

COLORADO

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Colorado's Water Quality Control Act¹ contains a general policy declaration in favor of preventing the discharge of untreated pollutants. However, the law does not have a general enforceable prohibition that directly applies to nonpoint sources. Instead, the Act confers authority on the water quality control commission to adopt regulations, which may include nonpoint source regulations. The Act specifically requires the use of non-regulatory mechanisms before regulatory approaches may be used for agricultural nonpoint sources. It also places express limitations on the use of permits or other control regulations against agricultural nonpoint source discharges.

- Under the Act, the state water quality control commission may classify state waters,² and must set water quality standards.³ The commission *may* also promulgate "precautionary measures, both mandatory and prohibitory, that must be taken by any person owning, operating, conducting, or maintaining any facility, process, activity, or waste pile that does cause or could reasonably be expected to cause pollution of any state waters in violation of control regulations or...any applicable water quality standard."⁴ The Act further declares the public policy of the state "to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to reasonably protect the legitimate and beneficial uses of such waters."⁵ "Pollutant" is defined as "dredged spoil, dirt, slurry, solid waste, incinerator residue, sewage, sewage sludge, garbage, trash, chemical waste, biological nutrient, biological material, radioactive material, heat, wrecked or discarded equipment, rock, sand, or any industrial, municipal, or agricultural waste."⁶ The Act expressly makes this policy enforceable against point sources, prohibiting pollutant discharges from point sources without a permit.⁷ It allows, but does not require, adoption of such measures for nonpoint sources of pollution. The Act expressly exempts agriculture return flows and runoff from any permitting requirement except as required by federal law.⁸

- For specific basins not meeting water quality standards, the commission has promulgated special control regulations. For example, special regulations for the Chatfield Reservoir basin⁹ allocate phosphorus emission limits to major point sources in the basin and authorize the local basin authority and Water Quality Control Division "to approve phosphorus poundage credits to point source allocations if nonpoint source phosphorus reductions can be verified," and require a two-to-one ratio of actual nonpoint source reduction to point source credit.¹⁰ The regulations also mandate that "counties, municipalities, districts, corporations, proprietorships, agencies, or other entities with responsibility for activities or facilities that cause or could reasonably be expected to cause nonpoint source pollution ... shall implement best management practices for control of erosion and sediments" and that the same entities "which have

responsibility for stormwater management shall implement nonpoint source control programs."¹¹

- The Act provides that "with regard to nonpoint source water pollution control related to agricultural practices, the commission and division shall pursue incentive, grant, and cooperative programs in preference to the promulgation of control regulations.... Control regulations related to agricultural practices shall be promulgated only if incentive, grant, and cooperative programs are determined by the commission to be inadequate and such regulations are necessary to meet state law or the federal act."¹² The Act further declares that "the commission shall not adopt control regulations which require agricultural nonpoint source dischargers to utilize treatment techniques which require additional consumptive or evaporative use which would cause material injury to water rights."¹³

Enforcement of control regulations or standards includes a written notice of violation, which may include a cease-and-desist order or proposed corrective action.¹⁴ Violators are entitled to a hearing.¹⁵ Administrative sanctions include cease-and-desist orders and clean-up orders.¹⁶ Civil penalties involve administrative and judicial processes. The state agency requests the penalty and sets the initial level up to \$10,000 per day of violation, and the penalty determination is subject to administrative appeal; however, the ultimate imposition and collection is through judicial action, and the court may review the amount of the penalty.¹⁷ The state may also ask the district attorney to seek injunctions.¹⁸ Reckless, knowing, intentional, or criminally negligent violations are subject to a criminal fine. Maximum fines are \$12,000 for reckless or criminally negligent acts; \$25,000 for knowing or intentional acts; and double those amounts for second violations within a two-year period.¹⁹

Other Discharge Limitations

- Under Colorado's health code, the state department of public health and environment has the power and duty "to abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases affecting the public health."²⁰ County and district health departments have similar powers.²¹ The department and county and local boards of health are responsible for enforcement. They may order abatement, assess a \$100 penalty for failure to act upon a nuisance abatement order within 24 hours, and recoup costs for abatement actions.²² The health code also empowers courts to order abatement by public authorities at the defendant's expense "whenever any person is convicted of maintaining a nuisance injurious to the public health and safety."²³

