



## MEMORANDUM

October 25, 2013

To: Board of Mayor and Aldermen

From: Eric Stuckey, City Administrator   
Shauna Billingsley, City Attorney

SUBJECT: Consideration of Professional Service Agreement with Hall And Associates (COF Contract Number 2013-0185)

### Purpose

The purpose of this memorandum is to provide information to the Board of Mayor and Aldermen (BOMA) for consideration of obtaining specialized legal and technical assistance in the City's Aquatic Resource Alteration Permit ("ARAP") Appeal.

### Background

The City of Franklin has had a lengthy history with the Tennessee Department of Environment and Conservation ("TDEC") in regard to its ARAP. The City's appeal is based on three primary areas of concern:

1. **Due process** – City was never given notice of the comment period on the permit, no draft permit was issued for review, and no meaningful response was provided to multiple requests by staff and our consultant (CDM Smith) for information regarding the basis for the permit. Essentially, the City has not been provided an opportunity for meaningful dialogue regarding the permit and its basis.
2. **Scientific, river specific basis for the permit changes** – The City has not been provided data or a direct scientific basis for changes in the permit related specifically to the Harpeth River. Two generic research papers/articles have been identified in our recent discussion with TDEC staff. Neither of which address the Harpeth River directly. Little reference has been made to the sophisticated modeling developed by the City as a part of the Integrated Water Resource Plan (IWRP). The IWRP river modeling was developed with extensive TDEC input.
3. **Reporting requirements** – While the City is supportive of the intent of the reporting requirements to be transparent regarding river-related data, some of the "real time" and online requirements may well be impractical. TDEC staff did indicate a willingness to "work with the City" on these issues. However, these issues need to be identified as issues for the appeal process.

For a complete briefing on these matters, please see the attached Notice of Appeal.

### Financial Impact

Hourly rates range from One Hundred Eighty Dollars (\$180.00) to Three Hundred Sixty Dollars (\$360.00) for attorneys and One Hundred Thirty Dollars (\$130.00) to Two Hundred Sixty Dollars (\$260.00) for technical/regulatory personnel. The City is attempting to cut costs by having the City



HISTORIC  
FRANKLIN  
TENNESSEE

## MEMORANDUM

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Attorney draft the Notice of Appeal. The Law Department will continue to be engaged in an effort to reduce costs.

**Recommendations:**

Staff recommends Board approval of the engagement agreement.

**LAW DEPARTMENT**

**Shauna R. Billingsley, Esq.**  
City Attorney  
Also Licensed in Texas



**HISTORIC  
FRANKLIN  
TENNESSEE**

October 1, 2013

**VIA ELECTRONIC MAIL**  
**scohen@hall-associates.com**

Gary B. Cohen  
Hall & Associates  
1620 I Street, NW, Suite 701  
Washington, DC 20006

**RE: COF# 2013-0185 Engagement Agreement for Aquatic Resources Alteration Permit (ARAP)  
Appeal Representation**

Dear Mr. Cohen:

We are pleased to retain you and your firm as outside counsel. In addition to the following, the terms of representation are contained in the *City of Franklin Law Department Policy and Procedures for Outside Counsel* (the "*Policy*"), a copy of which is enclosed. Please familiarize yourself with the requirements contained in the *Policy* and ensure that all personnel working on City of Franklin matters are familiar with them as well. By continuing to undertake further representation, you are agreeing to abide by the terms of the *Policy*.

Please identify an individual to serve as a Principal Client Contact as required under the *Policy*. This person will serve as the Law Department's main point of contact for this engagement. It is also important that you keep the City Attorney's office informed regarding all aspects of the work in accordance with the requirements set out in the *Policy*. You are required to submit to our office, via e-mail, a litigation status report every six (6) months. We will provide a form to you electronically at the e-mail address you provide. Please note that all bills should be submitted to my attention. Please send both a detailed bill as well as a bill/invoice summary, which states simply the hours worked, hourly rate, and total amount due. Please use the name of the matter on your bills, and bill each matter separately from any other work you are performing for the City. For all billing inquiries, please provide us with a business office contact.

