NEW MEXICO
Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

New Mexico’s Water Quality Act does not contain an enforceable prohibition directly applicable to nonpoint source discharges, but the Act does authorize the Water Quality Control Commission broadly to "promulgate and publish regulations to prevent or abate water pollution in the state" and to require permits. Thus, the availability of any enforceable authority depends entirely on the promulgation of specific regulatory requirements. The general permitting and enforcement scheme operates as follows.

- "Water pollution" is defined as "introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property." The Act directs the commission to "adopt water quality standards for surface and ground waters of the state," and gives it discretion to adopt regulations requiring "a permit for the discharge of any water contaminant." However, the Act allows "reasonable degradation of water quality resulting from beneficial use [provided] such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded." The same section also exempts activities regulated under the state oil and gas act, and limits the Act’s application to activities regulated under the state’s groundwater, hazardous waste, or solid waste acts, "except to abate water pollution or control the disposal or use of septage or sludge." Moreover, the Commission is barred from placing a permit requirement on "the use of water in irrigated agriculture, except in the case of employment of a specific practice in connection with such irrigation that documentation or actual case history has shown to be hazardous to public health or the environment."

The Commission is required to assign responsibility for administering its regulations to "constituent agencies," such as the department of environment, state engineer, department of game and fish, and department of agriculture, among others. The constituent agencies are empowered to issue administrative compliance orders (including penalties) or commence civil actions. The Act provides for administrative orders with penalties up to $15,000 per day for violations of permit and certification requirements, and $10,000 per day for other violations of the Act and its regulations or water quality standards. For failure to take corrective actions required in a compliance order, the penalty may be up to $25,000 per day. Further, a permit may be terminated or modified upon violation of its conditions.

There are also judicial civil penalties paralleling the $15,000 and $10,000 administrative penalties (though not the $25,000 penalty for noncompliance with an order). The Act also sets out criminal penalties for knowing violations. Knowingly violating a permit or discharging when a permit is required is a fourth degree penalty, with stricter penalties for subsequent violations (third degree felony), causing
substantial adverse environmental impact (third degree felony), or a substantial danger of death or serious bodily injury (second degree felony).\textsuperscript{13}

**Other Discharge Limitations**

The Water Quality Act includes a savings provision, which preserves "rights of action or remedies in equity under the common law or statutory law, criminal or civil."\textsuperscript{14} Accordingly, "no provision of the Water Quality Act or any act done by virtue thereof estops the state or any political subdivision or person as owner of water rights or otherwise, in the exercise of their rights in equity or under the common law or statutory law, to suppress nuisances or to abate pollution."\textsuperscript{15} Several statutory provisions on nuisance law could also be applied to nonpoint source water pollution.

- A public nuisance is defined as an unlawful act that either is "injurious to public health, safety, morals or welfare" or "interferes with the exercise and enjoyment of public rights, including the right to use public property."\textsuperscript{16} Committing a public nuisance is a misdemeanor.

- The state code also makes "polluting water for which the act is not otherwise prescribed by law" a misdemeanor.\textsuperscript{17} It defines "polluting water" as "knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use" and declares the act to be a public nuisance.\textsuperscript{18}

- Municipalities are authorized to "appoint a board of health" or "perform any act or adopt any regulation necessary or expedient for the promotion of health and the suppression of disease."\textsuperscript{19} They also may regulate plumbing and sewage disposal,\textsuperscript{20} "direct the location, regulate and prohibit any offensive and unwholesome business or establishment" within one mile of their boundaries,\textsuperscript{21} and "define a nuisance, abate a nuisance and impose penalties upon a person who creates or allows a nuisance to exist."\textsuperscript{22}

"Any public officer or private citizen" may bring a civil action to abate a public nuisance.\textsuperscript{23} Plaintiffs may seek an injunction against a public nuisance, with court costs and attorneys fees, but a recent case held that the court is not empowered to award damages.\textsuperscript{24} Criminal prosecution is the prerogative of the state, through the usual channels. The punishment for a petty misdemeanor is a fine of up to $500 or a jail term of up to 6 months or both; the punishment for a misdemeanor is $1000 or a year or both.\textsuperscript{25}

The Right to Farm Act\textsuperscript{26} exempts from public or private nuisance claims any "agricultural operation or agricultural facility if the operation was not a nuisance at the time the operation began and [if it] has been in existence for more than one year," provided that the operation or facility is not "operated negligently, improperly or illegally such that the operation or facility is a nuisance." Cities with agricultural operations or facilities within their limits at the time the Right to Farm Act was passed cannot apply nuisance ordinances against these farms.
Fish/Fisheries Laws

- No provisions relate explicitly to fish kills or habitat destruction due to nonpoint pollution. The state game commission is empowered to "prohibit the killing or taking of any ... game fish of any kind or sex." It is a misdemeanor to "hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any ... game fish in the state" except as permitted by the state game commission or otherwise by law. Further, every "poisonous or stupefying substance ... used ... in taking or killing game or fish in violation of this chapter" is declared to be a public nuisance. The game and fish code is enforced by "the director of the department of game and fish, each conservation officer, each sheriff in his respective county and each member of the New Mexico State Police." Any person violating any of the provisions of [the code] or any regulations adopted by the state game commission which relate to the time, extent, means, or manner that game animals, birds or fish may be hunted, taken, captured, killed, possessed, sold, purchased or shipped is guilty of a misdemeanor. The penalty for most violations is a fine of at least $50 but not more than $500, or up to six months in jail, or both. The department of fish and game also can collect civil damages for unlawful destruction of "any game quadruped, bird, or fish."

OPERATIONAL REQUIREMENTS

Forestry Requirements

New Mexico forestry laws do not appear to contain enforceable provisions relating to nonpoint source discharges. However, New Mexico counties may enact enforceable ordinances addressing harvest practices.

Agriculture Requirements

- New Mexico law has provisions for creation of local soil and water conservation districts, and conservancy districts. Neither seems to have regulatory authority.

- In contrast, once created, local wind erosion districts can respond to landowner complaints of property damage due to "effects of wind erosion on lands of an adjoining freeholder." The districts can serve notice on a land owner that preventive measures need to be taken to minimize or avoid damage to neighbors from wind erosion, and can specify a reasonable time for the land owner to implement those measures. If the owner does not implement the measures, the district must have the work performed at county expense. The district must then levy a special assessment against the land to recoup the costs of performing the work.

Development and Other Earth-Disturbing Activities

No relevant operating requirements are set forth, apart from those that may be contained in urban stormwater programs under the Clean Water Act or those authorized under the general zoning and construction authorities of municipalities and counties.
Endnotes
2. N.M. Stat. Ann. § 74-6-2(B). The Act defines "water contaminant" to mean "any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water." N.M. Stat. Ann. § 74-6-2(A).
29. N.M. Stat. Ann. § 17-2-20. Conservation officers may summarily seize and destroy poisonous or stupefying substances used illegally to take or kill fish or game. Id.
34. For example, Rio Arriba County adopted a permitting process for timber harvests incorporating the voluntary New Mexico forest practices guidelines as mandatory conditions. See Forest Trust, November 1998.