

NEW YORK

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

New York's Environmental Conservation Law provides some enforceable authority applicable to nonpoint source discharges. Support for applying the law broadly to include nonpoint source enforcement may be provided by a declared statutory policy to maintain reasonable standards of purity of the waters of the state "and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state."¹

- "It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301 [which establishes classification of waters and water quality standards.]"² Enforcement is by administrative order, injunction, civil penalty of up to \$25,000 per day, or for willful violations by criminal prosecution.³

- "Sewage, industrial waste or other wastes, or any substance injurious to edible fish and shellfish, or the culture or propagation thereof, or which shall in any manner affect the flavor, color, odor or sanitary condition of such fish or shellfish so as to injuriously affect the sale thereof, or which shall cause any injury to the public and private shell fisheries of this state shall not be placed or allowed to run into the waters of the state in the marine district nor into any waters of Long Island, tributary to the marine district."... "Garbage, cinders, ashes, oils, sludge or refuse of any kind shall not be thrown, dumped or permitted to run into the waters of the marine district."⁴ Enforcement is under the same provisions.

Other Discharge Limitations

- The Department of Health "may make rules and regulations for the protection from contamination of any or all public supplies of potable waters and water supplies...and the commissioner of environmental protection of the city of New York and the board of water supply of the city of New York may make such rules and regulations subject to the approval of the department..."⁵ Enforcement is via notice of violation, enforcement by local board of health; injunction; summary abatement; and civil penalties of up to \$200 for noncompliance.⁶ Violations are punishable as misdemeanors punishable by fines of up to \$200 and up to 1 year imprisonment.⁷

- "The commissioner [of health] shall have all necessary powers to make investigations and examinations into nuisances, or questions affecting the security of life and health in any locality."⁸ The governor may request investigation by commissioner of health, and upon approval of report, the governor may declare the matters public nuisances and may order them to be changed, abated or removed; such orders are judicially enforceable.⁹ In addition, "Every local board of health shall order the suppression and removal of all nuisances and conditions detrimental to life and

health found to exist within the health district;"¹⁰ and local health officers have power to "investigate and abate public nuisances which may affect health."¹¹ Such orders are judicially enforceable. Also, the Environmental Conservation Law expressly preserves state, local and private rights and remedies to "suppress nuisances or to abate any pollution now or hereafter existing".¹²

- "A person, who throws or deposits gas tar..or offal, refuse, or any other noxious offensive, or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters, is guilty of a misdemeanor."¹³

- "A person, who deposits, leaves or keeps, on or near a route of public travel...on the water, any noisome or unwholesome substance...is guilty of a misdemeanor," which is punishable by a fine of not less than \$100 and/or imprisonment for 3-6 months.¹⁴

There is only a limited exception from nuisance liability for certain agricultural activities. "Notwithstanding any other provision of law, the agricultural activities conducted on a farm...shall not be considered a *private* nuisance, provided such agricultural activities were commenced prior to the surrounding activities, have not increased substantially in magnitude or intensity and have not been determined to be the cause of conditions dangerous to life or health as determined by the [state health] commissioner, the local health officer or local board of health...."¹⁵

Fish/Fisheries Laws

In addition to the provision of the water pollution title of the Environmental Conservation Law summarized above, relating to discharges of substances "injurious to edible fish and shellfish, or the culture or propagation thereof," New York law provides several other enforceable authorities potentially applicable to nonpoint discharges affecting or potentially affecting fish.

- "No person shall, at any time of the year, pursue, take, wound or *kill in any manner*, number or quantity, any fish protected by law,....shellfish,...crustacea protected by law, or protected insects, except as permitted by the Fish and Wildlife Law."¹⁶ Moreover, "No fish, other than migratory food fish of the sea in the marine and coastal district, shall be taken except by angling."¹⁷

- "No dyestuffs, coal tar, refuse from a gas house, cheese factory, creamery, condensary or canning factory, sawdust, shavings, tan bark, lime, acid, oil *or other deleterious or poisonous substance* shall be thrown or allowed to run into any waters, either private or public, in quantities injurious to fish life, protected wildlife or waterfowl inhabiting those waters or injurious to the propagation of fish, protected wildlife or waterfowl therein."¹⁸

- New York law prohibits the placement of "sewage or other matter injurious to fish" and the erection or maintenance of any "privy, pigsty, inclosure for poultry, barn or barnyard" from which drainage or refuse can "find its way into water used by any state fish hatchery."¹⁹

- "No earth, soil, refuse, or solid substances...shall be disposed of in any stream or tributary thereto which is inhabited by trout" or placed on the banks "in such a manner that such solid substance can enter the stream at any stage of water level."²⁰

These provisions are punishable as petty criminal violations, including imprisonment for up to 15 days and/or fine of not more than \$250, plus penalties per fish, shellfish, or other aquatic creature taken.²¹ Fines are slightly higher for violations of the second and third provisions noted above.²²

OPERATIONAL REQUIREMENTS

Forestry Requirements

State forest-related laws do not appear to contain enforceable provisions related to nonpoint source discharges from forestry activities.

