

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 04, 2014

**STARLINK LOGISTICS INC. V. ACC, LLC, ET AL.**

**Appeal from the Chancery Court for Davidson County  
No. 121435II Carol L. McCoy, Chancellor**

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**No. M2014-00362-COA-R3-CV – March 11, 2015**

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This appeal stems from an environmental dispute involving the Appellant, StarLink Logistics Inc. (“StarLink”), the Tennessee Department of Environment and Conservation (“TDEC”), and Appellee ACC, LLC (“ACC”). StarLink appeals the trial court’s affirmance of an order of the Tennessee Solid Waste Disposal Control Board (“Board”), which had adopted a consent order entered into between TDEC and ACC. We affirm in part, and remand the case to the trial court for further remand to the Board for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal; Judgment of the Chancery Court Affirmed in Part; and Remanded**

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD P.J., W.S. and KENNY ARMSTRONG, J. joined.

William L. Campbell, Jr., Nashville, Tennessee, William T. Robinson, III, Christopher S. Habel, and Stephen N. Haughey, Cincinnati, Ohio for the appellant, StarLink Logistics Inc.

Sharon O. Jacobs, C. David Briley, Nashville, Tennessee, Thomas W. Hardin, Patrick M. Carter, and Kori A. Bledsoe, Columbia, Tennessee for the appellee ACC, LLC.

Elizabeth P. McCarter, Nashville, Tennessee for the appellee, Tennessee Solid Waste Disposal Control Board.

## OPINION

### I. Background and Procedural History

Although the history leading up to the present appeal is both detailed and complicated, the basic facts forming the controversy are not in dispute.<sup>1</sup> In 1981, the State of Tennessee issued ACC a permit to construct a landfill south of the City of Mt. Pleasant in Maury County, Tennessee. ACC disposed wastes at the site from 1981 until September 1993. The landfill, which is a Class II solid waste disposal facility<sup>2</sup>, encompasses approximately 14 acres of land on a larger parcel of 48.02 acres which is owned by ACC. During its period of active use as a landfill, the site was used for the disposal of aluminum recycling wastes from a smelting plant located in Mt. Pleasant. These wastes consisted almost entirely of “salt cake” slag<sup>3</sup> and bag-house dusts from the nearby plant’s smelting operations. After ACC ceased using the landfill for the disposal of wastes, it performed final closure of the facility in accordance with the Closure/Post-closure Care and Corrective Action Plans that were approved by the State. TDEC certified completion of the closure in 1996.

Within a few years after the landfill had begun operations, both ACC and TDEC recognized that unacceptable levels of chlorides and ammonia were leaching out of the wastes and into the underlying groundwater and down-gradient surface water that drained into nearby Sugar Creek and Arrow Lake.<sup>4</sup> Various efforts were taken by TDEC and ACC to investigate and correct the leaching, but the problem was never resolved. It continued after final closure of the facility and unfortunately persists to this day.

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<sup>1</sup> We note that much of the history in this case concerns the relationship between TDEC and ACC. According to the administrative record which we have reviewed in this case, we note that a witness on behalf of StarLink testified that StarLink “ha[s] no issues” and “neither agree[s] or disagree[s] with what’s been ongoing and recorded . . . between ACC and TDEC over the last 30 years[.]”

<sup>2</sup> The specific requirements for a Class II facility are found at Tenn. Comp. R. & Regs. 1200-01-07-.04.

<sup>3</sup> Salt cake contains high concentrations of sodium chloride and potassium chloride salts.

<sup>4</sup> These bodies of water are separated from ACC’s land by Arrow Mines Road. Whereas ACC’s property is located immediately east of the road, the Arrow Lake impoundment of Sugar Creek lies immediately to the west. As “waters of the state,” Sugar Creek is protected from pollution by both the Water Quality Control Act and the Tennessee Solid Waste Disposal Act. *See, e.g.*, Tenn. Code Ann. § 69-3-114(a) (2012); Tenn. Code Ann. § 68-211-104 (2013). The Arrow Lake impoundment of Sugar Creek is located on the property of the Appellant, StarLink. As represented in StarLink’s brief and in statements before the Board at the contested case hearing, Arrow Lake was used in the past by residents of the Mt. Pleasant area.

