

MOVING TOWARD ALABAMA LEGISLATION FOR WATER RESOURCES MANAGEMENT

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As a water rich state Alabama historically enjoyed the luxury of the abundance of the water resource, both surface water and ground water. Little thought was given to management except for the protection of human health. In fairly recent time our concern for environmental protection led to rapidly broadening regulations over discharges into our waters. Early programs were designed for improvement in waste treatment technology. Later, emphasis shifted to development of process changes that would enable industry to produce their products with significant reduction in effluent load.

In about those same years (1965 and on) much effort was devoted to comprehensive planning for land and water resources development. Review of these and related efforts in many states shows a production of state plans that were public relations documents rather than actual plans, "... typically containing sections on water as a vital resource, the state's water resources, problems of development and use of water such as water pollution or flood control, and discussion of state agencies." (1)

Governor George C. Wallace on April 2, 1973, submitted to the citizens of Alabama a statement of the State's Water Resources Policy "... as the official guide for the orderly and systematic development of its most valuable resource." "Alabama's Water Resources Policy" was published as a booklet by the Alabama Development Office along with brief comment on the abundance of surface water and ground water in the State and the future need for management of our water resources. The full text of Alabama's Water Resources Policy is appended to this paper for convenient reference (Appendix A).

The policy statement is couched in positive terms to identify the desired goals—

- maximum benefit of all people
- compatible with development plan
- public participation in state planning
- pre-eminence of public necessity for water
- adequate legal structure
- quality of the environment
- economic growth and efficiency
- quality of life and social well-being.

Appropriately, the policy statement does not lapse into identification of Alabama's water resources problems with an attempt to prescribe which problems are most critical. That task is left to the many agencies, institutions, and users of water. Many problem-identification efforts have been made within Alabama in recent years to provide a rational basis for design of service, planning, and/or research programs.

The water resources research institutes of eight southeastern states (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia) organized and conducted a series of regional conferences beginning in 1978. The conferences were

designed to address the most important water resources problems of the Southeast. Judged foremost among these was the question of state legal and administrative systems for water allocation and management. The first conference in the series, entitled "Southeastern Conference on Legal and Administrative Systems for Water Allocation and Management," had four objectives:

1. to identify present and anticipated water allocation, use, and management problems in the Southeast as related to the riparian reasonable use doctrine.
2. to analyze the adequacy of existing water law and administrative systems to cope with these problems.
3. to establish commonality of problems for sharing experiences and for identifying promising new legal and administrative approaches and research needs, and
4. to develop a responsive regional action program.

Excerpts from the summary of the conference proceedings are attached as Appendix B and include discussion, conference recommendations, and a summary for Alabama. The final conclusion for Alabama was that existing water law and administrative systems in Alabama are not adequate to cope with present (1978) and emerging water allocation, use and management problems. Recommendations call for legislation to provide a systematic and equitable framework for water law for Alabama.

In recent months much attention has been focused at the national level on ground water problems, ground water management, and ground water protection. In August 1984, EPA released its Ground Water Protection Strategy (2). Overall, the Strategy was designed to rationalize and better use the many statutes EPA has for protecting ground water. Thus, it focused on achieving four broad objectives: to enhance state programs, to deal more effectively with ground water problems of major national concern, to create a policy framework for guiding EPA programs, and to strengthen EPA's internal ground water organization.

The states have the principal role in protecting ground water. This is mainly because of their historical and legal roles in land use, water allocation and public health protection, as well as the lack of overriding federal legislation.

The federal government currently is responsible for controlling certain contaminants and activities affecting ground water, such as hazardous waste sites and pesticides. It also provides substantial research, information-gathering, technical and financial assistance to the states. While several federal agencies are involved to varying degrees with protecting ground water, the U.S. Environmental Protection Agency has the leading role in this area.