- Another title states that municipalities have the power "to declare what is a nuisance and abate the same".²⁴ Municipalities also have the power "to provide for the cleansing and purification of water, watercourses, and canals ... when necessary to prevent or abate nuisances."²⁵ Moreover, the water quality act states "nor shall any provision of this article or anything done by virtue of this article be construed as estopping individuals, cities, towns, counties, cities and counties, or duly constituted political subdivisions of the state from the exercise of their respective rights to suppress nuisances."²⁶ Municipalities have abatement authority for municipally-declared nuisances, and can impose fines of up to \$1000.²⁷

- Another law declares "any unlawful pollution or contamination of any surface or subsurface waters" to be a class 3 public nuisance, but provides that "no action shall be brought under this paragraph ... if the state department of public health and environment or any other agencies of state or local government charged by and acting pursuant to statute or duly adopted regulation has assumed jurisdiction by the institution of proceeding on that pollution or contamination."²⁸ Actions for abatement may be brought by the district attorney or, with the consent of the district attorney, by the attorney general.²⁹ The sanction is an injunction to abate the nuisance or an order for the sheriff to abate the nuisance at the expense of the owner or operator of the nuisance.³⁰

With respect to nuisance actions, evidence of compliance with a state water quality permit "shall constitute a prima facie case that the activity to which the permit pertains is not a public or private nuisance."³¹ Further, agricultural operations are exempt from common law nuisance actions and local nuisance ordinances where the operation has been in existence for at least one year, is not being operated negligently, and has not increased substantially in size.³²

Fish/Fisheries Laws

- The fish and wildlife code appears not to provide enforceable authority against nonpoint source discharges, except as noted below under "Development and Other Earth-Disturbing Activities." However, it provides that "all wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of the state."³³ Such a declaration arguably might serve as the foundation for a tort claim for property damage for fish kills. Violations of the wildlife code are misdemeanors punishable by fines of \$50 and "points" in a hunting and fishing license suspension system.³⁴ Items used in committing a violation are subject to seizure as public nuisances.³⁵

OPERATIONAL REQUIREMENTS

Forestry Requirements

The state board of agriculture has the power and duty "to foster and promote the control of soil erosion on ... forest lands."³⁶ The state forestry laws do not appear to contain enforceable provisions in this area.

Agriculture Requirements

- The soil conservation code creates soil conservation districts, but apparently does not vest them with regulatory powers.³⁷ However, the Soil Erosion-Dust Blowing Act makes it "the duty of the owner or occupier of any land in this state to prevent soil blowing therefrom, as nearly as can be done."³⁸ The act gives a right of action to individuals and governments for property damage due to blowing dust.³⁹ However, it does not apply to any land less than one acre in area.⁴⁰ There are two options for enforcement of the act: a civil suit for damages, or in emergency situations, an appeal for administrative action by the county.⁴¹ A written complaint to the county board is a prerequisite to both civil suit and administrative relief. Upon receiving a written

complaint, a county board may inspect lands and, if necessary, serve a citation or take corrective action and bill the land owner for costs.⁴²

- A 1929 law declares it "the policy of this state to preserve the grasses and vegetation on the public domain ... and to prevent erosion of the soil and thereby conserve the waters and water supply originating on the public domain ranges of this state."⁴³ It creates a cause of action to seek an injunction reducing use of public range lands when "any such range is overstocked or ... said range is about to be overstocked with the kind of livestock which may be lawfully herded or grazed thereon and ... vegetation is being permanently destroyed or is about to be permanently destroyed and the water supply upon which any person is dependent is about to be diminished or impaired."⁴⁴ "[A]ny person using such range and any person having the right to use water from any stream or source of supply fed from the watersheds in any such range may apply to the court," and "all persons using said range shall be made parties defendant."⁴⁵ In the court hearing, "if it is fully and satisfactorily established that such range is overstocked or is about to be overstocked, the court may determine the number of livestock that said range or portion of said range is capable of supporting for a period not exceeding two years, enjoining all persons from willfully or intentionally grazing or herding any greater number."⁴⁶ The court is to give preference in its order to those who have used the land continuously and customarily for grazing and to neighboring property owners.⁴⁷

