ENFORCEMENT OF THE SAFE DRINKING WATER ACT IN VIRGINIA

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INTRODUCTION

National enforcement of the Safe Drinking Water Act (SDWA) has been weak and ineffective, whether carried out by the Environmental Protection Agency (EPA) or a state agency. The situation may be due to inadequate funding for programs. Virginia reflects the national trend with its insubstantial record of enforcement. A citizen suit initiated by an environmental group has challenged the legality of the government's enforcement efforts. If successful, the suit will overturn many administrative law cases that favor enforcement discretion in decision-making by agencies. However, the seriousness of the policy implications of non-enforcement may cause the courts to reexamine administrative law precedent.

Water pollution clean-up in the Commonwealth has focused on improving the quality of water sources, including groundwater and surface water sources such as rivers and lakes. These waters are not exclusively covered by the SDWA. The SDWA focuses on the improvement of public, rather than private, water supplies.

OVERVIEW OF THE SDWA

The Safe Drinking Water Act (SDWA)[1] was enacted in 1974 to ensure that tap water reaching the public is safe for consumption. The statute requires that public water systems (PWSs) provide water which either does not exceed maximum contaminant levels (MCLs) or conforms to treatment requirements set out in the national primary drinking water regulations (NPDWRs).[2] It also requires a permit for underground injections which may endanger underground sources of water, thus preventing excessive MCLs.[3]

SDWA provisions allow PWSs to delay compliance under certain circumstances through variances[4] and exemptions.[5] These provisions were made more restrictive in the 1986 SDWA Amendments, wherein Congress provided that any water supplier applying for exemptions show that it has applied the best available technology (BAT) in attempting to comply.[6] PWSs self-monitor by testing for contaminant levels and

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[1] 42 U.S.C. Secs. 300f-300j-10 (1982 & Supp. IV 1986).

[2] 42 U.S.C. Sec. 300g-1 (1982 & Supp. IV 1986). For an excellent overview of the statute, *see* DEAN, DANGER ON TAP: THE GOVERNMENT'S FAILURE TO ENFORCE THE FEDERAL SAFE DRINKING WATER ACT (National Wildlife Federation, Oct. 1988).

[3] 42 U.S.C. Sec. 300h (1982 & Supp. IV 1986).

[4] 42 U.S.C. Sec. 300g-4 (1982 & Supp. IV 1986).

[5] 42 U.S.C. Sec. 300g-5 (1982 & Supp. IV 1986).

[6] 42 U.S.C. Sec. 300g-4(a)(1)(A) (Supp. IV 1986).

reporting the results to the enforcement agency.[7] The monitoring requirements have been described by one environmental group as "the heart of the law" because they enable the identification and correction of public health risks before they blossom into crises.[8] They are also important because of budgetary constraints at the enforcing agency, which are likely to occur and which make monitoring by the government impractical.

The PWSs are defined as systems that have at least fifteen service connections, or regularly serve at least twenty-five persons.[9] This definition covers not only public water systems which serve residential communities and are easy to identify and regulate, but may also include water suppliers that serve only a hospital, rest area, or campsite because they serve at least 25 persons. The EPA has treated these latter water suppliers as "non-community" water systems. The users of the water from these systems are transient, raising difficulties in notifying users about contaminated water. However, the non-community water system owner can be identified and regulated using regular PWS programs.

SDWA ENFORCEMENT IN VIRGINIA

Except for Wyoming, Indiana, and the District of Columbia, all other states and territories have been granted the responsibility for their own public water supply supervision.[10] States receive this grant of primary enforcement responsibility ("primacy") by, *inter alia*, adopting regulations no less stringent than the NPDWRs and promulgating enforcement plans and emergency provisions.[11] If a state fails to ensure enforcement, EPA should notify the state that a PWS is not in compliance, request the state to provide information about the supplier within fifteen days, and consider a civil action against the non-complying supplier.[12]

Virginia obtained primacy by enacting its own PWS statute, which vests responsibility for ensuring safe drinking water in the Virginia Department of Health.[13] Within the Department of Health, the Division of Water Programs oversees the drinking water regulations. The Virginia statute requires permits, minimum water quality standards, and mandatory testing of water for bacteriological, chemical, radiological,

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[7] 42 U.S.C. Sec. 300j-4(a)(1) (Supp. IV 1986).

[8] DEAN, *supra* note 2, at 11.

[9] 42 U.S.C. Sec. 300f(4) (1982).

