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A Proposal for an Outrageous, Albeit Effective, Strategy to Prevent Groundwater Pollution

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George Cameron Coggins, *A Proposal for an Outrageous, Albeit Effective, Strategy to Prevent Groundwater Pollution, in WATER QUALITY CONTROL: INTEGRATING BENEFICIAL USE AND ENVIRONMENTAL PROTECTION* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

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OUTLINE

A PROPOSAL FOR AN OUTRAGEOUS, ALBEIT EFFECTIVE,
STRATEGY TO PREVENT GROUNDWATER POLLUTION

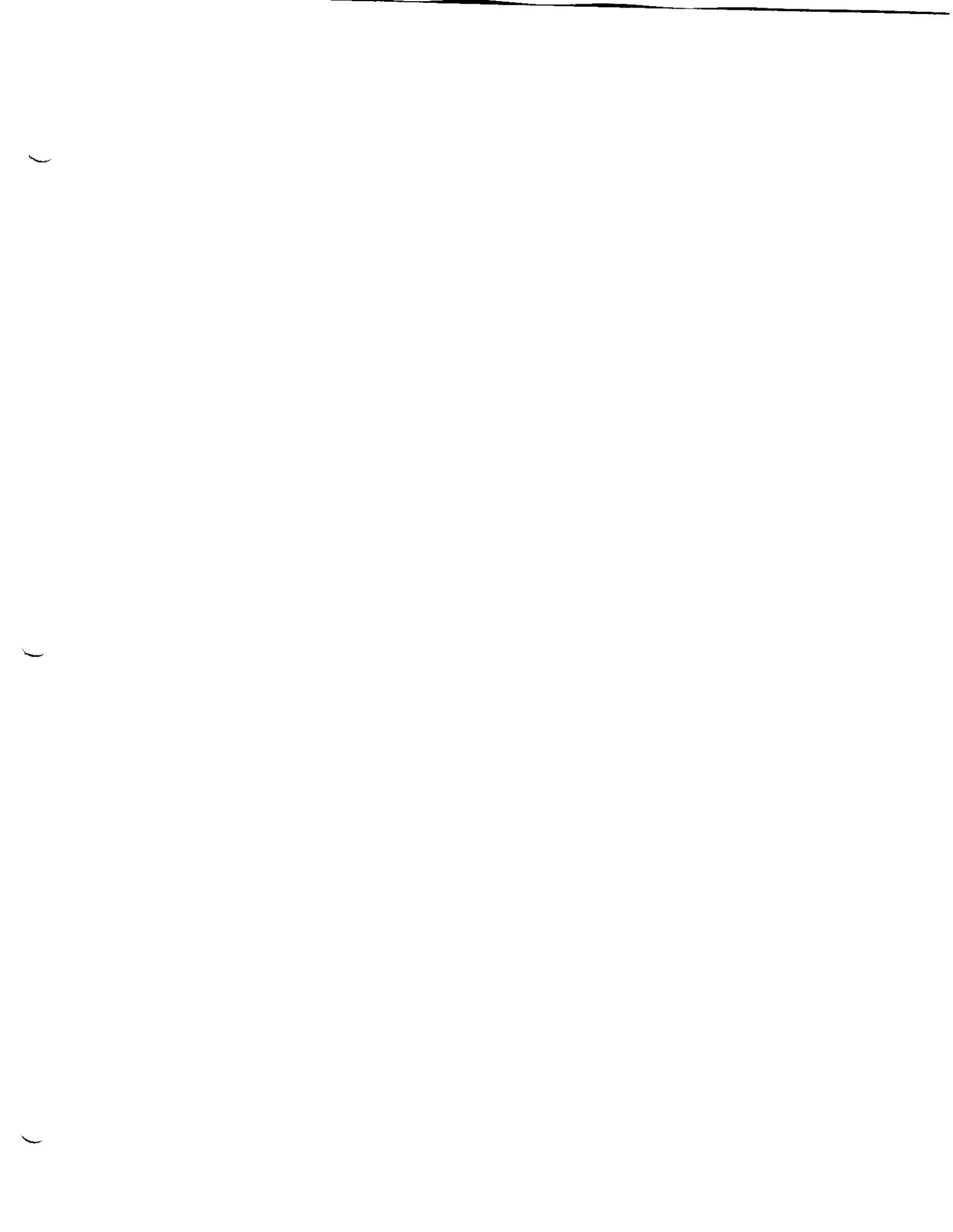
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Presented to

