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OPINION OF: TOM UDALL, Attorney General

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QUESTIONS

1. Whether an owner or operator of an underground storage tank containing petroleum which has experienced a "release" has a claim for payment from the Corrective Action Fund for costs incurred, or prospectively to be incurred, for "corrective action," provided that the requirements of NMSA 1978, § 74-6B-8(B)(1), as amended, 1991 N.M. Laws, Ch. 47, § 1, have been satisfied?

2. Whether an owner or operator of an underground storage tank containing petroleum which has experienced a "release" and who would otherwise be required to comply with the Underground Storage Tank Regulations, Part XII, with regard to "corrective action," is relieved of such requirements in the event the Corrective Action Fund either (a) contains insufficient funds to meet the costs of such corrective action or (b) is not used for such corrective action by reason of priorities imposed by regulations adopted by the Environmental Improvement Board pursuant to NMSA 1978, § 74-6B-7(B)?

CONCLUSIONS

1. The owner or operator of an underground storage tank which has experienced a release and who has complied with the requirements of NMSA 1978, § 74-6B-8(B)(1)(a) through (c) has no claim for payment from the Corrective Action Fund for costs expended by him for corrective action, nor does he have a claim for such amounts to be expended by him in the future.

2. The owner or operator of an underground storage tank which has experienced a release is not excused from compliance with corrective action requirements by reason of the insufficiency or unavailability of monies in the Corrective Action Fund to meet the costs of corrective action.

BACKGROUND

In 1984, Congress enacted Sections 9001-9010 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6991-6991i, in response to a nationwide threat to ground water posed by leaking underground storage tanks. The legislative reports estimated that nation-wide as many as 75,000 to 100,000 such tanks were leaking and

another 350,000 might develop leaks within the next five years and stated that these tanks were "considered the source or probable source of a substantial number of groundwater contamination cases." This was considered a very serious problem because "half the population of the United States depends on groundwater as a source of drinking water." H.R. Rep. No. 133, 98th Cong., 2d Sess. 128 (1984).

Pursuant to the RCRA, the federal Environmental Protection Agency ("EPA") issued regulations imposing significant new obligations upon owners and operators of underground storage tanks. The regulations cover a wide spectrum of topics, including detection, prevention and correction of releases, leak detection systems, monitoring records, reporting of releases, corrective action, closure, financial responsibility and new tank performance standards. 40 C.F.R. Part 280. The states were given the option to assume the primary enforcement responsibility by developing their own underground storage tank program and submitting it for approval to the EPA. The standards of state programs were to be "no less stringent" than the EPA regulations. 42 U.S.C. § 6991c(b), (d)(2). New Mexico submitted such a program to the EPA in 1990, and the EPA approved it. See, 55 Fed. Reg. 38064 (Sept. 17, 1990).

New Mexico's program for the regulation of underground storage tanks at the time of the EPA approval consisted of certain provisions of the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to 13 (Repl. Pamp. 1990), and regulations issued thereunder. The New Mexico Legislature had enacted amendments to the Hazardous Waste Act directing the Environmental Improvement Board ("EIB") to adopt regulations for underground storage tanks "which are equivalent to, and no more stringent than" the regulations adopted by the EPA pursuant to RCRA. NMSA 1978, § 74-4-4(C) (1987 N.M. Laws, ch. 179, § 3). These regulations were to include standards for installation, operation and maintenance of such tanks; requirements for financial responsibility to ensure that owners and operators have the financial ability to clean up leaks and to compensate third parties injured by leaks; standards for detection of leaks; and, in subsection seven, "requirements for the reporting, containment and remediation of all leaks from any underground storage tanks." NMSA 1978, § 74-4-4(C). As directed, the EIB adopted Underground Storage Tank Regulations, Parts I-XIV in 1990.

