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# A Model Water Code by Frank E. Maloney, Richard C. Ausness, and J. Scott Morris

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# BOOK REVIEWS

A MODEL WATER CODE. By Frank E. Maloney, Richard C. Ausness, & J. Scott Morris. Gainesville, Florida: University of Florida Press, 1972.

A book review of a model code raises some problems of exactly how to approach the task. One could presumably gather up all of the extant codes and then, biblical style, annotate the outstanding text to the proposed model, creating some sort of legal concordance. Better yet, one could survey the legislatures by means of a Gallup-type Poll to ascertain whether the proposed law was, indeed, a needed as well as a possible subject of legislative reform. Having neither the monkish scholarliness for the former nor the proper tools to accomplish the latter, I will proceed under a third method, my own opinion, based on a survey of existing state codes, that the model law goes far beyond present water regimes, coupled with a sneaking suspicion that too many state legislatures are, as of yet, unwilling to adopt the far reaching reforms proposed in the *Model Water Code*.

A *Model Water Code* is prefaced by the known if not accepted fact that the United States is in a water crisis. The authors note that, "In 1900, total water use in America amounted to only 40 billion gallons per day, but by 1965, the figure for daily use of water had risen to 360 billion gallons." Moreover, "In the period 1900-1950, industrial production increased about 700 percent, a figure far in excess of the population growth rate." This latter statistic is most important in assessing the need for new concepts of water planning and for a new regime of water law. Industrial growth has led to urban concentration; by 1980 more than 90 percent of the population will be located in cities and towns, which necessarily means a lessening of the amount of rural lands with water holding capacity. More importantly, industrial uses of water not only are far greater than domestic uses, they are also different in kind; industrial use both consumes and pollutes the water. Consequently the only feasible approach to successful water planning is one that provides for both quantity and quality controls.

The *Model Water Code* is based on a concept of water known as the hydrologic cycle.<sup>1</sup> Water use classification is now determined

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<sup>1</sup> For background material see Piper & Thomas, *Hydrology and Water Law: What is Their Future Common Ground*, in UNIV. OF MICH. LAW SCHOOL, WATER RESOURCES AND THE LAW (1958).

on the status of the user, i.e., whether the rightholder is a "riparian" user or "appropriations" user, or according to the classification of the water itself, i.e., whether the water is "ground water" or "surface water," or on the basis of similar artificial distinctions.<sup>2</sup> Eastern riparian codes, toward which the *Model Water Code* is directed, apply the reasonable use doctrine as between competing riparian users while Western prior appropriations codes declare the first user of water has a right, as against later users, to continue to use the same amount of water in perpetuity or to transfer his right in the marketplace. Both regimes are inequitable to later users, and the riparian system is also of uncertain legal application, since decisions as to competing uses must be made on a case-by-case basis. Recent legislative proposals for adopting the appropriations system in Eastern riparian states have been forwarded and accepted in at least one jurisdiction; however, the authors reject appropriations codes as creating or continuing the same sort of inequities against later users as well as being economically inefficient by "freezing" types and amounts of water use.

The *Model Water Code* takes the approach first forwarded in the *Model Water Use Act* of the Commissioners on Uniform State Laws in 1958. It is a balance of reasonable use and prior appropriations regulated through a permit system under the direction of a state water agency. The most important changes under the proposed *Model Water Code* would be the elimination of vested rights in water through the substitution of durational permits and the substitution of a reasonable-beneficial use concept of water allocation as between competing users in place of reasonable use under present riparian law.