[10] 53 Fed. Reg. 29194 (1988).

[11] 42 U.S.C. Sec. 300g-2 (1982 & Supp. IV 1986) provides the authority, whereas the requirements are set forth in 40 C.F.R 142, Subpart B.

[12] 42 U.S.C. Sec. 300g-3(a)(1) (1982 & Supp. IV 1986).

[13] VA. CODE ANN. Secs. 32.1-167 to 32.1-176 (1985 & Supp. 1988).

and other contaminants,[14] and dictates that free technical assistance be provided to water suppliers at their request.[15] The statute is consistent with the SDWA and conforms to the primacy requirements.[16]

The Virginia Department of Health is responsible for all issues relating to public health,[17] but shares responsibility with the State Water Control Board (SWCB) relating to regulating water quality.[18] However, the Department has sole responsibility for regulating drinking water quality. Unlike the Department, the SWCB deals primarily with water issues, with authority to regulate sewage discharge into waters, investigate fish kills, put conservation measures in place, among other duties.[19]

One of its most important duties is to establish and enforce water quality standards for state waters, including all surface and underground water within the state.[20] By doing so, it carries out its responsibility to enforce National Pollution Discharge Elimination System provisions of the Federal Water Pollution Control Act.[21] The State Water Commission estimates that out of the average 28 billion gallons per day of tap water used in Virginia, 27 billion gallons originate in state rivers and streams, and the remaining amount comes from the state's groundwater or 75 reservoirs.[22] While the Health Department regulates the public water suppliers, the SWCB regulates activity that affects the quality of water received by the public water suppliers.

This dual oversight of state waters could lead to confusion and overlap of responsibilities. In 1983, a Water Study Commission recommended that a body be used to overview and coordinate the activities of all state entities considering water-related

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[14] VA. CODE ANN. Sec. 32.1-170 (1985).

[15] VA. CODE ANN. SEC. 32.1-171 (1985).

[16] The EPA has proposed a rule that would modify the primacy requirements for state Public Water Supply Supervision (PWSS) programs. The rule would require states already granted primacy to adopt new or revised EPA regulations. 53 Fed. Reg. 29194 (1988). This was necessary to accommodate the 1986 SDWA amendments, which require EPA to promulgate NPDWRs for 83 new contaminants.

[17] *Report of the Joint Subcommittee Studying the Operation and Services of the Department of Health to the Governor and General Assembly of Virginia*, H. DOC. No. 43, 15 (1984) [hereinafter *Report of Jt. Subcommittee*].

[18] Functions of the Department of Health include administering Medicaid, regulating medical care, licensing hospitals, day care centers and migrant labor camps, compiling vital statistics, and regulating sewage disposal as well as water treatment and supply. *Report of Jt. Subcommittee*, *supra* note 17, at 5-7.

[19] VA. CODE ANN. Sec. 62.1-44.15 (Supp. 1988).

[20] VA. CODE ANN. Sec. 62.1-44.15(3a) (Supp. 1988). A Circuit Court held that its primary responsibility was to protect groundwater from contamination in all forms. Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983).

[21] 33 U.S.C Secs. 1251-1376 (1982 & Supp. IV 1986).

[22] *Report of the State Water Commission to the Governor and General Assembly of Virginia*, H. DOC. No. 31, 4 (1988).

issues.[23] A Legislative Joint Subcommittee recommended that the Division of Water Programs, in particular, work with other agencies with which they interface.[24] In fact, Virginia has received a grant from the EPA to develop a clearinghouse for groundwater data and has created a task force to help coordinate agencies.[25] If the two agencies are coordinated, it may not be necessary to reorganize state water-related programs.

The Division of Water Programs carries out its mandate through six offices around the state. Each office is divided into water and wastewater issues. PWSs work with the District Engineers to achieve compliance with SDWA provisions. Most cities and counties have local health departments, which are responsible for the water works compliance. The state officials work with local owners and officials to achieve compliance and compile records.

If a violation is found, the state follows a set procedure. Notice is sent to the violator, followed by a "Passion Report" which identifies the type of violation, and any follow-up action. The enforcement officer in Richmond receives it and keys it into a computer and sends it to EPA on a computer disk.

