

ENVIRONMENTAL REGULATION IN OKLAHOMA: A PATCHWORK GREEN

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Introduction

Environmental regulation in Oklahoma can be down right confusing. On its own terms, environmental regulation is complicated – often involving intricate technical, scientific, economic, political, and legal issues. These complexities are compounded in Oklahoma by the current system of governmental regulation. At least ten state agencies in Oklahoma have jurisdictional authority over environmental matters (OS 27A, § 2-1-102(14)). While some have broad regulatory jurisdiction, others have a finely focused environmental jurisdiction. Certainly, each has its own slice of the environmental pie.

Adding to the complexity is the web of statutes, regulations, standards, and requirements that governs activities in Oklahoma to protect the environment. For the most part, each state environmental agency has its own governing statute under which it promulgates regulations and procedures. Many employ separate and distinct permitting, licensing, and certification processes. Each has a distinct enforcement authority and philosophy. If the agencies and commissions of the federal government such as the U.S. Environmental Protection Agency, the U.S. Department of Labor, the U.S. Department of Energy, and the U.S. Nuclear Regulatory Commission are thrown in, getting your arms around environmental regulation gets even tougher. Include tribal governments, counties and municipalities, and one's eyes may roll to the back of the head.

Like Oklahoma itself, the current environmental regulatory scheme in Oklahoma is a patchwork. The purpose of this article is to briefly sketch this patchwork for the reader by discussing the various state agencies exercising environmental regulatory authority in the State of Oklahoma, their respective jurisdictions, and the processes of rulemaking, permitting, and enforcement that play such an integral role in the work they each perform.

The Players

Regulation of the environment in the State of Oklahoma is divided by, and shared among, federal agencies, state agencies, tribal governments, county governments, and municipalities. As to the State of Oklahoma, environmental regulatory authority is divided unequally among at least ten state agencies (OS 27A, § 2-1-104(14)). An understanding of the fractured environmental regulatory landscape in the State of Oklahoma must start with the environmental jurisdiction of each state environmental agency. Of course, only the principal jurisdictional reach of each environmental agency is outlined here. A detailed analysis of each agency's jurisdiction is beyond the scope of this discussion.

The Oklahoma Legislature

Any discussion of environmental regulation in Oklahoma must include the Oklahoma Legislature. Under the "police power," the Oklahoma Legislature has the authority to make laws that regulate and protect the environment. Although well-established, the concept of "police power" can be somewhat obscure and is best understood as:

an attribute of sovereignty, inherent in every sovereign state, and not derived from any written Constitution nor vested by grant of any superior power. [It] comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal and protection of the public interests. It is plastic in its nature, and will expand to meet the actual requirements of an advancing civilization and adjust itself to the necessities of moral, sanitary, economic, and political conditions. No principle in our system of government will limit the right of government to respond to public needs and protect the public welfare (*Ex parte Tindall*, 229 P. 125 (Okla. 1924)).

Thus, the Oklahoma Legislature enacts laws that regulate and protect the environment as part of its inherent power to protect the public interest. To protect the environment, the Oklahoma Legislature has created, over time, a network of agencies and statutes that govern the environmental arena.

The Department of Environmental Quality

The principal environmental agency in the State of Oklahoma is the Oklahoma Department of Environmental Quality ("ODEQ"). The successor to the Department of Health, ODEQ was formally created in 1992. Of all the state environmental agencies, its environmental jurisdiction is the most extensive.

ODEQ is responsible for certain point source discharges of pollutants and stormwater to waters of the state and for certain nonpoint source discharges (OS 27A, §§ 1-3-101(B)(1) & (2)). Surface water and groundwater quality and protection, including water quality certifications, are under the ODEQ's oversight, as are water and wastewater works and both public and private water supplies (OS 27A, §§ 1-3-101(B)(4), (5) & (6)). ODEQ is responsible for underground injection control under the federal Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, except for certain classes and types of injection wells regulated by the Oklahoma Corporation Commission (OS 27A, § 1-3-101(B)(7)). Air quality (except indoor air quality and asbestos), hazardous and solid waste, radioactive waste, environmental lab services and certification, freshwater wellhead protection, hazardous substances (except relating to branding, package, and labeling requirements), and utilization and enforcement of Oklahoma Water Quality Standards and implementation documents, each fall under ODEQ's environmental jurisdiction (OS 27A, §§ 1-3-101(B) (8), (9), (11), (14)-(16) & (18)). For those areas or activities under its environmental jurisdiction, ODEQ is responsible for groundwater protection, and for developing and promulgating a Water Quality Standards Implementation Plan (OS 27A, §§ 1-3-101(B)(17) & (21)).

