

STITES & HARBISON PLLC

ATTORNEYS



TDEC COMPLIANCE & ENFORCEMENT RESPONSE STRATEGIES

Tennessee Association of Utility Districts

Gregory T. Young
Stites & Harbison, PLLC
615-782-2264
Greg.young@stites.com

OUTLINE

- Legal Background
 - Pertinent Regulatory Programs
- Compliance & Enforcement Mechanisms
 - Administrative – TDEC
 - Judicial – Civil & Criminal
 - Citizen Complaints
- Managing TDEC Compliance & Enforcement
 - Inspections & Submittals

OUTLINE

- Managing TDEC Compliance & Enforcement (continued)
 - Notices of Violation
 - Orders
 - Appeals to Boards
- Regulatory Compliance Incentives
 - Audit Policies
 - Supplemental Environmental Projects

OUTLINE

- Other Considerations
 - Citizen Complaint / Citizen Suit
 - US EPA Involvement / Overfiling
- Conclusions & Questions

LEGAL BACKGROUND

- Tennessee Safe Drinking Water Act of 1983 (TCA § 68-221-701 *et seq.*)
 - Ensure adequate quantity and quality of drinking water
 - Division of Water Supply - Water Quality Control Board
 - General supervision over design, construction and operation of public water works systems
 - Water quality information reporting – sanitary surveys
 - Enforcement generally via Commissioner's Order that may include civil penalty assessment. TCA § 68-221-712 and 713.

LEGAL BACKGROUND

- Water Environmental Health Act (TCA § 68-211-901 *et seq.*)
 - Prevent inadequate operation of water and wastewater systems through certification of operators
 - Division of Water Supply – Operator Certification Board
 - Competency of operators of systems must be certified by Commissioner
 - Certification revoked if operator practiced fraud or deception or failed to exercise reasonable care
 - Commissioner may issue orders for non-compliance. TCA § 68-221-904

LEGAL BACKGROUND

- Tennessee Water Quality Control Act of 1977 (TCA § 69-3-101 *et seq.*)
 - Abate existing water pollution, prevent future water pollution, and plan for future use and enjoyment of water resources
 - Division of Water Pollution Control – Water Quality Control Board
 - Requires permit for any person to add pollutant discharge to or otherwise alter waters of the state
 - Enforcement generally via Commissioner's Order. TCA § 69-3-109.

Compliance and Enforcement Mechanisms

- Administrative Enforcement
 - Generally preferred versus some other more formal types of enforcement
 - Most violations are addressed administratively
 - Dealing with TDEC representatives - No AG lawyers or courts are involved at this stage
 - Can be different levels of formality even in the administrative context (NOV v. Order)
 - Opportunities to negotiate

Compliance and Enforcement Mechanisms

- Judicial Enforcement - Civil
 - Acts cited above also grant TDEC authority to pursue civil penalty actions in Tennessee State Courts
 - Lawsuit filed against violators
 - TDEC does not file suit on its own – needs assistance and concurrence from TN Attorney General, but AG may initiate lawsuit without TDEC
 - AG sector specific enforcement initiative – focused on repeat violators and situations where administrative enforcement not effective
 - Lawsuits can include claims for injunctive relief

Compliance and Enforcement Mechanisms

- Judicial – Criminal
 - Primary responsibility for state criminal prosecution is with district attorneys general
 - AG or TDEC staff attorney often assists DA
 - Federal / State Environmental Crimes Task Forces
 - EPA and US Attorneys offices investigate federal environmental criminal violations
 - Grand Jury Subpoenas

Compliance and Enforcement Mechanisms

- Citizen Complaints
 - Not available under TN SDWA
 - TWQCA (§69-3-118) and WEHA (§68-221-915)
 - TDEC may reject complaint if duplicitous or frivolous
 - If not, TDEC must investigate and render determination
 - Appeal to Water Quality Control Board or Operator Certification Board
 - Administrative procedures (declaratory order) are also available to citizens and third-party entities
 - TN common law claims – e.g., nuisance, trespass
 - Federal Citizen Suits – SDWA and CWA

Managing TDEC Compliance & Enforcement

- Inspections & Submittals
 - First impressions matter
 - Be prepared. Designate representative.
 - Availability of records and reports
 - Consider inventory or index
 - Cooperation and shadow during inspection
 - Exit interview – request notes, reports, photos
 - Post-inspection – pre-NOV
 - Submittal issues – late, incomplete, corrections, no falsification

