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COMMENT

GROUND AND SURFACE WATER IN NEW MEXICO: ARE THEY PROTECTED AGAINST URANIUM MINING AND MILLING?

UNANSWERED QUESTIONS ABOUT THE ENFORCEMENT AND INTERPRETATION OF BOTH STATE AND FEDERAL WATER POLLUTION STATUTES LEAVE AN APPARENT VOID IN THE CONTROL OF THE URANIUM INDUSTRY IN NEW MEXICO.

New Mexico is important to the uranium industry: 49.5% of all domestic uranium is in New Mexico.¹ That supply, located in the "Grants Mineral Belt" has an estimated worth of four billion dollars.² Uranium mining is a lucrative business. In one year United Nuclear's net profits increased 39%, and it plans to do even better. On the basis of mining and milling costs of \$20 per pound it estimates its reserves as of March 31, 1977 at 100 million pounds. If United Nuclear is able to sell the ore at the current price of \$43 a pound, its plan of continued success should be easily realized.³

It is not so clear how important this industry is to New Mexico. Within the "Mineral Belt" are rivers, streams and aquifers on which New Mexico farmers depend for irrigation and watering their livestock. These same aquifers are the major source of water for domestic and industrial users in the region.⁴ The uranium companies' methods of mining, milling and waste disposal affect both the surface and ground waters. While few people contend, as does Henry Zeller

1. Testimony of P. Howard, Rio Grande Chapter of the Sierra Club, Transcript of the Proceedings of the Application of Kerr-McGee Nuclear Corp. for NPDES Permits 59 (November 26, 1974) (hereafter cited as *Kerr-McGee Transcript*).

NPDES is the National Pollution Discharge Elimination System. No pollutant can be discharged into a "navigable body of water" without permission from EPA in the form of an NPDES permit. 33 U.S.C. § 1342 (Supp. 1975).

2. *Fuel Shortages Trigger a New Uranium Rush in N.M.*, Vol. 26, No. 8, Mining Engineering (August 1974) (a publication of the Society of Mining Engineers of the American Institute of Mining, Metallurgical and Petroleum Engineers).

3. "Earnings for 1978 fiscal year rose 48% to \$31,800,000 . . . these outstanding results reflect both higher uranium production and an increase in the average price United Nuclear Corporation received for uranium delivered to customers." UNITED NUCLEAR ANNUAL REPORT (1978).

4. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Water Quality Impacts of Uranium Mining and Milling Activities in the Grants Mineral Belt, New Mexico* (Dallas, TX: U.S. EPA, Region VI, Sept. 1975, EPA doc. no. 906/9-75-902 4). Also personal conversation with Maxine Goad, Water Quality Division, New Mexico Environmental Improvement Division (EID) (August, 1978).

of the Sierra Club, that "water is a possibly more valuable resource than uranium,"⁵ both federal and state legislatures have enacted statutes, the Federal Water Pollution Control Act⁶ and the N.M. Water Quality Act,⁷ intended to balance the need to protect water with the need to produce uranium.⁸

As of July, 1978 the balance has tilted in favor of uranium production. Only one company has a facility which is subject to effective federal control over its operations.⁹ Five companies have succeeded, since 1974, in having federal controls stayed as to them, while they are in adjudicatory hearings challenging the Environmental Protection Agency's (EPA) jurisdiction under the Federal Act.¹⁰ And it is unlikely that many of the New Mexico uranium mines and mills in operation as of June 1977 will be subject to discharge plans required by regulations enacted pursuant to N.M. Water Quality Act. It is even possible that the regulations themselves will be declared inoperative by the N.M. Supreme Court. Nine uranium companies are presently objecting to their legality.¹¹ This comment, then, examines the effectiveness of the FWPCA and New Mexico's regulations in protecting both ground and surface water in the "Grant's Mineral Belt."

GRANTS MINERAL BELT

I. DESCRIPTION OF THE AREA

The "Grant's Mineral Belt" is a thirty mile wide strip extending from a point slightly north of Albuquerque west towards Gallup. Four mining districts predominate: Churchrock which is about 15 miles north of Gallup, Ambrosia Lake about 20 miles north of Milan, Paquate Jackpile about 10 miles north of Laguna and thirty miles

5. *Kerr-McGee Transcript*, *supra* note 1, at 51.

6. Federal Water Pollution Control Act, Act of Oct. 18, 1972, Pub. L. 92-500 §101, 86 Stat. 816, amending 33 U.S.C. §1151 (1970) and codified at 33 U.S.C. §1251 (Supp. 1975) (hereafter cited as *FWPCA* or *The Act*).

7. New Mexico Water Quality Act, N.M. STAT. ANN. §75-39-1 to 12 (Repl. 1968) (hereafter cited as *Water Quality Act* or *state act*).

8. §3-110, N.M. Water Qual. Control Comm'n Regs. (Jan. 1, 1977) (hereinafter *Regs.*) allows the EID to grant a variance for non-health contaminants to a discharger if the EID believes the "discharge plan demonstrates the maximum use of technology within the economic capability of the discharger . . . [or] that there is no reasonable relationship between the economic and social costs and benefits to be obtained." *Id.*

9. Only United Nuclear's Churchrock facility is subject to an effective NPDES permit.

10. 9(a)0 Fed. Reg. § 125.35(d)(2).

11. The companies who have challenged the regulations are: Bokum Resources Corp., Continental Oil Co., Gulf Oil Corp., Kerr-McGee Nuclear Corp., Phillips Petroleum Co., Rancher's Exploration and Development Corp., United Nuclear Corporation, United Nuclear Homestake Partners, and Union Carbide Corporation. They are doing so in a case entitled Bokum Resources, et al. v. New Mexico Water Quality Commission, No. 2869 (Ct. App. field Feb. 17, 1977).

west of Albuquerque, and Crownpoint about 16 miles north of Thoreau. Although groundwater is the principal source of water in the area, supplying the municipalities of both Grants and Gallup,^{1 2} surface water is also important. Both the Puerco River, which is the receiving water of many of the mines in the Churchrock area, as well as the San Mateo Creek and its tributary, the Arroyo del Puerto, which are the receiving waters of the mines and mills in the Ambrosia Lake area, are used for irrigation of range land and for livestock watering.^{1 3} Both are subject to New Mexico's general stream standards.