Many of the State of Oklahoma's Superfund responsibilities under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 also fall under ODEQ jurisdiction (OS 27A, § 1-3-101(B)(10)). ODEQ is also broadly charged with regulating entities, activities, and preventing, controlling, and abating pollution, not subject to specific statutory authority of other state environmental agencies (OS 27A, § 1-3-101(B)(19)). Finally, the Oklahoma Legislature has charged ODEQ with developing and maintaining a computerized water quality database (OS 27A, § 1-3-101(B)(20)).

The Oklahoma Water Resources Board

By statute, the Oklahoma Water Resources Board ("OWRB") consists of nine members who are well-versed in recreational, industrial, irrigational, municipal, rural residential, agricultural, or soil conservation uses of water (OS 82, § 1085.1(A)). The OWRB's jurisdictional areas of environmental responsibility fundamentally revolve around surface water and groundwater quality and quantity.

One of the OWRB's most important environmental responsibilities is the promulgation of Oklahoma Water Quality Standards and policies affecting their application, including an anti-degradation policy (OS 27A, § 1-3-101(C)(9); OS 82, § 1085.2(16); and OS 82, § 1085.30(A)). Related to Oklahoma Water Quality Standards is the OWRB's responsibility for a Water Quality Standards Implementation Plan (OS 27A, § 1-3-101(C)(11)). The OWRB serves as technical lead agency for the federal Clean Water Act's clean lakes program (OS 27A, § 1-3-101(C)(8); and OS 82, § 1085.29). It also oversees groundwater protection for activities under its regulatory jurisdiction and develops classifications and identifications of permitted uses of groundwater (OS 27A, §§ 1-3-101(C)(10) & (12)). The OWRB is also responsible for surface water and groundwater rights and for interstate stream compacts (OS 27A, § 1-3-101(C)(1)). Weather modification, dam safety, floodplain management, and administration of loans and grants for water and wastewater projects are also within the domain of the OWRB, as is licensing for water well drillers and pump installers (OS 27A, §§ 1-3-101(C)(2)-(7); and OS 82, § 1085.2(12)).

The Oklahoma Corporation Commission

Interestingly, unlike many of the other state environmental agencies, the Oklahoma Corporation Commission owes its existence to Oklahoma's Constitution (OKLA. CONST. Art. 9, § 15). The Corporation Commission is led by three persons, each elected in a general election for a term of six years.

The Oklahoma Corporation Commission has a broad environmental jurisdiction, exercising authority, among other activities, oil and gas conservation, oil and gas exploration, drilling, development, production, and processing, underground injection control for certain classes of injection wells under the federal Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* and the Oklahoma Brine Development Act, certain tank farms used for storage of crude oil, pipelines for transporting oil, gas, petroleum, anhydrous ammonia, or mineral brine, subsurface storage of oil, natural gas, and liquified petroleum gas in geologic formations, and groundwater protection for activities under its environmental jurisdiction (OS 27A, §§ 1-3-101(E)(1)(a)-(h), (k) & (l)). Finally, certain above ground and below ground storage tanks are the responsibility of the Oklahoma Corporation Commission (OS 27A, § 1-3-101(E)(5)).

The Oklahoma Department of Agriculture

The Oklahoma Department of Agriculture, created by the Oklahoma Agricultural Code, consists of the State Board of Agriculture, which was created by Article 6, Section 31 of the Oklahoma Constitution (OS 2, § 1-2). Much of the Oklahoma Department of Agriculture's environmental jurisdiction is an outgrowth from its oversight of the agriculture industry.

Point source discharges and nonpoint source runoff from agricultural crop production and services, livestock production, silviculture, feed yards, livestock markets, and animal waste are the responsibility of the Oklahoma Department of Agriculture (OS 27A, § 1-3-101(D)(1)(a)). The Oklahoma Department of Agriculture is also charged with enforcing Oklahoma Water Quality Standards and developing and implementing a Water Quality Standards Implementation Plan for its jurisdictional areas of environmental responsibility (OS 27A, §§ 1-3-101(D)(1)(h) & (i)). Facilities storing grain, feed, seed, fertilizer, and agricultural chemicals must answer, for certain purposes, to the Oklahoma Department of Agriculture (OS 27A, § 1-3-101(D)(1)(e)). Forestry, pesticides, fertilizer, slaughterhouses, aquaculture and fish hatcheries, and waste from milk production facilities are also the responsibility of the Oklahoma Department of Agriculture (OS 27A, §§ 1-3-101(D)(1)(b)-(d), (D)(1)(f), & (D)(2)(a)(2)-(3)). Like many of the state environmental agencies, the Oklahoma Department of Agriculture is responsible for groundwater protection for activities within its environmental jurisdiction (OS 27A, § 1-3-101(D)(1)(g)).