Please note that current market rates for general municipal work are approximately \$195.00 for Attorneys, \$175.00 for Associates and \$65.00 for a paralegal. Please indicate to us your terms and conditions. Note that the *Policy* requires that you receive recommendation from the City Attorney. While I understand that your work may involve different terms than standard municipal work, please note that any additional terms and conditions you may propose must be separately approved; the City has several standard terms and conditions that are not negotiable. By signing this engagement letter, you are agreeing to the terms contained in this letter and in the *Policy*.

As you may know, the City of Franklin is committed to meeting the goals of the City's Equal Business Opportunity ordinance. During the engagement, we may want to discuss with you how the firm can provide opportunities to minority or women owned firms or minority or female attorneys within the firm.



We look forward to working with you on this matter to provide the highest level of legal services to the citizens of the City of Franklin.

Sincerely,

*Shauna R. Billingsley*

Shauna R. Billingsley  
City Attorney

Enclosures

cc: Eric Stucky, City Administrator

**PLEASE FILL OUT THE FORM BELOW AND RETURN**

Rates/hour or contract rate <i>See ATTACHED</i>		Principal Client Contact Information	
Attorney (includes partners)	\$ /	Name:	<i>GARY COHEN</i>
Associates	\$ /	Telephone:	<i>202-463-1166</i>
Paralegals	\$ /	E-mail:	<i>GCOHEN@HALL-ASSOCIATES.COM</i>
Copying costs	\$ /	Other information:	
Other	\$ /		
Proposed by:		Accepted by:	
<i>[Signature]</i>			
Attorney Signature		Dr. Ken Moore	
<i>Hall &amp; Associates</i>		Mayor	
Firm		Date:	
Date: <i>10/15/13</i>			

*Agreement modified by attached October 7, 2013, billing practices letter and 2013 Hall + Associates billing notes.*

*[Signature]*

## HALL & ASSOCIATES

Suite 701  
1620 I Street, NW  
Washington, DC 20006-4033  
Telephone: (202) 463-1166 Web: <http://www.hall-associates.com> Fax: (202) 463-4207  
Reply to E-mail:  
[gcocn@hall-associates.com](mailto:gcocn@hall-associates.com)

October 7, 2013

Shauna R. Billingsley, Esq.  
City Attorney  
City of Franklin  
109 3<sup>rd</sup> Avenue South  
Franklin, TN 37064

**RE: COF# 2013-0185 Engagement Agreement for Aquatic Resources  
Alteration Permit (ARAP) Appeal Representation**

Dear Ms. Billingsley:

This letter follows our discussion on your concerns regarding the City of Franklin appeal of its Aquatic Resources Alteration Permit (ARAP). As you indicated, the City of Franklin is interested in retaining Hall & Associates ("H&A") to assist in the permit appeal process. We are pleased to submit the following outline of our qualifications and proposal to address your concerns.

### Qualifications

H&A is a full-service legal/regulatory/technical consulting firm that specializes in resolution of complex Clean Water Act ("CWA") permitting and compliance matters. The firm's practice has particular expertise in such areas as NPDES permitting, compliance and enforcement, WIA and TMDL evaluation/assessment, water quality standards evaluation/revision, watershed planning, pollution credits trading, municipal and industrial coalition building, and CWA legislation. The firm represents municipal organizations and individual municipal/industrial facilities throughout the country. H&A integrates both legal and technical disciplines related to CWA compliance and permitting which ensures that all aspects of regulatory compliance are thoroughly evaluated. Our staff is composed of regulatory consultants, engineers, and attorneys (with approximately seventy-five combined years of CWA permitting and water quality impact assessment experience). This blend of talent facilitates our review of proposed actions from both legal and technical perspectives and ensures that our recommended strategies are legally and technically sound.

