

T C W N

TENNESSEE CLEAN WATER NETWORK

enforcement report

SUMMARY OF TENNESSEE'S WATER
POLLUTION CONTROL ENFORCEMENT
PROGRAM IN 2009 AND 2010

FALL 2011

table of contents

- 1 From The Desk Of The Executive Director
- 2 Four-year Downward Trend
- 3 2009-2010 Findings
- 10 What Happened?
- 14 Case Study: Enforcement Against TVA: The State's Worst Environmental Disaster
- 16 Appendix: Enforcement Provisions - Background

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from the desk of the executive director

In the past few years we have seen a troubling decline of enforcement against those who violate our water protection rules. Between 2008 and 2010 enforcement dropped by half, and it was already pretty low compared to our 2008 report findings. In our last report we stated it appears TDEC is not targeting any particular county and this remains to be true today. While we stated in the 2008 report TDEC appeared to be enforcing closer to a field office, it appears this is not the case when looking at the data from 2009-2010. Developers still lead in the number of enforcement actions received, though the numbers fell by half between 2009 and 2010. We did see a rise in enforcement actions against public utilities most likely to curb sanitary sewer overflows due to increased pressure by EPA. The agricultural industry enjoys exemptions from the Clean Water Act and the Tennessee Water Quality Control Act. As before, we found very little enforcement actions against agriculture. We note in the data most of the actions are against industrial farms such as confined animal feeding operations and not the family farmer. The Expedited Enforcement action is in decline, while Director's Orders are on the increase, but not by much.

We had five recommendations TDEC chose to ignore. They do so at the peril of public health. Enforcement actions should be deterrents of bad behavior, not the cost of doing business.

So what's to be made from these findings? Lack of enforcement creates a climate some businesses may find favorable. However, the public is becoming less tolerant of air and water pollution. In May 2011, Gallup released a poll that indicated 77% of Americans are more concerned with toxic pollution, pollution to their drinking water and pollution to their rivers and streams than about global climate change (56%). Clean water continues to be important to the public, and our clean water should not be sacrificed to ease the burdens on industry.

It is sad and shameful protecting clean water has become so contentious. It isn't about driving business out of state or out of the country. It's about protecting the resource we cannot do without. We need water to live and we need *clean* water to live well. Industry doesn't want dirty water for their processes, but the lack of enforcement allows permittees to dirty water for the rest of us, and that is hardly fair.

The only safety net between the public and polluters is the state, and TDEC must step up and claim its authority to regulate clean water for all of us. TCWN does its part to make polluters pay. TDEC needs to do so as well.

Sincerely,

A handwritten signature in black ink that reads "Renée". The signature is fluid and cursive.

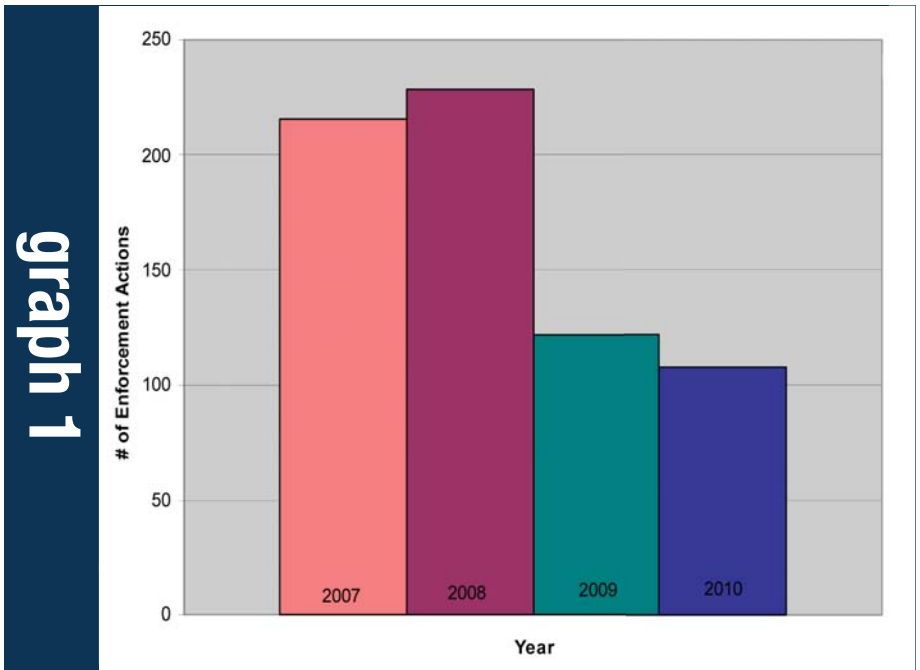
Renée Victoria Hoyos, Executive Director

This is TCWN's second enforcement report including three years of analysis on enforcement of our state's water quality rules. The trend is clearly downward.



FOUR YEAR DOWNWARD TREND: STATE EXPERIENCES A 4-FOLD DECREASE IN ENFORCEMENT SINCE 2008

Since 2007 enforcement by TDEC's Water Pollution Control Division has declined. In 2007 approximately 210 enforcement orders were issued by the state. By 2010, there were almost half as many.¹ This report analyzes the enforcement activities of 2009 and 2010 in comparison to 2008 in an effort to determine why enforcement of the state's water quality laws has declined at such a significant rate.



