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# The Tennessee Water Quality Control Act of 1971

Frank E. Maloney

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*The text of the Act and commentary that follows is the product of a larger study undertaken by Professor Maloney at the request of the 87th General Assembly of the State of Tennessee. This study was the subject of a seminar on environmental protection at the Vanderbilt University School of Law. Four of the participating students—Elbert E. Edwards, III, Thomas H. Graham, Robert D. McCutcheon, and Paul L. Sloan—drafted the proposed statute and commentary under Professor Maloney's supervision with the research assistance of the other members of the class. For many sections of the statute, the drafters drew heavily from the Suggested State Water Pollution Control Act[1] and the prior Tennessee Stream Pollution Control Law.[2] With the exception of two controversial features that were eliminated by amendments—a user-surveillance fee to provide additional operating funds for the Water Quality Control Board and a provision for initial review of Board action by an appellate court—the proposed law was enacted by the 87th General Assembly without significant change. The substantive provisions of the Act are reprinted here with bracketed references to comparative legislation from which some of these provisions were derived, and selected portions of the original commentary are included in order to provide a legislative history and further explanation for those sections most likely to require judicial interpretation.*

**SECTION 2. DECLARATION OF POLICY AND PURPOSE. Recognizing that the waters of the State of Tennessee are the property of the State and are held in puhlic trust for the use of the people of the State, it is declared to he the puhlic policy of the State of Tennessee that the people of Tennessee as beneficiaries of this trust have a right to unpolluted waters. In the exercise of its public trust over the waters of the State, the government of the State of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.**

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

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**It is further declared that the purpose of this law is to abate existing pollutiou of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consisteut with the maiuteuance of unpolluted waters.** [TENN. CODE ANN. § 70-325 (Supp. 1971).]

## COMMENTARY

### I. INTRODUCTION

Although scientific authorities have long recognized that the pollution and purification of water is a cyclical rather than a static process, the law concerning the use of water has not incorporated these scientific realities into our legal system. Ecological scientists would have us look at the hydrologic cycle as a continually changing entity, whereas the legal process has tried to fractionalize this ever-continuing cycle into correlative rights and duties applicable to specific persons who control a body of water for only a short period of the total cycle. The law generally has not defined rights in water as strict property rights but rather as usufructuary rights—or rights to reasonable use. The public trust concept seeks to revitalize our water law by imposing a duty both on State authorities and on private citizens to protect the *res* of the trust for all citizens.[3] It focuses on correlative rights and duties in the handling and consumption of water, not merely as they affect local riparian owners, but rather as these rights and duties affect the total citizenry of the State as the trust's beneficiaries.

### II. FEDERAL AND STATE AUTHORITIES SUPPORTING APPLICATION OF THE PUBLIC TRUST DOCTRINE

In *Georgia v. Tennessee Copper Co.*,[4] the Supreme Court held that

1. DIV. OF WATER SUPPLY & POLLUTION CONTROL, U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, SUGGESTED STATE WATER POLLUTION CONTROL ACT (rev. 1965) [hereinafter referred to as SUGGESTED STATE ACT].

2. TENN. CODE ANN. §§ 70-301 to -319 (1969), *as amended*, (Supp. 1970) (repealed July 1, 1971).

3. This concept had its inception in the case of Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). The United States Supreme Court, analogizing to common-law state ownership of tidelands in trust, held that the land underlying the navigable waters of Chicago harbor is held in trust by the State of Illinois for the use of the people of the State. Thus the State legislature could not assign these lands entirely to private control except for parcels to be improved for navigation or other public uses or parcels that could be disposed of without injuring the public interest in the remainder. For the most significant reeent discussion of the public trust doctrine see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

4. 206 U.S. 230 (1907).

the states, as quasi-sovereign entities, have an interest independent of all legal titles in "all the earth and air within [their] domain."[5] Although the Court did not specifically mention water, the decision may well be interpreted today to include this natural resource within the broad grant of power to the states, for when the case was decided water pollution did not threaten the well-being of society as it does today. The Court continued that the state "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[6] The import of such statements is a declaration that the states have an important interest in preserving their resources. This interest has been described as a *parens patriae* interest, signifying a state's duty to protect the resources within its boundaries for the common good of its citizens. The public trust doctrine thus has achieved federal recognition. Moreover, although the public trust doctrine has not been enacted as part of the statutory law or used for the protection of resources other than land in other states, it can be found in the common law of many states.[7]

## III. TENNESSEE AUTHORITIES SUPPORTING APPLICATION OF THE PUBLIC TRUST DOCTRINE

### *A. Application of the Public Trust Doctrine to Water Within Legally Navigable Bodies of Water*

The courts of Tennessee have always recognized that the State holds the bed of, and the water in, navigable streams in trust for the public.[8] For a stream to be considered legally navigable, it is not necessary that the legislature have declared it navigable.[9] The test of navigability that the Tennessee courts most often have adopted is the capability of the stream for the purposes of navigation in the ordinary state of the water.[10] Another test often enunciated is the capability of the water body to carry boats or any other craft for any commercial purposes.[11] Any waters that

5. *Id.* at 237.

6. *Id.*

7. Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962); State *ex rel.* Squire v. City of Cleveland, 150 Ohio St. 303, 82 N.E.2d 709 (1948); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896); *see* F. MALONEY, S. PLAGER, & F. BALDWIN, WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE § 122 (1968); Sax, *supra* note 3.

8. State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907). *See also* State *ex rel.* Cates v. West Tenn. Land Co., 127 Tenn. 575, 158 S.W. 746 (1913); Goodwin v. Thompson, 83 Tenn. 209 (1885).

9. Southern Ry. v. Ferguson, 105 Tenn. 552, 59 S.W. 343 (1900).

10. Webster v. Harris, 111 Tenn. 668, 675, 69 S.W. 782, 783 (1902).

11. State *ex rel.* Cates v. West Tenn. Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).

move in legally navigable streams, as classified by these ambiguous tests, are clearly held in trust for the citizens of Tennessee.

### B. *Application of the Public Trust Doctrine to Waters Not Within Legally Navigable Bodies of Water But Within Bodies of Water Navigable in Fact*

The courts of Tennessee uniformly have held that the public has an easement for navigation in bodies of water that are not legally navigable, but are navigable in fact.[12] When a stream, though not navigable in a legal sense, is "of sufficient depth, naturally, for valuable floatage, as for rafts, flatboats, and perhaps small vessels of lighter draft than ordinary," the riparian owner's right of property in its bed is subject to a public easement.[13] In one case this easement was held to give the public a right to free use and enjoyment of such a stream for the purposes of navigation to which it was adapted,[14] and the court suggested that hunting and fishing privileges were an aspect of this free use easement. The public's easement for navigation of these waters could easily be judicially broadened to prevent a riparian owner from polluting these bodies of water.

Another cogent argument for applying the public trust doctrine to nonnavigable water bodies is that the water within these bodies is not static and permanent but eventually will arrive at legally navigable streams through the hydrologic cycle. The pollution of these unnavigable bodies ultimately will cause deleterious results in surrounding navigable streams, whose waters the State holds in public trust.

### C. *The Extension of the Public Trust Doctrine to Water Within Bodies of Water that Are Neither Legally Nor Factually Navigable*

These waters, through the hydrologic cycle—evaporation, runoff, and percolation—may have a tremendous effect on the amount of pollution that will find its way into the navigable streams of the State. Thus they too should be held within the public trust, with every citizen as its beneficiary. This is not to say that the State effects a taking or condemnation of such property. It only requires the riparian owners to follow certain minimal procedures to ensure that their actions do not endanger waters held in trust for the public.

12. Miller v. State, 124 Tenn. 293, 137 S.W. 760 (1911); Webster v. Harris, 111 Tenn. 668, 69 S.W. 782 (1902).

13. Stuart v. Clark's Lessee, 32 Tenn. 9, 16 (1852).

14. *Id.* at 16-17.

## IV. Reasons for Implementation of the Public Trust Doctrine

The concept of a public trust is a viable enforcement tool to safeguard a transient natural resource. Water cannot be described as being permanently situated within any particular boundary line. Since no one citizen can own it or totally deny other citizens the right to use it, its use does not fall within the classic definition of a property right. Consequently, each citizen's right in the water is best described as a right to use but not to own. Since water is held by the State for all its citizens as beneficiaries, no one citizen can interfere unreasonably with other beneficiaries' rights to an unpolluted water source.

What pragmatic effects will the trust doctrine have? First, State agencies can be held to a higher standard by the public for their acts and omissions concerning the trust *res*. The actions of State agents, as fiduciaries of the trust *res*, could be judicially attacked by the public as not displaying the high standard of care needed to protect the *res*. Secondly, 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. Thirdly, it will serve as a constant reminder to each citizen who has the right to make use of riparian water that he does not have a license to despoil it as he wishes. Lastly, and perhaps most significantly, the public trust doctrine can serve effectively as a viable procedure to effectuate anti-pollution standards against private landowners whose claims to use are not based upon riparian status. Enforcement of these standards will not be a compensable taking of their land, but rather a demand that they live up to the same anti-pollution standards as other citizens of the State.

