

SENATE BILL 633

By Woodson

AN ACT to amend Tennessee Code Annotated, Title 68 and Title 69, relative to water quality.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 69, Chapter 3, is amended by adding Sections 2 through 15 of this act as a new part thereto.

SECTION 2. This act reduces the burden on the taxpayers for permit processing and enforcement of the Tennessee Water Quality Control Act and permit requirements. The burden is shifted to those who create a need for enforcement and increased monitoring due to noncompliance with the law.

SECTION 3. The general assembly declares that the regulated community has an interest in the prompt and efficient processing of permits. This process is delayed when resources are diverted or applied to monitoring of or enforcement against noncompliant permit holders. Significant resources are required to identify and document violations of the Water Quality Control Act and bring enforcement actions to compel compliance and protect the waters of the state. This act creates a separate permit track for priority applicants that have a history of compliance, and other applicants with negative or no histories.

SECTION 4. Priority applicants may apply for general or individual permit coverage as required by Section 69-3-108 and shall pay applicable fees for permits as approved by the water quality control board. These fees may change periodically to reflect the actual cost of permit processing. Priority applicants are subject to standard site checks and self-monitoring as required by law. Individual probationary permits shall be available for all other eligible applicants.

SECTION 5.

(a) Applicants applying for the first time or with a documented history of non-compliance with permits during or after the permitted activity may be issued individual probationary permits. A documented history of non-compliance shall be two (2) or more enforcement actions initiated within a three hundred sixty-five (365) day period or four (4) notices of violation for the same or similar violation.

(b) Probationary permits shall include at least the following:

(1) A site check by qualified department personnel to ensure that erosion controls are built and implemented according to the current storm water pollution prevention plan or other permit requirements and express, documented permission to begin work. No grading or site preparation can commence prior to receiving written permission from the commissioner;

(2) Site checks by qualified department personnel for each phase of construction to assess the sufficiency of erosion controls and expressly approve the next phase;

(3) Random, unannounced site checks by qualified department personnel for erosion control compliance;

(4) Electronic submission of weekly site self-monitoring reports conducted by erosion control personnel certified by the state of Tennessee;

(5) Water quality testing of all affected streams during a storm event before, during and after construction; and

(6) An erosion prevention and remediation bond if the project impacts a 303(d) listed stream or tributary to a 303(d) listed stream. As reflected in the 305(b) report reflecting the condition of surface waters and the 303(d) list of waters that do not meet minimum standards due to pollution, sediment is the most common pollutant of waters of the state which are held in the public trust.

When permitted activities contribute to the pollution, the taxpayers and state and local government agencies lose the significant investment Tennessee has made to recover these resources. The bond covers the additional cost state and local officials will have to expend to repair damage to waters of the state.

(A) Applicants shall post an erosion bond prior to the issuance of the permit. An erosion bond shall guarantee that best management practices constructed under the permit will be adequately sized and maintained throughout the life of the bonding period. All bond defaults shall be paid to the local or state issuing authorities having the power to call on all or any part of the bond if an applicant does not comply with the act or with the conditions of the permit.

(B) The board shall adopt regulations for the bond program which shall include at least the:

- (i) Establishment of the total dollar amount required for the bond;
- (ii) Specification of the length of the bond;
- (iii) The requirements for notice of defect or lack of maintenance, and
- (iv) A provision for release of the bond.

Bonds shall remain in effect until one (1) year after the final notice of termination for the project is issued in order to allow the erosion controls to mature and be tested through a rainy season to see whether the post-construction hydrology meets the permit and Tennessee Water Quality Control Act requirements.

(c) Fees for probationary permits shall include an additional maintenance fee for expenses necessary to process the application and monitor the project over the life of the permit, including but not limited to the cost of administration, inspections, water sampling and lab analysis, and other environmental services.

(d) After one (1) successful year of exercising probationary permits for a new vendor and three (3) years for an enforcement-related probationary permit applicant, the commissioner may change the applicant to a priority applicant.

(e) After five (5) years of permits without a permit violation a probationary permit holder shall become a priority applicant.

SECTION 6. Activities permitted under this act that are adjacent to or affect a 303(d) listed stream or tributary to a 303(d) listed stream are not eligible for general permit coverage.

SECTION 7.

(a) All permits on a 303(d) listed stream must be considered for their aggregate impact. Any activity subject to a permit or multiple of permits that negatively alters the chemical, physical, or biological integrity of a 303(d) listed stream is presumed to add to the condition of pollution and must be denied.

(b) All phases of a related project need to be considered for aggregate incremental impacts.