Vested rights in water and the *Model Water Code's* "public trust" doctrine are interrelated concepts. In § 1.02 *Declaration of Policy*, the Code declares, "the waters of the state are the property of the state and are held in public trust for the benefit of its citizens . . .," and, ". . . the people of the state as beneficiaries of this trust have a right to have the waters protected for their use." Water rights as property rights are not firmly entrenched in Anglo-American law; in fact, the courts have generally defined rights in water as being usufructuary and subject to reasonable use. The public trust doctrine, as well, is one of recent origin in United States Supreme Court history developed to define the police powers of the state to regulate public and private activity with regard to land and land titles. The two become inseparable when providing a legal basis for state action through legisla-

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<sup>2</sup> See generally Morse, *The Cost of Purity*, 7 VALPARAISO L. REV. 169 (1973).

tion and enforcement and for citizen standing in the courts to protect the *res* of the trust, i.e., the environment.<sup>3</sup>

Reasonable-beneficial use is defined in § 1.03 of the *Code* as, "The use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose and in a manner which is both reasonable and consistent with the public interest." This must be read in conjunction with § 1.02 (3) which declares beneficial uses to include, "domestic uses, irrigation, power development, mining, and industrial uses," as well as requiring that in the public interest ". . . adequate provision shall be made for the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the state for navigation, public recreation, municipal uses, and public water supplies." The commentary underneath this states that two "classes" of water uses are created by this section, one being beneficial uses and the other being those in the public interest. This division appears to be artificial, and the proper formula would be one that declared beneficial uses to be only those in the public interest.

Economic efficiency and best possible use theory is a difficult theory to apply when dealing with competing interests some of which may have no obvious measureable attributes. Benefit-cost analysis as applied to natural resources or other collective goods is an unworkable theory. The concept of "trade-offs" as a potential bargaining tool is not relevant in the distribution of natural resources because the individual is far more motivated by his economic self-interest than by political community interests.<sup>4</sup> Weighing public interest uses against beneficial uses will result in public interests being slighted because they are incapable of measurement. Reasonable-beneficial use in conjunction with a permit system of water use and control is the only answer to management of our most scarce and valuable resource; however, it must be defined in such a way so as to, if necessary, protect ourselves from ourselves.

If the definitions of use, ownership, and trust are the new deals of the *Model Water Code*, then the administrative framework is the

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<sup>3</sup> Recent court cases granting standing to citizens to protect the environment include *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Citizens Comm. for the Hudson Valley v. Volpe*, 297 F. Supp. 809 (S.D.N.Y. 1969). *But see Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *affirmed*, 92 S.Ct. 1361 (1972), *sub. nom. Sierra Club v. Morton*.

<sup>4</sup> See Morse, *Model Water Resources Program for International Boundaries of the United States and Canada*, 12 NAT. RES. J. 398 (1972); Maas, *Benefit-Cost Analysis: Its Relevance to Public Investment Decisions*, 80 QUARTERLY JOURNAL OF ECONOMICS (1966); *Cost-Benefit Analysis: A Survey*, 75 ECON. J. 683 (1965).

age-old curmudgeon without which, however, the reformation or revolution will fail. The authors have included extensive provisions for public hearings and administrative and judicial review of both rule making and enforcement decisions. Moreover, they have prescribed a water agency composed of working, full time members, one of which, ". . . shall be an attorney who has practiced law for at least five (5) years prior to his appointment; one member shall be a hydrologist or a professional engineer with experience in water management or conservation; one member shall be an experienced farmer or rancher; and the other two members shall be chosen from the public at large based upon their general education, business qualifications, and experience with problems relating to water resources." This is the key to any success in implementing the *Model Water Code*, for definitions of reasonable-beneficial use and the problems involved in changing to a permit system will require full time, sophisticated, and balanced decision-making. Not the uncompensated, part time, and too often biased outputs of many state water commissions now in existence.<sup>5</sup> The *Model Water Code* contemplates a two-tier system of state and local control based on the assumption that local problems are more amenable to local solution and that maximum flexibility will be maintained through local controls. The dual approach is one favored by the federal government in both the Revenue Sharing Act<sup>6</sup> and the Federal Water Pollution Control Act.<sup>7</sup> Both contemplate expenditures by local government units; however, both laws also stress planning, cooperation, and enforcement by state and federal agencies. Therefore any system, whether single or multiple in layers of authority, must ultimately implement one set of standards and enforce one overall law; it is only the flexibility that might be available in a state that has a number of diverse economic and geographic regions that would make the two-tier system more efficient than a single state agency. Iowa operates under the single-tier system.

