VERMONT

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Vermont’s Water Pollution Control Act draws no distinction between point and non-point sources, and its general prohibition is fairly broad.

- It prohibits "discharge [of] any waste, substance or material into the waters of the state" without a permit.1 "Discharge" is defined as "the placing, depositing or emission of any wastes, directly or indirectly, into an injection well or into the waters of the state".2 The law exempts from this prohibition "proper application of fertilizer to fields and crops".3 While the broad prohibition of discharges applies to agriculture and silviculture, specific prohibitions on discharges to Class A and Class B waters "shall not regulate accepted agricultural or silvicultural practices, as are defined by the commissioners of agriculture, food and markets and forests, parks and recreation, respectively...nor shall those provisions prohibit stormwater runoff or the discharge of nonpolluting wastes..."4 Essentially, this is interpreted to mean that those agricultural operations compliant with "accepted agricultural practices (AAPs)" and silvicultural operations compliant with "accepted management practices (AMPs)" are not required to obtain permits. They must not, however, cause water quality violations. With respect to violations of water quality standards, Vermont law further provides that persons engaged in farming and following accepted agricultural practices as described by the commissioner of agriculture, food and markets by rule "shall be presumed to be in compliance with water quality standards."5 However, the rules implementing this provision clarify that this presumption is rebuttable "by water quality data or results from a water quality study deemed conclusive by the Secretary."6

The water pollution law is enforceable by a variety of mechanisms.7 These include administrative orders,8 emergency orders,9 administrative penalties of up to $25,000 for a single violation, and $10,000 per day (but not more than $100,000 total for a continuing violation),10 civil enforcement,11 and criminal enforcement.12

Other Discharge Limitations

- Towns, cities, and incorporated villages have the power to define what constitutes a public nuisance.13 Boards of health may bring actions to abate nuisances.14 But "Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding non-agricultural activities, shall be entitled to a rebuttable presumption that the activity is reasonable and does not constitute a nuisance." This presumption is not available in suits brought by the local board of health, however.15

- While statutory nuisance law does not specifically address pollution of surface water, any person may seek equitable relief or damages "for unreasonable harm caused
by another person withdrawing, diverting or altering the character of groundwater."\textsuperscript{16} However, the law provides that in such an action, "a person who alters groundwater quality or character as a result of agricultural or silvicultural activities, or other activities regulated by the commissioner of the department of agriculture, food and markets, shall be liable only if the alteration was either negligent, reckless or intentional."\textsuperscript{17} Similarly, "An owner or lessee of agricultural lands shall not be liable for personal injury or property damage resulting from contamination of a permitted [public drinking] water source so long as the owner or lessee was utilizing accepted agricultural practices...and the lands were agricultural at the time the [water supply] permit was issued."\textsuperscript{18}

**Fish/Fisheries Laws**

- "A person shall not place in any waters lime, creosote, cocculus inducus or other drug or poison destructive to fish."\textsuperscript{19} The statute is silent on whether a violation requires intent to take fish, or even an intent to place the poison in the water. The list of substances suggests a narrow scope for any possible prosecution of nonpoint source pollution. The general penalty for violation is a fine of up to $1000.\textsuperscript{20}

**OPERATIONAL REQUIREMENTS**

**Forestry Requirements**

- State timber harvest rules are advisory for most operations.\textsuperscript{21} But, In 1997, the legislature enacted a law regulating "heavy cutting," defined as a harvest of more than forty acres which leaves a residual stocking level of acceptable growing stock (at least 4.5 in. dba) which is below the C-line as defined by the U.S. Dept. of Agriculture guidelines for the applicable timber type. Heavy cutting operations on 40 acres or more must be preceded by a notice of intent to cut. The notice is filed by the landowner with the state forestry agency; if the state field forester determines that the cut is exempt, no further review is necessary. Exemptions include cuts for agricultural conversion, conversion regulated by Act 250 (see below under "Development"), or cuts consistent with a forest management plan in effect under the state’s program for current use assessment taxation or several other forest planning programs. If an exemption does not apply, the forester must review the proposed heavy cut to determine its compliance with timber harvest rules. These rules include silvicultural guidelines and forestry standards, and requirements with respect to water quality, wetlands, and riparian zones.\textsuperscript{22} After review, the state field forester will issue an authorization to proceed or denial of authorization to proceed, appealable to the commissioner of forests, parks, and recreation. Violation of the law or rules may result in a penalty of up to $50,000 and up to $25,000 per day for a continuing violation.