In light of the continued leaching of contaminants at the site, TDEC contacted ACC in the summer of 2003 and requested that ACC submit a corrective action plan pursuant to Tenn. Comp. R. & Regs. 1200-01-07-.04(7)7 and 8. ACC submitted a plan meeting the regulatory requirements in December 2003. In its plan, ACC presented an assessment of the feasibility of the options available for the mitigation of the release of leachate and ultimately recommended that a “Wetlands Treatment Alternative” be pursued in order to enhance attenuation of releases and impacts. After a public hearing on the matter, TDEC allowed ACC to pursue the wetlands treatment pending the acquisition of an Aquatic Resource Alteration Permit.

On April 2, 2004, ACC submitted a remedial plan for a “Constructed Wetland System” down-gradient of the landfill that it asserted would not only retain and buffer leachate, but also improve the habitat and water quality of Sugar Creek and Arrow Lake. The wetland system was proposed to offer several benefits to the environment, including the reduction of surges of salt concentration downstream and the improvement of water quality by the reduction of erosion and breakdown of nutrients and organic matter. On May 4, 2004, TDEC’s Division of Water Pollution Control issued public notice of its intent to issue an Aquatic Resource Alteration Permit to allow the proposed wetland restoration. TDEC’s Division of Solid Waste Management approved the plan on June 2, 2004. Although the wetland system was subsequently built, site and drought conditions prevented the full development of the communities of salt-tolerant vegetation that were planned.

A compliance review meeting took place between TDEC and ACC in April 2008. Shortly thereafter, in a letter dated June 12, 2008, TDEC requested that ACC submit modifications to the original corrective action plan in light of ACC’s failure to satisfy the previous remedial objectives. ACC submitted the required modified corrective action plan to TDEC approximately two months later. TDEC approved the modified plan for implementation on April 19, 2010.

In February 2011, three inspections conducted by TDEC personnel revealed that leachate containing high levels of chlorides and ammonia continued to flow into Sugar Creek. As a result of this discovery, TDEC and ACC entered into a consent order on June 6, 2011, which set forth ACC’s obligations in addressing the continued contamination. In addition to describing the historical problems leachate contamination had posed at the ACC landfill site, the order found ACC to be in numerous violations of the Water Quality Control Act and the Tennessee Solid Waste Disposal Act. In particular, ACC was cited for “causing or allowing unauthorized discharges to waters of the state,” in addition to “allowing the release of solid waste or solid waste constituents to the waters of the State.” The order mandated that ACC develop plans to reduce leachate contamination on the site but stated that the plans which were developed and approved could be modified in the future upon the written approval of the TDEC Commissioner.

In addition, the order stated that the Commissioner could extend compliance dates for the plans developed “for good cause shown[.]” Although the order assessed a civil penalty against ACC in the amount of \$318,300.00, ACC was provided a means by which it could receive a credit in the amount of \$90,000.00 against the penalty if it proposed certain “Supplemental Environmental Projects.” The remaining \$228,300.00 penalty was due and payable only if ACC failed to submit and implement the plans called for by the order. Moreover, the order provided that the Commissioner could waive ACC’s noncompliance for demonstrated good cause. Shortly after this order was entered into, it was filed for entry as a judgment by consent in the Davidson County Chancery Court pursuant to Tennessee Code Annotated § 68-212-114(e), Tennessee Code Annotated § 68-212-215(f), and Tennessee Code Annotated § 69-3-115(e). StarLink, whose property adjoins the landfill, subsequently intervened in the case.

When TDEC, ACC, and StarLink were unable to resolve the issues among them, the Chancery Court remanded the matter for further proceedings before the Board as a contested case pursuant to the Tennessee Uniform Administrative Procedures Act. On May 17, 2012, TDEC gave written notice to StarLink that a hearing before the Board was set for August 7, 2012. Specific notice was given that ACC and TDEC would be asking the Board to adopt an Amended and Restated Consent Order which would supersede the June 2011 consent order. Although the Amended and Restated Consent Order (“Consent Order”) found that ACC committed the same violations of the Water Quality Control Act and the Tennessee Solid Waste Disposal Act that were cited in the original consent order, the Commissioner’s orders and assessments differed. In outlining a detailed remediation plan, the Commissioner ordered that ACC take several steps to improve conditions at the landfill site. In relevant part, ACC was ordered as follows:

A. [ACC] shall take the following actions to prevent the unauthorized discharge of leachate contamination in water flowing from the Site into the Arrow Lake impoundment of Sugar Creek:

1. Within 120 days of the effective date of this Amended and Restated Consent Order, or as is otherwise agreed to by the parties, [ACC] shall construct a berm upgradient of the site to divert uncontaminated storm water away from the Landfill prior to the commencement of any corrective action activities on the Landfill.