Enforcement Actions by Year

¹ Tennessee Department of Environment and Conservation, <http://environment-online.state.tn.us>.



2009-2010 FINDINGS: ENFORCEMENT DATA BY COUNTY CONTINUES TO INDICATE TDEC IS NOT FOCUSING ON A SPECIFIC COUNTY OR GEOGRAPHIC AREA OF THE STATE

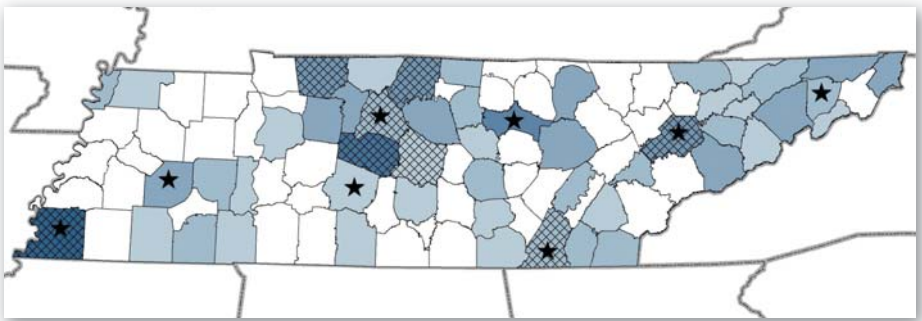
2009		2010	2009		2010	2009		2010
County	Count		County	Count		County	Count	
Anderson	0	0	Hamilton	2	2	Morgan	0	0
Bedford	1	2	Hancock	1	0	Obion	1	4
Benton	0	1	Hardeman	1	2	Overton	0	0
Bledsoe	0	0	Hardin	1	0	Perry	0	0
Blount	0	0	Hawkins	2	1	Pickett	0	0
Bradley	2	0	Haywood	0	1	Polk	2	0
Campbell	0	0	Henderson	2	0	Putnam	7	8
Cannon	0	1	Henry	0	0	Rhea	2	0
Carroll	0	0	Hickman	0	0	Roane	0	2
Carter	0	2	Houston	0	1	Robertson	1	0
Cheatham	4	3	Humphreys	1	0	Rutherford	1	2
Chester	0	1	Jackson	0	0	Scott	0	0
Claiborne	2	2	Jefferson	2	2	Sequatchie	0	0
Clay	0	1	Johnson	3	2	Sevier	3	1
Cocke	1	2	Knox	6	1	Shelby	17	9
Coffee	0	0	Lake	2	0	Smith	2	0
Crockett	0	1	Lauderdale	0	0	Stewart	0	0
Cumberland	4	4	Lawrence	0	2	Sullivan	3	5
Davidson	2	2	Lewis	0	0	Sumner	5	4
DeKalb	1	1	Lincoln	0	0	Tipton	0	0
Decatur	1	0	Loudon	2	0	Trousdale	0	0
Dickson	4	3	Macon	2	0	Unicoi	1	1
Dyer	0	0	Madison	4	1	Union	0	2
Fayette	0	0	Marion	1	2	Van Buren	0	2
Fentress	3	0	Marshall	0	1	Warren	2	0
Franklin	0	3	Maury	1	2	Washington	2	2
Gibson	0	1	McMinn	1	2	Wayne	0	0
Giles	1	0	McNairy	2	0	Weakley	0	1
Grainger	1	1	Meigs	0	1	White	0	0
Greene	3	1	Monroe	0	1	Williamson	12	6
Grundy	1	0	Montgomery	6	4	Wilson	3	3
Hamblen	1	0	Moore	0	0	Statewide	0	1

Table 1

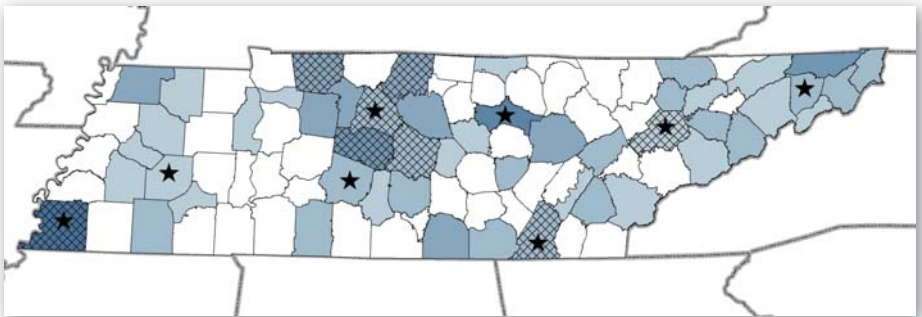
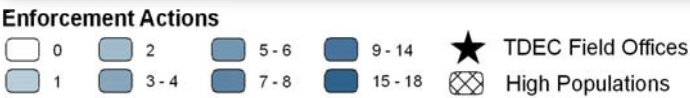
For 2009 the state reported 138 enforcement orders and 111 for 2010.² However, because these counts include enforcement for the same infractions against multiple offenders at the same site, it is more accurate to describe the enforcement orders as 133 and 102 respectively. For the purpose of paralleling as much as possible with the state's data the following analysis uses 113 rather than 111 as the count for 2010 in accordance with TDEC's enforcement database³ and 138 for 2009.

