearing on a permit application. *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 519 (Tenn. 2013).

6. The Tennessee Wildlife Federation is a non-profit conservation organization based in Tennessee. The Tennessee Wildlife Federation is an aggrieved person who submitted a written comment during the public comment period on the Permit, and it has timely filed this petition for permit appeal within thirty days after public notice of the Division’s issuance of the Permit.

7. Facts regarding the Tennessee Wildlife Federation’s longstanding interest in and work to protect the Duck River are detailed in the Declaration of Tennessee Wildlife Federation’s

Chief Executive Officer, Michael Butler. *See* Declaration of Michael Butler, Exhibit B attached. That declaration is incorporated by reference as if fully set forth herein.

III. APPEALED PERMIT TERMS, CONDITIONS, AND ISSUES

8. Petitioner appeals and seeks review by the Board of the following terms and conditions in the Permit as well as the following issues raised during the public comment period. Petitioner appeals these terms, conditions, and issues because they (i) are inconsistent with the TWQCA; (ii) are inconsistent with the rules promulgated by the Board; (iii) constitute an unauthorized delegation of power, duty, and responsibility from the Division to a third-party entity; and/or (iv) are otherwise arbitrary and capricious.

9. Petitioner appeals and seeks review by the Board of the following terms and conditions in the Permit:

a. **Pages 3 & 4:** Condition 4, stating: “Withdrawal above 1.7 MGD shall cease when flow in the Duck River as measured at the Milltown USGS Gage (03599240) is at or below 175 cubic feet per second (CFS), subject to the following schedule of compliance.

i. The permittee shall develop a plan for reducing the withdrawal of water from the Duck River to coincide with certain drought triggers. This reduction shall be measured either by a reduction in the instantaneous rate of withdrawal or total daily volume. This plan shall be submitted to the Division for its review not later than one year after the effective date of this permit. The permittee shall implement the plan no later than 30 days after receiving written approval from the Division.

- ii. The permittee shall provide annual water loss reporting using the American Water Works Association M36 Water Audits and Loss Control Programs free water audit software v6 to determine the amount of potentially recoverable leakage, with a goal of achieving a 25% unavoidable annual real loss.
 - 1. If the unavoidable annual real loss is greater than 25%, it shall develop and implement a plan to reduce water loss based on the potentially recoverable leakage.
 - 2. A plan that details the process and timeline by which the permittee would achieve this reduction shall be submitted to the Division for review and approval not later than 24 months after the effective date of this permit.
 - 3. The annual water loss reporting shall be submitted by October 31 of each year.
- iii. As reasonable and appropriate, the permittee shall participate in or perform studies necessary to determine the presence and extent of threatened and endangered mussels and other fish and aquatic life in the downstream portion of the Duck River impacted by the withdrawal, and flow requirements necessary to sustain these populations. These studies will include, but not be limited to, an evaluation of the efficacy of tapering withdrawal rates gradually downward. Participation may be through membership in the Duck River Agency.

iv. The special condition to cease withdrawal above 1.7 MGD when flow in the Duck River as gaged at the Milltown USGS Gage (03599240) is at or below 175 CFS shall become effective five years from the date of this permit.”

b. **Page 4:** Condition 5, stating: “The permittee shall comply with the provisions of the Duck River Agency’s Duck River Regional Drought Management Plan, including revisions. The provisions include, but are not limited to:

- i. triggers for drought restrictions
- ii. water use restrictions for drought stages, and
- iii. levels of enforcement for drought management stages.”

10. Petitioner additionally appeals and seeks review by the Board of the following issues raised during the public comment period:

- a. The Division’s issuance of a permit even though practicable alternatives to the proposed activity exist that would have less adverse impact on resource values and do not have other significant adverse environmental consequences. *See* Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(b).
- b. The Division’s issuance of a permit with conditions that are not protective of the resource values of the affected stream. *See* Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(2).
- c. The Division’s issuance of a permit that exempts grandfathered withdrawals from the Permit terms despite the Division failing to find that this withdrawal amount will not adversely alter or affect the classified uses of the Duck River. *See* Tenn. Comp. R. & Regs. 0400-40-07-.02(4).

