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ARIZONA ATTORNEY GENERAL

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

Re: 78-63 (R77-365)

Dear Mr. Williams:

In your letter of November 10, 1977, you requested this office's opinion whether Arizona statutes contain provisions and delegations of authority to enable Arizona to administer its own discharge permit program under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (hereinafter the "FWPCA"). While the FWPCA has been amended in certain respects by the Federal Clean Water Act of 1977, the portions of the FWPCA relevant to your question have not been changed by the 1977 legislation.

May we point out, initially, that you have formerly asked, and we have already answered in the negative, the question whether Arizona's statutes contain the elements required for assumption of the discharge permit program. Indeed, by letter dated January 23, 1976, we transmitted to you proposed revisions which would help cure the defects in present legislation.

In your letter of November 10, you asked us to indicate with specificity the presence or absence of particular elements in current statutes. In accordance with this request, we shall discuss seriatim the questions you have posed.

I

The first question you posed is whether current legislation provides adequate authority for prohibiting the disposal of pollutants into wells.

The Arizona statutes designed to provide the requisite authority for this State to administer its own discharge permit program are found in A.R.S. Title 36, Ch. 16, comprising Arizona's Water Pollution Control Act.

Those disposals of pollutants specifically prohibited in Title 36, Ch. 16, are (1) "the discharge of pollutants into waters of the United States except in compliance with a permit therefor," A.R.S. § 36-1858, and (2) "the discharge of any pollutant into waters of the United States in violation of a permit issued by the Director," A.R.S. § 36-1864.02 (emphasis added). Although the exact meaning of "waters of the United States" is not clearly established, and is currently being litigated, the term clearly does not include groundwater in all the individual wells in the State.

More generally, Title 36, Ch. 16 also prohibits violation of the provisions of that Chapter or of any permit or regulation issued or adopted pursuant thereto. A.R.S. § 36-1864.01. As will be discussed in the following section, Title 36, Ch. 16 delegates to the Department of Health Services authority to issue permits or adopt regulations pertaining to pollutants discharged into wells. Consequently, subject to the limitations discussed in this and following paragraphs, we conclude that A.R.S. Title 36, Ch. 16 provides sufficient authority to prohibit the discharge of pollutants into wells. Because of a peculiarity in the statutory definition of "pollutants", however, this prohibition is not commensurate with that required on the part of a state wishing to administer its own discharge program under the FWPCA.

33 U.S.C. § 1342(b)(1) establishes that a state desiring to administer its own discharge program must have adequate authority to "control the disposal of pollutants into wells". Implementing regulations adopted by the United States Environmental Protection Agency (EPA) specify that all "procedures which [a] State proposes to establish and administer to conform with the requirements of this part shall be set forth in State statutes or lawfully promulgated regulations", 40 CFR § 124.4, and that the authority to control the disposal of pollutants into wells must include the authority to "prohibit the proposed disposal." 40 CFR § 124.81.

In the federal statutes and regulations, the term "pollutant" is defined to exclude

water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or

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surface water resources. 33 U.S.C.
§ 1362 (emphasis added).

The Arizona statutes, by contrast, exclude from the definition of "pollutant"

water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if a permit for drilling of the well has been issued pursuant to title 27, chapter 4, article 1. § 36-1851.11.

Obtaining a permit for a well pursuant to A.R.S. Title 27, Ch. 4, Article 1 does not require a specific determination that a particular injection or disposal into that well will cause no degradation of ground or surface water resources. The exclusion in the State statutes is thus broader than that of the federal statutes. Consequently, State legislation does not meet the FWPCA requirements for prohibiting the disposal of pollutants into wells.

We should point out, additionally, that in Arizona's Water Pollution Control Act, "pollutant" is defined as something "discharged into water." A.R.S. § 36-1851. This definition is consistent with that of the FWPCA. However, 40 CFR § 124.81 could be interpreted as requiring that a State, administering its own permit program under the FWPCA, control the disposal of material into dry wells in order to prevent possible future pollution of groundwater. If the EPA adopted this interpretation of its regulations, then Arizona's statutes would not meet the requirements for assumption by this State of its own discharge permit system. The State statutes do not prohibit the disposal of waste into dry wells, unless such disposal could be considered as an indirect "discharge into water".

II

Your second question is whether Arizona's statutes provide authority to issue permits controlling the disposal of pollutants into wells.

The authority of the Director of the Department of Health Services to issue or deny permits for the disposal of pollutants is set forth in A.R.S. § 36-1859. That statute authorizes the Director to

deny, issue, modify or repeal . . .
a permit . . . for the discharge of
any pollutant or combination of

pollutants into waters of the United States within this State or other discharges for which permit authority is required as a condition for approval of the State's program under the federal water pollution control act, as amended. (Emphasis added.)