FORTY THREE COUNTIES RECEIVED NO ENFORCEMENT ACTIONS: WAS TDEC CONCENTRATING ON THOSE COUNTIES WITH HIGH POPULATIONS OR WITH A FIELD OFFICE? NO.

In 2009 the average number of enforcement orders by county was 1.5. This dropped to 1.2 in 2010, which is half the average from 2008 of 2.4 per county. Each year in 46% of the counties no enforcement orders were issued. Recognizing the potential for enforcement to occur in the most populated areas⁴ or where enforcement staff can more readily witness violations, TCWN compared the number of enforcement orders in these areas to the average number of enforcements per county.



Map 1



Map 2

2 *Tenn. Code Ann. § 69-3-142 Annual Report to the Legislature, 2009 and 2010.*

3 *Tennessee Department of Environment and Conservation <http://environment-online.state.tn.us>. Agreed Order WPC09-0174 (Agreed 4/20/2010) as well as an Order from Putnam County) were not included in the state's report. TCWN uses all orders signed in the applicable years as the basis of this report.*

4 <http://www.us-places.com/Tennessee/population-by-County.htm>

Number Of Enforcement Actions Per County With A TDEC Field Office			Number Of Enforcement Actions In The Most Populated Counties		
	2009	2010		2009	2010
Davidson	2	2	Shelby	16	9
Hamilton	2	2	Davidson	2	2
Knox	6	1	Knox	6	1
Madison	4	1	Hamilton	2	2
Maury	1	2	Rutherford	1	2
Putnam	8	8	Williamson	12	6
Shelby	16	9	Sullivan	3	5
Washington	1	2	Sumner	5	4

Table 2

Table 3

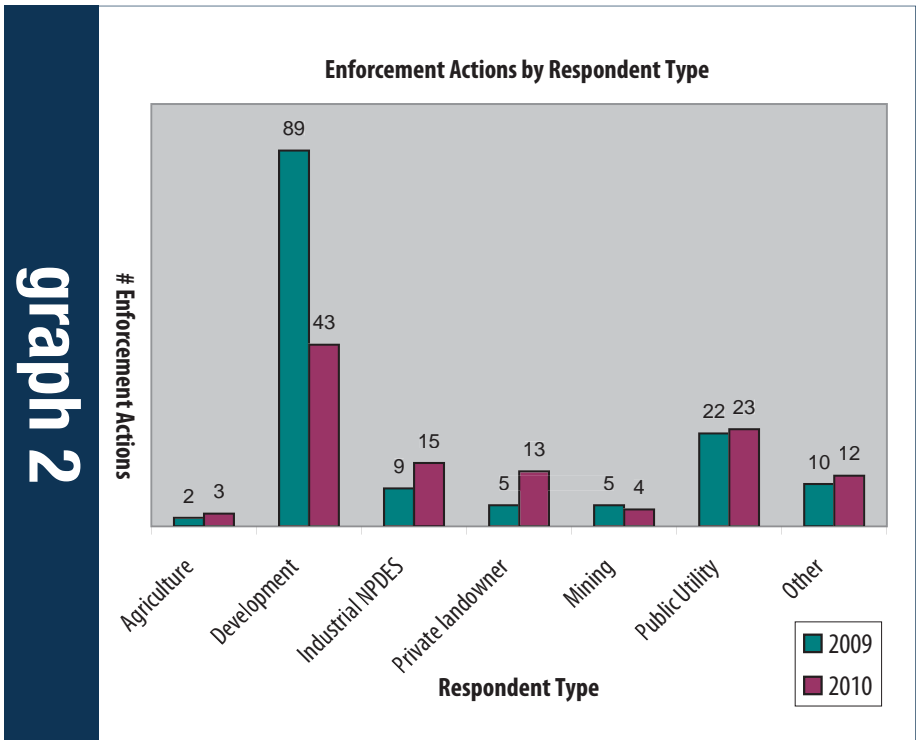
All counties in which a TDEC Environmental Field Office is located have at least one enforcement order each year. The same is true for the most populated counties of the state. However, there are not significantly more enforcement orders in counties located near a field office. The same is not true for the most populated counties in the state. Shelby County has significantly more enforcement orders than the other counties, and it is also the most populated county. While Davidson, Knox, and Hamilton have close to average numbers of enforcement, several slightly less populous counties have noticeably above average enforcement. There is not a consistent pattern of enforcement in relation to population.



