NORTH CAROLINA

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

The North Carolina water pollution law establishes several discharge prohibitions that are potentially enforceable against nonpoint sources. A general provision prohibits the discharge of waste in violation of water quality standards; the state may issue special orders to abate water pollution; and there are specific prohibitions against unpermitted discharges to the Atlantic Ocean and other defined areas.

• Absent a permit or special order, no person shall "cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications."[1] "Discharge of waste" is defined broadly to include "discharge, spillage, leakage, pumping, placement, emptying, or dumping into waters of the State"[2]; "waste" is defined to include sewage, industrial waste, toxic waste, and "other waste."[3] "Other waste" is defined as "sawdust, shavings, lime, refuse, offal, oil, tar chemicals, dissolved and suspended solids, sediment, and all other substances ... which may be discharged into or placed in such proximity to the water that drainage therefrom may reach the water."[4]

• Even more broadly, the Environmental Management Commission may issue special orders "to any person whom it finds responsible for causing or contributing to any pollution of the waters of the State within the area for which standards have been established."[5] The law defines "water pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of the waters of the State, including, but not specifically limited to, alterations resulting from the concentration or increase of natural pollutants caused by man-related activities."[6]

• There are also specific prohibitions against the discharge of wastes or thermal discharges to waters of the Atlantic Ocean within state jurisdiction;[7] discharge of pollutants to "defined managed areas," such as fisheries, without a permit;[8] and stormwater discharges that result in water pollution.[9]

Violations of the water pollution law may be assessed civil penalties of up to $10,000 per violation per day, misdemeanor criminal fines of up to $15,000 per violation per day, or felony criminal fines of up to $250,000 per violation per day; they also are subject to injunctive relief.[10]

Other Discharge Limitations

North Carolina nuisance law may be applicable to some forms of nonpoint source pollution. There does not appear to be a statutory definition of "nuisance" that expressly includes water pollution, but common-law definitions should cover some forms of nonpoint discharge.

• State and local health officials are authorized to bring civil actions for abatement of public health nuisances,[11] as are county officials.[12] Private suits for "injuries remediable by the old writ of nuisance" are allowed under the common law and civil procedure code, and may seek damages, removal of the nuisance, or both.[13]

A recent statutory enactment makes it more difficult to bring either private or public nuisance suits against agricultural or forestry operations where the operation has been in existence for more than one year.[14] However, that provision in turn contains an exception, stating that it "shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream."[15]

Fish/Fisheries Laws

• The Environmental Management Commission is authorized "to direct the investigation of any killing of fish and wildlife which, in the opinion of the Commission, is of sufficient magnitude to justify investigation and is known or believed to have resulted from the pollution of the waters or air."[16] The Commission is required to develop and to follow fish kill response protocols for coordinating investigation of and response to "significant fish kill events."[17] Where investigation determines that a person has, with or without a permit, "negligently, or carelessly or unlawfully, or willfully and unlawfully, caused pollution of the water or air...in such quantity, concentration or manner, that fish or wildlife are killed as the result thereof, the Commission may recover, in the name of the State, damages from such person" according to an established schedule of damages.[18]

OPERATIONAL REQUIREMENTS

Forestry Requirements

• The Sedimentation Pollution Control Act requires the Department of Environment, Health and Natural Resources to adopt "Forest Practice Guidelines Related to Water Quality," which are best management practices for forest activity.[19] The Forest Practice Guidelines are found in the North Carolina Administrative Code[20] as well as in a Forestry Practices Manual issued by the Division of Forest Resources. Forest activities conducted in accordance with these Guidelines are exempt from the other provisions of the Act,[21] which regulates certain kinds of "land-disturbing activity" that causes erosion and sedimentation.[22]

Agriculture Requirements

North Carolina has extensive provisions regulating agricultural activity that could cause nonpoint source pollution. These fall into three main categories: soil conservation measures aimed at preventing soil erosion and sedimentation; regulations on siting and operation of animal feeding operations; and pesticide-related laws. Agricultural activities also may be affected by the Watershed Supply Water Protection Act, which is discussed below in the "Development" section.

