WATER QUALITY LAWS IN NEW MEXICO

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INTRODUCTION

No matter how well the water rights laws and regulations function, no matter how much water a party is allocated for beneficial use, and regardless of whether interstate export of water is ultimately required by the courts, if the water is polluted, it cannot be used. The importance of water quality in New Mexico has taken on increasing proportions as the demand for usable water has grown and as the sources of pollution have increased. Although water pollution has been recognized for hundreds of years as undesirable and wrong, until 1963 only the common law was available as a remedy for parties aggrieved by water pollution. In 1963, the state adopted a public nuisance statute that specifically outlawed water pollution. The public nuisance statute, however, provides little guidance on what pollution is or how one can determine when water pollution exists. In the 21 years since the adoption of the public nuisance statute, the state of New Mexico has promulgated hundreds of pages of additional laws, regulations, standards, plans and other documents attempting to answer those questions. The new state adoptions include the Water Quality Act and regulations addressing both surface and ground water pollution. In that same period, the federal government has generated thousands of pages of documents aimed at the same purpose.

Some might surmise that what we have is the typical lawyers' conspiracy to keep other lawyers occupied. How often have we heard it said that lawyers complicate simple matters and perpetuate their profession through the promulgation of unnecessary lengthy and confusing regulations? In part this may be true, but in defense of the legal profession, it should be noted that other factors have been instrumental in complicating the process of addressing water pollution. One complicating factor is scientific progress. Not only does science

continuously revise the standards of what is safe and acceptable and what is not, but new chemical compounds are discovered every day, each of which might exist in an infinite number of combinations with existing and other new chemical compounds. Each combination may have a different degree or type of toxicity.

There are also many difficult political or policy questions to resolve. Some water already is so contaminated that it cannot be used. Is it acceptable to allow such water to be further contaminated without control? Other water is found in quantities that may not be sufficient to support a continuing use. Should this water be protected from pollution? Other questions that complicate the matter include: Should water pollution requirements in the arid and semi-arid southwest, where water is scarce, be the same as those where water is relatively plentiful? Should discharges be held responsible for pollution that occurred before pollution laws came into effect? Should some degree of water contamination be tolerated or should a zero discharge goal be set? These policy questions are addressed in the thousands of pages of state and federal documentation. Although the basic approaches for the control of surface and ground water contamination have been established, there are fundamental differences between the New Mexico and the federal policies of water pollution control that remain unresolved.

HISTORICAL WATER POLLUTION CONTROL

The primary rational for protecting water against pollution is that polluted water is not available for use. Under the common law (the principals and rules which were developed by usages, customs, and court decrees dating back to the ancient unwritten law of England [BLACK'S LAW DICTIONARY 345-6, 4th ed., 1968]), it was a nuisance to pollute water. A neighbor could sue another neighbor for compensation if he could prove to the court that his well was being fouled or his stream polluted by the actions of the other. Also, under the common law, public officials could sue those creating water pollution public nuisances, which affected the public at large. Common law remedies include monetary compensation and

court ordered injunctions. These remedies are still available in New Mexico. The common law of nuisance provides an adequate means of relief for a party aggrieved by a clear and definite case of polluted water. However, scientific progress and increased water demands have created the demand for legislative action.

STATUTORY PUBLIC NUISANCE

The first attempt of the New Mexico Legislature to define water pollution was in 1963. That definition states: "Polluting water consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use" (Section 30-8-2 N.M.S.A. 1978). The Legislature made polluting water punishable by up to one year imprisonment and a $1,000 fine. It also made water pollution subject to a civil action in state district court for abatement. Any private citizen or public official could take such an action. While the public nuisance statute served to clarify the criminal sanctions and civil remedies available for polluting water, the definition of water pollution did not provide sufficient guidance to a judge to assist him in complex technical matters. For example, there are no standards in the definition to determine what is offensive or dangerous for human or animal consumption or use. Scientists and doctors could argue, and have argued for decades, about appropriate or safe levels of contamination. While the properties of certain contaminants are well known and understood, those are in a small minority. Neither the time nor the resources have been devoted to epidemiological and laboratory studies on the effects of all of the potential water contaminants and the various combinations in which they might be found. Something more than the public nuisance statute was needed.

THE EXPLOSION OF WATER QUALITY LAWS

Following adoption of the Public Nuisance Statute in 1963, New Mexico adopted the New Mexico Quality Act in 1967 (Section 74-6-1 at sec.,

N.M.S.A. 1978). The act, for the first time in New Mexico, established a framework for a comprehensive and detailed scheme for the prevention, abatement and control of water pollution. That act mandates the adoption of water quality standards as a guide to water pollution control (Section 74-6-4 C.N.M.S.A. 1978) and the adoption of regulations to prevent or abate water pollution (Sections 74-6-3 and 4 N.M.S.A. 1978). To adopt the standards and regulations, the Legislature created the Water Quality Control Commission. That commission is constituted of heads of eight state agencies or departments and one member-at-large. The eight agencies include representation of those interests in New Mexico that are concerned with water quality and the expertise that those agencies possess. They include the heads of the Environmental Improvement Division, the State Engineer Office, the New Mexico Department of Game and Fish, the Oil Conservation Division, the State Park and Recreation Division, the New Mexico Deparment of Agriculture, the Soil and Water Conservation Division and the New Mexico Bureau of Mines.