- Colorado has promulgated feedlot rules under the rulemaking authority in the water quality control act.⁴⁸ Under these rules, "concentrated animal feeding operations are required to operated as no-discharge facilities."⁴⁹ The rules set out best management practices, which are enforceable using the department's authority in the water quality act.⁵⁰ In addition, the department has extensive rules on the use of sewage sludge ("biosolids") as fertilizer, which were also promulgated under the water quality act.⁵¹ In 1998, Colorado voters adopted further controls on animal feeding operations by referendum.

- A targeted amendment to the water quality act directs the commissioner of agriculture to address groundwater pollution from agricultural chemicals.⁵² It requires the commissioner to promulgate rules governing bulk storage and mixing of fertilizers and pesticides.⁵³ The agriculture department enforces the standards, may issue cease and desist orders against violators, and may also bring a civil suit.⁵⁴ It may seek civil penalties of up to \$1000 per violation, and in court may seek the same penalties plus attorneys fees.⁵⁵

The same amendment also empowers the commissioner to develop best management practices for "any other activity relating to the use of any agricultural chemical."⁵⁶ However, this authority is to some extent undercut by the water quality act, which defines "best management practices," to be "any *voluntary* activity, procedure, or practice established by the department of agriculture" to address pollution.⁵⁷ If voluntary practices do not work, the commissioner then can require agricultural management plans.⁵⁸ Further, "if continued monitoring reveals that rules and regulations adopted by the commissioner ... are not preventing or mitigating the presence of the subject agricultural chemical to the extent necessary," the water quality control commission effectively has authority to promulgate additional regulations.⁵⁹

- The general state pesticide law gives the commissioner of agriculture the authority to promulgate rules "adopting a list of restricted use pesticides or limited use pesticides for the state or designating areas within the state if the commissioner determines that such pesticides require rules restricting their distribution or use."⁶⁰ The department also regulates handling, transportation, storage, display, and disposal of pesticides and their containers.⁶¹ It is unlawful "to use or cause to be used any pesticide contrary to the rules or regulations."⁶² The commissioner may issue compliance orders, may bring a civil suit seeking injunctive enforcement of administrative orders, or may bring a civil enforcement suit without prior administrative action.⁶³ The commissioner also may suspend, revoke, or deny registrations and licenses of violators,⁶⁴ and may also assess a civil penalty of up to \$5000 per violation, with each day a separate violation.⁶⁵

- The Colorado Chemigation Act governs the addition of agricultural chemicals to irrigation water.⁶⁶ This practice requires a permit from the department of agriculture.⁶⁷ The commissioner of agriculture can deny, suspend, or revoke permits if the operation does not meet equipment and installation requirements, has contaminated ground or surface water, or has operated in violation of procedural requirements of the law.⁶⁸ Chemigating without a permit is a class 6 felony, punishable by a fine of up to \$1000, and an additional civil penalty of between \$100 and \$1000 dollars.⁶⁹ The department may also seek an injunction against the violator.⁷⁰

Development and Other Earth-Disturbing Activities

Apart from any programs for the control of urban stormwater under the federal Clean Water Act or that may be authorized by general land use regulations such as zoning, state law provides the following authorities potentially applicable to nonpoint source discharges.

