# STATUTORY NOTE

## WATER QUALITY CONTROL IN GEORGIA

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Due to the ever increasing importance of water quality control in Georgia and because of recent legislation in the field, it was thought that a review of the current status of the problem from a legal standpoint would be timely. This article reviews the earlier acts, describes the most recent legislation, and outlines the procedure to be followed by the Board created by the 1964 act.

In 1957 the Georgia General Assembly enacted into law two bills designed to combat the problem of water pollution. The GEORGIA RESOURCES COMMISSION ACT, a companion act to the GEORGIA WATER QUALITY CONTROL ACT, provided study facilities and a procedure for determining the optimum usages of the waters of the State, while the latter act designated the State Board of Health as the state agency to administer a water quality control program. Seven years later the 1964 General Assembly realized that a stronger law would be necessary, and thus came the repeal of both 1957 laws and the establishment of the Division for Water Quality Control. This 1964 act remedies many of the defects found in the 1957 legislation, but it seems that some amendatory legislation could provide better machinery for the maintenance of a water quality control program adequate for the present and future needs of the State of Georgia.

THE WATER QUALITY CONTROL ACT OF 1957:[1] Pollution was defined under this act as being "the degradation of the quality of the waters of this State by man's use which renders the water unfit for its reasonable use by others."

The Board of Health was given a great deal of power and responsibility under CODE section 17-504, but a reluctance to construe 17-504 (12) (which gave the authority to exercise all incidental powers necessary to carry out the purpose of the Chapter) as having conferred the authority to seek the injunctive aid of the courts to enforce its orders left the Board with power to issue orders but no effective means of enforcement except in situations where there existed a "grave and immediate public health hazard" as provided in CODE section 17-517. CODE section 17-9901 did provide that any violation of the

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1. GA. LAWS, 1957, pp. 264-269.

act, rule or regulation, or failure to comply with orders of the Board shall be considered a misdemeanor. The obvious shortcomings of such a penal provision when applied to cities or to industries which constitute the economic backbone of the community prevented this from being an effective means of enforcing the provisions of the act and the orders of the Board.

CODE section 17-505 provided for the creation of the Georgia Water Quality Council. The Council was made up of four ex officio members: the Director of the State Department of Public Health; the Commissioner of Agriculture; the Secretary of the State Department of Commerce; and the Director of the State Game and Fish Commission. The Governor selected seven citizens of the State each representing one of the following interest groups: (a) Conservation, (b) Municipal Government, (c) Soil Conservation, (d) Agriculture, (e) Textile Industry, (f) Pulp and Paper Industry, and (g) Food Processing Industry. It seems that the only responsibilities of the council consisted in (1) consulting with and advising the Board, (2) reviewing Board rulings upon application by an aggrieved person, and (3) conducting hearings, through an appointed hearing examiner, on charges of violations of the chapter or rules and regulations issued pursuant to it. The hearing officer could make findings of fact and return them to the council for consideration and action.

Since the council under CODE section 17-512 could affirm or reverse the action of the Board with or without a hearing upon application by an aggrieved person, the Board by appointing a qualified hearing examiner could bypass any necessity for ever holding a hearing itself. As will be pointed out below, the Water Quality Control Board created under the 1964 act was not so fortunate. It must be kept in mind that any person aggrieved by the decision of the council could petition the Superior Court of Fulton County or the superior court of the county of his residence for a de novo hearing under CODE section 17-513. The expenses of the council members were to be paid from the funds appropriated to the Department of Public Health.

CODE section 17-514 required the Attorney General to represent the Board, council, or the director. The Board of Health was designated as the state agency to receive and administer financial aid from the Federal Government or other public or nonprofit sources for purposes of water quality or water pollution control.

Mainly due to an absence of a specific fund set up for exclusive use in the water quality control program and the failure of the legislature to provide effective means of enforcement it became apparent that further legislation would be necessary.

THE WATER QUALITY CONTROL ACT OF 1964:[2] Pollution is a word not easily defined, but an improvement was achieved by re-definition in the new water quality control act. Here pollution is defined as meaning,

> any alteration of the physical, chemical, or biological properties of the waters of this State, including change of the temperature, taste, or odor of the waters, or the addition of liquid, solid, radioactive, gaseous, or other substances to the waters or the removal of such substances from the waters, which will render or is likely to render the waters harmful to the public health, safety, or welfare, industrial, agricultural, recreational, or other lawful uses, or for animals, birds, or aquatic life.

The 1964 General Assembly created a hybrid organization characterized by separate and independent status within the Department of Public Health and named it the Division for Georgia Water Quality Control. The State Board of Health which was so dominant under the 1957 Act has only an indirect part in the water quality control program under the 1964 legislation. The Department of Public Health is given one seat on the new Water Quality Control Board and this representative is designated Chairman under CODE section 17-504. The Board has direct control and supervision over the Division, and only in the promulgation of rules and regulations under CODE section 17-505 (9) is the Board required to act jointly with the Department of Public Health. Even though this new Board has some resemblance to the old council, its powers are much more extensive since under CODE sections 17-521 and 17-514 the Board is authorized to take legal action to prevent or stop any violation of the Chapter. The Governor appoints nine members to the Board, selecting one from each of the following representative interests: (1) Department of Public Health, who serves as chairman; (2) soil and water conservation; (3) municipal government; (4) commerce; (5) agriculture; (6) industry; (7) recreation, fish and wildlife; (8) county government; and (9) public at large.