The Oklahoma Conservation Commission

The Oklahoma Conservation Commission was created by the Conservation District Act and is the successor agency to the State Soil Conservation Board (OS 27A, § 3-2-101). Not surprisingly, soil conservation and erosion control are within the jurisdiction of the Oklahoma Conservation Commission (OS 27A, § 1-3-101(F)(1)). Wetlands strategy, abandoned mine reclamation, and the coordination of environmental and natural resource education are also the responsibility of the Oklahoma Conservation Commission (OS 27A, §§ 1-3-101(F)(3), (4), & (8)). Other areas of environmental responsibility include groundwater protection, and developing and promulgating a Water Quality Standards Implementation Plan for those activities subject to its environmental jurisdiction (OS 27A, §§ 1-3-101(F)(10) & (11)).

Nonpoint source pollution is also a principal part of the Oklahoma Conservation Commission's environmental jurisdiction. For example, the Oklahoma Conservation Commission is charged with monitoring, evaluating, and assessing waters to determine nonpoint source pollution impacts (OS 27A, § 1-3-101(F)(2)). It serves as the technical lead agency for nonpoint source pollution categories, except for industrial or municipal stormwater (OS 27A, § 1-3-101(F)(2)). The Oklahoma Conservation Commission also acts as a management agency, with jurisdiction and responsibility for directing nonpoint source pollution prevention programs outside of the jurisdiction of local governments (OS 27A, § 3-2-106(19)). It is also responsible for all identified nonpoint source categories except silviculture, urban storm water runoff, and industrial runoff. *Id.*

The Department of Wildlife Conservation

Like the Oklahoma Corporation Commission, the Department of Wildlife Conservation was established by Oklahoma's Constitution (OKLA. CONST. Art. 26, § 1). The Department of Wildlife Conservation's

jurisdictional areas of environmental responsibility extends to the investigation of fish kills (OS 27A, § 1-3-101(H)(1)). It also has the broad responsibility of wildlife protection (OS 27A, § 1-3-101(H)(2)). Lastly, the Department of Wildlife Conservation is responsible for wildlife damage claims (OS 27A, § 1-3-101(H)(2)). Like other state environmental agencies, the Department of Wildlife Conservation is charged with developing and promulgating a Water Quality Standards Implementation Plan for its jurisdictional areas of environmental responsibility (OS 27A, § 1-3-101(H)(3)).

Department of Mines

The Department of Mines also owes its creation to the Oklahoma Constitution. The Department of Mines is charged "with the execution of laws passed in relation to mining activities and corporations engaged in mining activities in the State" (OKLA. CONST. Art. 6, § 25). Thus, its jurisdictional areas of environmental responsibility extend to mining regulation and the reclamation of active mines (OS 27A, § 1-3-101(G)(1) & (2)). It is also charged with the protection of groundwater and with developing and promulgating a Water Quality Standards Implementation Plan for these activities (OS 27A, § 1-3-101(G)(3) & (4)).

Department of Public Safety

Many of the Department of Public Safety's jurisdictional areas of environmental responsibility derive from the Hazardous Materials Transportation Act. It is responsible for hazardous waste, substances, and material transportation inspections under the Hazardous Materials Transportation Act (OS 27A, § 1-3-101(I)(2)). It is also responsible for inspecting and auditing hazardous waste and materials carriers under the Hazardous Materials Transportation Act (OS 27A, § 1-3-101(I)(3)). Its final responsibility is vehicle inspection for air quality (OS 27A, § 1-3-101(I)(1)).

Department of Labor

The Department of Labor cuts a fairly narrow swath through the field of environmental regulation. One of its principal jurisdictional areas of environmental responsibility is regulating indoor air quality under the Oklahoma Occupational Health and Safety Standards Act (OS 27A, § 1-3-101(J)(3)). The Department of Labor also regulates asbestos in the workplace and has responsibility for asbestos monitoring in public and private buildings (OS 27A, § 1-3-101(J)(1) & (2)).

Oklahoma Department of Civil Emergency Management

Created by the Oklahoma Civil Defense and Emergency Resources Management Act, OS 63, § 683.1 *et seq.*, the Oklahoma Department of Civil Emergency Management was created to prepare for and deal with disasters and emergencies in the State of Oklahoma (OS 63, § 683.2(A)). An important part of the Oklahoma Department of Civil Emergency Management's environmental responsibility is maintaining a computerized emergency information system that allows state and local access to information relating to the location, quantity, and potential threat of hazardous materials (OS 27A, § 1-3-101(K)(5)).

