

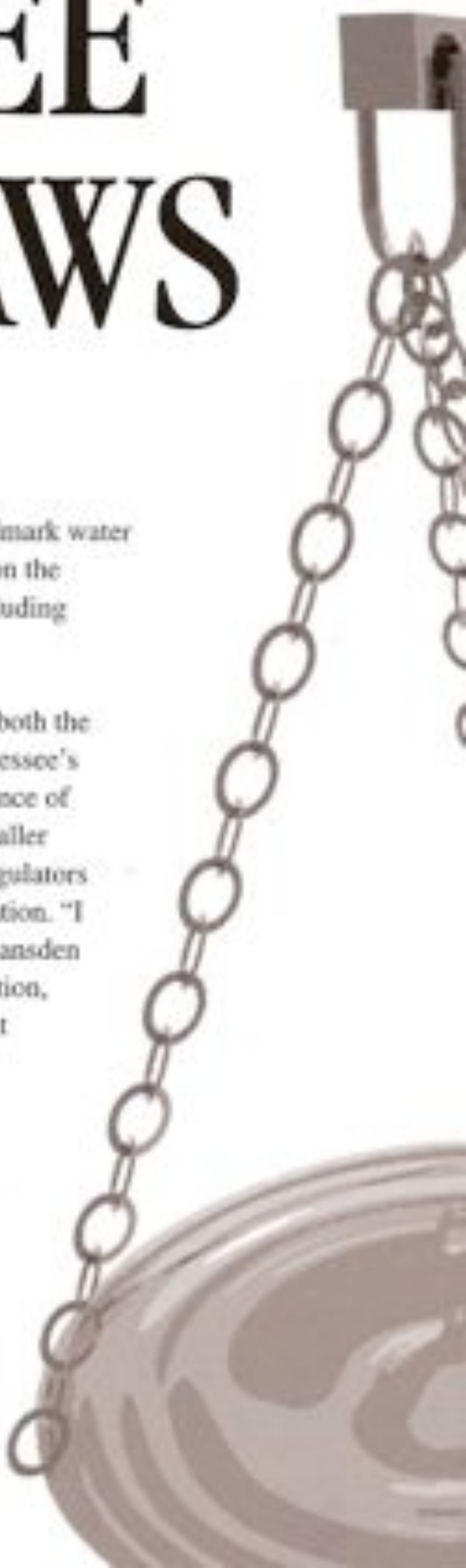
# TENNESSEE WATER LAWS


## *State General Assembly Passes Landmark Water Quality Legislation*

**T**he Tennessee General Assembly recently approved landmark water quality legislation that will have a far-reaching impact on the agricultural and development industries as a whole, including contractors and road builders throughout the state.

Senate Bill (S.B.) 632, which received overwhelming approval in both the House and the Senate, reforms the clarity and consistency of Tennessee's water quality standards. The Responsible Water Coalition, an alliance of business, agriculture and elected officials, organized and led by Waller Lansden's Regulatory Affairs Practice, worked with legislators, regulators and the environmental community for two years to pass the legislation. "I am very proud of this legislation," Tom Lee, partner with Waller Lansden Dortch & Davis, LLP in Nashville and spokesperson for the Coalition, said. "I think our General Assembly did a great thing, and I think it really does strike the proper balance."

TRBA Executive Vice President Kent Starwalt said the issue for The Responsible Water Coalition was always in regards to clarity, consistency and interpretation of the state's water quality rules. Prior to S.B. 632, farmers or developers wanting to do something with their land found themselves trying to determine the difference between the type of body of water – whether it's a stream or a ditch – and what permit needed to be applied for – if one was needed at all – for work to proceed. "The idea behind the legislation was so the average person could make an easy determination of what needed to be done so they could abide by the law," Starwalt said. "Now, we have more clarity of what the law means and consistency in regards for





the water quality standards as they affected business and development. The problem was affecting a number of diverse businesses across the state, from homebuilders and road builders to state chambers of commerce, farmers, bankers and the paper products industry. In reality, it was affecting everyone who depended on economic development for their livelihood.

#### **STREAM OR WET WEATHER CONVEYANCE**

First, there was a lack of clarity because many of the standards being applied in the field were not in statute or regulation, according to Lee. Because there were no formal laws, individuals had no place to go to determine if they were in compliance when dealing with these issues. "The (Tennessee) Department of Environment and Conservation (TDEC) was applying standards that weren't always in statute or regulation — subject to change and not approved by any regulatory body," Lee said. That, of course, left things subject to individual interpretation, which varied dramatically depending on your location within the state. In short, there was no clearly defined difference between streams and wet weather conveyances and the regulatory standards that apply to each.

