

# DELAWARE

## *Enforceable Provisions Applicable to Nonpoint Source Water Pollution*

### DISCHARGE PROHIBITIONS

#### Water Pollution Control Law

Delaware's water pollution law prohibits discharge of a pollutant to the waters of the state without a permit. This provision may be used to address pollution events caused by nonpoint source discharges; however, the regulations exempt certain agricultural and other activities.

- "No person shall, without first having obtained a permit from the Secretary [of Natural Resources and Environmental Control] undertake any activity... (2) In a way which may cause or contribute to discharge of a pollutant into any surface or ground water..."<sup>1</sup> The adopted permitting regulations are aimed at point sources, but the state also can use this statutory authority to deal with nonpoint source pollution events.<sup>2</sup> Regulations provide that numerous nonpoint activities do not require a permit, however. These include activities involving existing drainage ditches; uncontaminated stormwater discharges; application of fertilizer "using recognized methods"; transportation of fertilizers; application of herbicides, pesticides and plant growth regulators; plowing or cultivating for agricultural or horticultural purposes; irrigation practices utilizing uncontaminated water; snow and ice removal; movement of earth for building excavations; regrading of earth "unless otherwise regulated"; and salting and sanding of roadways for the express purpose of snow and ice control.<sup>3</sup> Enforcement includes civil penalties, orders, and injunctions.<sup>4</sup>

#### Other Discharge Limitations

- A separate law addresses pollution of public water supplies. "No person shall cast, put, place, discharge in or permit or suffer to be cast, put, discharged in or to escape into any running stream of water within the limits of this State, from which stream the inhabitants of any borough, town or city within this State are supplied wholly or in part with water for and as drink or beverage, any dye-stuffs, drugs, chemicals or other substance or matter of any kind whatsoever whereby the water so supplied...becomes noxious to the health or disagreeable to the senses of smell or taste."<sup>5</sup> This offense is punishable by a fine of \$1000-\$5000.

- Under nuisance-type legislation, Delaware law provides that a local board of health may abate "noisome matter."<sup>6</sup> And "a person is guilty of criminal nuisance when...[b]y conduct either unlawful in itself or unreasonable under all the circumstances, the person knowingly or recklessly creates or maintains a condition which endangers the safety or health of others." Criminal nuisance is punishable by fine of up to \$575 and up to 30 days in jail.<sup>7</sup> However, with respect to nuisances, "No agricultural or forestal operation within this State which has been in operation for a period of more than 1 year shall be considered a nuisance, either public or private, as the result of a changed condition in or about the locality where such agricultural or forestal operation is located. This section shall not apply when the nuisance is

determined to exist as the result of the negligent or improper operation of any agricultural or forestal operation or when such operation is being operated in violation of state or federal law or any local or county ordinance."<sup>8</sup>

- Littering legislation may also be usable to address pollution resulting from waste material or other discarded materials. It is unlawful to "dump, deposit, throw or leave, or cause or permit the dumping, depositing, placing, throwing or leaving of litter on any public or private property of this State, or any waters in this State."<sup>9</sup> "Litter" includes "all rubbish, waste material, refuse, cans, bottles, garbage, trash, debris, dead animals or other discarded materials of every kind and description."<sup>10</sup> This is a petty offense punishable by fine of \$25-\$50.<sup>11</sup>

## **Fish/Fisheries Laws**

The state laws directed at fish and fisheries do not appear to provide independent enforcement mechanisms for nonpoint source pollution.

### **OPERATIONAL REQUIREMENTS**

## **Forestry Activities**

Delaware has a detailed enforcement order authority, or "bad actor" authority, to address nonpoint sediment pollution from forestry operations.

- "The Forestry Administrator shall provide for the protection of the waters of the State from pollution by sediment deposits resulting from silvicultural activities."<sup>12</sup> "Pollution" is defined as "such alteration of the physical, chemical or biological properties of any waters of the State resulting from *sediment deposition* that will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future source of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural or other reasonable uses."<sup>13</sup>

The statute contemplates informal attempts to abate the problem initially. "If the Forestry Administrator...determines that an owner or operator is conducting or allowing the conduct of any silvicultural activity in a manner which is causing or is likely to cause pollution, the Forestry Administrator ...may advise the owner or operator of corrective measures needed to prevent or cease the pollution. Failure of the Forestry Administrator...to advise an owner or operator of such corrective measures shall not impair the Forestry Administrator's authority to issue special orders."<sup>14</sup>

The enforcement mechanism is the special order. "Special orders can be issued if the Forestry Administrator...finds that any owner or operator is conducting any silvicultural activity in a manner which is causing or is likely to cause alteration of physical, chemical or biological properties of any state water, resulting from sediment deposition presenting an *imminent and substantial danger* to (a) the public health, safety or welfare, or the health of animals, fish or aquatic life; (b) a public water supply; or (c) recreational, commercial, industrial, agricultural or other reasonable uses." The order

may direct the owner or operator "to cease immediately all or part of the silvicultural activities on the site and to implement specified corrective measures within a stated period of time."<sup>15</sup> However, "[t]he Forestry Administrator shall not issue a special order to any owner or operator who has incorporated generally acceptable sediment control and stormwater management techniques and guidelines developed by the Forestry Administrator, which techniques have failed to prevent pollution, if the Forestry Administrator determines that the pollution is the direct result of unusual weather events which could not have been reasonably anticipated."<sup>16</sup>

