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Tennessee's new Water Quality Control Act[1] is one of the most significant pieces of environmental legislation to be produced in recent years. It is destined not only to revamp water pollution control in Tennessee but also to serve as a model for legislation in other states. The Act and commentary written by its drafter, Professor Frank E. Maloney, are printed following this article.[2] Consequently, no attempt will be made to summarize the entire Act or to provide a detailed guide for its use. The purpose of this introductory article is to examine the salient, often innovative, features of the Act and to comment on its efficacy both as the basic law for Tennessee and as a model for other jurisdictions.

The most striking feature of the Act is its recognition of the public trust doctrine by the following language in section 2: "Recognizing that the waters of the State of Tennessee are the property of the state and are held in public trust for the use of the people of the state, it is declared to be the public policy of the state of Tennessee that the people of Tennessee as beneficiaries of this trust have a right to unpolluted waters."[3] Although references to this concept may be found in the legislation of other states,[4] the Tennessee Act is the first to adopt it expressly. The importance of this enactment of the public trust doctrine as positive law cannot be overstressed, and one should beware of treating section 2

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1. [1971] Tenn. Pub. Acts, ch. 164 (codified at TENN. CODE ANN. §§ 70-324 to -342 (Supp. 1971)).

2. Maloney, *The Tennessee Water Quality Control Act of 1971*, 25 VAND. L. REV. 331 (1972).

3. TENN. CODE ANN. § 70-325 (Supp. 1971).

4. The Michigan Environmental Protection Act of 1970, MICH. STAT. ANN. § 14:528 (201-07) (Supp. 1971), refers to a public trust in air, waters and other natural resources in connection with the creation of a private cause of action. There is an indirect reference to the doctrine in N.C. GEN. STAT. § 143-211 (Supp. 1971), which provides: "Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interests of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare."

of the Act as nothing more than a declaration of policy and purpose. This provision alone establishes the Act as a model for other jurisdictions.

The body of the Act specifies how the citizens of the State may protect their rights and how the State is to perform its obligation. Let us deal first with the right of the individual to protect his beneficial interest. Professor Joseph Sax, who deserves credit for first explaining the relevance of the public trust doctrine to environmental preservation and protection,[5] believes that the beneficial interest conferred by the public trust on the general citizen can be best protected by giving private citizens direct access to the courts, thereby placing a premium on a private-rights orientation in environmental litigation.[6] To accomplish this end, Professor Sax drafted an act for the State of Michigan that, in effect, confers a statutory cause of action on any individual who wishes to litigate in order to protect his beneficial interest.[7] The merits of giving environmental litigants a right of direct access to the courts have been disputed.[8] In drafting the Tennessee Act Professor Maloney rejected the Michigan approach and instead provided direct access to the relevant administrative agencies. Thus, section 17(a) of the Tennessee Act provides that "[a]ny person may file with the Commissioner a signed complaints against any person allegedly violating any provisions of [this Act]."[9] The Commissioner then determines what action, if any, his office will take on the complaint. This decision is appealable to the

5. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

6. Professor Sax expounds his theory of judicial activism in the environmental protection field in J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1970).

7. The Michigan Environmental Protection Act of 1970, MICH. STAT. ANN. § 14:528(202) (Supp. 1971) provides: "The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." This provision forms the model for the citizen suits provisions in both the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and the Water Quality Standards Act of 1971, S. 2770, 92d Cong., 1st Sess. (1971).

8. *See, e.g.*, Juergensmeyer, *Common Law Remedies and Protection of the Environment*, 6 U.B.C.L. REV. 215, 233-36 (1971); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A.L. REV. 429, 456-59 (1971); Maloney, *Judicial Protection of the Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145, 160-63 (1972); Jaffe, Book Review, 84 HARV. L. REV. 1562 (1971).

9. TENN. CODE ANN. § 70-340(a) (Supp. 1971).

Tennessee Water Quality Control Board, and a decision by that Board is appealable of right to the Chancery Court of Davidson County.[10] Requiring the private citizen to assert his beneficial interest first before the administrative personnel and Board charged with executing the Act is clearly preferable to the Michigan approach, which allows private citizens to bypass the administrative machinery and go directly to the courts. The Tennessee procedure ensures that any dispute involving water quality which does reach the courts will have the benefit of the record from an expert administrative determination.