- d. The Division’s issuance of a permit that unlawfully delegates the Division’s power, duty, and responsibility for water quality control to an unauthorized third-party. *See* Tenn. Code Ann. § 69-3-107(13).

Water Conservation Requirements

11. Petitioner incorporates by reference the paragraphs above as if set out in full herein.
12. Tennessee rules forbid TDEC from issuing an ARAP when “there is a practicable alternative to the proposed activity that would have less adverse impact on resource values, so long as the alternative does not have other significant adverse environmental consequences.” Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(b). A “practicable alternative” is one “that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” Tenn. Comp. R. & Regs. 0400-40-07-.03(24). The Division is required to incorporate practicable alternatives in the Permit when doing so would prevent or lessen the degradation associated with the permitted activity.
13. Practicable alternatives to water withdrawals include but are not limited to water conservation, water reuse or recycling, and pricing structures that encourage a reduction in consumption. Tenn. Comp. R. & Regs. 0400-40-03-.06(1)(b)(3)(ii).
14. As part of its Permit application, BCUD submitted an alternatives analysis which the Division incorporated verbatim into the Permit Rationale. In that analysis, BCUD considers utilizing groundwater, constructing off-site storage, or purchasing water from another entity. Notably absent is any analysis by the utility regarding the feasibility of water conservation, water reuse or recycling, or pricing structures to reduce consumption. These are all alternatives identified in Tennessee rules which could be practicable alternatives to increasing water withdrawals.

15. Despite BCUD providing no information regarding certain water conservation measures identified in TDEC's rules as practicable alternatives, the Division agreed with BCUD's analysis and determined that "the authorized activities represent the least impactful practicable alternative to accomplish the project's purpose and goals." Permit Rationale at 12.

16. The final Permit imposes only two water conservation conditions, as discussed in greater detail below. The first is an arbitrary and unlawful condition which sets a goal to increase BCUD's current water loss rate—from 18% to 25%. The second requires BCUD to comply with a drought management plan which is outdated and inadequate to protect the existing uses of the Duck River.

17. The Division failed to request more information from BCUD to determine whether other practicable alternatives to water withdrawals from the Duck River could be included as permit conditions, and it did not impose such conditions in the final Permit.

18. The Division's failure to consider water conservation alternatives is particularly acute given that the segment of the Duck River where BCUD's intake is located is impaired for its designated use of recreation. This reach of the river currently does not support recreational use due to unavailable *Escherichia coli* (E. Coli) parameters. Therefore, the Division should require BCUD to implement all practicable water conservation measures in order to promote healthy water flows and allow for adequate assimilative capacity in this reach of the Duck River.

19. The Division's finding that there are no practicable alternatives which BCUD can implement to prevent or lessen its degradation of the Duck River is arbitrary and capricious because it is based on inadequate information and therefore violates Tennessee's Antidegradation Statement and applicable rules. Practicable alternatives may exist which would lessen BCUD's impact on the Duck River by limiting the amount of water which the utility would otherwise

withdraw from the river to meet consumer demand. The Division has issued a permit that allows BCUD to impact to a portion of the Duck River with unavailable parameters whose impairment could be lessened or mitigated by promoting healthier and more abundant river flows. Therefore, it was particularly important for the Division to identify and select all practicable alternatives to lessen the degradation from the proposed withdrawal.

20. The Division's failure to impose conditions in the Permit which require BCUD to implement all practicable water conservation measures violates Tennessee's Antidegradation Statement and applicable rules and is otherwise arbitrary and capricious.

Water Loss Condition

21. Petitioner incorporates by reference the paragraphs above as if set out in full herein.

22. In a public presentation by the Division on October 30, 2023, the Division stated that BCUD maintains an 18% water loss rate.

23. The Division issued a draft Permit to BCUD with Special Condition 4(b), which proposed to allow BCUD to lose up to 25% of its total withdrawal amount. Public commenters commented that this condition would authorize a water loss amount well above the utility's current water loss rate and would create perverse incentives for BCUD to backslide from its current water loss rate.

24. Despite public opposition to the weak water loss condition proposed in Special Condition 4(b), the Division retained it. The condition requires that BCUD have "a goal of achieving a 25% unavoidable annual real [water] loss" rate. Given the Permit's terms allowing BCUD to withdraw 4.07 MGD of water from the Duck River, this condition authorizes BCUD to leak approximately 1.02 MGD of that water each day unused into the ground. The lax and arbitrary 25% water loss limit is significantly higher than BCUD's current water loss rate of 18%.