• Soil and Water Conservation Districts are authorized to prepare comprehensive plans for soil conservation, including best management practices, and "to bring such plans and information to the attention of occupiers of lands within the district."[23] Districts also may condition any grants or other assistance on landowners covenanting to adopt such practices on their lands.[24] Further, "the supervisors of any district shall have authority to formulate regulations governing the use of lands within the district in the interest of conserving the soil and soil resources and preventing and controlling soil erosion"; in such cases, regulations must be proposed by the district and approved by a two-thirds vote of district residents in a referendum.[25] When land-use regulations are in place, district supervisors are authorized to enter and inspect lands to determine whether the regulations are being observed,[26] and to file civil actions for injunctive relief, to take remedial measures, and to seek compensation for any costs incurred.[27]

• For animal feeding operations, the Animal Waste Management Systems Act "intends to establish a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden."[28] It applies to feeding operations of more than 250 swine, 100 confined cattle, 75 horses, 1000 sheep, or 30,000 confined poultry with a liquid waste management system.[29] These operations must maintain an "animal waste management system" which is defined as a "combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste,"[30] and which must be designed "so that the animal operation served by the animal waste management system does not cause pollution in the waters of the State except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm."[31]

Operators are required to obtain a permit before constructing or operating an animal waste management system, and permit applications must include animal waste management plans with "best management practices for riparian buffers or equivalent controls, particularly along perennial streams."[32] The operations are required to undergo an annual inspection and review, and to give immediate notification of direct discharges of animal waste or other immediate threats to the environment.[33] However, "except as required by federal law or regulations, the [Environmental Management] Commission may not adopt effluent standards or limitations applicable to animal or poultry feeding operations," though it may assess fines of up to $10,000 against conveyances "constructed for the purpose of willfully discharging pollutants to the waters of the State."[34]

• Similarly, the Swine Farm Siting Act applies to operations raising more than 250 swine on a single site.[35] It requires that swine houses or lagoons holding animal waste "shall be located at least 1,500 feet from any occupied residence; at least 2,500 feet from any school, hospital, or church; and at least 500 feet from any property boundary"; it also requires that "the outer perimeter of the land area onto which waste is applied from a lagoon that is a component of a swine farm shall be at least 50 feet from any boundary of property on which an occupied residence is located and from any perennial stream or river, other than an irrigation ditch or canal."[36] However, swine houses or lagoons can be sited closer to residences, schools, hospitals, churches or property boundaries (though apparently *not* to rivers and streams) than the stated

limits "if written permission is given by the owner of the property and recorded with the Register of Deeds."[37] "Any person owning property directly affected by the siting requirements" may bring a civil action against the swine farmer; "persons directly affected" are defined to include those owning "property that abuts a perennial stream or river, or on which a perennial stream or river is located."[38] Plaintiffs may seek injunctive relief, damages and, in appropriate cases, court costs, attorney and expert witness fees.[39]

• The North Carolina Pesticide Law[40] provides that "no person shall handle, transport, store, display or distribute pesticides in such a manner as to endanger man and his environment or to endanger food, feed, or any other products that may be transported, stored, displayed, or distributed with pesticides" and that "no person shall dispose of, discard, or store any pesticides or pesticide containers in such a manner as may cause injury to humans, vegetation, crops, livestock, wildlife, or to pollute any water supply or waterway."[41] It also establishes pesticide registration requirements and prohibits distribution or sale of unregistered or mislabelled pesticides.[42]

The Pesticide Board is authorized to adopt regulations for carrying out the Pesticide Law, including regulations governing handling, transport, storage, display, distribution, and disposal of pesticides.[43] The Board issues licenses for pesticide dealers and applicators,[44] and may require reports and conduct inspections, investigations and administrative hearings.[45] Violations of the Act or regulations are subject to misdemeanor criminal penalties and/ or civil penalties of up to $2,000 per violation.[46] The Board may seek civil injunctive relief in court, and has emergency authority for license suspensions and seizures in cases of imminent hazard caused by any pesticide, whether registered or unregistered.[47]