It could be argued that recognition by the Act of the public trust doctrine and the concomitant beneficial interest of Tennessee citizens still makes a direct action in the courts possible under general trust law concepts. Indeed, at one point the commentary to section 2 states that "each citizen will have standing to demand judicial review of the acts or omissions of private individuals or State agents that affect the quality of water in the State of Tennessee. Since each citizen is a beneficiary of the *res*, the courts can no longer deny the citizen a forum on the grounds that he lacks sufficient standing."[11] Furthermore, section 17(b) of the Act provides: "Nothing herein contained shall be construed to abridge or alter rights of action or remedies in equity or under common law or statutory law . . . ."[12] Nonetheless, an interpretation of the Act permitting direct access to the courts clearly would be contrary to the intent of its drafter and adverse to its most effective implementation. The drafter's comments on section 17(b) in his report to the General

10. *Id.* § 70-333(a). In effect, Tennessee has adopted the so-called Illinois approach, and the Act's provisions on citizen suits are modeled after the Illinois Environmental Protection Act § 31(b), ILL. ANN. STAT. ch. 111 1/2, § 1301(b) (Smith-Hurd Supp. 1972). As to the procedure established in Tennessee for judicial review of administrative determinations, it should be noted that the Act as drafted and submitted to the Tennessee General Assembly provided that the appeal should lie to the Court of Appeals for the Middle Section of Tennessee. Unfortunately, an extra level was added when the General Assembly amended the Act to require an appeal to the Chancery Court of Davidson County. Maloney, *supra* note 2, at 358-59.

11. Maloney, *supra* note 2, at 335.

12. TENN. CODE ANN. § 70-340(b) (Supp. 1971). Unfortunately, § 17(b) begins with the provision that "[t]he penalties, damages, and injunctions provided for in sections 15-18 [TENN. CODE ANN. §§ 70-337 to -341] are intended to provide additional and cumulative remedies . . ." thus leaving uncovered in this saving clause the provision in § 13 [TENN. CODE ANN. § 70-336] which declares that water pollution constitutes a public nuisance. There is some support in Tennessee case law for the proposition that only the State may bring an action to abate public nuisances, unless an individual who wishes to do so has suffered damages differing in kind rather than just in degree from those suffered by the general public. *See* Fox v. Corbitt, 137 Tenn. 466, 194 S.W. 88 (1917); Weakley v. Page, 102 Tenn. 178, 53 S.W. 551 (1899); Lowery v. Petree, 76 Tenn. 674 (1881); Franer v. English, 8 Tenn. App. 121 (1928). Since the clear intent of the drafter was in no way to impair existing private rights, the portion of § 17 quoted in the text above should be interpreted to cover the public nuisance provision of § 13.

Assembly lend support to this view:

> This provision . . . was in the eyes of the drafting committee much superior to the approach taken in the Michigan law which authorizes the direct filing of suits in the courts, thus by-passing the enforcing agency. We believe the latter approach, which assumes that the agency will not do its job unless the courts make it, is unwise, and that the Division of Water Quality Control should be given an opportunity to consider complaints and take corrective action before the courts become involved.[13]

The question how the State of Tennessee is to perform its obligation as trustee requires a discussion of the remainder of the statute. Two of the Act's definitions[14] merit attention and praise. First, the definition of "waters" in section 3(14) makes it clear that the reference to "waters of the State of Tennessee" in section 2 is extremely broad. It provides that "waters" means "any and all water, public or private, on or beneath the surface of the ground, which are contained within, flow through, or border upon the State of Tennessee or any portion thereof . . . ."[15] Thus the Act progresses beyond such artificial legal classifications of water as underground streams, ground water, surface water, navigable and nonnavigable into the regulation of water whenever and wherever found.[16] Secondly, one must note the definition of "pollution" contained in section 3(11). This definition begins by providing that pollution means "alteration of the physical, chemical, biological, bacteriological, or radiological properties" of water that has one or more of the following effects: "[W]ill result or will likely result in harm, potential harm or detriment" to (1) "the public health, safety, or welfare" or (2) "the health of animals, birds, fish, or aquatic life," (3) "will render or will likely render the waters substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses . . . ."[17] The comprehensiveness of the interests protected by these three provisions seems exhaustive. Moreover, by phrasing these protections in the future tense the Act gives enforcement authorities the widest possible latitude. Finally, the fourth part of the definition of "pollution" should cover any situation beyond the purview of the first

13. 1 F. Maloney, Final Report: Study of the Water Pollution Control Laws of the Fifty States of the United States with Recommendations for the Revision of Tennessee Stream Pollution Control Law, Tennessee Code Annotated, Sections 70-301 - 70-323, at vi (1971) (unpublished report in Vanderbilt Law School Library).

14. TENN. CODE ANN. § 70-326 (Supp. 1971).

15. *Id.* § 70-326(14).