SECTION 8. The commissioner shall not process or issue permits or permit renewals to applicants that are in violation of the Tennessee Water Quality Control Act. In addition, the commissioner shall not issue, amend, or renew permits, registrations, certifications, or licenses to an entity or person who is delinquent on penalties, fees or remediation efforts. After the terms of all enforcement actions, remediation and fees are satisfied the permit may be processed.

SECTION 9.

(a) The director of the division of water quality control must deny permits and permit coverage under the Act to bad actors. The director shall not issue a permit or permit coverage in response to a notice of intent from a bad actor. If an applicant only eligible for probationary permits submits a notice of intent, all fees, monitoring and testing schedules and other elements of a probationary permit will attach.

(b) In addition to the causes for which the commissioner of water quality control can revoke, suspend or modify any permit for cause listed in 69-3-108(f), are the applicant:

(1) Has obtained a permit as an agent of an individual or company not eligible for such permit due to its non-compliance status; or

(2) Comes under control of an ineligible party due to circumstances such as merger, acquisition, or contract.

(c) If the violation of the Water Quality Control Act or provisions of the permit are causing a condition of pollution, a stop work order shall be used alone or in conjunction with a revocation, suspension, or modification of the permit in order to avoid additional pollution discharged into waters of the state.

SECTION 10.

(a) The commissioner is authorized to issue stop work orders for activities that violate or will imminently violate the Water Quality Control Act or threaten public safety in accordance with subsection (b). Stop work orders for coal mining and forestry shall continue to be regulated under Sections 69-3-139 and 69-3-133 respectively.

(b) In order to protect the public trust and investment in the waters of the state the commissioner may issue a stop work order to the responsible party. The stop work order shall specify those parts of the activities on site that are contributing to the pollution that must stop. Work must cease immediately upon notice on the stop work

order. The stop work order shall remain in effect until the department determines that the responsible party has installed or repaired all necessary measures to remedy the activity causing the condition of pollution so that further pollution associated with the activities will not occur and to comply with any permit requirements. Evidence of compliance must include at a minimum receipts and photos or a site visit by qualified department personnel.

(c) Failure to comply with a stop work order issued pursuant to this section shall subject the responsible party to the penalties in § 69-3-115 but in no case will be less than twenty-five thousand dollars (\$25,000) plus the cost of remediation or other compensation for loss of public trust resources to the state.

(d) The commissioner shall issue a stop work order when a sample taken downstream of a site is one hundred (100) turbidity units or greater over the ambient or background level of such body of water. For sites on 303(d) listed streams impaired by sedimentation or habitat loss, the commissioner must issue a stop work order when a sample taken downstream of the site is greater than the background level or discharge from the site exceeds water quality standards.

SECTION 11.

(a) All notices of violation director's and commissioner's orders and all other enforcement actions and outcomes will be published weekly in their entirety on the department website. Notices of violation will be electronically filed through the central enforcement office to expedite the process cost-effectively.

(b) In addition to any other publication required by law, board rulings on contested cases and acceptance of judgments by consent shall be published on the department website within five (5) business days.

(c) Notices of intent to appeal will be published on the department website within three (3) business days of receipt, but no later than fourteen (14) days prior to the date the appeal or an agreed order will be heard by the board in addition to other publication required by law.

(d) In addition to other publication required by law, draft agreed orders will be available to the public and published on the department's website no less than seven (7) days prior to the date the agreed order will be presented to the board.

SECTION 12.

(a) In an effort to reduce the burden on taxpayers by funding enforcement with fines and fees from noncompliant parties and by deterring future violations certain fines shall be mandatory, including:

(1) The amount calculated with the environmental protection agency benefit (BEN) model to recover the violator's economic benefits of noncompliance from delaying or avoiding pollution control expenditures;

(2) Reimbursement of department employees' time for investigating complaints, travel, site visits, testing, writing notices of violation, preparing for and attending compliance meetings or other enforcement-related meetings, and preparation and other reasonable expenses incurred to document and seek correction of the violation;

(3) A percentage of the maximum civil penalties that shall be imposed, with the percentage depending on the number of enforcement actions initiated in the past three hundred sixty-five (365) days, as follows:

(A) First enforcement – at least fifty percent (50%) of the maximum penalty for at least one (1) day of the violation for each violation;

(B) Second enforcement -- at least seventy-five percent (75%) of the maximum penalty for at least one (1) day of the violation for each violation; and

(C) Third or more enforcement actions – one hundred percent (100%) of the maximum penalty for at least one (1) day of the violation for each violation.

(4) For violations on 303(d) listed streams or their tributaries that have continued unabated for more than thirty (30) days, the mandatory fine must be at least twenty-five thousand dollars (\$25,000).

(b) A plea by the violator of financial inability to prevent, abate, or control pollution shall not be a valid defense under the provisions of this part.

