KENTUCKY

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Kentucky’s water pollution control provisions may be enforced against nonpoint source discharges that pollute state waters in violation of applicable standards or regulations. However, violations that are traceable to specific agricultural sources must be addressed under a separate law.

- "No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit, or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any rule, regulation, permit or order or in contravention of any provision of the statute."¹ The Natural Resources and Environmental Protection Cabinet’s Office of Legal Services or the Attorney General may institute an action to recover penalties or bring an action seeking an injunction.² Violators are subject to a civil penalty not to exceed $25,000 per day for each violation.³ Knowing violations are a Class D felony punishable by a fine not to exceed $25,000, imprisonment of one to five years, or both.⁴ However, where there is documented evidence that a violation of water pollution laws or administrative regulations is traceable to a specific agriculture operation, then the provisions of the Agriculture Water Quality Act (discussed below) govern resolution of the violation.⁵

Other Discharge Limitations

- Kentucky law has restated and codified the common law of nuisance as it existed in the Commonwealth on May 24, 1991.⁶ The codification defines what would constitute permanent and temporary nuisances; private and public nuisances; and how damages should be determined. The section does not specify what actions, such as polluting, constitute a nuisance. However, no agricultural or silvicultural operation is abatable as a nuisance or may be deemed in violation of any zoning ordinance that would restrict the right of the operator to utilize "normal and accepted practices" after it has been in operation for more than one year, provided that the operation was not a nuisance at the time it began.⁷ This provision does not apply if the violation or nuisance results from negligence. Nor does it affect the right of any person to recover damages for any injuries or damages sustained by them on account of pollution of the waters of any stream or groundwater.⁸

- Kentucky law also makes it a violation if any person "places or causes to be placed in any stream, dam, pool or pond any substance that renders the water unfit for use or produces a stench."⁹ This violation is punishable by a fine of $10 to $100 and imprisonment for a period of 30 days to six months.
A person is guilty of "criminal littering," a Class A misdemeanor, if he or she knowingly and willfully places or throws litter in any public or private water.\textsuperscript{10} For purposes of this provision, litter is defined as "rubbish...waste material...or any foreign substance."\textsuperscript{11}

Fish/Fisheries Laws

- Under the wildlife code, "no person shall place or cause to be placed in any public waters any substance that might injure, interfere with, or cause the waters to be unfit for the support of wildlife."\textsuperscript{12} Further, "no person shall willfully place or attempt to place in any public waters any substance which has a poisonous or intoxicating effect upon wildlife."\textsuperscript{13} The section is enforced by the Department of Fish and Wildlife Resources.\textsuperscript{14} Violators may be fined not less than $100 nor more than $500, imprisoned for not more than 6 months, or both. Violators are also liable to the Department for the replacement value of the fish and wildlife killed.\textsuperscript{15}

- Similarly, the water quality code requires that "where the injury, death, or destruction of fish or other wildlife results from pollution or from any violation of the orders, rules, regulations, or other determinations of the Cabinet, the person responsible shall be liable to the Commonwealth in an amount reasonably necessary to restock or replenish."\textsuperscript{16} The Commonwealth may seek civil penalties of up to $1000 plus actual damages in any court of competent jurisdiction.\textsuperscript{17}

OPERATIONAL REQUIREMENTS

Forestry Requirements

- In 1998 Kentucky enacted a Forest Conservation Act, which establishes some enforceable mechanisms applicable to commercial timber harvesting practices.\textsuperscript{18} The law does not apply to cutting firewood or Christmas trees, to removal of trees incidental to mining and mineral extraction activities, to right-of-way construction or maintenance, or to the cutting of trees by "an individual, nonindustrial landowner on his own property" if the cutting is done by the owner.\textsuperscript{19}

The new law requires that after July 15, 2000, no person shall conduct commercial timber harvesting operations within the Commonwealth unless there is a certified "master logger" on site who has completed the required educational and training requirements (including continuing education every three years).\textsuperscript{20}

Such timber harvesting operations must use "appropriate best management practices" which are defined as "effective practical, economical structural, or nonstructural methods that prevent or reduce the movement of sediment, nutrients, pesticides, and other pollutants from the land to surface or groundwater, or that otherwise protect water quality from potential adverse effects of timber harvesting operations."\textsuperscript{21} Best management practices are to be defined by the Division of Forestry and approved by the Agriculture Water Quality Authority (see below), and are to be reviewed by a newly created Forestry Best Management Practices Board, which is to be convened by July 15, 1999 and given one year to review such BMPs. The Board is to review the BMP's not more often than every five years thereafter.\textsuperscript{22}
In addition, "no logger or operator shall conduct any timber operation in a manner that is causing or will likely cause water pollution."\textsuperscript{23}

