

Before The Mississippi Environmental Quality Permit Board

In Re: Hunter's Construction, Huntington Park Estates, Lauderdale County
Reconsideration of NPDES Permit No. MS0049867

Findings Of Fact And Conclusions Of Law

Pursuant to Miss. Code Ann. § 49-17-29(b), the Mississippi Environmental Quality Permit Board ("Permit Board") makes its findings of fact and conclusions of law regarding the reissuance of National Pollutant Discharge Elimination System ("NPDES") Permit No. MS0049867 to Hunter's Construction, Huntington Park Estates, Lauderdale County, Mississippi. These specific findings and conclusions support the decision of the Permit Board, after reconsideration of this matter, to reissue Permit No. MS0049867 with the original March 14, 2000 permit conditions. The Permit Board finds and concludes as follows:

I. Procedural History

1. Dr. Eugene Hunter of Hunter's Construction or Huntington Park Estates ("Dr. Hunter") is the owner of a subdivision located in Meridian, Lauderdale County, Mississippi, known as Huntington Park Estates. On June 14, 1994, the Permit Board first issued an NPDES permit to Huntington Park Estates. Commercial wastewater systems such as the one Dr. Hunter constructed on his property are required to obtain an NPDES permit under the state water pollution control regulations adopted by the Mississippi Commission on Environmental Quality ("Commission"), WPC-1. A permit obtained from the Permit Board under WPC-1 satisfies both state and federal permitting requirements, since the United States Environmental Protection Agency has delegated its federal Clean Water Act permitting authority to the State.

2. The Hunter subdivision, as permitted, includes a wastewater treatment system designed to handle sewage from 36 homes at a maximum rate of 15,000 gallons per day. To date, only 4 homes have been built in this subdivision. The system is a low pressure sewerage collection system and a plant/rock filter treatment facility. The wastewater collected is treated on site and then discharged into an intermittent stream or drainage way that also drains the rainwater from the area. In the MDEQ report of a site inspection performed on February 3, 1994, the receiving stream is described as having a depth of 4 to 6 inches and a width of 5 to 6 feet. The effluent limits included in the NPDES permit issued in 1994 were developed to protect water quality in this stream according to the state's water quality standards adopted as Commission Regulation WPC-2.

3. The Permit Board issued Dr. Hunter's original NPDES permit for a 5-year period. When the NPDES permit came up for reissuance, MDEQ staff recommended reissuance because Hunter had complied with all permit limitations and conditions, and there had been no changes in state or federal law or regulations concerning the appropriateness of the discharge location. An adjacent landowner, Ms. Jean Ledbetter ("Ms. Ledbetter"), objected to the reissuance of the permit and requested a public hearing. As Ms. Ledbetter was the only objector, the Permit Board determined that a public hearing was not necessary. MDEQ did respond to the objection received by Ledbetter, and visited the site on at least two additional occasions at the request of Ledbetter. MDEQ Staff originally intended to present the matter before the Permit Board at the October 26, 1999 Permit Board meeting, but the matter was continued several times in order to allow the parties additional time to reach a resolution. Since no agreement resulted between the parties, MDEQ Staff went forward in recommending reissuance of the permit at the March 14, 2000 Board meeting. The Permit Board voted to reissue the permit on March 14, 2000. At that time, Ms. Ledbetter requested a formal evidentiary hearing before the Permit Board pursuant to Miss. Code Ann. § 49-17-29 arguing, among other issues, that the receiving stream, which flows across her property, did not constitute waters of the state as defined under state and federal law. The Permit Board conducted the evidentiary hearing on August 22, 2000. At the conclusion of the evidentiary hearing, the Permit Board rejected MDEQ Staff's recommendation, reversed its preliminary decision, and reissued the permit in a highly modified form that required Dr. Hunter to convert the treatment system into a no-discharge system within 9 months and to allow no more than 4 homes to use the treatment system. *See Findings of Fact and Conclusions of Law* (November 1, 2000).