Runoff from zinc mining in Mascot, Tennessee

DEVELOPMENT STILL MAKES UP THE LARGEST GROUP OF OFFENDERS

In 2008 73% of the state's enforcement orders were against development. With development making up the largest group of violations in both 2009 and 2010, this trend continues. While still the majority, development has experienced a decline in overall enforcement. This decline could be the result of several factors. The significant decrease in development due to difficult economic conditions is likely a significant factor. In 2008 approximately 133,000 people were working in the "construction and mining" category. This figure was down to 103,000 by the end of 2010.⁵



ENFORCEMENT AGAINST PUBLIC UTILITIES HAS GROWN SIGNIFICANTLY. WASTEWATER TREATMENT PLANTS AND PUBLIC ROADS GET MORE SCRUTINY.

The public utilities category, which includes wastewater treatment plants and public roads, witnessed an increase in enforcement over the past three years. This increase may be a result of EPA's recent emphasis on enforcement against sewage treatment facilities, particularly involving sanitary sewer overflows.

⁵ Tennessee Department of Labor, <http://www.tn.gov/labor-wfd/lmr/>, Labor Market Reports.

FARMERS ARE NOT TARGETED FOR ENFORCEMENT.

Agriculture is largely exempt from state and federal water quality laws and remains one of the smallest groups against which enforcement occurs. Of the two enforcement orders against agriculture in 2009, one was against an unpermitted animal feeding operation and the other was against a farm for causing a condition of pollution when altering a stream. In 2010 there were three enforcement orders relating to agriculture. All three were the result of animal feeding operations causing a condition of pollution. Unlike traditional farms, Concentrated Animal Feeding Operations are point sources of pollution and must obtain a permit from the state.

Agriculture – animal feeding operations and crop production

Private Landowner – activities on one’s personal property

Public Utilities – sewage treatment plants and public roads

Development – business owned land impacted for the purpose of profit

Industrial NPDES – permitted industries with discharge allowances for processed waste and/or stormwater

Mining – activities covered under surface mining permits

Other – forestry, illicit discharges, borrow pit, MS4

EXPEDITED DIRECTOR’S ORDERS DECLINE, WHILE DIRECTOR’S ORDERS INCREASE, BUT NOT BY MUCH.

In 2008 62% of the enforcement orders were Expedited Director’s Orders (“EDOs”), which require no corrective action, but can only be applied when no pollution has resulted from the violation and for which the fine can be forgiven by half if the right for appeal is waived. For 2009 and 2010, the percentage of EDOs dropped to less than half of the total enforcement orders, with Director’s Orders making up most of the remaining balance. This trend could indicate a number of changes. More pollution may be resulting from violations or more egregious violations may be occurring, preventing the issuance of an EDO. It is also possible the state is requiring greater compensation for the violations.

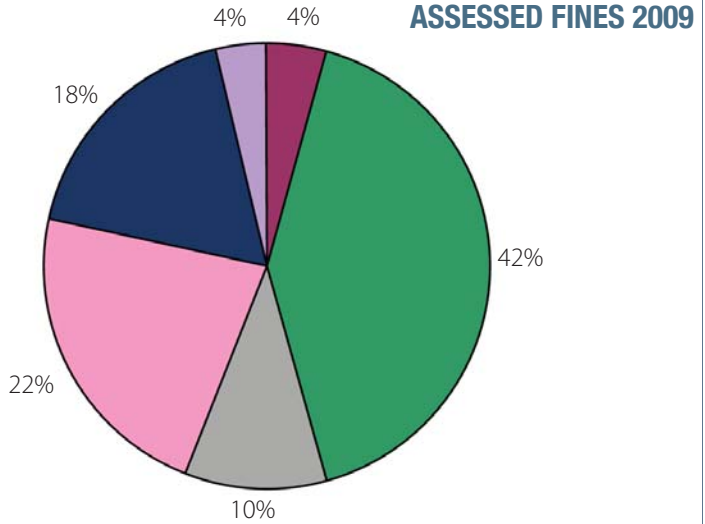
Order Type	2009	2010
	Percent	
AO	8.0%	2.7%
CO	3.6%	3.5%
DO	47.1%	44.2%
EDO	41.3%	48.7%

Table 4

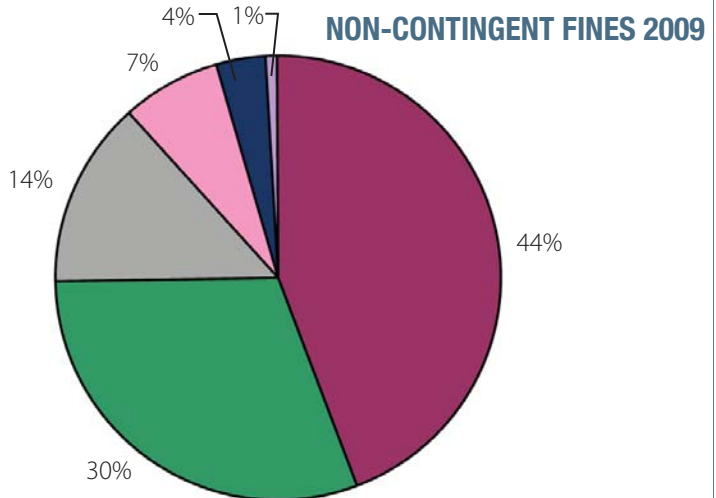
FINE FORGIVENESS REMAINS HIGH⁶

Over the past three years a majority of the fines assessed by TDEC were in the \$2000 to \$4999 range. However, during this same time the amount mandated to be paid up-front, known as the non-contingent portion, is almost always less than \$2000. The charts below illustrate the significant decrease in fines from the original assessed amount.

