

From Michigan to Minnesota: Water Pollution is Under the Microscope

By Jazz A. Hampton



Water pollution cascaded to the forefront of media coverage in 2014, when the Flint, Michigan, water crisis garnered national news coverage. In Minnesota, a recent case has also addressed pollution of local water. At the end of last month, 3M Co.

settled a lawsuit with Minnesota's Attorney General Lori Swanson for \$850 million, putting an end to eight years of litigation over a chemical that was allegedly released into the state's water. The original complaint, filed in December 2010, provides a roadmap for how water pollution cases may be initiated in the state of Minnesota.

Attorney General's Power

Chapter 115B of the Minnesota statutes, is also known as the Minnesota Environmental Response and Liability Act (MERLA). Under MERLA, the State of Minnesota is the trustee of the air, water and wildlife of the state. Minn. Stat. § 115B.17, subd. 7. Further, an action pursuant to § 1158.04 for damages with respect to air, water or wildlife may be commenced by the attorney general in the name of the State of Minnesota as trustee for the state's natural resources. *Id.*

Important Statutes, Laws & Agencies

If a company produces waste that needs to be disposed, the recent 3M case highlights just a few of the legal considerations

for proper disposal. Minn. Rule 7050.0210, subp. 2, provides:

No sewage, industrial waste, or other wastes shall be discharged from either point or nonpoint sources into any waters of the state so as to cause any nuisance conditions, such as the presence of significant amounts of floating solids, scum, visible oil film, excessive suspended solids, material discoloration, obnoxious odors, gas ebullition, deleterious sludge deposits, undesirable slimes or fungus growths, aquatic habitat degradation, excessive growths of aquatic plants, or other offensive or harmful effects.

Similarly, subp. 13 of the same rule states:

No sewage, industrial waste, or other wastes shall be discharged from either a point or a nonpoint source into the waters of the state in such quantity or in such manner alone or in combination with other substances as to cause pollution as defined by law.

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Finally, Minn Rule 7060.0600, subp. 2, provides that:

No sewage, industrial waste, other waste, or other pollutants shall be allowed to be discharged to the unsaturated zone or deposited in such place, manner, or quantity that the effluent or residue therefrom, upon reaching the water table, may actually or potentially preclude or limit the use of the underground waters as a potable water supply, nor shall any such discharge or deposit be allowed which may pollute the underground waters.

Based upon *Minnesota v. 3M*, discharge of waste disposal of waste, or wastewater can sufficiently cause nuisance conditions and other offensive and harmful effects on state water within the meaning of Minn. Rules 7050.0210, subp. 2 and 7053.0205, subp. 2.

The Minnesota Department of Health (MDH) establishes health-based standards for human consumption chemicals in drinking waters. Under Minnesota law, a health risk limit (HRL) is “... a concentration of a substance or chemical adopted by rule of the commissioner of health that is a potential drinking water contaminant because of a systemic or carcinogenic toxicological result from consumption.” Minn. Stat. § 103H.005, subd. 3. If there is currently a HRL for a specific chemical that a Minnesota company intends to dispose of, it is imperative that it is done in accordance with limits established by the MDH. Beyond the MDH, the state may also look to the Minnesota Pollution Control Agency (MPCA) for guidance on water and soil contamination. The MPCA issues generic health-based criteria for soil that are based

on a standard exposure scenario for contaminated sites. In the past, the MPCA has issued soil reference values for evaluating the risks to public health from concentrations of chemicals in both residential and industrial soils.

Beyond human consumption, fish advisories may also be a red flag for the State. The MPCA can identify bodies of water as “impaired” under Section 303(d) of the Federal Clean Water Act, 33 U.S.C. § 1313(d). According to Minnesota Rule, a water body is impaired when it “does not meet applicable water quality standards or fully support applicable beneficial uses, due in whole or in part to water pollution from point or nonpoint sources, or any combination thereof.” Minn. Rule 7050.0150, subp. 4.O. If a Minnesota company disposes of waste improperly, it may result in a fish advisory from the MPCA and subsequent legal action.

Damages

Damages can be sought based upon statutory and common law grounds. First, they may be sought under Chapter 115B of the Minnesota Statutes, which is known as the Minnesota Environmental Response and Liability Act (MERLA). Under MERLA:

Any person who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes: (1) all reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United States; (2) all rea-

sonable and necessary removal costs incurred by any person; and (3) all damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss. Minn. Stat. § 115B.04, subd. 1.

Damages may also be sought under Sections 115.01 - 115.09 of the Minnesota Statutes, which are known as the Minnesota Water Pollution Control Act (MWPCA). Under Minn. Stat. § 115.071, subd. 3(a)-(b), a company may be required to (1) forfeit and pay to the state a sum which will adequately compensate the state for the reasonable value of cleanup and other expenses directly resulting from unauthorized discharge of pollutants, whether or not accidental; and (2) forfeit and pay to the state an additional sum to constitute just compensation for any loss or destruction to wildlife, fish or other aquatic life and for other actual damages to the state caused by an unauthorized discharge of pollutants.

Beyond these statutory grounds, the state may also seek damages based upon negligence, trespass, common law nuisance and statutory nuisance.

Conclusion

In the wake of Flint, Michigan, and *Minnesota v. 3M*, water pollution is a key issue politically and judicially. Despite settling before the commencement of trial, *Minnesota v. 3M* outlined a roadmap for how these cases may play out in the future. While this type of litigation is highly complex, a great starting point can be the Minnesota Pollution Control Agency and the Minnesota Department of Health, coupled with relevant state and federal regulatory laws.

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