25. The water loss condition in BCUD's Permit stands in contrast to the water loss provision that the Division incorporated into ARAP NRS20.177, issued in May 2022 to the Marshall County Board of Public Utilities, which permits that utility to withdraw water from the Duck River. In ARAP NRS20.177, the Division imposed Special Condition 7, which requires the permittee to "develop reasonable goals for leakage reduction to consist of lowering leakage approximately one percent per year with the goal of reduction to 15 percent volumetric treated water loss." ARAP NRS20.177 at 5.

26. Requiring BCUD to maintain its current water loss rate while steadily working toward a 15% water loss rate is a practicable alternative to the 25% water loss goal the Division imposed in Special Condition 4(b). A more stringent water loss condition is clearly feasible, as BCUD is already maintaining a lower water loss rate. Furthermore, the Division imposed a similar water loss restriction in an analogous ARAP issued to another water utility to withdraw water from the Duck River.

27. Imposing a water loss condition on par with BCUD's current estimated water loss rate of 18%, with an ultimate goal of reaching a 15% water loss rate, would minimize the amount of water BCUD withdraws from the river. Requiring BCUD to maintain and improve its current water loss rate would therefore lessen the degradation authorized by the Permit by requiring BCUD to more efficiently use the water it pulls from the Duck River.

28. The Division's finding that there is no practicable alternative to a 25% water loss goal violates Tennessee's Antidegradation Statement and applicable rules and is otherwise arbitrary and capricious. The Division's issuance of a permit which includes a 25% water loss condition likewise violates Tennessee's Antidegradation Statement and applicable rules and is otherwise arbitrary and capricious. BCUD's current practice and the Division's past permitting

actions conclusively establish that imposing a more protective water loss condition on water withdrawals from the Duck River is practicable.

Drought Management Plan Condition

29. The TWQCA imbues the Commissioner of TDEC with certain powers, duties, and responsibilities over state waters. For instance, the Commissioner must “exercise general supervision and control over the quality of all state waters, administer and enforce all laws relating to pollution of such waters, and administer and enforce this part, and all standards, policies, rules, and regulations promulgated under this part.” Tenn. Code Ann. § 69-3-107(1). The Act also specifically provides that the Commissioner may “[d]elegate to the director of [the Division of Water Resources] any of the powers, duties, and responsibilities of the commissioner under this part. *Id.* at § 69-3-107(13). The Act does not enable the Commissioner to delegate his authority to any other party, nor does it allow the Division of Water Resources director to delegate any of her duly delegated authority to a third-party.

30. The Commissioner is empowered to grant permits which authorize impacts to state waters. Tenn. Code Ann. § 69-3-108(g)(1). However, in doing so, the Commissioner must impose conditions in those permits to ensure that the permitted activity does not violate the terms of the TWQCA or its rules and regulations. *Id.* Tennessee rules and regulations require TDEC to provide the public an opportunity to comment on a draft permit and the sufficiency of its conditions to ensure that the proposed activity will comply with the TWQCA and its implementing regulations. Tenn. Comp. R. & Regs. 0400-40-07-.04(4)(b).

31. When the permitted activity is a water withdrawal, “the Commissioner shall establish permit conditions which are protective of the resource values of the affected stream.” Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(2). Resource values are those properties of the water

resource that help maintain its classified uses, including but not limited to the ability of the water to provide habitat for aquatic life. Tenn. Comp. R. & Regs. 0400-40-07-.03(25).

32. Special Condition 5 of the Permit requires BCUD to comply with the provisions of the Duck River Development Agency's ("the Development Agency") Duck River Regional Drought Management Plan ("Drought Management Plan" or "the Plan"), including any future versions of that Plan. That Plan contains provisions related to drought triggers, water use restrictions applicable to drought stages, and levels of enforcement for drought stages.

33. The Development Agency is staffed by one full-time and one part-time employee. Its purpose is to promote economic development in the Upper Duck River watershed and to utilize the Duck River as a resource to effectuate that development. Tenn. Code Ann. § 64-1-601(b). The Development Agency is fully funded by the water utilities which take water from the Duck River.

