

MICHIGAN

Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Michigan's water pollution control laws include provisions that may be used to take enforcement action against nonpoint source discharges that cause environmental harm. They also provide general authority for the state to adopt rules and issue orders with respect to polluting substances. Virtually all of Michigan's laws relating to the environment are codified as the "Natural Resources and Environmental Protection Act," administered by the state's departments of natural resources and environmental quality.¹ Chapter and article headings in the Act *are not part of the act and are not to be used to construe the scope of the act.*² This has particular relevance to the interpretation of nonpoint source enforceable mechanisms, as the following enforceable provisions are found in a part of the Act captioned "Article II, Chapter 1-Point Source Pollution Control."³

- The broadest prohibition apparently applies to nonpoint sources as well as point sources. "A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following: (a) To the public health, safety or welfare. (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters. (c) To the value or utility of riparian lands. (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to the growth, propagation, or the growth and propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired."⁴

- In addition, the Department of Environmental Quality "may promulgate rules and issue orders restricting the polluting content of any waste material or polluting substance discharged or sought to be discharged into any...waters of the state. The department shall take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest in view of the existing conditions in any...waters of the state."⁵ This broad provision also apparently covers nonpoint as well as point source categories.

A related requirement provides for issuance of waste discharge permits. However, the regulations apply the permit requirement most clearly to point source dischargers.⁶ Definitions in the state regulations nevertheless create the possibility that nonpoint source dischargers could also fall within the permit requirement.⁷

The state agency may enforce the laws and regulations noted above, and may bring or cause to be brought civil actions or criminal prosecutions in court.⁸ It may revoke a permit, issue an order of abatement, or refer a case to the attorney general.⁹

Sanctions include civil fines of not less than \$2,500 nor more than \$25,000/day, and criminal penalties and terms of imprisonment for knowing violations.¹⁰

Other Discharge Limitations

- The Michigan Environmental Protection Act (MEPA) allows the Attorney General or "any person" to bring an action in court "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."¹¹ Natural resource damage actions may also be brought by the state.

- Nuisance law provides additional remedies that may be used to address some instances of nonpoint source pollution. Michigan law provides that causing pollution ("directly or indirectly discharg[ing] into the waters of the state" any substance that is or may become injurious to public health, safety, or welfare, or to human uses of waters or to aquatic life or wildlife or to riparian land) is "prima facie evidence of a public nuisance and in addition to the remedies provided for in this part may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction."¹²

However, a farm may not be found to be a nuisance if it "conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture." The law provides that these "[g]enerally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary."¹³

- An anti-litter law has some potential applicability to nonpoint source water pollution as well. It provides that "[a] person shall not knowingly, without the consent of the public authority having supervision of public property or the owner of private property, dump, deposit, place, throw, or leave, or cause or permit the dumping, placing, throwing, or leaving of, litter on public or private property or water other than property designated and set aside for such purposes."¹⁴ Litter is defined as "all rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris, or other foreign substances." "Public or private property or water includes....a body of water or watercourse, or the shore or beach of the body of water or watercourse, including the ice above the water..."¹⁵ Offenses are punishable by civil fines of up to \$800 or \$2,500 depending upon the volume of the discarded litter, and costs of removing the material and "the costs of damages to any land, water, wildlife, vegetation, or other natural resource or to any facility damaged by the violation."¹⁶

Fish/Fisheries Laws

- "A person shall not put into any stream, pond, or lake any sand, coal, cinders, ashes, log slabs, decayed wood, bark, sawdust, or filth."¹⁷ Violation of this provision is a misdemeanor punishable by a fine of not more than \$100, and/or imprisonment for up to 90 days, and damages.¹⁸

- The Michigan DNR also uses its general enforcement authorities to "protect and conserve the natural resources" and "guard against the pollution of lakes and

streams and enforce all laws provided for that purpose."¹⁹ To that end, it can use its authority to impose sanctions for fish kills, based on the unlawful taking of fish by "means" other than rods and lines.²⁰