The Oklahoma Department of Civil Emergency Management also administers and conducts hazardous materials training for state and local emergency planners and first responders and is required to administer and enforce planning requirements set forth in the federal Emergency Planning and Community Right-To-Know Act (Title III of the Superfund Amendments and Reauthorization Act of 1986) (OS 27A, § 1-3-101(K)(2) & (4)). It also develops emergency operations plans that mitigate, prepare for, respond to, and recover from environmental disasters and emergencies under the Oklahoma Hazardous Materials Planning and Notification Act, OS 27A, § 4-2-102 *et seq.* (OS 27A, § 1-3-101(K)(2) & (4)).

Secretary of Environment

In addition to the state environmental agencies discussed above, the Secretary of Environment is granted environmental responsibilities. The Secretary is charged by the Oklahoma Legislature as the recipient of federal monies (along with the OWRB for certain federal funds) distributed under the Clean Water Act (OS 27A, § 1-2-101(A)(2)). These funds are then disbursed to state environmental agencies based upon statutory duties and responsibilities (OS 27A, § 1-2-101(A)(2)). The Oklahoma Legislature has designated the Secretary of Environment as public trustee for natural resources under federal laws such as the Clean Water Act, the Comprehensive Environmental Response and Liability Act of 1980, and the Oil Pollution Act of 1990 (OS 27A, § 1-2-101(A)(4)). Importantly, the Secretary of Environment coordinates pollution control

and complaint management to avoid duplicative efforts among state environmental agencies (OS 27A, § 1-2-101(A)(3)).

The Secretary of Environment is also charged with developing and implementing public participation procedures relating to the development and modification of reports and assessments required by the Clean Water Act such as the 303(d) report (list of impaired waters), the 305(b) report (water quality assessment), and the 319 report (nonpoint source assessment) (OS 27A, § 1-2-101(B)(1)(a)-(d)). Lastly, the Secretary of Environment is authorized and directed to coordinate lake monitoring in Oklahoma and to identify lakes that are eutrophic (overloaded with nutrients such as phosphorous and nitrogen that can cause algal blooms and a concomitant loss of dissolved oxygen) under Oklahoma Water Quality Standards (OS 27A, § 1-2-102(A)).

Rulemaking

In addition to the various state statutes governing environmental regulation, state environmental agencies often adopt rules and regulations that implement and administer the Oklahoma Legislature's mandates as prescribed by statute. When creating environmental agencies and defining their jurisdictional boundaries, the Oklahoma Legislature, from time to time, delegates rulemaking authority to environmental agencies to administer the general public policy enacted (OS 75, § 250.2(B)); *City of Sand Springs v. Department of Public Welfare*, 608 P.2d 1139, 1144 (Okla. 1980)). In delegating rulemaking authority, constitutional concerns dictate that the Oklahoma Legislature provide definite standards that guide agencies in the rulemaking process (*Democratic Party of Oklahoma v. Estep*, 652 P.2d 271, 277-78 (Okla. 1982)). Rulemaking authority and the standards governing delegation generally are found in the provisions that created the agency or granted it jurisdiction over a particular environmental issue. The process of rule promulgation is governed by the Administrative Procedures Act (OS 75, § 250 *et seq.*).

The first step for an environmental agency in the rulemaking process is to draft a proposed rule that implements or interprets legislation enacted by the Oklahoma Legislature.

The next step is the process of "adoption." This step is characterized by a number of public participation components. Notice of the intended rulemaking must be published in *The Oklahoma Register* (OS 75, § 303(A)(1)). Upon publication, interested persons are afforded a comment period of at least twenty days, during which interested persons may submit data, views, or arguments (OS 75, § 303(A)(2)). Under certain circumstances, a public hearing must be held, although many environmental agencies voluntarily elect to hold one or more public hearings or public meetings at this juncture (OS 75, §§ 303(A)(3) & (C)). Agencies must also issue rule impact statements, which generally contain a brief description of the purpose of a proposed rule, a description of those persons who will be benefited and burdened by the proposed rule, a description of the probable economic impacts of the proposed rule and the probable costs to the state environmental agency, and a discussion as to whether there exists any less costly or non-regulatory methods to achieve the purpose of the proposed rule (OS 75, § 303(D)). Upon consideration of the submissions relating to the proposed rule, and after public hearings have been held, an environmental agency may then "adopt" a proposed rule (OS 75, § 303(E)).