34. The Development Agency does not have the power, duty, or authority to manage and enforce state water quality standards, nor does it have the power, duty, or authority to dictate enforceable conditions in a state water permit. *See* Tenn. Code Ann. § 64-1-603. The TWQCA does not delegate any authority to the Development Agency, nor does it allow duly delegated parties to sub-delegate their authority over water quality control to the Development Agency. *See* Tenn. Code Ann. § 69-3-107.

35. The Development Agency's current Drought Management Plan is outdated and insufficient to protect the resource values and designated uses of the Duck River. *See Duck River Regional Drought Management Plan* (2013), available at

<https://webgen1files1.revize.com/theduckriveragencytn/Document%20Center/Projects%20and%20Programs%20Programs/DMP%20Report.pdf>.

36. The Plan was developed over a decade ago, when average daily water demand from *all* of the Duck River water utilities was approximately 25.6 MGD. TDEC is in the process of permitting the Duck River water utilities to withdraw a combined total of approximately 73.1 MGD of water from the river. Thus, the Development Agency's Drought Management Plan is predicated on cumulative water withdrawal amounts approximately three times less than the Division's current proposed withdrawal amounts for all Duck River utilities.

37. The provisions of the Development Agency's outdated Plan are grossly inadequate. The Plan only imposes a mandatory 20% customer water use reduction in the last stage of drought management, during a Stage 4 "Drought Emergency." Plan at 28. No customer water use restrictions are imposed or suggested in Stage 1 "Drought Monitoring" or Stage 2 "Drought Alert." *Id.* A voluntary 10% customer water use reduction is suggested in Stage 3 "Drought Warning." *Id.* Moreover, the Plan contains no water withdrawal restrictions on the utilities themselves. In other words, pursuant to the Drought Management Plan, utilities remain able to withdraw their entire permitted amounts of water, and customers need only marginally curtail water use in the most severe stage of drought.

38. The Drought Management Plan also allows utilities to "assess their individual circumstances and determine that alternative drought stages should be invoked for their water system." Plan at 18. Accordingly, utilities may unilaterally choose to invoke lesser drought stages so that no mandatory water curtailment is ever required by the utilities themselves or their customers no matter the severity of the drought or the water levels within the Duck River.

39. Assuming the water utilities themselves curtail the amount of water they pull from the Duck River by 20% during a Stage 4 drought, based on TDEC's proposed permitted amounts, the utilities will be able to cumulatively withdraw approximately 58.65 MGD of water from the

Duck River during a Stage 4 drought. That amount is over double the total unrestricted cumulative average daily utility withdrawals at the time the Drought Management Plan was finalized. Of that amount, BCUD would be able to withdraw approximately 3.26 MGD.

40. Given the huge increase in the amount of water currently being withdrawn from the Duck River, and the even larger amount which the Division proposes to permit to be withdrawn, the Development Agency's Drought Management Plan is insufficient to protect the Duck River during periods of low river flow. The Plan's provisions related to drought triggers, water use restrictions applicable to drought stages, and levels of enforcement for drought stages are predicated on severely outdated assumptions about human water consumption from the Duck River. In addition, the Plan's restrictions are expressed in terms of water use percentages which will allow utilities to withdraw significantly larger amounts of water during times of drought than they would have been able to withdraw under the Plan's provisions when originally adopted.

41. TDEC effectively shuts the public out of the drought management planning process by adopting a Plan that the Development Agency established more than ten years ago. Drought management planning is a crucial part of water withdrawal permitting. Nevertheless, TDEC incorporated the Development Agency's outdated Drought Management Plan into the Permit even though the public was not given notice of, or an opportunity to comment on, the shortcomings of that Plan.

42. The Permit likewise does not require that the public be given notice and provided an opportunity to comment on any future iteration of the Drought Management Plan. The Permit excludes the public from future drought management planning even though the terms of future drought management plans will become enforceable conditions in the Permit. Instead, TDEC purports to give the Development Agency authority to update the Drought Management Plan. In

other words, a development-oriented entity, fully-funded by the same water utilities that withdraw water from the Duck River, will be completely unaccountable to the public in drafting and finalizing drought management restrictions. Those unvetted restrictions will then become enforceable conditions in a state water withdrawal permit without the public having an opportunity to weigh-in and appeal when necessary.

