

ALABAMA

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Alabama's water pollution control law, which requires a permit for discharge of "pollution," provides a basis for enforcement against some nonpoint source discharges, but regulations exclude nonpoint source discharges from agriculture and silviculture from the permit requirement. The state also maintains that it may directly enforce against nonpoint sources, if they cause violation of water quality standards. In addition, the law provides two general authorities which allow the state to take enforcement action to deal with any type of water pollution resulting from negligence, or any water pollution that produces a health hazard.

- "Every person, prior to discharging any new or increased pollution into any waters of this state, shall apply to the commission [now the Alabama Department of Environmental Management (ADEM)] in writing for a permit and must obtain such permit before discharging such pollution."¹ But although Alabama's permit requirement is not limited to point sources,² nevertheless a permit is not required for discharges "from non-point source agricultural and silvicultural activities."³

- Enforceable provisions may include water quality standards.⁴ In addition to setting standards, the regulations only require specifically, however, that "nonpoint source discharges shall use best management practices adequate to protect water quality consistent with the Department's nonpoint source control program" with respect to antidegradation of waters meeting water quality criteria and outstanding state and national waters.⁵ The referenced program, however, appears to be largely based on cost-shares and technical assistance.⁶

Enforcement of these provisions follows this procedure: "Whenever the commission [ADEM] determines that any person is violating, or is about to violate, any of the provisions of this chapter, or any rule or regulation or order or permit...thereunder, [ADEM] may notify such person of such determination... Within such time as may be specified in such notice, such person shall file with the commission [ADEM] a full report showing steps that have been taken and are being taken to control such pollution. Thereupon, the commission [ADEM] may make such orders as in its opinion are reasonable."⁷ Enforcement includes orders, injunctions, civil actions for damages for pollution (including "any reasonable costs to prevent, minimize, or clean up any damage," costs for restocking of fish killed, civil penalties of \$100 to \$25,000 per day, and criminal penalties for willful violation or grossly negligent violations.⁸

- The law also provides that ADEM, the attorney general or any district attorney "may commence a civil action for damages for pollution of the waters of the state including, but not limited to, any reasonable costs to prevent, minimize or clean up any damage resulting from the wrongful act, omission or negligence of a person."⁹

- Furthermore, "Any and all pollution is...declared to be a public nuisance and, if it creates, or is about to create, a health hazard, shall be subject to immediate control of the commission [ADEM] by order or injunction. Any order issued under this subsection shall be deemed to be final and conclusive for the purposes of this chapter."¹⁰

Other Discharge Limitations

- Nuisance liability is noted above.
- Alabama law gives some rulemaking powers with respect to pollution discharges to the department of conservation and natural resources.¹¹ But the department cannot make "any rules or regulations which will hamper industry or which will interfere with the operation of any industrial plant or plants or any industrial operation...[or] which will hamper or interfere with the construction of dams built for impounding private waters...[or] which will in any way hamper or interfere with the maximum development of private waters as a source of food, farm income and recreation in the state of Alabama..."¹²

Fish/Fisheries Laws

- The taking or killing of any fish by depositing in any public stream or body of water "any poison, poisonous substance...or other deleterious or poisonous matter" is an offense.¹³ The taking or killing of any fish by any means other than those expressly allowed by law or regulation of the department of conservation and natural resources is an offense.¹⁴ These are punishable as misdemeanors, with a fine of \$50 to \$200.

OPERATIONAL REQUIREMENTS

Forestry Requirements

- The State Forestry Commission has power to operate state forests and to administer all laws relating to timber and forestry.¹⁵ "The commission shall have the power to adopt and promulgate rules and regulations pertaining to all phases of forestry within this state, which rules and regulations when adopted shall have the force and effect of law."¹⁶ However, the commission has not adopted enforceable nonpoint source regulations, relying instead on voluntary BMPs. The commission has adopted licensing requirement for foresters.¹⁷ There are no enforcement provisions in the regulations apart from the licensing requirements. The state reports that it relies on its water pollution control act for enforcement.

