

New Mexico Adopts More Stringent Uranium Ground Water Standard

by Stuart R Butzier

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In a hotly contested proceeding initiated by a petition from the New Mexico Environment Department, the State's Water Quality Control Commission ("WQCC") has changed New Mexico's human health ground water standard from 5 mg/L to .03 mg/L. The new, much more stringent, ground water standard, which will be the same as the Maximum Contaminant Level ("MCL") standard for uranium under the federal Safe Drinking Water Act ("SDWA"), becomes effective on June 1, 2007 for past and current discharges resulting in an exceedance of the standard. For any new discharges, the new standard has an effective date of September 1, 2004.

The WQCC found "credible scientific evidence" of the dangers of "certain levels" of uranium in ground water supporting the change in standard. The centerpiece of the Environment Department's scientific evidence was an epidemiological study that relied heavily on non-human animal studies of the toxicity of uranium. The study, which also was based in part on observations about special sensitivities of Native American and Hispanic communities in New Mexico, recommended the human health ground water standard be put at .007 mg/L, that is, even more stringent than the current uranium MCL adopted for drinking water by the Environmental Protection Agency. The Environment Department initially proposed the .007 mg/L level based on the study.

The WQCC, understandably troubled by the prospect of having a standard for water in the ground that is more stringent than the federal drinking water standard, opted for the federal MCL level of .03 mg/L. The WQCC's statement of reasons cites witnesses on all sides of the issues as purportedly supporting the new standard. In addition, the WQCC found comfort in the fact that EPA's use of epidemiological data and non-human animal studies in establishing the drinking water MCL was found to be reasonable in *City of Waukesha, et al. v. Environmental Protection Agency*, 320 F.3d 228 (D.C. Cir. 2003). The New Mexico Mining Association, which extensively challenged the reliability of the Environment Department's scientific data, is expected to appeal or otherwise continue its challenge to the WQCC's new standard.

Although the proposal to tighten the uranium standard apparently was prompted by recent attempts to develop *in situ* uranium projects in western New Mexico's uranium belt (much of which is also in Indian country), the new standard is anticipated to have potentially far-reaching consequences, including consequences that may not have been foreseen or adequately vetted by proponents and other stakeholders. For example, uranium mill facilities that are at various stages of closure in New Mexico may find it necessary to pursue alternative abatement standards for their sites under a procedure already available in the WQCC's regulations. In addition, oil and gas operators and municipal water treatment facilities dealing with areas of naturally occurring radioactive materials and uranium rich waters will be well advised to re-evaluate their regulatory compliance in light of the new stringent standard.

Moreover, many as yet undetermined and unaddressed regulatory issues are presented by the WQCC's adoption of the new standard. For example, issues of

preemption are implicated involving Congress' and the Nuclear Regulatory Commission's regulation of the nuclear fuel cycle under the Atomic Energy Act and the Uranium Mill Tailings Radiation Control Act. Even within the WQCC's own regulatory programs, which are administered by NMED, complicated issues concerning whether and how to take into account naturally occurring uranium, existing concentrations, historic contamination, appropriate points of compliance, and the evolving notion of institutional control mechanisms remain. These are issues that will require the considered attention of regulators and the regulated community in the years to come.