Shauna R. Billingsley, Esq.  
City Attorney  
October 7, 2013  
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### Proposed Scope of Services

Based upon our discussions, H&A, in coordination with local counsel (e.g., an assistant City Attorney), would prepare an appeal of the ARAP permit issued by Tennessee Department of Environment and Conservation. H&A, in addition to providing legal support, has technical personnel to evaluate water quality-based requirements. As such, H&A would provide a combination of legal and technical support in addressing the City of Franklin's ARAP permit. Should the matter ultimately go to trial, H&A would provide support to the local counsel that would take the lead in the litigation. Services to be provided to assist the City of Franklin's resolution of issues include:

- (1) Initial review of documentation;
- (2) Review permit and identify issues of concern;
- (3) Prepare an appeal of the ARAP permit that would be filed by local counsel;
- (4) Undertake an analysis of the legal and technical issues;
- (5) Participate in negotiations with TDEC regarding resolution of the identified issues, if applicable.
- (6) Strategize with the City and undertake discovery, should that be the agreed-upon approach.

We look forward to working with you on these issues. Please call if you have any questions regarding this proposal.

Sincerely,

  
Gary B. Cohen

## 2013 STATEMENT OF BILLING PRACTICES

For your information, the following outlines our fee schedule and billing practices. The firm bills on both flat fee and level of effort bases. Our time on this matter would be billed at our normal rates for the type of work involved. These hourly rates currently range from \$180 to \$360 for attorney's and \$130 to \$260 for technical/regulatory personnel. Specific hourly rates for the calendar year 2013 are:

John Hall	\$360.00
Gary Cohen	\$310.00
Bill Hall	\$260.00
Philip Rosenman	\$205.00
Associate Attorney	\$180.00
Research Associates	\$130.00
Law Clerk	\$ 85.00

These rates may be adjusted upward during the pendency of this matter as a result of general billing rate increases, usually at the beginning of the calendar year. Prior notice will be given before any billing rate increases become effective.

The rates quoted above do not include other charges such as long-distance telephone, delivery charges, reproduction and computer processing, LEXIS or similar computer research, filing fees, travel expenses, and any out-of-pocket disbursements made by the firm. All such expenses are increased by ten percent (10%) to cover time associated with management and bill processing. Telephone, copy, and print charges will be billed on a proportional basis. Our practice is to only bill time for travel that occurs during work hours; weekend travel is fully billed. Daily billings associated with meetings or client briefings will normally not exceed 8 hours, unless work is being conducted throughout the day to meet a deadline (*e.g.*, litigation or permit filing).

For flat fee contracts, fifty percent (50%) of the fee is due upon commencement of the work; at half completion of the task(s), twenty-five percent (25%) of the fee is due; and the final twenty-five percent (25%) is payable when the finished work product(s) is delivered. Work products may not be used by or for the benefit of any entity other than the client which commissioned the work and are retained as the joint intellectual property of Hall & Associates.

For level of effort contracts, monthly invoices will be issued which are due and payable within 30 days. In some cases, depending upon the amount and complexity of the work, a retainer fee may be required at the commencement of a level or effort engagement.

Invoices or statements of work in progress are rendered on a monthly basis, and a 1.5% monthly interest rate is charged on invoices which are thirty (30) days past due.

**BEFORE THE DIRECTOR OF THE DIVISION OF WATER RESOURCES FOR THE  
TENNESSEE BOARD OF WATER QUALITY, OIL AND GAS**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>CITY OF FRANKLIN, TENNESSEE</b>	)	<b>DOCKET No.:</b> _____
	)	<b>NRS12.195</b>
<b>PERMIT NUMBER: NRS12.195</b>	)	

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**NOTICE OF APPEAL**

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Pursuant to T.C.A. §69-3-105(i) and Rule 1200-04-05-.12, the City of Franklin (hereinafter “City”) files this Notice of Appeal of Aquatic Resource Alteration Permit (hereinafter “ARAP”) NRS12.195 (hereinafter “Permit”) issued and effective on September 17, 2013 and publicly noticed on September 24, 2013. The City files this appeal to preserve its rights pursuant to any and all applicable provisions under T.C.A. §69-3-101, et seq., the rules of the Tennessee Department of Environment and Conservation, Division of Water Resources, the rules of the Tennessee Department of Environment and Conservation, Division of Water Pollution Control, and common law.