Neither New Mexico's Hazardous Waste Act nor its Underground Storage Tank Regulations provide a public mechanism to fund the costs to clean up sites contaminated by leaking underground storage tanks; private individual financial responsibility is required. Those costs are expected to be substantial. One study authorized by the Legislature estimated that it would require $391 million over a five-year period to clean up the sites contaminated by leaking underground petroleum storage tanks in New Mexico.[1] In 1990, the study reported that there were 14,266 petroleum tanks located at 4,615 locations, of which 2,502 were service stations and gasoline retail facilities. Of these, 63 percent were in urban areas and 37 percent in rural areas. The estimated number of owners of these tanks was 1,965, and the owners ranged from major oil companies to sole proprietors. The report said that probably 70 percent of the retail gasoline outlets in New Mexico are owned by jobbers (wholesale

distributors), convenience stores and independent chains. The New Mexico Environment Department ("NMED") currently knows about 404 tanks that are leaking.

In 1990 the New Mexico Legislature approved two acts in an effort to deal with the financial implications of the Hazardous Waste Act and the Underground Storage Tank Regulations: the Ground Water Protection Act ("GWPA"), NMSA 1978, §§ 74-6B-1 to 11 (Repl. Pamp. 1990), which, among other things, created a state Corrective Action Fund (the "Fund"), and the Petroleum Products Loading Fee Act, NMSA 1978, §§ 7-13A-1 to 6 (Repl. Pamp. 1990), which imposed a per-gallon fee on the loading of gasoline or special fuel into cargo tanks and on gasoline or special fuel imported into the State for resale or consumption. The net proceeds attributable to imposition of the fee are to be distributed to the Fund, but collection of the fee is to cease if the unencumbered balance of the Fund reaches $25 million and resume again if the balance falls to $12 million or less. NMSA 1978, § 7-1-6.25 (Repl. Pamp. 1990). As of June 1991, after about a year of receipts but no disbursements, the Fund had a balance of approximately $10 million.

The Fund "is intended to provide for financial assurance coverage required by federal law and shall be used by [NMED] to take corrective action in response to a release."[2] NMSA 1978, § 74-6B-7(A). The EIB was directed to adopt regulations which prioritize sites contaminated by leaking underground storage tanks for corrective action based on "public health, safety and welfare and environmental concerns," and NMED is directed to make expenditures from the Fund in accordance with the priorities established in the regulations. NMSA 1978, § 74-6B-7(B)(C). The EIB adopted these "priority" regulations on June 13, 1991.

ANALYSIS

1. The first question raised ---- the "right" of an owner or operator of a leaking underground petroleum storage tank to payments from the Fund ---- is resolved by long-established rules of statutory construction. If such a right exists, then it must be established by statute. The only statute which even arguably creates such a right is the GWPA.[3]

The GWPA's declared purpose reflects that the State, not private persons, shall control expenditures from the Fund. Its purpose is to provide "substantive provisions and funding mechanisms that will enable the state to take corrective action at sites contaminated by leakage from underground storage tanks." NMSA 1978, § 74-6B-2. The GWPA created the Fund in 1990 to be used by the NMED to take corrective action in response to a release in accordance with a system of priorities specified in regulations and based on recommendations from the Underground Storage Tank Committee (the "Committee"). NMSA 1978, § 74-6B-7(A) and (B). The GWPA also directed NMED to "establish priority lists of sites in accordance with regulations adopted by the board" and to:

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...make expenditures from the corrective action fund in accordance with regulations adopted by the board for corrective action at sites contaminated by underground storage tanks. The [NMED] shall take corrective action at sites in the order of priority appearing on the priority lists, except where an emergency threat to public health, safety and welfare or to the environment exists.

NMSA 1978, § 74-6B-7(B) and (C).[4]

ANALYSIS

Here, the Legislature has said that in expending Fund monies, NMED shall adhere to EIB regulations and established priorities. Such language forbids expenditures by NMED except to clean up sites in accordance with its own adopted priorities or in a situation determined by NMED to be an emergency. When the Legislature establishes such specific conditions on a public body's expenditure of funds, expenditures which do not satisfy these conditions shall not be made. See **Fancher v. Board of Commissioners,** 28 N.M. 179, 210 P. 237 (1921). Unless the Legislature clearly directs otherwise, NMED has no authority to substitute a different disbursement system for the EIB-priority mechanism.

