



Summer 1979

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David N. Whitham

Recommended Citation

David N. Whitham, *New Mexico Water Pollution Regulations and Standards Upheld*, 19 Nat. Resources J. 693 (1979).

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NEW MEXICO WATER POLLUTION REGULATIONS AND STANDARDS UPHELD

Bokum Resources Corp., et. al. v. New Mexico Water Quality Control Commission, no. 2869 (Ct. App. 1978). The New Mexico Court of Appeals upholds New Mexico's regulation of pollution in state stream systems caused by uranium mining activities.

BACKGROUND

The New Mexico Water Quality Act¹ is New Mexico's attempt at protecting the stream systems from pollution by regulating discharges into state waters. The Act created the New Mexico Water Quality Control Commission² and authorized its adoption of regulations and standards for the control of pollution caused from discharges.³ The resulting regulations require every person whose discharge affects groundwater to submit plans to the New Mexico Environmental Protection Division (EID) demonstrating that the discharge will not result in concentrations of pollution in excess of the Commission's water quality standards.⁴ Facilities in operation before June 18, 1977 do not have to submit plans unless they are specifically requested to do so by EID;⁵ facilities in operation before June 18, 1977 which thereafter modify their operations must submit plans as if they were a new operation.⁶

The Act defines water quality in terms of use and the Commission's regulations recognize three uses: 1) human health; 2) domestic water supply; and 3) irrigation.⁷ Water is allowed to be polluted up to but not exceeding standards which protect against the impairment of a recognized use.⁸ The facility bears the burden of showing a discharge will not pollute a stream in excess of commission-set

1. Water Quality Act, N.M. STAT. ANN. § 74-6-1 to 74-6-13 (1978).

2. Hereinafter cited as Commission.

3. N.M. STAT. ANN. § 74-6-4 (1978).

4. See Comment, *Ground and Surface Water in New Mexico: Are They Protected Against Uranium Mining and Milling?* 18 Nat. Res. J. 941, 953 (1978). (Hereinafter cited as *Ground and Surface Water in New Mexico*).

5. See *Id.*

6. See *Id.* at n. 68.

7. New Mexico Water Quality Control Commission Regulations § 3-103 (1977). (Hereinafter cited as regulations or Regs.)

8. *Ground and Surface Water in New Mexico*, at 954.

standards.⁹ The Act also allows a timely appeal of a Commission regulation directly to the New Mexico Court of Appeals by anyone who is or may be affected by a regulation,¹⁰ but the court may review regulations only, not standards.¹¹ "Regulations" are defined as the rules of procedure by which a given course of conduct or specific acts are directed or controlled according to certain standards.¹² "Standards," on the other hand, are the criteria for judging whether given levels of performance have been achieved.¹³ On appeal the Court may set aside regulations which are arbitrary, capricious or an abuse of discretion, not supported by substantial evidence in the record of the hearing, or otherwise not in accordance with law.¹⁴

Nine uranium companies challenged the Commission regulations of discharges into the state stream systems in *Bokum Resources, et. al. v. New Mexico Water Quality Control Commission*,¹⁵ alleging five major points of error. They first argued that in promulgating the regulations, the Commission had failed to explain adequately the reasons for adopting the regulations. Failure to support a decision with adequate explanation in the record would render the regulations arbitrary and capricious and therefore in violation of the Commission's mandate under the Act. Next, the regulations were challenged as being in excess of the Commission's authority. Another challenge was that the definitions of "toxic pollutants" and "hazard to public health" as used in the regulations were unconstitutionally vague. Similarly, the standards regulating selenium and total dissolved solids (TDS) were challenged as being arbitrary. Finally, the requirement that the companies treat water already polluted in order to bring the discharge within acceptable limits was challenged as being violative of due process.

SUFFICIENCY OF THE RECORD

In challenging the sufficiency of the record supporting the Commission regulations, the uranium companies argued that *City of*

9. *Id.*

10. N.M. STAT. ANN. §74-6-7(a) (1978).

11. *Id.*

12. *Bokum Resources Corp., et. al. v. N.M. Water Quality Control Comm'n No. 2869 at 5* (Ct. App. Dec. 19, 1978). (Hereinafter cited as *Bokum.*)

13. *Id.*

14. N.M. STAT. ANN. §74-6-7(c) (1978).

15. The nine companies are: *Bokum Resources Corp., Continental Oil Corp., Gulf Oil Corp., Kerr-McGee Nuclear Corp., Phillips Petroleum Corp., Ranchers Development and Exploration Corp., United Nuclear Corporation, United Nuclear Homestakes Partners, and Union Carbide Corporation.*

Roswell v. New Mexico Water Quality Control Commission required that the record made at the public hearing show the reasons underlying the Commission's adoption of regulations.¹⁶ In *City of Roswell* there was no showing of what testimony or exhibits the Commission relied on in promulgating its regulations. The *Bokum* Court, however, found there was sufficient evidence of the Commission's reasoning behind the regulations. Eight very specific reasons were noted in the record of the hearing upon which the Commission had justified its regulations.¹⁷ In addition there was a complete record made of the public hearings during which the regulations were presented in detail and the companies had opportunity to cross-examine and to rebut any presentations. Further, the companies were allowed to submit additional written statements after the close of the public hearings. The *Bokum* court noted the difficulty in drafting these regulations caused by the need to interpret legislative policy and the technical nature of the problem, plus the fact that the evidence was couched in terms of probabilities. In light of these difficulties the Commission's reasoning behind the regulations was sufficient.