**FACTS**

The City owns and operates a water treatment plant (hereinafter “WTP”) with a capacity of 2.1 mgd. The raw water is withdrawn from the Harpeth River within the southern City limits and stored in an open earthen reservoir for later treatment. The City purchases a balance of its water from the Harpeth Valley Utility District. The original WTP was constructed in 1952 and was expanded and upgraded in 1968 and again in 1994. Because the WTP was constructed prior to TDEC ARAP rule promulgation, the withdrawal was not regulated under ARAP. However, in



1997 the City requested to increase the withdrawal to the existing WTP facilities and an ARAP was required.

The City applied for the ARAP in 2006 and a public notice announced the application and was published on January 31, 2007. A public hearing was requested and TDEC held the public hearing on March 8, 2007. After the public hearing and as part of its Notice of Determination, TDEC determined that “the proposed withdrawal rate at 20% of the flow in the river would not result in an impairment of the uses designated to the Harpeth River when it is coupled with an additional requirement that the withdrawal will not cause the flow to fall before 10 cfs.” TDEC then issued a permit, dated November 28, 2007 that authorized the withdrawal under the conditions. The Notice of Determination also discussed the antidegradation alternatives analysis and it was determined that “[a]lternative 6 (10 cfs cut-off, 20% of flow withdrawn) would result in less degradation than the Harpeth River currently experiences and would not impair the river’s uses. Therefore the department has determined that neither alternative 6 nor purchasing all of the water from HVUD would cause new or additional degradation.”

The City was issued ARAP NRS06.332 effective November 28, 2007. As stated above, the special conditions that the flow not be reduced below ten cubic feet per second (10cfs) as a result of the withdrawal and that the water be withdrawn at a rate of no more than twenty percent (20%) of the flow in the river at the intake. ARAP NRS06.332 expiration date was November 27, 2012.

On September 28, 2012, the City submitted an application to renew its current ARAP for withdrawal of water from the Harpeth River for the City’s public drinking water supply. As part of the process for reviewing and reissuing the permit, TDEC issued the draft ARAP for public

comment on November 13, 2012. TDEC failed to provide the City notice of the public comment period.

The City requested a meeting with TDEC and a meeting occurred on February 4, 2013. As part of that meeting, TDEC requested the City address comments made by Harpeth River Watershed Association and Tennessee Wildlife Resources Agency, which were received during the public comment period. On February 14, 2013, Robert Baker sent City representatives and email, including the specific comments which needed to be addressed.

On March 27, 2013, City Engineer David Parker provided to TDEC, via email dated the same day, a supplemental analysis created by the City's consultant, CDM Smith. The purpose of the analysis was to provide TDEC with requested additional information based on comments TDEC received during the public comment period. The analysis was prepared in support of the permit determination specifically to clarify two issues: (1) to address potential differences in withdrawal scenarios associated with 10% and 20% cut-off limits (allowable percentage of river flow for withdrawal), and (2) to provide a description of the plan for future gauging of the Harpeth River flow at the water treatment plant intake, or other appropriate location. The requested analysis was sent to TDEC representatives Dr. Sandra Dudley, Alan Schwendimann, and Robert Baker. The analysis concluded as follows:

1. "Total annual river flow would only be reduced by 0.05% (at current WTP capacity) or 0.16% (at the proposed expanded WTP capacity). The thresholds would *NOT* change the total river flow by 10% all the time and would have a negligible effect of the level of ecological protection.

2. “The impacts on dissolved oxygen, as shown [in the analysis], would be negligible, and there are not distinguishable water quality improvement realized by reducing the withdrawal limits.”

