Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

California’s Porter-Cologne Water Quality Control Act contains enforceable permitting provisions that may be applied to nonpoint source discharges. The law also empowers regional water quality control boards to order the abatement of discharges, including nonpoint source discharges, that create or threaten to create pollution.

- The Porter-Cologne Act requires "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state..." to file a "report of waste discharge" with the regional water quality control board. The regional board must then issue waste discharge requirements (WDRs) - essentially a permit -- implementing "any relevant water quality control plans" and taking into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, and the need to prevent nuisances. The law prohibits any discharge prior to filing of the report and the issuance of WDRs, or the expiration of prescribed decision times after filing the report, or receipt of a waiver. The law allows regional boards to "conditional[ly]" waive the report of waste discharge and WDRs for specific discharges or types of discharges "where the waiver is not against the public interest." The waiver may be terminated at any time by the board. California uses these provisions in the nonpoint context as a backup to voluntary and incentive based mechanisms, using the regional boards’ power to require a report of waste discharge or to grant a conditional waiver. Timber operations conducted under the state’s Z-Berg-Nejedly Forest Practices Act are exempt from the waste discharge requirements if the Act’s requirements are certified as best management practices (BMP) by EPA, unless the State Water Resources Board makes a finding that compliance by forestry operations is not protecting water quality, or the forestry board requests issuance of WDRs.

- A second provision includes general abatement authority. "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, cleanup the waste or abate the effects of the waste, or in the case of threatened pollution or nuisance, take another necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts."

Enforcement under Porter-Cologne is by order, injunction, or remedial action with cost recovery. Other sections of the law provide for civil penalties, injunctions, misdemeanor prosecutions, and administrative orders.
• Another provision, with some bearing on enforceable requirements, requires the state Water Resources Board to "establish fees applicable to all point and nonpoint dischargers who discharge to enclosed bays, estuaries, or any adjacent waters in the contiguous zone or the ocean...The fees...December 14, 1998...will create incentives to reduce discharges to the ocean, bays, and estuaries and shall be based on the relative threat to water quality from point and nonpoint dischargers." However, "[n]o fee may be imposed pursuant to this section on any agricultural nonpoint source discharger."10

Other Discharge Limitations

California has numerous nuisance law authorities potentially applicable to nonpoint source water pollution, in addition to "nuisance" as defined in Porter-Cologne itself.11 The remedies against a public nuisance are: criminal "indictment or information...; [a] civil action; or... Abatement."12

• "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin...is a public nuisance."13

• "Anything which is injurious to health...or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin...is a nuisance."14

• "Every person who litters or causes to be littered, or dumps or causes to be dumped, any waste matter into any bay, lagoon, channel, river, creek, slough, canal, lake, or reservoir, or other stream or body of water, or upon a bank, beach, or shore within 150 feet of the high water mark of any stream or body of water, is guilty of a misdemeanor."15 For purposes of this offense, littering means the "willful or negligent throwing, dropping, placing, depositing, or sweeping, or causing any such acts, of any waste matter on land or water in other than appropriate storage containers or areas designated for such purposes."16 "Waste matter" means "discarded, used, or leftover substance including, but not limited to...any garbage, trash, refuse, paper, container, packaging or construction material, carcass of a dead animal, any nauseous or offensive matter of any kind, or any object likely to injure any person..."17 This offense is punishable by a fine of $100 to $1,000.

• The Health and Safety Code contains other specific prohibitions: "no person shall put the carcass of any dead animal, or the offal from any slaughter pen, corral, or butcher shop, into any river, creek, pond, reservoir, or stream."18 "No person shall put any water closet, privy, cesspool or septic tank, or the carcass of any dead animal, or offal of any kind, in, or upon the borders of any stream, pond, lake, or reservoir from which water is drawn for the supply of any portion of the inhabitants of this state..."19 "No person shall allow any...[of same] to remain in or upon the borders of any stream, pond, lake or reservoir..."20 contamination of water supply by live stock.21 It is also unlawful to dump "garbage" "in or upon the navigable waters of this state."22 Violations
of these provisions are punishable as misdemeanors. In addition, "Anything done, maintained, or suffered, in violation of any of the provisions of this article is a public nuisance, dangerous to health, and may be summarily abated as such." Nevertheless, "Nothing which is done or maintained under the express authority of a statute can be a nuisance."