A bold program, such as that intended by this Act, should be supported by a clear and forceful legislative declaration of purpose. This declaration is intended to help sustain the validity of the statute against possible attack on the basis of unconstitutionality.

**SECTION 3. DEFINITIONS. The terms used in this chapter are defined as follows:**

**(1) The term "Board" means the Tennessee Water Quality Control Board herein created.**

**(2) The term "boat" means any vessel or watercraft moved by oars, paddles, sails or other power mechanism, inboard or outboard, or any vessel or structure floating upon the water whether or not capable of self-**

locomotion, including but not limited to houseboats, barges, docks, and similar floating objects.

(3) Tbe term "Commissioner" means tbe Commissioner of tbe Tennessee Department of Public Healtb or bis duly authorized representative.

(4) The term "Department" means the Tennessee Department of Public Health.

(5) The term "Director" means the Director of the Division of Water Qnality Control of the Tennessee Department of Public Healtb.

(6) The term "Division" means the Division of Water Quality Control of the Tennessee Department of Public Health.

(7) The term "industrial wastes" means any liqnid, solid, or gaseous substance, or combination thereof, or form of energy including heat, resulting from any process of industry, manufacture, trade, or business or from the development of any natural resource.

(8) The term "member" means a member of tbe Tennessee Water Qnality Control Board.

(9) The term "other wastes" means any and all other snbstances or forms of energy with the exception of sewage and indnstrial wastes wbicb may resnlt in the pollution of any waters of this State inclnding, but not limited to, decaying wood, sand, garbage, silt, municipal refuse, sawdust, shavings, bark, lime, ashes, offal, oil, tar, sludge, or otber petroleum byproducts, radioactive material, chemicals, and heated substances.

(10) The term "person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions or officers thereof, departments, agencies, or instrumentalities, or public or private corporations or officers thereof, organized or existing under the laws of this or any other state or country.

(11) Tbe term "pollution" means snch alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this State including but not limited to changes in temperature, taste, color, turbidity, or odor of said waters,

(i) as will result or will likely result in harm, potential harm or detriment to the pnhlic health, safety, or welfare; or

(ii) as will result or will likely result in harm, potential harm, or detriment to the health of animals, birds, fish, or aquatic life; or

(iii) as will render or will likely render the waters substantially less nseful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses; or

(iv) as will leave or will likely leave the waters in snch condition as to violate any standards of water quality estahlished by the Board.

[Comparative legislation: ALASKA STAT. § 46.03.900(15) (1971); ARIZ. REV. STAT. ANN. § 36-1851(g) (Supp. 1971); ARK. STAT. ANN. § 82-1902(5) (Supp. 1971); COLO. REV. STAT. ANN. § 66-28-2(b) (Supp. 1967); FLA. STAT. ANN. § 403.031(3) (Supp. 1971); GA. CODE ANN. § 17-503(f) (1971); ILL. ANN. STAT. ch. 111½, § 1003(n) (Smith-Hurd Supp. 1971); KAN. STAT. ANN. § 65-171d (Supp. 1971); MINN. STAT. ANN. § 115.01(5) (1964); MISS. CODE ANN. § 7106-112(1)(a) (Supp. 1971); NEB. REV. STAT. § 71-3002(1) (Supp. 1967); N.M. STAT. ANN. § 75-39-2(B) (Supp. 1971); N.D. CENT. CODE § 61-28-02(1) (Supp. 1971); ORE. REV. STAT. § 449.075(8) (1970); PA. STAT. ANN. tit. 35, § 691.1 (Supp. 1971); R.I. GEN. LAWS ANN. § 46-12-1 (1970); S.C. CODE ANN. § 63-195(7) (Supp. 1971); VA. CODE ANN. § 62.1-44.3(6) (Supp. 1971); WASH. REV. CODE ANN. § 90.48.020 (Supp. 1971); W. Va. CODE ANN. § 20-5A-2(f) (1970).]

**(12) The term "sewage" means water-carried waste or discharges from humau beings or animals, from residences, public or private buildings, or industrial or agricultural establishments, or boats, together witb such other wastes and ground, surface, storm, or other water as may be present.**

**(13) The term "sewerage system" means the conduits, sewers, and all devices and appurtenances by means of which sewage and other waste is collected, pumped, treated, or disposed of.**

**(14) The term "waters" means any and all water, public or private, on or beneath tbe surface of the gronnd, which are contained within, flow through, or border upon the State of Tennessee or any portion thereof except 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 uuderground waters.** [TENN. CODE ANN. § 70-326 (Supp. 1971).]

## COMMENTARY

The definitions are a vital part of the Act because they establish the scope of its coverage. The definition of "pollution" is designed to include all harmful alterations of the properties of Tennessee's waters, and the water quality standards established by the Board will constitute minimum criteria for determining the existence of pollution. Thus an alteration will be pollution under *subsection (iv)* of the definition if it violates the water quality standards, even though it does not come within the definition of pollution under one of the other subsections. It is also clear, however, that an alteration can be pollution under *subsections (i)-(iii)* without contravening the water quality standards.

Both groundwater and the waters bordering the State are specifically included in the definition of "waters." The definition does exempt from its coverage certain waters contained completely within private property that do not combine or effect a junction with either natural surface or underground waters. This is a limited exemption because of the mobile nature of water.

The definition of "industrial waste" covers all forms of energy including heat. This coverage specifically brings thermal pollution within the ambit of the definition and is duplicated in only one other state.[15]

SECTION 4. WATER QUALITY CONTROL BOARD CREATED—MEMBERSHIP—COMPENSATION, MEETINGS, RECORD OF PROCEEDINGS. (a) **There is herehy created and established the Tennessee Water Quality Control Board, hereinafter referred to as the "Board" which shall be composed of seven (7) members as follows: The Commissioner of the Department of Public Health, who shall he the Cbairman of the Board; the Commissioner of the Department of Conservation; the Executive Director of the Tennessee State Planning Commission; and four (4) citizen members appointed for terms of four (4) years by the Governor of Tennessee. Each ex officio member may, by official order filed with the Director, designate a representative from his staff who shall have the powers and be subject to the duties and responsibilities of the ex officio member designating him, except that the representative designated hy the Commissioner of Public Health shall not serve as Chairman. In the absence of the Commissioner of Public Healtb, the Board shall elect one of its members to serve as Chariman. One (I) of the four citizen memhers shall be from the public-at-large, one (I) shall be representative of conservation interests, one (I) shall be representative of the municipalities of the State, and one (1) shall he representative of industries. The occupation of the member representing the public-at-large shall not be in the same primary area of interest as any other citizen member of the Board. Each appointive member shall be a resident and domiciliary of the State of Tennessee. No memher shall be appointed unless at the time of his appointment his employer is in compliance with the provisions of this Act as certified hy the Commissioner. The three (3) ex officio members shall hold their positions on the Board throughout their respective terms and until the appointment of their successors as such. The first appointive citizen members shall hold office for staggered terms. One (1) shall hold office for one (1) year; one (I) shall hold office**

15. VT. STAT. ANN. tit. 10, § 901(6) (Supp. 1971).

for two (2) years; one (1) shall hold office for three (3) years; and one (1) shall hold office for four (4) years. All snbsequent appointments of citizen memhers shall be for a full four (4)-year term. No appointive member shall be appointed to more than two (2) consecutive full terms. Any appointive memher who is absent from three (3) consecutive, regularly scheduled meetings shall he removed from the Board by the Governor. Upon the death, resignation, or removal of any appointive memher, the Governor shall appoint some person representing the same area of interest as the memher whose position has been vacated to fill the unexpired term of said member. [Comparative legislation: SUGGESTED STATE ACT § 3.]

(b) Each member of the Board, other than the ex officio members, shall be entitled to he paid forty dollars ($40) for each day actually and necessarily employed in the discharge of official duties, and each member of the Board shall be entitled to receive the amount of his traveling and other necessary expenses actually incurred while engaged in the performance of any official duties when so authorized by the Board, but such expenses shall he limited by the maximum provided under State law.

(c) The Board shall have two (2) regularly scheduled meetings each year, one (1) in October and one (1) in April. Special meetings may be called by the Chairman at any time and shall be called as soon as possible by the Chairman on the written request of two (2) members. All memhers shall he duly notified of the time and place of any regular or special meeting at least five (5) days in advance of such meeting. The majority of the Board shall constitute a quorum and the concurrence of a majority of those present and voting in any matter within its duties shall be required for a determination of matters within its jurisdiction.

(d) No member of the Board shall participate in making any decision upon a case in which the municipality, firm, or organization which he represents, or by which he is employed, or in which he has a direct substantial financial interest, is involved.

(e) The Board shall keep a complete and accurate record of the proceedings of all its meetings, a copy of which shall be kept on file in the office of the Director and open to public inspection. Any policies, rules, regulations or standards of quality of all waters of the State adopted by the Board to have general effect in part or all of the State shall be filed with the Secretary of the State of Tennessee at least thirty (30) days before they are to take effect.

(f) The Director shall serve as the Technical Secretary of the

**Board. In that capacity he shall report the proceedings of the Board pursuant to section 9 and perform such other duties as the Board may require.**

**(g) The chief attorney for the Department shall serve as legal advisor to the Board in its proceedings pursuant to section 9. The staff attorney or attorneys provided for in section 6(e) shall he availahle to advise the Board in all other matters.** [TENN. CODE ANN. § 70-327 (Supp. 1971).]