The water in the Ambrosia Lake area has already been affected. Discharges from Kerr-McGee's ion exchange plant and their mines, and from United Nuclear's ion-exchange plant have resulted in radium concentrations in Arroyo del Puerto which exceed New Mexico water quality criteria.^{1 4} The increased concentrations of selenium and vanadium has rendered the stream unfit for irrigation, livestock watering and human consumption according to 1972 EPA Water Quality Criteria. Selenium contamination has also been found in the groundwater downgradient from the United Nuclear Homestake Partners mill.^{1 5}

Still most company officials contend that humans have not been harmed. In fact, as of 1975 the Gallup, Grants, Milan and Bluewater water supplies had not been found to contain contaminants in excess of the proscribed limits.^{1 6} However, not only is the data incomplete,^{1 7} but New Mexico is confronted with the probability of great growth in the uranium industry in the next 40 years,^{1 8} and the certainty that each company will have more waste to dispose of than it currently discharges. Consequently it is unreasonable to suppose that there is no problem yet since the lethal level is a measure of the density of the same kind and quality of radioactive particles already present in the water and unable to disappear before one million years.

One company promised that it would not oppose the 3.3 pCi/l limit^{1 9} because

12. EPA report, *supra* note 4, at 2.

13. Kerr-McGee transcript, *supra* note 1, at 54.

14. EPA report, *supra* note 4, at 4.

15. *Id.*

16. *Id.* at 2.

17. Perkins, *Summary of Data Publicly Available for Uranium Industry*, EID Grants Mineral Belt file (January 1978).

18. DEPARTMENT OF ENERGY (DOE) GJO 100 (71) Statistical Data on the Uranium Industry.

19. pCi=picucurie. A picucurie is a measure of radioactive disintegration per unit time. The rate of radioactive disintegration depends on the particular chemical.

[I]t was cognizant of the concerns of the New Mexico Environmental Improvement Agency and of the need to insure (pure water). Kerr-McGee will take all steps to reach the lowest picucurie limit consistent with the best practicable control technology available. Accordingly we will do all in our power to seek and achieve the 3.3 limitation.²⁰

But, Kerr-McGee, as other companies under only a moral obligation to comply, has not done so. In fact, an EID survey conducted in October, 1977 found that the Kerr-McGee facility was exceeding 3.3 pCi/l limit by 27 times and was emitting 89 pCi/l of radium 226.²¹ Apparently even a willing spirit needs the law's coercion.

In spite of this gross violation of the EPA "guidelines," Kerr-McGee need not reduce its effluent because it is in the process of challenging EPA's jurisdiction under the Federal Water Pollution Control Act Amendments of 1972.²² Whether its objection is valid is the question which must be answered.

II. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

In 1972 the U.S. Senate and the House of Representatives overwhelmingly passed the amendments to the Federal Water Pollution Control Act (the Act) over President Nixon's veto: 247-160 in the House, 52-12 in the Senate.²³ The vote demonstrates Congress's determination to safeguard water supplies for both present and future generations. In an important step, Congress rejected the view of previous congresses that industry could use water for waste disposal as long as it did not interfere with other uses of that water. The Act's focus on polluters rather than on the pollution's effect on water is specially significant in the Grant's Mineral Belt where, due to inadequate monitoring and the often unknown effects and delayed disease etiology of many of the discharged chemicals, it is hard to accurately evaluate the harm done. Yet the legislative scheme forbids justification of pollution on the grounds that "no one is being hurt."

The regulatory scheme of the Act is relatively simple. Basically,

20. James Cleveland (Superintendent of Environmental Control Individual Hygiene Dept., Kerr-McGee Nuclear Corp.) *Kerr-McGee Transcript, supra* note 1, at 25.

21. Intra-office compilation of data by the Water Quality Division at EID.

22. It is not clear that EPA has the authority to waive limitations prior to final decision. *FWPCA, supra* note 6, §1311 states that "except as in compliance with this section and sections 302, 307, 318, 402 and 404 of this act, the discharge of any pollutant completed by any person shall be unlawful." *Id.* None of these sections allow for waiver.

23. 118 CONG. REC. S 18554 (daily ed. Oct. 17, 1972); *Id.* H. 10272 (daily ed. Oct. 17, 1972).

any facility which discharges pollutants into "waters of the U.S." from a point source must obtain a permit issued by the EPA.²⁴ A permit requires a discharger to demonstrate that it is using, by 1977, the best practicable control technology (BPT) currently available and by 1983 the best available technology (BAT) economically achievable. Guidelines for BPT and BAT are established by EPA in terms of effluent limitations for the entire industry.²⁵ The state may, if it meets certain criteria, issue the permits instead of the EPA, subject to EPA approval.²⁶ Even if the state does not issue permits, it can require that provisions of state law necessary for the protection for water within the state, be included within the permits.²⁷ The Act provides both civil and criminal penalty provisions²⁸ as well as provisions for citizen suits.²⁹

The crux of the problem concerning EPA's ability to control a company's discharges and the one remaining workable objection³⁰ raised by the companies in their challenge is the meaning of the words "waters of the United States." The Act prohibits discharges of pollutants to "navigable water." "Navigable waters" are defined as "waters of the United States and its territorial seas." EPA's jurisdic-

24. *FWPCA, supra* note 6, § 301(a) provides that "except in compliance with this section and sections 302, 306, 307, 318, 402, and 404, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1362(12) (Supp. 1975) provides that "the term discharge of pollutant . . . means (A) any addition of any pollutant to navigable waters from any point source. . . ." *Id.* § 502(7) defines navigable waters as "water of the United States. . . ." *Id.*

25. 33 U.S.C. § 1314 (Supp. 1975) directs the EPA to publish "guidelines for effluent limitations" within a year of the Act's effective date. *Id.* It suggests that the EPA consult with appropriate state and federal agencies and other interested persons and lists the factors that the agency should consider in establishing BPT and BAT. The guidelines provide the general standard on which to base the specific limits in the permits.

26. 33 U.S.C. § 1342 (Supp. 1975). Twenty-seven states have already done so; New Mexico has not.

27. 33 U.S.C. § 1341 (Supp. 1975).

28. 33 U.S.C. § 1319 (Supp. 1975).

29. 33 U.S.C. § 1365 (Supp. 1975).