Since the adoption of the Water Quality Act, the commission has adopted standards for every perennial stream in the state, as well as lakes and reservoirs. The commission also has adopted formal planning documents, which outline future research and pollution control strategies throughout the state. Other commission enactments include regulations prohibiting surface water and ground water pollution and regulations establishing criteria for certification of sewage treatment plant operators.

During the same period that New Mexico's water pollution requirements expanded, the federal government also adopted several water pollution acts. They are: the Water Quality Act of 1965; the Federal Water Pollution Control Act of 1972; the 1977 amendments to that act which make up the current Federal Clean Water Act (The Clean Water Act addresses pollution of surface waters.); the Safe Drinking Water Act (adopted 1974, amended through 1980); the Resource Conservation and Recovery Act (RCRA) (adopted 1976, amended through 1983); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund Law, amended through 1983); as well as other federal laws that address ground water

pollution control. Additionally, each of the major federal legislative enactments has been the springboard for a new body of federal regulations.

PROTECTION OF SURFACE WATER IN NEW MEXICO

The Water Quality Control Commission in August 1973 first adopted its standards for interstate and intrastate streams in New Mexico. The focus on those standards is protection of the use of surface waters. The commission established designated uses for stream segments, reservoirs and lakes. Those designated uses include high quality cold water fisheries, warm water fisheries, irrigation, and primary contact recreation (swimming). Each designated use was then assigned allowable contaminant limits. The quality of the water in each stream is mandated by the designated use. For example, a stream designated as a high quality, cold water fishery has more stringent stream quality requirements than one designated as a warm water fishery.

The New Mexico stream standards are enforced through a joint effort by the federal Environmental Protection Agency (EPA) and the state. Under the Federal Clean Water Act, all discharges to surface waters in the United States must have a permit from the EPA. Under the federal system, New Mexico is allowed to certify requirements for inclusion in those federal permits to ensure that the Water Quality Control Commissions' stream standards cannot be exceeded. The federal government is mandated by law to include the state certified requirements in the permits and then to enforce them. Surface water pollution was the first type of water pollution addressed by both federal and state regulatory agencies throughout the country. Once the regulatory scheme was in place, the emphasis changed to ground water quality protection.

NEW MEXICO GROUND WATER QUALITY REGULATIONS

New Mexico was a leader in the development of regulations to protect ground water quality. Following an extensive public hearing in June 1976, review of numerous public comments, and extensive deliberations,

the Water Quality Control Commission adopted the nation's first comprehensive regulations designed to protect ground water quality on January 11, 1977, nearly 10 years after the state law first authorized such regulations.

Although those regulations address many technical and procedural points, in concept they are quite simple. The commission first established standards for some of the most common water contaminants. The regulations require anyone who discharges a potential ground water contaminant onto or below the surface of the ground to notify the director of the Environmental Improvement Division, or in some cases, the director of the Oil Conservation Division. The appropriate director may then request that a discharge plan be submitted. The discharge plan is a permit application. The basis for approval of a discharge plan is a demonstration by the discharger that the discharge will not cause any of the commission's ground water standards to be exceeded at any place in the present or reasonably foreseeable future use. In its ground water regulations, the Water Quality Control Commission has again focused on the useability of water. The commission considered the importance of water use to both the discharger and to the potential future user. A balance was struck. A discharger is allowed to use water and discharge some contaminants so long as the discharge does not adversely impact future use by others. The regulations provide a large degree of flexibility for dischargers to demonstrate compliance while, at the same time, they empower the director to require information and future monitoring from the discharge to ensure that future users will not be harmed by contaminant discharges. The New Mexico ground water regulations have been upheld by the State Court of Appeals and the State Supreme Court and have remained fundamentally unchanged since 1977.

Two major additions have been made to the ground water regulations since their original adoption. The first is a new definition of toxic pollutants. This definition lists approximately 77 chemical compounds and defines them as toxic when they exist in concentrations . . .

> which upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food

> chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit. As used in this definition injuries to health include: death, histeopathologic change, clinical symptoms of disease, behavior abnormalities, genetic mutations, physiological malfunctions or physical deformations in such organisms or their offspring. In order to be considered a toxic pollutant a contaminant must be one of the potential toxic pollutants listed and be in a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above. Any water contaminant or combination of water contaminants in the list below creating a lifetime risk of more than one cancer per one hundred thousand exposed persons is a toxic pollutant (WQCC regs. 1-101 UU).