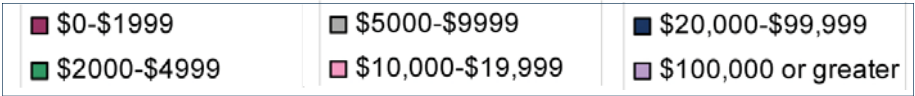
graph 3



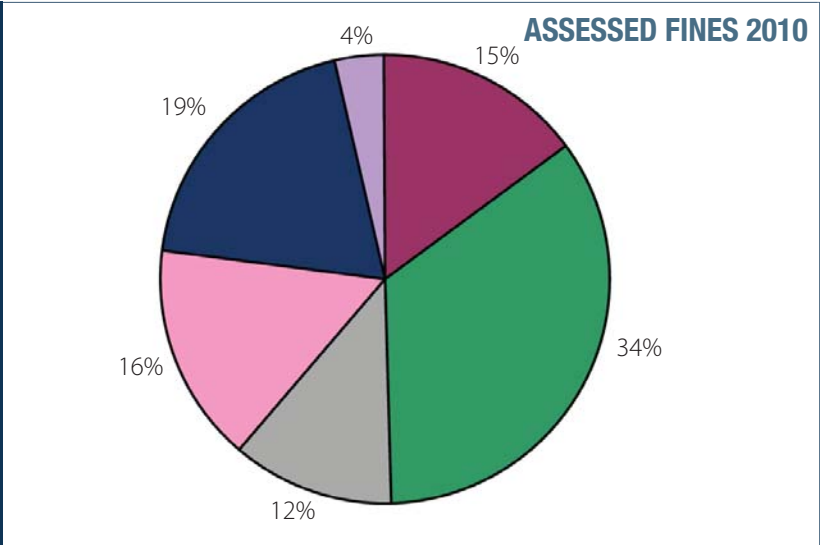
graph 4



⁶ 2010 data excludes both the \$11,500,000 fine (WPC08-0290) and \$0 fine (WPC10-0135) levied against the Kingston Fossil Plant for the illicit coal ash discharge of 2008 due to their values as significant outliers.



graph 5



graph 6

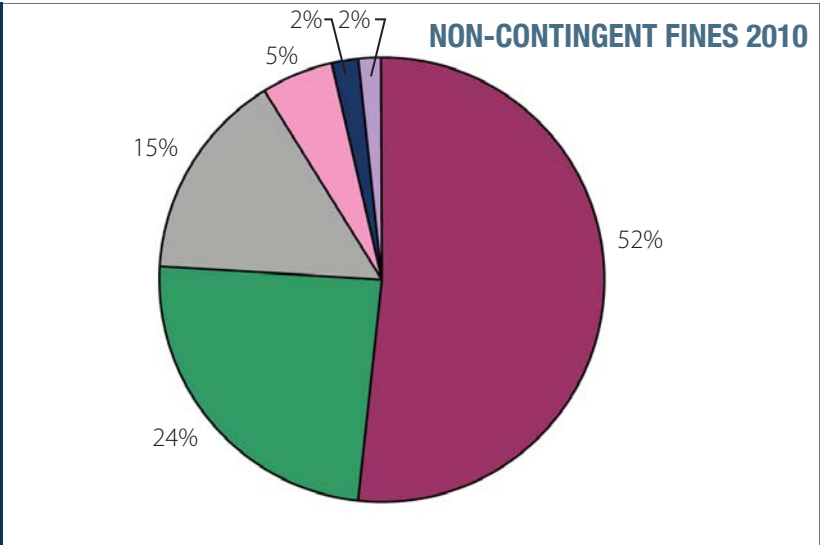


Table 5 breaks down data on the fines from enforcement orders in 2009 and 2010. While the average non-contingent penalty in 2009 was \$8,655, this is skewed by an outlier of a \$625,000 fine from an order initiated in 2005, and resolved in 2009. On average more than half of the fine is not required to be paid unless the respondent fails further compliance.

Year	Sum of Assessed	Amt of Fine Paid to		Avg Non-contingent	Avg percent non-contingent
		State Up-front	Avg Assessed		
2009	\$2,859,624	\$1,194,450	\$20,722	\$8,655	62%
2010	\$1,901,931	\$516,531	\$16,982	\$4,612	57%

Table 5

What the “Total Assessed” versus the “Amount of Fine Paid Up-front” indicates is the difference between what the state valued as appropriate for the degree of the violations, frequency of occurrence and other factors compared to how much the state actually required the respondent pay as a direct penalty. The remainder of the penalty is either forgiven, in an EDO if the respondent waives the right to appeal, or is only required to be paid if the respondent commits another violation.



Duck River

WHAT HAPPENED?