30. Between 1976 and 1977, five uranium companies applied for permits under protest contending that 1) the limitations imposed by the permit could not be achieved by July 1, 1977 using BPT, 2) EPA did not have the authority to impose discharge limits in the absence of EPA's promulgation of appropriate national effluent guidelines and standards of performance, 3) the state conditions imposed by the state certification go beyond federal law i.e. indirect discharges, discharge limits and monitoring techniques, and 4) their discharges were not into navigable waters. Issues raised in memo accompanying Kerr-McGee's request for an Adjudicatory Hearing, January 10, 1975, pursuant to 40 C.F.R. § 125, 36(b)(2).

Since the July 1, 1977 deadline is passed, the BPT issue is moot. And, since as of July 11, 1978, 1978 guidelines have been promulgated, the guideline issue is moot, at least as to these particular companies. As to the third objection, see notes 94-100 *infra*, and accompanying test.

tion depends on whether the discharges from the mines, mills and ion-exchange plants are discharges into "waters of the U.S." Since the facts concerning the discharges are in dispute, and the meaning of "waters of the U.S." is "shrouded in ambiguity," EPA's jurisdiction is a question both of fact and law.

A description of the hydraulic situation is helpful in understanding the legal issue. Four of the challenges concern discharges into San Mateo Creek in the Ambrosia Lake area, while the fifth involves a discharge into the Rio Puerco in the Churchrock area.³¹ At Ambrosia Lake, the mines and mills discharge into unnamed arroyos which flow into either the San Mateo Creek or the Arroyo del Puerto which then flows into the San Mateo. Under normal circumstances the "discharge" in Kerr-McGee words, "goes down an arroyo (San Mateo Creek) 5-10 miles where it then disappears into the ground."³² However, EPA in asserting jurisdiction is interested not in the present-day normal flow but in the unusual flow, and in past and future flows. EPA contends that thirty years ago the San Mateo reached the Rio San Jose, a tributary of the Rio Grande. It also claims that during severe storms the San Mateo once again reaches the San Jose, carrying enough water to flood two trailer parks. The EPA also offers proof that cows eventually sold out of state, drink from the Creek. Furthermore, the EPA asserts that once the Creek disappears from view, it in fact joins a groundwater flow part of which ends up in Milan water supply, albeit not for 145 years. That part of the "Creek" which is not used by Milan, could continue downgradient for another nine years where it would resurface at Horace Springs, and then join the Rio San Jose, a navigable stream.³³ The uranium companies dispute most of the EPA's factual contentions.³⁴ Presumably they will also dispute their legal significances.

31. The following is a list of the companies in adjudicatory hearings with a description of the receiving waters as appears on the permit.

- (1) Kerr-McGee Nuclear Corp.: natural watercourse into Arroyo del Puerto to San Mateo Creek (Actually Kerr-McGee alleges that its discharges from certain mines never reach the Arroyo del Puerto.); natural watercourse into the Puerco River.
- (2) Gulf Oil Corp.: unnamed arroyo tributary to San Mateo Creek.
- (3) Ranchero-Exploration and Development Company: San Mateo Creek.
- (4) United Nuclear Homestake Partners: Arroyo del Puerto tributary to San Mateo Creek.

32. Cleveland, *Kerr-McGee Transcript, supra* note 20, at 24.

33. Testimony of Charlie Nylander, Water Quality Division, EID, prepared for Adjudicatory Hearing on NPDES permit for Kerr-McGee Nuclear Corp. (July 11, 1978) (hereafter cited as *Nylander, adjudicatory hearing testimony*).

34. Testimony of Dr. William Gannis, expert witness for Kerr-McGee, hearing on NPDES permit for Kerr-McGee Nuclear Corp. (July 11, 1978) (hereafter cited as *Gannis, adjudicatory hearing testimony*).

Kerr-McGee Nuclear Corporation has a mine in the Churchrock area whose discharge is also the subject of an adjudicatory hearing. EPA contends that the discharge flows into an unnamed tributary of the Puerco River which joins an unnamed drainage system of the Puerco River which then flows into a stem of the Puerco River, through the City of Gallup into Arizona.³⁵ Kerr-McGee thinks it significant that there is no flow in the unnamed arroyo "upstream" from its plant and that the flow downstream is not always continuous.³⁶ The significance of EPA's factual contentions of course depends on the interpretation of "waters of the U.S."

III. EPA'S JURISDICTIONAL DISPUTE

At the outset it is important to determine whether groundwater is encompassed within "waters of the U.S." for if so there is no issue as to EPA's jurisdiction. A literal reading of "waters of the U.S." would cover groundwaters since aquifers are certainly part of the United States. However, an amendment to include groundwaters within the regulatory scheme of the Act was defeated.³⁷ That defeat has been treated as indicative of Congress's intent to exclude discharges into groundwater.³⁸

However, legislative intent not to regulate groundwater per se should not preclude regulation of discharges which first flow to the surface and then percolate into the ground. Congress rejected the amendment thinking that the federal government did not have the "vast store of knowledge essential to full protection of subsurface"³⁹ waters and that therefore it should not interfere with or displace "the complex and varied state jurisdiction over groundwater."⁴⁰ The amendment was defeated not because groundwater was thought unimportant⁴¹ but because Congress feared that the EPA lacked the expertise to determine BPT and BAT. But what was

35. *Nylander, adjudicatory hearing testimony, supra* note 33.

36. *Gannis, adjudicatory hearing testimony, supra* note 34.

37. The Senate defeated the groundwater amendment by a vote of 86 to 34. A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 597, Senate Committee on Public Works (1973) (hereafter cited as *Legis. History*).

38. See *Train v. Colorado Public Interest Research Group*, No. 74-1270, slip op. filed 16 June 1, 1976; *United States v. GAF*, 389 F. Supp. 1379 (D.S.D. 1975); and *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977).

39. 118 CONG. REC. H2642 (daily ed. March 28, 1972).

40. S. Rep. No. 414, 2 *Legis. History, supra* note 37, at 1491.

41. In fact, even a cursory glance at *The Act, supra* note 6, shows concern for groundwater: §102(a) (Comprehensive Programs for Water Pollution Controls) states "The Administration shall, after careful investigation, and in cooperation with other federal agencies, interstate agencies, and the municipalities and industries involved, prepare and develop comprehensive programs for preventing, reducing or eliminating the pollution of navigable

really meant to be excluded from regulation was the deep well injection process of *United States v. GAF*⁴² and *Exxon Corp. v. Train*⁴³ not the sort of discharges made by the uranium companies which may reach groundwater. In the case of the uranium companies' waste, the fear of complicated technology is unjustified. The technology is the same whether the effluent ends up in a stream or in the groundwater. It is not logical that under an act which uses technology as the regulating criteria mere happenstance of the terrain should determine EPA's jurisdiction.