4. Dr. Hunter then appealed the final Permit Board decision to the Chancery Court of Lauderdale County. While on appeal in Lauderdale County, the parties to that case, Dr. Hunter and the Permit Board¹, agreed to remand the case to the Permit Board for further consideration. The Chancellor in Lauderdale County signed an Order of Remand on May 17, 2002. *See Order of Remand, Cause No.: 00-929-S* (May 17, 2002); *Minutes of the Permit Board* (May 14, 2002).

5. The Permit Board then requested that all interested parties submit briefs to the Permit Board to address the following narrow issue:

Whether the discharge point authorized under the Hunter NPDES Permit under consideration for renewal is into waters of the state, acceptable for a point source discharge?

¹ At the request of MDEQ and the Permit Board, Special Assistant Attorney General Roger Googe of the Mississippi Attorney General's Office represented the Permit Board in the appeal of this matter. This representation separate from representation by the MDEQ Legal Division was necessary because the legal opinions in this matter voiced by MDEQ were, and are, diametrically opposed to the legal conclusions reached by the Permit Board on August 22, 2000. Thus, MDEQ's Legal Division did not participate in the representation of the Permit Board before the Chancery Court.

During this reconsideration, MDEQ Staff, represented by the MDEQ Legal Division, and Dr. Hunter and Ms. Ledbetter, both represented by counsel, submitted briefs for review and consideration by the Permit Board on November 18, 2002. On December 10, 2002, the Permit Board deliberated on this issue but voted to take the matter under advisement to allow the Permit Board members additional time to review the evidence in the case.

6. On January 14, 2003, the Permit Board voted unanimously to reissue the NPDES permit with its original conditions and limitations as included in the 1994 permit and the March 14, 2000 permit. The Permit Board determined that the permit allows a discharge into waters of the state at a point acceptable for a point source discharge.

II. Waters of the State and Appropriate Discharge Points

7. Water pollution control permits are issued for the discharge of pollutants into waters of the state at such points, after such treatment, and in such concentrations and volumes that are protective of the water quality standards set for that water body by the Commission. *See* Miss. Code Ann. § 49-17-29 (Supp. 2002), WPC-1, and WPC-2. Miss. Code Ann. § 49-17-5(f) (Rev. 1999) defines “waters of the state” as: “All waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the state, and such coastal waters as are within the jurisdiction of the state, except lakes, ponds or other surface waters which are wholly landlocked and privately owned, and which are not regulated under the Federal Clean Water Act (33 U.S.C. 1251 et seq.)” The definition of “waters of the state” in WPC-1, Section I.A.75, is identical to Miss. Code Ann. § 49-17-5(f), above, except for the addition of the word “wetlands.” The federal government’s counterpart to Mississippi’s law defines “waters of the United States or waters of the U.S.” more narrowly, most notably omitting groundwater. However, even the federal definition explicitly includes intermittent streams (and wetlands) as part of the definition. *See* 40 C.F.R. Section 122.2.

8. Ms. Ledbetter argued that “nowhere on the land in question owned by Jean Patterson Ledbetter . . . is there a stream, lake, pond, impounding reservoir, marsh, well, spring, irrigation system, coastal water, or any other ‘body or accumulation of water’.” *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 2. Ms. Ledbetter argues that waters of the state do not exist on the land in question, making the discharge unacceptable as against state and federal regulations.

9. Ms. Ledbetter contends that no “watercourse” or “waterway” exists on her property. In the November 2002 brief, Ledbetter refers to a 1910 case in which “watercourse” is defined as “a natural channel . . . with defined bed and banks, of varying width and depth, through which water is conveyed and discharged . . .” *Belzoni Drainage Commission v. Winn*, 53 So. 778, 779 (Miss. 1910). Ledbetter refers to the record and states that there is no “natural channel with well defined bed and banks” on

Ledbetter's property; therefore, there is no "watercourse" as referred to in the definition of "waters of the state." *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 3.