The next step can be described as the process of "final adoption." Within ten days of adopting a proposed rule, the state environmental agency files the newly adopted rule, among other documentation, with the Governor, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate (OS 75, § 303.1(A)). A statement is published in *The Oklahoma Register* that the newly-adopted rule has been submitted to the Governor and the Legislature (OS 75, § 303.1(C)). The Governor has forty-five days to approve or disapprove the newly-adopted rule (OS 75, § 303.2(A)). If approved, the Governor notifies the environmental agency and a copy of the approval is given to the Legislature (OS 75, § 303.2(A)(1)). Notice of the approval is published in *The Oklahoma Register* (OS 75, § 303.2(A)(1)). In the event of disapproval, the Governor notifies the environmental agency of the reasons for disapproval and provides notice to the Legislature of the disapproval (OS 75, § 303.2(A)(2)). Failure of the Governor to approve the rule constitutes disapproval (OS 75, § 303.2(A)(2)). Notice of the disapproval is published in *The Oklahoma Register*.

Upon the Legislature's receipt of the newly-adopted rule from the state environmental agency, it is assigned to appropriate committees in the House of Representatives and the Senate for review (OS 75, § 308(A)). The Legislature must review the rule within thirty days of receipt (OS 75, § 308(A)). Through adoption of a joint resolution, the Legislature may approve or disapprove the rule, or waive the thirty-day review period

(OS 75, § 308(B)(1)). Transmission of an adopted rule for legislative review on or before April 1 results in the approval of such rule by the Oklahoma Legislature if the Oklahoma Legislature is in regular session and has failed to disapprove such rule within thirty legislative days after such rule was submitted or if the Oklahoma Legislature adjourned before the expiration of the thirty legislative days and has failed to disapprove such rule (OS 75, § 308(E)(1)). After April 1 of each year, transmission of a newly-adopted rule for legislative review results in the approval of such rule by the Legislature only if the Legislature is in regular session and has failed to disapprove the newly-adopted rule within thirty legislative days after the newly-adopted rule has been transmitted (OS 75, § 308(E)(2)). If the Oklahoma Legislature adjourns before the expiration of the thirty legislative days, the newly-adopted rule is carried over for consideration during the next regular legislative session (OS 75, § 308(E)(2)).

If approved by the Legislature and the Governor, the newly adopted rule is considered “finally-adopted” (OS 75, § 308.1(A)). The finally adopted rule is thereafter submitted to the Secretary of State for filing and publication in *The Oklahoma Register*. (OS 75, § 308.1(A)); and OS 75, §§ 304(A) & 308.1(A)). Final rules are effective ten days after publication in *The Oklahoma Register* (OS 75, § 304(B)(1)). The rules are then valid, binding, and have the force of law (OS 75, § 308.2(A)). The Secretary of State codifies, compiles, indexes, and publishes agency rules in a publication known as the Oklahoma Administrative Code and annually updates this compilation (OS 75, §§ 256(A)(1)-(2)).

Permitting

Mindful of the fractured nature of environmental regulation in the State of Oklahoma, it is not surprising that each agency empowered to permit an activity may have its own statutes, rules, and regulations that govern the subject matter of the activity and the permitting process itself. It is entirely possible that one activity or operation will require permits from more than one state environmental agency. For example, in Oklahoma, those desiring to operate concentrated animal feeding operations usually must obtain two permits for the operation. First, it is necessary to obtain a license from the Oklahoma Department of Agriculture to operate a concentrated animal feeding operation. Secondly, many concentrated animal feeding operations rely upon groundwater and must therefore appear before the Oklahoma Water Resources Board to obtain a permit to take and use groundwater.

A brief discussion of the permitting process in Oklahoma must include the Oklahoma Uniform Environmental Permitting Act (OS 27A, § 2-14-101 *et seq.*). This Act specifically applies only to ODEQ and is intended to provide a uniform and consistent scheme for notices and public participation opportunities relating to applications for permits and permit authorizations (OS 27A, § 2-14-102). Under the Act, permits are categorized by “tiers.” Tier I is the basic permitting process and includes, fundamentally, an application, notice to landowner, and review by ODEQ (OS 27A, § 2-14-103(9)). Tier II is a more involved permitting process that includes notice of an application filing by publication in a local newspaper, ODEQ’s preparation of a draft permit or draft denial of the application, publication of a notice of the draft permit or draft denial in a local newspaper, opportunity for public comment, and a possible public meeting (OS 27A, § 2-14-301(A), 2-14-302(A) & (A)(2)). Tier III is an expanded permitting process that includes all of the Tier II elements plus the opportunity for a meeting on the permitting process and ODEQ’s preparation of responses to comments received (OS 27A, §§ 2-14-301(B) & 2-14-304(C)).