OPERATIONAL REQUIREMENTS

Forestry Requirements

- Michigan has a law that applies to forest improvement districts. These are governmental subdivisions containing at least 4 working forests, and are established by 10 or more forest owners with 50,000 acres in the aggregate filing a petition with the DNR.²¹ Districts have power to develop comprehensive forest management plans; and the DNR participates in the plan if state land encompassed by the district's gross boundary is greater than 5% of the total forest area.²² But the state does not provide financial or other support for the district. "For the public benefit, the [district's] board shall mandate the continuous growing, improvement, and harvesting of forest tree species so as to protect and maintain the forest soil, air, water resources, wildlife, and aquatic habitat within a district. The board of a district shall establish minimum standards for the conduct of forest practices on forest land within a district. These standards shall do all of the following: (a) Provide for the improvement and harvesting of forest tree species in a manner that will increase the productivity of the forest land, reduce soil and debris entering streams, and protect wildlife and fish habitat....."²³ "A member shall notify the district of compliance with the forest practice rules by submitting a forest management plan on forms prescribed and provided by the board."²⁴ The district board must issue a notice of violation if a forest practice rule was violated. The notice must order that further violations cease and may order the member to make "reasonable efforts to repair the damage or correct the unsatisfactory condition."²⁵ If the member fails to comply, the board may take action and then file a lien to recover the costs of the action.²⁶ This is essentially a cooperative, member-enforced approach, under which timber sales are inspected by foresters employed by the district. But state enforcement actions for forestry nonpoint source water pollution are basically limited to those identified in the "Discharge Prohibitions" portion of this summary.

- Michigan also has a tax incentive program for commercial forests.²⁷ It requires forest management plans to be prepared by a registered forester or natural resources professional, and requires compliance with such plan to receive the favorable tax benefits. This program is considered an enforceable mechanism because violation of the plan does not simply lead to loss of tax benefits, as in many other states, but is also a misdemeanor (or felony, depending upon the value of removed forest products).²⁸

- Michigan's law relating to sand dune protection and management has some relevance to forest cover.²⁹ The Department of Environmental Quality notifies local governments that have critical dune areas, and local governments adopt zoning ordinances with approval by the department, or the department regulates directly under a model zoning plan.³⁰ Permitting is carried on by the local government or the department.³¹ The local zoning ordinance must cover at least lands within 250 feet of critical dune area if essential to the dune area; direct departmental regulation is limited to the 250 feet (unless the local government authorizes an extension).³² The ordinance

must assure that removal of trees corresponds to instructions or plans of the local soil conservation district.³³ In addition, zoning ordinances may not allow silvicultural practices "that are likely to increase erosion, decrease stability, or are more extensive than required to implement a use for which a permit is requested."³⁴

- Michigan's Inland Lakes and Streams law (discussed below under "Development and Other Earth-Disturbing Activities") has some bearing on such forestry activities as construction of stream crossings.

Agriculture

- The Department of Agriculture is required to investigate "all complaints involving a farm or farm operation, including, but not limited to, complaints involving the use of manure and other nutrients, agricultural waste products,...surface- or groundwater pollution..." If the department finds that the operation is using generally accepted agricultural and management practices, then it notifies the farm and the complainant of its finding. If the department finds that "the source or potential sources of the problem [is] caused by the use of other than generally accepted agricultural and management practices," the department must "advise" the farm operation to resolve or abate the problem and to conform to such practices.³⁵ As noted above, conformance to such practices is necessary if a farming operation is to enjoy the protection from actions to abate a nuisance. There is also a memorandum of understanding between the Department of Agriculture and the Department of Environmental Quality that provides that if there is a discharge to surface water, the DEQ will address the complaint and can take enforcement action if needed under the Natural Resources and Environmental Protection Act (as described above under "Discharge Limitations").

- The soil conservation district law³⁶ empowers districts to act as governmental subdivisions, but does not give them broad powers (apart from making rules consistent with their other responsibilities).³⁷ However, conservation districts may act as the enforcing agencies for a county under agreement under the soil erosion and sedimentation control program.³⁸ Some agricultural practices -- but not "plowing, tilling, or harvesting" of crops³⁹ -- fall within the scope of Michigan's Soil Erosion and Sedimentation Control program, discussed below under Built Environment. If a person engaged in agricultural practices enters into an agreement with the appropriate soil conservation district to pursue agricultural practices consistent with the rules, then such person is not subject to site plans, approvals, or permit requirements under the law, but only to the enforcement provisions.⁴⁰

- Michigan law provides for pesticide registration, groundwater protection fees and state management plans to protect groundwater. The law also provides for dealer licensing and applicator certifications including training requirements.⁴¹ The law provides for action by the government where there is confirmed contamination of groundwater, including requiring the person whose "action or negligence" was "potentially responsible" to develop and submit an activity plan for approval and to implement it.⁴² Also the state may issue an order if an applicator is using a pesticide in an unsafe or inadequate manner or a manner inconsistent with its labeling.⁴³ Enforcement is via registration and certificate actions, orders, administrative fines of up

to \$1,000, civil fines of up to \$5,000, injunctions, and misdemeanor prosecutions for knowing violations.⁴⁴

Development and Other Earth-Disturbing Activities

Apart from any programs for the control of urban stormwater under the federal Clean Water Act or that may be authorized by general land use regulation such as zoning, state law provides the following authorities relevant to nonpoint source discharges.