Knowing that the legislative history neither mandates regulation of discharges to groundwater nor precludes their control does not resolve the issue of EPA's jurisdiction. The crucial question then is the significance of the Congressional omission of the word "navigable" from the definition of protected waters. "Navigable waters of the United States" is the term used in previous acts to define the extent of federal control over maritime commerce. The term encompasses two distinct concepts:

First the waters had to be navigable, this meant any water that was or had been capable of sustaining maritime commerce or could be given such capability through reasonable public works. Second they had to be navigable "waters of the United States." This meant that they form in their ordinary condition by themselves or by uniting with other water, a continual highway over which commerce is or may be carried on with other states.⁴⁴

Because many in Congress thought that navigable waters as defined in the *Daniel Ball* too narrowly restricted the scope of federal jurisdiction, "navigable" was amended to read "waters of the United States." Although there is general agreement that the omission was intentional, the uranium companies and the EPA dispute its new meaning.

Not surprisingly EPA interprets the omission as giving it broad jurisdiction. Simply put, the EPA through its interdepartmental memos and decisions of counsel defines its limits over any water of the United States in terms of whether "pollution of the waters" affects interstate commerce.⁴⁵ However, until the Supreme Court

waters and groundwaters, and improving the sanitary condition of surface and underground waters," *Id.* (emphasis added). For further evidence of interest in pollution control of groundwaters see *The Act, supra* note 6, § 104(5), § 106(e)(1), § 212(a), § 208(b)(2)(k), § 304(a)(1)(A) & (B), § 304(e), and § 402(b)(1)(d).

42. 389 F. Supp. 1379 (Tex. 1975).

43. 554 F.2d 1310 (5th Cir. 1977).

44. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

45. John Quarles, Assistant Administrator for Enforcement and General Counsel issued a memo on February 6, 1973, which after defining "navigable water of the U.S." as 1)

rules on the meaning of "navigable waters" for purposes of the Act, one must examine the legislative history and developing case law. For even if the EPA asserts jurisdiction it may be overturned.

A case which, if accepted as controlling, would be dispositive of the issue is *United States v. Phelps-Dodge*.⁴⁶ There the court held that discharges to normally dry arroyos could be controlled if they end up in groundwater in which there is some public interest. It states:

For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into *any waterway* including normally dry arroyos, where any water which might flow therein might reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.⁴⁷

Since there is "some" public interest in New Mexico's groundwater, under this court's rationale permits in both Ambrosia Lake and Churchrock would be required.

Phelps-Dodge has not been appealed and it has been cited as good law.⁴⁸ Perhaps a court hearing the appeal will follow it unquestioningly. However, that is unlikely. Other than policy reasons there is little support for a broad assertion of jurisdiction. Its reference to groundwater seems contradicted by legislative history.⁴⁹ It is worthwhile, therefore, to examine what congress intended in its definition of navigable waters and how those words have been treated by courts.

The term "navigable waters" has been rarely discussed in Congress. The most quoted and the most significant is the comment of the House Conference Committee. It reads: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."⁵⁰ That language tracks the language in the House Report,⁵¹ and has given rise to the statement that Congress intended

navigable in fact and 2) capable of being used in interstate commerce, reasons that the omission of "navigable" means that the only remaining requirement, then, is that the pollution of the waters must be capable of affecting interstate commerce.

46. 391 F. Supp. 1181 (D. Ariz. 1975).

47. *Id.* at 1187.

48. *Comm. of Puerto Rico v. Alexander*, 438 F. Supp. 90 (D.D.C. 1977); *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977).

49. See discussion *supra* note 37-39.

50. Committee of Conference H.R. Rep. 92-1465, 92nd Congress, 2nd sess. 144 (1972).

51. H.R. Rep. No. 92-911, 92nd Congress, 2nd sess. 335 (1975) (hereafter cited as *House Report*).

for the EPA to assert jurisdiction "to the maximum extent permissible under the commerce clause of the Constitution." *Natural Resources Defense Fund v. Calloway*.⁵² If that were the only comment in the legislative history then presumably the District of Columbia court's statement and EPA's interpretation of its authority would be correct. However, there are other references. The report of the Senate Committee on Public Works,⁵³ and even the House Report⁵⁴ placed in context do not show a Congress determined to bestow upon EPA jurisdiction to the maximum extent of the Commerce Clause.

These reports indicate a much more modest intent. They are concerned that the EPA not be limited to controlling discharges into waters which were navigable-in-fact and capable of being used in interstate commerce—that is the *Daniel Ball* definition of navigable waters. They show their approval of recent court decisions, all of which involve water which has the potential for use "in the stream of commerce between the states." These reports seek to contrast the new meaning with the narrow coverage of previous acts which failed to recognize waters not part of a navigable-in-fact interstate highway. Aware that water moves in hydraulic circles and it is essential that discharges be controlled at the source, they wanted the EPA to control discharges into streams which although they themselves weren't navigable-in-fact might enter navigable-in-fact streams.

The facts in a leading and widely quoted case reflect just such a situation. *United States v. Ashland Oil and Transportation Co.*⁵⁵ involved a company's discharge "into the waters of a small tributary of Little Cypress Creek . . . (which) is a tributary to Cypress Creek, which is a tributary to Pond River, which is a tributary to Green

52. 392 F. Supp. 685 (D.D.C. 1975).

53. The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirement must be made to the navigable waters, portions thereof and their tributaries. Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Congress, 1st sess. 77 (1975).

Obviously, the Senate was concerned that the waters which flow into navigable waters be regulated. However, it does not refer at all to regulating waters that are used in ways other than in navigation.

54. When the House Report stated that "navigable waters" be given the broadest possible constitutional interpretation, "navigable waters" had not yet been re-defined as "waters of the United States." That occurred later in the Conference Committee. Thus, when the House Report says that navigable waters should be broadly defined, it still retains a notion that *navigable* waters and *not* waters of the United States should be so broadly defined.

55. 504 F.2d 1317 (6th Cir. 1974).