43. Robust and enforceable drought management conditions are a necessary component of the Permit. Such conditions are needed to ensure that BCUD does not unlawfully impair the designated uses and resource values of the Duck River during times of low flow and drought. The outdated Drought Management Plan does not contain sufficient drought management conditions to accomplish those important objectives.

44. The Division's incorporation of the Development Agency's Drought Management Plan into the Permit as an enforceable condition violates the TWQCA, Tennessee's Antidegradation Statement, applicable rules, and is otherwise arbitrary and capricious, because it will not protect the Duck River and its resource values during periods of inevitable low flow and drought.

45. Moreover, it is arbitrary and capricious for the Division to find that an as-yet-to-be-determined future Drought Management Plan, authored by an entity that is unaccountable to the public and motivated by financial incentives to appease major water withdrawers, will actually protect the Duck River and its resource values during periods of low flow and drought.

46. Further, the Division unlawfully delegated its power, duty, and responsibility over water quality control and protection in the Duck River: (1) by requiring BCUD to adhere to the terms and conditions of the Development Agency's outdated Drought Management Plan; and (2) by purportedly authorizing the Development Agency to set as-yet-unknown future enforceable

permit conditions. TDEC is the entity responsible for ensuring that permits contain conditions which protect the designated uses of receiving waters, not the Development Agency.

47. By delegating authority over current drought management conditions and the development of future enforceable drought management conditions to the Development Agency, the Division unlawfully denied the public the opportunity to review and provide public comment on those conditions. Because public review and comment are necessary to ensure that the Permit complies with applicable water laws and regulations, such delegation wrongfully stifles public participation.

Flow Condition

48. Petitioner incorporates by reference the paragraphs above as if set out in full herein.

49. Tennessee's rules governing ARAPs for water withdrawals require the Commissioner to "establish permit conditions which are protective of the resource values of the affected stream." Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(2). The rules explicitly provide that "[t]hese conditions may include flow levels below which no withdrawal may occur." *Id.*

50. "Resource values are the physical, chemical, and biological properties of the water resource that help maintain classified uses." Tenn. Comp. R. & Regs. 0400-40-07-.03(25). They include but are not limited to "provid[ing] habitat for fish, aquatic life, and wildlife." *Id.*

51. In waterways designated for use by fish and aquatic life, applicable water quality criteria include biological integrity, habitat, and flow criteria. Tenn. Comp. R. & Regs. 0400-40-03-.03(3)(m),(n) and (o). These criteria require that flow in a waterbody support the aquatic organisms within the waterway.

52. The Division is in the process of finalizing water withdrawal permits which will significantly increase the amount of water that water utilities can withdraw from the Duck River.

Utilities along the Duck River currently withdraw approximately 54.13 MGD from the river each day. The Division is in the process of permitting utilities to cumulatively withdraw approximately 73.31 MGD from the river. This represents an approximately 35% increase in the amount of water withdrawn from the Duck River each day.

53. The Duck River is home to an incredible array of aquatic life. According to the U.S. Army Corps of Engineers, the Duck River is one of the most biodiverse rivers on the continent of North America and one of the three most diverse rivers in the world.

54. The segment of the Duck River where BCUD operates its water withdrawal intake is an Exceptional Tennessee Water designated for use by fish and aquatic life.

55. Despite the presence of aquatic life in the Duck River that are vulnerable to reductions in river flow, the Division did not impose an effective condition in the final Permit limiting the amount of water that BCUD can withdraw from its intake during periods of low flow and drought, nor did it acknowledge a flow level below which designated uses for the river, including providing habitat for fish and aquatic life, will be impaired.

56. Instead, the Division inserted Special Condition 4, a red herring which seemingly restricts BCUD's withdrawal above 1.7 MGD from its intake when levels in the Duck River are at or below 175 cubic feet per second (cfs) at the Milltown USGS Gage (03599240). Permit at 3. However, that condition only becomes effective five years after the effective date of the Permit, and the Permit's term only lasts for a period of five years. Permit at 4. In other words, this restriction does not become effective or applicable to BCUD's withdrawals for the entire life of the Permit, meaning that it is not an enforceable condition at all.