10. Ms. Ledbetter also contends that general terms such as "waterway" or "accumulation of water" as seen in the definition of waters of the state should be construed as applying only to objects of the same general class as those enumerated, with the common theme here being the notion of a natural watercourse. Ms. Ledbetter argues that since there is no "stream, lake, pond, impounding reservoir, marsh, watercourse . . . then no waters of the state exist where the Hunter NPDES Permit would authorize a discharge of human waste to occur." *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 5.

11. To the contrary, the definition of "waters of the state" is broad, capturing every water body in the state with the exception of hydrologically isolated water bodies not regulated by the federal Clean Water Act. The Permit Board interprets § 49-17-5(f)'s definition to include all waters within the jurisdiction of the federal Clean Water Act, plus groundwater, plus any other waters "within the jurisdiction of the state" except privately-owned surface waters that are not hydrologically connected to other surface waters (i.e. are "landlocked"). This includes intermittent streams and "drainageways" such as the area in question here. MDEQ presented as an exhibit to its November 2002 brief a United States Geological Survey ("USGS") quadrangle map dated 1971 (Revised 1982) that designates the tributary into which the effluent discharges as an intermittent stream. *See* Brief of MDEQ, November 18, 2002, Exhibit A. Ms. Ledbetter disputed the reliability of the topographic map, but the Permit Board regularly refers to topographic maps and accepts USGS topographic maps as credible indicators of streams and other water bodies. Here, the USGS indication also was corroborated by MDEQ's site visit. An intermittent stream is "water within the jurisdiction of this state" that is not excluded by the statutory definition and that is appropriate for discharge from a wastewater system, given that the permit conditions allowing the discharge are required to protect water quality in that particular stream. MDEQ Staff determined after an on-site inspection that the drainage system into which the effluent discharges constitutes waters of the state as defined in state law and regulations. *See* Affidavit of Rickey Terry² at 4, Section 6.

12. The discharge point discharges into an intermittent stream that is waters of the state, and the permit conditioning the discharge is protective of the water quality standards set for this water body.³ The Permit Board previously has issued permits allowing for a discharge into streams very similar to the one at hand with similar permit conditions. *See* Second Affidavit of Rickey Terry at 4, Section 9.

13. It is obvious from the nature of the language of the statutory definition that the Legislature intended the definition of "waters of the state" in Section 49-17-5(f) to be

² Rickey Terry is the Chief of the Municipal and Private Facilities Branch of MDEQ's Environmental Permits Division.

³ Ms. Ledbetter does not argue or present evidence indicating that this discharge has caused or will cause a water quality violation.

construed broadly, as public health statutes normally are construed in a civil or administrative context, in order to protect the environment and the citizens of the state. *See generally, U.S. v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 647-48 (2d Cir. 1993). Thus, the Permit Board construes the statute broadly in order to require permits of the greatest number of discharges allowed by law. This is consistent with the Legislature's direct charge to the Permit Board found in Section 49-17-29(1)(b), where the Legislature states that permits are to be required both of discharges directly into waters of the state and to the placement of wastes "in a location where they are likely to cause pollution of any waters of the state." *Id.*

III. Public Notice Requirements in WPC-1

14. During the August 22, 2000 evidentiary hearing, counsel for Ms. Ledbetter argued that the original 1994 permit was issued with improper notice, making the permit invalid. Ms. Ledbetter argued that the notice did not name properly the receiving stream, that the public notice was not as specific as it could have been, and that therefore the public notice was invalid. WPC-1, Chapter 1, Section I.C. includes the following requirements for public notice:

A public notice of a draft State, UIC, or NPDES permit shall contain the following:

- a. the date of posting or publication of the public notice;
- b. the address and telephone number of the Department office in Jackson;
- c. the name and address of the applicant, except in the case of a draft general NPDES permit or a draft general State permit;
- d. a concise description of the activities and operations which result in the discharge identified in the draft permit;
- e. the name of the receiving waters into which the discharge is being made or is proposed to be made, including the location of the proposed existing discharge point (in the case of general permits, a description of geographical area and/or allowable receiving waters);
- f. a concise description of the procedures for the formulation of the final determinations; and
- g. the address and telephone number of the Department office where additional information on the draft permit, copies of the draft permit and fact sheets may be obtained or any other applicable forms and related documents may be inspected or copied.