The ACT calls for the appointment of a sanitary engineer of good character to serve as Executive Secretary of the Board. He is the administrative officer of the Board with a salary set by the Board. This Executive Secretary is the real "work horse" of the Division and under CODE section 17-507 is given authority to exercise all power vested in the Division. It would seem that subject to approval of the Board, the Executive Secretary could administratively handle almost all business

2. GA. LAWS, 1964, pp. 416-436; GA. CODE ANN. ch. 17-5 (Supp. 1964).

of the Division except hold hearings in cases where, under CODE section 17-512, the Board itself must conduct the hearing.

Regarding hearings to be held by the Board, it would seem that here the 1957 Act is more satisfactory since provision was made therein allowing the appointment of a hearing officer to make findings of fact and recommendations to the council in a case where an aggrieved party had petitioned for review of action taken by the Board of Health or its duly authorized agent. There are perhaps hundreds of persons who could take exception to orders which may be given by the Board or actions relative to a permit. Is it possible for a board of nine prominent Georgians to conduct hearings for each person taking such an exception? Each hearing could continue for several days. An amendment designed to remedy this defect was introduced in the 1965 General Assembly but met with defeat. It will be considered below.

CODE section 17-511 gives the guide for procedure under the 1964 act. It requires that the Board act to secure co-operation from a person polluting the waters of the State and that the Board furnish technical and scientific information as may be helpful in reducing or eliminating the polluting effects of the discharge, and whenever anyone refuses to co-operate the Board may issue its order. It seems that this order would be in the form of a demand for co-operation, *i.e.*, submit a plan showing how the abatement of pollution is to be attained rather than the more compelling order under CODE section 17-505 (13), which serves to direct "any particular person or persons to secure within the time specified therein such operating results as are reasonable and practicable of attainment toward the control, abatement, and prevention of pollution of the waters of the State and the preservation of the necessary quality for the reasonable use thereof." This latter type order may be issued only after an opportunity to be heard has been afforded under the provisions of CODE section 17-512 while no such requirement is set out in section 17-511. It would seem that the reason for requiring a hearing prior to issuing an order pursuant to CODE section 17-505 (13), is that to secure "such operating results as are reasonable" will very likely involve substantial expenditures, while on the other hand an order pursuant to section 17-511 requiring the submission of a plan showing how the result will be attained, perhaps in several years, would not place such an immediate burden upon a person so ordered.

PROPOSED AMENDMENTS[3] Even though this amendment was never accepted by the General Assembly it is helpful to consider what its effects would have been.

3. Senate Bill 187, 1965 Session.

The amendment would have: (1) authorized the Board to adopt rules and regulations concerning the disposal of sewage by boats equipped with marine toilets; (2) removed the requirement of a mandatory hearing prior to the rendition of *any* order by the Board; (3) provided for procedure for the conduct of hearings relative to any order of the Board or any action relative to a permit; and (4) repealed conflicting laws.

As pointed out above there seems to be ground for distinguishing between the type orders to be rendered pursuant to CODE section 17-505 (13) and those rendered pursuant to CODE section 17-511. Clearly 17-505 (13) deals only with orders directing persons to secure operating results. An order to bring about the reduction or elimination of pollution issued pursuant to CODE section 17-511 (3) is issued only after the Board has failed to secure cooperation from the person causing the pollution and has offered such technical and scientific information as may be helpful in reducing the polluting effects of the discharge. A person so ordered pursuant to 17-511 (3) would have the right to take exception to this order under the procedure outlined in CODE section 17-512, but there seems to be no requirement for a hearing prior to the rendition of such an order. An interpretation which required a hearing before the full Board prior to the rendition of any order whatsoever would render the entire act ineffective and incapable of successful implementation. Could it have been intended that the Board should give a hearing prior to ordering a known polluter to submit a plan showing how the problem is to be reduced or eliminated, and after such hearing when the Board issues its order the person causing the pollution is then given the right under 17-512 to take exception to this order of the Board?

The amendment would have provided for the appointment of a hearing examiner to conduct hearings now required to be conducted by the Board itself under CODE section 17-512. The procedure for the conduct of hearings under the amendment seems to have only lengthened the period of time before a final disposition of the appeal could be had. Under the amendment the hearing examiner was to keep a record of the proceedings and upon conclusion of the hearing he was required to write a reasoned opinion explaining his findings of fact and recommendations. The Chairman of the Board was to render his final order after allowing time for filing of written exceptions to the hearing examiner's recommendations and findings of fact. The chairman then rendered his final order, but this order was final only if no exception was taken thereto. The party affected by such order still had 30 days to file application for review before full Board, and if so filed

the Board was required to review the record of the evidence at the hearing, or in its discretion hear the parties in issue and then render a final order concurred in by a majority of the members of the Board.