However, "No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation from more than three years if it was not a nuisance at the time it began." But the right-to-farm nuisance exemption "shall not invalidate" applicability of provisions of the state’s Health and Safety Code, Fish & Game Code, Food & Agriculture Code, or Porter-Cologne Act, if the activity constitutes a nuisance "specifically defined or described in any of those provisions." The Health & Safety Code further provides that none of its prohibitions "shall be held to prevent the grazing of livestock in areas embracing any stream or watershed where the grazing would not tend to render the waters unwholesome of injurious to the public health."

**Fish/Fisheries Laws**

- A provision of the Porter-Cologne law is designed to protect commercial shellfish harvesting "from the effects of point and nonpoint pollution sources." Regulation is authorized once an area is "threatened." This is defined as an area that has been downgraded or restricted by the state’s Department of Health Services, subjected to closure for more than 30 days per year for 3 previous years, or formally determined by a regional water quality control board, the Department of Fish & Game, or the California Coastal Commission to be threatened. Once the nature, sources, scope, and degree of the pollution affecting a commercial shellfish growing area have been determined, the regional board, with the advice of the local technical advisory committee, shall order appropriate remedial action, including the adoption of best management practices to abate the pollution affecting that area. However, the law further provides that "if agricultural sources of pollution have been identified as contributing to the degradation of shellfish growing areas, the regional board shall invite members of the local agricultural community representing the type of agricultural discharge affecting the local shellfish growing area, the local resource conserve district, the local soil conservation service......and affected shellfish growers to develop and implement appropriate short- and long-term remediation strategies that will lead to a reduction in the pollution affecting the commercial shellfish growing area."

- The Fish and Game Code contains several provisions that appear to create enforceable prohibitions applicable to nonpoint discharges. "Except [as authorized by a permit, license or waiver issued by the state water resources control board, a regional board, or federal permit for which a state water quality certification has been issued]..., it is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this state any of the following: (1) Any petroleum, acid,...or residuary product of petroleum, or carbonaceous material or substance. (2) Any refuse, liquid or solid, from any...factory of any kind. (3) Any sawdust, shavings, slabs, edgings. (4) Any
factory refuse, lime, or slag. (5) Any cocculus indicus. (6) Any substance or material deleterious to fish, plant life, or bird life.  

- A separate provision makes it "unlawful to deposit, permit to pass into, or place where it can pass into the waters of the state, or to abandon, dispose of, or throw away, within 150 feet of the high-water mark of the waters of the state, any cans, bottles, garbage, motor vehicle or parts thereof, rubbish, or the viscera or carcass of any dead mammal, or the carcass of any dead bird."

These Fish & Game Code provisions are enforced as misdemeanors, although the first is also punishable by civil penalty of up to $25,000. Another provision of the Code allows the state to recover damages for unlawful destruction of wildlife or fish.

- The Fish & Game Code requires stream alteration permits; this may be applicable in some instances to some nonpoint source pollution, as it applies where debris, waste or other material may pass into the waters of any river, stream or lake. It is "unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake designated by the department, or use any material from the streambeds, without first notifying the department" and obtaining the agreement of the Department (or pursuant to arbitrators’ decision if another state agency is involved and agreement is not reached).

OPERATIONAL REQUIREMENTS

Forestry Requirements

The Z’Berg-Nejedly Forest Practices Act contains numerous provisions addressing nonpoint source pollution in the operating context of timber practices and harvests. The law provides for the division of the state into 3 districts (coast forest, northern forest, southern forest), with distinct rules established by the state board of forestry.

- The rules must "protect the soil, air, fish, and wildlife, and water resources, including, but not limited to, streams, lakes, and estuaries." The rules must include measures for "soil erosion control, for site preparation that involves disturbance of soil or burning of vegetation following timber harvesting activities..., for water quality and watershed control, for flood control....[etc]." The rules must set forth tree stocking standards. Soil erosion must be controlled, and the board must conduct research and "promulgate regulations for each district to govern timber operations that may cause significant soil disturbance." In addition to these rules, "the board shall adopt rules for control of timber operation which will result or threaten to result in unreasonable effects on the beneficial uses of the waters of the state" including rules for disposal of petroleum products, refuse, and sanitary wastes, construction of stream crossings to protect free passage of water and fish, minimizing damage to unmerchantable streamside vegetation, minimizing damage to streambeds or banks, control of slash, debris, fill, and side cast earth which may be carried into streams, and minimizing the effects of erosion on watercourses and lakes by installation and maintenance of certain drainage facilities, soil stabilization treatments, and planned abandonment of roads and landings.
• Provisions are implemented through requirements for licensing of foresters and for filing and approval of timber harvest plans. “[N]o person shall engage in timber operations until that person has obtained a license from the board.”\(^{44}\) The license requirements include for first time applicants, completion of an education program and completion of work experience (with the exception of owners operating on their own lands), and liability insurance.\(^{45}\) Licenses may be denied for misrepresentation, conviction within 1 year of application of unlawfully operating without a license, failure to comply with law and rules within three years prior to date of application, failure to pay a judgment or reimburse state for expenses resulting from violation of law or rules, failure to maintain insurance.\(^{46}\)