15. Ms. Ledbetter argued during the August 22, 2000 evidentiary hearing that Section I.C.e., above, was not satisfied. *See* Transcript at 42. The 1994 public notice stated that the receiving stream is into "an unnamed tributary of Chickasawhay River," which is accurate, but Ms. Ledbetter argued that Sowashee Creek should have been listed since it is the first named stream downstream from the discharge point. Ms. Ledbetter argued that simply listing Chickasawhay could be somewhat confusing to someone looking for the discharge point.

16. MDEQ Staff disputed this argument since the city, address of the subdivision, and subdivision development name was printed in the public notice, which helps a reader identify the proposed discharge point. The notice further describes the discharge point as originating from Huntington Park Estates with treated domestic waste water from a sewage treatment facility into an unnamed tributary of Chickasawhay River. *See* Ledbetter Exhibit 1, August 22, 2000. The Chickasawhay River is a “receiving water” as stated in the regulations, WPC-1.

17. In reviewing the public notice criteria set forth in WPC-1, Chapter 1, Section I.C., the public notice complied with the regulations. The intent of the public notice regulations adequately was met by listing the Chickasawhay River. The notice published in the Meridian Star includes sufficient information regarding the project and satisfactorily meets the requirements of WPC-1, Chapter 1, Section I.C.1. It is also obvious that if Ledbetter, upon seeing the notice, needed incrementally more detailed information, she could have contacted the MDEQ office listed. Therefore, the argument that proper public notice was not given is without merit.

IV. Receiving Streams May Be Natural or Artificial

18. The Permit Board’s previous Findings of Fact and Conclusions of Law executed on November 1, 2000 states that “while the evidence suggested that there is a natural drainage way running roughly west to east across a great deal of the Hunter property, there is no doubt there now exists a defined channel along that drainage way on the Hunter property. The evidence was conflicting as to how long that defined channel has existed, how far it extended, and whether a defined channel existed on Mrs. Ledbetter’s property.” *See* “Findings of Fact and Conclusions of Law” at 3, Section 8. Ledbetter argued that construction ensued in the drainage way on or around the time of original issuance of the permit in 1994, that the drainage way was man-made, and therefore did not constitute “waters of the state.” The simple fact is that a drainage way, or stream, exists that satisfies state and federal law and regulations, and the dispute regarding construction in the stream is not an issue that should affect the outcome of this case.

19. Referring to the definition of “waters of the state” as defined in Miss. Code Ann. § 49-17-5(f), waters of the state includes “all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, ***natural or artificial*** . . .” Emphasis added. Although Ledbetter argued and debated the issue of whether or not parts of the intermittent stream were artificially created, the issue is irrelevant. The definition includes streams that are natural or artificial, and no regulation exists stating anything to the contrary.

20. Neither MDEQ nor the Commission has a written policy stating that defined beds and banks of certain linear feet must be established before a stream becomes

waters of the state. The Permit Board has approved discharge points very similar to this one, and the Permit Board for years has issued permits that allow sufficiently conditioned discharges to occur in similar streams that may or may not flow across another private property owner's land. The Permit Board must make the decision regarding reissuance of Dr. Hunter's permit on the facts as they exist today and in a manner consistent with prior application of state law and regulations on point. The issue regarding a natural or artificial stream is not relevant.