River . . . only Green River is actually navigable 'in fact' in terms of water-borne commerce."⁵⁶ The court decided that Congress intended this tributary of a navigable river to be covered. In fact that is exactly what the Senate Report recommended.

What is interesting about *Ashland* however is not merely the decision to require a permit, but the language that the court used to reach that decision and the subsequent use of that language by other courts. In justifying Congress's constitutional powers to control pollution the court stated: "We believe . . . that Congress was convinced that uncontrolled pollution of the nation's waterways is a threat to the health and welfare of the country, as well as a threat to interstate commerce."⁵⁷ It then listed irrigation, fishing, boating, swimming and the dislocation of industry as examples of uses of water which can affect commerce. In so doing it went far beyond what had been mentioned by Senate or House reports and started a trend in which courts, as in *Phelps-Dodge*, have looked to "the *intention of congress* . . . to eliminate or reduce as much as possible all water pollution throughout the United States both surface and underground," (emphasis added)⁵⁸ rather than on the statutory scheme devised.

For example, in *United States v. Holland*,⁵⁹ a case involving the periodic inundations of wetlands, the court held that the EPA could control defendant's activities above the mid-high tide water mark, the line which had marked the boundary of federal jurisdiction under previous acts. Although it ostensibly justified its decision on the grounds that any pollution which might reach navigable waters should be controlled at its source, the court referred to the effect of defendant's activities on the eco-system. The implication is that if a facility's discharge touches the eco-system, as all do, then EPA has jurisdiction.⁶⁰ As congressman James C. Wright of Texas observed . . . "the court now says that Congress meant the permit program to apply literally to every pond and puddle in the U.S."⁶¹ Although the puddle case has yet to appear it is difficult to find any court which

56. *Id.* at 1320.

57. *Id.* at 1325.

58. *United States v. Phelps-Dodge*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

59. 373 F. Supp. 665 (M.D. Fla. 1974).

60. "The inclusion of ecological factors in the determination of whether the corporations should grant a construction permit allows for the denial of a permit *on purely ecological, rather than on navigational grounds*" (emphasis added). *Properties Inc. v. Train*, 399 F. Supp. 1370, 1381 (D.D.C. 1975).

61. CURRENT DEVELOPMENTS, *Env't'l Rep.* 1758 (Feb. 13, 1976). Congressman Wright is a member of the House Public Works and Transportation Committee having jurisdiction over water pollution control legislation.

has rejected EPA's assertion of jurisdiction over a discharge to surface water.⁶²

The language used by the courts then, implies agreement with EPA's "affecting commerce" assertion of jurisdiction. Thus the discharges of the uranium companies would be subject to NPDES permits. Admittedly this interpretation is more in line with the goal of "water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation both in and on the water,"⁶³ without encouraging industry dislocation since it is mere coincidence that wildlife and fish use water that are part of the "stream of commerce."

However, even with the narrowest construction of navigable waters, EPA may be able to assert jurisdiction if it shows that occasionally the discharges into San Mateo Creek reach the Rio San Jose and that discharges at Churchrock flow into the Rio Puerco, because they both flow into interstate streams. A court may also be convinced by the argument that because at one time the discharges from the San Mateo flowed into the Rio San Jose, the San Mateo should be treated as a navigable water. *Puente de Reynosa, S.A. v. City of McAllen*⁶⁴ held that a portion of the Rio Grande could be considered navigable because evidence of prior use would raise a presumption that navigability could be restored.

The importance of a stream occasionally flooding a couple of trailer parks and being used by cows depends on how closely the courts stick to a notion of navigability. The dicta of the *Ashland* and *Holland* courts would require that a permit be obtained.

The fact that the discharge reaches Milan's water supply or Horace Springs will probably be more significant if it gets there within 150 years rather than 1000 years as Kerr-McGee contends. One hundred and fifty years is a conceivable time frame while a court may decide that the consequences of uranium or radium contamination 1000

62. For examples of court approval of EPA assertion of jurisdiction see: *PFZ Properties Inc., v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975); *Wyoming v. Hoffman*, 437 F. Supp. 114, 145 (D. Wyo. 1977); *Comm. of Puerto Rico v. Alexander*, 438 F. Supp. 90, 92 (D.D.C. 1977); *Conservation Council of North Carolina v. Train*, 398 F. Supp. 653, 673-4 (E.D.N.C. 1975); *Leslie Salt Co. v. Froelke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sun Enterprises Limited v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975); *Minnesota v. Hoffman*, 543 F.2d 1198, 1200 (8th Cir. 1976); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

63. 33 U.S.C. §1251(a)(2) (Supp. 1975). The court in *United States v. GAF Corp.* 389 F. Supp. 1379 (S.D. Tex. 1975), stated that a discharge into underground waters could be regulated under the FWPCA, provided that it could be shown that the underground waters flow into or otherwise affect surface waters. See also *Sierra Club v. Lynn*, 502 F.2d 43, 64 (8th Cir. 1974): If a ranch is discovered to be polluting the underground water supply (of the municipality) the developer has the legally enforceable duty to remedy the situation.

64. 347 F.2d 43 (5th Cir. 1966).

years hence is too speculative. However, even if EPA can prove that the discharge will reach Milan in 100 years, the uranium companies may argue that in essence this constitutes a discharge to groundwater. It is excluded from the Act's regulatory scheme because it is the type of discharge that congress intended to be left to the states to control.

IV. STATE GROUNDWATER REGULATIONS

EPA's inability to regulate the uranium company's discharges in the Ambrosia Lake and the Churchrock may provide the impetus needed to implement the "congressional plan . . . to leave control over subsurface pollution to the states."⁶⁵ In fact, Congress's belief that the states know best reflects the attitude of some members of the New Mexico Environmental Improvement Division (EID), which is charged with implementing the state act. The practicability of that attitude, however, depends upon the companies' success in avoiding New Mexico's groundwater regulations.

Under authority granted it by the New Mexico Water Quality Act,⁶⁶ the Water Quality Control Commission is authorized to adopt standards and regulations to protect New Mexico's waters. However, not until ten years after the Act was passed, on January 11, 1977, did the commission adopt standards and regulations governing groundwater.⁶⁷ In brief, the regulations require every person whose discharge affects groundwater to submit a plan to EID which demonstrates that the discharge will not result in concentration of pollutants in the water in excess of New Mexico's water quality standards. Some exemptions are provided for, such as those contaminants in particular discharges already covered by an NPDES permit.