The *Model Water Code* requires a water inventory of the state and foresees environmental zoning will be the future of rational planning for best possible uses of water resources. Not only are preferred uses possible under the code, but also permit fees may be

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<sup>5</sup> See, e.g., Ky. REV. STAT. § 224.030 (1970) which provides for a Water Pollution Control Commission composed of the Commissioners of Health, Natural Resources, Fish and Wildlife Resources, Mines and Minerals, Commerce, and the Director of Reclamation, the Attorney General, and three citizen members, one representing municipalities, one representing industrial management, and one representing either municipalities or industrial management. No public representation is provided for, and no compensation is allowed to the members.

<sup>6</sup> 31 U.S.C. § 1221 *et seq.* (1972).

<sup>7</sup> 33 U.S.C. § 1151 *et seq.* (1972).

used to regulate the use of water and to provide revenues for the control of water quality. At this point the interrelationship between water use and water quality control may be most effectively described.

Chapter 2 of the *Model Water Code* covers the regulation of consumptive uses, or the permit system. Chapter 5 of the Code covers the regulation of water quality control. As water use permits are essential to the control of water quantity, so are water pollution permits essential to the control of water quality. The approach taken by the *Model Water Code* is utilized in Title IV, "Permits and Licenses," of the Federal Water Pollution Control Act.<sup>8</sup> It has also been implemented in a number of state water pollution control programs; however, existing programs have failed to combine quality and quantity control with funding of water resource programs and, consequently, have turned the permit system into "permits to pollute."<sup>9</sup> Section 5.08 "Discharge Permits," creates two classes of permit users. The first class includes any person discharging any substance into the waters of the state, or, in the case of a person subject to the jurisdiction of the state, into interstate waters. Within the first class fall those permits issued for discharges determined not to lower the water quality in the affected water below the standards set for that class of water pursuant to the state water quality plan. The permit is declared to create a privilege and not a right, and this distinction is made clear by the ten year durational limitation on permits as well as by the procedures for revocation, modification, and suspension of permits. Class Two permits are those issued on a temporary basis when a Class One permit has been denied. The permit may only be issued when the board determines that the applicant is installing pollution control equipment or control is, as of yet, technologically infeasible and that the discharge will be both in the public interest and not unreasonably distinctive to the quality of the receiving waters. A maximum of one year is allowed for a Class Two permit. Section 5.11, "Fees," provides that, "The state board may establish fees for the issuance and renewal of any permits established under this chapter. All funds collected under this provision shall be credited to the water development account." The commentary states that such a fee could be structured to resemble the effluent charge, proportioned to the volume and strength of the effluent discharged. It has been argued in another place that the only effective method of both raising sufficient revenues to finance water quality and water quantity

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<sup>8</sup> *Id.*

<sup>9</sup> See Morse, *The Cost of Purity*, 7 VALPARAISO L. REV. 169 (1973).

control and to provide sufficient incentive to polluters to reduce the amount of effluents they discharge into receiving waters is through an effluent tax based on the actual cost of cleaning up the pollution plus an additional incentive charge to reduce the present level of discharge.<sup>10</sup> The *Model Water Code* offers the first truly comprehensive water regime comparable to that in the Ruhr Valley in Germany, known as the *Genossenschaften*.<sup>11</sup> It is only under a comprehensive system of water quality and quantity control that a truly effective and equitable system of charges can be levied. Without accurate assessment of real damage done by the polluter to the affected water as well as jurisdictional control over all intrastate, and, possibly, interstate and national waters, a water resources program is no more than a sanitation district.<sup>12</sup> For example both quantity and quality of water used and disposed of is important. Sewerage bills based on water usage are inadequate because industrial users can decrease the amount of water used and increase the amount of wastes dumped into the water.<sup>13</sup>