It would seem that the procedure under the 1957 ACT would be the most satisfactory when looking toward the most prompt reduction of pollution of the waters of our State. It will be remembered that under the 1957 ACT, the hearing examiner submitted his fact findings and recommendations to a council which could approve or reverse with or without any further hearing. From their decision the party affected had the right to petition for a de novo hearing in the superior court under the old CODE section 17-513.

PROCEDURE UNDER THE 1964 ACT: Effective implementation of the act seems to demand that CODE section 17-505 (13) be employed only in extraordinary circumstances, and it must be remembered that CODE section 17-520 is limited to emergency orders. The procedure outlined below would seem to serve the purposes of the act in all but such exceptional circumstances. On page 477 appears a Flow Chart which is an attempt to put the *practical application* of the act in diagram form and is traced as follows:

The real beginning of the elimination of pollution comes about upon the discovery that such pollution exists. The chart shows three ways that this discovery may come about:

1. A statutory duty of the Board is to survey the waters of the State to determine where pollution exists. (GA. CODE ANN. 17-505 (b) (4)).

2. The Board is given the duty to hold hearings to determine whether or not an alleged pollution is contrary to the public interest. (GA. CODE ANN. 17-505 (b) (7)). This would appear to be an instance where the appointment of a hearing examiner would serve to lighten the work load of the Board without impairing the effectiveness of the program.

3. Information furnished by the federal government.

Once pollution is discovered, the Board is required under CODE section 17-511 (1) to seek the polluter's co-operation in the reduction or elimination of the detrimental effects of the discharge. Upon receipt of this request for cooperation, which could be a detailed plan showing how the polluter intends to bring about the reduction or elimination of the polluting effects caused by his discharge into the waters of the State, the polluter has two alternatives:

1. Polluter may cooperate by compliance with the request by submitting a detailed plan showing how the elimination or reduction of the pollution is to be brought about.

2. The polluter may refuse to cooperate by ignoring the request altogether or by actively refusing to cooperate.

COOPERATION

After a plan has been submitted, the Board may either reject this plan and call for another, dictate a reasonable plan to the person causing the discharge which is having a polluting effect upon the waters of the State, or the Board may issue its approval of the plan submitted. Since it would be unlawful under CODE section 17-510 (2) for the polluter to proceed with the plan without first securing a permit, the Board should concurrently issue a permit to the polluter along with its approval of the plan. It would seem that the Act contemplates every known polluter in the State operating under a permit of some sort. Once the permit is issued the Board may compel compliance with its request for cooperation in the same manner employed by other State agencies seeking cooperation of those holding licenses or permits under that agency's authority. The Board would have only to issue a citation requiring the permit holder to come in and show cause why the permit should not be revoked.

After the person causing the pollution proceeds to carry out the approved plan with the Board offering technical and scientific information as may be helpful in reducing or eliminating the polluting effects of the discharge as required by CODE section 17-511 (2), there are only three possibilities:

1. The person causing the pollution may carry out the approved plan and thereby satisfactorily dispose of the case.

2. Conditions may change which call for a modification of the polluter's permit under CODE section 17-510 (3), and this modification leaves the polluter with three alternatives:

(a) Compliance.

(b) Refusal to acknowledge the modification which would give rise to injunctive remedy under CODE section 17-521.

(c) Appeal to the Board itself under CODE section 17-512 and if dissatisfied with the Board's ruling further to the superior court under CODE section 17-513.

3. The person causing the pollution may violate the permit and such violation would call for a modification or revocation of the permit by the Board under CODE section 17-510 (3). Polluter now has the same three alternatives as set out in 2 next above.

REFUSAL TO COOPERATE

Pursuant to CODE section 17-511 (3), in cases where the person causing the pollution refuses to cooperate with the efforts of the Board to reduce pollution, the Board may issue its order to bring about the reduction or elimination of pollution. It has been suggested that this order be in the alternative: submit a plan showing how pollution will be abated or cease and desist from carrying on activities which result in pollution. After receipt of such an order the person causing the pollution has three alternatives:

1. Polluter may now decide to cooperate with the efforts of the Board, and such a decision would have the same effect as if such an election had been made originally.

2. Polluter may ignore the order thus giving rise to an injunctive remedy as provided for in CODE section 17-521 and/or criminal prosecution pursuant to CODE section 17-9901. CODE section 17-514, which requires that a public hearing be afforded prior to the institution of legal proceedings, must not be overlooked.

3. CODE section 17-512 (1) gives the polluter the right to obtain a hearing before the Board by filing a petition with the Board, and CODE section 17-513 provides for further appeal to the superior court if five Board members concur against the person taking exception to an order of the Board or any action relative to a permit.

It would be impossible to place too much emphasis upon the spirit of cooperation evidenced by CODE section 17-511. Without cooperation between the person causing the discharge into the waters of the State and the Water Quality Control Board there can never be an effective program which guarantees that the water resources of the State will be utilized prudently to the maximum benefit of the people. It is hoped that this article will in some way contribute to that end.