EFFECTIVENESS OF ENFORCEMENT IN VIRGINIA

Enforcement efforts in Virginia reflect the national trend by being underfunded and insubstantial. The EPA maintains computerized records of PWS violations and actions taken by states and the EPA against the violators, which are called the Federal Reporting Data System (FRDS) reports. An analysis of these reports by the National Wildlife Federation (NWF) revealed an enormous gap between the number of reported violations and the number of enforcement actions taken. In Fiscal Year (FY) 87, for example, NWF found that out of 101,588 violations, representing 36,763 water systems (both community and non-community), only 2544 enforcement actions were taken by states.[26] When the EPA discovers that a system is in violation, it must inform the state and take action on its own if the state does not commence action within 30 days of notification.[27] According to the NWF report, the EPA took only 50 such actions in FY 87, which amounts to five one-hundredths of one percent of the 99,044 cases in which the state governments failed to take action.[28]

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[23] *Report of the State Water Study Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 32, 6 (1984).

[24] *Report of Jt. Subcommittee*, *supra* note 17, at 16.

[25] Interview with Evans Massie, Compliance Officer, Office of Water Programs, Virginia Department of Health (Sept. 1988).

[26] DEAN, *supra* note 2, at 14.

[27] 42 U.S.C. Sec. 300g-3(a) (1982 & Supp. IV 1986).

[28] DEAN, *supra* note 2, at 17. According to the report, the enforcement figures are probably overstated. In the FRDS reports, the EPA may take several distinct "actions" for a given violation: a notice of violation, proposed administrative order, and a final administrative order. Thus the EPA can "triple count" enforcement data. *Id.*

FRDS reports of EPA Region III states reveal that in FY 1987, Virginia's 4,768 PWSs experienced 2,578 violations, for which the state took 65 enforcement actions.[29] This 2.52% enforcement rate is about average for all of the states.

It is conceivable that the lack of enforcement actions listed in FRDS does not mean that PWS violations continue in Virginia. EPA records only the state actions which constitute "appropriate" actions, because SDWA requires EPA to take action if "appropriate enforcement" is not taken by a state.[30] Therefore, if the Health Department informally worked with a PWS, or compliance was actually achieved, SDWA goals could be attained without taking "action" as recorded in FRDS.

Evidence indicates that this may not be the case. In 1988, EPA performed an audit of the performance of non-community water systems, those who do not use a commercial or community water supply, by selecting a sample of non-community water supplies and scrutinizing their actual SDWA compliance performances. According to the audit report, EPA found "numerous" monitoring violations that were not reported in FRDS.[31] In FY 86, there were 79 unreported coliform bacteria monitoring violations discovered at 51 non-community water supplies which recorded no violations in FRDS. The same year, EPA found that 86% of the non-community water supplies in Virginia did not monitor for nitrates as required by law, despite the fact that FRDS listed no monitoring violations at all for this contaminant.[32]

The audit also reported that in FY 86, Virginia PWSs were lax in initiating check sampling once a maximum contaminant level (MCL) violation occurs.[33] Check sampling, required every 24 hours when MCL violations occur, is necessary to assure users that the contamination has been expunged.

The audit revealed other enforcement problems in Virginia. Upon confirmation of an MCL violation, the Health Department is required to notify the public of the problem.[34] EPA found "little evidence" that the Health Department issued notification for any of the 36 MCL violations it found in the sample.[35] It also found that data reported from Virginia to EPA was erroneous, to the extent that some counties were unaware that violations should be reported to the state.[36] The discrepancies between reported violations and the data sent to EPA is understandable in light of the

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[29] DEAN, *supra* note 2, at B-2.

[30] 42 U.S.C. Sec. 300g-3(a)(1)(B) (Supp. IV 1986).

[31] EPA, *Report of Audit E1HW7-03-0171-81928: Non-Community Water System Program* 38 (Sept. 26, 1988).

[32] *Id.* at 39.

[33] *Id.*

[34] 42 U.S.C. Sec. 300g-3(a)(1)(B) (1982 & Supp. IV 1986).

[35] EPA, *supra* note 31, at 40.

[36] *Id.*

difficulties in coordinating the 1531 community and 2550 non-community water works in the state. If much of the field work necessary is done by county and city officials unfamiliar with the technicalities of the state-EPA reporting requirements, it is possible that many attempts to achieve compliance remain on the local and informal level.

Enforcement is complicated by the fact that violations are common in some circumstances where enforcement officials are reluctant to initiate action. One state official revealed that they have difficulties with PWSs without definable owners. For example, after a coal company emplaces a water supply, it may move out of the area and deed the rights to the supply to a new landowner, who may be unaware of his or her responsibilities under the SDWA.[37] Another problem is that the testing required in the monitoring provisions can be expensive for a small supplier. The State Corporation Commission must approve some water works' rate increases, but rate increases for smaller suppliers may be difficult.