• The Watershed Supply Water Protection Act, discussed in detail below, requires local governments to develop water supply watershed protection programs that govern development in key areas and that could affect agricultural activities. However, the Act expressly states that "the reduction of agricultural nonpoint source discharges shall be accomplished *primarily* through the Agriculture Cost Share Program for Nonpoint Source Pollution Control,"[48] a separate program that encourages voluntary implementation of best management practices.[49] In addition, the Act provides that any local watershed protection ordinances governing agricultural and silvicultural activities "shall be no more restrictive than those adopted by the [Environmental Management] Commission."[50]

Development and Other Earth-Disturbing Activities

• The Sedimentation Pollution Control Act[51] applies to certain kinds of "land-disturbing activity" that causes erosion and sedimentation. "Land-disturbing activity" is defined as "any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation."[52] It excludes agricultural activities, forestry activities conducted in accordance with best management practices, mining, or emergency activities.[53] For land-disturbing activity, the Act establishes mandatory standards including: (1) no activity is permitted in proximity to a lake or natural watercourse unless there is a buffer zone "along the margin of the watercourse of

sufficient width to confine visible siltation within the twenty-five percent of the buffer zone nearest the land-disturbing activity"; (2) graded slopes and fills shall not be steeper "than the angle which can be retained by vegetative cover or other adequate erosion-control devices or structures"; and (3) tracts where more than an acre of land is uncovered must include, "such sedimentation and erosion control devices and practices as are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract" during construction, and permanent ground cover following completion of construction."[54]

Under the Act, the Sedimentation Control Commission is authorized to "develop, promulgate, publicize and administer a comprehensive State erosion and sedimentation control program," including rules and regulations. The rules are to "contain conservation standards for various types of soils and land uses, which standards shall include criteria and alternative techniques and methods for the control of erosion and sediment resulting from land-disturbing activities."[55] The Commission is also required to develop a model local erosion control ordinance and to review and approve proposed programs submitted by local governments and State agencies and erosion control plans submitted by project proponents.[56] The Act sets out a procedure for approval of proposed erosion control plans; in addition to decisions on the merits, plans may be disapproved based on a finding of previous violations of the Act or failure to pay a previous penalty.[57] The Commission may delegate its authority to review and approve erosion control plans to local governments with State-approved erosion control programs.[58]

The Commission and local governments with delegated authority are authorized to inspect sites, issue notices of violation, and specify dates for compliance.[59] Further, the Secretary of Environment, Health and Natural Resources is authorized to issue stop-work orders for violations of the Act or Rules if the violation is knowing and willful and: "(1) Off-site sedimentation has eliminated or severely degraded a use in a lake or natural watercourse or ... such degradation is imminent; (2) Off-site sedimentation has caused severe damage to adjacent land or ... such damage is imminent; [or] (3) the land-disturbing activity is being conducted without an approved plan."[60] The Act provides for up to $500 per violation per day for violation of the Act, an ordinance, rule or order; civil penalties of up to $5,000 per violation per day for violation of a stop-work order; and criminal misdemeanor fines of up to $5,000 for knowing and willful violations.[61] The Secretary, or a local government with delegated authority, may also impose restoration requirements or seek an injunction, and "any person injured by a violation" of the Act or the rules may seek injunctive relief and/ or damages.[62]

• The Watershed Supply Water Protection Act requires the Environmental Management Commission to "adopt rules for the classification of water supply watersheds and that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies by (I) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of both (I) and (ii)."[63] Further, the Commission "may designate water supply watersheds or portions thereof as critical water supply watersheds and impose management requirements that are more stringent than the minimum statewide water supply watershed management requirements," and adopt rules that require that any

permit issued by a local government for a development or construction activity conducted by that local government within a designated water supply watershed be approved by the Department [of Environment, Health, and Natural Resources] prior to issuance."[64]