In 1991, Section 74-6B-8(B) of the GWPA was amended by adding the following underlined language to read: the owner or operator "shall not be liable [to pay NMED back for any cleanup costs] **and shall be entitled to the use of the state corrective action fund for corrective action at the site**," if he is in compliance with "regulations issued pursuant to NMSA 1978, § 74-4-4(C)(1) through (7)."[5] The question presented is whether Section 74-6B-8, as amended in 1991, now entitles owners or operators to payment of the costs of corrective action at a site regardless of the site's position on the priorities list and regardless of the availability of funds. We conclude that it does not, indeed that it cannot, without undermining the disbursement scheme of the GWPA and destroying the fundamental purposes of the Hazardous Waste Act (discussed in Part 2 of this opinion).

In construing the GWPA, effect must be given to all of its provisions which govern disbursements. If Section 74-6B-7 requires that disbursements adhere to EIB-established and NMED-administered priorities and forbids any that do not, and Section 74-6B-8 were read to require that disbursements be made to any qualifying person on a first-come-first-served basis without regard to priority or availability of funds, inconsistent provisions would govern NMED's duty to expend monies on contaminated sites. Either the owner/operator controls the disbursements, or the EIB priorities and regulations control the disbursements; the Fund is not infinite, and the disbursements cannot be controlled by both.

A well-established principle of statutory construction directs that statutes must be read to avoid such inconsistencies. **State ex rel. Klineline v. Blackhurst,** 106 N.M. 732, 749 P.2d 1111 (1988). Here, there is no need to conclude that the Legislature enacted conflicting provisions. In addressing disbursements from the Fund, the Legislature is

presumed to have been aware of the specific limitations on such disbursements already set forth in the statutory section immediately preceding the one amended. **Quintana v. Department of Corrections,** 100 N.M. 224, 668 P.2d 1101 (1983); **City Commission v. State,** 75 N.M. 438, 405 P.2d 924 (1965). Thus, it is most reasonable to read the new "entitled to the use" language of Section 74-6B-8 to mean that a site is eligible for Fund expenditures, but only in accordance with the other statutes, regulations, priorities and limitations governing the use of the Fund.[6]

Pursuant to Section 74-6B-7 the Legislature in 1990 crafted a system for the distribution of a limited Fund. That section was left unchanged in 1991. To conclude that by amending Section 74-6B-8(B) the Legislature intended to replace the priority system with first-come-first-served payments in uncontrolled amounts to all qualified applicants would mean that in amending Section 74-6B-8 the Legislature had repealed Section 74-6B-7, not expressly, but by implication. A conclusion of implied repeal is not reached in the absence of a clear and irreconcilable conflict between the earlier and the later statute or a demonstrable legislative purpose to displace the operation of the prior statute. Such a conclusion is strongly disfavored and is not reached without convincing support. See **Clothier v. Lopez,** 103 N.M. 593, 711 P.2d 870 (1985); **Jaramillo v. Kaufman Plumbing & Heating Co.,** 103 N.M. 400, 708 P.2d 312 (1985); compare **In re Childers' Estate,** 89 N.M. 334, 552 P.2d 465 (1976); **Galvan v. City of Albuquerque,** 87 N.M. 235, 531 P.2d 1208 (1975). Here, there is no such clear conflict between Section 74-6B-8, as amended, and Section 74-6B-7; rather, the statutes can be reconciled. And, since the 1991 Legislature was plainly aware of the provisions assertedly repealed, and it left standing Section 74-6B-7, calling for disbursement in accordance with EIB priorities, it would be entirely illogical to conclude that the Legislature intended to displace that statute. No implied repeal can be asserted here.