V. Permittee's Reissuance Requirements in WPC-1

21. During the August 22, 2000 evidentiary hearing, Ms. Ledbetter argued that Dr. Hunter did not make timely application for reissuance of his NPDES permit that was issued in 1994. Ledbetter argued that by failing to make timely application, the Permit Board should not even consider reissuance of the permit.

22. A review of the public record file in this matter demonstrates that Dr. Hunter did fail to submit his application timely. WPC-1 states that a permittee that wishes to continue to operate under an existing NPDES permit shall submit an application for reissuance at least 180 days prior to the expiration date of the permit. *See* WPC-1, Chapter One, Section V.B.1. at 29. The expiration date included in Dr. Hunter's permit was May 31, 1999, so under the regulations, Dr. Hunter should have submitted his reissuance application 180 days prior to May 31, 1999, or by December 2, 1998. Dr. Hunter submitted his application on March 11, 1999.

23. The overwhelming majority of permit reissuance applications received by MDEQ for wastewater systems such as Dr. Hunter's are not submitted timely; however, MDEQ goes forward in processing the applications and reissuing permits when the delay does not cause MDEQ hardship and does not encourage or allow damage to the environment. During the August 22, 2000 evidentiary hearing, Rickey Terry of MDEQ Staff testified that it is very common to receive applications for reissuance of these types of facilities prior to expiration of the existing permit, but not 180 days in advance of expiration. Mr. Terry goes on to say that "we also routinely send letters to remind people that their permit will expire, because a lot of these small commercial dischargers just will not remember exactly when their permit expires. So we routinely try to notify them." *See* Transcript at 62-63. In this instance, MDEQ did send a letter reminding Dr. Hunter to submit an application for reissuance, and Dr. Hunter sent in his application prior to the expiration of his then existing permit. This delay in submitting the application is an error, but is considered a harmless error in this case. The error did not affect the substantial rights of the parties to this case and did not encourage or allow harm to the environment, since Dr. Hunter's system continued to operate within the parameters set by his permit during the period of lapse. This error is not sufficient on its own to support a decision of denial of reissuance of Dr. Hunter's NPDES permit.

24. Rule 61 of the Mississippi Rules of Civil Procedure, entitled "Harmless Error," states:

No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

By analogy, the issue of late filing for reissuance in this case does not lead a reasonable mind to conclude that Dr. Hunter's right to reissuance of his NPDES permit should be denied. The failure to timely submit an application for reissuance does not, absent harm or evidence of important misfeasance or malfeasance, warrant denial of reissuance. The Commission's authority to consider an enforcement action in an appropriate similar situation is in no way jeopardized by the Permit Board's action to reissue a permit.

VI. The Permit Board's Scope of Authority

25. In reviewing the reissuance of Dr. Hunter's permit, the Permit Board is limited to state and federal law and regulations as they exist today, and must not act outside those boundaries. The Permit Board must make a decision consistent with existing regulations, and must act within the scope of authority set forth in statutes pertaining to it.

26. Miss Code Ann. § 49-17-28 (Rev. 1999) sets forth the Permit Board's role, which includes "issuing, reissuing, modifying, revoking or denying, under the conditions, limitations and exemptions prescribed in Section 49-17-29." For the Permit Board to attempt to redefine what is considered waters of the state is beyond its scope of authority. The Commission has the "right and obligation to adopt such rules and regulations as may be needed to specify methodology and procedure to meet the requirements of the law, which shall include . . . rules and regulations specifying the terms and conditions under which the Permit Board shall issue, modify, suspend, revoke or deny such permits as may be required by law," *Mississippi Department of Environmental Quality v. Weems*, 653 So.2d 266 at 272 (Miss. 1995), but neither the Commission nor the Permit Board can rewrite a state statute. The Permit Board, in addition, is constrained by Miss. Code Ann. § 49-17-34(4) to include in a permit only those requirements that have a direct basis in Commission regulations.