WATER QUALITY CONTROL:
INTEGRATING BENEFICIAL USE AND ENVIRONMENTAL PROTECTION

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A PROPOSAL FOR AN OUTRAGEOUS, ALBEIT EFFECTIVE,
STRATEGY TO PREVENT GROUNDWATER POLLUTION

George Cameron Coggins

I. INTRODUCTION

A. Abstract.

Groundwater contamination is a growing problem for which no jurisdiction has found satisfactory solutions. This presentation proposes a comprehensive, integrated approach, embodied in the attached draft statute. The proposed strategy has virtually no chance of political acceptance. The main starting assumption is that the job of regulation should be done right the first time.

After recounting the fundamental issues that state legislatures must face in order to control and prevent groundwater pollution, this presentation outlines a group of elements that together comprise a fair, effective, and costly strategy. Those elements include administrative centralization, creation of a trust fund (by, among other sources, imposing a severance tax on groundwater extraction), education, classification of aquifers and of pollution sources (point and nonpoint, new and existing), flexible permit requirements, numerical cleanup standards, monitoring, land use controls, noncompliance penalties, judicial review, and damage and cleanup liability.

B. Sources

1. This proposal is adapted from Coggins & Glicksman, Groundwater Pollution II: An Immodest Proposal for a Strategy to Prevent Groundwater Pollution, 35 Kansas Law Review 241 (1987).
2. Pertinent citations are found in that article and its predecessor, Glicksman & Coggins, Groundwater Pollution I: The Problem and the Law, 35 Kansas law Review 75 (1986).
3. Citations in this outline are to the sections of the draft Groundwater Conservation Act (GCA) attached as an appendix.

II. ASSUMPTIONS

- A. Groundwater pollution is a serious problem.
- B. Scientific information is grossly inadequate.
- C. Prevention is superior to abatement or cleanup.
- D. Federal law does not preclude state solutions.
- E. No state has an effective prevention program.
- F. Groundwater pollution is or will be a high legislative priority.
- G. The job should be done right the first time.
 1. Water pollution example.
 2. Incrementalism is worse for all concerned.

III. FUNDAMENTAL POLICY CHOICES

- A. How clean is clean?
- B. Should all aquifers be treated the same?

- C. Should regulation be targeted or general?
- D. What basic regulatory approach is preferable?
- E. Which level of government should have primary responsibility?
- F. Should the legislature rely on strict rules or administrative discretion?
- G. How and to what extent should groundwater property rights be protected?
- H. How will groundwater protection be paid for and by whom?

IV. LEVEL AND ORGANIZATION OF GOVERNMENT

- A. The state is the appropriate level of government to assume primary regulatory responsibility.
 - 1. Federal preemption is highly unlikely, but federal advice and assistance should be helpful.
 - 2. Cities and counties often lack ability and resolution, but land use aspects should have strong local components.
- B. Within the state, regulatory authority should be centralized in one agency or one department of one agency. GCA §§ 6, 7.
 - 1. Administrative fragmentation has been a major problem.
 - 2. Responsibility must be defined.

V. GROUNDWATER CONSERVATION TRUST FUND

- A. You get what you pay for.