- As noted above, compliance with forestry AMPs can provide some shelter from permitting under the state’s water pollution control law. Thus, these can be construed as indirectly enforceable mechanisms.
Agriculture Requirements

- Vermont’s Agricultural Nonpoint Source Pollution Reduction Program, includes two kinds of enforceable standards: 1) Farmers generally must follow "accepted agricultural practices" (AAPs) as designated by rule by the commissioner of agriculture, food and markets. 2) The commissioner may also require farmers to implement "best management practices" (BMPs) on a case-by-case basis. Both types of standards must be "practical and cost effective to implement."

The rules for accepted agricultural practices prohibit the direct discharge of waste into surface waters; the "concentrated overland flow of waste into adjoining waters"; discharge of manure runoff from storage areas; overland flow of manure runoff following stacking of manure on fields; construction of manure, fertilizer, or pesticide storage structures in floodways; construction of the same in floodplains except in conformance with National Flood Insurance Program Standards; and field stacking of manure or fertilizers within 100 feet of neighbors’ wells or springs or on lands subject to annual flooding (unless there is no practical alternative). They further limit unnecessary applications of plant nutrients or applications of nutrients or pesticides in specific ways likely to lead to runoff. They set an acceptable limit for soil loss and require management of agricultural wastes to "eliminate adverse water quality impacts." They require perennial vegetative buffer zones between row croplands and water, and require structures to be set back from surface waters.

For enforcement purposes, the commissioner must, after responding to a complaint, first send the offender a written warning with proposed corrective action. After thirty days, the commissioner must offer opportunity for a public hearing, then issue an order or seek enforcement in civil court. Farmers may appeal administrative orders to the courts. Violation of an order may be punished by assessment of civil penalties, as well as enforced by injunction in court.

BMPs may be required in order to meet water quality standards in particular places. The BMP rules provide that the commissioner, "upon receipt of a petition from a person with an interest in the agricultural nonpoint source component of the basin planning process," or acting on the commissioner’s own initiative, is to determine "whether to require BMPs beyond AAPs on farms or in a specific basins in order to achieve compliance" with water quality goals. A petition for imposition of BMPs must include identification of each farmer whose actions violate water quality standards, documentation as to the water quality violation, including a study conducted pursuant to USEPA quality assurance/quality control program standards for the Clean Water Act, a description of the specific actions sought by the petitioner, a detailed narrative as to which AAPs are insufficient, and other information. The petition, if complete, is set for public hearing, leading to a written decision. The decision may be appealed by the farmer or petitioner, resulting in a hearing de novo before the water resources board. Imposing BMPs requires a finding that sufficient financial assistance is available to the farmer to implement the BMPs. The BMP rules provide that a grant to the farmer of 85 percent of the cost is to be considered sufficient to make this finding.

- Vermont also regulates large farm operations, based on animal units. (Regulatory thresholds are defined differently from federal CAFO requirements, but
basically cover animal operations that are 95% the size of the federal threshold). The law requires the operator to obtain from the commissioner permits for construction of barns, and for operation of the large livestock operation. The operating permit must include demonstration of an adequately sized manure management system, and a nutrient management plan "to dispose of wastes in accordance with accepted agricultural practices" described above. State regulations for this program are to be no stricter than the corresponding federal CAFO regulations, as adjusted for the differing size threshold. Enforcement is under the general provisions applicable to the commissioner of agriculture, food, and markets, and may include civil penalties and injunctive relief.