- The Soil Erosion and Sediment Control Act⁴⁵ provides for some enforceable mechanisms directed at erosion from a variety of activities. The Department of Agriculture must, with assistance of soil conservation districts, prepare and submit to DEQ for its approval a "unified statewide soil erosion and sedimentation control program" identifying land uses and controls, including agricultural practices (other than plowing, tilling, and harvesting).⁴⁶ DEQ provides information on effects of sediment on water quality, location of degraded or at risk waters, and water quality standards to be included in the program to protect designated uses. DEQ then adopts rules for the program.⁴⁷ Counties administer the rules, but cities, villages or charter townships may, by ordinance, provide for their own corresponding controls.⁴⁸ State, local, or county *agencies* may also apply to DEQ for designation as an authorized public agency by submitting the erosion and sedimentation control procedures used for all land uses normally undertaken by the agency; if approved, authority is delegated. This means that such agencies may self-regulate and may not need permits (e.g. DOT, county road commissions, etc.).⁴⁹ "A person shall not maintain or undertake a land use or earth change governed by this part or the rules or governed by an applicable local ordinance, except in accordance with this part and the rules or with the applicable local ordinance and pursuant to a permit approved by the appropriate county or local enforcing agency."⁵⁰ An owner of land on which an earth change has been made that may result in or contribute to soil erosion or sedimentation of waters must implement and maintain control measures that will "effectively reduce" such erosion or sedimentation.⁵¹ Subdividers must, with filing of the subdivision plat, attach a statement of compliance, and certificate of permitting in accordance with this law or the applicable local ordinance.⁵² And no building permit may be issued for construction involving disturbance of an acre or more, or within 500 feet of a lake or stream, until there is proof of compliance.⁵³ The Soil Erosion and Sediment Control Act does not apply to logging, mining, nor to plowing, tilling, or harvesting of crops.⁵⁴ Enforcement includes administrative notices and orders, injunctions, misdemeanor prosecutions, civil fines of up to \$500, and cost-recovery if the agency needs to enter on the land and construct and maintain the necessary measures.⁵⁵

- Other laws dealing with riparian and littoral lands also have some potential bearing on nonpoint source water pollution and controls. DEQ has jurisdiction over "alterations of natural or present watercourses of all rivers and streams in the state to assure that the channels and the portions of the floodplains that are the floodways are not inhabited and are kept free and clear of interference or obstruction that will cause any undue restriction of the capacity of the floodway."⁵⁶ "A person shall not occupy or permit the occupation of land for residential, commercial, or industrial purposes or fill or grade or permit the filling or grading for a purpose other than agricultural, of land in

a floodplain, stream bed, or channel of a stream...or undertake or engage in an activity on or with respect to land that is determined by the department to interfere harmfully with the discharge or stage characteristics of a stream" without a permit.⁵⁷ DEQ makes rules and issues orders for the prevention of harmful interference with the discharge and stage characteristics of streams.⁵⁸ Enforcement may include prosecution for misdemeanor with a civil fine of up to \$500, or up to \$2,500 for more serious violations.⁵⁹

- Michigan law also provides protection for inland lakes and streams.⁶⁰ The law requires a permit for dredge or fill, for structures therein, or for connecting a ditch or other channel with a lake or stream.⁶¹ The permit is issued if the department finds that the structure or project "will not adversely affect the public trust or riparian rights....the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state...A permit shall specify that a project completed in accordance with this part shall not cause unlawful pollution as defined by part 31."⁶² Enforcement is by civil action for compliance and civil fine of up to \$5,000 per day, or a misdemeanor prosecution with a fine of up to \$10,000 per day for more significant violations.⁶³

- Other laws protect shorelands and sand dune areas,⁶⁴ as well as littoral and riparian wetlands and certain isolated wetlands.⁶⁵ These laws provide some basis for local nonpoint source controls, but a number exempt agricultural uses. Designated state natural rivers also are entitled to protection, including local zoning and subdivision controls over activities on adjacent lands, or DEQ controls absent such local action.⁶⁶

Endnotes

¹ Mich. Comp. Laws Ann. § 324.101 et seq. (NREPA).

² Mich. Comp. Laws Ann. § 324.103.

³ Mich. Comp. Laws Ann. § 324.3101 et seq. Compare "Article II, Chapter 2- Nonpoint Source Pollution Control," § 324.8301 et seq. The statutory compilers have also reserved Part 81 for a future "General Nonpoint Source Pollution Control" program.

⁴ Mich. Comp. Laws Ann. § 324.3109(1).

⁵ Mich. Comp. Laws Ann. § 324.3106.

