



efficient, effective protection of our waters

The TN Clean Water Act of 2007 does not create significant changes to current law. Rather, it provides guidelines for earlier enforcement, mandatory fines, mandatory individual permits for recurring offenders, and tools for stopping illegal activity and denying permits to the worst offenders.

Background on the Current Law

Tennessee has more than 60,000 miles of rivers and streams and over 500,000 acres of publicly accessible lakes. Only 50% of the waters of the state have been assessed, and of those, 30% are substandard. There are laws specific to impaired and high quality waters. The federal Clean Water Act and the TN Water Quality Control Act both require that water quality be maintained and improved. Our laws, approved by EPA, were developed to meet these goals. The regulations protect water quality at several levels.

Permits

Permits are the first step toward protecting our resources.

Tier I: Activities that cause or contribute to water pollution can't be permitted. Therefore, no permits are legal on impaired streams that are already polluted unless all pollution is filtered from any discharge.

Tier II: High quality waters can't be degraded, so permits must contain erosion control measures and filtering necessary to bring any discharge up to the current water quality standards. High quality waters include waters in state parks and other public property and investments.

Tier III: Our highest quality waters can be nominated as Outstanding National Water Resources and no pollution is allowed into those rivers and lakes. Reelfoot Lake is an example in Tennessee.

The levels of protection are only as good as the process for issuing permits. Individual permits are required for projects that affect more than a minimum of water resources (i.e. over 200 linear feet of streams). These permits require certain buffers, monitoring, individual Stormwater Pollution Prevention Plans, etc.

Disturbance on a smaller scale is covered under a General Permit held by the state. The permits, however, are only as good as the enforcement of the terms of the permits.

Enforcement

Often the permits are not monitored, and TDEC only hears of pollution or failure to comply through citizen complaints. Construction stormwater and illegal stream alterations pollute and cause private and public property damage. Tennessee loses drinking water sources, recreational opportunities, and property value when mud and other pollutants fill our streams.

Once a complaint is called in, TDEC is required to investigate to some extent. They may call the permit holders or make a site visit if they have time to go to the county in question. The field offices cover from three (3) to eighteen (18) counties. In response to the complaint, if the field officer identifies that the erosion controls are not in place, stream that is not permitted to be disturbed is being altered in some way, or a permit violation is occurring, the officer has several options.

- 1) Verbal warning and request for compliance.
- 2) Notice of violation outlining the noncompliance and requesting corrective action within a timeline.
- 3) Expedited director's order to assess fines of up to \$9,500 for specific, easily proven violations.
- 4) Initiate a Director's Order for up to \$25,000 in fines per day, corrective actions, and reimbursement for staff time and the economic benefit of delaying appropriate controls.
- 5) Initiate a Commissioner's Order for up to \$125,000, corrective actions, and reimbursement for staff time and the economic benefit of delaying appropriate controls.

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The drafters of the TN Water Quality Control Act of 1971 anticipated these costs and assumed that law breakers would pay for their own regulation. Tennessee Department of Environment and Conservation (TDEC) diverts significant resources to document noncompliance and teach best management practices, but rarely follows through with enforcement actions or fines that deter future violations.

Through record review and discussions with field officers, we have identified that it is common for officers to initiate one enforcement in a year. When enforcement is initiated, the field officer builds the case and sends it to Nashville to the enforcement division. There, the fines are identified and the orders are written. Each violation of a permit or the TN Water Quality Control Act can be fined up to \$10,000 per violation per day. The majority of violations in the last six months have been ongoing for a number of months or years. Erosion controls or unpermitted activities have persisted throughout the investigation period, and often are still noncompliant at the time the enforcement is going through the process. However, most fines begin at less than \$100,000 (equal to one violation for 10 days). Of those, often 80% are forgiven.

The Department has decided that appeals are too expensive, and though the Water Quality Control Board usually agrees with their position, the legal department prefers to settle and save the time and expense. At one level, they believe that the payment for repairing the damage done to the streams is better than deterrent money to the state AND the cost of repairs.

Therefore, \$20,000 is a common fine in the agreed orders that are arranged instead of an appeal. Recently, we came across a fine for a Wal-Mart contractor that had polluted a stream for over a year and botched a required repair effort in the stream. The original fine for this was \$21,000, and the end fine was \$5,000 and another opportunity to get in the stream to make repairs.