2. As part of [a] Corrective Action Plan . . . [ACC] shall submit to the Commissioner for his review and comment or approval a modified Discharge Reduction Plan . . . that incorporates TDEC’s comments and revisions to [ACC’s]

draft DRP that was submitted to TDEC in September 2011. The modified DRP shall significantly reduce, particularly during periods of low area surface water flow, the loading of contaminants that are currently discharging from the Site via surface waters. The modified DRP shall include a schedule for implementation.

3. The DRP shall contain a plan to divert surface water away from the landfill area and the current wetland system. The DRP shall eliminate, to the extent practicable, the potential for surface water to migrate from the surface into the landfill and eliminate the potential for surface water to enter the excavated area of the landfill once corrective action begins.

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B. [ACC] shall remove from the current landfill all solid waste, to the extent practicable, that has the potential for future contact with ground or surface water. All waste removed will be relocated to a new landfill cell constructed on the Site or to a permitted off-site landfill.

1. Prior to the Commissioner’s approval of the Corrective Action Plan . . . but after commencement of waste removal activities, [ACC] shall capture ground water entering the excavated area, analyze the ground water to determine its chemical characteristics, and then either (a) redirect the collected water back into the landfill or (b) discharge the collected ground water directly into Arrow Lake if the water is consistent with background concentrations as approved by TDEC[.]

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2. After the Corrective Action Plan . . . has been approved by the Commissioner, the list of constituents, their concentrations, and frequency of analysis shall follow the sampling plan contained in the approved Water Monitoring Plan as contained in the approved CAP[.]

3. As waste is removed from the Site, [ACC] shall capture ground water that is upgradient of the remaining waste and

handle such ground water as described in the approved DRP, or as is otherwise required by the CAP. Treatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed.

- C. Within one hundred and fifty (150) days of the effective date of this Amended and Restated Consent Order, [ACC] . . . shall submit to the Department a Corrective Action Plan . . . which provides for the methods and schedule for removal of solid wastes that have been disposed of in the ACC Landfill which have the potential for future contact with surface or groundwater.

Under the Corrective Action Plan called for in the Consent Order, which is the plan at the center of this appeal, ACC is required to include an operation plan concerning the amount of waste it proposes to remove daily and a schedule for removal and relocation of all impacted waste “which has the potential for future contact with surface or ground water within four (4) years or less[.]” In addition, ACC is required to develop and implement a monitoring and sampling plan for the leachate discharging from the landfill and for any groundwater pumped from the worksite. The Consent Order further provides that the Commissioner can extend the compliance dates stated therein. Although the order also assesses a civil penalty in the amount of \$400,000.00, this penalty only comes due and payable in \$100,000.00 increments if ACC fails to meet yearly milestones relative to the Corrective Action Plan’s deadlines for waste removal. Moreover, despite stating that the Commissioner does not implicitly or expressly waive any provisions of the Water Quality Control Act or the Tennessee Solid Waste Disposal Act, the Consent Order notes that compliance with its provisions can be considered as a mitigating factor in determining the need for future enforcement actions.

On July 30, 2012, StarLink formally moved the Board to intervene in the contested case hearing. The Board granted its motion on August 2, 2012, and the hearing before the Board took place as noticed on August 7, 2012. The Board entered an order approving the Consent Order on August 9, 2012.<sup>5</sup> On October 5, 2012, StarLink appealed by filing a Petition for Judicial Review in the Chancery Court for Davidson County.<sup>6</sup> Oral argument on the Petition was held on May 23, 2013, and on January 29, 2014, the Chancery Court entered an order affirming the Board’s decision to approve the Consent Order. StarLink then commenced this timely appeal.

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<sup>5</sup> We note that two provisions from the originally proposed Consent Order were struck by TDEC and ACC at the beginning of the administrative hearing before the Board. The order actually approved by the Board reflects this fact.