Managing TDEC Compliance & Enforcement

- Notice of Violation (NOV)
 - Division issues NOV as a letter and sets forth information about:
 - Background of violation
 - Statutory or regulatory provisions violated
 - Corrective measures
 - Response – timeliness – engage TDEC – request show cause meeting (informal appeal within TDEC)
 - Mitigating factors – factual accuracy, level of cooperation, corrective actions
 - Argue no further action

Managing TDEC Compliance & Enforcement

- Orders
 - Usually multiple NOVs or instances of non-compliance
 - Case referred to TDEC Office of General Counsel
 - Quarterly Non-Compliance Report if NPDES permit - 2 consecutive quarters means order.
 - More formal – looks like a pleading and normally contains:
 - Factual basis
 - Requirements for corrective measures
 - Civil penalties (contingent penalties)
 - Damages – TDEC expenses, Natural Resource Damage Assessment
 - Appeal rights – go to Board

Managing TDEC Compliance & Enforcement

- Orders (continued)
 - Commissioner's Order versus Director's Order
 - Delegated authority – limitation on amount of civil penalty or type of respondent
 - Response – must appeal within 30 days or Order becomes final
 - TDEC withdrawal of Order - rare
 - More common to appeal and negotiate a resolution (Consent Decree) – careful attention to details
 - Penalty factors – economic deterrent, economic benefit to violator, efforts to cooperate and correct
 - Repeat violator concerns

Managing TDEC Compliance & Enforcement

- Appeals to Boards – Contested Cases
 - Trial governed by the UAPA
 - Pretrial – discovery, experts, witnesses
 - State has burden of proof in enforcement actions - preponderance of the evidence standard
 - ALJ typically sits with Board – ALJ conducts proceedings and rules on questions of law and procedure
 - Board acts as jury and must declare findings of fact and conclusions of law, providing a rationale for its decision
 - Board decision may be appealed to Davidson County Chancery Court

Managing TDEC Compliance & Enforcement

- Appeals to Boards – Contested Cases (continued)
 - Factors to consider (among others):
 - Factual accuracy
 - Legal interpretation and precedence
 - Penalty amounts and ability to pay
 - Disparate treatment
 - Legal expenses
 - Make up of Board and prior Board decisions

Regulatory Compliance Incentives

- Audit Policies
 - TDEC Policy Encouraging Self-Policing and Voluntary Correction
 - Policy in effect since 1996 – updated in 2009
 - Goal is to “encourage regulated entities to voluntarily discover, disclose, correct, and prevent violations of Tennessee environmental requirements.”
 - Encourages environmental audits
 - Patterned after EPA’s audit policy and approved by EPA, but EPA does not participate in disclosures to TDEC

– TDEC Policy Encouraging Self-Policing and Voluntary Correction (continued)

- Policy provides incentives to report and correct violations:
 - Reduced or waived civil penalties (contingent penalties)
 - Lessened chance of criminal prosecution
 - No routine requests by TDEC for audit reports
- Policy conditions – systematic and voluntary discovery, prompt disclosure prior to government action, corrective action.
- Benefits even if you don't fully meet policy requirements
- See also, 60 Fed. Reg. 66,706 and 65 Fed. Reg. 19,618.

Regulatory Compliance Incentives

- Supplemental Environmental Projects
 - Case by case basis
 - Mitigation ratio for SEP dollars required to penalty amount can be one-to-one in best case, or higher
 - Projects may include:
 - Pollution prevention
 - Pollution reduction
 - Restoration or protection of environment
 - Protection of human health

Other Considerations

- Citizen Suits
 - Be Proactive – before and during notice period
 - Consider working with State to resolve compliance issues that are readily apparent through submittals
 - Defenses
 - Defective notice
 - Wholly past violations
 - Standing
 - Diligent Prosecution

Other Considerations

- US EPA Involvement / Overfiling
 - Delegated versus non-delegated programs
 - NPDES Permitting
 - Oil Pollution Prevention Act
 - Situation where EPA views State action as insufficient
 - More formalities and usually higher civil penalties (matrices)

CONCLUSIONS

- Understand the type of enforcement action
- Know the regulator and the chain of command
- Know the facts – good, bad and ugly
- Know the law and regs – flexibilities
- Understand the process – use to your advantage
- Be proactive