The Conservation Foundation and the National Governors Association jointly sponsored The National Groundwater Policy Forum. The Forum's goal is to articulate a thoughtful, organized, persuasive

national program for ground water management and protection, assigning responsibilities among all levels of government and the private sector. Key decisions were made at Forum meetings during 1985 resulting in the publication in November 1985 of the Forum's proposed conclusions and recommendations (3). The report calls for a new type of federal-state relationship that simultaneously sets forth a clear national mandate and ensures the states ample room to operate. The environmental partnership would demand maximum participation from local governments, private industry, and public interest groups. Quoting from the proposed conclusions and recommendations:

1. comprehensive mapping of aquifer systems and their associated recharge and discharge areas;
2. anticipatory classification of aquifers;
3. ambient groundwater standards;
4. authorities for imposing controls on all significant sources of potential contamination;
5. programs for monitoring, data collection, and data analysis;
6. effective enforcement provisions;
7. surface-use restrictions to protect groundwater quality;
8. programs to control groundwater withdrawals so as to protect groundwater quality;
9. coordination of groundwater and surface-water management; and
10. coordination of groundwater programs with other relevant natural resource protection programs.

"It will be a big step for the Congress to decide that a program of groundwater protection is in the national interest and to lay the policy foundation for that program," said Sen. David Durenberger, addressing the participants of "Water Policy: 1985," a conference held in September by the National Water Alliance (NWA). The conference featured other members of Congress and water quality professionals who gathered to address the issue of developing a comprehensive U.S. water policy.

The NWA National Groundwater Task Force presented a consensus draft report during the conference. The draft noted, "The primary consideration at all levels of government must be the protection of aquifers from contamination and depletion." The report also advised that state and local governments "should retain primacy in managing groundwater," and that interstate compacts can be created for the transfer of water across state borders. Such compacts would be "preferable to allocations made by Congress or the U.S. Supreme Court."

Within Alabama interest heightened. The Committee on Energy, Environment and Natural Resources of the Alabama League of Municipalities set a top priority on enactment of legislation for management of the state's water resources.

Over the past several months the Alabama Farm Bureau Federation has moved in response to the interests and concerns of its membership to explore the feasibility and desirability of water resources management law in Alabama. While a case can be made for the desirability of a law covering the total water resources of the State, the ground water problems were perceived by the Federation as more pressing than surface water problems. Therefore, it was considered politically feasible to press for enactment of ground water management legislation at this time.

Mr. Raleigh Wilkerson, Director of the Beef Division of the Alabama Farm Bureau Federation, has been providing administrative leadership. Preliminary discussions led to hiring hydrologic and legal consultants. Following a review of water law in eastern states, a decision was made to use the newly-enacted Mississippi ground water law as model legislation for the design of an Alabama ground water management bill. On February 7, 1986, a number of people from a wide variety of interests met at the Farm Bureau building in Montgomery in response to Mr. Wilkerson's invitation. Discussions of the

draft bill raised many points of constructive criticism. Following that meeting the consultants were charged to produce a revised draft.

The Alabama Farm Bureau Federation originally set a schedule of 12 months for enactment of ground water management law. Some consider this an optimistic schedule, especially since 1986 was an election year. Others consider this an ideal time, noting that it is very difficult to demonstrate that commitment to the environment is associated with some particular slice of the partisan political spectrum. There may well be broad and eclectic public support. No decision has been made about introduction of the Federation's bill into the current session of the Alabama Legislature.

The Alabama Farm Bureau Federation's draft bill provides a time-limited permit system for use of ground water, protects an aquifer from overdraft, provides that the right granted by a permit may be conveyed, bequeathed or inherited, and among other points provides that a permit may be revoked or modified. The draft bill declares that all ground water is among the basic resources and natural legacies of the State and therefore subject to regulation under the police powers of the State.