## COMMMENTARY

*Subsection (a)* replaces the Stream Pollution Control Board with the Water Quality Control Board. The name was changed for two reasons: (1) the Board is no longer concerned only with streams since it now has jurisdiction over the "waters" of the State; and (2) the Board's concern is broader than the mere regulation of pollution. Given the new Board's function of long-range planning, it now deals with all aspects—past, present, and future—of water quality.

The Board is to be comprised of seven members. This number was selected for two reasons: (1) the Tennessee Legislative Council Committee made a recommendation to the General Assembly in 1970 that all regulatory boards have seven (7) members; and (2) the Board sometimes will act in a quasi-judicial capacity, thus requiring a small number of members for reasons of administrative feasibility. The Board contains representatives from interested departments of the State government and citizens not connected with the State government who are appointed by the Governor. Since the Board is located within the framework of the Department of Public Health, the Commissioner of Public Health serves as Chairman of the Board. Due to the vital interest in water quality of the Department of Conservation, its Commissioner serves on the Board. Moreover, the Board's planning function requires seating of the Executive Director of the State Planning Commission on the Board. Since these ex officio members might be unable to meet regularly with the Board for the purpose of carrying out its functions, provision is made allowing each of them to designate a representative who has full power to act at Board meetings.

Water quality control is not only a concern of many interests but also an integral part of preserving the water resources of the State. Therefore, health, conservation, wildlife, recreational , industrial, commereial, and municipal interests have a stake in enforcement of the water quality control program. The four citizen members of the Board represent varied backgrounds in order to ensure that as many interested

groups as possible are represented in the policy-making and enforcement of water quality control in Tennessee.

The provision requiring the employer of a member of the Board representing either an industrial or a municipal interest to be in compliance with the Act at the time of the employee's appointment is original. It was felt that a more vigorous enforcement effort would be made if those members of the Board employed by dischargers into the waters of the State came from municipalities or industries that had made the effort to come within the provisions of the Act. The determination of compliance by the industry or municipality is made by the Commissioner.

*Subsection (d)* is a conflict of interest provision that attempts to ensure that determinations of the Board concerning enforcement are made in an unbiased manner. This provision applies to Board members when they are exercising their quasi-judicial function by deciding cases that have been appealed from actions of the Commissioner, but does not apply to Board determinations concerning policy-making, since it is recognized that the Board's policy decisions necessarily must affect the interests represented by the members. In the event that a policy decision of the Board concerns only one industry or municipality and there is a member on the Board who is employed by that particular industry, however, this provision would apply to him, and he would not be permitted to participate in the decision.

*Subsection (g)* delineates the functions of the attorneys assigned to the Board. The staff attorney or attorneys will appear before the Board as prosecutors in the enforcement of this Act. For this reason, the attorney or attorneys should not advise or assist the Board with respect to the building of a trial record in the hearings. The Board should have unbiased advice with respect to the legal decisions it will make during the course of a hearing. For that purpose, therefore, the Department's chief attorney will advise the Board. On all other legal questions, however, the attorney or attorneys assigned to the Division should be available to advise the Board.

SECTION 5. DUTIES AND AUTHORITY OF THE BOARD. **The Board shall have and exercise the following powers, duties, and responsibilities:**

**(a) To establisb and adopt standards of quality for all waters of the State. The General Assembly recognizes tbat due to various factors, no single standard of quality and purity is applicable to all waters of tbe State or to differeut segments of the same waters. The Board sball classify all waters of the State and adopt water qnality standards pursuant**

to sucb classifications. Such classifications shall be made in accordance witb the Declaration of Policy and Purpose in section 2. In preparing the classification of waters and the standards of quality mentioned above, the Board shall give consideration to: the size, depth, surface area covered, volume, direction, and rate of fiow, stream gradient, and temperature of the water; the character of the land bordering, overlying, or underlying the waters of the State and its particular suitahility for particular uses, with a view to conserving the value of said land, encouraging the most appropriate use of the same for economic, residential, agricnltural, industrial, recreational, and conservation purposes; the past, present, and potential uses of the waters for transportation, domestic and industrial consumption, recreation, fishing and fish culture, fire prevention, the disposal of sewage, industrial and other wastes, and other possible uses. The State Water Quality Plan provided for in section 5(e) shall contain standards of quality and purity for each of the various classes of water in accordance with the hest interests of the public. In preparing such standards, the Board shall give due consideration to all physical, chemical, biological, hacteriological, or radiological properties that may he necessary for preserving the quality and purity of the waters of the State. The Board may amend and revise such standards and classifications, including revisions to improve and npgrade the quality of water. [Comparative legislation: SUGGESTED STATE ACT § 4(g).]

(b) To adopt, modify, repeal, promnlgate after due notice, and enforce rules and regulations which the Board deems necessary for the proper administration of this Act the prevention, control, and ahatement of pollution, or the modification of classifications and the upgrading of the standards of quality in accordance with section 5(a).

(c) To adopt, modify, repeal, and promulgate after due notice, all necessary rules and regulations for the purpose of controlling the discharge of sewage, other wastes, and other snhstances from any boats.

(d) Prior to classifying or reclassifying waters of the State, or adopting, amending, or revising standards of quality for waters of the State, or promulgating, adopting, modifying, or repealing rules and regulations, the Board shall conduct, or cause to he condncted, public hearings in connection therewith. Notice of any puhlic hearing shall be given not less than thirty (30) days before the date of such hearing and shall state the date, time, and place of hearing, and the suhject of the hearing. Any such notice shall he puhlished at least once in one newspaper of general circulation circulated within the area of the State in which the water affected is located. Any person who desires to he heard relative to water quality matters at any such public hearing shall give notice thereof in

writing to the Board on or hefore the first date set for the hearing. The Board is authorized to set reasonable time limits for the oral presentation of views by any person at auy such public hearing.

(e) 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 section 5(a); water quality objectives for planning and operation of water resource development projects for qnality control activities and for the improvement of existing water quality; other principles and guidelines deemed essential hy the Board for water quality control; and a program of implementatiou for those waters which do not presently meet estahlished water quality standards. The State Water Qnality Plan shall he reviewed at least hiennially and may he revised. During the process of formulating or revising the State Water Qnality Plan the Board shall consult with and carefully evalnate the recommendations of concerned federal, state, and local agencies.

(f) To hear appeals from orders or permits issued hy the Commissioner; to affirm, modify, or revoke such orders or permits of the Commissioner; to issue uotices of such appeals and suhpoenas requiring attendance of witnesses and the production of evidence; to administer oaths; and to take such testimony as the Board deems necessary. Any of these powers may he exercised on hehalf of the Board hy any memher or memhers thereof appointed by the Chairman, or hy a hearing officer designated by him.

(g) To require the Technical Secretary to carry out surveys, research, and investigations into all aspects of water use and water quality. [TENN. CODE ANN. § 70-328 (Supp. 1971).][16]

SECTION 6. DUTIES AND AUTHORITY OF THE COMMISSIONER. In addition to any power, duty, or responsihility given to the Commissiouer under this Act, the Commissioner shall have the following powers, dnties, and responsihilities:

(a) To exercise general supervision and control over the quality of all State waters, to administer and enforce all laws relating to pollution of such waters, and to administer and enforce this Act and all standards, policies, rules, and regulations promulgated thereunder.

(b) To administer oaths, issue suhpoenas and compel the attendance of witnesses and production of necessary data for all purposes of this Act.

(c) To hring suit in the name of the Department for any violation of the provisions of this Act, seeking any remedy therein provided and any

16. The commentary for section 5 has been incorporated with the commentary for section 6. The combined commentary appears following section 6.

other statutory or common law remedy available for the control, prevention, and ahatement of pollution. [Comparative legislation: N.J. STAT. ANN. § 1A-27 (1964); N.Y. PUB. HEALTH LAW § 1210(3)(c) (McKinney Supp. 1970); ORE. REV. STAT. § 449.097(6) (1970); R.I. GEN. LAWS ANN. § 46-12-17 (Supp. 1970).]

(d) To proceed against, as provided in this Act, any owner or operator of any boat, located or operated on the waters of the State, that discharges or causes to be discharged any sewage, other wastes, or other substances into such waters in violation of this Act or any rules or regulatious promulgated thereuuder.

(e) To employ, with the approval of the Attorney Geueral, one or more staff attorneys to be assigned to the Division of Water Quality Control, in order to bring about aud maintaiu an effective admiuistration aud enforcement of this Act.

(f) To make inspectious and iuvestigations, carry on research, or take such other actiou as may be necessary to carry out the provisions of this Act.

(g) To enter or authorize his ageuts to enter at all reasonable times upon any property other than dwelling places for the purpose of conducting investigations and studies or enforcing auy of the provisions of this Act.