The companies further attacked the record made of the hearings on the basis that it should conform to the statutory requirements for an appeal from a district court.¹⁸ But, the court held that an administrative appeal was distinct from a district court appeal and need only be made on the record of the hearing.¹⁹ Further, what con-

16. *City of Roswell v. N.M. Water Quality Control Comm'n* 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1972).

17. The eight reasons are: (1) Groundwater is an important resource of the State of New Mexico and protection of groundwater for present and future use is vital to the welfare of the citizens of this state. (2) There is a need for groundwater standards and regulations because groundwater is a limited resource, recharge of the groundwater resource is slow and there have been, and are presently, problems with groundwater pollution in the State of New Mexico. (3) The standards and regulations will reasonably protect human health, animal and plant life, property, public welfare, the use of property and present and future uses of groundwater and prevent unreasonable degradation of groundwater in New Mexico. (4) The regulations provide the State of New Mexico a reasonable mechanism with which to address groundwater contamination and pollution and to prevent or abate water pollution. (5) The commission has, in adopting these regulations, given the weight it deems appropriate to all facts and circumstances including those specifically set forth in N.M. STAT. ANN. § 74-6-4(d) (1978). (6) The regulations allow reasonable degradation of water quality resulting from beneficial use. (7) The regulations contain sufficient flexibility to allow for and accommodate, in a manner consistent with the New Mexico Water Quality Act and regulations adopted thereunder, any reasonably foreseeable situation which might fall under the Commission's jurisdiction. (8) The provisions placing the burden on the discharger to prove that his discharge will not impair any other use of the groundwater are proper and desirable because they prevent an excessive administrative burden on the state and are consistent with basic principles of law and fairness. *Bokum supra* at 6-7.

18. N.M. STAT. ANN. Rule 7(a) App. P. (Civ.).

19. N.M. STAT. ANN. § 74-6-7(a) (1978).

stitutes the record of the hearing is within the sound discretion of the Commission and there was no abuse of discretion in this case.

STATUTORY AUTHORITY OF THE COMMISSION

In the second general attack upon the regulations, the companies made several arguments alleging that they were in excess of the Commission's authority under the Act. The companies first alleged that the regulations made no exemption for discharged water which does not leave the property on which the pollution takes place and does not combine with any other state waters. The Act does, in fact, prohibit the Commission's adoption of any regulations relating to water which is confined entirely within the property where the pollution occurs and which does not combine with other state waters.²⁰ The court found, however, that the Commission was not required to include this limitation in its regulations although the jurisdiction of the Commission did not extend to exempted waters. While it may have been a better practice to include the exemption in the regulations, the regulations were not defective for having failed to do so.

The regulations which set out the proper basis for refusing to approve a discharge plan were also challenged as being in excess of the Commission's authority under the Act. These regulations require disapproval of plans where: 1) the facility has not provided a site and method of flow sampling and measurement of the discharge into a stream; 2) the discharge will cause a stream standard to be violated; or 3) the discharge will result in toxic pollutants being present in the groundwater.²¹ The court characterized this challenge as frivolous because the Act clearly mandates that the Commission prevent and abate water pollution²² and the regulations were consistent with this purpose. Further, the Act grants authority to the Commission to require permits "... for the discharge of any water contaminate either directly or indirectly into the water."²³ And the Act grants authority to the Commission to require "... plans, specifications, and other relevant information which it deems necessary."²⁴ The Commission, being specifically mandated to control water pollution, can require the presentation of necessary information regarding the application for a permit to discharge.

The companies also argued that the Act placed the burden of

20. N.M. STAT. ANN. § 74-6-12(c) (1978).

21. Regs. § 3-109(g) (1977).

22. N.M. STAT. ANN. § 74-6-4(b)(c)(d) (1978).

23. N.M. STAT. ANN. § 64-6-5(a) (1978).

24. N.M. STAT. ANN. § 74-6-5(b) (1978).

proof that stream standards would not be violated upon the Commission and that the regulations improperly shifted this burden to the permit applicant. The court relied upon *Public Service Co. of New Mexico v. New Mexico Environmental Improvement Board*²⁵ in holding that authority vested in an administrative agency should be construed so as to permit the fullest accomplishment of the legislative purpose behind the creation of the agency. The court therefore found that the regulations requiring a permit applicant to provide the information necessary to evaluate the application were consistent with the legislative purpose of abating or preventing water pollution.