The City requested meetings with TDEC to discuss the reissuance and to address comments made during the public comment period. These meetings were requested after the public comment period had closed because the City was not given notice of the public comment period. TDEC officials agreed to meet with City representatives on May 3, 2013.

On May 17, 2013, Kati Bell, Engineer with CDM Smith, contacted Mr. Baker by email again asking for the additional information on how the proposed withdrawal rate limit was established, and specifically how the benefit of the proposed rate would be measured. Ms. Bell stated that the information would be necessary for CDM Smith to analyze the costs and benefits of the proposed changes in context of the broader IWRP.

Mr. Baker did not respond to Ms. Bell’s email request of May 17, 2013. On May 23, 2013, Ms. Bell sent a follow-up email to Mr. Baker again requesting information in support of the proposed changes to the ARAP. As of the date of this Notice of Appeal, no such information has been provided by TDEC or Mr. Baker.

On May 31, 2013, City Administrator Eric Stuckey sent a follow-up email to Mr. Baker and Dr. Dudley stating that the City was interested and concerned with the implications of possible modifications to the ARAP. Mr. Stuckey discussed the City’s position of being an advocate and steward of the Harpeth River evidenced by its development of the Integrated Water Resource Plan (hereinafter “IWRP”), the first of its kind in the State of Tennessee, and by the successful removal of the low head dam from the Harpeth River. Further, Mr. Stuckey made it clear that the City “[stood] ready to work to review the data and science used in the development

of the ARAP renewal” stating that ARAP NRS06.332 was “based on a peer-reviewed, scientifically valid approach and from [the City’s] perspective, is working well.” Mr. Stuckey pointed out that the approach being used by TDEC was neither published nor peer-reviewed and requested an opportunity to review the information being relied on by TDEC and Mr. Baker. Finally, Mr. Stuckey reminded TDEC that TDEC failed to provide notice of the public comment period to the City, which would have allowed the City to share its information with and obtain information from TDEC from the outset.

On June 6, 2013, Mr. Baker, the TDEC ARAP Permit Coordinator, responded to City representatives “apologiz[ing] for the apparent oversight regarding the public notice” and stating that TDEC is “putting together information to address the matters that [Eric Stuckey] and Dr. Bell have noted and hope[s] to soon respond” and that TDEC “look[s] forward to continued dialogue as we work through this process.”

The City was never provided documentation as requested and never engaged in further dialogue with TDEC relative to the ARAP renewal. Instead, on September 17, 2013, Director of Water Management Mark Hilty received an email from Jeanene Woodruff with TDEC which contained a copy of the final permit, NRS12.195, effective September 17, 2013. The following day, Mr. Hilty contacted Ms. Woodruff questioning the date of the public notice for NRS12.195. Mr. Baker responded to Mr. Hilty on September 23, 2013 stating the notice of permit issuance would be the following day, September 24, 2013.

ARAP NRS12.195 provides for special and general conditions, and monitoring requirements and procedures much more stringent than those of ARAP NRS06.332, but more importantly, it appears more stringent than any other permit in the State based on the fact that TDEC has yet to provide information as to how it arrived at these requirements. The specific

conditions which the City takes issue with will be discussed below under “Grounds for Appeal.” The City has requested, numerous times, for documentation supporting such stringent requirements. As of the date of this Notice of Appeal, TDEC has not provided such documentation.

The City requested a meeting with Dr. Dudley and Mr. Baker. On September 30, 2013, after the effective date of the ARAP renewal and after the date of the public notice, the City’s request was granted and a meeting was held. During the meeting, TDEC officials were unable to provide scientific methods or models used evaluate the Harpeth River or in determining the conditions set forth in the ARAP NRS12.195. Instead, TDEC now asserted that their approach is based upon the State’s antidegradation rule.