Agriculture Requirements

- "Every owner or occupier of agricultural land as defined [a landholding exceeding 25 acres and used for raising agricultural or forestry products; and smaller holdings with "concentrated agricultural operations" such as feedlots and poultry operations]...shall apply to the appropriate soil and water conservation district for a soil and water conservation plan for the land under his ownership or control."²³ While the obligation of the district to prepare a plan is enforceable, there is no penalty for failing to apply for or implement the required plan.

- New York also provides for registration of pesticides, certification of applicators, and other general requirements relating to pesticide use, although none that specifically address nonpoint source discharges.²⁴

Development and Other Earth Disturbing Activities

Apart from requirements that may be contained in urban stormwater programs under the Clean Water Act or that may be authorized by general land use regulations, New York's nonpoint source regulatory mechanisms of this type are largely local or pursuant to state programs designed to protect particular kinds of water resources.

- The State Environmental Quality Review Act requires state and local agencies to prepare environmental impact statements, consider alternatives, and mitigate harm. SEQRA can affect control of nonpoint sources with respect to state and local government projects, major development decisions, etc.²⁵

- Under the state's Wild, Scenic and Recreational Rivers law,²⁶ "[t]he commissioner or agency shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas..." This authority can address nonpoint source-related activities in these areas. In wild river areas, structures and development are prohibited. In scenic river areas, mining, excavation, and public roads are prohibited, as is large-scale development (but the rules allow development on lots of 4 acres or greater). In scenic river areas, moreover, "the continuation of present

agricultural practices, the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed or cluster residential developments and stream improvement structures for fishery management purposes shall be permitted." In recreational river areas, the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or cluster residential developments and public recreational areas, as well as roads and railroads.²⁷ Enforcement remedies include civil penalties of \$100 to \$1000 per day and injunctive relief.²⁸

- The Shoreowners' Protection Act²⁹ regulates "activities or development" which means "any land use, construction or placement by any person of a structure, or any action which materially alters the condition of land, including grading and excavating or other disturbance of soil. The term shall include the division of land into lots, parcels or sites."³⁰ This law too may provide usable authority in dealing with nonpoint source discharges and potential discharges. Enforcement is under the general enforcement provisions of the Environmental Conservation Law.³¹

- The Freshwater Wetlands Act³² also provides some regulatory authority that may affect some forms of nonpoint source water pollution. Local governments may administer the law if they adopt their own ordinance; local governments may transfer these functions to the county, or the Department of Environmental Conservation may assume enforcement and implementation. DEC may designate by rule special wetlands of unique value to be subject to DEC administration. Unmapped wetlands of less than 12.4 acres in size are reserved to jurisdiction of local governments.³³ Permits are required for any form of drainage, dredging, excavation, dumping, filling of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind, either directly or indirectly; erecting any structures or obstructions; "any form of pollution, including but not limited to, installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom..."³⁴ These activities are regulated within 100 feet from the boundary of any wetland; a local government or the DEC may regulate a greater distance "where necessary to protect and preserve the wetland."³⁵ The law provides for DEC determining what uses of mapped and classified wetlands are "compatible" and directs the commissioner to "prepare minimum land use regulations to permit only such compatible uses." Local governments must adopt consistent regulations unless "overriding economic and social considerations vital to" the local jurisdiction require a variance.³⁶ Freshwater wetlands permits are not required for grazing and watering livestock, or for making reasonable use of water resources, harvesting natural products of wetlands, selectively cutting timber, draining land or wetlands for growing agricultural products; public health activities and orders.³⁷ The law is enforceable by civil penalty of up to \$3,000, order, or injunction.³⁸ (Also potentially relevant in some instances is a law regulating placement of fill in navigable waters).³⁹

- The Tidal Wetlands Act⁴⁰ requires the commissioner to adopt "land-use regulations governing the use of" inventoried tidal wetlands. "No permits may be

granted by any local body, nor shall any construction or activity take place at variance with these regulations."⁴¹ The law requires state permits for draining, dredging, dumping, filling etc. as with freshwater wetlands, but lacks the "any form of pollution..." clause found in the freshwater wetlands act. It also requires a permit for "any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area."⁴² The law is enforceable by civil penalties of up to \$10,000 per day, orders, or misdemeanor prosecutions.⁴³

- The Long Island Pine Barrens maritime reserve act⁴⁴ requires a management plan to guide land use to protect the pine barrens and underlying aquifer. It is administered by participating towns, per approval by the governor. Towns and local jurisdictions must review all development applications, and must implement the law consistently with the management plan. The commission responsible for implementing the act reviews development activities in critical resource areas and reviews developments of regional significance as identified in the plan.