The regulations were next attacked for not allowing reasonable degradation of the water quality resulting from beneficial use as required by the Act.²⁶ The court found several provisions in the regulations, however, which allow for the reasonable degradation of water resulting from beneficial use. Groundwater pollution found to be in conformance with the standards may be increased up to the limits of the standards.²⁷ And, discharges which will not affect naturally occurring TDS already in excess of a stream standard are allowed.²⁸ The regulations further allow a facility to discharge where it is demonstrated that the discharge will not violate a stream standard or will not result in toxic pollutants in any place of withdrawal of the water for the present or reasonably foreseeable future.²⁹ And, while the discharge of water which violates the standards may be either curtailed or the discharge plans modified, the regulations allow for one exception. The facility may file a petition seeking consideration of a plan which would result in discharges that exceed regulation standards. A variance would be properly granted upon a showing that there is maximum use of technology within the economic capability of the facility, that no reasonable relation exists between economic and social costs and benefits, and that the discharge would pose no hazard to public health and to property.³⁰

The court found the regulations allowed reasonable degradation of water from a beneficial use in excess of the standards upon the

25. *Public Service Co. of N.M. v. N.M. Environmental Improvement Bd.* 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

26. N.M. STAT. ANN. §74-6-12(f) (1978) provides "In the adoption of regulations and water quality standards 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."

27. Regs. §3-101(a)(1) (1977).

28. Regs. §3-109(c)(2) (1977).

29. Regs. §3-109(c)(3) (1977).

30. Regs. §3-109(e)(1) (1977).

granting of a temporary variance provided the facility effects controls within a reasonable period of time. For all of the above reasons, the court found the Act and the Commission standards to be in harmony and together to show a legislative intent not to allow discharges in excess of standards except for temporary degradation when the use is beneficial and there is no hazard to public health and property.

The next challenge was that the regulations controlling the leaching of pollution into state waters were in excess of the Commission's authority under the Act. The companies alleged that the authority of the Commission extended only to control the discharge of water and that leachates were not discharges within the meaning of the Act. But, the court found the Act clearly allowed the Commission to regulate indirect discharges into state water.³¹ The intent of the Act was to include leachates within the jurisdiction of the Commission and the regulations were consistent with that intent. Regulations relating to leachages caused by rainfall, however, were found to be in excess of the authority under the Act to the extent that they regulated leachates from materials not yet disturbed by the mining process. The regulation of leachates from undisturbed geologic formations was, therefore, remanded for further consideration.

VAGUENESS OF REGULATORY DEFINITIONS

The third and fourth general attacks upon the regulations comprised two related challenges: 1) that the definitions of "toxic pollution" and "danger to public health" were unconstitutionally vague; and 2) that the standards of allowable amounts of selenium and TDS were arbitrary. In denying that the definitions of "toxic pollution" and "hazard to public health" were unconstitutionally vague, the court found that the flexibility within the language of the regulations was the result of practical difficulties in forming definitions when the underlying scientific knowledge is uncertain and the risk of irreparable harm is great. The court declined to review the allegation that the standards of selenium and TDS were arbitrary and unsupported by the evidence. This refusal was based upon the fact that the Act did not allow for review of standards. However, the court did note that the evidence in support of the standards seemed to be sufficient.

31. N.M. STAT. ANN. § 74-6-5(a) (1978).

DUE PROCESS

The final challenge to the Commission's regulations alleged that the requirement that a facility control pollution in its discharge to bring it within allowable levels would result in a violation of due process where the levels of pollution vary from stream to stream. Such a regulatory scheme, it was argued, would make the facility responsible for pollution already occurring in the water. And, facilities in different stream systems would be accorded different treatment by the Commission because of the diversity of levels of pollution between the various stream systems. By not allowing credit for the higher levels of pollution already occurring in the stream due process would be violated. The court found that the legislative intent to control water pollution did not violate due process where a facility had elected to use a more heavily polluted stream and its subsequent discharges would violate the stream standards. It is constitutionally permissible to require a water user using water polluted below acceptable levels to treat the discharge when the resulting discharge would exceed allowable levels.

CONCLUSION

With one exception all of the Commission's regulations were upheld. That exception arose from the issue of whether the Commission would assert authority to regulate leachates from as yet undisturbed geologic formations. This was remanded for further Commission consideration. In upholding the Commission's authority to regulate the discharge of pollution into state streams, the uranium companies will thus be required to file plans showing that their discharge into state streams will not violate the Commission's stream standards.

The regulation of pollution in New Mexico streams by setting standards which would protect beneficial uses of the water is consistent with the western states priority allocation of water to persons putting the water to a beneficial use. The uranium companies are quite likely to appeal the decision of the New Mexico Court of Appeals in hopes of mitigating the regulations to some extent. It is unlikely, however, that the regulations will be altered to any significant degree because the protection of water put to a beneficial use is a long established principle in New Mexico.

DAVID N. WHITHAM