(h) To advise, consult, cooperate, and contract with the various agencies of the Federal Government aud with state and local administrative and governmental agencies, colleges and universities or with any other persons. In furtberance of tbis Act the Commissioner may require auy state or local ageucy to investigate and report on any matters involved in water quality coutrol; provided tbat the burden, including costs, of such reports shall bear a reasonahle relationship to the need for the reports and the benefits to be obtained therefrom. In addition, the Department shall have authority, subject to approval by the Governor, to enter into agreements with other states aud the United States relative to prevention and control of pollutiou in interstate waters. This authority shall not be deemed to extend to the modification of any agreement with the State concluded by direct legislative act, but unless otherwise expressly provided, the Department shall be the ageucy for the administration and enforcement of any such legislative agreemeut.

(i) To apply for, accept, admiuister, and utilize loans and grants from the Federal Government, State Government, and from any other sources, public or private, for prevention, abatement, and control of pollution of the waters of the State. The Department shall he the water quality control ageucy for the State for the purposes of any federal water pollution control act.

**(j) To prepare, publish, and issue sucb printed pamphlets and bulletins as tbe Department deems necessary for the disseminatiou of iuformation to the public concerning its activities.**

**(k) To require the submission of such plans, specifications, and other information as deemed necessary to carry out tbe provisions of this Act or to carry out tbe rules and regulations adopted pursuant to tbese sections.**

**(l) To be the administrative agent for the Board to carry out the provisions of tbis Act.**

**(m) To make an annual report to tbe Governor and tbe General Assembly on tbe status of water quality, inclnding a description of tbe plan, regnlations in effect, and other pertinent information, togetber witb any recommendations be may care to make.**

**(n) To delegate to tbe Director of tbe Division of Water Quality Control any of tbe powers, dnties, and responsibilities of tbe Commissioner nnder this Act except tbe Commissioner's powers, duties, and responsibility as Chairman of the Board.** [TENN. CODE ANN. § 70-329 (Supp. 1971).]

## COMMENTARY

### I. THE BOARD

It is essential to the success of this Act that one agency exercise responsibility for the planning and coordination of a statewide pollution control program. In the past, regulatory agencies often have failed to recognize the necessity of long-range planning. Nearly all water pollution statutes empower the control agencies to engage in planning, but too often the agencies have concentrated on day-to-day administration and neglected their planning function.[17] *Section 5(e)* of the Act requires the Board to exercise its planning responsibilities.

The central focus of the Board's planning effort is the requirement that it formulate a comprehensive water quality plan. The plan must be reviewed once every two years to provide for changing water patterns reflected by the operation of the permit system, since both the quality of water available and its distribution pattern affect the quantity and quality of wastes that can be discharged into the receiving waters.[18] One

17. Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 233 (1966).

18. Bower, *Some Physical, Technological, and Economic Characteristics of Water and Water Resources Systems: Implications for Administration*, 3 NATURAL RESOURCES J. 215, 219 (1963).

of the primary benefits of establishing a water quality plan is that it forces the agency to formulate concrete proposals for administrative action immediately, rather than waiting until the water pollution situation becomes intolerable.

Not only should the Board utilize its own knowledge and expertise in making inquiries and judgments concerning the plan, but it also should seek the advice of other informed federal, state, and local agencies. One important aspect of sound planning is affirmative action to coordinate the pollution control efforts of agencies with common interests. State laws usually authorize participation in cooperative programs, but local agencies seldom take the initiative to seek out areas of mutual interest with other groups.[19] This section requires such action.

The main feature of the water quality plan is the establishment of water quality standards. Establishment of these standards for interstate waters is required by federal law,[20] but *section 5(a)* requires such standards to be adopted for all waters of the State. The standards assist in water quality control[21] by fleshing out the legislature's policies concerning the type of water quality impairment that needs to be abated. Quality standards are a form of pollution gauge; they facilitate enforcement and, yet, are basically preventive in character.

The Board may revise the established standards at any time, including revisions to improve and upgrade the quality of water. Opponents of water quality standards have argued that once such standards are adopted, they will create vested rights which cannot be impaired by later alteration of the standards. According to this view, once the State has formulated a set of standards and persons have materially changed their position in reliance on the standards, a later change of standards might amount to an unconstitutional taking of property unless just compensa-

19. Hines, *supra* note 17, at 233-34.

20. Federal Water Pollution Control Act (FWPCA), ch. 758, 62 Stat. 1155 (1948), *as amended*, 33 U.S.C. §§ 1151-60, 1171-75 (1970). The FWPCA has been amended 4 times: Water Pollution Control Act Amendments of July 9, 1956, ch. 518, 70 stat. 498; Federal Water Pollution Control Act Amendments of July 20, 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of Oct. 2, 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Waters Restoration Act of Nov. 3, 1966, Pub. L. No. 89-753, 80 Stat. 1246. Section 10(c) provides for establishment and enforcement of water quality standards.

21. SUGGESTED STATE ACT § 4(g); SENATE COMM. ON PUBLIC WORKS, A STUDY OF POLLUTION-WATER, 88th Cong., 1st Sess. 79 (1963); MCKEE & WOLF, WATER QUALITY CRITERIA 30 (Cal. State Water Quality Control Bd. Pub. No. 3-A, 2d ed. 1963). For a discussion of the pros and cons of a "stream classification" system as opposed to a "case-to-case" approach see Gindler, *Water Pollution and Quality Controls*, in 3 WATERS AND WATER RIGHTS 241-42 (R. Clark ed. 1967).

tion is provided.[22] Indeed, the existence of substantial injury to persons who have reasonably relied on a set of standards would be significant in determining the reasonableness of the standards as a means of accomplishing desired goals.

This argument has a number of weaknesses. First, if the purpose of the standards has sufficient social importance to outweigh the interests of the individuals being injured, the standards may be upheld as reasonable.[23] Since water pollution is a matter of great public concern, this fact should be of considerable importance. Secondly, it is difficult to believe that anyone could successfully claim detrimental reliance on a water quality standard, since changes will seldom be drastic or unexpected. Inherent in the concept of water quality standards is the belief that persons can adapt to changing requirements.

Another element of the water quality plan required by *section 5(e)* is the establishment of water quality objectives by the Board. Because this element is part of the required plan, it is a mandatory directive for water quality improvement rather than a mere planning objective.

Along with its policy-making function, the other major duty of the Board under *section 5(f)* is to hear appeals from orders issued by the Commissioner. The appeals may be heard by a quorum of the Board, a single member designated by the Board, or a hearing officer.

## II. THE COMMISSIONER

Whereas the Board is responsible for planning and policymaking, *section 6(a)* places the Commissioner of Public Health in charge of enforcement of the Act. As a result of this arrangement, the Commissioner now has powers, duties, and responsibilities that formerly were vested in the Board. For example, the Commissioner, not the Board, is responsible for assisting and coordinating with other agencies in preventing and abating water pollution in the State. The Commissioner is empowered to enforce any State law that deals with pollution of the State's waters. Many other administrative responsibilities also are given to the Commissioner by *section 6(b)*, such as administering oaths and issuing subpoenas.

One of the important responsibilities given to the Commissioner by *section 6(c)* of the Act is the authority to bring suit in the name of the

22. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-16 (1922); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 65-71.

23. *Cf.* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

Department, which is authorized under *section 6(e)* to maintain a legal staff to prosecute violators. Suits no longer have to be brought by the Attorney General's office. *Section 6(f)* gives the Commissioner authority to gather technical and other information to enforce the Act properly. This section sanctions legal, social, biological, and economic studies, as well as purely geologic, hydrologic, and engineering surveys to ascertain the State's water resources and its problems. *Section 6(g)* also authorizes agents of the Commissioner to enter private property for the purpose of sampling and monitoring effluents from the various industries throughout the State. Without this power, effective enforcement would be virtually impossible.

The Commissioner is expressly empowered to contract and cooperate with government agencies and private persons by *section 6(h)*. The Commissioner also can require any State or local agency to conduct reasonable investigations on behalf of the Department. This does not abolish the powers that state, county, and municipal agencies have over the water resources in their jurisdiction. It merely allows the Department to utilize the technical facilities and personnel of these agencies in order to enforce the Act effectively, as long as the cost to the agencies is reasonable.

### III. The Director of the Division of Water Quality Control

The Director of the Division of Water Quality Control is also the Technical Secretary of the Board. As Technical Secretary, he has the duty to assist the Board in surveys, research, and investigations concerning water quality control authorized by *section 6(f)* of the Act. In his other capacity, the Director heads the Division of Stream Pollution Control, which serves as the Board's administrative staff; and as Director he is directly responsible to the Commissioner. Because the Commissioner is unable to supervise personally all the activity necessary for effective enforcement of the Act, *section 6(n)* allows him to delegate his powers, duties, and responsibilities to the Director, who will actually carry out these functions on a day-to-day basis. Since the Director is an enforcement officer under the Act, however, he is not permitted to assume the Commissioner's duties on the Board. For the same reason, he cannot advise the Board as its Technical Secretary when the Board is engaged in its quasi-judicial function.

**SECTION 7. ACTIVITIES REQUIRING PERMITS—TEMPORARY PERMITS—REVOCATION AND MODIFICATION. (a) Every person who is or is planning to carry on any of the**

activities outlined in subsection (b) of this section, other than by discharge into a sewerage system, shall file an application for a permit with the Commissioner or, when necessary, for modification of his existing permit.