<sup>6</sup> An amendment to its Petition for Judicial Review was filed on October 9, 2012.

## II. Issues on Appeal

On appeal, StarLink asserts that the Chancery Court erred by upholding the Board's adoption of the Consent Order and raises four issues for our review. Having reviewed the parties' briefs and the record transmitted to us, we find that there are two issues for this Court to address at this juncture. As we perceive it, the essence of the issues on appeal are twofold: 1) whether the Board's adoption of the Consent Order was in error where the Board failed to fully consider a feasible and potentially economically viable plan that would contain the leachate contamination from the landfill site from continued discharge into Sugar Creek and Arrow Lake;<sup>7</sup> and 2) whether StarLink's assertion that the Consent Order is deficient in that it fails to assess significant monetary penalties against ACC despite over thirty years of knowing environmental violations.

## III. Standard of Review

Judicial review of an agency's action follows the statutorily defined standard contained in Tennessee Code Annotated § 4-5-322(h) rather than the broad standard of review generally applicable to civil appeals. *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988) (citations omitted). The trial court may reverse or modify the decision of the agency only if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

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<sup>7</sup> Although StarLink primarily phrases the issue on appeal as one relating to the permit requirements outlined in Tennessee Code Annotated § 69-3-108, the substantive underlying question raised on appeal is whether the Board erred in adopting a remediation scheme that sanctions ACC's pollution indefinitely where the Board failed to fully consider a plan that could contain the leachate contamination. Tennessee Rule of Appellate Procedure 13(b) "expressly grants the appellate courts authority to consider issues not brought up for review by any party." *Panzer v. King*, 743 S.W.2d 612, 616 (Tenn. 1988), *abrogated on other grounds by Lacy v. Cox*, 152 S.W.3d 480 (Tenn. 2004)). In this case, to the extent that we address an issue not specifically raised by the parties, we invoke our authority under Rule 13(b) in order "to prevent injury to the interests of the public," one of the reasons expressly stated by the Rule. Tenn. R. App. P. 13(b).

- (5) (5) Unsupported by evidence that is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(h)(1)-(5) (2011). The trial court may not substitute its judgment concerning the weight of the evidence for that of the agency, and the same limitations apply to the appellate court. *Tenn. Env'tl. Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 402 (Tenn. Ct. App. 2007) (citations omitted). “The scope of review in this Court is the same as in the trial court[.]” *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison County Gen. Hosp. Dist.*, 129 S.W.3d 57, 63 (Tenn. Ct. App. 2003). Therefore, in this Court’s review of an administrative agency’s decision, we are tasked with determining whether the trial court properly applied the standard of review found at Tennessee Code Annotated § 4-5-322(h). *Roy v. Tenn. Bd. of Med. Exam’rs*, 310 S.W.3d 360, 364 (Tenn. Ct. App. 2009) (citation omitted).

Substantial and material evidence “requires something less than a preponderance of the evidence . . . but more than a scintilla or glimmer.” *Wayne County*, 756 S.W.2d at 280 (citation omitted). Although appellate courts “generally defer” to agency decisions on highly technical matters, “the court’s deference to an agency’s expertise is no excuse for judicial inertia.” *Id.* The substantial and material evidence standard “requires a searching and careful inquiry that subjects the agency’s decision to close scrutiny.” *Id.* (citations omitted).

Agency decisions may be considered “arbitrary and capricious if caused by a clear error in judgment.” *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm’n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993) (citations omitted). “An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment . . . or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.” *Id.* at 111 (citations omitted).

#### **IV. Discussion**

As observed at the outset of this Opinion, the dispute in this case is not predicated on a factual controversy among the parties. There is no question that the landfill operated by ACC is leaking contaminants and polluting the land and waters of Tennessee. Indeed, the consent order approved by the Board specifically acknowledges that ACC has violated Tennessee Code Annotated § 69-3-108(a) and (b), Tennessee Code Annotated § 69-3-114(a) and (b), and Tennessee Code Annotated § 68-211-104(1),(3), and (4).<sup>8</sup>

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<sup>8</sup> Tennessee Code Annotated § 69-3-108(a) (2012) provides as follows:

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is

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regulated under a general permit as described in subsection (1), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

Under Tennessee Code Annotated § 69-3-108(b) (2012):

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:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;

\* \* \* \*

(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[.]

