

WISCONSIN

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Wisconsin's water pollution law does not contain a general discharge prohibition. However, the state may issue enforceable orders for the abatement of "significant" nonpoint source pollution, and for critical sites within priority watersheds.

Wisconsin law authorizes the department of natural resources (DNR) to issue general orders and adopt rules applicable throughout the state for "preventing and abating pollution of the waters of the state."¹ Pollution is defined as "contaminating or rendering unclean or impure the waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life."²

- The law specifically authorizes the department to issue orders for the abatement of nonpoint source pollution which the department has determined to be "significant" on a case-by-case basis.³ However, the department may not order abatement or best management practices with respect to pollution caused primarily by animal waste.⁴ Investigations involving animal waste are handled under regulations described below under "Agricultural Requirements." Nor may the DNR order abatement of nonpoint source pollution from agricultural sources located in a priority watershed or priority lake area, unless the source has been designated as a "critical site" in the priority watershed plan.⁵ The priority watershed program provides state funding for watershed staff and cost-sharing for necessary best management practices to control nonpoint sources of pollution within the watershed.⁶

One year's notice must be provided in orders for abatement or implementation of best management practices, unless the department determines that the pollution will cause severe water quality degradation that could be mitigated by action taken sooner.⁷ The department may issue temporary emergency orders to abate nonpoint source pollution if certain statutory conditions are met.⁸ Violators of agency orders are subject to administrative penalties of up to \$5,000 per day. The state may recover the costs of investigation, as well as attorney's fees.⁹ In addition, the department may take the action directed by its order and collect the costs incurred from the owner to whom the order was directed.¹⁰

- Where agricultural sources are involved, the department must first notify the county land conservation committee (LCC).¹¹ The department must also notify the state department of agriculture, trade and consumer protection (DATCP), which in turn issues a list of BMPs and financial and technical assistance sources to the person polluting and then submits a report to the department of natural resources within a year describing the actions taken and recommending whether to issue an order to abate pollution or implement best management practices. The DNR may not issue an order

until it receives this report, unless it makes a determination of severe water quality degradation, concurred in by the DATCP.¹²

In addition, if the notice of intent is for a critical site in a priority watershed, the LCC may disapprove issuance of an order by acting within 60 days after the notice of intent was issued.¹³ The DNR may appeal the disapproval to the state's Land and Conservation Board; the landowner may likewise appeal a proposed order that was not disapproved by the LCC.¹⁴

- In 1997, the legislature enacted a law requiring the DNR to prescribe performance standards for sources of nonpoint source pollution. For non-agricultural sources, the DNR must develop technical standards to implement the performance standards in order to "achieve water quality standards by limiting nonpoint source water pollution."¹⁵ Provisions relating to agricultural sources are discussed below under "Agricultural Requirements."

Other Discharge Limitations

- The state's environmental health code gives local health officers the authority to order the abatement or removal of "human health hazards."¹⁶ The state's water law, in addition to providing the order authorities described above, gives the department of natural resources authority to "order or cause the abatement of any nuisance affecting the waters of the state."¹⁷ This includes nonpoint sources. However, Wisconsin's nuisance statute provides a general exception to nuisance cases involving agricultural sources. To qualify for the exemption, the agricultural use must be on land that was already used for agricultural purposes, use generally acceptable operating practices, and must not present a substantial threat to public health and safety. Relief granted must not substantially restrict or regulate agricultural uses or practices, unless the agricultural use or practice is a substantial threat to public health and safety.¹⁸

- Wisconsin's groundwater protection law establishes a framework for addressing activities that cause pollution of groundwater. The department of natural resources assigns groundwater enforcement standards, as well as "preventive action limits" -- more stringent restrictions on the permissible concentration levels of substances in groundwater.¹⁹ A preventive action limit is not an absolute standard, but "shall serve as a means to inform regulatory agencies of potential groundwater contamination problems, to establish the level of groundwater contamination at which regulatory agencies are required to commence efforts to control the contamination and to provide a basis for design and management practice criteria in administrative rules."²⁰

Each state agency is required to promulgate design and management criteria for facilities, activities and practices that are regulated by the agency and that affect groundwater.²¹ This enforcement is linked to other statutory schemes. The department of natural resources "may not approve a proposed facility, practice or activity at a location where a preventive action limit or enforcement standard...has been attained or exceeded unless an exemption has been granted..."²² For existing facilities, practices or activities, a response is required if a preventive action limit or an enforcement standard has been attained or exceeded.²³