What the Legislation does:

The Tennessee Clean Water Act of 2007:

- ◆ Streamlines enforcement to increase compliance and comply with state and federal law;
- ◆ Rewards the regulated community that uses good practices to safeguard our water;
- ◆ Funds monitoring and enforcement actions with fines and fees from those who pollute; and
- ◆ Protects and measurably improves our water resources, property, and quality of life.

The TN Clean Water Act of 2007 streamlines TDEC processes and funds water protection.

Each of these goals can be accomplished without significant public funding or changes to existing law.

Probationary Permitting Repeat offenders will be required to get individual probationary permits that include maintenance fees for increased monitoring by the department. Chronic violators will be considered bad actors ineligible for new permits. Responsible applicants that obey the law will continue to self-monitor.

TDEC currently has the authority to require in each enforcement action that the violators receive individual permits. They also have the authority to require fees for environmental services supplied by the Department to monitor and test sites throughout permit coverage. TDEC is planning this year to revisit the maintenance fees. The legislation makes their use mandatory so that the recurring offenders pay for their own monitoring, not the public. Also, at this time TDEC does not have the authority to deny a stormwater permit to contractors who are already or chronically out of compliance. This common sense needs to be spelled out in legislation. After four enforcements in one year, these permits are required.

Mandatory Enforcement To expend the least amount of resources and be fair, enforcement needs to be swift and consistent. After two notices of violation and chances to fix the problem, TDEC must enforce.

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Currently, though TDEC can bring an enforcement the first time they have evidence of a violation, they tend to give out not only one or two Notices of Violations (NOVs) and opportunities to fix the issue, but several or dozens of NOVs with no financial penalties. The legislation sets a limit for the number of times a permit holder can be out of compliance, warned, and still not fix the problem. This is not a new authority, nor does it stop TDEC from enforcing as early as they choose.

Mandatory Fines The Water Quality Control Act currently allows TDEC to fine violators up to \$10,000 per violation per day. However, TDEC rarely assesses fines over \$20,000 even when there are multiple violations over months or years. Fines will start at 50% of the maximum for the particular violation.

The fines in the bill are no larger than allowed currently. In fact, the mandatory fines are half the possible fine for one day and one violation, even when NOVs have been ignored and days or months or years of multiple violations have occurred. This allows some flexibility for leniency if appropriate. The fines will be placed in a special fund as already required by law. The added requirement is that the fees be spent to fund enforcement personnel. The enforcement staff should grow and narrow with the increase and decrease of enforcement.

Public Access Public action starts with proper notice of TDEC's permitting and enforcement activities. TDEC must publish all notices of violation, enforcement actions, fines and agreed orders on the web.

Currently, even when an interested party asks, they are not always kept informed of activities regarding permits or enforcement. I personally have asked to be kept informed of complaints that I have filed, and only found out after the fact that (months later) small fines for lack of permit coverage had been issued. The pollution, erosion control failure, and unstable slopes continue to this day. Some notices are published when it is too late for the public to exercise their rights before the hearing. The Clean Water Act specifically requires that the public be involved in every area of water protection, and requires the federal government and states to encourage and facilitate that participation. The small changes required in the legislation will help the community that has access to the web, and will publish enforcement drafts and final agreements for the first time. This is beyond the current TDEC activities, but fully within their authority and responsibility. The enforcement manager is enthusiastic about these changes.

Stop Work Order TDEC is responsible for protecting the waters of the state and needs the authority to stop activities that are noncompliant or polluting. Now, pollution continues until the legal appeals process ends.

TDEC has the authority to stop coal mining and forestry pollution. The project cannot continue until the proper permits are issued and the pollution is stopped. The proposed legislation simply expands that authority to include all TDEC activities. TDEC cannot be responsible for the safety of our resources without the power to stop pollution when it is identified, not after appeals and legal wrangling. The Department is very cautious about using this tool, and is not likely to abuse it.

[Helping Tennesseans Protect our Waters](#)

The TN Water Quality Control Act has given TDEC ambitious goals and powerful enforcement tools to protect our waters and fund those efforts through permit fees and fines. This legislation increases the resources available to TDEC without burdening the public and streamlines the process to make enforcement certain, swift, consistent and self-sustaining. The TN Clean Water Act of 2007 will require enforcement before significant environmental harm occurs, preserve water resources, and deter future violations.

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