Following a series of meetings that were organized by the Alabama Farm Bureau Federation to discuss their ground-water bill, the Alabama Department of Environmental Management released for comment its own draft legislation. The major difference is that ADEM's bill is broader in scope to embrace ground water and surface water under their title, "Alabama Water Management Act." This bill establishes a water management program to provide for the protection and prudent utilization of the water resources of the state; confers upon the Alabama Department of Environmental Management the power and authority to study the existing water resources of the state and formulate a State Water Management Plan; permits the extraction or withdrawal of ground water and the diversion or withdrawal of surface water; permits the construction or alteration of dams; collects permit fees; formulates a plan for implementation during periods of water shortage in the state; and provides for penalties for violations. No decision has been announced about introducing this bill in the current session of the Alabama Legislature.

At the bottom line of discussion about ground water management (allocation) law for Alabama, we must ask, "Do we really need it?" Putt (4) sees permit programs as offering improved capability of balancing public and private interests in water, but he calls for caution regarding imposition of comprehensive permitting systems in water surplus states with only isolated water supply problems.

Enactment of ground water management legislation would be another important step in Alabama's commitment to health and environmental protection. In developing interest and support from the citizenry, and indeed from members of the legislature, of the benefits of such legislation, it should be made clear that a resource management law will not remove all risk and conflict. William B. Ruckelshaus, former administrator of the U.S. Environmental Protection Agency, in an editorial entitled, "Environmental Protection: Politics and Reality," wrote:

"Safety is not, as sometimes thought, the absolute removal of risk. Rather it is a social construct, an agreement, a way of directing social resources and attention toward reasonable levels of protection." (5)

REFERENCES

1. Krane, Dale A., and Mitchell, Gayle F., 1985, Methodology for a Water Management Plan in a Water Surplus State, Mississippi State University Water Resources Research Institute, Mississippi State, MS, 122 p.
2. Mlay, Marion, 1985, Moving to Protect Ground Water: Ground Water Monitoring Review, Fall 1985, vol. V, no. 4, pp. 4-5.
3. —1985, Groundwater, Saving the Unseen Resource. The Conservation Foundation, Washington, D.C., 27 p.

4. Putt, Larry O., 1984, Allocation of Supplies Among Competing Offstream Users in Legal and Administrative Systems for Water Allocation and Management: Options for Change, Ed. by William R. Walker, et al, Virginia Polytechnic Institute and State University, Virginia Water Resources Research Center, Blacksburg, VA, pp. 13-57.
5. Ruckelshaus, William B., 1985, Environmental Protection: Politics and Reality. Ground Water Monitoring Review, Winter 1985, vol. 5, no. 1, pp. 4-6.

APPENDIX A

Alabama's Water Resources Policy

It is the BASIC WATER RESOURCES POLICY of the State of Alabama that the total water resources of the State shall be conserved, developed, and used for the maximum benefit of all people of the State, both now and in the future and that the development of the water and related land resources shall complement and be compatible with the development plan for the total resources of the State.

In recognition that comprehensive planning must precede competent management, there shall be a plan of development for the water resources of the state prepared with the public interest in mind, and there shall be purposeful development in accordance therewith under the guidance and management of the State.

In the comprehensive planning process, concerned departments of state and local government and the public at-large will be informed of proposed plans and will be afforded participation in the decision-making process.

Concomitant with National goals and objectives, it is the policy of the State of Alabama that, insofar as possible, the development of its water resources shall complement any plans and actions directed toward the enhancement of the natural environment. To this end, plans for public water resources development shall be considered with a view to their effect upon the State's other natural and cultural resources and its ecological systems.

The State of Alabama will take cognizance of Federal and local programs for public water and related land resources and will coordinate State activities with appropriate programs to improve the economic conditions within the State and of its citizens in conformity with the State's comprehensive planning program.

The State of Alabama will participate in arrangements for the planning, management, and development of interstate water provided such arrangements are conformable with State public water resources development plans and with interests of the citizens of the State and the Nation.

It is the policy of the State of Alabama that public necessity for water and for its development shall be pre-eminent over private interests and that, insofar as is practicable, development shall be commensurate with local needs and desires. Local units of government shall share, to the extent of their ability, in the cost of development of local public water resources projects.