The Oklahoma Water Resources Board administers a permitting process for the appropriation of stream water, OAC 785:20-1-1 *et seq.*, and for taking and using groundwater (OAC 785:30-1-1 *et seq.*). Similarly, those seeking licenses to operate concentrated animal feeding operations are required to proceed through the Oklahoma Department of Agriculture’s permitting process (OAC 17:35-3-1 *et seq.*).

Understanding that different agencies have distinct permitting procedures and that environmental jurisdictions can overlap is only part of the story. Environmental permitting in Oklahoma is influenced by the Oklahoma Supreme Court’s decision in *Dulaney v. Oklahoma State Department of Health*, 868 P.2d 676 (Okla. 1994). In *Dulaney*, the issue was whether adjacent landowners and mineral interest owners are entitled to notice and an opportunity to be heard when a party applies for a permit to operate a solid waste disposal site (868 P.2d 678-79 (Okla. 1994)). The facts of the case reveal that a landfill permit was issued by ODEQ’s predecessor agency after turning down adjacent landowners’ request for an evidentiary hearing under the Administrative Procedures Act.

The Court first ruled that mineral interest owners are entitled to notice and an opportunity to be heard:

[m]inimum standards of due process require that administrative proceedings, which may directly and adversely affect legally protected interests, be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. A petroleum engineer testified that use of the surface as a landfill would create numerous problems for oil and gas exploration, development, and recovery....

The permit granted by the Department of Health allows the use of the surface estate in a manner which may impair recognized and well-defined property rights of the mineral interest owner. Due process requires that the mineral interest owner be given notice and an opportunity to contest the permit at the administrative level. The due process clauses of the United States and the Oklahoma Constitutions provide that certain substantive rights – life, liberty and property – cannot be deprived except by constitutionally adequate procedures (868 P.2d 680-81 (Okla. 1994)).

Employing similar reasoning, the Oklahoma Supreme Court also ruled that neighboring landowners have a right to notice and an opportunity to be heard:

The trend is toward an enlargement of the class of people who may protest administrative action. This nation's highest court has recognized that aesthetic and environmental well-being, like economic prosperity, are important ingredients of the quality of life in our society....

[U]nder the facts presented, these landowners are entitled to notice and an opportunity to be heard. Water rights are property, which are an important part of the landowners' "bundle of sticks." The use and control of fresh water is a matter of publici juris, and of immediate local, national, and international concern. No commodity affects and concerns the citizens of Oklahoma more than fresh groundwater. Here, evidence was presented that drilling operations, which the mineral interest owners are entitled to engage in on the landfill site, could potentially contaminate the ground water supply – the same supply underlying the adjacent landowners' property and which they use for drinking purposes. It is a problem that must be explained. These landowners' water-related property interest alone requires that they be given notice and an opportunity to participate in a hearing whose outcome could affect their constitutionally protected rights (868 P.2d 683-85 (Okla. 1994)).

What the reader must take from *Dulaney* is that "minimum standards of due process require administrative proceedings that may directly and adversely affect legally protected interests be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard" (868 P.2d 686-86 (Okla. 1994)). Thus, permitting proceedings before state environmental agencies that may affect property interests must include notice and an opportunity to participate in those proceedings for those whose property interests may be affected.

Enforcement

The enforcement of environmental laws and regulations serves several important purposes. One such purpose is "deterrence." The idea of deterrence relates equally to encouraging compliance and discouraging non-compliance. Deterrence is often subdivided into "specific deterrence" and "general deterrence." Specific deterrence relates to enforcement of environmental laws against a person for violative behavior. In this way, environmental enforcement actions can serve to rehabilitate or reform the violator, and restrain the violator from engaging in present and future noncomplying conduct. General deterrence relates to the effect that an enforcement action, or the threat thereof, against one person has upon the behavior of another person. Just as we decide to maintain the speed limit when we witness another motorist pulled over by a police officer, an environmental enforcement action against one person may deter others from noncompliance.

Related to the idea of deterrence are the active and passive enforcement models. Environmental agencies that operate under the active enforcement model vigorously investigate or "hunt" for environmental noncompliance. Environmental agencies operating under the passive enforcement model take a less aggressive stance with the regulated community. These environmental agencies view themselves less as police and more as a technical consultant that encourages environmental compliance through a "partnership" with the regulated community. Numerous factors influence which model an environmental agency will employ in its approach to enforcement. One factor is budget constraints, *i.e.*, how to achieve the

greatest degree of environmental compliance per dollar. Political pressures also exert influence on this decision. Political forces can come from numerous sources: the public, the regulated community, public interest groups, state and federal legislators, local politicians, the Governor, and even other governmental agencies, federal, state, and local.