Under Tennessee Code Annotated § 69-3-114(a) (2012):

It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103, unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

Under Tennessee Code Annotated § 69-3-114(b) (2012):

[I]t is unlawful for any person to act in a manner or degree that is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to this part; or to fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

Under Tennessee Code Annotated § 68-211-104 (2013), it is unlawful to:

(1) Place or deposit any solid waste into the waters of the state except in a manner approved by the department or the Tennessee board of water, quality, oil and gas;

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(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 or in such a manner as to create a public nuisance; or

Further, there is no question that the leachate contamination that caused these violations persists today. This dispute focuses not on whether an environmental violation exists, but on the appropriate remediation effort and environmental law enforcement. Simply put, the question in this case is whether the Board erred in adopting the remediation plan agreed to by TDEC and ACC in the Consent Order where that plan fails to address the flow of leachate from the landfill site into Arrow Lake and Sugar Creek.

We note that, in its brief, StarLink specifically challenges the validity of the Consent Order due to the fact that the Consent Order does not mandate ACC to obtain a permit under Tennessee Code Annotated § 69-3-108 to bring its discharge of pollutants into compliance with the Tennessee Water Quality Control Act and the federal Clean Water Act. We further note that ACC's discharge of pollutants without a permit is also at issue in a stayed federal action brought by StarLink against ACC in the United States District Court for the Middle District of Tennessee. Given our disposition herein, which remands the case to the Board for further proceedings, we find that this issue and all other issues raised by StarLink which are not directly addressed herein, are pretermitted as advisory. As will be further explained in this Opinion, the Board acted capriciously in the manner that it failed to give any significant consideration to an option that would divert the flow of pollutants from discharge into waters of the state. Because this diversion option could potentially eliminate ACC's unlawful discharges if it is adopted and implemented on remand, the issue of a discharge permit could ultimately be mooted.

#### *Sufficiency of the Assessed Civil Penalties*

Before addressing the Board's failure to fully consider this diversion option, we first consider StarLink's assertion that the Consent Order is deficient because it fails to impose civil penalties against ACC for environmental violations that have been occurring for over the past thirty years. In addition to complaining about the State's failure to impose significant penalties for past violations, StarLink notes that the \$400,000.00 that can be imposed as civil penalties is only due and payable under the Consent Order if ACC fails to meet future deadlines relative to the ordered remediation scheme. On appeal, our review of an agency's sanctions is subject to "very limited judicial review." *Armstrong v. Metro. Nashville Hosp. Auth.*, No. M2004-01361-COA-R3-CV, 2006 WL 1547863, at \*3 (Tenn. Ct. App. June 6, 2006) (citation omitted). The appropriateness of a sanction is peculiarly within the discretion of the agency, *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996), and we will only review whether the sanction is "unwarranted in law" or "without justification in fact." *Rawdon v. Tenn. Bd. of Med. Exam'rs*, No. M2012-02261-COA-R3-CV, 2013 WL 5874779, at \*2 (Tenn. Ct.

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(4) Transport, process or dispose of solid waste in violation of this chapter, the rules and regulations established under this chapter or in violation of the orders of the commissioner or board.

App. Oct. 30, 2013). In its brief on appeal, the State generally argues that the emphasis in the Consent Order is on compliance rather than retribution; as it puts it, the focus is on “expending resources for remediation, rather than on filling the Department’s coffers.” We agree with this characterization of the Consent Order, and we find that the Board did not abuse its discretion in adopting an order that assesses penalties against ACC with such remediation efforts in mind. Although the rampant pollution that the landfill site has generated over the years certainly warrants stringent state enforcement, the State’s focus on preserving ACC’s resources for remediation of the site is a reasonable one. The Board was not without justification when it made the civil penalties provided for in the Consent Order contingent upon ACC’s failure to comply with the ordered remediation activities. The sufficiency of the remediation efforts actually required by the Consent Order, however, is another question.

### *Sufficiency of the Ordered Remediation Efforts*

As we have already noted, the Consent Order broadly addresses the remediation efforts ACC is required to fulfill at the landfill site. Although its provisions are both varied and detailed, its terms obligate ACC to perform two primary tasks. First, ACC is required to take steps to divert water upgradient of the site so that the water does not enter the waste-ridden landfill area. Second, ACC is required to excavate the landfill and remove all solid waste, “to the extent practicable,” that has the potential for future contact with surface or groundwater. The order requires the removed waste to be relocated to a new landfill cell constructed on site or to a permitted off-site landfill. This waste removal process is contemplated to occur over a four year period.