16. Section 3(14) of the Act contains an unimportant exception for "those bodies of water confined to and retained within the limits of private property in single ownership which do not combine or effect a junction with natural surface or underground waters." *Id.*

17. *Id.* § 70-326(11).

three provisions because it extends the definition's application to any alteration that "leaves the waters in such condition as to violate any standards" established by the Tennessee Water Quality Control Board.[18]

Section 4 of the Act creates the Tennessee Water Quality Control Board as the prime administrative machinery for performance of the State's duties to protect water quality.[19] This Board supersedes the old Stream Pollution Control Board,[20] and their composition, functions, and roles differ significantly. The number of people on the Board has been cut from nine to seven. Its membership has been diversified and the balance has been improved by providing that one of the four public members shall be a representative of the "conservation interests" in Tennessee.[21] Functionally, the Board, unlike its predecessor that not only issued orders but also judged their validity, serves as a reviewing agency for enforcement orders and permits issued by the Commissioner of Public Health.

A further and extremely important function given to the Board by the Act is that of planning. One of the most shocking omissions from nearly all environmental legislation in the United States is the absence of a mandate and authority for planning. This deficiency was corrected by Professor Maloney and the Tennessee General Assembly in section 5(e) of the Act, which directs the Board to formulate a comprehensive Water Quality Plan.[22]

Another functional strength of the Act is its creation of a staff

18. *Id.*

19. *Id.* § 70-327.

20. Tennessee Stream Pollution Control Law, TENN. CODE ANN. §§ 70-301 to -323 (repealed 1971).

21. Section 4(a) of the Act provides: "One (1) of the four (4) citizen members shall be from the public-at-large, one (1) shall be representative of conservation interests, one (1) shall be representative of the municipalities of the State, and one (1) shall be representative of industries." *Id.* § 70-327(a) (Supp. 1971). As drafted and submitted to the General Assembly the Act provided for one of the 4 citizen members to be "a full-time faculty member from one of the universities or colleges in the State who has technical background, training, and knowledge in the field of water quality control and who is not employed by any business or industry within the State on more than an independent consultant basis." 1 F. Maloney, *supra* note 13, at 33. By amendment in the General Assembly this provision was deleted and a member from the public-at-large was substituted.

22. Section 5(e) describes the duty of the Board as follows: "to proceed without delay to formulate and adopt a State Water Quality Plan which shall consist of the following: water quality standards as outlined in subdivision (a) of this section; water quality objectives for planning and operation of water resource development projects for water quality control activities and for the improvement of existing water quality; other principles and guidelines deemed essential by the Board for water quality control; and a program of implementation for those waters which do not presently meet established water quality standards." TENN. CODE ANN. § 70-328(e) (Supp. 1971).

attorney or attorneys to be assigned to the Division of Water Quality Control.[23] Too often state administrative bodies charged with environmental functions find that their efforts and activities are hampered because they must wait in line behind other agencies for help from an understaffed or unsympathetic Attorney General's office. The Act does not guarantee the Board adequate legal assistance, but it certainly increases the chances that it will be forthcoming.

A final major strength of the Act is the dual permit system it establishes. In essence the Act makes it unlawful for any person to alter the water quality of any Tennessee waters without a permit from the Commissioner. All activities affecting water quality are included rather than just discharges. Permits are to be issued only if the activity for which authorization is sought will not cause pollution as defined by the Act. Existing dischargers who cannot comply with this strict proviso may obtain temporary permits if they can show that all of the following conditions are met: (1) They are taking measures to qualify for a permit; (2) "[t]he denial of a temporary permit would work an extreme hardship upon the applicant;" (3) "[t]he granting of a temporary permit will result in substantial public benefit;" and (4) "[t]he discharge will not be unreasonably destructive to the quality of the receiving waters.[24] This dual permit system seems far superior to the traditional approach of allowing a variance or suspension of standards for existing water users. The stringent requirements for a temporary permit coupled with the necessity of annual review provide the best possible statutory guarantee that existing polluters will not obtain concessions which will enable them to indefinitely continue their polluting activities.

Although numerous other commendable and innovative features of the Act, such as the provision for boat pollution[25] and that allowing the State to collect money damages for injury to its waters,[26] also could be discussed, the previously stated purposes of this article now require an

23. *Id.* § 70-329(e).

24. *Id.* § 70-330(f).

25. *Id.* § 70-328(c) (gives the Board authority to promulgate necessary rules and regulations to control discharge of sewage and other wastes from boats).