- The Colorado Land Use Act provides that "local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof"; state agencies are directed to assist local governments in designating areas and developing guidelines for their administration.⁷¹ Potential areas of state interest include "natural hazard areas," which include floodplains, as well as "areas containing, or having a significant impact upon, historical, natural, or archeological resources of statewide importance."⁷² As part of the designation process, the local government must adopt local guidelines for administration of the area.⁷³ Development in areas of state interest is subject to a permit system, and the standard for approving a permit is compliance with the local guidelines and regulations.⁷⁴ Local governments designate areas, adopt guidelines, and issue permits.⁷⁵ Either the local government or the Colorado Land Use Commission may take action against "any person desiring to engage in development in an area of state interest ... who does not obtain a permit," and violators may be enjoined from engaging in the development.⁷⁶

As applied to floodplains, the Act requires these areas to be "administered so as to minimize significant hazards to public health and safety or to property. ... Activities shall be discouraged which, in time of flooding, would create significant hazards to public health and safety or to property. Shallow wells, solid waste disposal sites, and

septic tanks and sewage disposal systems shall be protected from the inundation of floodwaters."⁷⁷ Similarly, the Act may extend to other kinds of ecologically sensitive areas, such as wetlands or endangered species habitat.⁷⁸ However, the Act may not be construed to affect constitutionally guaranteed property rights or "existing laws or court decrees with respect to the determination and administration of water rights."⁷⁹

- The wildlife code requires state agencies to give notice to the wildlife commission 90 days before any action which would "obstruct, damage, diminish, destroy, change, modify, or vary the existing shape or form of any stream or its banks or tributaries by any type of construction."⁸⁰ If the project will "adversely affect" the stream, particularly as fishing waters, the commission can request modifications to the project and ultimately elevate decision on the project to the governor.⁸¹ There are no sanctions beyond the elevation of inter-agency disputes to the governor.

Endotes

- ¹ Colo. Rev. Stat. § 25-8-101 et seq.
- ² Colo. Rev. Stat. § 25-8-203.
- ³ Colo. Rev. Stat. § 25-8-204.
- ⁴ Colo. Rev. Stat. § 25-8-205(1)(c).
- ⁵ Colo. Rev. Stat. § 25-8-102(2).
- ⁶ Colo. Rev. Stat. § 25-8-103(14).
- ⁷ Colo. Rev. Stat. § 25-8-501(1).
- ⁸ Colo. Rev. Stat. § 25-8-504.
- ⁹ 5 Colo. Code Regs. § 1002-19-4.7.0 et seq.
- ¹⁰ 5 Colo. Code Regs. § 1002-19-4.7.3(B)(5).
- ¹¹ 5 Colo. Code Regs. § 1002-19-4.7.6.
- ¹² Colo. Rev. Stat. § 25-8-205(5).
- ¹³ Colo. Rev. Stat. § 25-8-205(5).
- ¹⁴ Colo. Rev. Stat. § 25-8-602.
- ¹⁵ Colo. Rev. Stat. § 25-8-603.
- ¹⁶ Colo. Rev. Stat. §§ 25-8-605, -606.
- ¹⁷ Colo. Rev. Stat. § 25-8-608.
- ¹⁸ Colo. Rev. Stat. § 25-8-607.
- ¹⁹ Colo. Rev. Stat. § 25-8-609.
- ²⁰ Colo. Rev. Stat. § 25-1-107(1)(d).
- ²¹ Colo. Rev. Stat. § 25-1-506(1)(e).
- ²² Colo. Rev. Stat. §§ 25-1-514(1)(d), -615 to -618.
- ²³ Colo. Rev. Stat. § 25-1-619.
- ²⁴ Colo. Rev. Stat. § 31-15-401(1)(c).
- ²⁵ Colo. Rev. Stat. § 31-15-710.
- ²⁶ Colo. Rev. Stat. § 25-8-612(3).
- ²⁷ Colo. Rev. Stat. §§ 31-15-401(1)(c), 31-16-101.
- ²⁸ Colo. Rev. Stat. § 16-13-305(1)(e).
- ²⁹ Colo. Rev. Stat. § 16-13-307.
- ³⁰ Colo. Rev. Stat. § 16-13-309.
- ³¹ Colo. Rev. Stat. § 25-8-611(2).
- ³² Colo. Rev. Stat. § 35-3.5-102.