Under the Act, local governments are required to develop a water supply watershed protection program and ordinances for enforcing the minimum management requirements, and they "may adopt such ordinances pursuant to their general police power, power to regulate the subdivision of land, zoning power, or any combination of such powers."[65] The Commission must assume enforcement authority where a local government "fails to adopt a program that meets the requirements of this section or whenever a local government fails to adequately administer and enforce the provisions of its program."[66] However, if a local government wishes to adopt an ordinance more stringent than Commission requirements, it must give notice to the Commission;[67] and local ordinances governing agricultural and silvicultural activities "shall be no more restrictive than those adopted by the Commission."[68] Local governments that fail to adopt or enforce water supply watershed management programs are subject to civil penalties of up to $10,000 per month; persons who violate the management requirements are subject to civil penalties of up to $10,000 per violation per day.[69]

• Under the Natural and Scenic Rivers Act, "the State Utilities Commission may not permit the construction of any dam, water conduit, reservoir, powerhouse transmission line, or any other project works on or directly affecting any river that is designated as a component or potential component of the State Natural and Scenic Rivers System. No department or agency of the State may assist by loan, grant, license, permit, or otherwise in the construction of any water resource project that would have a direct and adverse affect on any river that is designated as a component or potential component of the State Natural and Scenic Rivers System."[70] The Act's provisions "shall not, however, preclude licensing of or assistance to a development below or above a designated or potential component."[71] The Act authorizes the Department of Environment, Health and Natural Resources to adopt rules to implement the Natural and Scenic Rivers System,[72] and violations of the Act or rules is subject to injunctive relief and to a misdemeanor fine of no more than $50 per violation per day.[73]

• The Coastal Area Management Act applies only to counties within the coastal zone, and requires the "development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area, which plans shall serve as criteria for the issuance or denial of development permits."[74] The guidelines "shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area," and "shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the [Coastal Resources] Commission.[75] "Areas of environmental concern" are defined to include coastal wetlands, estuarine waters, renewable resource areas (public water supplies and forest land), fragile or historic areas, areas with rights of public access or public trust, natural-hazard areas, outstanding resource waters, and fisheries;[76] there is a public procedure for designating areas of environmental concern.[77] Once areas of environmental concern

are designated, all local land-use plans, local ordinances, and permits issued within the areas must be consistent with the state guidelines.[78]

Within the coastal zone, city and county governments must submit implementation and enforcement plans to the state, which either approves the plan and delegates enforcement authority or assumes enforcement until an adequate plan is approved.[79] The Act authorizes the Secretary to seek injunctive relief, misdemeanor criminal penalties for knowing and willful violations, and administrative civil penalties of up to $250 for "minor developments" or $2500 for "major developments."[80] Local officials also may seek injunctions for minor developments.[81]

Endnotes

1. N.C. Gen. Stat. § 143-215.1(a)(6).
2. N.C. Gen. Stat. § 143-213(9).
3. N.C. Gen. Stat. § 143-213(18).
4. N.C. Gen. Stat. § 143-213(18)(d).
5. N.C. Gen. Stat. § 143-215.2.
6. N.C. Gen. Stat. § 143-213(19).
7. N.C. Gen. Stat. § 143-214.2(c).
8. N.C. Gen. Stat. § 143-215.1(a)(10).
9. N.C. Gen. Stat. § 143-215.1(a)(11).
10. N.C. Gen. Stat. §§ 143-215.6A, .6B, .6C.
11. N.C. Gen. Stat. § 130A-19.
12. N.C. Gen. Stat. § 153A-140.
13. N.C. Gen. Stat. § 1-539.
14. N.C. Gen. Stat. § 106-701(a).
15. N.C. Gen. Stat. § 106-701(c).
16. N.C. Gen. Stat. § 143-215.3(a)(7).
17. N.C. Gen. Stat. § 143B-279.7.
18. N.C. Gen. Stat. § 143-215.3(a)(7).
19. N.C. Gen. Stat. § 113A-52.1.
20. N.C. Admin. Code T15A:1I.0101-.0209.
21. N.C. Gen. Stat. § 113A-52.1.
22. *See* N.C. Gen. Stat. § 113A-50 et seq., which is discussed below.
23. N.C. Gen. Stat. § 139-8.
24. N.C. Gen. Stat. § 139-8.
25. N.C. Gen. Stat. § 139-9.
26. N.C. Gen. Stat. § 139-10.
27. N.C. Gen. Stat. § 139-11.
28. N.C. Gen. Stat. § 143-215.10A.
29. N.C. Gen. Stat. § 143-215.10B(1).
30. N.C. Gen. Stat. § 143-215.10B(3).
31. N.C. Gen. Stat. § 143-215.10C(b).
32. N.C. Gen. Stat. §§ 143-215.10C(a), (d), (e). The detailed animal waste management regulations are found at N.C. Admin. Code T15A:02H.0200 et seq.
33. N.C. Gen. Stat. §§ 143-215.10D, .10E, .10F.
34. N.C. Gen. Stat. § 143-215.
35. N.C. Gen. Stat. § 106-800 et seq.
36. N.C. Gen. Stat. § 106-803(a).
37. N.C. Gen. Stat. § 106-803(b).