Whether the problems with enforcement pose a threat to the health of Virginians is difficult to assess. It appears that contamination of drinking water sources has become a serious problem in some areas of the state,[38] so failure by the PWS to adequately treat water may raise health dangers. For example, problems with trilomethane contamination at PWSs in Northern Virginia have occurred, as well as high bacterial levels in limestone regions, mainly in the western part of the state.[39] A Health Department survey of tap water in the south-central Piedmont region revealed that 72.5 percent of the water had "serious water quality problems," the most prevalent being high levels of fecal coliform.[40] This constituent comes from human and animal fecal matter and is associated with gastroenteric infections.[41]

ACTIONS TO COMPEL ENFORCEMENT

Enforcement of the SDWA is weak, but there is considerable uncertainty as to whether this deficiency can be remedied through judicial action. In the following months, a federal court will face this question in a suit brought by an environmental group. On December 12, 1988, the National Wildlife Federation issued a notice of its intent to sue the EPA. The notice contained charges that the EPA has failed to enforce standards, review state programs effectively, assist PWSs in violation of the SDWA,

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[37] Interview with Evans Massie, Compliance Officer, Office of Water Programs, Virginia Department of Health (Sept. 1988).

[38] *See* WEIGMANN & KROEHLER, THREATS TO VIRGINIA'S GROUNDWATER (1988).

[39] Interview with Evans Massie, Compliance Officer, Office of Water Programs, Virginia Department of Health (Sept. 1988).

[40] WEIGMANN & KROEHLER, *supra* note 38, at 35.

[41] DEAN, *supra* note 2, at 26.

adopt adequate enforcement policies, and prepare annual reports required by the SDWA.[42]

The major issue in the case is whether the EPA has discretion to refrain from taking enforcement actions for the provisions identified in the suit. The evidence that no enforcement actions have been taken against many violators is strong, because much of it is EPA documentation.

The language of some of the provisions supports the contention that EPA enforcement is non-discretionary. The specific provision reads:

> Whenever the Administrator finds during a period during which a State has primary enforcement responsibility...that any public water system-
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> i) ...does not comply with any national primary drinking water regulation...
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> he **shall** so notify the State and provide such advice and technical assistance...as appropriate...to bring the system into compliance.[43]

The SDWA then specifies that where a state fails to take enforcement action within 30 days of being notified of a violation, the Administrator "shall issue an order...or...commence a civil action...."[44] The use of the word "shall" raises questions about the mandatory nature of the clause, where canons of statutory construction, common law precedents, and legislative history reveal divergent interpretations.

There is considerable weight in support of the interpretation that would make EPA's decision to issue an order or commence a civil action non-discretionary. The critical first step in statutory interpretation is "that language must ordinarily be regarded as conclusive."[45] The ordinary meaning of the word "shall" implies that the action is mandatory. Accepted practice in drafting legislation is to use "shall" if an "obligation to act is to be imposed."[46] The plain meaning of the word "shall" points to the mandatory nature of EPA enforcement.

The fact that the 1986 Amendments changed the word "may" to "shall" in the clause quoted above also supports this contention, since it implies a legislative recognition of the distinction between the words. Statements in the legislative history show that some legislators interpreted the language as mandatory.[47] The wording appears to be clear and unambiguous, but extrinsic evidence suggests that "shall" may indeed be treated as a discretionary order.

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[42] 19 Env't Rep. (BNA) 1653 (1988).

[43] 42 U.S.C. Sec. 300g-3(a)(1)(A) (1982 & Supp. IV 1986) (emphasis added).

[44] 42 U.S.C. Sec. 300g-3(a)(1)(B) (Supp. IV 1986). Other provisions contain the "shall" language as well, and raise similar questions about the mandatory nature of the sentence.

[45] North Dakota v. United States, 460 U.S. 300, 312 (1983), *quoted in* Sacramento Regional Co. Sanitation Dist. v. Thomas, 668 F.Supp. 1427, 1431 (E.D. Cal. 1987).

[46] SUTHERLAND, 1A STATUTORY CONSTRUCTION 689 (1985). *See also* STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 133 (West 1984).