Definition of water quality impairment and standards of water quality are, of course, the tools for implementing a water resources program and define the charges to be levied on polluters. The *Code* uses water quality standards of the receiving waters as a primary tool and effluent standards based on the nature of the effluent discharged into the water as a secondary tool. The former allows flexibility and adaptability whereas the latter may freeze an existing pattern. However, water quality standards are more difficult to set and to enforce. One problem is how to set individual standards within the over-all system. Effluent standards or point-discharge limitations may be necessary as a backup to water quality standards, and constant surveillance of both discharges and the receiving waters will be necessary. In the long run, however, water quality standards rather than effluent standards will be the best method of preserving the quality of waters in varying conditions. Water quality standards depend upon the basic definition given in the law to water quality,

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<sup>10</sup> See *id.*

<sup>11</sup> See BOWER & KNEESE, *MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, AND INSTITUTIONS* 237-38 (1968); Fair, *Pollution Abatement in the Ruhr District*, in *COMPARISONS IN RESOURCE MANAGEMENT* 142-97 (1961).

<sup>12</sup> See H. BANKS, E. CLEARY & R. KNEESE, *REPORT TO THE DELAWARE RIVER BASIN COMMISSION: DEVELOPMENT OF A WATER QUALITY MANAGEMENT PROGRAM FOR THE DELAWARE RIVER BASIN* (July 1963); MOISE, *Model Water Resources Program for International Boundaries of the United States and Canada*, 12 *NAT. RES. J.* 388 (1972).

<sup>13</sup> F. ZWICK & L. BENSTOCK, *WATER WASTELAND, RALPH NADER'S STUDY GROUP REPORT ON WATER POLLUTION* 327 (1971).

impairment of water quality, and pollution. The *Model Water Code* defines impairment broadly, and pollution is only one form of impairment, so that removal as well as discharge of substances into water may be proscribed under the *Code*. Moreover the *Code* permits state action when activity is likely to affect waters in a manner proscribed under the *Code* as well as when harm is imminent or actually occurring. A comprehensive water resources program requires the ability to act in a preventive manner and not, as the law too often does, after the fact.

Chapters 3, 4, and 6 of the *Model Water Code* are further indications of both the comprehensive nature of this effort and of the emphasis on planned, preventive law making. The authors have attempted to integrate all activities within the state that have the most effect on water resources quality and quantity. I am somewhat perplexed by the inclusion of weather modification and not agricultural spraying, when the *Code* excludes air pollution. However, the exclusion of agricultural activity may be justified on the basis that weather modification is a little regulated activity whereas agricultural spraying receives both state and federal attention. In fact the *Model Water Code* favors federal legislation and assumes state legislation to be a temporary measure, in the case future federal regulatory measures are exclusive.

The final question is whether a *Model Water Code* has any place in the growing federal regulation of water resources. There is a federal-interstate law of water,<sup>14</sup> a federal navigation servitude,<sup>15</sup> and a Federal Water Pollution Control Act,<sup>16</sup> however, there is still room for state regulation<sup>17</sup> and, in fact, the federal government encourages, if not demands, local activity. The *Model Water Code* is a much needed effort, and it will serve the best interests of state legislators, lawyers, and citizens interested both in saving our environment and getting government grants to seriously consider the proposed legislative reform.

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<sup>14</sup> *Arizona v. California*, 373 U.S. 546 (1963).

<sup>15</sup> *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>16</sup> 33 U.S.C. § 1151 *et seq.* (1972).

<sup>17</sup> 33 U.S.C. §§ 1311-1345 (1972). *See also* *Askew v. American Waterways Operators, Inc.* — U.S. —, 41 USLW 4507 (U.S. April 17, 1973) which held the Florida Oil-Spill Prevention and Pollution Control Act was not preempted by federal regulatory activity under F.W.P.C.A.