Endnotes

¹ N.Y. Env'tl. Conserv. Law § 17-0101.

² N.Y. Env'tl. Conserv. Law § 17-0501.

³ N.Y. Env'tl. Conserv. Law §§ 71-1707, 71-1711, 71-1725, 71-1929; 71-1931; 71-1715; 17-0301(6); 17-0905.

⁴ N.Y. Env'tl. Conserv. Law § 17-0503.

⁵ N.Y. Pub. Health Law § 1100.

⁶ N.Y. Pub. Health Law § 1102.

⁷ N.Y. Pub. Health Law § 1103.

⁸ N.Y. Pub. Health Law § 1300(1).

⁹ N.Y. Pub. Health Law § 1301.

¹⁰ N.Y. Pub. Health Law § 1303(3).

¹¹ N.Y. Pub. Health Law § 1304.

¹² N.Y. Env'tl. Conserv. Law § 17-1101.

¹³ N.Y. Pub. Health Law § 1300-b; N.Y. Env'tl. Conserv. Law § 71-3503 (same).

¹⁴ N.Y. Pub. Health Law § 1300-a.

¹⁵ N.Y. Pub. Health Law § 1300-c.

¹⁶ N.Y. Env'tl. Conserv. Law § 11-0107(1).

¹⁷ N.Y. Env'tl. Conserv. Law § 11-1301(1)(a).

¹⁸ N.Y. Env'tl. Conserv. Law § 11-0503(1).

¹⁹ N.Y. Env'tl. Conserv. Law § 11-0503(2).

²⁰ N.Y. Env'tl. Conserv. Law § 11-0503(4).

²¹ N.Y. Env'tl. Conserv. Law § 71-0919(1)(b), referencing § 71-0923, § 71-0925.

²² N.Y. Env'tl. Conserv. Law § 71-0925 (fine for discharge of dyestuffs, etc. is \$500-\$1,000 plus \$10 per fish killed; fine for pollution of hatchery waters is \$500 plus \$10 per fish killed).

²³ N.Y. Soil and Water Conserv. Dist. Law § 9(7-a). Definitions at § 3.

²⁴ N.Y. Env'tl. Conserv. Law §§ 33-0701 to 1301.

²⁵ N.Y. Env'tl. Conserv. Law §§ 8-0101 to 8-0117.

²⁶ N.Y. Env'tl. Conserv. Law §§ 15-2701 to 2723.

²⁷ N.Y. Env'tl. Conserv. Law § 15-2709.

²⁸ N.Y. Env'tl. Conserv. Law § 15-2723.

²⁹ N.Y. Env'tl. Conserv. Law, Art. 34.

³⁰ N.Y. Env'tl. Conserv. Law § 34-0103(1).

³¹ N.Y. Env'tl. Conserv. Law, Art. 71.

³² N.Y. Env'tl. Conserv. Law § 24-0101 et seq.

- ³³ N.Y. Eenvtl. Conserv. Law §§ 24-0501, 24-0503, 24-0505, 24-0507.
- ³⁴ N.Y. Eenvtl. Conserv. Law § 24-0701.
- ³⁵ N.Y. Eenvtl. Conserv. Law § 24-0701.
- ³⁶ N.Y. Eenvtl. Conserv. Law § 24-0903.
- ³⁷ N.Y. Eenvtl. Conserv. Law § 24-0701.
- ³⁸ N.Y. Eenvtl. Conserv. Law §§ 71-2303, 71-2305.
- ³⁹ N.Y. Eenvtl. Conserv. Law § 15-0505.
- ⁴⁰ N.Y. Eenvtl. Conserv. Law § 25-0101 et seq.
- ⁴¹ N.Y. Eenvtl. Conserv. Law § 25-0302.
- ⁴² N.Y. Eenvtl. Conserv. Law § 25-0401.
- ⁴³ N.Y. Eenvtl. Conserv. Law §§ 71-2503, 71-2507.
- ⁴⁴ N.Y. Eenvtl. Conserv. Law §§ 57-0101 to 0137.