(b) Unless a person holds and operates under the conditions of a valid permit, it shall he unlawful for him to carry on any of the following activities other thau by discharge into a sewerage system:

(1) The alteration of the physical, chemical, radiological, biological, or hacteriological properties of any waters of the State;

(2) The construction, installation, modification, or operation of any treatment works or part thereof, or any extention or addition thereto;

(3) The increase in volume or strength of any wastes in excess of tbe permissive discharges specified under any existing permit;

(4) The construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to canse an increase in the discharge of wastes into the waters of the State or wonld otherwise alter the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State in any manner not already lawfully authorized;

(5) The construction or use of any new outlet for the discharge of any wastes into tbe waters of the State.

(c) Any person operating or planning to operate a sewerage system shall file an application with the Commissioner for a permit or, when necessary, for modification of his existing permit. Unless a person holds a valid permit it shall he unlawful to operate a sewerage system.

(d) Nothing in this section shall be construed to require any person discharging into a septic tank connected only to a suhsurface drainfield to secure a permit or temporary permit; provided, however, that the exemption provided in this subsection shall not exempt snch person from any other provision of this Act.

(e) The Commissioner shall issue a permit which authorizes a person to make a discharge that will not cause a coudition of pollution either by itself or in comhination with the activities of others. In granting such permits, the Commissioner shall impose such conditions, including effluent standards and conditions and terms of periodic review, as are necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board thereunder.

(f) A persou discharging auy substance into the waters of the State on the effective date of this Act [July 1, 1971] who does not qualify for or has been denied a permit under suhsection (e) of this section may apply to the Commissioner for a temporary permit. No such temporary permit

**shall be granted by the Commissioner unless he affirmatively finds all of tbe following: .**

**(1) The proposed discbarge does not qualify for a permit under subsection (e) of tbis section; and**

**(2) The applicant is constructing, installing, or placing into operation, or bas submitted plans and reasonable schedules for the construction, installation, or operation of au approved pollution abatement facility or alternate waste disposal system wbicb will qualify tbe applicant for a permit under subsection (e) of this section, or tbat the applicant bas a waste for whicb no feasible and acceptahle method of treatment or disposal is kuown or recognized but he is making a hona fide effort tbrough research and otber means to discover and implement such a method; and**

**(3) Tbe denial of a temporary permit would work an extreme bardsbip upon tbe applicaut; and**

**(4) Tbe granting of a temporary permit will resnlt iu substantial puhlic benefit; aud**

**(5) The discbarge will uot be uureasonably destructive to the quality of tbe receiving waters.**

**A temporary permit shall be reviewable annually or witbin such a lesser period of time as tbe Commissioner may specify in tbe temporary permit, and it shall not be renewed or extended unless it is affirmatively sbown tbat all of tbe requirements for tbe initial issuance of the temporary permit are still being met by tbe holder tbereof.** [Comparative legislation: ALA. CODE tit. 22, § 140(9)(j) (Supp. 1969); 1971 Fla. Laws ch. 71-203, § 2; N.C. LAWS § 143-215.1(c)(2) (Supp. 1971); 1971 Tex. Laws ch. 58; VT. STAT. ANN. tit. 10, § 912a (Supp. 1971); W. VA. CODE ANN. § 20-5A-7(c) (1970).]

**(g) Tbe Commissioner may revoke or modify any permit or temporary permit issued under subsections (e) or (f) of this section if the holder of tbe permit is found to he iu violation of any provision of tbis Act, if tbe permit provides for periodic review and modification, or if the holder of tbe permit fails to operate an existing facility as specified in tbe plan approved iu bis permit. Nothing in tbis section sball be construed to limit or circumscribe the autbority of the Commissioner to issue emergency orders as specified in section 8 of tbis Act.**

**No permit or temporary permit under subsections (e) or (f) of tbis section for any new outlet or for tbe construction of a new waste treatment system or for tbe modification or extension of an existing waste treatment system sball be issued by tbe Commissioner until the plans bave first been suhmitted to and approved by bim. No such approval shall he construed as creating a presumption of correct operation nor as warrant-**

**ing by the Commissioner that the approved facilities will reach the designed goals.**

**(h) Any person who is denied a permit, or who disagrees with the conditions imposed in his permit, or who has his permit revoked or modified shall be given an opportunity for a fair hearing as provided in section 9 in connection therewith upon written petition to the Commissioner within ten (10) days after receipt of notice from the Commissioner of such denial, revocation, or modification. On the hasis of such hearing the Board shall affirm, modify, or revoke the Commissioner's previous determination.** [TENN. CODE ANN. § 70-330 (Supp. 1971). Comparative legislation: SUGGESTED STATE ACT § 5.]

## COMMENTARY

The permit system established under this section is the foundation for the regulatory provisions of the statute and is potentially one of the most effective techniques for control of water pollution. Under the permit system, any alteration of water quality is prohibited except as permitted by the Commissioner under regulations promulgated by the Board. By means of the permit system, the Commissioner can either prohibit discharges altogether or condition their approval on treatment adequate to protect legitimate water uses.

The overall philosophy behind the permit system is twofold: (1) to provide a system of monitoring alterations of water quality regardless of whether those alternations cause a condition of pollution; and (2) to enhance the system of enforcement. *Subsection (a)* requires every person who plans to do or is doing any of the activities in *subsection (b)* to apply for a permit from the Commissioner. A person who discharges into a sewerage system is exempt from the permit requirement because the system itself is subject to this regulation.

*Subsection (b)(1)* is intended to provide an omnibus clause making it unlawful for any person, other than a person discharging into a sewerage system, to alter in any manner the properties of the waters of the State without securing either a permit or a temporary permit. The alteration may result from operations such as dredging, which affects the turbidity of the waters, as well as from discharges into the waters of the State.

*Subsections (b)(2)-(5)*, collectively, are intended to encompass all phases of treatment and discharge of substances into the waters of the State—the initial construction of treatment works; any subsequent modification of those treatment works; and any increase in a discharge al-

ready permitted under an existing permit, including the addition of outlets.

*Subsection (c)* makes it clear that the operator of a sewerage system, including municipalities, must apply for a permit to operate the system. This subsection complements *subsections (a)* and *(b)*, which exclude a person discharging into a sewerage system. The concept of exempting those discharging into a sewerage system was directed at not requiring these persons to secure a permit. Instead, the Act requires the operator of the sewerage system to secure the permit and, consequently, controls the aggregate discharge at the system level.

*Subsection (d)* is intended to exempt from the permit provisions of this Act a person who discharges into a septic tank connected only to a subsurface drainfield. If the septic tank is connected to an outfall that discharges into any of the waters of the State, however, the operator must secure a permit. Likewise, should the septic tank malfunction and result in a condition of pollution, the operator thereof will be subject to other provisions of the Act, including the order and penalty provisions, although he was not originally required to secure a permit.

While many states employ a unitary permit system under which the permittee is allowed to pollute within prescribed conditions, *subsections (e)* and *(f)* institute a dual permit system using the permit and temporary permit concept. *Subsection (e)* directs the Commissioner to issue a permit for any discharge that will not result in a condition of pollution as defined in section 3(11). The first sentence makes it clear that the discharge by itself need not cause a condition of pollution. This allows the Commissioner to allocate the waste assimilative capacity among several persons discharging along the same watercourse. The last sentence allows the Commissioner to require the permit holder to conform to certain conditions imposed in the permit. These conditions may be, but are not limited to, requirements for periodic permit review and adherence to effluent standards. *Subsection (f)* is the provision for temporary permits.[24] The intent is to draw a sharp distinction between those activities that are permitted because they do not cause a condition of pollution and those activities that are permitted temporarily and out of extreme necessity even though they cause a condition of pollution. The former are regulated under *subsection (e)* and the latter under *subsection (f)*. *Subsection (f)* prohibits the Commissioner from issuing a temporary permit unless he affirmatively finds that each of the five outlined require-

24. Subsection (f) is derived almost in its entirety from VT. STAT. ANN. tit. 10, § 912a (Supp. 1971).

ments is met. It is intended that the discharger must demonstrate affirmatively each and every proposition before a temporary permit may be granted. The last sentence of the subsection provides for annual review of the temporary permit. At each annual review, the discharger must prove affirmatively that he is still meeting the requirements for initial issuance.

*Subsection (g)* grants the Commissioner authority to revoke or modify any permit or temporary permit issued: (I) if the holder is in violation of any provision of the Act; (2) if the permit provides for periodic review, regardless of whether the holder is in violation of the Act; or (3) if the holder of the permit fails to operate an approved facility as specified. This authority is standard in most water quality statutes.[25] The balance of the subsection is original. The second sentence makes it clear that the permit section is not intended to circumscribe in any manner the power of the Commissioner to issue emergency orders as specified in section 8. The third sentence provides for the approval of plans by the Commissioner, but the last sentence dispels any conceivable presumption of correct operation or warranty of designed goals that the discharger might allege results from such approval.

*Subsection (h)* grants the person denied a permit or temporary permit the right to appeal the decision to the Board under the general hearing provisions in section 9.