33. Colo. Rev. Stat. § 33-1-101.
34. Colo. Rev. Stat. §§ 33-6-104, -106.
35. Colo. Rev. Stat. § 33-6-102.
36. Colo. Rev. Stat. § 23-30-202(1)(b).
37. See Colo. Rev. Stat. tit. 35, art. 70.
38. Colo. Rev. Stat. § 35-72-102(1).
39. Colo. Rev. Stat. §§ 35-72-106(2), (3).
40. Colo. Rev. Stat. § 35-72-102(6).
41. Colo. Rev. Stat. §§ 35-72-102(4), -103(1).
42. Colo. Rev. Stat. §§ 35-72-103, -105.
43. Colo. Rev. Stat. § 35-45-106.
44. Colo. Rev. Stat. § 35-45-106.
45. Colo. Rev. Stat. §§ 35-45-106(1), (2).
46. Colo. Rev. Stat. § 35-45-106(2).
47. Colo. Rev. Stat. § 35-45-106(2).
48. 5 Colo. Code Regs. § 1002-19-4.8.0; see Colo. Rev. Stat. § 25-8-205.
49. 5 Colo. Code Regs. § 1002-19-4.8.3(A).
50. 5 Colo. Code Regs. § 1002-19-4.8.6.
51. 5 Colo. Code Regs. § 1002-19-4.9.0.
52. Colo. Rev. Stat. § 25-8-205.5.
53. Colo. Rev. Stat. § 25-8-205.5(3)(b). The rules, which primarily establish technology-prescribing standards, are found at 8 Colo. Code Regs. § 1203-12.
54. Colo. Rev. Stat. § 25-8-205.5(h)(IV)-(VI).
55. Colo. Rev. Stat. § 25-8-205.5(h)(IV)-(VI).
56. Colo. Rev. Stat. § 25-8-205.5.
57. Colo. Rev. Stat. § 25-8-103(1.3) (emphasis added). The agriculture code also limits the authority of local governments to regulate the use of agricultural chemicals. Local governments can zone sites for sale and storage, regulate discharges into sewers, act to regulate stormwater runoff, or act to protect drinking water supplies "in accordance with current state or federal applicable law", but they cannot otherwise regulate a broad category of actions relating to use. Colo. Rev. Stat. §§ 35-1.5-101(1)(a), -103.
58. Colo. Rev. Stat. § 25-8-205.5(d); see Colo. Rev. Stat. tit. 24, art. 4.
59. Colo. Rev. Stat. §§ 25-8-205.5(6), (7).
60. Colo. Rev. Stat. § 35-9-118(2)(c)(I).
61. Colo. Rev. Stat. § 35-9-118(2)(f).
62. Colo. Rev. Stat. § 35-9-120(1)(d).
63. Colo. Rev. Stat. §§ 35-9-121(2), (3).
64. Colo. Rev. Stat. § 35-9-122.
65. Colo. Rev. Stat. § 35-9-124(1). The criminal penalty provisions of the act do not appear likely to be directly used to address water pollution issues. See Colo. Rev. Stat. § 35-9-125.
66. Colo. Rev. Stat. tit. 35, art. 11.
67. Colo. Rev. Stat. § 35-11-103.
68. Colo. Rev. Stat. § 35-11-112.
69. Colo. Rev. Stat. § 35-11-115.
70. Colo. Rev. Stat. § 35-11-116.
71. Colo. Rev. Stat. § 24-65.1-101(2)(b)-(c).
72. Colo. Rev. Stat. § 24-65.1-201; see Colo. Rev. Stat. §§ 24-65.1-103(7), (13), (14) (floodplains included in the definition of "natural hazard areas").
73. Colo. Rev. Stat. § 24-65.1-404.

- ⁷⁴ Colo. Rev. Stat. § 24-65.1-501(3).
- ⁷⁵ See generally Colo. Rev. Stat. § 24-65.1-301.
- ⁷⁶ Colo. Rev. Stat. § 24-65.1-501(6).
- ⁷⁷ Colo. Rev. Stat. § 24-65.1-202(2)(a)(I).
- ⁷⁸ E.g., Colo. Rev. Stat. § 24-65.1-104(12) (defining "natural resources of state importance").
- ⁷⁹ Colo. Rev. Stat. § 24-65.1-106.
- ⁸⁰ Colo. Rev. Stat. § 33-5-102.
- ⁸¹ Colo. Rev. Stat. §§ 33-5-103 to -105.