• “No person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the department [of forestry] pursuant to this article.”\(^{47}\) The plan must include, among other provisions, ”An outline of the methods to be used to avoid excessive accelerated erosion from timber operations to be conducted within the proximity of a stream” as well as measures to protect unique areas and information required to meet the rules.\(^{48}\) The law provides for public comments and review by other agencies.\(^{49}\) The promulgated rules are the ”sole criteria” for review of the timber harvesting plans.\(^{50}\) Reports of completion of work must be filed within one month after completion of the activity described in the plan, and operations must be inspected within six months.\(^{51}\)

• California also regulates nonindustrial timberlands, defined as owners with less than 2500 acres and not primarily engaged in manufacture of forest products.\(^{52}\) The law allows nonindustrial ”timber management plans,” which are reviewed but then remove the board’s discretion to disapprove individual nonindustrial timber harvest notices submitted pursuant to th approved plans. The plan must include ”(d) An outline of the methods to be used to avoid excessive accelerated erosion from timber operations to be conducted within the proximity of a stream” as well as measures to protect unique areas and information to meet the rules.\(^{53}\) The plan is subject to public inspection, is reviewed and approved.

Enforcement measures include license actions, misdemeanor prosecutions (with fines of not more than $1000 per day nor imprisonment for more than 6 months), civil injunction actions, and departmental corrective actions with cost recoveries.\(^{54}\) As noted above, timber operations conducted pursuant to the Forest Practices Act are, in most instances, exempt from the waste discharge provisions of Porter-Cologne.

• Although local government regulation of forestry is largely preempted\(^{55}\) the California Tahoe Regional Planning Agency may adopt rules that are stricter than those provided under the law or Board of Forestry regulations.\(^{56}\)

Agriculture Requirements

• As noted above, waste discharge requirements may be applied to some agricultural nonpoint discharges. In addition, California’s regional water quality control boards specifically require WDRs for confined animal facilities and "may impose additional requirements, if such additional requirements are necessary to prevent degradation of water quality or impairment of beneficial uses of waters of the state"\(^{57}\)

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Regulations include management of manure application, animal contact with surface waters, and other conditions.58

- California has a fertilizer law, which like those of many states, is aimed primarily at assuring efficacy and appropriate labeling of the fertilizer; the law includes licensing of manufacturers and distributors, and registration of products.59 However, registration may be cancelled or refused if the substance is "detrimental or injurious to plants, animals, public safety, or the environment when it is applied as directed..."60 The law is enforced as a petty criminal infraction, by cancellation of registration, and/or by injunction.61

- The Health & Safety Code provides that "No person shall keep any horses, mules, cattle, swine, sheep, or live stock of any kind, penned, corralled, or housed on, over, or on the borders of any stream, pond, lake, or reservoir, in a manner that the waters become polluted, if water is drawn therfrom for the supply of any portion of the inhabitants of this state."62 In addition, "No person shall cause or permit any horses, cattle, sheep, swine, poultry, or any kind of live stock or domestic animals, to pollute the waters, or tributaries of waters, used or intended for drinking purposes by any portion of the inhabitants of this state."63 Violation is punishable as a misdemeanor.64 However, "Nothing in this article shall be held to prevent the grazing of livestock in areas embracing any stream or watershed where the grazing would not tend to render the waters unwholesome or injurious to the public health."65

- California has detailed laws governing the use of pesticides, including licensing of applicators and registration for pesticides. A pesticide registration may be cancelled where the material "has demonstrated serious uncontrollable adverse effects either within or outside the agricultural environment", "is of less public value or greater detriment to the environment than the benefit received by its use", or that "when properly used, is detrimental to vegetation, except weed, to domestic animals, or to the public health and safety."66 The state also may regulate possession and use of restricted use material "injurious to the environment or to any person, animal, crop, or other property".67 Criteria include "hazard to the environment from drift onto streams, lakes, and wildlife sanctuaries...[or] persistent residues in the soil resulting ultimately in contamination of the...waterways, estuaries or lakes, with consequent damage to fish, wild birds, and other wildlife."68 A full panoply of license and registration actions, orders, injunctions, civil penalties, and criminal penalties exist under these laws.69