If the Commonwealth’s Natural Resources and Environmental Protection cabinet determines that a logger or operator is failing to use the appropriate best management practices or is causing water pollution, it must give the operator a written warning and prescribe "a reasonable period for abatement and compliance." If the logger or operator fails to comply after the time specified for abatement, the logger or operator will then be provided "an opportunity for an informal conference with the district forester." If, after this opportunity, the logger or operator has failed to comply, then the cabinet must issue a notice of violation and order the implementation of corrective measures "within a specified period of time." If, after the notice, the logger or operator fails to comply, then the cabinet must issue a "special order" mandating the immediate implementation of the corrective measures, and may order cessation of all or a portion of the timber harvesting operation. This special order is reviewable in an administrative hearing, to be held within 5 working days of receipt of a request for hearing.\textsuperscript{24} However, notwithstanding the previous provisions, if the cabinet finds that the logger or operator is conducting timber harvesting without a master logger or in a manner "that is causing or is likely to cause water pollution that is presenting or will likely present an imminent and substantial danger" to public health, safety or welfare, or to the health of animals, fish or aquatic life, or to a public water supply or other beneficial uses of water, the cabinet may issue an emergency order requiring immediate cessation of the activity and implementation of corrective measures within a reasonable time; this order, too, is subject to hearing within 5 working days.\textsuperscript{25} If the logger or operator fails to comply with a special order or emergency order, he or she is deemed a "bad actor" and is subject to civil penalties of up to $1,000, assessable after an opportunity for administrative hearing, and recoverable in court.\textsuperscript{26}

- The Agriculture Water Quality Act,\textsuperscript{27} discussed below, establishes enforceable best management practices (BMPs) that apply to farm operations of ten or more acres, including silviculture conducted on such operations. This law can reach some non-industrial private timber harvesting activities not subject to the Forest Conservation Act.

**Agriculture Requirements**

- The Agriculture Water Quality Act\textsuperscript{28} created Kentucky’s Agriculture Water Quality Authority, which shall "evaluate the adoption and effectiveness of best management practices for agriculture operations," and develop "statewide agriculture water quality plans to address identifiable water pollution problems from agriculture operations."\textsuperscript{29} The plans establish applicable requirements to be used by agriculture operations, defined as "any farm operation on a tract of land ... situated on ten (10) contiguous acres or more of land used for the production of livestock, livestock products, poultry, poultry products, milk, milk products, or silviculture products, or for the growing of crops such as, but not limited to, tobacco, corn, soybeans, small grains, fruit and vegetables; or devoted to and meeting the requirements and qualifications for payments to agriculture programs under an agreement with the state or federal government."\textsuperscript{30}
Within five years of approval of the statewide plan, persons engaged in agriculture operations across the state are required to implement its applicable requirements. It is a violation to conduct or allow the conduct of any agriculture operation in a manner which results in water pollution or to fail to implement the provisions of the plan. The Division of Water, working with the Agriculture Water Quality Authority, must designate water priority protection regions where it is documented that agriculture is contributing to water quality pollution problems. In those regions, the Water Quality Authority shall reevaluate the effectiveness of the best management practices in the plan. A person engaging in agriculture operations in a water priority protection region where water pollution has been documented shall be presumed to be in compliance with the Act if the person has implemented the practices required by the plan.

If the Division of Water documents a violation, the Division shall notify the person in writing, setting forth a reasonable period for compliance. If any person engaged in agriculture operations fails or refuses to comply or respond to a written notice on noncompliance with the plan, the person shall be deemed a "bad actor" and subject to enforcement action, as well as loss of eligibility for financial assistance. The Cabinet’s Office of Legal Services or the Attorney General shall institute an action for the recovery of any penalties and costs and shall bring an action for injunction. Violation of the statute is punishable by civil penalty not to exceed $1000; compliance with the statewide and any regional agriculture water quality plan is a mitigating factor in determining whether to impose civil penalties.

- A soil conservation district may be created if the Conservation Commission determines that the operation of the district is administratively practicable and feasible, and if there has been a majority vote of landowners in favor of creation. Soil conservation districts are authorized to propose land-use regulations for lands within the soil conservation district whenever the Board of Supervisors of a conservation district determines that uncontrolled soil erosion on some lands within the district is causing damage to other lands. These regulations may be adopted by the Board after a referendum in which at least 90% of the landowners have approved.

