UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 12A
Date Signed: June 20, 1978

MEMORANDUM

SUBJECT: May a Community Public Water System Raise the Defense in an Enforcement Proceeding that it is not a "Public Water System", Under §1401(4) of the SDWA, Because it Does Not Provide Water for Human Consumption?

FROM: Lorraine Chang, Attorney[1/] (signed by L. Chang)
Water Quality Division (A-131)

TO: James Manwaring, Chief
Drinking Water Branch (WH-550)

If a water supplier can show that it does not fit the definition of a public water system, it may raise that defense in an enforcement proceeding. The definition is not easy to evade, however, in view of the broad coverage and purpose of the SDWA.

The SDWA was intended to establish NPDWRs which apply to as many water suppliers as possible. The statutory language in §1411 is clear, "NPDWR shall apply to each public water system in each state," unless it meets the four listed criteria. The legislative history states that such regulations "are to apply to public water systems and are to protect public health to the maximum extent feasible." House Report 93-1185 at 1. The issue remains whether, aside from listed exceptions, a water supplier can avoid application of NPDWR on the ground that it is not "a system for the provision to the public of piped water for human consumption", as defined in §1401(4).

The problem of community water systems attempting to evade the NPDWR is exemplified by Saginaw-Midland, Michigan's attempt to define itself out of the Act by contract with its customers. Two issues are raised; first, whether the water supplier, merely by saying it does not supply its water for human consumption, although it actually is so used, can be excluded from the §1401 definition. The second, is that even if the supplier is still considered a public water system, whether its customers can contract away their right to safe drinking water under the Act. The answer to both of these is no.

The first issue involves statutory construction of the phrase "for human consumption". Is this phrase to be applied to the intent of the water supplier, as shown by his declarations or is it determinable by the actual use to which the water is put? There is clear authority to the effect that the actual facts should control.

In I.C.C. v. A.W. Stickle & Co., 41 F. Supp. 268 (E.D. Okla., 1941) the court held that a transporter of lumber who was paid for the transportation function could not avoid compliance with the Motor Carrier Act merely by asserting that it was engaged only in the lumber wholesale business. The language of the Court is equally applicable to the Saginaw-Midland situation;

> "It must be assumed that Congress, in defining a private carrier, did not attempt thereby to afford a means or device whereby one might evade the provisions applicable to common or contract carriers .... It is the effect of the plan, of what is actually being done, rather than the designation of it by the person concerned ... that is to govern if the beneficial results intended by the Act are to be attained." Id. at 273.

In S.E.C. v. American International Savings & Loan Ass'n., 199 F. Supp. 341 (D.C. Md., 1961) an institution which called itself a savings and loan, but which performed none of the functions of such an organization, was held not to be entitled to an exemption from the Securities Act of 1933 as a savings and loan. The court, relying on earlier authority, held that an entity's designation of itself would not be upheld if it was a "gross misuse of the name." Id. at 350.

Furthermore, it has been held that "there is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." U.S. v. Powers, 59 S.Ct. 805 (1939). An interpretation of the SDWA which would allow water suppliers to actually supply consumers with unclean water could very easily cause a "grave public injury."

The second issue is whether the public beneficiaries of the Safe Drinking Water Act can waive their right to be protected by it, by the formation of a contract with a water supplier allowing it to provide untreated water. Under principles of contract law, applied to the purpose of the act, they cannot.

The general rule is that if a performance rendered in a bargaining transaction is unlawful and forbidden, the parties cannot make it lawful by declaring that as between themselves it shall be so regarded. Corbin on Contracts at 727. On the other hand, waiver may be allowed if the public at large will suffer no harm thereby. Id. at 732.

The general rule was applied in Brooklyn S. Bank v. O'Neil, 65 S.Ct. 895 (1945), in which employees were not allowed to waive the right to recover liquidated damaged under the Fair Labor Standards Act. The Court stated the rule that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Id at 900-901. In the absence of specific statutory language on the question, the Court looked to broad considerations of legislative policy, as evidenced in the legislative history and provisions and structure of the Act. Of primary importance as the fact that the purpose of the statute was to protect the national health and well being, by protecting certain groups in the population. Id. at 902. Other negative considerations were that such waivers would nullify the deterrent effects of the Act and detract from its enforcement effectiveness. Id. at 903. Also important was the fact that the statutory provision in question was mandatory in form. Id. at 904.

Many of the same considerations also apply to the Safe Drinking Water Act. It is unquestionable that its purpose is to protect the public health and welfare. This purpose, not being tied to purely private rights, makes its effect even stronger than with the Fair Labor Standards Act. Also, deterrence would be affected if water systems had a method for evading the law with such possibilities of misuse. Water suppliers by attractive rates might effectively "bribe" their customers to accept lower water quality, if it were allowed. Enforcement would be hampered, for citizen suits are a part of the Act and those who had waived their rights would thus be precluded from participating in an important mechanism for insuring high water quality. Finally, the language in the Safe Drinking Water Act is also mandatory. Section 1411 states that national primary drinking water regulations shall apply to each public water system in each state unless it meets defined and non-discretionary criteria.

The SDWA intended to apply to all water suppliers who are public water systems, in fact. Neither a change in designation by the supplier nor consent to evasion by the consumer can narrow the coverage of the Act. A claim by a water supplier that it is not a public water system, raised as a defense in an enforcement action, must be supported by concrete evidence; a claim based entirely on self-designations would not be conclusive.

1/ Nancy Warren, a law clerk with OGC's Water Division, assisted substantially in the preparation of this opinion.