Another purpose of enforcement is punishment. Related to the idea of punishment is extracting the benefit, economic or otherwise, achieved from environmental noncompliance from the noncomplying person. Extracting these benefits may be achieved through the assessment of monetary penalties or by requiring certain actions such as remediation, removal, and/or natural resource repair. Environmental enforcement may also educate the public about environmental laws. Publicity surrounding environmental enforcement educates the public about the dire legal, social, and environmental consequences that flow from noncompliance, and fosters a heightened awareness about the environment.

Administrative Enforcement

Using the Environmental Quality Code as an example, ODEQ has the power to enforce noncompliance through administrative procedures. In this regard, administrative enforcement is initiated with the issuance of a Notice of Violation, which ODEQ issues when there are reasonable grounds to believe that a person is in violation of the Environmental Quality Code (OS 27A, § 2-3-502(A)). The Notice of Violation sets forth the alleged violation, the alleged violator's duty to correct the alleged violation, and the time within which such correction must be made (OS 27A, § 2-3-502(A)).

After service of the Notice of Violation upon the alleged violator, ODEQ may issue a proposed compliance order (OS 27A, § 2-3-502(B)). Therein, ODEQ may assess an administrative penalty for past violations and propose the assessment of an administrative penalty for each day of noncompliance with the compliance order (OS 27A, §§ 2-3-502(B)(1)(a) & (b)). The proposed compliance order may also specify compliance requirements, compliance schedules, and mandate corrective action (OS 27A, § 2-3-502(B)(2)). Proposed compliance orders become final orders if the violator does not request an administrative enforcement hearing within fifteen days (OS 27A, § 2-3-502(B)). Failure to comply with a final compliance order results in the issuance of an assessment order, which assesses the administrative penalty set forth in the final compliance order (OS 27A, § 2-3-502(C)).

The Executive Director of ODEQ is also empowered to revoke, modify, or suspend permits (OS 27A, § 2-3-502(D)). To satisfy due process concerns, this action may be taken only after notice and an opportunity for an administrative hearing (OS 27A, § 2-3-502(D)).

Generally, penalties assessed or proposed in an order cannot exceed \$10,000.00 per day of noncompliance (OS 27A, § 2-3-502(K)(1)). Determinations as to the amount of the penalty must include consideration of the nature, circumstances, and gravity of the violation, the economic benefit resulting from the violation, the history of violations, the violator's culpability, and the violator's good faith efforts to achieve compliance (OS 27A, § 2-3-502(K)(2)). ODEQ may take or request civil action or criminal prosecution, or both, for violations of the Environmental Quality Code in addition to, or in lieu of, administrative enforcement proceedings (OS 27A, § 2-3-504(I)).

The Oklahoma Department of Agriculture is empowered to assess an administrative penalty of not more than \$10,000.00 per day of non-compliance with the Oklahoma Concentrated Animal Feeding Operations Act (OS 2, § 9-212(C)(1)(a)).

Civil Enforcement

The Environmental Quality Code also provides that violations of its provisions are punishable in civil proceedings in district court by the assessment of a civil penalty of not more than \$10,000.00 for each violation (OS 27A, §§ 2-3-504(A)(2) & (B)). Each day or part of a day upon which such violation occurs constitutes a separate violation (OS 27A, § 2-3-504(D)). Additionally, injunctive relief may be granted by the district court (OS 27A, §§ 2-3-504(A)(4) & (F)). Injunctions are court orders that prohibit (prohibitive injunctions) or command (mandatory injunctions) certain conduct. Thus, through injunctive relief, a district court can compel compliance with, or prevent violations of, the Environmental Quality Code (OS 27A, §§ 2-3-504(A)(4)). It is worth noting that ODEQ is not the only governmental entity empowered to seek enforcement of the Environmental Quality Code through civil proceedings. The Attorney General and district attorneys are also empowered to bring a civil action in district court to prosecute violations of the

Environmental Quality Code (OS 27A, § 2-3-504(E)). Further, if requested by Executive Director of ODEQ, it is the responsibility of the Attorney General or district attorney to bring actions for injunctive relief or for recovery of an administrative or civil penalty (OS 27A, § 2-3-504(F)(4)).

Under the Oklahoma Department of Agriculture's environmental jurisdiction, owners or operators of animal feeding operations that fail to take reasonable and necessary action to avoid pollution of surface waters can be assessed a civil penalty of up to \$10,000.00 for each violation (OS 2, § 9-212(B)). The Oklahoma Department of Agriculture may also bring an action for injunctive relief in district court (OS 2, 9-212(C)(1)(b)).

