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DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

May 10, 1977

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Mr. Ted Williams
Deputy Director
Arizona Department of Health Services
1740 West Adams
Phoenix, Arizona 85007

Re: 77-102 (R76-495)

Dear Mr. Williams:

This letter is in response to your request for an opinion dated December 22, 1976, in which you posed the following questions:

1. Is underground water included in the term "waters of the state" as defined in A.R.S. § 36-1851?

2. Does the Water Quality Control Council have either mandatory or discretionary jurisdiction to establish water quality standards for groundwater? If so, does A.R.S. § 36-1857.B.2 exclude groundwater under private property or any other groundwaters from regulation by the Water Quality Control Council?

3. (a) If the Water Quality Control Council cannot or does not establish groundwater quality standards, could discharge of pollutants into underground water constitute a violation of A.R.S. §§ 36-1858.1 or 36-1858.2?

(b) Without the establishment of such standards, could the Department of Health Services issue, modify or revoke orders prohibiting the discharge of wastes into underground waters under A.R.S. § 36-1856.8 (a)?

A.R.S. § 36-1851.16 defines waters of the state in the following manner:

'Waters of the state' means all waters within the jurisdiction of this state including all streams, perennial or intermittent, lakes,

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ponds, impounding reservoirs, marshes, water-courses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.

The language of the above quoted statute expressly includes underground water within the definition of "waters of the state". That underground water is included within the term "waters of the state" is made doubly clear from the definition which includes "all waters within the jurisdiction of the state" and the subsequent specific inclusion of "water, surface and underground."

The Water Quality Control Council's jurisdiction to establish water quality standards for groundwater does not conflict with authority delegated to the State Land Department under A.R.S. Title 45, Chapter 1. The jurisdiction of the State Land Department under Title 45, Chapter 1 is to maintain records of groundwater basins, designate the boundaries of such basins, designate critical groundwater areas and grant permits for construction of irrigation wells. This jurisdiction does not extend to establishing groundwater quality standards.

The affirmative response to your first question requires the conclusion that the Water Quality Control Council has a statutory mandate to establish water quality standards for groundwater since A.R.S. § 36-1857 provides that:

The council, in addition to other powers and duties enumerated in § 36-1854, shall adopt . . . reasonable standards of quality of waters of the state for the preservation, control and abatement of pollution. (Emphasis added)

The word "shall" has an "imperative or mandatory meaning," Brooke v. Moore, 60 Ariz. 551, 554, 142 P.2d 211, 212 (1943). A statute which states that something "shall" be done indicates a "positive mandate of the legislature," McDonald v. Frohmiller, 63 Ariz. 479, 486, 163 P.2d 671, 674 (1945).

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Accordingly, in our opinion the Council is required to adopt water quality standards for all waters of the state, including underground waters. We recommend to the Council that it take immediate action to adopt ground water standards, or if sufficient data are not available to enable it to adopt such standards, that it act formally and on the record stating the reasons for not adopting such standards and directing the Department's staff or other appropriate persons to immediately commence a study to acquire the necessary information.

A.R.S. § 36-1857.B.2 excludes groundwater under private property from regulation by the Water Quality Control Council only under the limited circumstance that such water cannot pollute any other waters of the state, including groundwater under other property.

A.R.S. §§ 36-1858.1 and 36-1858.2 establish that it is unlawful to cause certain discharges into waters of the state. The criterion of an unlawful discharge under these sections is reduction of "the quality of such waters below the water quality standards established therefor by the [Water Quality Control Council]." Consequently, until the Council establishes water quality standards for any given waters of the state, no discharge into such waters can constitute a violation of A.R.S. §§ 36-1858.1 or 36-1858.2.

A.R.S. § 36-1856 gives the Department of Health Services certain powers including that of issuing orders "prohibiting or abating discharges of wastes into waters of the state." A.R.S. § 36-1856(8) (a). The authority to issue such orders is not dependent upon the establishing of water quality standards by the Water Quality Control Council or a violation thereof. All the Department need do is establish that the discharge is a "waste" as that term is defined in A.R.S. § 36-1851.

We note that authority delegated to the Department of Health Services by A.R.S. § 36-1856 must be exercised under the direction of the Water Quality Control Council or of the Director of the Department of Health Services, "given within their respective authority." The statutes of Title 36, Chapter 16, Article 1, "Water Pollution Control", are far from clear, however, in delineating the "respective authority" of the Director and the Water Quality Control Council. Consequently, it is uncertain whether a particular order issued under the authority of A.R.S. § 36-1856 is to be issued at the directive of the Water Quality Control Council or of the Director.

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Under the provisions of A.R.S. § 36-1853, the Water Quality Control Council consists of thirteen members, residing in various counties of this State. The concurrence of a majority of its members is required for any determination made by the council, A.R.S. § 36-1853.E. Meetings are held quarterly and "special" meetings may be held, if requested by three members. Special meetings require the advance mailing of notice to each member, A.R.S. § 36-1853.D. While the quarterly meetings of the Water Quality Control Council may be very well suited for establishing water quality standards, the necessity of either awaiting such meetings or endeavoring to convene a special meeting of the Council would result in a time-consuming and cumbersome procedure for obtaining an order to protect the waters of this state from pollution.

It is unlikely that the Legislature intended to require a lengthy and unwieldy procedure, during which the pollution against which the order was to be directed might continue unchecked, before an order prohibiting pollution might be issued under A.R.S. § 36-1856. Since, however, the language of A.R.S. § 36-1856 is ambiguous, it warrants legislative clarification.

Sincerely,

BRUCE E. BABBITT
Attorney General



EVELYN R. EPSTEIN
Assistant Attorney General

ERE:jrs