[38] N.C. Gen. Stat. § 106-804.
[39] N.C. Gen. Stat. § 106-804(a), (c).
[40] N.C. Gen. Stat. § 143-434 et seq.
[41] N.C. Gen. Stat. §§ 143-441(b), (c).
[42] N.C. Gen. Stat. §§ 143-442, -443.
[43] N.C. Gen. Stat. §§ 143-437,-441(a).
[44] N.C. Gen. Stat. §§ 143-448 to -459.
[45] N.C. Gen. Stat. §§ 143-461, -466.
[46] N.C. Gen. Stat. §§ 143-469(a), (b). Penalties for violations of an applicators' license are limited to $500. N.C. Gen. Stat. § 143-469(d).
[47] N.C. Gen. Stat. §§ 143-461, -447.
[48] N.C. Gen. Stat. § 143-214.5(a).
[49] *See* N.C. Gen. Stat. § 143-215.74.
[50] N.C. Gen. Stat. § 143-214.5(d1).
[51] N.C. Gen. Stat. § 113A-50 et seq.
[52] N.C. Gen. Stat. § 113A-52(6).
[53] N.C. Gen. Stat. § 113A-52.01.
[54] N.C. Gen. Stat. § 113A-57.
[55] N.C. Gen. Stat. § 113A-54.
[56] N.C. Gen. Stat. § 113A-54.
[57] N.C. Gen. Stat. § 113A-54.1.
[58] N.C. Gen. Stat. §§ 113A-60, -61.
[59] N.C. Gen. Stat. § 113A-61.1.
[60] N.C. Gen. Stat. § 113A-65.1.
[61] N.C. Gen. Stat. §§ 113A-64(a), (b).
[62] N.C. Gen. Stat. §§ 113A-64.1, -65, -66.
[63] N.C. Gen. Stat. § 143-214.5(b).
[64] N.C. Gen. Stat. § 143-214.5(b).
[65] N.C. Gen. Stat. § 143-214.5(d).
[66] N.C. Gen. Stat. § 143-214.5(e).
[67] N.C. Gen. Stat. § 143-214.5(d).
[68] N.C. Gen. Stat. § 143-214.5(d1). *See also* N.C. Gen. Stat. § 143-214.5(a) (notwithstanding the Watershed Supply Water Protection Act, "the reduction of agricultural nonpoint source discharges shall be accomplished *primarily* through the Agriculture Cost Share Program for Nonpoint Source Pollution Control.")
[69] N.C. Gen. Stat. § 143-214.5(g).
[70] N.C. Gen. Stat. § 113A-44.
[71] N.C. Gen. Stat. § 113A-44.
[72] N.C. Gen. Stat. § 113A-36(d).
[73] N.C. Gen. Stat. § 113A-42.
[74] N.C. Gen. Stat. § 113A-106.
[75] N.C. Gen. Stat. § 113A-107.
[76] N.C. Gen. Stat. § 113A-111.
[77] N.C. Gen. Stat. § 113A-115.
[78] N.C. Gen. Stat. §§ 113A-108, -111. The permit requirement and procedures and criteria for permit issuance are found at N.C. Gen. Stat. §§ 113A-118 to -123.
[79] N.C. Gen. Stat. § 113A-117.
[80] N.C. Gen. Stat. § 113A-126.
[81] N.C. Gen. Stat. § 113A-126(b).