However, the regulations distinguish between facilities before and after so that only the latter *must* submit a discharge plan. Facilities presently operating as of June 18, 1977 need not submit a plan unless EID specifically requests them to do so. As of July 1, 1978, of all the uranium mines and mills in operation before June 1977, only Anacanda has been asked to submit a plan.⁶⁸

65. Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977).

66. N.M. STAT. ANN. § 75-39-4(c) (Repl. 1968); § 73-39-4 (Repl. 1968).

67. The standards and regulations were amended on June 14, 1977 and on November 8, 1977.

68. Plants in operation before June, 1977 but which modify their operations are subject to regulations applicable to new facilities. Rancher's Exploration and Development Corp., Gulf Mineral Resources, United Nuclear Corp. and United Nuclear Homestake Partners have been required to submit discharge plans for existing discharges which are being modified. Personal conversations with Maxine Goad, New Mexico Water Quality Division, EID (August 1978).

As of August 4, 1978 EID has sent notification of discharge requirements to 21 uranium mines and mills who started operation after June 18, 1977. Eight discharge plans have been received and two have been approved.⁶⁹ Yet, even these may be declared inoperative if the nine uranium companies now challenging the regulations are successful.⁷⁰

The state act differs from the FWPCA in ways which reflect both differences in philosophy and available expertise. Unlike FWPCA which operates under the premise that no one has the right to discharge pollutants, and sets effluent limitations in accordance with available technology,⁷¹ the state act sets water quality standards in terms of use, and prohibits discharges which would result in higher concentrations of contaminants than "use" allows.⁷² And unlike the federal act which is directed at improving the nation's waters, the state act allows water to be polluted up to a certain level. Moreover, it provides that if the water, due to previous pollution, contains levels of pollutants above the statutory standard, the higher contaminated level will be the standard.

In part, New Mexico's approach reflects the fact that it has limited funds. The state does not have the resources to set effluent limits for each industry and apply them to each discharge. Instead it places the burden on the discharger to prove that its effluent does not unduly pollute the states' waters.⁷³

The regulations do have some advantages. First, they definitely cover discharges to groundwater. Second, because the exemption for the NPDES permit is operable only if the permit is "effective and enforceable," and only for those constituents included, the discharges to San Mateo Creek could be covered.⁷⁴ Moreover unlike the permits, the regulations have not been suspended. And the companies' appeal is moving more rapidly than the adjudicatory hearing.

In their challenge the companies have alleged a number of defi-

69. Report on progress of compliance with groundwater regulations, compiled by Bruce Garber, attorney with EID. One additional plan has been approved as of June 16, 1978.

70. See note 11.

71. See 40 CFR 130.17 (1977); 33 U.S.C. § 1313(c); 303(C)(20) (1977).

72. *Regs., supra* note 8, § 3-103 sets three uses: human health, domestic water supply, and irrigation.

73. Steve Reynolds, New Mexico State Engineer, thought the Commission should put the burden of proof where it belongs, namely on the discharger. He should prove that his discharge would not impair any other use of the groundwater. This would parallel state water law where a permit cannot be granted except with a finding that other rights will not be impaired. Minutes of Commission Consideration for Adoption of Proposed Regulations Governing Discharges to Ground Water (Dec. 14, 15, 16, 1976). Adopted by the Commission Jan. 26, 1977. 2 RECORD OF BOKUM RESOURCES, et al. 29 (hereafter cited as *Minutes*).

74. *Regs., supra* note 8, § 3-105.

ciencies in the regulatory scheme. Three issues merit brief discussion: 1) whether the Water Quality Commission gave sufficient reasons for the adoption of the regulations; 2) whether the commission has statutory authority to regulate leachate; and 3) whether the toxicity standard is too vague.

1) *Reasons*

The New Mexico courts require that an administrative agency explain why it adopts regulations for "some very practical reasons." In *City of Roswell v. N.M. Water Quality Commission*,⁷⁵ the court incorporated Davis's elucidation of the reason's requirement:

The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for re-hearings and judicial review, and keeping agencies within their jurisdiction. 2 Davis, *Administrative Law Treatise* 16.05 (1958).⁷⁶

In this case where the record reveals only the notice of public hearing, the testimony of various experts, and others, some exhibits and the regulations, the court held that "it could not effectively perform the review."⁷⁷ The New Mexico courts require reasons primarily in order to "know what [they] might review."⁷⁸ Clearly then an agency must provide a minimal record.

The type of record required is suggested by the court in *New Mexico Municipal League v. New Mexico Environmental Board*.⁷⁹ There under the authority granted it by the Environmental Improvement Act, the EIA issued regulations relating to the collection and transportation of solid waste. The EIA explained the purpose of the regulation in 12 reasons.⁸⁰

The regulations were challenged under the same statute which the uranium companies now challenge the groundwater regulations.⁸¹

75. 84 N.M. 561 505 P.2d 1237 (Ct. App. 1972).

76. *Id.* at 565.

77. *Id.*

78. SCHWARTZ, *ADMINISTRATIVE LAW* 421 (1976).

79. 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975).

80. The reasons speak in general terms and track the statutory language concerning EID's responsibility for environmental protection. Some of the reasons are that no regulations concerning solid waste disposal have been adopted previously, that testimony shows both that existing procedures impinge on public health and that new procedures will not place an unreasonable economic burden on the state, and that these new regulations are necessary to protect the health of New Mexico's citizens.

81. Both the appellants in the groundwater regulations and appellants in *City of Roswell* appealed under N.M. STAT. ANN. §75-39-6 (Repl. 1968, Supp. 1975). It states that "the regulations shall be set aside only if found to be: (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record or reasonably related to the prevention or abatement of water pollution; or (3) otherwise not in accordance with law."

The *Municipal League* court found the reasons to be adequate stating that the "Environmental Improvement Board, here has given us sufficient indication of its reasoning and of the basis upon which it adopted these regulations."⁸² The court also stated that "in its brief the Board amply demonstrated that each of the 12 reasons for adopting the regulations were founded upon evidence and testimony it had accumulated during several meetings it had on the proposed regulations."⁸³ Interestingly enough, in order to sustain the regulations the court was willing to accept the *post hoc* rationalizations of a lawyer's brief.