Noticeably absent from the Consent Order is any mandate that ACC treat or otherwise divert the leachate before it discharges into Sugar Creek. Although ACC is required to develop and implement a water monitoring plan, the adopted consent order expressly states that “[t]reatment, transport or disposal of water is not required pursuant to this Order until the TDEC approved CAP has been completed.” On appeal, StarLink generally contends that the absence of such a requirement invalidates the appropriateness of the Consent Order in light of our state’s environmental laws and policies.

As is evident from the administrative record, the Board’s decision to adopt the Consent Order was grounded in a belief that ACC’s funds would be applied most efficiently in removing waste from the landfill site. During deliberations on the date of the contested case hearing, one Board member commented, “[I]t doesn’t make sense to spend a lot of money on the symptoms and divert that money away from addressing the root cause. It’s a waste of funds, in my opinion.” This view was echoed by several other Board members, including one who stated as follows:

If you try to just treat the system and not go ahead of the stream, then if you just try to treat it, if you do that in a

manner that you bankrupt the company, that does neither party in this matter any good if you bankrupt them. They've got to remediate that site, if they ever get started. Then, hopefully, they'll have something to measure to see if it's getting better or worse.

These comments were in response to testimony from ACC's wastewater engineering consultant, George Garden ("Mr. Garden"). When before the Board, Mr. Garden testified that treating the discharged leachate, although technically possible, would be expensive and of little impact:

We costed out 30,000 gallons of the most concentrated waste that we could collect. And a plant to do that would probably cost – and I say a plant to do that, using the most efficient technologies that we could come up with, going all the way to salts, taking that salt and dumping it in somebody else's stream, was probably \$5 million. And that is a mall [sic] percentage of the flow when you have a good bit of wet weather flow from groundwater coming out as surface water from the landfill. So we're talking about, at the best of times, only removing about 45 percent of the salt leaving the site. That's the best day. Any other day in the year it's probably going to be much less than 45 percent and, in fact, overall it's probably less than 10 percent in a year.

Mr. Garden estimated that in addition to the five million dollar cost needed to build the required plant, the operational costs would be nearly \$700,000.00 each year.

Although concerns of economic efficiency may have been the impetus for the Board's action in adopting the Consent Order, this Court finds the Board's decision to be arbitrary and capricious inasmuch it failed to fully consider the range of remedial options which were available and discussed at the hearing before the Board. Having reviewed the testimony before the Board, we note that sufficient evidence of a feasible complement to the Board-approved plan exists. This complement, which involves diversion of leachate contamination before it enters Sugar Creek rather than direct treatment of the leachate, would help preserve the integrity of our state's waters.

That this diversion option was discussed before the Board cannot be disputed. During the contested case hearing, StarLink's counsel specifically questioned a representative of ACC, Tom Grosko ("Mr. Grosko"), on why remediation efforts had

focused on the removal of waste from the landfill site instead of the continued discharge of leachate into Sugar Creek:

Q: And so what I'm asking you now is, why aren't we focusing on diverting the water below?

A: Around what? If it's already been through the landfill, I don't understand.

Q: There is polluted water coming out the other side.

A: Yes, sir.

Q: Would there be a way to divert the water coming out the other side?

A: To?

Q: I guess, has there ever been a proposal to pipe the water to other property that you own?

A: I believe so, yes.

Q: And did [StarLink] not propose paying for that pipe so that the water could be diverted to other land that you own?

A: I've heard that, yes.

Q: And so that proposal was rejected, because you don't want that polluted water any more than [StarLink] does, do you?

A: I personally didn't reject it, no.

Immediately following the above exchange, ACC's counsel questioned Mr. Grosko on the proposal that contaminated leachate be diverted onto ACC's lands instead of being allowed to discharge into the waters:

Q: Were you a party to any of these so-called offers of piped water? Was that during your tenure with the company, or is that something that you have heard of or about?

A: I believe it was last year.