California’s resource conservation districts do not exercise regulatory enforcement authority over nonpoint source pollution; but may only impose and enforce conditions for the receipt of funding and technical assistance.70

Development and Other Earth-Disturbing Activities

- California’s land use laws to some extent provide enforceable mechanisms relevant to nonpoint source pollution from the built environment. California provides for comprehensive local land use regulation. Counties and cities must adopt comprehensive plans.71 Such plans must include a "conservation element" for the conservation, development, and utilization of waters, forests, soils, rivers, harbors, fisheries, etc. "The conservation element may also cover (1) The reclamation of lands and waters. (2) Prevention and control of the pollution of streams and other waters. (3)
Regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan. (4) Prevention, control, and correction of the erosion of soils, beaches, and shores. (5) Protection of watersheds. (6) The location, quantity and quality of the rock, sand and gravel resources. (7) Flood control.\textsuperscript{72} Also see the Coastal Act, discussed below, which requires local governments to prepare local coastal programs consistent with Coastal Act policies, and Coastal Commission certification.

Land use plans are implemented through zoning regulations and ordinances.\textsuperscript{73} Further regulation is applied through subdivision ordinances. "The ordinance shall specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property."\textsuperscript{74} A subdivision map must be disapproved if inconsistent with the applicable plans, or if "the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat."\textsuperscript{75} Local governmental land use planning and zoning, as well as state agency decisions, are subject to the California Environmental Quality Act (CEQA),\textsuperscript{76} which provides for the preparation of Environmental Impact Reports, alternatives analysis, mitigation, etc. Enforcement of zoning and subdivision requirements is through local authority, while CEQA is enforceable in court.

- California law addresses enforcement of urban stormwater requirements, technically a point source, but relevant to nonpoint source activities.\textsuperscript{77}

- California’s Coastal Act\textsuperscript{78} regulates many activities in the coastal area. Provisions include the goal of biological productivity and water quality,\textsuperscript{79} limits on diking, filling, or dredging of coastal waters, wetlands, estuaries, and lakes,\textsuperscript{80} and limits on channelization, dams, alteration of rivers and streams.\textsuperscript{81} A specific provision provides "(a) Environmentally sensitive habitat area shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas."\textsuperscript{82} And detailed portions of the law establish provisions for development in the coastal zone,\textsuperscript{83} including industrial development.\textsuperscript{84} The law provides for preparation of local coastal plans by local governments, and for designation of sensitive coastal resource areas; as well as for submission and approval of local coastal plans, land use plans, zoning ordinances.\textsuperscript{85} A coastal development permit must be obtained from a certified local government or from the California Coastal Commission.\textsuperscript{86} Enforcement includes orders, injunctions, and civil penalties.

- The McAteer-Petris Act provides for the San Francisco Bay Conservation and Development Commission.\textsuperscript{87} A permit is required for fill activities.\textsuperscript{88} Enforcement is by order, injunction, and civil penalty.

- The State Lands Commission does permitting for depositing material or removing material from wetlands or other waters owned by the state.\textsuperscript{89} Violation is a misdemeanor.
• Stream alteration permits are discussed above under "Fish/Fisheries Laws."

Endnotes
7. Id.
11. Cal. Water Code 13050(m): "Nuisance" means "anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes."
27. Cal. Civil Code § 3482.5. Cal. Civil Code § 3482.6 provides similar protection to agricultural processing activities in operation for more than three years, but allows nuisance actions based on increases in activities occurring after Jan. 1, 1993.
33. Cal. Fish & Game Code § 5650.
34. Cal. Fish & Game Code § 5652.
35. Fish & Game Code §§ 5650.1
37. Fish & Game Code § 1603.
57. 23 Cal. Code Reg. § 2560.
59. Food & Ag. Code § 14501 et seq.
60. Food & Ag. Code § 14601.
64. Health & Safety Code § 117015.
67. Food & Ag. Code § 14001 et seq.
68. Food & Ag. Code §§ 14004.5(d),(e).
69. Food & Ag. Code §§ 11401 et seq.
71. Govt. Code § 65300.
72. Govt. Code § 65302.
73. Govt. Code § 65850.
74. Govt. Code § 66411.
75. Govt. Code § 66474.
77. See AB 2019, adding chapter 5.9 to Div. 7 of the Water Code.
87 Govt. Code § 66600 et seq.
88 Govt. Code § 66632.