SECTION 8. ORDERS. (a) **Whenever the Commissioner has reason to believe that a violation of any provision of this Act or regulation promulgated thereunder or orders issued pursuant thereto has occurred, is occurring, or is about to occur, the Commissioner may cause a written complaint to be served upon the alleged violator or violators. The complaint shall specify the provision or provisions of this Act or regulation or order alleged to be violated or abont to be violated, the facts alleged to constitute a violation thereof, and may order that necessary corrective action be taken within a reasonahle time to be prescribed in such order. Any such order shall become final and not subject to review unless the persou or persons named therein request by written petition a hearing before the Board, as provided in Section 9, no later than thirty (30) days after the date such order is served; provided, however, that the Board may review such final order on the same grounds upon which a court of the State may review default judgments.** [Comparative legislation: SUGGESTED STATE ACT § 7(a).]

25. *See, e.g.*, GA. CODE ANN. § 17-510(3) (1971); MO. ANN. STAT. § 204.030.3 (Supp. 1971).

**(b) Whenever the Commissioner, with the concurrence of the Governor, finds tbat au emergency exists requiring immediate action to protect tbe public healtb, safety, or welfare, or the health of animals, fish, or aquatic life, or a public water snpply, or recreational, commercial, indnstrial, agricnltnral, or other reasonahle uses, the Commissioner may, without prior notice, issue an order reciting the existence of such an emergency and requiring that such action be taken as the Commissioner deems uecessary to meet the emergency.** [Comparative legislation: MINN. STAT. ANN. § 115.05(2) (Supp. 1971); VA. CODE ANN. § 62.1-44.15(8)(b) (Supp. 1971).]

**(c) Except as otherwise expressly provided, any notice, complaint, order, or other instrument issued by or under authority of this Act may be served ou any persou affected thereby personally, hy the Commissioner or any persou designated by him, or sucb service may he made in like manuer as in the case of iu personam service iu a civil action. Proof of service shall be filed iu the office of the Commissioner.** [TENN. CODE ANN. § 70-331 (Supp. 1971).]

## COMMENTARY

*Subsection (a)* allows the Commissioner a certain degree of flexibility in the issuance of orders. He may merely issue a complaint if he believes that notification would be sufficient to ensure compliance. The Commissioner also is empowered to issue orders that become final and binding unless appealed to the Board within thirty (30) days,[26] but a judgment that becomes final from failure to appeal may be reviewed upon the same grounds as a default judgment.

Under *subsection (b)* the Commissioner may issue an emergency order with the concurrence of the Governor. The emergency order is issued *ex parte* and is not stayed pending appeal to the Board under section 9(h). A full Board hearing must be held on the order as soon as possible, but no later than three (3) days following the issuance of the order.

Since all actions taken under this Act are in personam, it is believed that service by registered mail is not sufficient to satisfy due process requirements. *Subsection (c)* provides exclusively for personal service either by the Commissioner or his agent, or in like manner as in other civil actions.

**SECTION 9. HEARINGS. Any hearing or rehearing hrought**

26. *Cf.* MD. ANN. CODE art. 96A, § 28(a)(1) (Supp. 1971).

before tbe Board shall he conducted in accordance witb tbe following:

(a) Upon receipt of a written petition from tbe alleged violator pnrsuant to this section, the Commissioner sball give the petitioner thirty (30) days' written notice of the time and place of the hearing, but in no case shall sucb hearing he held later than sixty (60) days from the receipt of the written petition;

(h) The hearing herein provided may he conducted by the Board at a regular or special meeting or by any memher or panel of memhers of the Board designated by the Chairman to act in its hebalf, or the Chairman may designate bearing examiners who sball have the power and autbority to conduct such bearings iu the name of tbe Board at any place and time within the period established under subsection (a) of this section. In the event the bearing is conducted by a person or persons designated by the Chairman, the quorum requirements of section 4(c) sball not apply;

(c) A verhatim record of the proceedings of such hearings shall be taken and filed with the Board, together with findings of fact and conclusions of law made pursuant to subsection (f) of this section. The transcript so recorded shall he made available to the petitioner or any party to a hearing upon payment of a charge set by the Commissioner to cover the costs of preparation;

(d) In connection with the hearing, the Chairman shall issue subpoenas in response to any reasonable request by any party to the hearing requiring the attcndance and testimony of witnesses and the production of evidence relevant to any matter involved in the hearing. In the event a bearing is conducted by a member or a panel of members designated by tbe Chairman or by a designated hearing examiner, the memher, chairman of the panel, or hearing examiner shall also issue such suhpoenas in response to any reasonable request by any party to the hearing. Any memher of the Board or the bearing examiner may administer oaths and examine witnesses. Witnesses shall be reimbursed for all travel and other necessary expenses which shall be claimed and paid in accordance with tbe prevailing travel regulations of tbe State. In case of contumacy or refusal to ohey a notice of hearing or subpoena issued under this section, the Chancery Court of Davidson County or the Chancery Court of the county in which the hearing is conducted shall have jurisdiction upon application of the Board or Commissioner to issue an order requiring such person to appear and testify or produce evidence as the case may require, and any failure to ohey such order of the court may be punished by such court as contempt thereof;

(e) If the hearing is held before any person or persons designated

**by the Chairman, the record of the hearing together with recommendations for findings of fact and conclusions of law sball be transmitted to the Board and the party affected. The parties may submit, within ten (10) days, for the Board's consideration exceptions to the recommending findings or conclusions and supporting reasons for such exceptions;**

**(f) On the basis of the evidence produced at the hearing or review of hearing under subsection (e) of this section, the Board shall make findings of fact and conclusions of law and enter such decisions and orders as in its opinion will best further the purposes of this Act and shall give written notice of such decisions and orders to the alleged violator. The order issued nnder this subsection shall be issued no later than thirty (30) days following the close of the hearing by the person or persons designated by the Chairman;**

**(g) The decision of the Board shall become final and hinding on all parties unless appealed to the courts as provided in section 10;**

**(h) Any person to whom an emergency order is directed pursuant to section 8(b) shall comply therewith immediately but on petition to the Board shall be afforded a hearing as soon as possible, but in no case shall such hearing be held later than three (3) days from the receipt of such petition by the Board.** [TENN. CODE ANN. § 70-332 (Supp. 1971).]

## COMMENTARY

The hearing provisions under section 9 govern appeals from all decisions of the Commissioner and include appeals by a citizen pursuant to section 17. In order to expedite the hearing and appellate procedure and to ensure a prompt determination of the alleged violation, *subsection (a)* requires the Board to hear appeals from the Commissioner's determinations within sixty (60) days.

The intent of *subsection (b)* is to devise a streamlined appellate procedure. It is believed that hearing officer provisions are essential to such a streamlined system since the activities of the Board will increase significantly under full implementation of the law.

The functions of the Board are policy-making and adjudicatory but not prosecutorial. In order for the Board to function properly in its adjudicatory capacity, it must operate essentially as a trial level court. *Subsection (c)* provides for the taking of a verbatim record of these adjudicatory proceedings. Additionally, the Board must make findings of fact and conclusions of law in order to prepare the record properly for judicial review under section 10.

*Subsection (d)* was intended to provide any party to the hearing

with a method for compelling the attendance of witnesses and the production of documents while at the same time preventing a burdening of the procedure by unreasonable requests for unnecessary witnesses. Similar subpoena powers are granted to the chairman of a hearing panel and to a hearing officer in the event he conducts the hearing.

*Subsection (e)* provides that there should be an opportunity for full Board review of a hearing conducted by a hearing panel or a single person, since the Board is functioning essentially as a trial court. The parties have ten (10) days to file objections with the Board.

*Subsection (f)* directs the Board to make findings of fact and conclusions of law at the close of an adjudicatory hearing. These findings and conclusions, in conjunction with the verbatim record made under subsection (c), become the record for appeal as provided in section 10. The Board must make a determination of the proposed findings of fact and conclusions of law no later than thirty (30) days following the close of the hearing conducted by the designated person(s).

The emergency order provision, section 8(b), is complemented by *subsection (h).* This subsection directs that the emergency order not be stayed pending appeal, but it suspends the normal appeal time and allows the alleged violator to have an appeal to the Board as soon as possible. Additional safeguards are provided by requiring the Board to hold such a hearing no later than three (3) days after the receipt of the petition.