57. The flow condition in BCUD's Permit stands in contrast to the flow condition the Division incorporated into ARAP NRS20.177, issued to the Marshall County Board of Public

Utilities for operation of an analogous water intake in the Duck River. In ARAP NRS20.177, the Division imposed Special Condition 4, which requires the permittee to cease withdrawal “when flow in the Duck River as gaged at the Milltown USGS Gage (03499240) reaches a low of 175 cfs.” ARAP NRS20.177 at 4. That condition became enforceable on the date the Permit became effective, rather than the day after the Permit expired.

58. Imposing an immediately effective flow condition applicable to BCUD’s water withdrawal would ensure that the utility does not cause or contribute to impairment of the river’s use as habitat for fish and aquatic life during times of low flow and drought. Without an enforceable flow condition, BCUD could meaningfully dewater the segment of the river downstream from its intake and impair biological integrity, habitat, and flow criteria applicable to that segment of the river. Requiring BCUD to comply with a flow condition would therefore lessen the degradation authorized by the Permit.

59. Imposing an immediately effective flow condition in the Permit is a practicable alternative to the unenforceable flow condition the Division imposed in Special Condition 4. The Division imposed such a flow condition in an analogous ARAP issued to another water utility for its water withdrawal from the Duck River.

60. The Division’s finding that there is no practicable alternative to imposing an ineffective flow condition violates Tennessee’s Antidegradation Statement and applicable rules and is otherwise arbitrary and capricious. The Division’s issuance of a permit which includes an ineffective flow condition likewise violates Tennessee’s Antidegradation Statement and applicable rules and is otherwise arbitrary and capricious. The Division’s past permitting practice shows that imposing a more protective water conservation condition on water withdrawals from the Duck River is practicable.

61. Even if the flow condition was actually enforceable during the life of the Permit, the Division acted arbitrarily and capriciously by determining that the flow condition does not apply to BCUD's withdrawal of 1.7 MGD of water. The Permit Rationale states that this amount is exempt from permit requirements because it constitutes BCUD's peak withdrawal amount during the summer of 2000. Permit Rationale at 12.

62. ARAP rules state that water withdrawals that have existed since July 25, 2000 and that "do not adversely alter or affect the classified use of the source stream" are not subject to ARAP rules. Tenn. Comp. R. & Regs. 0400-40-07-.02(4). The Division must therefore make two findings before exempting a pre-existing withdrawal from rules governing ARAPs: first, that the withdrawal existed on or before July 25, 2000; and second, that the existing withdrawal amount does not negatively affect the classified uses of the impacted waterway.

63. Although the Permit and the Permit Rationale state that BCUD's peak withdrawal as of July 25, 2000 was 1.7 MGD, neither the Permit nor the Permit Rationale find that this withdrawal amount does not adversely alter or affect the classified uses of the Duck River. The Division's issuance of the Permit which exempts BCUD's withdrawal of 1.7 MGD of water from the Permit's terms is therefore arbitrary and capricious and in violation of Tennessee's rules governing ARAPs.

64. To make any such finding, the Division would need to analyze whether BCUD's existing withdrawal, in combination with the other existing withdrawals on the Duck River, would impair the designated uses of the Duck River, including its use as habitat for fish and aquatic life, by violating applicable water quality criteria such as biological integrity, habitat, and flow.

65. The Division's failure to impose an effective minimum flow condition applicable to BCUD's intake was arbitrary and capricious and contrary to Tennessee's Antidegradation

Statement and rules requiring permit conditions which are protective of impacted resource values. This is particularly true given: (1) the Division's current coordinated expansion of permitted water withdrawals from the Duck River, including withdrawals upstream from BCUD's intake; and (2) the location of BCUD's intake in a reach of the river that provides habitat to aquatic wildlife particularly vulnerable to changes in river flow.

66. The Division's determination that 1.7 MGD of BCUD's withdrawal is exempt from the flow condition and ARAP rules was arbitrary and capricious and contrary to ARAP rules because the Department did not find that this withdrawal amount does not adversely alter or affect the classified uses of the Duck River.

67. In addition to the issues discussed above, Petitioner reserves the right to raise any other issue raised during the public comment period.