Under the *Municipal League* test therefore, the court should uphold the groundwater regulations. The reasons adopted by the Water Quality Commission are similar to those approved in *Municipal League*. Moreover, in the groundwater appeal the record also consists of 16 pages of minutes which, with only a few exceptions, explain the basis of the Board's adoption of each standard and regulation.⁸⁴ Finally the brief submitted by the Water Quality Commission further details the reasons for certain standards.

To say that the *Municipal League* criteria has been met does not resolve the issue of adequate reasons. A second important purpose of the reason requirement is to assure more careful administrative consideration. The *Municipal League* court's acceptance of the lawyer's brief as a source of reasons indicates that it was more concerned with its ability to review. However, if a court is alerted to other purposes of the reason requirements, such as assuring that an agency has engaged in careful deliberations, then it may require an agency to meet a stricter standard than that permitted in *Municipal League*.

Even with the stricter standard applied, the regulations should be approved. The minutes provide just the precise picture of the Commission's reasoning that is desirable. For example, they adopted the standard for uranium of 5 mg/l rather than the 2 mg/l suggested by their staff because "2 mg/l would probably cause an economic hardship and 5 mg/l appeared safe enough at the time."⁸⁵ However gaps do exist in the minutes. For example, the Commission accepted the selenium standard suggested by the staff without explaining why.⁸⁶ Because the selenium standard was objected to by the companies, the

82. *New Mexico Municipal League v. New Mexico Environment Board*, 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975).

83. *Id.* at 204.

84. *Minutes, supra* note 73, at 28-44.

85. *Minutes, supra* note 73, at 5.

86. *Id.* at 4.

brief submitted by the Water Quality Commission explains quite succinctly the danger of selenium and the need for its control. However, a court interested in forcing an agency to be careful in its reasoning may be dissatisfied with a brief alone.

In sum, up till now the New Mexico courts have required reasons primarily to help them perform their reviewing function. If they continue to be interested only in that, the record presented by the Water Quality Commission should suffice. However, if they want to assure "more careful administrative consideration" then the court should demand a fuller record for those regulations where the Commission unquestioningly accepted its staff's recommendation. Of course a desire that the Commission articulate the reasons for its decisions should not be translated into a requirement that any decision that it make be correct "beyond any reasonable doubt." The court should not require documented evidence of death and disease before it declares a substance dangerous. Any margin of error should lie on the side of health and safety.

The reasons issue raises significant questions as to the type of record that an agency should make. The two remaining issues show how the uranium companies, through their lawyers, are able to raise issues which irritating at best, at worst show a real disregard for the health of the people of New Mexico.

2) *Leachate*

One of the questions presented by the uranium companies is whether the Commission has the authority to regulate leachate.⁸⁷ The issue can arise for uranium companies in two ways. First, uranium companies may emit water which itself meets the groundwater standards but in the course of reaching groundwater, leaches out pollutants which cause it to exceed New Mexico groundwater standards.⁸⁸ Second, a company may construct a tailings pond which,

87. Leachate is the liquid that has percolated through soil or other medium. *Regs., supra* note 8, §3-104 provides that a discharge place is required for leachate, but exemptions are allowed. §3-105 exempts leachate which conforms to §3-103 standards, has a total nitrogen concentration of 10 mg/l or less and does not contain toxic pollutants. And, even if not exempted under §3-105, if it leaches undisturbed into natural material it is exempted unless a hazard to public health results. *Id.* §3-109(D). Rainwater leachate is also exempted unless a hazard to public health results. *Id.* §3-105(H).

88. In their brief, the uranium companies describe a situation in which a farmer who uses mineral-rich land would be required to have a discharge plan if it rains on the land and leaches out material which would cause the water to be a hazard to public health. Although a sympathetic scenario, it exists only in a lawyer's mind. Rain would not leach out such minerals in levels high enough to create a hazard to public health.

when rained upon, emits contaminants which pose a "hazard to public health."⁸⁹

Whether the Commission has the authority to regulate depends on an interpretation of section 75-39-4.1(A) of the New Mexico statutes⁹⁰ which reads: "By regulation the commission may require persons to obtain from a constituent agency designated by the commission a permit for the *discharge of any water contaminant either directly or indirectly into water*" (emphasis added).

The issue centers on the meaning of "discharge of contaminants." The companies interpret this as being the action of its mines and mills in emptying effluent; however, such a reading ignores the phrase "into water." If the focus of the regulations were on the chemical makeup of the water emitted then neither the rain nor the "clean" water that is discharged would require a permit. Such would be the case if the regulating mechanism was effluent limitations. However, it is not. Because the thrust of the regulations is to preserve water quality the focus of the regulations has been on the receiving water, not the water emitted.⁹¹

Besides objecting to the definition of "discharge," the companies object to the regulation of leachate as unfair, portraying such regulation as forcing them into being responsible for something over which they have no control such as water which has already been emitted from their mines or mills, or rain that happens to fall on their lands. The objection is disingenuous. The "clean" water emitted from the mines and mills will become dangerous only if it travels through dangerous materials. It will be the uranium companies who have discharged the dangerous materials on the ground, and the uranium companies who will have constructed tailings piles through which the rainwater and "clean" water will seep.

3) *Definition of Toxic Pollutants*

The uranium companies also object to the definition of toxic pollutants as being unconstitutionally vague, and to the meaning of "hazard to public health." The apparent problem is the requirement

89. *Regs., supra* note 8, §1-101(N) states that a hazard to public health exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of §3-103(A), or the naturally-occurring concentrations, whichever is higher, or if a toxic pollutant affecting human health is present in the water. In determining whether a discharge would cause a hazard to public health, the director shall investigate and consider the purification and dilution reasonably expected to occur from the time and place of discharge to the time and place of withdrawal for use as human drinking water.

90. N.M. STAT. ANN. §75-39-4.1(A) (Repl. 1968, Supp. 1975).

91. See discussion *supra* notes 71 and 72 and accompanying text.

that any facility which discharges toxic pollutants must have a discharge plan. Theoretically a facility may not know that it is discharging toxic pollutants, not get a plan and then be held both civilly and criminally liable. However, it is not likely that this would ever happen to any uranium company. A facility that discharges toxic pollutants is probably discharging substances which are subject to control under the regulations, and would therefore require a discharge plan. Obviously all uranium mines and mills will be required to have a discharge plan. The mechanics of getting a plan approved are such that once a facility has an approved discharge plan and is abiding by it, it cannot be held either civilly or criminally liable for the discharge of any pollutants unless it has first been told what pollutants it cannot emit. Therefore it is impossible that a uranium company would be forced to guess at whether a pollutant is toxic.