2. The second question asked is whether an owner or operator of a leaking tank is excused from his statutory obligation to take corrective action because of either an insufficiency of monies in the Fund or the use of the Fund at other sites. There is no statutory basis for relieving an owner or operator of his cleanup obligation. Indeed, the statutory and regulatory scheme is all-inclusive.

The Hazardous Waste Act directs the EIB to adopt regulations for the "remediation of **all** leaks from any underground storage tanks." NMSA 1978, § 74-4-4(C). (emphasis added). Likewise, the Underground Storage Tank Regulations, Part XII, apply to "[a]ll releases." Section 1200.[7] Neither the RCRA, the Hazardous Waste Act nor the Underground Storage Tank Regulations contain any language exempting an owner or operator from cleanup obligations based upon unavailability of funds; in fact, they do just the opposite.

The EPA regulations, which the State program has supplanted based upon the representation that the State regulations are no less stringent than the EPA requirements, clearly place the primary responsibility for compliance with the regulations on the owners and operators of the underground storage tanks. See, e.g., 40 C.F.R. §§ 280.53(b) and 280.60 -- 280.67. Those regulations also specifically require that "to be

considered no less stringent," the state requirements must ensure that " **[a]ll** releases ... are cleaned up through soil and ground water remediation and any other steps, as necessary to protect human health and the environment." 40 C.F.R. § 281.35 (emphasis added). The Underground Storage Tank Regulations essentially reproduce the EPA regulatory scheme in placing primary responsibility for compliance with the regulations on the owners and operators of the underground storage tanks. See Parts VII, XII and XIII. Like the EPA requirements, the EIB regulations require that all releases be cleaned up. Part XII.[8]

To enforce these obligations pursuant to the Hazardous Waste Act, NMED has been given comprehensive enforcement powers. The director can issue compliance orders, commence civil actions, and suspend or revoke permits. The Act provides for penalty assessments of $10,000 per day for noncompliance with compliance orders or for any violation of the Hazardous Waste Act or any regulation enacted under the Act. NMSA 1978, §§ 74-4-10, 74-4-12. "Per violation" means "per tank" in assessments made relating to underground storage tanks. NMSA 1978, §§ 74-4-10(B), 74-4-12. Criminal penalties are available against a person who "knowingly violates" the provisions of the Hazardous Waste Act and regulations enacted thereunder relating to underground storage tanks. First offenders are subject to penalties of imprisonment for a term of less than one year and/or a fine of not more than $10,000 per day per violation. Second offenders face imprisonment of up to two years and/or a fine of $25,000 per violation per day. NMSA 1978, § 74-4-11.

These enforcement and penalty provisions would be incongruous if the Legislature intended that the cleanup responsibility be assumed by the State by the creation of the Fund and that an offending owner or operator could claim, as a defense to criminal or civil liability, that he had no obligation to clean up a contaminated site because the State had failed to give him the funds to do so. To the contrary, these provisions reflect a legislative intent that private action be taken to remedy the health and environmental hazards created by the leaking tanks and that the owners or operators use their own resources to pay the bill for the cleanup.[9]

The question then becomes whether the provisions of the GWPA change this result. We believe they do not. There is nothing in the GWPA generally, nor in the 1991 amendment to Section 74-6B-8 of the GWPA, that conditions the owner or operator's obligation to take corrective action upon the availability of funds.[10] Thus, we do not believe that the Legislature intended to relieve owners or operators of their statutory cleanup obligations, particularly since the practical effect of such relief would be to allow continued contamination of the ground water (unless the site is a NMED priority and the agency spends enough of the limited Fund monies on the site to achieve correction and remediation). Neither the federal requirements nor New Mexico's statutory and regulatory schemes sanction such a passive approach to remediation of the health and environmental risks created by leaking underground storage tanks.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Institute of Public Law, University of New Mexico, **Final Report,** "State-Sponsored Self-Insurance Programs for Owners of Petroleum Products Storage Systems" (January 1990). The report was prepared for EID pursuant to New Mexico Laws 1989, Ch. 336, § 1.

n2 In October 1991, pursuant to federal law, most owners or operators of underground petroleum storage tanks will be required to demonstrate that they have insurance coverage in the amount of at least $ 1 million per occurrence for timely corrective action and for third party claims or be otherwise able to "demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks...." 40 C.F.R. § 280.93.