State regulations outline a variety of responses to be taken by agencies where a preventive action limit or enforcement standard is attained or exceeded. In cases involving enforcement standards, these response include requiring the following: monitoring; investigation; revision of operational procedures; change in design or construction; alternate methods of waste treatment or disposal; prohibition or closure and abandonment; remedial action to renovate or restore groundwater quality or to minimize further releases of the substance to groundwater; and revision of rules or criteria on facility design, location or management practices.²⁴ With limited exceptions, the regulations require the department to prohibit the activity or practice and require remedial actions unless the department can demonstrate that other responses will achieve compliance with enforcement standards.²⁵

The law provides that regulatory agencies "shall enforce the provisions of this chapter in accordance with enforcement procedures and subject to the penalties established by statute for activities and practices regulated by the regulatory agency."²⁶

Fish/Fisheries Laws

- Fisheries laws include the provision that no person shall "throw or deposit, or permit to be thrown or deposited, into any waters within the jurisdiction of the state any lime, oil, tar, garbage, refuse, debris, tanbark, ship ballast, stone, sand...slabs, decayed wood, sawdust, sawmill refuse, planing mill shavings or waste material of any kind, or any acids or chemicals or waste or refuse arising from the manufacture of any article of commerce, or any other substance deleterious to game or fish life."²⁷ (Exceptions are provided for approved operations involving sewage drainage and industrial waste, as well as certain highway work carried out under the direction of the department of transportation.)²⁸ This provision is enforced through forfeiture of not more than \$200 per day, imprisonment of up to 90 days (for intentional violations), and natural resources damages.²⁹

- Wisconsin's fish and game law also provides generally that no person "may take, capture or kill fish...in any waters of this state by means of...poisonous or stupefying substances or devices."³⁰ The wording may allow prosecution for fish kills even without a showing of intent to take fish. Enforcement is through fines of up to \$500 and/or imprisonment up to 90 days.³¹

OPERATIONAL REQUIREMENTS

Forestry Requirements

- Wisconsin has a tax incentive program, which involves submitting a management plan.³² While participation in the program is voluntary, there are penalties for violating the provisions of the program. For example, failure to file a notice of intent to cut, as required in the law, can result in a forfeiture not to exceed \$1,000. In addition, any owner who intentionally cuts merchantable timber in violation of the law is subject to forfeiture equal to 20 percent of the current value of the merchantable timber cut.³³

- "All slash, which during the process of cutting timber or taking out other forest products, falls into or is deposited in any lake or stream or on the land of an adjoining owner, shall be immediately removed therefrom by the timber owner or cutting operator...when in the opinion of the department such removal is in the public interest."³⁴ Violators are subject to a forfeiture of not more than \$50, however repeat offenders are subject to higher fines and imprisonment.³⁵

Agriculture Requirements

- As noted above, Wisconsin's water pollution law specifically authorizes the DNR to order abatement or best management practices with respect to nonpoint source agricultural pollution.³⁶ Certain limitations apply in priority watersheds.³⁷

- The state soil and water conservation law authorizes the enactment of local ordinances for the control of nonpoint source pollution. County land conservation committees are authorized to "develop and adopt standards and specifications for management practices to control erosion, sedimentation and nonpoint source water pollution."³⁸ LCC's "may carry out preventive and control measures and works of improvement for flood prevention and for conservation, development, utilization and control of water within the county."³⁹

In addition, county and municipal governments are authorized to enact ordinances to address nonpoint source pollution. Such ordinances are effective only if approved by referendum. "To promote soil and water conservation or nonpoint source water pollution abatement, a county, city, village or town may enact ordinances for the regulation of land use, land management and pollutant management practices....An ordinance enacted under this section may prohibit land uses and land management practices which cause excessive soil erosion, sedimentation, nonpoint source water pollution or storm water runoff."⁴⁰ The county board must adopt an ordinance setting forth administrative enforcement procedures and provide personnel for enforcement of ordinances enacted under the law.⁴¹

Enforcement is through civil forfeiture or injunction in an action initiated by the county or LCC. The court may award reasonable attorney fees to any plaintiff in a successful action for enforcement through injunction.⁴² Notice to landowners or users is required, along with a list of BMPs and available financial assistance "at least one year before" the county or LCC may initiate an action for enforcement.⁴³

The DATCP is also responsible for setting and implementing statewide soil and water conservation policies and administering the state's soil and water conservation programs. The department "shall coordinate" its soil and water conservation program with the state's nonpoint source water pollution abatement financial assistance program.⁴⁴