Some critics of the toxic pollutant definition have argued that is is too complicated or confusing to implement. While there is little question that numerical standards are preferable, pollution control measures such as the toxic pollutant definition will continue to exist in our laws and regulations because of the insurmountable task of determining safe and acceptable concentration levels for each and every potential water contaminant. For this reason among others, the toxic pollutant definition was upheld by the State Appellate Courts in 1982.

The second major development since the adoption of the Water Quality Control Commissions Ground Water Regulations is the addition of Part 5 of the regulations. Part 5 is the first of a trend in the state's regulatory process. Part 5 was required to be adopted by the EPA and federal laws in order for the state to maintain certain federal grant monies and the authority to carry out a federal program, in this case the safe drinking water program. Part 5 constitutes 30 pages in the Water Quality Control Commission regulations. It focuses on a very small group of discharges and injection wells. Also, Part 5 mandates, in detail, specific requirements for the installation and use of those wells. It is approximately twice as long as the entire body of the original ground water regulations, which adresses almost all sources of potential ground water pollution. It is questionable whether or not Part 5 adds any additional protection to the ground water of New Mexico. However, the federal government's insistence on uniformity throughout the country and

the carrot and stick effect of federal monies affecting state regulations were responsible for the adoption of Part 5 of the Water Quality Control Commissions regulations.

STATE-FEDERAL POLICY CONFLICTS

Specific provisions in the Water Quality Act ensure that overzealous control of water pollution cannot impact adversely on the ability to use water. Limitations in the New Mexico Water Quality Act include:

> The Water Quality Act does not grant to the Commission or any other entity the power to take away or modify property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights (Section 74-6-12 A.N.M.S.A. 1978).

and:

> In the adoption of regulations and water quality standards and in any action for enforcement of the Water Quality Act and regulations adopted thereunder reasonable degradation of water quality resulting from beneficial use shall be allowed (emphasis added) (Section 74-6-12 F.N.M.S.A. 1978).

The Water Quality Control Commission has followed these requirements by focusing its regulations on the protection of the use of water. The term "reasonable degradation" has been interpreted by the state as degradation that does not impair future beneficial use of water. In other words, in New Mexico some water quality degradation is permitted so long as it is not harmful to future users. For example, if a water quality standard for a stream is 25 mg/l for chloride and the existing concentration is 1 mg/l, under state law, a discharger will be allowed to discharge chloride to that stream so long as the concentration in the stream does not exceed 25 mg/l. This approach allows beneficial use of water by adequately protecting future users without unduly restricting the activities of dischargers. In a state such as New Mexico where water is often the limiting factor in growth, it makes sense to allow maximum beneficial use of water.

Unlike New Mexico's water pollution control policy, the federal approach does not focus on beneficial use. Rather, beginning in 1972

with the adoption of the Federal Water Pollution Control Act, the federal approach has focused on technology based pollution control requirements. Through the 1972 Federal Water Pollution Control Act and its 1977 Clean Water Act amendments, the federal government has addressed allowable discharges to surface waters on an industry by industry approach. EPA regulations and guidelines establish specific levels of control that must be achieved by each category of discharger. Also, each category is divided into existing and new dischargers, with the new dischargers held to an even higher standard of control. Simply stated, the federal approach is to require every discharger to maximize pollution control, regardless of the necessity to protect water for future use. If, for example, the EPA guidelines allowed no discharge of a contaminant, the discharger would be required to comply, even if some discharge of that contaminant could occur without resulting in harm to future uses or in any violation of stream standards.

The difference in the state "reasonable degradation" requirement and the federal "technology based" approach is one of the main reasons New Mexico did not elect to accept delegation of the federal surface water discharge permit program. Since 1972, the EPA has administered that permit program in New Mexico. The state refused to change its reasonable degradation policy and therefore could not adopt EPA's rigid technology based requirements.

The same state-federal policy conflict exists between the federal hazardous waste RCRA regulations and the New Mexico ground water regulations. While the ground water regulations allow reasonable degradation of ground water (within the limits of the standards) resulting from beneficial use, the RCRA regulations specify technology for each case. The ground water regulations would allow water containing contaminants to be discharged if discharge would recharge an aquifer without adverse impact on the health or safety of future users. The same discharge might be required to be placed in impermeable ponds and evaporated under the RCRA regulations. While evaporation of such water may be an acceptable procedure in areas where water is plentiful, it could be considered a waste of usable resources in areas like New Mexico

where water is scarce. The RCRA approach to control of ground water pollution apparently has failed to take into account the special needs in water short areas. Until the federal approach is revised or the state policy changes, the conflict will remain.

CONCLUSION

The field of water pollution control law has expanded at an incredible rate over the past 20 years. While progress has been made, questions remain unanswered and some conflicts remain unresolved. The next 20 years of change in water pollution control laws will be crucial to the future of our most important resource--water.