On October 8, 2013, Mr. Stuckey submitted an Inspection/Duplication of Records Request relative to the City’s ARAP renewal to TDEC’s Record’s Custodian. The City hopes that this method of documentation request will result in response from TDEC.

### **GROUND FOR APPEAL**

#### **I. Failure to Provide Due Process**

A. Notice of a Permit Was Not Provided to the Permittee: Pursuant to Tenn. Comp. R. & Regs 1200-04-07-.04(4) (2011) public notice is a requirement for ARAP permits similar to the City’s. Further, Tenn. Comp. R. & Regs 1200-04-07-.04(4)(d)(2) requires the applicant, the City in this case, once it is provided a copy of the public notice to distribute the approved public notice to the neighboring landowners by publishing in a local newspaper of general circulation and by posting a sign within view of a public road in the vicinity of the proposed project site. This subsection provides that the applicant will be made aware that a public notice has been created. Tenn. Comp. R. & Regs 1200-04-07-.04(4)(f) provides that the applicant may request a

public hearing on its application, again reflecting that the applicant be made aware of such public notice. Pursuant to Tenn. Comp. R. & Regs 1200-04-07-.04(8), the procedures set forth in Tenn. Comp. R. & Regs 1200-04-07-.04(4) apply to the re-issuance of a permit.

As stated above, the City was not provided notice of the public notice by TDEC. In fact, the City was not aware of the public comment period until well after the period ended. For this reason, the City respectfully appeals ARAP NRS12.195.

B. Notice of the Permit Was Only Provided to Parties With Positions Potentially Adverse to the Permittee: Upon information and belief notice of the Department's intended action and opportunity to comment were only provided to parties with positions potentially adverse to the permittee. As such, the City was denied due process rights, particularly when others were provided an opportunity to comment.

C. The Permittee Was Neither Provided a Draft Permit nor a Rationale Explaining the Basis for the Permit Conditions as Required by Regulation: Rule 1200-4-5-.01 provides that Chapter 1200-4-5 Rules apply to permits issued under T.C.A. section 69-3-108. Rule 1200-4-5-.06(2) provides:

Each completed application (or request for permit action) shall be evaluated and a tentative determination of whether to issue or deny a permit action shall be made. If a tentative determination is made to issue a permit, then a draft permit shall be prepared . . . . A rationale, as defined in Rule 1200-4-5.06(3), shall also be provided along with the draft permit. The commissioner may attach other relevant information as necessary.

A "permit action" is defined in Rule 1200-4-5-.02 to include the "reissuance . . . of an individual permit" which would include an ARAP permit. The permit rationale accompanying a draft permit is supposed to apprise the permittee of the underlying rationale associated with the

permit conditions, rather than keeping the permittee in the dark and refusing to reveal the agency's reasoning. Among other things, the permit rationale is supposed to explain:

(b) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

....

(f) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions ....

Rule 1200-4-5-.06(3)(b) and (f).

Furthermore, "for all permits" TDEC is required to mail a copy of the notice to permit applicant. Rule 1200-4-5-.06(9)(b)1. Additional notice requirements apply for NPDES permits, not applicable here. Rule 1200-4-5-.06(9)(b)5.

TDEC failed to follow any of the above referenced procedures regarding (1) providing notice to the permittee of the proposed permitting action; (2) providing the permittee an opportunity to comment on the permit; (3) providing a draft permit to the permittee; and, (4) providing a rationale explaining the bases for the underlying permit conditions.

As such, the City appeals each and every condition as set forth in the reissued ARAP permit as due process procedures have not been followed.

## **II. Special Conditions and General Conditions Too Stringent as Compared to Other Similar Cities and Not Supported by Scientific Evidence**

The City provides that many of the special conditions and general conditions imposed by ARAP NRS12.195 are excessive and unprecedented. The City would assert that TDEC's unwillingness to provide documentation to support its special conditions and general conditions have resulted in a permit that is patently unfair and biased.