⁶ Mich. Comp. Laws Ann. § 324.3112; Mich. Rules 323.2106(1) (point source dischargers required to obtain permit).

⁷ Mich. Rules 323.2102(n) (defining "discharge" to include "indirect" discharges into any "waters of the state or upon the ground"); see Rules 323.2106(2),(3) (not specifically referencing "point sources").

⁸ Mich. Comp. Laws Ann. §§ 324.1601, 324.3115.

⁹ Mich. Comp. Laws Ann. § 324.3112(2).

¹⁰ Mich. Comp. Law Ann. § 324.3115.

¹¹ Mich. Comp. Laws Ann. § 324.1701-.1705.

¹² Mich. Comp. Laws Ann. § 324.3109(4).

¹³ Mich. Comp. Laws Ann. § 286.473.

¹⁴ Mich. Comp. Laws Ann. § 324.8902.

15. Mich. Comp. Laws Ann. § 324.8901.
16. Mich. Comp. Laws Ann. §§ 324.8905a, 324.8905b.
17. Mich. Comp. Laws Ann. § 324.47903.
18. Mich. Comp. Laws Ann. § 324.47904.
19. Mich. Comp. Laws Ann. §§ 324.503, 324.1601.
20. Mich. Comp. Laws Ann. § 324.48703.
21. Mich. Comp. Laws Ann. §§ 324.50108, 324.50124.
22. Mich. Comp. Laws Ann. § 324.50135.
23. Mich. Comp. Laws Ann. § 324.50140.
24. Mich. Comp. Laws Ann. § 324.50141.
25. Mich. Comp. Laws Ann. § 324.50142.
26. Mich. Comp. Laws Ann. § 314.50143.
27. Mich. Comp. Laws Ann. § 324.51101 et seq.
28. Mich. Comp. Laws Ann. § 324.51120.
29. Mich. Comp. Laws Ann. § 324.35301 et seq
30. Mich. Comp. Laws Ann. § 324.35303.
31. Mich. Comp. Laws Ann. § 324.35304.
32. Mich. Comp. Laws Ann. § 324.35312.
33. Mich. Comp. Laws Ann. § 324.35313.
34. Mich. Comp. Laws Ann. § 324.35316.
35. Mich. Comp. Laws Ann. § 286.473a.
36. Mich. Comp. Laws Ann. § 324.9301 et seq.
37. Mich. Comp. Laws Ann. § 324.9308(j).
38. Mich. Comp. Laws Ann. § 324.9308(l).
39. Mich. Comp. Laws Ann. § 324.9101(1).
40. Mich. Comp. Laws Ann. § 324.9109.
41. Mich. Comp. Laws Ann. §§ 324.8301-324.8315.
42. Mich. Comp. Laws Ann. § 324.8323.
43. Mich. Comp. Laws Ann. § 324.8327.
44. Mich. Comp. Laws Ann. §§ 324.8309-.8312; 324.8329-.8333. Also see Parts 85, 87, 111, 115, 117, and 201 of the Act.
45. Mich. Comp. Laws Ann. § 324.9101 et seq.
46. Mich. Comp. Laws Ann. § 324.9103.
47. Mich. Comp. Laws Ann. § 324.9104.
48. Mich. Comp. Laws Ann. §§ 324.9105, .9106.
49. Mich. Comp. Laws Ann. § 324.9110.
50. Mich. Comp. Laws Ann. § 324.9112.
51. Mich. Comp. Laws Ann. § 324.9116.
52. Mich. Comp. Laws Ann. §324.9111.
53. Mich. Rule 323.1711.
54. Mich. Comp. Laws Ann. § 324.9115.
55. Mich. Comp. Law Ann. §§ 324.9107 - 324.9121. Enforcement mechanisms are also available under Part 31 of the NREPA (described above under Discharge Limitations) and under Permit-By-Rule provisions § 323.2190.
56. Mich. Comp. Laws Ann. § 324.3104.
57. Mich. Comp. Laws Ann. § 324.3108.
58. Mich. Comp. Laws Ann. § 324.3107.
59. Mich. Comp. Laws Ann. §§ 324.3115.
60. Mich. Comp. Laws Ann. § 324.30101 et seq.
61. Mich. Comp. Laws Ann. § 324.30102.
62. Mich. Comp. Laws Ann. § 324.30106.
63. Mich. Comp. Laws Ann. §§ 324.30112

⁶⁴ Mich. Comp. Laws Ann. §§ 324.32301 et seq., 324.35301 et seq.

⁶⁵ Mich. Comp. Laws Ann. § 324.30301 et seq.

⁶⁶ Mich. Comp. Laws Ann. § 324.30501 et seq.