33 U.S.C. § 1342 establishes, as a condition of approval for a state's program, delegation of authority to issue permits which "control the disposal of pollutants into wells". Consequently, subject to the limitations set forth in the preceding paragraphs, Title 36, Ch. 16 does authorize the Director of the Arizona Department of Health Services to issue permits for the disposal of pollutants into wells.

One additional problem with the statutes as they are now structured is that the State Water Quality Control Council is instructed to adopt regulations establishing effluent limitations and other standards only "for the discharge of pollutants into waters of the United States" (emphasis added). A.R.S. § 35-1854.A(4). The Council would thus not have authority to establish criteria for the discharge of pollutants into groundwater unless such water constituted "waters of the United States". The Director of the Department of Health Services is not authorized to establish discharge limitations, but only to adopt regulations "necessary to enable this state to administer a permit program in accordance with the requirements of the federal water pollution control act, as amended". A.R.S. § 36-1859 (emphasis added). Thus, the statutes do not provide for the establishment of effluent limitations to govern the issuance or denial of permits for the discharge of pollutants into wells.

The Water Quality Control Council is required to adopt water quality standards for groundwater within this State. A.R.S. § 36-1857. Such standards could provide a criterion for determining whether a proposed discharge should be permitted. It is our understanding, however, that no groundwater standards have yet been adopted.¹ Until such standards are adopted, there will exist no basis upon which the Director could determine whether to grant or deny a permit for a proposed discharge.

III

Your next query is whether this State's legislation provides authority "to ensure that no permit for the discharge

1. We have previously advised the Council that it has not complied with this statutory mandate.

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of pollutants will be issued if the Secretary of the Army judges that anchorage and navigation of any navigable waters would be substantially impaired thereby?" This subject is not separately addressed in the statutes. However, the Director of the Department of Health Services is mandated to "adopt . . . regulations . . . necessary to enable this State to administer a permit program in accordance with the requirements of the federal water pollution control act, as amended". A.R.S. § 36-1859. This mandate suffices to authorize adoption of a regulation assuring the State's compliance with the requirement of § 402(b)(6) of the FWPCA that no permit be issued "if, in the judgment of the Secretary of the Army . . . anchorage and navigation of any of the navigable waters would be substantially impaired thereby."

IV

You indicated that EPA officials have expressed concern that Arizona's statutes may not provide authority for this State "to ensure that any industrial user of any publicly-owned treatment works will comply with §§ 204(e) and 308 of the federal water pollution control act".

Section 204(b) of the FWPCA refers to payment by industrial users of publicly-owned treatment works "of a portion of the cost of construction of such treatment works . . . which is allocable to the treatment of . . . industrial wastes contributed by that user," A.R.S. § 36-1855 specifically gives the Director of the Department of Health Services authority to "adopt . . . regulations . . . including establishment of a system of user charges as may be required by the federal water pollution control act, as amended. . . ."

Section 308 of the FWPCA concerns inspections and monitoring of the activities of dischargers (including industrial users of publicly-owned treatment works) and requires the right of entry "to, upon or through any premises in which an effluent source is located."

A.R.S. § 36-1863 provides that the Director of the Department of Health Services may "enter . . . upon . . . property which is . . . reasonably believed to be the source of waste being discharged into waters of the state. . . ." This statute, less broad in its authorization than § 308 of the FWPCA, does not authorize entry upon the premises of an industrial user of a publicly-owned treatment works who is not discharging waste "into the waters of the state". Additional inspection authority is delegated to the Director of the Department of Health Services in A.R.S. §§ 36-136.A.6. That statute, however, authorizes entry only upon certain enumerated categories of premises which do not include private industries, and also any premises in which the Director "has reason to believe there exists a violation of

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a health law, rule or regulation of the state which he has the duty to administer". This authority is not coextensive with that required under the FWPCA.

Since the industrial user itself is not required to obtain a discharge permit, any provisions authorizing inspection, in the permit issued to the publicly-owned treatment works, would not apply to the industrial user. Therefore, we must conclude that existing statutes do not authorize the Director's entry onto premises of industrial users of publicly-owned treatment works in those instances where a violation of health laws is not suspected.

V

You have posed a series of inquiries whether, under State statutes, the public would have access to: National Pollutant Discharge Elimination System forms; any public comment thereon; and information as to the discharge of pollutants obtained pursuant to monitoring, reporting or sampling or other investigative activities of the State. There is nothing in the statutes to prevent such availability to the public, except a rather ambiguously worded reference to "trade secrets":

Notwithstanding any provision of this article and except as otherwise required by law, public disclosure shall not be required of any information submitted by any person which would divulge methods or processes which are trade secrets. A.R.S. § 36-1860.F.

In light of this provision, State officials cannot ensure that any information pertaining to the permit discharge program which contains "trade secrets" will be available to the public. In response to your next question, we must similarly reply that present statutes do not ensure availability to the public of effluent data, regardless of whether such data divulge trade secrets. Neither do the statutes authorize disclosure "upon request" to EPA officials of any information accorded confidential status.