Special orders are issued after notice and hearing and are effective not less than 5 days after service, except for emergency special orders which may be issued immediately provided there is a rapid post-issuance hearing. Sanctions are civil penalties of \$200 to \$2,000 per violation per day; but intentional and knowing violations of orders after written notice to comply are subject to fines of \$500 to \$10,000 per violation per day.<sup>17</sup>

## **Agricultural Activities**

Delaware appears to have few enforceable nonpoint source provisions directed at agricultural practices, apart from manure management provisions for CAFOs.

- An older public health provision provides that "No person shall put or place, or permit to be put, place or used, any...hogpen or slaughterhouse over or so near that the excrement or offal therefrom shall escape or run into any stream of running water within the limits of this State from which the inhabitants of any town, borough or city are wholly or in part furnished with water as a drink or beverage."<sup>18</sup> This offense is punishable by a \$100 fine.

- The state also has pesticide applicator regulations.<sup>19</sup> The law provides that the Department of Agriculture "may prescribe the methods to be used in application of pesticides, and may relate to the time, place, manner, materials and amounts and concentrations, in connection with the application of the pesticides, and may restrict or prohibit use of pesticides in designated areas during specified periods of time and shall encompass all reasonable factors which the Department deems necessary to prevent damage or injury by drift or misapplication to...plants...or adjacent or nearby lands...fish and other aquatic life in waters in reasonable proximity to the areas to be treated..."<sup>20</sup>

## **Development and Other Earth-Disturbing Activities**

- Delaware's law on erosion and sedimentation control addresses some nonpoint issues in addition to the basic urban stormwater program.<sup>21</sup> "[U]nless exempted, no person shall engage in land disturbing activities without submitting a sediment and stormwater management plan to the appropriate plan approval authority and obtaining a permit to proceed."<sup>22</sup> "Projects which do not alter stormwater runoff characteristics may be required to provide water quality enhancement even if the predevelopment runoff characteristics are unchanged. Criteria will be detailed in the regulations regarding level of water quality control and variance procedures."<sup>23</sup> Local governments are authorized to adopt their own programs for DNREC approval.<sup>24</sup>

"Land disturbing activity" means "any land change or construction activity for residential, commercial, industrial and institutional land use which may result in soil erosion from water or wind or movement of sediments or pollutants into state waters or onto lands in the State, or which may result in accelerated stormwater runoff, including, but not limited to, clearing, grading, excavating, transporting and filling of land..."<sup>25</sup> Regulations exempt construction or development that disturbs less than 5,000 square feet.<sup>26</sup> The law also "does not apply to commercial forestry practices."<sup>27</sup> This exemption, and the deletion of "silvicultural" from the list of regulated activities occurred in 1994. Also, "The provisions of this chapter shall not apply to agricultural land management practices unless the conservation district or the Department determines that the land requires a new or updated soil and water conservation plan, and the owner or operator of the land has refused either to apply to a conservation district for the development of a plan, or to implement a plan developed by a conservation district."<sup>28</sup>

Standards are set by DNREC, providing minimum standards for delegation to local governments, and establishing required provisions and regulations.<sup>29</sup> Regulations require all plans to comply with the Delaware Erosion and Sediment Control Handbook dated 1989 and all supplements (subject to public review and comment prior to adoption of supplements).<sup>30</sup> Regulations identify other specifics of plans.<sup>31</sup> General permits apply for certain structures - such as certain individual residences with disturbed area less than 1 acre, highway shoulder and swale maintenance, commercial and industrial projects when disturbed area is less than ½ acre, modification of tax ditch when no change in water quantity, quality.<sup>32</sup> Based on certain criteria, the person engaged in the activity may be required to provide for construction review by a state-certified construction reviewer; the reviewer is responsible for weekly review of site activities, informing of violations, and referral to DNREC if person fails to correct items identified in review report.<sup>33</sup>

The law further provides that watersheds or subwatersheds proposed by a conservation district, county, municipality, or state agency and approved as "designated" shall have "regulatory requirements clearly specified through a watershed approach to nonpoint pollution control or flood control. The watershed approach shall result in a specific plan, developed or approved by the Department..." "Upon approval of the designated watershed or subwatershed plan, all projects...shall have stormwater requirements placed upon them that are consistent with the...plan."<sup>34</sup>

Enforcement provisions include local enforcement and/or referral to DNREC; also the law provides for DNREC cease and desist orders, and requests by DNREC to local authorities to deny any further building or grading permits until a violation is corrected.<sup>35</sup> Injunctions,<sup>36</sup> and criminal fines are also available.<sup>37</sup>

- The Delaware Land Protection Act also provides some possible basis for local enforceable mechanisms.<sup>38</sup> It requires each county government to adopt "overlay zoning ordinances, guidelines and specific technically based environmental performance standards, design, criteria and mitigation requirements, where appropriate" to protect open space. The guidelines shall include but not be limited to setback and design requirements, and the establishment of technically based specific environmental performance standards and design criteria that shall apply in and may

apply adjacent to state resource areas in order to protect the values of said lands.<sup>39</sup> However, the law does not apply to lands producing agricultural commodities. Enforcement is under local laws and ordinances.