SECTION 10. APPEALS FROM THE BOARD—PROCEEDINGS BEFORE THE COURTS. **(a) An appeal may be taken from any final order or other final determination of the Board by any party, including tbe Department, who is or may be adversely affected tbereby to the Chancery Conrt for Davidson County within ten (10) days from the date such order or determination is made. No hearing, however, shall be allowed hy the Chancery Court from any disposition made by the Board if such disposition has become final as a result of a person's failure to appear at a bearing after having requested such hearing or after having received adequate notice.**

**(b) The appeal sball be processed in accordance with the following:**

**(1) The appellant sball serve a notice of appeal on tbe other parties witbin the time allowed for appeal by subsection (a) of this section;**

**(2) Accompanying the notice of appeal shall be a copy of the appellant's objections referring to the action of the Board appealed from, specifying the grounds of appeal, and including both points of law and fact which are asserted or qnestioned by the appellant;**

**(3) A copy of the original notice of appeal with proof of service and the appellant's objections shall be filed by the appellant or his attorney with the clerk of the court within ten (10) days of the service of the notice, and therenpon the court shall have jurisdiction of the appeal. The appellant shall also give bond as required in other suits; provided, however, that no bond or deposit for costs shall be required of the State or Department upon any such appeal or upon any subsequent review by the Supreme Court. The appellant shall notify the other parties of the filing thereof;**

**(4) Within thirty (30) days after receipt of such notice of filing the Board shall transmit to the Chancery Court for Davidson County a complete transcript of the proceedings under review, which shall contain all the proof submitted before the Board;**

**(5) Any decision of the Board shall be reviewed by the Chancery Court solely upon the transcript of the proceedings before the Board, and neither party shall be entitled to introduce any additional evidence in the Chancery Court. No decision of the Board shall be set aside unless it is shown that such decision was not supported by substantial evidence produced before the Board at the hearing;**

**(6) A further review by the Supreme Court of the State may he sought in conformity with the procedure provided in Tennessee Code Annotated** § 27-819. [TENN. CODE ANN. § 70-333 (Supp. 1971). Comparative legislation: TENN. CODE ANN. § 51-712 (1955).]

## COMMENTARY

The statute, as originally drafted, called for an appeal from a Board determination exclusively to the Court of Appeals for the Middle Section of Tennessee.[27] The proposed judicial review procedure was patterned after the extensive federal experience with judicial review of administrative determinations. The previous law had provided for an appeal to the chancery court and thence to the Tennessee Supreme Court. There were four reasons for the proposed change: (1) the fact-finding function of the Board alleviated the necessity for a trial-level determination; (2) the court of appeals had not experienced the docket congestion of the lower courts; (3) an appellate court would be reticent to engage in an exercise of disguised "trial de novo;" and (4) prior enforcement agencies had experienced considerable difficulty in obtaining cooperation from chancery courts in enforcement of the prior law. Nevertheless,

27. Two other states bypass the trial level courts and place review directly at the appellate level: ILL. ANN. STAT. ch. 111½, § 1041 (Smith-Hurd Supp. 1971), and N.M. STAT. ANN. § 75-39-6 (Supp. 1971).

the statute was amended by the Senate after it had passed the House of Representatives.[28] Appeals from Board determinations now are taken to the Chancery Court for Davidson County.

Within thirty (30) days after receipt of the notice of filing, the Board must transmit to the chancery court a complete transcript of the proceedings under review. The decision of the Board is to be sustained unless it is not supported by substantial evidence produced before the Board at the original hearing. No evidence may be presented other than that presented at the hearing by the Board. Moreover, the appeals procedure is not intended to provide a trial de novo in the chancery court. Provision also is made for review of the chancery court decisions by the Tennessee Supreme Court.

SECTION 11. DUTIES OF STAFF ATTORNEY. **It shall he the duty of the staff attorney as provided for in section 6(e) to represent the Department in all hearings before the Board and in all civil litigation nnder this Act under the supervision of the Attorney General. In addition, it shall he the duty of the District Attorneys General in the various circuits throughout the State or the Attorney General to assist the Department, npon its request, either hy prosecuting or assisting the staff attorney in prosecuting, those persons in violation of sections 14 through 16.** [TENN. CODE ANN. § 70-334 (Supp. 1971).]

COMMENTARY

In order to assist the Division of Water Quality Control in the discharge of its duties, a staff attorney has been provided. His functions include working closely with the staff, representing the Department before the Board in its hearings and before the courts in all civil appeals, and assisting the Attorney General in the criminal prosecution of any person who violates section 14 of the Act. This is one of the most important additions to the prior law because it provides an individual attorney or attorneys for the Division who can devote undivided attention to the legal problems of the Division, thereby assuring prompt handling of necessary court actions.

SECTION 12. PROCUREMENT OF INFORMATION. **Any person whom the Board or the Commissioner has reason to helieve is**

28. An amendment calling for de novo review by the chancery court in the county where the pollution occurred was going to be introduced in the Senate. This would have emasculated the statute and completely frustrated effective pollution control. A compromise was effected providing for review exclusively by the Chancery Court for Davidson County, which can overturn the decision only if not supported by substantial evidence.

**causing or may be about to cause pollution or any person baving information couceruing such person sball fnrnisb the Board or tbe Commissioner upon tbeir request all pertineut information reqnired by the Board or the Commissioner in the discharge of their duties under tbis Act. Under this section, information sball include data relating to processes or methods of manufacture or production required by tbe Board or the Commissioner in tbe administration of tbeir duties. All information sball be used by tbe Board only for purposes of water quality control. Tbe Board or the Commissioner sball bave tbe power to issue protection orders to prevent public dissemination of any secret formulae or proprietary manufacturing processes; except tbat, sucb orders sball not extend to information concerning waste products discbarged to tbe waters of tbe State. In addition to providing information, persons may be required to keep sucb records as deemed necessary by tbe Board or the Commissioner to facilitate the discbarge of tbeir duties.** [TENN. CODE ANN. § 70-335 (Supp. 1971). Comparative legislation: CAL. WATER CODE § 13267(b) (West 1971); FLA. STAT. ANN. § 403.11 (1960); S.C. CODE ANN. § 63-195.30 (Supp. 1971).]

## COMMENTARY

The new law restricts the information obtainable by the Board or Commissioner to that information which is pertinent to the discharge of their duties under the Act. Although this section does not contain an exception for secret formulae, it does safeguard the confidentiality of such material by empowering both the Board and the Commissioner to issue protection orders to prevent public dissemination.

SECTION 13. CAUSING POLLUTION OR REFUSING TO FURNISH INFORMATION. **It sball be unlawful for auy person by himself or in combination witb others to willfully cause pollution of any waters of tbe State or to place or cause to be placed any substance or substances in a location wbere they will likely cause pollution of any waters of the State unless sucb action bas been properly autborized. Any sucb action is bere declared to be a public nuisance. In addition, it shall be unlawful for any persou to act in a manner or degree wbicb is violative of any provision of tbis Act or of any rnle, regulation, or standard of water quality promulgated by the Board or of any permits or orders issued pursuaut to tbe provisions of tbis Act; or to fail or refuse to file an application for a permit as required iu section 7; or to refuse to furnisb, or to falsify auy records, information, plans, specifications, or other data required by the Board or tbe Commissioner under tbis Act.**

**The plea of financial inability to prevent, abate, or control pollution shall not be a valid defense under the provisions of this Act.** [TENN. CODE ANN. § 70-336 (Supp. 1971). Comparative legislation: MO. ANN. STAT. § 204.030 (Supp. 1971); N.D. CENT. CODE § 61-28-06(1) (Supp. 1971); UTAH CODE ANN. § 73-14-5 (1968), *as amended,* (Supp. 1971); SUGGESTED STATE ACT § 5(a).]

## COMMENTARY

Section 13 Makes it unlawful to pollute willfully any waters of the State either by direct discharge or other means, or by placing material in a location that would likely result in pollution of any waters of the State. The section further declares such action to be a public nuisance. Under the prior law, TENN. CODE ANN. § 70-317 (Supp. 1970), the Board was given the power to determine whether a violation constituted a public nuisance. This section clarifies the law by expressly making this conduct a public nuisance. The prior provision of the Code, title 70, section 316, that makes it unlawful to refuse information required by the Board, is also retained.

**SECTION I4. PENALTIES. (a) Any person unlawfully polluting the waters of the State or violating or failing, neglecting, or refusing to comply with any of the provisions of this Act shall be guilty of a misdemeanor and, upon convictiou thereof, shall be punished by a fine of not less than fifty dollars ($50.00) uor more than five thousand dollars ($5,000.00). Each day upon which such violation occurs shall constitnte a separate offense.**

**(h) Any person who willfully aud knowingly falsifies any records, information, plans, specifications, or other data required by the Board or the Commissioner or who willfully and knowingly unlawfully pollutes the waters of the State or willfully fails, neglects, or refnses to comply with any of the provisions of this Act shall be guilty of a felony and shall be punished by a fine of not more than ten thousand dollars ($I0,000.00) or imprisonment not to exceed two (2) years or both.**

**(c) Provided, however, that person for the purpose of any criminal prosecntion shall uot mean a municipality or political subdivision or officers thereof, departments, agencies, or instrumentalities it heing the purpose of this Act to enforce all regulations against a municipality by injunctive relief.**

**And fnrther provided, that uo process by warrant, presentment or indictment shall be issued except upon applicatiou of the Board or Commissioner or such application for process autborized by them.** [TENN.

CODE ANN. § 70-337 (Supp. 1971). Comparative legislation: MD. ANN. CODE art. 96A, § 28A(a) (Supp. 1971); S.C. CODE ANN. § 63-195.35 (Supp. 1971); VT. STAT. ANN. tit. 10, § 918 (Supp. 1971).]

COMMENTARY

Section 14 distinguishes between two types of violations. A violation that is not committed willfully or knowingly is treated in *subsection (a),* which makes it a misdemeanor and subjects the violator to a fine of not less than 50 dollars nor more than 5,000 dollars. *Subsection (b)* treats those instances when pollution or falsification of records or other information has been committed willfully and with knowledge. In these cases, the violator may be subjected to a fine of as much as 10,000 dollars and/or imprisonment for as long as two years.