- Wisconsin regulations contain permitting requirements for large animal feeding operations involving at least 1,000 animal units, requiring a WPDES permit. The regulations establish other requirements for smaller operations, where the state has determined through on-site investigation that the operation is responsible for a discharge of *significant* amounts of pollutants to waters of the state.⁴⁵ The DNR issues a

notice of discharge allowing a specific time for a remedy. The regulations provide that the owner or operator must control the discharge by implementing necessary corrective measures in compliance with the regulations.⁴⁶ "Accepted animal waste management practices shall be used...in implementing the necessary corrective measures relative to runoff control, storage or disposal of animal wastes."⁴⁷ If an operation *fails to implement* necessary corrective measures, it must obtain a WPDES permit.⁴⁸ In addition, owners or operators of animal feeding operations subject to the regulations must design and install permanent runoff control structures, according to specified performance standards.⁴⁹ This standard can be modified by the department when the owner or operator demonstrates that such standards are more stringent than necessary to avoid detrimental effect on water quality.⁵⁰ Permitted facilities must provide manure storage and a landspreading plan.

- In 1997, the legislature enacted a law directing the DNR, in consultation with the DATCP, to promulgate rules setting performance standards and prohibitions for *agricultural* nonpoint sources, including performance standards and prohibitions for livestock operations.⁵¹ The legislature also authorized local governmental units to regulate livestock operations consistent with state performance standards.⁵² Such regulations may not apply to existing operations unless cost-sharing is available.⁵³

- Wisconsin's pesticides law authorizes rule making to govern the use of pesticides, including their formulations, and to determine the times and methods of application and other conditions of use.⁵⁴ State regulations prohibit any person from using or directing the use of pesticides in a "negligent manner" or "in a manner that results in pesticide overspray or significant pesticide drift."⁵⁵ With limited exceptions, the regulations prohibit any person from causing a pesticide to enter waters of the state directly or through sewer systems, and from using a pesticide in a manner which the user knows or should know will result in contamination of state waters.⁵⁶ The regulations further require that chemigation systems be designed and operated to prevent pesticides used in the system from contaminating waters of the state.⁵⁷

Enforcement of the state pesticide law is through forfeiture of between \$100 and \$500, with higher penalties for repeat violators. Commercial applicators, dealers or distributors who knowingly violates the misbranding and licensing provisions of the law are subject to a fine of \$5, 000 and/or imprisonment for one year. The state may also apply to a circuit court for a temporary or permanent injunction to prevent, restrain or enjoin violations.⁵⁸ "In addition to other enforcement procedures, the department may issue a special order...prohibiting the use, application, storage, distribution or sale of pesticides...to prevent or control pesticide contamination of groundwater...."⁵⁹

Development and Other Earth-Disturbing Activities

- Wisconsin's navigable waters protection law gives the department of natural resources a central role in the adoption of local shoreland zoning ordinances that relate to lands under, abutting or lying close to navigable waters. The purposes of such ordinances are to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses...."⁶⁰ The department is responsible for providing general recommended standards and criteria for navigable water

protection regulations and their administration, and for authorizing such regulations.

Counties are required to adopt zoning and subdivision regulations for the protection of all shorelands in unincorporated areas.⁶¹ State regulations require that these county shoreland ordinances include, at a minimum, zoning regulations for shoreland-wetland zoning districts.⁶² The ordinances must "provide sufficient control of the use of shorelands to afford the protection of water quality...."⁶³ The regulations further specify certain minimum components, including building setbacks that "conform to health, safety and welfare requirements, preserve natural beauty, reduce flood hazards and avoid water pollution."⁶⁴ The regulations also require limits on alterations to existing nonconforming structures.⁶⁵ Exemptions from local shoreland zoning ordinances are provided for state highway and bridge work and for farm drainage ditches in certain circumstances.⁶⁶ Where a county has not adopted an ordinance that meets the "reasonable minimum standards," the department is to adopt an ordinance to be administered by the county.⁶⁷

State law also explicitly requires municipalities (cities and villages) to adopt ordinances to regulate zoning of wetlands in shorelands.⁶⁸ State regulations establish minimum standards for the municipal ordinances. The regulations establish permitted and prohibited uses and address non-conforming structures and uses. If a municipality fails to establish an ordinance that meets "reasonable minimum standards," the department of natural resources is to adopt an ordinance for the municipality.⁶⁹