- B. States should create trust funds devoted to specific groundwater protection purposes. GCA § 8.
1. Creation and operation of a statewide system for monitoring and testing groundwater quality. GCA § 11.
 2. Support immediate responses to pollution instances. GCA § 8f (i).
 - a. Reimbursement from responsible parties could be sought later.
 - b. State share of Superfund cleanup costs.
 3. Finance investigations of inactive and abandoned pollution sources. GCA § 15.
 4. Furnish drinking water to communities and individuals whose wells are polluted. GCA § 8f (vii).
 5. Construct a repository for contaminated soil until better permanent solutions are found. GCA § 12.
 6. Purchase easements for non- or limited use of recharge areas. GCA § 21.
 7. The possibilities are boundless, and the need is clear.
- C. To finance a conservation trust fund, the state should tap several sources.
1. Permit fees. GCA § 8c.
 2. Reimbursement of cleanup and abatement costs from responsible parties. GCA § 22.
 3. Shares of recoveries from natural resources damage actions. GCA § 22.

4. Severance tax on extraction of usable groundwater.

GCA § 8d.

- a. User pay principle.
- b. Insignificant burden for ordinary household.
- c. Encourage groundwater conservation, and discourage notion that groundwater is a free good.
- d. Clearly constitutional.
- e. Exempt brines.
- f. Main problem: disproportionate burden on irrigators.
 - (1) But they take depletion allowances.
 - (2) And contribute heavily to pollution problem.

5. General revenues for standard regulatory aspects.

VI. EDUCATION

- A. The state should require at least one responsible person from defined categories of sources to take and pass a short course on groundwater pollution. GCA § 13.
- B. The course would include sources, groundwater hydrology, law, and prevention and abatement technology and techniques.
- C. The list of course registrants would give the agency a list of persons to notify when necessary.

VII. ACQUIFER CLASSIFICATION

- A. Existing state and EPA classification systems are

inconsistent, different, overly ambitious, and impossible to implement.

- B. Aquifer-by-aquifer classification as the need arises is inefficient and usually after the fact.
- C. Initial classification should be legislative, with the proponent of administrative reclassification bearing the burden of persuasion. GCA § 9.
- D. We propose a three-tiered system.
 - 1. The legislature would immediately classify all nonbrine groundwaters as drinking water aquifers, to be protected from any degradation to the fullest extent possible. GCA § 9a.
 - 2. Users could apply to have drinking water aquifers reclassified to "usable;" protection for usable aquifers would be differential, depending on situation and use as decided by the agency. GCA §§ 9a, b.
 - 3. Brines and other waters too contaminated by nature or man for other use could be used for injection or waste disposal. GCA §§ 9d, e.
 - 4. In each case, the agency would be required to find that permitted pollution will not adversely affect better quality waters.

VIII. GROUNDWATER QUALITY CLEANUP STANDARDS

- A. Attempts to regulate premised on the quality of the receiving groundwater are doomed.

1. Causation cannot be determined.
 2. Standards are questionable guesswork, beyond the scientific capability of state agencies (and, so far, of the EPA).
 3. Miscalculations cannot be remedied.
- B. Nevertheless, the agency needs an idea of how clean is clean.
- C. This proposal would establish numerical standards by expeditious means but use them only for limited purposes. GCA § 10.
1. The legislature initially would adopt the most current and comprehensive list of state and federal standards for minimum contamination levels. GCA § 10a.
 2. Thereafter, the agency could change them as new information came to light. GCA § 10a.
 3. The resulting standards, however, will be used only to identify problems and as the goals to be reached in cleanups. GCA § 10b.

IX. SOURCE CLASSIFICATION AND CONTROL

- A. Sources of groundwater pollution fall into four main but nonexclusive classes.
1. Existing point sources.
 2. New point sources.
 3. Existing nonpoint sources.
 4. New nonpoint sources.

- B. Point sources are facilities, such as plants, wells, lagoons, or dumps. GCA § 5cc.
- C. Nonpoint sources are activities, such as pesticide spraying and road de-icing. GCA § 5aa.
- D. Differing control strategies by source category are inevitable.
- E. Existing point sources. GCA § 15.
 - 1. The trust fund would fund cleanup of abandoned sources. GCA § 15b.
 - 2. Major sources would be required to monitor. GCA § 15c.
 - 3. Source categories deemed substantial threats would have to retrofit if economically and technologically feasible. GCA § 15d.
 - 4. All sources would be subject to individual case-by-case retrofit orders with expedited judicial review available. Noncompliance can result in shutdown. GCA §§ 15f, g.
 - 5. The agency should promulgate best management practices to cover the operations of existing point sources deemed to present hazards. GCA § 15h.
- F. New point sources. GCA § 14.
 - 1. Each would be required to obtain a permit before construction. GCA § 14b.
 - 2. The permit applicant would have the burden of demonstrating that it will use the best available technology to avoid groundwater contamination, that