- State law provides for the establishment of soil and water conservation districts;¹⁸ the districts have the power to carry out preventive and control measures and to provide assistance, to develop comprehensive plans, and "to make and, from time to time, amend and repeal rules and regulations not inconsistent with this article to carry into effect its purposes and powers."¹⁹ Specifically, the supervisors of a district have authority to "formulate regulations governing the use of lands within the district in the interest of conserving soil and soil resources and preventing and controlling soil erosion."²⁰ Such regulations may only go into effect after a referendum results in their approval by 4/5 of the votes cast; and the supervisors are not required to adopt the regulations even if the referendum is favorable.²¹

- A separate law provides that "any management guidelines developed by watershed management authorities [a special form of authority within some soil and water conservation districts] to protect forested watersheds shall follow the best management practices established by the Alabama Forestry Commission as they pertain to forested watersheds."²² Enforcement of soil and water conservation district land use regulations is by injunction sought by the supervisors in the circuit court; or the supervisors may perform the work and recover the expenses thereof.²³

Agriculture Requirements

- Enforceable land use regulation by soil and water conservation districts is described above.

- The Alabama Pesticide Act provides for pesticide registrations, for permitting of commercial applicators by the Dept. of Agriculture and Industry.²⁴ "Before any person is authorized to purchase and use restricted-use pesticides for application or use thereof, such person shall meet certain qualifications to be prescribed pursuant to rules and regulations...designed to satisfy the requirements of the Federal [FIFRA]...and to determine whether the user or applicator...can use and apply such products in a manner that will not endanger or be injurious to human health and nontarget animals, wildlife, vegetation, crops, and water or be detrimental to the general environment..."²⁵ The statute provides for penalties and injunctive relief.²⁶

Development and Other Earth-Disturbing Activities

No operating requirements are set forth apart from any that may be contained in urban stormwater programs under the Clean Water Act or that may be authorized by general land use regulation such as zoning. Control of pollution from development activities is limited to stormwater permitting for activities over 5 acres.

State law does provide for the formation of watershed management authorities, which include contiguous watershed lands which may lie within one or more soil and water conservation districts.²⁷ The land included in the authority must be in a single watershed and must encompass at least 50 square miles. The purposes include plans and programs relating to, among other things, "water pollution control...erosion prevention and control of erosion, floodwater and sediment damages."²⁸ Authority to make and enforce rules and regulations is not clearly among the enumerated powers of these watershed management authorities.²⁹ Individual local government jurisdictions, particularly in the coastal zone, also have some authorities over runoff and sediment under their general land use powers or the coastal zone program.³⁰

Endnotes

¹. Ala. Code § 22-22-9(I)(3).

². Ala. Code § 22-22-1(b)(3); Admin. Code 335-6-6-.02(jj).

³. Admin. Code 335-6-6-.03(a)4. This exception does not apply to concentrated animal feeding operations, concentrated aquatic animal production facilities, and certain silvicultural discharges treated as point sources by regulation.

⁴. Alabama asserted that these standards are directly enforceable against nonpoint source dischargers in its 1995 submittal under the Coastal Zone Act Reauthorization Amendments.

5. Admin. Code 335-6-20-.04(3) ("antidegradation policy"); Admin. Code §§ 335-6-10-.09, -.10 ("Outstanding Alabama Waters", "Outstanding National Resource Waters").
6. Ala. Code §22-38-1 et seq.
7. Ala. Code § 22-22-9(e).
8. Ala. Code §§ 22-22-9(I) to (n), 22-22A-5(17) to (19), 22-22-14.
9. Ala. Code § 22-22-9(m).
10. Ala. Code 22-22-9(I)(4).
11. Ala. Code § 9-2-2 et seq.
12. Ala. Code § 9-2-8.
13. Ala. Code § 9-11-93.
14. Ala. Code § 9-11-94.
15. Ala. Code § 9-3-1 et seq.
16. Ala. Code 9-3-9 ;Admin. Code 390-X-1-.02.
17. Ala. Code § 34-12-35; Admin. Code 380-X-3-.01 to .10.
18. Ala. Code § 9-8-20 et seq.
19. Ala. Code § 9-8-25(16).
20. Ala. Code § 9-8-26.
21. Ala. Code § 9-8-26.
22. Ala. Code § 9-10A-4.
23. Ala. Code § 9-8-28.
24. Ala. Code § 2-27-1 et seq.
25. Ala. Code § 2-27-11(b).
26. Ala. Code § 2-27-16.
27. Ala. Code § 9-10A-1 et seq.
28. Ala. Code § 9-10A-3.
29. Ala. Code § 9-10A-14.
30. Ala. Code §§ 9-7-11(7), 9-7-10(6).