When the Board deliberated the case at the conclusion of the parties' proof, one Board member questioned why StarLink's proposed offer of diversion should not be implemented:

Starlink indicated that they would pay for catching the water after it runs through the landfill and apply it to another location on the site. All right. The State and ACC have proposed berms to slow down the water running into the landfill and excavating the landfill. Why don't we do a combination of the three, if they're still willing to do that, if

that's possible. And if they want to be a party to the consent order, then everybody is participating in it. We're catching as much water as we can catch before it gets into the landfill. We're excavating the landfill, and then we're catching whatever water goes through it and applies it to another location on the 48 acres at no cost to ACC, as I heard it. To me, I see that as a much better resolution to the problem than just part of trying to resolve part of the problem.

Although the Board members briefly discussed the merits of this proposed diversion of contaminated leachate, they were ultimately dismissive of the option as a complement to the remediation scheme outlined in the Consent Order. The Board's cursory discussion included an unresolved query into the extent to which the leachate could be captured before entering the waters and concerns regarding a possible delay in order to make StarLink a party to the consent order.

We find that the Board's disregard of the proposed complement to the remediation scheme was in error. First, notwithstanding some testimony that the direction of the flow was unknown with respect to some of the groundwater that eventually discharged, other testimony indicated several identifiable points of discharge of the leachate. For example, as Mr. Garden stated:

Well, as you all have pointed out, there isn't just one point. Most of the water right now that is contaminated goes over the weir that's at that second pond. The vast mass of contaminant goes over that way. There's also a little bit that goes around it that goes out through the same culvert underneath Arrow Lake Road[.]

To the extent the Board chose not to require diversion of the leachate on the basis that some of the contaminated water might escape capture, such reasoning is arbitrary and capricious. If feasible to divert the water, it would be unreasonable in light of our environmental statutes to neglect to capture and redirect the contaminated water that is discernible.

Second, we find that it was arbitrary and capricious for the Board to dismiss the diversion option simply on the basis of possible delay. We note that when some of the Board members expressed uncertainty as to whether StarLink was still willing to pay for the costs of diverting the water from points of discharge to elsewhere on ACC's property, the Board neglected to explore the matter further or seek additional clarification. Rather, a Board member suggested that involving StarLink would only delay remediation of the site, and soon thereafter, the Board voted to approve the Consent Order. Certainly, time is of the essence, and we commend the Board for its

concern that the landfill site be remediated as quickly as possible. Respectfully, however, we find that the Board’s decision was arbitrary and capricious inasmuch it ignored the viability of a plan that proposed diverting contaminants before discharge. Assuming StarLink is still willing to pay for the pipe(s) necessary to divert the water, it would be unreasonable to not implement the diversion plan, under which leachate would be contained on ACC’s property rather than continually polluting the waters of the state. ACC has sufficient remaining acreage outside of the landfill that could host a retention pond or other storage for the leachate, and this should not be ignored at the expense of continued pollution to waters of the state. The Water Quality Control Act provides that the people of Tennessee “have a right to unpolluted waters” and obligates the government “to take all prudent steps to secure, protect, and preserve this right.” Tenn. Code Ann. § 69-3-102 (2012). The statute further declares that its purpose is “to abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.” *Id.* Moreover, under the statement of policy included at the opening of the Tennessee Solid Waste Disposal Act, the State is charged to “protect the public health, safety and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, [and] enhance the beauty and quality of our environment[.]” Tenn. Code Ann. § 68-211-102 (2013). These considerations simply cannot be ignored, and any delay occasioned by gauging StarLink’s willingness to pay for the costs of diversion would certainly be justified by future abatement of leachate discharges.<sup>9</sup>

Regardless of whether StarLink is still willing to pay for the costs necessary to divert the leachate, however, the diversion plan should be further explored in light of the statutory mandates. As outlined in the policy statements issued as part of the Water Quality Control Act and the Tennessee Solid Waste Disposal Act, protecting our environment and state waters remains an important goal of the State. *See* Tenn. Code Ann. § 69-3-102 (2012); Tenn. Code Ann. § 68-211-102 (2013). It would be unreasonable to not consider the diversion plan further given the threat that the continued discharge of contaminants poses to the waters of the state. We note that when the Board decided to adopt the Consent Order, the proof before the Board was that *treatment* of the water would be expensive and costly. There simply was no proof that ACC could not economically carry on waste removal activity in addition to *diverting* contaminated water before its discharge into Sugar Creek and Arrow Lake. In fact, the only evidence before

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<sup>9</sup> Moreover, although this Opinion remands this case to the trial court for further remand to the Board so that the Board can fully consider the viability of a diversion plan, we see no reason why the rest of the remediation plan cannot be initiated in the meantime.

the Board relative to the cost of the proposed water diversion was that StarLink had offered to pay for the pipe required to effectuate the diversion.