- The state's Wetlands Act applies to tidal and connected wetlands.<sup>40</sup> It requires a permit for any "activity in the wetlands" unless exempted by law; the secretary must consider environmental impacts including "impact of the site preparation and proposed activity on land erosion; effect of site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and subsurface water resources and other resources..."<sup>41</sup> No permit may be granted unless local government has first approved it by local zoning procedures. Fines and civil penalties apply; and enforcement includes orders, injunctions, and prosecutions.<sup>42</sup>

- A permit from DNREC is also required to deposit material upon or remove materials from, or construct or modify structures or facilities on, submerged lands or tidelands.<sup>43</sup> The regulations provide that no "project which may potentially...contribute to water pollution...shall be undertaken on public or private subaqueous lands unless approval has been obtained from the Department."<sup>44</sup> Enforcement is via orders, injunctions, civil and criminal penalties.<sup>45</sup>

## Endnotes

- <sup>1</sup> Del Code Ann. tit. 7, § 6003(a).
- <sup>2</sup> 70 500 Del. Code Regs. 005 §§ 3-4 (1996).
- <sup>3</sup> 70 500 Del. Code Regs. 005 § 13.
- <sup>4</sup> Del. Code Ann. tit. 7, §§ 6005 et seq.
- <sup>5</sup> Del. Code Ann. tit. 16, § 1301(a).
- <sup>6</sup> Del. Code Ann. tit. 16, § 310.
- <sup>7</sup> Del. Code Ann. tit. 11, § 1322(1); sanction in tit. 11, § 4206.
- <sup>8</sup> Del. Code Ann. tit. 3, § 1401.
- <sup>9</sup> Del. Code Ann. tit. 16, § 1604.
- <sup>10</sup> Del. Code Ann. tit. 16, § 1603(1).
- <sup>11</sup> Del. Code Ann. tit. 16, § 1605.
- <sup>12</sup> Del. Code Ann. tit. 7, § 2977.
- <sup>13</sup> Del. Code Ann. tit. 7, § 978(3).
- <sup>14</sup> Del. Code Ann. tit. 7, § 2979.
- <sup>15</sup> Del. Code Ann. tit. 7, § 2980.
- <sup>16</sup> Del. Code Ann. tit. 7, § 2980.
- <sup>17</sup> Del. Code Ann. tit. 7, § 2982.
- <sup>18</sup> Del. Code Ann. tit. 16, § 1302.
- <sup>19</sup> Del. Code Ann. tit. 3, § 1201 et seq.
- <sup>20</sup> Del. Code Ann. tit. 3, § 1203(b).
- <sup>21</sup> Del. Code Ann. tit. 7, §§ 4001-4016.
- <sup>22</sup> Del. Code Ann. tit. 7, § 4003(a).
- <sup>23</sup> Del. Code Ann. tit. 7, § 4003(b).
- <sup>24</sup> Del. Code Ann. tit. 7, § 4007.
- <sup>25</sup> Del. Code Ann. tit. 7, § 4002(3).
- <sup>26</sup> SS Regulation 3.1B.

27. Del. Code Ann. tit. 7, § 4002(3).
28. Del. Code Ann. tit. 7, § 4004(a).
29. Del. Code Ann. tit. 7, § 4006.
30. SS 10.2.B.
31. SS Regulation 10.
32. SS Regulation 11.
33. Del. Code Ann. tit. 7, § 4013. SS Reg. 12 requires such reviewers for all projects exceeding 50 acres.
34. Del. Code Ann. tit. 7, §§ 4011(a), (b).
35. Del. Code Ann. tit. 7, § 4016.
36. Del. Code Ann. tit. 7, § 4015.
37. Del. Code Ann. tit. 7, § 4015.
38. Del. Code Ann. tit. 7, § 7501 et seq.
39. Del. Code Ann. tit. 7, § 7508.
40. Del. Code Ann. tit. 7, §§ 6601-6620.
41. Del. Code Ann. tit. 7, § 6604.
42. Del. Code Ann. tit. 7, §§ 6614-6617.
43. Del. Code Ann. tit. 7, §§ 7201-7216, § 7205 (permit).
44. See USL Regulation 1 for details and regulated activities. USL 1.07.
45. Del. Code Ann. tit. 7, §§ 7214-7215.