- The commissioner of agriculture, food and markets has broad authority to regulate pesticide use, storage, and disposal. Also, permit regulations for use of herbicides to maintain rights-of-way require applicants to prepare a long-term plan including establishments of standards for wetlands, wildlife, erosion control, and aesthetic considerations. Prior to spraying, permit holders must flag water supplies and other sensitive areas designed by the commissioner and must not spray near flagged areas. Permits must specify buffer strip distances to protect the waters of the state. Golf courses must obtain permits to apply pesticides, and this includes "buffer strips to protect surface waters and environmentally sensitive areas." The commissioner may enforce the standards administratively by revoking or suspending licenses, entering into consent agreements with violators, requiring "correction of sources of pesticide contamination that threaten human health or the environment", seeking injunctive relief, or assessing administrative penalties of up to $1,000 by notice and hearing process. Criminal penalties are also available.

Development and Other Earth Disturbing Activities

- State law regulates the alteration of streams. Permits are required to alter or modify the course, current, or cross-section of any watercourse with a drainage area greater than ten square miles at the location of the proposed modification, or any outstanding resource waters. This law does not apply to accepted agricultural practices or accepted management practices for silvicultural as defined by the respective commissioners. A permit may be issued only if the change will not increase flood hazards, significantly damage fish or wildlife, significantly damage the rights of riparian owners, or adversely affect outstanding resource waters. Violations are punishable by civil fine of not more than $10,000 per day, and restoration.

- State law also provides for regulations for the protection of "significant" wetlands. Some of the activities affecting wetlands are also nonpoint sources of water pollution. The rules list activities that are allowed within protected wetlands and their buffer zones; other activities are considered "conditional uses" and require a conditional use determination from the state’s wetlands office in the Department of Environmental Conservation. Enforcement is under the authorities described above for the water quality control program.

- Vermont has comprehensive land use regulation under its "Act 250," the Land Use and Development Law. This law requires a land uses permit for numerous activities, some of which affect nonpoint sources. It does not, however, regulate the
construction of improvements for farming, logging, or forestry unless they are 2500 feet or more above sea level. District environmental commissions must evaluate the grant of an Act 250 permit under a variety of criteria, several of which address water quality, water supply, and erosion.

- The municipal and regional planning and development laws allow municipalities to adopt restrictions and requirements as bylaws. The state program calls for regional plans, which must include a land use element, including areas "which require special consideration for aquifer protection, wetland protection, or for other conservation purposes". Municipal plans must be consistent with regional plans, and must include elements parallel to the ones just outlined. Once a municipality has a plan in place, it may adopt bylaws to enforce it.

- Municipalities are also empowered to adopt bylaws governing shorelands, either as part of or in addition to zoning bylaws. These bylaws may regulate design and maintenance of sanitary facilities, regulate alterations to wetlands and wildlife areas, control building locations, and require maintenance of vegetation. "Shorelands are "lands being between the normal mean water mark of a lake, pond or impoundment exceeding twenty acres and a line not less than five hundred feet nor more than one thousand feet from such mean water mark.""

- Municipalities are authorized to adopt flood hazard area regulations. Specifically municipalities may regulate permitted uses and type of construction "within any area designed by the department of environmental conservation as subject to periodic flooding".

Notwithstanding these provisions, municipal bylaws may not restrict "accepted agricultural or farming practices, or accepted silvicultural practices, including the construction of farm structures". Enforcement is by notice of violation, injunction, and penalty of $50 per violation per day.

Endnotes
4. Vt. Stat. Ann. tit. 10, § 1259(f) (exempting such "accepted practices" from subsections (c), (d), and (3)).
6. Accepted Agricultural Practice Rules at AAP-ii (June 29, 1995).
25. Accepted Agricultural Practice Rules §4 (June 29, 1995).
34. Vermont Code of Regs. 20 031 012.