To adopt a remediation plan that permits continued contamination of state waters despite being aware of a feasible and potentially economically viable remedial complement to the adopted order was arbitrary and capricious in light of the environmental policies of this State. The Board was aware of a potential complement to the Consent Order that would help directly combat the discharge of pollutants into the waters of the state, and yet the record shows that the Board did not give it any significant consideration. The Board's error lies in this lack of consideration. "In its broadest sense, the [arbitrary and capricious] standard requires the court to determine whether the administrative agency has made a clear error in judgment." *Mobilecomm of Tenn., Inc. v. Tenn. Pub. Serv. Comm'n*, No. 01-A-01-9303-BC-00138, 1994 WL 69590, at \*3 (Tenn. Ct. App. Mar. 4, 1994). Here, we hold that it was a clear error in judgment for the Board to dismiss the diversion option without fully considering its viability. The proof before the Board established that some points of leachate discharge were discernible, and as such, the practical feasibility of implementing a diversion plan should not be in question.<sup>10</sup> Moreover, the only evidence with regard to the cost of the diversion plan was that StarLink had once been willing to pay for it. Under these circumstances and in light of the environmental policies of this State, it simply was arbitrary and capricious for the Board to adopt the Consent Order without conducting further inquiry into a water diversion plan such as that initially proposed by StarLink. Although we applaud the Board's actions requiring ACC to conduct extensive waste removal activities, we must emphasize again that the adopted remediation plan effectively sanctions what are ongoing pollution violations. That this ongoing pollution is a significant concern cannot be stressed enough.

In the midst of the Board's discussion, we note that the administrative law judge presiding at the hearing specifically noted that the Board could reconvene on the record to explore the diversion option further. Rather than conduct further inquiry into a plan which would help decrease the ongoing pollution of state waters, however, the Board proceeded to adopt the Consent Order without amendment. We find this action of the Board to be arbitrary and capricious given the information it had before it; it is not reasonable to adopt a plan permitting ongoing pollution without further inquiry<sup>11</sup> when there is evidence that a feasible and potentially economically viable complement to the plan exists that would help

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<sup>10</sup> Again, the fact that some groundwater might escape capture is not a reasonable reason to take no efforts to divert contaminated water that is discernible.

<sup>11</sup> Although the Board may have had concerns that StarLink was no longer willing to pay for the diversion plan, it should have asked for clarification on this matter in light of the continued threat of pollution to Sugar Creek and Arrow Lake. StarLink's counsel was present at the hearing, and the Board should have reconvened on the record to conduct further investigation into the issue.

curb the pollution. Put another way, in the context of its enforcement of state environmental laws, it was arbitrary and capricious for the Board to allow ACC to continue to effectively violate those laws, while only giving cursory consideration to a feasible plan that would counteract the very pollution that compelled state enforcement in the first place. We accordingly remand this matter to the trial court for further remand to the Board for further proceedings consistent with this Opinion, which may include, but are not limited to, proof on (a) Starlink's willingness to pay for the costs of diverting contaminated leachate that would otherwise discharge into the Sugar Creek and Arrow Lake, and if necessary, (b) the estimated costs of implementing a plan which diverts contaminated water from points of discharge to another location on ACC's property and (c) ACC's economic ability to implement such a diversion plan while still conducting the waste removal activities outlined in the Consent Order.

## **V. Conclusion**

Although we discern no error in the Board's approval of the monetary civil penalties provided for in the Consent Order, we find that the Board erred in the manner it failed to give full consideration to a diversion option that would counteract the pollution discharging from the landfill site. This matter is affirmed in part and remanded to the trial court for further remand to the Board for further proceedings consistent with this Opinion. Costs on appeal are assessed against the Appellees, ACC, LLC, and the Tennessee Solid Waste Disposal Control Board.

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**ARNOLD B. GOLDIN, JUDGE**