- it will utilize best management practices, and that it has a disposal avoidance plan. GCA §§ 14b, c.
3. The permit applicant would also have to demonstrate compliance with land use requirements. GCA § 15a.
 4. The key is the burden: it not only relieves the agency from the impossible job of technology assessment, it allows the applicant to use the most efficient means.
- G. Existing and new nonpoint sources. GCA §§ 16, 17, 18.
1. Agricultural nonpoint sources.
 - a. Bring agriculture within zoning laws. GCA § 16a.
 - b. Rate polluting characteristics of herbicides, pesticides, and fertilizer. GCA § 16d.
 - (1) Ban the use of the worst.
 - (2) Require BMPs and land use controls for the others.
 - c. Abatement order authority for tracable sources. GCA § 16c.
 - d. Require commercial applicators to take the groundwater pollution course.
 - e. Authorize purchase of nonuse easements in sensitive recharge areas. GCA § 21.
 2. Other nonpoint sources.
 - a. Intentional dumping is a felony. GCA § 17.
 - b. Spills and accidents must be reported. GCA § 18.

X. LAND USE CONTROLS

- A. Land use controls for water protection such as septic fields have ancient origins but have not always been successful. This proposal incorporate two varieties.
- B. Water well protection. GCA § 20.
 - 1. Establish zones around all drinking water wells, public and private. GCA § 20a.
 - 2. The closer to the well, the fewer facilities and activities would be allowed and would be more tightly controlled. GCA § 20a.
 - 3. Existing point sources would be nonconforming uses. GCA § 20b.
- C. Recharge area protection. GCA § 19.
 - 1. Statewide recharge area mapping, to the extent possible, noting especially vulnerable areas. GCA § 19a.
 - 2. Promulgation of advisory rules for source placement in recharge areas. GCA § 19a.
 - 3. Integrate groundwater consideration into local land use plans. GCA § 19a.
 - 4. Authorize local officials to grant or deny land use permit application on groundwater criteria. GCA §§ 19b, c.
 - 5. Experimental program that will likely fail.

XI. LIABILITY

- A. Criminal liability should be imposed for intentional or willful polluting acts. GCA § 25a.

- B. Civil liability should be imposed for:
1. constructing or operating without a permit;
 2. violating the statute;
 3. violating regulations or orders;
 4. violating permit terms;
 5. failing to monitor as required;
 6. falsifying reports;
 7. failing to pay taxes; and
 8. otherwise endangering groundwater quality. GCA § 24.
- C. The agency should have power to abate imminent hazards and to bring suit for that purpose. GCA §§ 6g, 22h.
- D. The polluter should be liable to the state for costs of cleanup. GCA § 22a.
1. Responsible parties are those who contributed to the pollution, without fault. GCA § 22f.
 2. Liability would be joint and several, with rights of contribution. GCA § 22c.
 3. Response costs would be similar to those under CERCLA.
- E. The polluter would also be liable for damage to natural resources, usually the groundwater. GCA § 22b.
- F. People injured in their persons or property would have a direct statutory right of action against responsible parties. GCA § 22g.
- G. Citizens could bring suit against the agency for failure to perform any duty required by law and against any source not in compliance after notice. GCA §§ 23b, c.

H. Judicial review of all significant agencies will be available on an appellate basis, but polluters will litigate at their own risk of noncompliance penalties for the interim. GCA § 23.

XII. CONCLUSION

- A. This strategy is neither a panacea nor a blueprint.
- B. It is, however, comprehensive, fair, efficient, and effective.
- C. In any event, it is far better than any existing legal system for prevention of groundwater pollution.