Local public water needs shall ordinarily be satisfied from local sources before the transfer of public waters from one area or basin to another within the State or across its boundaries is undertaken, but overall public welfare and necessity shall predominate over considerations of this nature.

It is the policy of the State of Alabama to develop and maintain an adequate legal structure for the effective development and efficient management of the public water resources of the State; to seek statutory authority to control the withdrawal and use of public water resources in a manner that will best promote the health, safety, convenience, prosperity and welfare of the people of the State; and to improve the efficiency of planning and management of its public water and related land resources by restructuring, as may be necessary, institutional arrangements to attain the goals and objectives of the State in water resources development.

It is the policy of the State of Alabama to direct its public water resources planning activities and efforts toward the implementation of plans, projects, and procedures that will be of early applicability in the enhancement of the quality of the environment, in the promotion of regional economic growth and National economic efficiency, and in the improvement of the quality of life and social well-being of the citizens of Alabama.

APPENDIX B

ALABAMA SUMMARY from Proceedings of the Southeast Conference on Legal and Administrative Systems for Water Allocation and Management. Virginia Polytechnic Institute and State University, Virginia Water Resources Center, Blacksburg, Virginia. 1978, 387 p.

Water Law

The allocation and use of water in Alabama has not been the subject of significant legislation. Such law as exists is largely case law where the courts have dealt with water problems by default. In the present state of affairs it is not possible to clearly define water rights in Alabama.

Court decisions extending back into the 17th Century support a number of conclusions about Alabama riparian water law. Only land-owners whose lands actually touch a watercourse are entitled to the use of the water. Water rights are attached only to the ownership of riparian land. These rights may not be lost by nonuse. Riparian owners cannot convey their rights, and they must use the water only on the riparian land.

Alabama courts have not clearly recognized the riparian natural flow and reasonable use theories as distinct doctrines. Neither has been consistently followed. Both have been used and often mixed when circumstances demanded.

Water law in Alabama has tended to revolve around a balancing of interests, with certain interests having preference over others. Mining and manufacturing have been the preferred interests, with agriculture and municipal use in a secondary role. This is illustrated by a 19th century court decision related to the City of Mobile which wanted to withdraw water from a stream for municipal purposes. Lower riparian grist mills depended on a sustained stream flow for water power, and they sued the City to prevent the diversion. Their position was that they were entitled to the natural flow-undiminished in quantity and quality. The State Supreme Court ruled against the City because of the mills' need for the natural flow. The argument was that the corporate City, in contrast to its citizens, had no natural needs and was thus relegated to a lower priority than the mills. Most litigation revolved around diminishing the flow of water and the natural flow doctrine prevailed. This was changed by the entrance of mining and industrial activities in the early 1900's.

The philosophy surrounding mining and industrial development was that these economic activities needed to be sheltered to facilitate their growth. Mining and ore processing require water, and to encourage this use the natural flow doctrine was modified to permit reasonable use involving diversion and pollution. Both were perceived as reasonable in the context of mining and industrial technology of that period. Thus developed a dichotomy in water law in which riparian mining and industrial activities were governed by what was then characterized as reasonable use and other riparian users by the natural flow doctrine.

The Alabama courts realized that a question of constitutionality existed with respect to damages to downstream riparian owners from the the upstream industries. A remedy of monetary damages was provided if affected parties could prove substantial injury. This required such an extensive showing of damage as to provide little opportunity for redress. Since injunctive relief was not provided, a class of preferred users was established.

Until the mid-1950's, the Alabama Supreme Court considered water pollution to be a reasonable concomitant of mining and industrial activity. On two earlier occasions, it has referred to the effects of serious pollution on downstream users as a trifling inconvenience. By this time, industry was well established, and there seemed less justification for continuation of the earlier philosophy. Furthermore, there was increased public interest in lessening the impact of stream pollution. Concern of overall environmental quality was rising. There was also new federal legislation with its own set of requirements for pollution control. These all contributed to a shift away from earlier views.