The test for whether a regulation is unconstitutionally vague is whether someone of common intelligence must guess at its meaning.⁹² Since the uranium companies never will have to guess the issues is obviously frivolous.

The fact that the uranium companies could raise the leachate and vagueness issues demonstrates how little they care that the effluent from their mines and mills will pollute the waters of the "Grants Mineral Area" causing people living in the area to suffer serious physical harm. It is possible, of course, that the pollutants may not affect the inhabitants of the "Grants Mineral Belt." However, where, as here, the cost of pollution control is minimal—\$520,000 a facility compared to a company's net income of \$21 million⁹³—and the value of healthy citizens inestimable, their objections seem not only petty, but malevolent.

State Certification

As stated above, the state can incorporate provision of its statutes concerned with water quality into a NPDES permit.⁹⁴ The advantages for New Mexico would be twofold. First, the state's limited resources could be conserved since the federal government would enforce the state's standard. Second, such an incorporation would trigger the citizen suit provision of the federal act. Here, too, state resources could be conserved. New Mexico's goal of clean water

92. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

93. In 1974, United Nuclear estimated that the cost of pollution control would be \$520,000 for its Churchrock plant. Transcript of Proceedings before the EPA concerning NPDES permit for United Nuclear Corp., Churchrock Mine (21) (Nov. 26, 1974) (hereafter cited as *United Nuclear Transcript*). See note 3 *supra*.

94. 33 U.S.C. §1341 (Supp. 1975).

might be better achieved if watchdogs with federal enforcement powers were encouraged.

Although the Water Quality Commission and EID have considered including state water quality regulations in the NPDES, this has not yet been done. The reasons are not entirely clear. During deliberation of groundwater regulations the Water Quality Commission discussed the possibility of incorporating parameters controlled solely by the Water Quality regulations with the NPDES permit.⁹⁵ In March, 1977, the EID asked EPA if they were willing to regulate these parameters as well as discharges that occur upstream from the EPA measuring point (NPDES outfall) in the permit. The request raised interesting legal issues.

First, since New Mexico regulates by water quality standards rather than by effluent limitations, there was a question as to whether standards should be directly included in a permit and, if not, whether either the EPA or EID should translate the standards into effluent limitations. Second, since discharges upstream from the NPDES outfall are not from a point source, and are to be regulated only in order to protect groundwater,⁹⁶ this request posed the question as to whether EPA could control discharges from non-point sources to groundwater under state certification. In its answer, EPA did not address the second issue. It merely said that only "effluent limitations" would be appropriate.

Section 401(d) of the FWPCA states that any "certification provision under this section shall set forth effluent limitations and other limitation . . . (and) any other *appropriate requirement of state law* . . . (emphasis added)."⁹⁷ EPA understood "appropriate" to refer to effluent limitation. Effluent limitations are obviously much easier to enforce than water quality standards. Because EID has never pursued its request, the question of control of groundwater has not been answered, and EPA's position concerning the meaning of "appropriate" has not been challenged.

Whether EPA's position accurately reflects Congressional intent is unclear. As was stated by the Office of Management and Budget (OMB) and the EPA in their joint comments on the bill, "the scope of the catchall phrase is not defined."⁹⁸ Various comments through-

95. *Minutes, supra* note 73, at 9.

96. By discharges upstream from a NPDES outfall, the EID was referring to seepage from a tailings pond which could reach surface or groundwater, and seepage from a stream that occurs after the stream leaves the tailings pond but before it reaches the NPDES outfall point.

97. 33 U.S.C. §1341 (Supp. 1975).

98. *Legislative History, supra* note 37, at 853.

out the legislative history show Congress's intent to respect a state's prerogative to set more stringent limitations.⁹⁹ However, the comments do not say that the EPA must translate state water quality standards into effluent limitations. In fact, comments on Section 303 water quality standards and implementation plans indicate that the Congress, recognizing the difficulty and cost that determining effluent limitation in terms of water quality standards would entail, delegated the task to "secondary priority."¹⁰⁰ Thus, even if EPA is responsible, it can probably excuse itself on the grounds that more vital issues need be dealt with first.

CONCLUSION

The reluctance of EPA to incorporate New Mexico's groundwater regulations and grant the request that discharges upstream from the NPDES outfall be controlled, exemplifies one of the major difficulties in controlling uranium companies, namely, lack of resources. Limited funds mean that New Mexico does not have adequate data to determine whether certain elements such as molybdenum, vanadium, and selenium should be controlled in the permit.¹⁰¹ The state can only request that monitoring be done. More seriously, although it has the authority to do so, EID cannot demand discharge plans from many of the uranium mines and mills already in operation.¹⁰²

Lack of resources is not the only problem. The uranium companies through their lawyers can prolong the adjudicatory hearing for many years, and may successfully thwart the state's groundwater regulation. If the New Mexico court is swayed by the companies' argument, it may be another five years until discharges to groundwater will be controlled.¹⁰³ The lack of a citizen suit provision in the state statute means that the New Mexico Citizens for Clean Air and Water must, as *amicus curiae*, support the EID against the com-

99. §301(b)(c)(1) of the *FWPCA*, *supra* note 6, specifically allows for compliance with a state's stricter standards.

100. *Legislative History*, *supra* note 37, at 171.

101. *United Nuclear Transcript*, *supra* note 93, at 36.

102. EID can't request that certain elements be controlled because they don't have the data to support the requests. However, the EID can request that the EPA monitor the elements and provide the data to EID. EID has done precisely that. Personal conversation with Maxine Good, New Mexico Water Quality Division, EID (July, 1978).

See discussion in *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977), in which the court concluded that Congress intended to have the EPA provide "the states with information needed to operate their own groundwater pollution programs the establishment of which 402(a) was designed to encourage." *Id.* at 1326.

103. EID fears that if the regulations are declared illegal, the Water Quality Act will have to be amended and new regulations declared.

pany's challenge rather than assert a position more in line with its own concerns.

Finally, both the federal act and the state regulations should be much stronger. Discharges to groundwater should be controlled by the FWPCA. The issue of EPA's jurisdiction should not have been allowed to prolong regulation so many months. It is senseless in an act that is concerned with technological limits, to allow the happenstance of terrain determine that New Mexico's waters will be polluted.

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