The City specifically appeals the following conditions for the following reasons:

**1. Part 1, Special Conditions 1: Water shall be withdrawn from the river at a rate of no more than 15% of the stream flow measured simultaneously at the intake.**

**Response:** The City believes that this change in the percentage of withdrawal is not based on scientific data as no such documentation has been provided. The City respectfully requests an opportunity to review any such data from TDEC, if such exists, and requests the opportunity to provide its own scientific data supporting no change from the 20% withdrawal rate provided for by ARAP NRS06.322.

Furthermore, the City believes that TDEC is without a legal basis to make this change to the ARAP permit. In the meeting of September 30, 2013, TDEC asserted that the change is based upon the antidegradation rule as set forth in Rule 1200-04-03-.06. Among other things, the antidegradation rule would only address new or increased permitted withdrawals to a receiving water such as the Harpeth River – it does not provide for a decrease of previously authorized withdrawals.

**2. Part 1, Special Conditions 2: Stream flow shall be measured to represent instantaneous discharge as background, pre-withdrawal flow at the point of withdrawal.**

**Response:** The City avers that the term “discharge” refers to the addition of pollutants to waters from a source and is inapplicable to the ARAP permit issued to Franklin which pertains to a water withdrawal. Rule 1200-4-5-.02. State’s rules clearly distinguish between discharges and withdrawals.



- 3. Part 1, Special Conditions 4: Within 90 days of the effective date of this permit, the mechanism(s) that will be used to control the rate of withdrawal in compliance with special condition number 1 above shall be presented to the department for review and written approval.**

**Response:** The City respectfully requests that the schedule be extended for the submission of its “mechanism” until 90 days after completion of the design of the water treatment plant upgrade. As the design of the completion of the upgrade has not been completed, it would be premature to require the submission within 90 days of the effective date of the permit as the City would need to base its “mechanism” decision on the new design.

- 4. Part 1, Special Conditions 5: Within 90 days of the effective date of this permit, the mechanism(s) that will be used to measure, monitor, and record the rate of withdrawal in compliance with special condition number 1 above shall be presented to the department for review and written approval.**

**Response:** The City respectfully requests that the schedule be extended for submission of the “mechanism” used to measure, monitor and record the rate of withdrawal until 90 days after completion of the design of the water treatment plant upgrade. As the design of the completion of the upgrade has not been completed, it would be premature to require the submission within 90 days of the effective date of the permit as the City would need to base its “mechanism” decision on the new design.

- 5. Part 1, Special Conditions 6: Within 90 days of the effective date of this permit, the mechanism(s) that will be used to measure stream flow used to determine the appropriate rate of withdrawal and protection of the minimum stream flow in compliance with special conditions 1 and 2 above shall be presented to the department for review and written approval.**

**Response:** The City respectfully requests that the schedule be extended for submission of the “mechanism” used to measure stream flow until 90 days after the completion of the design of the water treatment plant upgrade. As the design of the completion of the upgrade has not been completed, it would be premature to require the submission within 90 days of the effective date of the permit as the City would need to base its “mechanism” decision on the new design.

- 6. Part 1, General Conditions 1: The activity shall be accomplished in conformance with the accepted plans, specifications, data and other information submitted in support of the application and the limitations, requirements and conditions set forth herein.**

**Response:** The City avers that the word “activity” should be defined as “withdrawal” similar to the remainder of the ARAP and the previous ARAP, NRS06.332.

- 7. Part II, Monitoring Requirements and Procedures 1: The permittee shall monitor stream flow (discharge).**

- a. Discharge shall be measured to represent instantaneous discharge as background, pre-withdrawal flow at the point of withdrawal.**

- b. Discharge shall be measured with such precisions and accuracy as to assure and demonstrate compliance with special conditions number 1 and 2.**
- c. The accuracy of discharge data must be proven and verified annually over the range of discharge conditions.**
- d. Discharge data shall be publicly available on the internet as real time.**
- e. Discharge data shall be recorded and reported monthly to the division. Discharge shall be reported as daily minimum, daily maximum and daily mean.**