IV. RELIEF REQUESTED

68. Petitioner hereby appeals the terms and conditions of the Permit as well as the issues properly raised during the public comment period and requests review by and a hearing before the Board pursuant to Tenn. Code Ann. § 69-3-110(a).

69. Petitioner requests entry of an order requiring the Division to modify the Permit to conform with the TWQCA and its implementing rules and regulations as outlined above.

70. Petitioner requests entry of an order requiring the Division to modify the Permit to correct all deficiencies outlined above.

71. Petitioner requests such other relief as required by justice and supported the facts and the law.

DATED this 22nd day of April, 2024.

Respectfully submitted,

/s/ George Nolan

George Nolan, BPR#014974

Stephanie Biggs, BPR#036734

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ATTORNEYS FOR THE TENNESSEE WILDLIFE FEDERATION

CERTIFICATE OF SERVICE

This is to certify that, on the 22nd day of April, 2024, a true and correct copy of the foregoing was sent via electronic mail and U.S. Mail to the following parties:

Stephanie A. Durman
Tennessee Department of Environment and Conservation
Office of General Counsel
William R. Snodgrass Tennessee Tower, 2nd Floor
312 Rosa L. Parks Avenue
Nashville, TN 37243
Stephanie.Durman@tn.gov

/s/ George Nolan

George Nolan

Exhibit A

From: Emily Vann <Emily.Vann@tn.gov>
Sent: Monday, April 1, 2024 1:06 PM
To: George Nolan
Cc: Stephanie Biggs; April Grippo; Stephanie Durman; Patrick Parker; Michaela Gregory
Subject: RE: Duck River Stakeholders - Notice of ARAP Issuance for CPWS, DRUC, BCUD

Hi George – I just saw you called, but I’m currently in back-to-back meetings so I thought that I would just shoot you an email. I’ve spoken with the Division and pursuant to standard practice, the last notice date is the date typically used to set the 30-day appeal window. As the last notice date for these permits was March 26, 2024, the appeal deadline is **Thursday, April 25, 2024**.

As I said, I’m currently in meetings, but should be free by 3:00pm this afternoon if you have any questions or would like to discuss further.

Emily



Emily B. Vann | Senior Associate Counsel
Office of the General Counsel
Tennessee Tower, 2nd Floor
312 Rosa L. Parks Avenue
Nashville, Tennessee 37243
c. 615-626-2782
emily.vann@tn.gov

Note: This email may contain legally PRIVILEGED and/or CONFIDENTIAL information. If you are not the intended recipient of this email, you are hereby notified that any dissemination, distribution, or copy of this email is legally and strictly prohibited. If you have received this email in error, please delete it and immediately notify the sender. Thank you for your cooperation.

Exhibit B

DECLARATION OF MICHAEL BUTLER

I, MICHAEL BUTLER, do hereby declare as follows:

1. I have personal knowledge of the following and could competently testify thereto if called as a witness.
2. I am the Chief Executive Officer of the Tennessee Wildlife Federation. In my capacity I lead our organization's work in the area of conservation and environmental protection, of which a significant portion involves working to ensure that Tennessee has healthy and abundant water resources. Specifically, our organization engages in public policy and advocacy work at the state and federal level, including participation in drafting water quality legislation and rules, permitting processes, non-regulatory water conservation and protection efforts, and community-based initiatives to ensure water resources are utilized in ways that protect and ensure their sustainability. With regards to the Duck River, we have engaged in water permitting processes intended to protect the river and its associated fish and wildlife health and abundance, as well as working on land use protection and land use issues adjacent to the Duck.
3. The Tennessee Wildlife Federation is a non-profit organization with was originally founded in 1946 as the Tennessee Conservation League. Its mission is to lead the conservation, sound management, and wise use of Tennessee's wildlife and great outdoors. The Tennessee Wildlife Federation represents the various interests of sportsmen, outdoor enthusiasts, and affiliate organizations committed to conserving Tennessee's wildlife and natural resources.
4. To further its mission, the Tennessee Wildlife Federation participates in environmental stewardship activities, collaborations with public and private partners, and youth engagement. The Federation additionally monitors and recommends wildlife, water, and land policies. The Federation works with various groups including supporters, businesses, organizations, agencies, and legislators to protect and sustainably use the State's natural resources.
5. The Tennessee Wildlife Federation has approximately 20 employees, and 200,000 individual friends and supporters, and represents the interests of hunters, anglers, bird watchers, hikers, gardeners, and other outdoor enthusiasts in Tennessee who enjoy the State's natural resources.
6. Employees and supporters of the Tennessee Wildlife Federation use and enjoy the Duck River in Tennessee. As the most biodiverse river in the State, the Duck River is enjoyed by outdoor enthusiasts of all types. Employees and supporters of the Tennessee Wildlife Federation use the Duck River for various outdoor recreational activities such as