Land use regulations may include: 1) requirements for the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches and other structures; 2) requirements for particular methods of cultivation, including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, seeding and plants of land to conserve water; 3) specifications of cropping programs and tillage practices; 4) requirements on the retirement of highly erosive areas; and 5) other measures and programs as may assist conservation of soil resources and prevent or control soil erosion.

The Board may file a petition in circuit court to compel observance with the land-use regulations if it determines that nonobservance tends to increase erosion on those lands and is interfering with the prevention or control of erosion on other lands within the district. The board may provide by ordinance that any landowner who sustains damages from a land-use violation may recover from the violator. The court may require the violator to perform the work or, if the violator fails to do so within the time
specified, the board may perform the work and recover costs and expenses with interest of 5% per annum.46

- The pesticide law establishes licensing requirements, and states that the Department of Agriculture may "restrict or prohibit the use of pesticides in designated areas during specified times and the storage of fertilizer ... to prevent damage or injury by drift or misapplication to ... fish and other aquatic life in waters in reasonable proximity to the area to be treated."47 Further, "no person shall discard or store any pesticide or pest containers so as to pollute any waterway in a way harmful to any wildlife therein."48 Individual farmers are not subject to any liability or response costs unless there is a finding of negligence.49

A notice of violation is issued to the licensee for violation of the statute or regulations.50 If the violation is not abated, the Agriculture Commissioner must issue an order for immediate compliance and may assess civil penalties. If the order is not complied with, the applicant’s license may be revoked, with an opportunity to appeal to circuit court.51 Civil penalties may be recovered in an action brought by the Attorney General or the Department of Agriculture; the Attorney General also may bring an action for injunction for violation of the act, or a violation or threat of violation of an order.52 Violations of the act or an order are punishable by a civil penalty not to exceed $1000 per day; failure to abate is punishable by a civil penalty of not less than $100; and willful violation of the act or an order is a misdemeanor punishable by a fine of not less than $100 and up to $1000, imprisonment for not more than one year, or both.53

**Development and Other Earth-Disturbing Activities**

Apart from any programs for the control of urban stormwater or that may be authorized by general land use regulation such as zoning, Kentucky law provides the following enforceable authorities potentially relevant to nonpoint source discharges.

- "No person shall commence the filling of any area with earth, debris ... or place a building, barrier or obstruction of any sort on any area located adjacent to a river or stream or in the floodway of the stream so that such filling, raising or obstruction will in any way affect the flow of water in the channel or in the floodway of the stream" unless a permit has been issued by the Natural Resources and Environmental Protection Cabinet.54 However, the Cabinet has no jurisdiction or control over the construction, improvement, maintenance or operation of any drainage district, ditch or system established for agricultural purposes, nor can it require approval of the same, except where it determines the obstruction of the stream or floodway is a detriment or hindrance to the beneficial use of water resources in the area.55

If this provision or a regulation has been violated, the Cabinet may issue a written notice of violation and require the person to answer the charges at a hearing not less than 30 day from the notice. Appeals may be taken from all final orders of the Cabinet by filing a petition for review in Circuit Court.56 The Cabinet’s Department of Law or the Attorney General may bring an action for the recovery of penalties and bring an action for an injunction to prevent or correct a condition constituting or threatening to constitute a violation of the chapter.57 Violators are subject to a civil penalty of not more than $1000 and may be enjoined from continuing.58
• Streams that meet certain criteria are eligible for inclusion in the Wild Rivers System.\(^{59}\) Criteria for inclusion include streams that are free-flowing, with unchanged shorelines and scenic vistas; their waters "shall not be polluted beyond feasible correction and shall be kept unpolluted once corrected according to standards established by the natural resources and environmental protection cabinet."\(^{60}\) Land use restrictions for wild rivers include prohibitions on dredging and strip mining. Select cutting or timber or other resource removal and agricultural use may be allowed by permit only pursuant to regulation.\(^{61}\) The restrictions on land uses do not apply to uses already existing at the time the stream is included in the system,\(^{62}\) and the law also states that existing agricultural areas in the boundaries may continue.\(^{63}\) The Attorney General shall bring an action to recover civil penalties or for an injunction to prevent or correct a condition that is or threatens to violate the provisions of the law.\(^{64}\)

Endnotes
19. S.B. 214 § 1(8).
22. S.B. 214 § 11.
23. S.B. 214 § 8(2).
24. S.B. 214 § 8(3)-(5).
25. S.B. 214 § 8(6).
26. S.B. 214 §§ 8(8), 9, 10.