**Response:** The City avers that the term “discharge” is not synonymous with the term “river flow.” The City respectfully requests that the term “discharge” be replaced with the term “river flow.” Further, TDEC uses the term “stream flow” in Monitoring Requirements and Procedures 3, which advances the City’s request to use the term “river flow.” The requirements set forth in (d) above pertaining to having discharge data available real time are unrealistic and will create an undue hardship on the City. The City is not aware of any manufacturer that can provide equipment that is capable of providing reliable real time river flow data or “discharge” data. Even if such equipment did exist, the City avers that no other ARAP permittee is under such harsh and stringent requirements and that such provision is being imposed without the requisite underlying rulemaking. The City respectfully requests that this section be modified as stated above along with the deletion of subparagraph (d). *See also Response to Part I, Special Conditions 2, above.*

**8. Part II, Submission of Monitoring Results 2 and 3: (2) Monthly reports shall be due on the last date of each month. (3) Submittals shall be postmarked or sent electronically no later than 15 days after the compilation of the reporting period.**

**Response:** The City avers that these two sections are contradictory. The City cannot submit monthly reports on the last day of each month and have them submitted no later than 15 days after the compilation of the reporting period. The City respectfully requests that these sections be modified to be complimentary rather than contradictory. [Requiring monthly reports on the last date of each month purports to require you to obtain the information and submit the report on the last day of the month. I suggest asking that #2 be deleted and that reports be postmarked or sent electronically by the 15<sup>th</sup> of the following month per #3. ]

**III. The Imposition of the New More Stringent Requirements are the Result of Rulemaking Which has Failed to Follow Due Process Procedures**

Upon information and belief, TDEC has started to implement an initiative to impose additional requirements on the quantity of water withdrawn from source water. Such requirements are being imposed without providing the regulated community an opportunity to comment upon the underlying legal and technical issues contrary to applicable due process rulemaking requirements. Among other things, the Department has not undertaken cost estimates to determine the State-wide costs associated with such new requirements. Nor has the Department taken comment about less onerous approaches being imposed upon the regulated community.

#### IV. Stay of Appealed Permit Conditions

To the extent that TDEC does not provide for the stay of the appealed permit conditions (which in this instance would be the full 2012 ARAP permit due to, among other things, the due process issues), such failure to stay the appealed conditions would be inconsistent with State law. See, e.g., T.C.A. § 4-5-320.

#### CONCLUSION

As previously stated, the City has filed this Notice of Appeal to preserve its rights of review.<sup>1</sup> The City requests the opportunity to show that it was not provided due process and that many of the special conditions and general conditions imposed by ARAP NRS12.195 are without legal and/or technical basis. These conditions result in excessive and unprecedented requirements.-As part of the review process, the City also expresses its desire to go forward in cooperation with representatives of TDEC to address the issues contained in this Notice of Appeal and ARAP NRS12.195. If such discussions prove fruitless, the City requests that ARAP NRS12.195 be remanded back to TDEC.

Respectfully Submitted,

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**Shauna R. Billingsley** (023362)

City Attorney

**Kristen L. Corn** (028258)

Staff Attorney

109 3<sup>rd</sup> Avenue South  
Franklin, Tennessee 37065  
Phone: 615-550-6603  
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**Attorneys for City of Franklin, Tennessee**

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<sup>1</sup> The City reserves the right to file an amended Notice of Appeal or a supplement to this Notice of Appeal to address in more detail conditions set forth in NRS12.195.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to:

Technical Secretary of the Tennessee Board of Water Quality, Oil and Gas  
Attention: Dr. Sandra Dudley, Director of the Division of Water Resources  
Tennessee Department of Environment and Conservation  
312 Rosa L. Parks Avenue, William R. Snodgrass Tennessee Tower  
12<sup>th</sup> Floor  
Nashville, TN 37243

on this the 22nd day of October, 2013.

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Shauna R. Billingsley