Beginning in 1974, there was a sharp increase in the construction of small power dams. Most affected lower riparians, particularly agricultural and municipal users. Associated with this activity was pressure to ease up on the application of the natural flow doctrine. The result again appears to be some form of reasonable use doctrine in which certain uses are preferred. Users today face a confused background of law in which there is considerable uncertainty and insecurity for all but eight categories of industry which enjoy a preferred status.

The legal basis for interbasin transfer has not been specifically addressed under present law. Birmingham's use of water from the Cahaba River Basin by prescriptive right is an example of need for clarification. It also serves to illustrate the need for scenic river protection. Scenic river and wetland protection are viewed as harmonious with the need to protect public water supplies. The two might profitably be considered as a dual-purpose designation.

There has been no concern in Alabama over the appropriation of diffused surface water. It has been viewed largely as a problem of excess water with emphasis on disposal problems associated with accelerated runoff in urbanizing areas. Most cases have involved the rights of developers to change the natural flow patterns on affected lands. There is no real consistency in applicable doctrines. Rural lands are usually subject to the civil rule. This has been interpreted by the courts to mean that an upper landowner can collect and channel water so long as it doesn't significantly endanger or affect lower land use. The common enemy rule generally has been applied to urban lands. It has meant that a landowner can do whatever necessary to protect himself from diffused water, including construction of barriers and injury to neighbors. Injured parties have recourse to damages through the courts. These two rules have not been applied to transportation companies, which have been held to a strict liability doctrine.

Groundwater law in Alabama is based on the reasonable use doctrine, under which reasonable use of the land is the deciding factor. The assumption of percolation prevails in the absence of proof of underground streams. There has been the same pattern of preferred status for mining and industry. The greatest proportion of injured parties includes farmers and municipalities.

Water Administration

Alabama imposes no statutory controls over water withdrawal, diversion, or consumptive use. Water management is carried out

through single-purpose agencies responsible for public water supplies, recreation, navigation, drainage, industrial development, fish and wildlife, and water pollution control. Some three dozen agencies are involved. Foremost are the Department of Conservation and Public Health and The Water Improvement Commission. Twelve of these have restrictive or permissive functions. Examples are the Tennessee Tombigbee Waterway Development Authority, Coosa Valley Development Authority, and Tennessee-Mulberry Waterway Commission, created for the development of waterways, navigation, water supply, and conservation, flood control, recreation, irrigation, industrial development in limited specific geographic areas.

Because of the limited nature of Alabama water statutes, only a few agencies have administrative duties in the enforcement of statutory water law. The Department of Public Health has general supervision and control over the quality of public water supplies. Except for oil field operations, responsibility for water pollution control is in the hands of the Alabama Water Improvement Commission. This is the only agency created solely for water management purposes. The State Oil and Gas Board has jurisdiction over pollution from oil field operations. Broad jurisdiction over certain land resources related to water use is held by the Department of Conservation. This includes fishing lakes, recreational areas, irrigation districts, etc., which do not involve actual water management. There is a multiplicity of overlap and fragmented responsibility among these limited-purpose water agencies.

Conclusions

1. Alabama water law has shown little concern for the protection of riparian owners unless they fall within certain preferred classes. There is little security under present law for other users.
2. There are important questions about substantive rights, inequities, interbasin transfer, and various levels of protection for scenic rivers, agriculture, and municipal water users.
3. Hydrologic relationships between surface and ground waters have not been recognized.
4. There is a multiplicity of overlap and fragmented responsibility among these limited-purpose water agencies.
5. Existing water law and administrative systems in Alabama are not adequate to cope with present and emerging water allocation, use, and management problems.

Recommendations

1. Research in support of a legislative program for improved state water resources allocation and management.
2. Legislation to provide a systematic and equitable framework of water law for Alabama.
3. Administrative action to reduce overlap and fragmented responsibility for water planning and management among State agencies in Alabama.