27. The Permit Board's authority in considering the reissuance of Dr. Hunter's NPDES Permit is limited to the criteria of WPC-1 regarding an application for reissuance. WPC-1, Section V.B.2., states as follows:

The Permit Board shall review the application and before reissuing a permit shall be assured that:

- (a) The permittee is in compliance with or has substantially complied with the terms, conditions, requirements, and schedules of compliance of the existing permit.

- (b) The Permit Board has up-to-date information on the permittee's production levels, waste treatment practices and the nature, contents and frequency of the permittee's discharge.
- (c) The discharge is consistent with applicable effluent standards and limitations, water quality standards, and other applicable requirements, including any additions to, revisions or modifications.

28. At the close of the evidentiary hearing on August 22, 2000, the Permit Board made a decision to reissue Dr. Hunter's permit in a modified form that was not based on applicable laws and regulations. Dr. Hunter's reissuance application satisfies the considerations outlined in WPC-1, Section V.B.2.

29. The Permit Board understands that it must not act arbitrarily or capriciously in making this decision, but rather must follow applicable rules and regulations. MDEQ Staff refers to the *Weems* case in its November 2002 brief, citing:

An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone, -- absolute in power, tyrannical, despotic, non-rational, --implying either a lack of understanding of or a disregard for the fundamental nature of things . . . An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

Id. at 274.

30. In the context of the Permit Board's history of issuing permits and the interpretation of state laws and regulations, the Permit Board cannot conclude that Dr. Hunter's permit should not be reissued. Rather, Dr. Hunter's permit should be reissued with its original permit conditions. To act otherwise would be for the Permit Board to make an arbitrary and capricious decision not based on law or regulation.

31. In addition to the issue of what constitutes "waters of the state" appropriate for a point source discharge, Ms. Ledbetter argued that certain procedural issues were not followed properly by MDEQ and therefore Dr. Hunter's permit should not be reissued. The Permit Board did not make a ruling on those issues in its November 1, 2000 Findings of Fact and Conclusions of Law, stating:

The Permit Board recognized that petitioner has argued that certain procedural requirements were not followed by MDEQ staff and/or Dr. Hunter in the processing of Dr. Hunter's original application and application for reissuance. While the Board acknowledges that those issues cause it concern, it chooses not to make any findings or conclusions concerning them at this time. The Permit Board's decision herein is based solely upon the Permit Board's finding and conclusion that the discharge point in question is not waters of the state acceptable for a point source discharge.

See Findings of Fact and Conclusions of Law (November 1, 2000). Although the Permit Board did not base its August 2000 decision on the procedural issues raised, at this time the Permit Board concludes that the procedural arguments raised during the August 22, 2000 hearing do not present an adequate basis for denying the reissuance of Dr. Hunter's permit. The only issue raised to date that raises the level of concern of this board to a degree that would warrant denial or revocation of Dr. Hunter's permit is the question of whether the discharge point is into "waters of the state" acceptable for a point source discharge, and that issue has been addressed.

VII. Conclusion

32. Upon reconsideration of this matter, and having reviewed the evidence presented to it from the inception of this matter, the Permit Board concludes that the NPDES permit originally issued to Dr. Hunter in 1994 and reissued in 2000 should be reissued with its original permit conditions and limitations. The Permit Board finds that the existing discharge point does discharge into waters of the state requiring a permit and that the discharge point is acceptable. The Permit Board also finds, and it is not disputed, that the permit conditions are protective of water quality. The Board concludes that the NPDES permit initially issued by the Board on March 14, 2000 falls within the Permit Board's statutory and regulatory authority and is legally sound.

WHEREFORE, PREMISES CONSIDERED, the Mississippi Environmental Quality Permit Board, by affirmative vote cast in open session and recorded in the minutes of this body, adopts these findings of fact and conclusions of law in support of its January 14, 2003 decision to reissue NPDES Permit No. MS0049867 to Hunter's Construction, Huntington Park Estates, Lauderdale County, Mississippi. The cost bond for appeal of this matter is set at \$500.

S. Cragin Knox
Chairman

Date