VI

You next inquire whether present statutes contain adequate authority to ensure that "no permit will authorize radiological discharges prohibited by federal law, discharges objected to by the Regional Administrator of EPA, or discharges conflicting with an areawide waste treatment management plan adopted under § 208 of the FWPCA".

The Water Quality Control Council is authorized in A.R.S. § 36-1854, to adopt regulations

pertaining to effluent limitations, water quality related limitations, new source performance standards, toxic and pretreatment effluent standards, and inspection, monitoring and entry provisions for the discharge of pollutants into waters of the United States within this state in accordance with the requirements of §§ 301, 302, 306, 307 and 308 of the federal water pollution control act, as amended.

Section 301 of the FWPCA prohibits any discharge of radiological agents or high-level radioactive waste into waters of the United States. The Water Quality Control Council's regulations must, pursuant to A.R.S. § 36-1854, incorporate the prohibitions of § 301. No permit may be issued in violation of the effluent limitations and other standards adopted by the Water Quality Control Council, since the Director's authorization is to "issue . . . a permit under conditions imposed by this article and rules and regulations promulgated thereunder, for the discharge of any pollutant. . . ." (emphasis added.)

The Director has authority under A.R.S. § 36-1859.B, to "adopt . . . regulations . . . necessary to enable this state to administer a permit program in accordance with the requirements of the federal water pollution control act, as amended." This authority would allow her to adopt a regulation assuring this State's compliance with the requirement of § 402(d)(2) of the FWPCA that:

No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

A.R.S. Title 36, Ch. 16 does not require and does not clearly authorize regulations establishing limitations "in accordance with the requirements of" § 208 of the FWPCA.

VII

Replying to your question whether Arizona statutes contain adequate authority to make available for public inspection the names of permit holders failing to comply with permit requirements, we find nothing in the statutes that would prevent making such information available for public inspection. See also A.R.S. § 39-121, under which public records are open to public inspection.

VIII

You ask whether present statutes contain adequate authority "to provide a 90-day period during which the Regional Administrator of EPA may object to any proposed permit." A.R.S. § 36-1859.B requires that the Director adopt "regulations . . . necessary to enable this state to administer a permit program in accordance with the requirements of the federal water pollution control act, as amended." The FWPCA states:

No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

A.R.S. § 36-1859.B clearly authorizes the Director to adopt a regulation providing for the 90-day period required by the FWPCA, during which the Regional Administrator of the EPA may object to a proposed permit.

IX

In your next question you seek to establish whether Arizona presently meets the requirement on the part of a state wishing to administer its discharge permit program that

no board or body which approves permit applications or portions thereof shall include as a member any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applications for a permit. 33 U.S.C. § 1314.

The administrative regulations promulgated pursuant to the quoted portion of 33 U.S.C. § 1314 specify that

The term "board or body" includes any individual, including the Director, who has or shares authority to approve permit applications or portions thereof either in the first instance or on appeal. 40 CFR § 124.94.

A.R.S. Title 38, Ch. 3, Article 8 deals with the potential conflicts of interest of public officers and employees. These statutes require that an officer or employee who has a substantial interest in any specific decision refrain from participating therein. These statutes would not apply to approval of a permit application unless the official or employee had an interest in that approval.

Additional legislation is needed to ensure that persons approving or participating in the approval of permit applications generally do not receive a significant portion of their income from any permit holder.

X

Considering next your question of whether current state statutes authorize the imposition of zero discharge limitations when required by Federal law, we must conclude that Arizona's statutes now preclude imposition of such limitations. A.R.S. § 36-1857 provides:

In formulating any . . . regulation establishing effluent limitations, water quality related limitations and other requirements pertaining to discharge requirements, the Water Quality Control Council shall be guided by the principle that waters of the state are put to beneficial use within the state and become return flows to the state and are subsequently reused and that such . . . requirements shall not diminish the water available for such beneficial uses nor deprive the state of such water.

The Director of the Department of Health Services is similarly cautioned that no permit must diminish water available for beneficial uses. A.R.S. § 36-1859.C. The imposition of zero discharge limitations cannot be achieved without consumptive treatment technology which diminishes to some extent the water available for use.

XI

Your final inquiry is whether present State statutes authorize notifying people who have requested such notification "of public hearings held for the adoption of rules and regulations under A.R.S. § 36-1859.B." This notification is not precluded by any statute and is in accordance with the intent of A.R.S. § 36-1860 which provides:

[T]he director in adopting . . . rules and regulations pursuant to subsection B of § 36-1859, shall give notice and conduct public hearings. . . . A copy of the notice of hearing shall be mailed at least thirty days prior to such hearings to . . . persons . . . whom the council and director deem may be affected or who have requested notification of council action.

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We hope this detailed response to your series of questions, along with our earlier communications on this subject, will clarify your comparisons between State statutes and FWPCA requirements. Please let us know if we may be of further assistance.

Sincerely,

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