(c) Documentation of the same violation at the same location on two (2) dates creates a rebuttable presumption that the violation continued each day between those dates, and each day thereafter until compliance is achieved. Fines may reflect the maximum penalty for each day in that range. The violator may rebut this presumption with clear and convincing evidence of supplies, receipts for labor costs, and photographic evidence including proof of the date the photos were taken.

(d) In the event of an appeal of any enforcement order, the board shall fine any frivolous appeals five hundred dollars (\$500) plus an amount equal to the staff and board resources expended to prepare for, hear, and finalize the enforcement action. An appeal undertaken to delay, induce the state to settle or avoid payment of a judgment without a legal basis is presumed frivolous.

(e) Fines assessed and collected under this Section will first be applied to funding the salaries, benefits and training of additional qualified personnel dedicated to enforcement. Money will not be allocated to other priorities until each field office has no

less than one (1) dedicated enforcement officer per one hundred (100) active sites under individual permits or general permit coverage. The remainder will revert to the special fund required by § 69-3-119.

SECTION 13.

(a) The board shall adopt regulations that estimate the expense of water quality testing, site visits, compliance review meetings, appeals, and all other environmental services and administrative expenses related to monitoring, enforcement, settlement, or other compliance activities related to permit review or enforcement for the purposes of creating a cost list for maintenance fees and other environmental services provided in response to permit applications and violations.

(b) The department shall use this cost list throughout the state to efficiently, consistently and fairly shift the cost of monitoring and compelling compliance to permit holders and other actors that violate clean water laws. The list will also provide a foundation for assessing fees for permit applicants based on the estimated resources that will be expended by the department.

(c) Probationary applicants shall pay yearly maintenance fees. Maintenance fees shall equal the added expenses beyond the evaluation and monitoring of priority applicant permits and shall be collected in advance for the expected term of the project. If a project is not completed within the expected term, the applicant shall pay maintenance fees until a notice of termination is filed with and approved by the commissioner. Extension fees shall be paid in advance for a term of at least six (6) months and are not refundable. All fees imposed by this section shall be deposited in the special fund required by § 69-3-119.

SECTION 14

(a) The commissioner must proceed to either a director's or commissioner's order enforcement action if after two (2) notices of violation for the same or similar violation on a site the condition persists. This section in no way limits the initiation of enforcement actions prior to this condition.

(b) Whenever the commissioner believes that a violation of any provision of this part or regulation promulgated thereunder or orders issued pursuant thereto has occurred or is occurring, the commissioner shall cause a written complaint to be served upon any alleged violator. This action in no way limits any other enforcement actions related to the violation.

SECTION 15. Tennessee Code Annotated, Section 69-3-103, is amended by adding the following new items thereto:

() "Applicant" means any person making application for the approval of a permit pursuant to the water quality control act;

() "Bad actor" means an applicant that:

(A) Received an enforcement action for one or more permit violations or activities that legally required a permit or otherwise violate the Water Quality Control Act while eligible only for probationary permits due to a history of non-compliance;

(B) Has a documented history of disregard of permit requirements evidenced by five (5) or more enforcement actions initiated within a three hundred sixty-five (365) day period, eight (8) notices of violation statewide, or a series of incidents demonstrating a disregard for environmental regulations or a pattern of prohibited conduct.

(C) Regardless of eligibility, has been charged with, or incarcerated for, an environmental criminal offense or fraud within three (3) years preceding the application for a permit,

(D) Has been found by the department to have caused significant harm through a disregard of permit requirements or other violation of the Water Quality Control Act; or

(E) Any applicant who has received a stop work order in the last year;

() "Compliance history" means any record of being a responsible party found to have violated the Clean Water Act in Tennessee or any other state or the Water Quality Control Act of 1971 including notices of violations, complaints, enforcement actions, agreed orders, commissioners orders, or other such actions;

() "Enforcement action" means commissioner's orders, director's orders, and expedited director's orders for Water Quality Control Act or Clean Water Act violations for permitted activities or for failing to have a permit when necessary. Enforcement actions are considered in the aggregate, not by individual permit or site;

() "Ineligible individual or company" means companies that assumed liability for, share management with or are owned in whole or in part by a person or company that is a bad actor;

() "Priority applicant" means an applicant who is eligible for priority permits and fee schedules at the time the permit application is complete due to a history of compliance evidenced by a lack of violations of the Clean Water Act, Tennessee Water Quality Control Act, or other environmental law.

() "Responsible party" means:

(A) Any individual who is an applicant, an officer or director of a corporation, partnership, or business association that is an applicant, or person

with overall responsibility for operations of the site required to have a construction stormwater or other permit; or

(B) Any official or management committee member of the state or political subdivision thereof that is an applicant.

SECTION 16. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 17. This act shall take effect July 1, 2007, the public welfare requiring it.