One of the ways in which an owner or operator can satisfy this "financial assurance" requirement is through participation in a state fund which is "at least equivalent" to these other mechanisms for financial assurance provided for under the EPA regulations. 40 C.F.R. § 280.101(a). The EPA regional administrator evaluate the equivalency of a state fund primarily in terms of "[c]ertainty of the availability of funds for taking corrective action and/or for compensating third parties; the amount of funds that will be made available; and the types of costs covered." 40 C.F.R. § 280.101(b). Despite the apparent legislative intent, given the small size of the Fund relative to the projected need, and given that monies from the Fund are expected to be depleted by disbursements, it is highly doubtful that the Fund can meet applicable standards as a substitute for the insurance requirement.

n3 Such "right" would raise serious questions under the anti-donation clause of the New Mexico Constitution, Art. IX, Sec. 14, particularly in the case of a contaminated site which does not pose an emergency threat to the public health and which is owned or operated by a financially solvent person or entity. However, since we conclude that the statute does not create such a right, it is not necessary to analyze potential anti-donation issues.

n4 The EIB on June 13, 1991, adopted regulations to establish priorities for corrective action and procedures for administering the Fund.

n5 The GWPA had previously required compliance with subsections (1) through (6); thus, the amendment added Subsection (7), containing the reporting, containment and remediation requirements. (1991 N.M. Laws, Ch. 47).

n6 The current language of Section 74-6B-8(B), which seems to allow owners and operators to avoid strict liability for NMED's cleanup costs if they are in compliance with sections 74-4-4(C) (1) through (7) of the Hazardous Waste Act, is highly problematic. It

is not evident why NMED would spend any Fund money to clean up a site which is in compliance with the Hazardous Waste Act's requirements to repair and clean up a leak (**see** sections 74-4-4(C)(6) and (7)).

n7 The Underground Storage Tank Regulations were approved by the EPA based upon the State's representation that the rules applied to all underground storage tanks and all releases. Indeed, the EPA regulations concerning approval of state programs mandate such coverage. 40 C.F.R. § 281.32, .34, .35. If these representations have been rendered incorrect by the recent amendments to § 74-6B-8, the Attorney General would be duty-bound to withdraw his certification to the EPA pursuant to 40 C.F.R. § 281.25, and the State would in any event be required to notify EPA of a change in controlling state authority pursuant to 40 C.F.R. § 281.52. However, there is no such need, because the obligations of the owner and operator have not been so lessened by the new legislation.

n8 EIB's corrective action regulations also reinforce this conclusion from another perspective. They require the owner or operator to act quickly--within 24 hours to begin with--to contain damage from a leak (See § 1202) and to continue an unbroken course of abatement, reporting, investigation, sampling, treatment, and reclamation actions. See §§ 1203-10. By contrast, the process of committing monies from the Fund to a particular site may take weeks. See § 1506. Obviously, the Legislature would not have intended the owner's and operator's corrective action, which must begin immediately, to await the methodical calculation of priorities, planning, and allocation of monies from the Fund.

n9 This statutory responsibility is in addition to the common law liability for negligence or intentional conduct which may exist against the owner or operator of a leaking underground storage tank.

n10 Senate Bill 119 (1991), enacted as L. 1991, Ch. 47, originally provided that the owner or operator "shall not be liable for corrective action at the site" if in compliance with regulations issued under NMSA 1978, § 74-4-4(C)(1) through (6). The bill was later amended, nonliability for corrective action was deleted, and the obligation to perform corrective action under NMSA 1978, § 74-4-4(C)(7) was inserted.