[47] H.R. CONF. REP. No. 575, 99th Cong., 2d Sess., 30 (1986), *reprinted in* 132 CONG. REC. H2335 (daily ed. May 5, 1986).

One commentator analyzed similar enforcement language in the Federal Water Pollution Control Act (FWPCA)[48] and found that an overwhelming number of courts that interpreted the "shall" language held that the enforcing agency retained its enforcement discretion.[49] The primary case cited was *Sierra Club v. Train*,[50] where the Fifth Circuit examined a FWPCA provision very similar to that of the SDWA. The court said that although upon superficial examination it appeared that "shall" imposed a non-discretionary duty to act, extrinsic aids showed that the meaning of Congress was inconclusive, and "shall" need not be considered mandatory.[51] Because many courts regard "shall" as a discretionary, rather than mandatory, command, the meaning is ambiguous.

When ambiguity exists in a statute, the administrative interpretation, although not conclusive, is entitled to deference if consistent with the statutory purpose and linguistically reasonable.[52] If the EPA asserts that it has interpreted the "shall" language to mean "may," it is questionable whether it can be considered "linguistically reasonable," but numerous precedents making that interpretation may make it so. Assuming that the statutory purpose of the SDWA is to achieve safe drinking water within budgetary or resource constraints, EPA may argue that enforcement discretion is appropriate. Indeed, a spokesman for EPA has implied that budget realities are partially responsible for the enforcement deficiencies.[53]

Another factor supporting the discretionary enforcement of agencies is the doctrine of separation of powers. In a speech given when signing the SDWA Amendments into law, President Reagan stated:

> "I believe that Congress cannot bind the Executive in advance and remove all prosecutorial discretion without infringing on the powers of the Executive. It is unrealistic to expect that the EPA will ever have the resources or the need to take formal action against each and every violation of the Act, without regard to how trivial the violation or unfair an enforcement action would be."[54]

The EPA may also argue that such a statutory interpretation is consistent with the general acceptance of the fact that enforcement decisions are so committed to agency discretion as to preclude review. The Third Circuit has suggested three criteria

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[48] 33 U.S.C. Secs. 1251-1376 (1986 & Supp. I 1987).

[49] Gray, *The Safe Drinking Water Act Amendments of 1986: Now a Tougher Act to Follow*, 16 Envt'l. L. Rep. (Envt'l. L. Inst.) 10338, 10342 n.66 (1986). The article cited ten supporting cases as well as four analogous cases.

[50] 557 F.2d 485 (5th Cir. 1977).

[51] *Id.* at 489.

[52] Flint v. State of California, 594 F.Supp. 443, 448 (E.D. Cal. 1984), *quoted in* Sacramento Regional Co. Sanitation Dist. v. Thomas, 668 F.Supp 1427, 1431 (E.D. Cal. 1987).

[53] 19 Env't Rep. (BNA) 1177 (1988).

[54] 22 WEEKLY COMP. PRES. DOC. 832 (June 19, 1986).

for determining whether review is appropriate, the second of which is the consideration of "the product of political, economic, or managerial choices that are inherently not subject to judicial review."[55] Enforcement decisions may be so clearly related to economic, management, and political choices that they might be the appropriate decision to which the phrase "committed to agency discretion" might apply.

The National Wildlife Federation case outcome could depend on the court's view of discretionary agency enforcement. If the environmental group succeeds in having a judge compel EPA enforcement, it may be necessary for EPA to request more money from Congress for SDWA programs, or divert money from other programs to programs of enforcement. Attention will be on this case, since another group has recently filed a lawsuit to compel enforcement of the Resource Conservation and Recovery Act (RCRA).[56]

CONCLUSION

Virginia's weak enforcement of the SDWA reflects a national trend. Where public water suppliers remain in violation due to state inaction, the law requires the federal government to step in and take action to ensure that water is safe. The federal government has not been responsive. A suit has been filed to require EPA to increase its enforcement presence. The success of the suit may depend upon the degree to which courts are willing to abandon a traditional view of discretion in agency enforcement. If the suit is successful, Virginia's water system may benefit due to the additional presence of more certain sanctions against water suppliers who provide contaminated water.

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[55] Local 2855 v. United States, 602 F.2d 574, 579 (3d Cir. 1979).

[56] The Environmental Defense Fund is alleging that RCRA provisions should be interpreted as meaning that EPA had a non-discretionary duty to perform certain tasks by the dates Congress had set forth. 19 Env't Rep. (BNA) 2376 (1989).