26. Section 15(a) of the Act provides: "The Commissioner may assess the liability of any polluter or violator for damages to the State resulting from any person's pollution or violation" of the Act. This section defines damages to "include any expenses incurred in investigating and enforcing [this Act], in removing, correcting, and terminating any pollution, and also compensation for any loss or destruction of wildlife, fish, or aquatic life and any other actual damages . . . ." *Id.* § 70-338(a). The last phrase clarifies any problems that might be caused by questions of ownership of *ferae naturae*. *See* Commonwealth v. Agway, Inc., 210 Pa. Super. 150, 232 A.2d 69 (1967). It also should be noted that § 14 of the Act establishes economically meaningful fines of up to $5,000 per day for unlawful pollution. TENN. CODE ANN. § 70-337(a) (Supp. 1971).

examination of the Act's two major shortcomings. The first deficiency is the result of an omission made by amendment in the Tennessee General Assembly. As drafted and introduced in the General Assembly, the Act contained a provision for a so-called "user-surveillance fee" to be assessed by the Board.[27] This fee was to provide funds for the Commissioner and Board.[28] It was contemplated that through this fee the major water users would pay approximately one-third of the estimated budget necessary for efficient enforcement and administration of the Act. The fee was to be based on the quantity of water used rather than the quality of the user's effluent. Thus the fee would have been a quantity variation of the quality-oriented effluent charge that has been so effective in many foreign countries and much advocated by many American environmentalists.[29]

It is difficult to understand the general reluctance of American legislative bodies to enact effluent charge schemes since the concept of paying for the damage one causes, thereby internalizing external dise-

27. The omitted provisions read as follows: "Section 5—Duties and Authority of the Board. The Board shall have and exercise the following powers, duties and responsibilities:

. . . .

(h) To establish, by regulation, a schedule of user-surveillance fees for discharge of any substance, including water, into the waters of the State. This schedule of fees shall be completed prior to February 1, 1972, provided, however, that such fees shall not become effective until enacted into law by the General Assembly." 1 F. Maloney, *supra* note 13, app. 1, at 9, 12.

The following provisions also were omitted: "Section 7a—Annual User-Surveillance Fee—Fee Scale—Collection. (a) Every person who requires a permit or temporary permit under section 7 shall be subject to a user-surveillance fee. This fee shall be an annual fee based on a schedule established by the Board on the basis of the volume of discharges into the waters of the State. This schedule of fees shall be completed prior to February 1, 1972, but shall not become effective until enacted into law by the General Assembly. (b) The surveillance fee shall be collected on an annual basis by the Department of Revenue in accordance with procedures established by it. All monies received under the provisions of this section shall be earmarked and allocated for the use of the Division, and shall be in addition to monies otherwise appropriated in the general appropriation bill; provided, however, that an amount not exceeding 10% of such monies shall be used for the cost of collection and administration. (c) The failure of any person to pay the user-surveillance fee established hereunder shall constitute a violation of this Act and subject the violator to the penalties therefor." *Id.* app. 1, at 19-20.

28. The drafting committee was informed that an analysis of the effectiveness of the stream pollution control program of Tennessee based on a study of the numbers of personnel needed as developed by the Public Administration Service of the Council of State Governments indicated that in 1970 the Tennessee Stream Pollution Control Division was operating a 35% effective program because of understaffing. 1 F. Maloney, *supra* note 13, at iv. Fortunately, since the passage of the Act, the Board's budget has been increased considerably.

29. For recent discussions of the tax or charge based on the quantity and deleterious quality of effluent discharges see Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 MAINE L. REV. 29 (1967); Grady, *Effluent Charges and the Industrial Water Pollution Problem*, 5 NEW ENGLAND L. REV. 61 (1969). For an explanation of the German effluent charge system see A. KNEESE, THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT (1964).

conomies, seems well founded in the free enterprise concepts that supposedly motivate the American economy. Under this rationale a comparable statute with an effluent charge system as a major provision would be the optimum solution. Given the present lack of acceptance of the effluent charge concept in this country, however, Professor Maloney's utilization of a "user-surveillance fee" is a commendable compromise. The Tennessee General Assembly weakened the Act and the administrative machinery by omitting it, without any apparent reason for doing so. Perhaps in the near future an amendment will rectify the omission and restore this important provision to the Act.

The second criticism is more general, and it is more difficult to place the blame on any specific party involved. Perhaps the best way to express this deficiency is by first praising the Act. It is the most significant statute directed to water quality control yet drafted and enacted in the United States. Unfortunately, it goes no further. It has nothing to say about such equally important environmental areas as air quality, noise pollution, and general land use planning and control. The Illinois Environmental Protection Act,[30] for example, is a comprehensive statute that covers air pollution, water pollution, land pollution and refuse disposal, noise, and atomic radiation. It is unfortunate that when the Tennessee General Assembly had so able a draftsman at hand, it did not think more comprehensively and commission a Tennessee Environmental Protection Act. The lost opportunity is not necessarily permanent, however, and in the interim Tennessee can be proud to have a Water Quality Control Act that is sound insofar as existing institutions and concepts are concerned and yet commendably innovative. Other states should and will take note.

30. ILL. ANN. STAT., ch. 111 1/2, §§ 1001-51 (Smith-Hurd Supp. 1972).