IN ITS 2008 ENFORCEMENT REPORT, THE TENNESSEE CLEAN WATER NETWORK RECOMMENDED SEVERAL ACTIONS TO ENSURE ENFORCEMENT ACTUALLY PROTECTS OUR WATER QUALITY.

1. Increased compliance inspections

Knowledgeable TDEC staff must inspect permitted sites on a regular basis. TDEC needs adequate staff to conduct routine site visits to assess permit compliance and conduct follow-up inspections after violations have been noted. If permit holders know there is little chance of TDEC staff evaluating compliance, non-compliance becomes the norm.

What happened? TDEC’s Water Pollution Control Division eliminated two enforcement staff positions as a result of a budget-cutting employee buyout program in 2008, and it is not currently refilling all voluntarily vacated positions. This could contribute to the capability of the Division to pursue enforcement orders. The enforcement program remains as a complaint-driven program.

2. Stronger enforcement actions – set a limit on NOVs

It is not uncommon for permit violators to receive multiple NOVs before ever receiving an enforcement order. TCWN recognizes it is often appropriate to notify the permit holder of a violation and give them an opportunity to correct the violations. However, it is too generous to give violators 3, 4, or 5 NOVs before taking more stringent actions against them. How many times does one need to be told to correct for violations before actually coming into compliance?

What happened? Notices of Violation are still not capped. An example of poor use of an NOV was one issued in Benton County after a stream/wetland fill occurred without permission. The recipient of the NOV was not required to correct the violation, pay the permit application fee, or pay a financial penalty for breaking the law. He was only required to mitigate.⁷

3. Increased fines –Violators must pay the cost of their violations.

This addresses two problems:

a. Larger fines assist in deterring violations. When permit holders know it will cost them a great deal of money when they violate their permits, they are less likely to do so. To serve as a deterrent, the fine for noncompliance must be greater than the cost of complying in the first place. Currently, this is not the case. It is cheaper to ask for forgiveness than permission. Fines have become a cost of doing business rather than an expense to be avoided.

b. Fines paid for permit violations go into the Environmental Protection Fund to fund enforcement activities.⁸ This fund pays the expenses of enforcement of the TN Water Quality Control Act. Therefore, forgiving 77-97% of a fine on the promise of future compliance weakens TDEC's ability to conduct its enforcement work. Violators, not the citizens of Tennessee, should pay for enforcement.

What happened? Fines have not been increased. As noted previously, since 2008 the average respondent paid a fine less than \$2000.

4. Corrective actions must be required

Any enforcement action that results from a violator causing a condition of pollution to our rivers, streams, lakes, or wetlands must include a corrective action component. While it is important a violator be held accountable for its actions and punished accordingly, it is most important our rivers and streams be restored and protected.

What happened? Corrective actions are sometimes required. The state should take greater advantage of its Natural Resources Damage Assessment Program, which recoups the financial damages caused by the violations. This provides a step-by-step means to ensure the Tennessee's citizens do not bear the costs of illegal pollution.

⁷ Notice of Violation/Corrective Action – Environmental Waste Solutions/Recycling Ventures. Tennessee Department of Environment and Conservation. February 4, 2011.

⁸ Tenn. Code Ann. § 68-203-101.



Not one of these recommendations was implemented.

TCWN maintains all of the above actions are necessary to protect our water quality and deter future permit violations. Permit violators must bear the financial responsibility of breaking the laws, not the taxpayers or the state, particularly given the financial difficulties the state is currently facing. The enforcement program is in part funded by the penalties paid by permit violators. The entirety of the program should be paid by the violators through adequate penalty assessment rather than as a burden on the citizens of Tennessee. Appropriately assessing penalties is not an income generating technique by the state, but rather a means of not punishing the public when permittees decide to break the rules.

What is happening now? TDEC updated a non-binding department-wide enforcement guidance in May. This guidance specifically states:

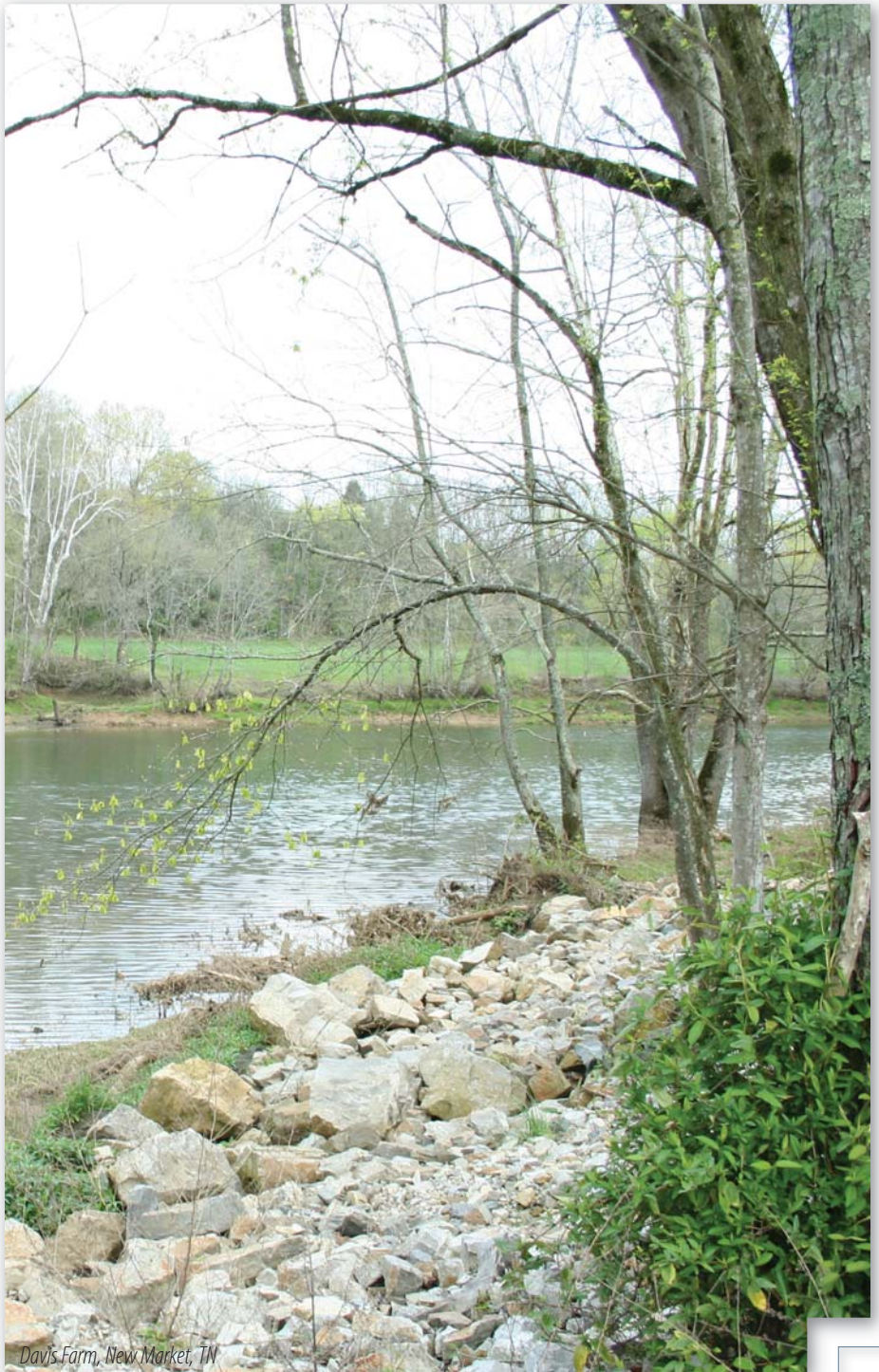
To the extent practicable, the upfront civil penalty should remove any known economic benefit which the facility may have enjoyed during the period of non-compliance and encourage compliance by having non-compliance cost more than compliance.

The guidance also provides a step-by-step procedure for calculating civil penalties as well as adjustments to the initial penalty. The document closes by noting:

Natural resource damages should be reviewed in all cases that result in a temporary or permanent loss of resources.⁹

TCWN agrees!

⁹ State of Tennessee, Department of Environment and Conservation. *Uniform Guidance for the Calculation of Civil Penalties*. May 2011.



Davis Farm, New Market, TN



Kingston Ash Spill



Case Study

Enforcement Against TVA: The State's Worst Environmental Disaster

As 2008 was nearing an end Tennessee experienced its worst environmental disaster – the coal ash discharge into the adjacent river from TVA's Kingston Fossil Plant. When the Plant's coal ash storage facility collapsed 5.4 million cubic yards of ash sludge containing multitudes of toxic chemicals contaminated both the waters and adjacent land as well as human and animal health. Heavy metals such as arsenic, selenium, and lead polluted the river and sent contaminants downstream. In a July 23, 2009 report, TVA's own Inspector General acknowledged TVA's fault in the disaster and stated "TVA could have possibly prevented the Kingston spill if it had taken recommended corrective actions."¹⁰

In this situation, catastrophic pollution as well as human and animal health threats resulted from a facility's own self-acknowledged negligence. There is no question of responsibility. TDEC issued two orders against the facility. The first was an immediate Emergency Order mandating the control and clean up of the coal ash waste as well as a requirement for TVA to reimburse TDEC for its costs associated with oversight and review, at the time amounting to \$3,000,000.¹¹

For these illicit discharges TVA was ordered to pay an \$11,500,000 fine.¹² While this is the "largest cash penalty that TDEC has issued,"¹³ is it enough? \$3,000,000 of the assessed fine was credited for the amount paid in the Emergency Order – reimbursing the state and taxpayers our cost to correct TVA's failure (TVA is required to continue reimbursing the state for ongoing and future costs associated with the spill). Therefore, the assessed civil penalty was more accurately \$8,500,000 since \$3,000,000 of it was damages. Regardless, \$11,500,000 is hardly significant to TVA since it "adds up to about 1% of the utility's annual electricity revenues."

The question therefore is: was an \$11,500,000 civil penalty enough to deter TVA from committing the same negligence which resulted in this catastrophe? It seems if a fine is not significant to the violator it is likely will have no impact on the violator.