**SECTION 15. DAMAGES TO THE STATE. (a) The Commissioner may assess the liability of any polluter or violator for damages to the State resultiug from auy person's pollution or violation, failure, or neglect in complying with any rules, regulations, or standards of water quality promulgated by the Board or permits or orders issued pursuant to the provisions of this Act. If an appeal from such assessment is not made to the Board by tbe polluter or violator witbin ten (10) days of notificatiou of such assessment, he shall be deemed to have consented to such assessment aud it sball become final. Damages may 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 otber actual damages caused by the pollution or violation. Whenever any assessment has become final hecause of a person's failure to appeal within the time provided, the Commissioner may apply to the appropriate court for a judgment, and seek execution on such judgmeut. The court, in such proceedings, shall treat the failure to appeal such assessment as a confession of judgment in tbe amount of the assessment.** [TENN. CODE ANN. § 70-338 (Supp. 1971). Comparative legislation: ALA. CODE tit. 8, §§ 295, 297 (Supp. 1969); FLA. STAT. ANN. § 403.141 (Supp. 1971); KY. REV. STAT. ANN. § 224.110 (1969); MD. ANN. CODE art. 96A, § 29D (Supp. 1971); MO. ANN. STAT. § 204.180 (Supp. 1971); WASH. REV. CODE ANN. § 90.48.142 (Supp. 1971).]

COMMENTARY

Section 15 establishes a means by which damages may be recovered by the State of Tennessee for pollution of State waters. If the person

assessed objects to the Commissioner's assessment, he may bring an appeal before the appropriate court as provided in section 10. It is only when the person assessed fails to appeal to the Board that he is deemed to have consented to the Commissioner's assessment.

The policy underlying this section is that a person who causes damages to the State should be held responsible for paying those damages. The burden should not be borne by the Department or by the taxpayers of the State.

SECTION 16. INJUNCTIONS. (a) **When there is reason to believe that a person is causing or is about to cause or has caused pollution or is violating or is abont to violate or has violated any of the provisions of this Act or any permits or orders issued thereunder, the Commissioner may institute proceedings in the appropriate court for injnnctive relief to prevent continnance of such action or to correct the conditions resulting in or ahont to result in such pollution or both. The court shall grant the injunction without the necessity of showing a lack of adequate remedy at law upon a showing hy the Commissioner that such person is polluting or is ahout to pollute the water[s] of this State or to violate one or more of the provisions of this Act. In such snits, the Commissioner may obtain permanent or temporary injunctions, prohihitory or mandatory, and restraining orders.**

**(b) The Commissioner may hring snit for injunctive enforcement of auy order made by him when such order has hecome final as a result of any person's failure to appeal to the Board, and such person has failed to comply with the order. In such suits all findings of fact contained in the order and complaint shall he deemed to be final, and not suhject to review except as to receipt of notice of the order, hut the defendaut may [proffer] evidence showing that he has in fact complied with the Commissioner's order. The order made hy the Commissioner in such cases shall he prima facie reasonable and valid, and it shall he presumed that the Commissioner has complied with all requirements of the law. The Board may likewise hring suit for enforcement of any order made by it, which has become final either hy the failure of any person to appeal the Board's order or hy an appellate court's decision against any person who fails to comply with such final order. In such suits the Board's decision shall not be suhject to challenge as to matters of law or fact, but the polluter or violator may proffer evidence showing that he has in fact complied with the Board's order.** [Comparative legislation: SUGGESTED STATE ACT § 13.]

**(c) Any snit for an injunction hrought hy the Commissiouer shall**

he filed in the Chancery Court of Davidson County or in the Chancery Court of the county in which all or a part of the pollution or violation has or is about to occur, in the name of the Department, hy the staff attorney at the direction of the Commissioner or the Board and under the supervision of the Attorney General. Such proceedings shall not be tried by jury. Appeals from judgments or decrees of the Chancery Court in proceedings brought under the provisions of this Act shall lie to the Supreme Court despite the fact that controverted questions of fact may be involved. [TENN. CODE ANN. § 70-339 (Supp. 1971).]

SECTION 17. OTHER REMEDIES. (a) Any person may file with the Commissioner a signed complaint against auy person allegedly violating auy provisions of this Act. Unless the Commissioner determines that such complaint is duplicitons or frivolous, he shall immediately serve a copy of it upon the persou or persons named therein, promptly investigate the allegations contained therein, and shall uotify the alleged violator of what action, if any, he will take. In all cases he shall notify the complainant of his action or determination. If either the complainant or the alleged violator helieves that the Commissioner's action or determination is or will be inadequate or too severe, he may appeal to tbe Board for a hearing which will he conducted pursuant to section 9. Such appeal must be made within ten (10) days after receipt of the notification sent by the Commissioner. If the Commissioner fails to take the action stated iu his notification, the complainant may make an appeal to the Board within twenty (20) days from the time at which the complainant knows or has reason to know of such failure. The Department shall not be obligated to assist a complainant in gathering information or making investigations or to provide counsel for the purpose of drawing his complaint. [Comparative legislation: CAL. WATER CODE § 13320 (West 1971); ILL. ANN. STAT. ch. 111½, § 1031 (Smith-Hurd Supp. 1972).]

(b) The penalties, damages, and injunctions provided for in sections 14-17 are intended to provide additional and cumulative remedies to prevent, abate, and control the pollution of the waters of the State. Nothing herein contained shall be construed to ahridge or alter rights of action or remedies iu equity or under common law or statutory law, criminal or civil, nor shall any provision of this Act, or any act doue by virtue thereof, he construed as estopping the State or any municipality or person, as riparian owners or otherwise, in the exercise of their rights in equity or under the common law or statutory law to suppress nnisances, to abate pollution, or to recover damages resulting from such pollution. [TENN. CODE ANN. § 70-340 (Supp. 1971). Comparative legislation: FLA. STAT. ANN. § 403.191 (Supp. 1971); GA. CODE ANN. § 17-517 (1971);

MD. ANN. CODE art. 96A, § 28B (Supp. 1971); MO. ANN. STAT. § 204.160 (1959); N.J. REV. STAT. § 58:10-1 (Supp. 1971); N.M. STAT. ANN. § 75-39-12 (1953); S.C. CODE ANN. § 63-195.27 (Supp. 1971); W. VA. CODE ANN. § 20-5A-22 (1970).]

## COMMENTARY

Several states and the federal government have enacted laws allowing citizen suits for environmental protection. Contrasting theories, however, are used in the various statutes. At the federal level, the Clean Air Amendments of 1970[29] permit the citizen to bring an action directly against the polluter, but only after giving 60 days notice to the Administrator. If the Administrator commences a civil action against the polluter within this 60-day period, the citizen cannot begin another action, but may intervene by right. The Florida[30] and Illinois[31] Acts have a minimum notice and waiting period, analogous to that in the Clean Air Amendments. Conversely, the Michigan Environmental Protection Act of 1970[32] does not require the citizen to notify the responsible state agency, and he may commence his action immediately, without waiting for possible agency action.

The latter approach seems to be premised on the theory that failure of the agency to act in the first instance is sufficient evidence of its unwillingness to act to justify direct judicial intervention. Arguably, however, the best interests of the court, the agency, and the public will be served by giving the agency a fair opportunity to bring its expertise to bear on the problem before turning it over to the courts on the theory that the agency's failure to act indicates prejudice on behalf of the party to be regulated. This section is based on the approach of the Illinois law, which permits any person to file with the Board a complaint against any violator. Under the new Tennessee law, the complaint is filed with the Commissioner. If he fails to act, the complainant's route of appeal is through the Board. This procedure assures an administratiive hearing and review before court action.

**SECTION 18. FUNDS APPROPRIATED TO WATER QUALITY CONTROL—DISBURSEMENT. Any funds appropriated to water quality control shall be set up in the Department as an earmarked fund, and said funds shall be paid out on warrants issued by**

29. Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 (1970)).
30. Environmental Protection Act of 1971, Fla. Laws ch. 71-343, § 3.
31. ILL. ANN. STAT. ch. 111½, § 1031(b) (Smith-Hurd Supp. 1972).
32. MICH. STAT. ANN. § 14.528(201-07) (Supp. 1971).

**the State as provided by law. In addition, all fines collected pursuant to sections 8 and 15 shall be earmarked for the use of the Water Qnality Control Division in the discharge of its dnties. Damages recovered from any person for violation of any provision of this Act shall be earmarked for the nse of the Water Quality Control Division, or, in tbe event that another state agency has primary responsihility for the property for which damages are recovered, sucb damages shall he earmarked for tbe nse of that agency.** [TENN. CODE ANN. § 70-341 (Supp. 1971).]

## COMMENTARY

This section is intended to channel to the Division all revenues appropriated for the purpose of water quality. In addition, those fines that are paid are directed to be used by the Division for the maintenance of the waters of the State. If a polluter has to pay damages for harm done to the waters of the State, those damages are earmarked for the use of that agency which will be expected to correct the harm. For example, if half of the assessed damages is for the killing of fish, then that portion would be earmarked for the use of the Fish and Game Commission rather than the Division of Water Quality Control.