It's important to understand that the state takes the view that all water, once it hits the ground, falls under state jurisdiction. These so-called waters of the state are divided into two categories — streams and wet weather conveyances. Prior to the new legislation, a stream was defined vaguely as water that is not a wet weather conveyance. And a wet weather conveyance was anything that carries water on the surface that's not a stream. In theory, the latter could be a person's front yard. But streams are heavily regulated, and a wet weather conveyance only requires compliance with certain conditions, so it's important to make the proper distinction.

At the same time, there are two types of permits available to someone who is trying to develop a piece of property. First, a specific permit is used when the result will be point-source pollution. This is for companies that are going to emit something

According to a February 2008 report by the Tennessee Department of Environment and Conservation's Water & Pollution Control Division, more than 1,250 lakes and streams in the state were listed as being impaired.

In all, Tennessee has more than 60,000 miles of streams and one-half million acres of lakes.

that changes the quality of the water. This is not typically the case when a developer creates a subdivision. In fact, what occurs in this instance is nonpoint-source pollution, a situation that might result in a muddy stream from runoff. These are generally not pollutants — just dirt and changes in the stream water.

However, when nonpoint-source pollution occurs, there are two types of permits. The first, known as an aquatic resource alteration permit (ARAP), is required if you intend to alter a stream. If no stream is being altered, then the state requires a general permit. The general permit is not really a permit, Lee explains. Rather, it's a list of conditions for anyone who is going to alter the land surface. "If your intent is to affect or move a stream, then you must apply for permission, and it's a difficult and expensive process," he said. Knowing all this and understanding how much everything is open to individual interpretation, it became necessary to educate legislators about the broad-reaching differences in wet weather conveyances.

But clarity wasn't the only issue. Since a wide range of standards was being applied across the state, consistency ran a close second. "We held lots of discussions and meetings with TDEC and leading environmental groups," Lee said, "and even the environmentalists agreed that there was an enormous problem with the consistency of the laws."

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To address these issues, the Responsible Water Coalition was formed in late 2007. "We had to help legislators understand the problems so we could help them understand the solution," Lee said. "We educated lawmakers not just with words, but with the simple presence of the Coalition."

The Responsible Water Coalition consisted of the following organizations:

Associated Builders and Contractors  
Associated General Contractors of Tennessee  
Home Builders Association of Tennessee  
Tennessee Bankers Association  
Tennessee Chamber of Commerce & Industry  
Tennessee County Highway Officials Association  
Tennessee Farm Bureau Federation  
Tennessee Mining Association  
Tennessee Paper Products Council  
Tennessee Road Builders Association

The goal was to get as many of these industry groups in the room as possible in an effort to demonstrate that concern over the problem was broad-reaching. After two years of hard work on the part of many parties, including the TRBA, the new legislation was passed.

#### SENATE BILL 632

Signed by Gov. Bredesen on June 24 and immediately going into effect, SB 632/HB 1615 was sponsored by Sen. Steve Southerland (R-Morrisville) and Rep. Joe McCord (R-Maryville). The bill passed the House by a 72-22 vote and was approved in the Senate by a 26-3 vote.

As lead spokesperson and lobbyist, Lee describes the S.B. 632 reforms as follows:

- The Tennessee Code will clearly define the difference between streams and wet weather conveyances and the regulatory standards that apply to each
- Although the regulatory standards applying to streams do not change, the bill requires that a stream is defined as containing water flowing through a watercourse — but not sheet flow off a hillside, water moving through ditches or standing pools of water

- Property owners working in wet weather conveyances (not a stream) will find standards applicable to their projects inside the Tennessee Code
- Tennesseans will be able to participate in a public rulemaking meeting with the Tennessee Water Quality Board to further clarify the distinction between streams and wet weather conveyances
- TDEC will issue guidance documents to the public, telling the public and regulated community how the new water quality standards will be enforced and establishing training and qualification standards for its enforcement staff
- Hydrology and biology professionals will play a new and heightened role in shaping wet weather and stream determination as property owners will receive incentives to retain state-certified hydrologic professionals to ensure the regulatory status of waters on their property

Lee is confident that although there is more work to be done,

much has been accomplished. "Over time we will have a clearer, easy-to-follow water quality law, and one that we think strikes a balance between economic development and environmental protection," he said. "But the law should be an immediate benefit to builders by clarifying the standards that apply when they need an ARAP permit and when they don't — and when they are working in a stream or merely affecting a wet weather conveyance."

In negotiating a solution that works for all parties, the Coalition acted professionally and with integrity. And although it was a group effort, TRBA played a huge role overall. "There is no doubt in my mind that we wouldn't have a Coalition and we wouldn't have achieved these results without the leadership of the TRBA," Lee said. "Too often individual groups try to achieve something or stop something in the legislature, and those efforts meet with varying degrees of success. We could not have done this without a broad base of support. This was more than a single-industry issue, and we had to convince the legislators of that. The Road Builders really took the lead on this, and it made a huge difference."

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