¹⁰ TVA Office of Inspector General, *Inspection Report: Review of the Kingston Fossil Plant Ash Spill Root Cause Study and Observations About Ash Management*. July 23, 2009.

¹¹ State of Tennessee Department of Environment and Conservation, *Case No. SWM09-0014/WPC08-0290. Commissioner's Order, Section X*. June 14, 2010.

¹² *Ibid.*

¹³ JJ Stambough. *TVA won't appeal civil penalty of \$11.5M for coal ash spill*. Knoxville News Sentinel. June 15, 2010.

Appendix

ENFORCEMENT PROVISIONS - BACKGROUND

The federal Clean Water Act and the Tennessee Water Quality Control Act both provide robust enforcement mechanisms. This report focused on enforcement of permits issued by the Tennessee Department of Environment and Conservation (TDEC).

The Federal Rules

The Federal Water Pollution Control Act, known informally as the Clean Water Act (CWA) is the law protecting our nation's rivers and streams from pollution. The CWA set national goals to eliminate pollution and provides assistance to states in meeting these goals. The Environmental Protection Agency (USEPA) oversees and enforces the CWA.

One of the strongest tools to protect water quality is the National Pollutant Discharge Elimination System (NPDES) permit program. NPDES permits are required for activities that cause pollution through point sources such as pipes. Discharges covered under the NPDES program include sewage treatment plants; construction, municipal and industrial stormwater; industrial wastewater; mining; and confined farming operations. The CWA prohibits pollution from point sources except in compliance with an NPDES permit.¹⁴ In other words, these permits are permission to pollute within limits set by state and federal rules. The goal was to eliminate the discharge of pollutants by 1985¹⁵, but we clearly failed to achieve that goal.

While the USEPA does have the ability to pursue violations in criminal court, NPDES permit violators are usually taken to civil court. Once an NPDES permit is issued, the permit holder has a duty to comply.¹⁶ As of 2008, the CWA also provides for a monetary penalty of up to \$37,500 per violation per day.¹⁷

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. 40 C.F.R. § 122.41

The State Rules

In Tennessee, as in most states, the NPDES program is managed by the state. TDEC issues NPDES permits and enforces the conditions of these permits. In addition to the NPDES permit program, TDEC issues Aquatic Resources Alteration Permits (ARAP) for those activities proposing to physically alter waters of the state. This program is similar to the Section 404 Program of the CWA, which establishes conditions for issuing permits when dredged or fill material is placed in waters of the U.S. Authority for oversight of these permits is granted to the U.S. Army Corps of

¹⁴ 40 C.F.R. § 122.1(b).

¹⁵ 33 U.S.C. § 1251(a)(1).

¹⁶ 40 C.F.R. § 122.41.

¹⁷ 40 C.F.R., §19.4.

Engineers.¹⁸ This report covers state enforcement orders against NPDES permits and ARAPs.

Basically, TDEC becomes aware of a permit violation through routine inspections of industries or complaints from the public. Once a violation is documented, TDEC can issue an order against the permit violator. TDEC typically notifies the permit violator through a Notice of Violation (NOV), which requires the violator fix the problem and gives a timeframe to complete the fix. An NOV does not include a fine. If a violation is severe, TDEC may immediately issue an Order rather than an NOV; however, that is a rare occasion. Orders come with fines. However, TDEC often issues multiple NOVs to a single violator before issuing an Order. There is no established policy on when an Order becomes necessary. TDEC makes those decisions on a case by case basis.

Under state law, TDEC may impose fines against a violator. The violator can be assessed a fine of up to \$10,000 per day per violation. State law lists the following factors to consider when calculating a fine:

- Whether the fine imposed will deter future illegal activity - *will the fine keep this person from doing it again?*
- Damages to the state, including compensation for loss or destruction of wildlife, fish, and other aquatic life that result from the violation, expenses paid by the State in enforcing against the violator and the costs involved in fixing the problem – *what is the cost of the loss of a resource?*
- Cause of pollution – *was it a one-time accident or an ongoing problem?*
- The severity of the pollution and its effect upon the stream that was polluted – *how bad is the damage?*
- Effectiveness of action taken by the violator to cease the violation - *did the violator fix it immediately and completely, or did the violator drag his/her feet?*
- The technical and economic reasonableness of reducing or eliminating the discharge – *is the fix the right one and within the means of the violator?*
- The social and economic value of the discharge source – *is the pollution a fair trade for economic growth?*
- The economic benefit gained by the violator – *did the violator make more money by ignoring clean water laws and hoping not to get caught?*¹⁹

The Water Pollution Control Division also has a document entitled “Minimum Civil Penalties for Administrative Orders.” This guidance provides a minimum amount a permittee should be fined for a specific violation, broken down by NPDES permits and ARAP violations. While this is a useful tool, the Division is not required to abide by this document.

*To learn more about the CWA NPDES program in Tennessee go to
<http://www.state.tn.us/environment/permits/npdes.shtml>.*

¹⁸ 33 U.S.C. § 1344(d).

¹⁹ Tenn. Code Ann. § 69-3-115(3).



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