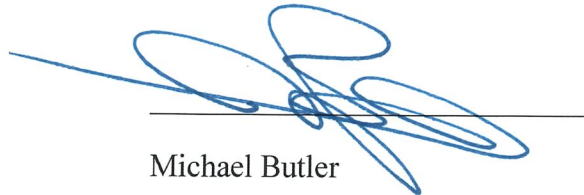
swimming, boating, fishing and bird watching. Such employees and supporters include people such as Chris Nischan, Horace Tipton, and Sam Kennedy.

7. The Tennessee Wildlife Federation has historically collaborated with the State of Tennessee on water resource issues affecting Tennessee waters. For instance, the Tennessee Wildlife Federation was a participating stakeholder in the State's development of its TNH2O plan, and served as the chair of the natural resource working group within the planning effort. This collaboration was a multi-year process, and the Tennessee Wildlife Federation devoted staff time and resources to assist the State in evaluating its water resources and to make recommendations for their sustainable use and protection. As part of this effort, the Tennessee Wildlife Federation helped lead the process of drafting recommendations for the plan's natural resources section. The Tennessee Wildlife Federation also served on the TNH2O Steering Committee.
8. As part of its water and wildlife protection work, employees of the Tennessee Wildlife Federation continuously monitor permit applications which are submitted to the Tennessee Department of Environment and Conservation (TDEC) and relevant federal agencies which would affect waters of the state. The Tennessee Wildlife Federation frequently submits comments during the permitting process for these activities.
9. The Tennessee Wildlife Federation has additionally established and maintains an in-lieu fee wetland mitigation program within Tennessee in order to preserve and protect the health of the State's waters, and also partners with other organizations to effect stream restoration.
10. The Tennessee Wildlife Federation has also created and is implementing a campaign to develop river-specific recreational use management plans for all of Tennessee's rivers. Although not completed, the Tennessee Wildlife Federation intends to ensure appropriate state agencies develop one such management plan for the Duck River.
11. The Tennessee Wildlife Federation has worked to protect the health and biodiversity of the Duck River for years. The Federation was actively involved in:
 - a. Opposing the Tennessee Valley Authority's consideration of building the Columbia Dam on the Duck River several decades ago.
 - b. Advocated to protect Lick Creek, one of the largest tributary of the Duck River, by opposing efforts to locate a regional wastewater plan in Hickman County, Tennessee that would discharge into Lick Creek.
 - c. Advocated to TDEC to protect the biodiversity of the Duck River against the threat of pollution discharges from a large sand and gravel mine in Humphreys County, Tennessee.

- d. Participated in several meetings convened by TDEC as part of the Duck River Pilot Project, and it was an intervening party in an appeal by the Marshall County Board of Public Utilities regarding a Duck River water withdrawal permit. The Federation intervened in that proceeding to support the State's use of reasonable flow restrictions as a management tool for protecting the health of the river. The Tennessee Wildlife Federation has devoted staff time and organizational resources to these activities in furtherance of its state water work.
12. The Tennessee Wildlife Federation submitted written comments on all seven of the proposed ARAPs TDEC issued in the fall of 2023 to the water utilities that withdraw water from the Duck River. The Tennessee Wildlife Federation submitted a written comment on the draft Aquatic Resource Alteration Permit NRS23.228 on November 16, 2023. The Division likewise submitted a written comment on draft Aquatic Resource Alteration Permits NRS22.201, NRS21.274, NRS22.320, NRS19.148, NRS22.288, and NRS23.098.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 18th day April, 2024.



Michael Butler