Enforcement mechanisms are specified in the local ordinance. However, state law provides generally that county ordinances "shall be enforced by appropriate fines and penalties" and may be enforced as well by injunction in a suit by the local government or local affected property owners.⁷⁰ State law also provides that violations of city zoning ordinances are punishable by fine and by imprisonment for failure to pay such fine, and that violations are subject to suit by local government or affected property owners to prevent or correct the unlawful practice.⁷¹ In addition, the department of natural resources may initiate enforcement through fines (not more than \$50 per day) and injunctions if it determines that the city or village fails to keep its ordinance "current, effective and enforceable."⁷²

- Wisconsin law also authorizes municipal construction site erosion control ordinances "for the efficient use, conservation, development and protection of this state's groundwater [and] surface water..." as well as for the prevention and control of water pollution, and the control of building sites and placement of structures and land uses.⁷³ State regulations require counties, cities, villages, and towns receiving financial assistance under the state's nonpoint source water pollution plan to adopt a construction site control ordinance if it is required in the watershed plan under the state program. Such ordinances also must require consistency with the Wisconsin Construction Site Best Management Practice Handbook.⁷⁴ The local ordinances are enforceable as explained above. A county board may authorize the local land conservation committee to administer and enforce the provisions of certain county zoning or construction site erosion control ordinances.⁷⁵

Endnotes

- ¹ Wisconsin Statutes 281.19(1).
- ² WS 281.01.
- ³ WS 281.20(1)(a).
- ⁴ WS 281.20(1)(a), (b).
- ⁵ WS 281.20(1)(a), (b).
- ⁶ WS 281.65.
- ⁷ WS 281.20(3)(a).
- ⁸ WS 281.20(3)(d).
- ⁹ WS 281.98(1), (2).
- ¹⁰ WS 281.19(7).
- ¹¹ WS 281.20(3)(b).
- ¹² WS 281.20(3)(a), 281.20(3)(c)2.
- ¹³ WS 281.20(3)(b).
- ¹⁴ WS 281.20(5)(a).
- ¹⁵ WS 281.16(2).
- ¹⁶ WS 254.59.
- ¹⁷ WS 281.19(4).
- ¹⁸ WS 823.08.
- ¹⁹ WS 160.07, 160.09, 160.13., 160.15.
- ²⁰ WS 160.001(8).
- ²¹ WS 160.19(2)(a).
- ²² Wisconsin Administrative Code, Natural Resources 140.28(1).
- ²³ *Id.*
- ²⁴ WAC NR 140.24(4).
- ²⁵ WAC NR 140.26(2)(b).
- ²⁶ WS 160.26.
- ²⁷ WS 29.29(3)(b).
- ²⁸ WS 29.29(3)(b).
- ²⁹ WS 29.29(3)(c).
- ³⁰ WS 29.29(1).
- ³¹ WS 29.29(1).
- ³² WS 77.82.
- ³³ WS 77.86(5)(a).
- ³⁴ WS 26.12(7).
- ³⁵ WS 26.98, 26.985.
- ³⁶ WS 281.20(1)(a).
- ³⁷ WS 281.20(1)(b).
- ³⁸ WS 92.07(2).
- ³⁹ WS 92.07(6).
- ⁴⁰ WS 92.11.
- ⁴¹ WS 92.11(5).
- ⁴² *Id.*
- ⁴³ WS 92.11(5)(b).
- ⁴⁴ WS 92.05.
- ⁴⁵ WAC NR 243.21.
- ⁴⁶ WAC NR 243.23(2).
- ⁴⁷ WAC NR 243.26.
- ⁴⁸ WS 243.24.
- ⁴⁹ WAC NR 243.25.
- ⁵⁰ WAC NR 243.05.
- ⁵¹ WS 281.16(3), (4).

52. WS 92.15, 281.16.
53. WS 281.16(3)(e), (4), 92.15(4).
54. WS 94.69(9).
55. WAC Agriculture, Trade and Consumer Protection 29.50(1)(2).
56. WAC ATCP 29.51(4).
57. WAC ATCP 29.54(2)(c).
58. WS 94.71(1),(3).
59. WS 94.71(3)(c).
60. WS 281.31.
61. WS 59.971.
62. WAC NR 115.05(1).
63. WAC NR 115.05(3).
64. WAC NR 115.05(3).
65. WAC NR 115.05(e).
66. WAC NR 115.02, 115.03(5).
67. WAC NR 115.01(1).
68. WS 62.231, 61.351.
69. WS 62.231(6).
70. WS 59.97(11).
71. WS 62.23(7)(f).
72. WS 87.30(2); WAC NR 117.06(3).
73. WS 281.33. See also WS 59.69 and 59.693, which specifically authorize county zoning ordinances for construction site erosion control at sites where the activities do not include construction of a building.
74. WAC NR 120.16.
75. WS 92.07(15).