Criminal Enforcement

The final mode of enforcement involves criminal actions. Persons criminally violating the Environmental Quality Code are guilty of a misdemeanor and may be punished by a fine of between \$200.00 and \$10,000.00 for each violation or by imprisonment of not more than six months, or both (OS 27A, § 2-3-504(A)(1)).

In addition to the general criminal enforcement provisions of the Environmental Quality Code, specific criminal provisions may be found in the Environmental Crimes Act (OS 21, § 1230.1 *et seq.*). The Environmental Crimes Act criminalizes several acts. First among these is the crime of unlawful hazardous waste transportation, which is knowingly and willfully transporting or causing the transport of hazardous waste without a proper manifest (OS 21, § 1230.3). Unlawful hazardous waste transportation is a felony punishable by not more than five years in prison and/or a fine of not more than \$25,000.00 (OS 21, § 1230.8(1)).

Under the Environmental Crimes Act, a person who knowingly and willfully receives, stores, treats, processes, recycles, or disposes of waste without a permit commits unlawful waste management (OS 21, § 1230.4). The criminal sanctions for unlawful waste management vary by waste. For example, for hazardous waste, unlawful waste management is a felony punishable by imprisonment of not more than 5 years and/or a fine of not more than \$50,000.00 (OS 21, § 1230.8(2)(b)). For waste other than hazardous waste, the crime of unlawful waste management is a misdemeanor, which is punishable by a fine of not more than \$10,000.00 (OS 21, § 1230.8(2)(a)).

An interesting group of six criminal activities is included under the general crime of unlawful misrepresentation of waste. Included among these are making false statements, including false data, and omitting material information in an application for a waste permit or authorization (OS 21, § 1230.5(A)(1)). Similarly, making false statements, including false data, or omitting material information in waste manifests, waste labels, or waste compliance documents, records, or plans, is a crime (OS 21, § 1230.5(A)(2)). Submitting false samples of waste for analysis is a crime, as is tampering with environmental monitoring devices (OS 21, §§ 1230.5(A)(3) & (5)). It is also a crime to make false statements, include false data, or omit material information from a laboratory analysis of waste (OS 21, § 1230.5(A)(4)). Lastly, providing hazardous waste to another person for transportation without proper manifest is a crime (OS 21, § 1230.5(A)(6)). Like the crime of unlawful waste management, penalties for the crime of unlawful misrepresentation of waste are tied to the type of waste involved. For example, if the crime of unlawful misrepresentation of waste involves hazardous waste, it is a felony punishable by imprisonment for not more than five years and/or a fine of not more than \$25,000.00 (OS 21, § 1230.8(3)(b)). For wastes other than hazardous waste, the crime of unlawful misrepresentation of waste is a misdemeanor punishable by a fine of not more than \$5,000.00 (OS 21, § 1230.8(3)(a)).

Certainly, hazardous waste was very much on the collective mind of the Oklahoma Legislature when deliberating the Environmental Crimes Act as it specifies that it is a felony to unlawfully dispose of hazardous waste. This crime contains two parts: (1) knowingly and willfully failing to secure a permit; and (2) without a permit, knowingly and willfully disposing, directing the disposal, or aiding and abetting in the disposal of hazardous waste at a solid waste landfill, a transfer station, a processing facility, or into a sanitary sewer system without pretreatment (OS 21, § 1230.6). Unlawful disposal of hazardous waste is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000.00 (OS 21, § 1230.8(4)).

Additionally, the Environmental Crimes Act specifies that it is a felony to unlawfully conceal hazardous waste. Consisting of several elements, the unlawful concealment of hazardous waste is: (1) knowingly and

willfully subjecting other persons to the potential for immediate or long term risk to health or safety by exposure to chemical wastes by: (a) knowingly and willfully concealing or causing others to conceal the unlawful abandonment or disposal of hazardous waste; or (b) concealing or causing others to conceal the transportation of hazardous waste; or (c) misrepresenting or causing others to misrepresent the type of hazardous waste being transported (OS 21, §§ 1230.7(1)-(3)). If the severity of punishment is any indication, the Oklahoma Legislature believed that the unlawful concealment of hazardous waste is more serious than other environmental crimes since it is punishable by imprisonment of two to ten years and a fine up to \$100,000.00 (OS 21, § 1230.8(5)).

Penalties imposed under the Environmental Crimes Act are in addition to, and not in lieu of, other civil or administrative penalties or sanctions that may be imposed under law (OS 21, § 1230.10). Similarly, administrative, civil, or criminal penalties available under the Environmental Quality Code are in addition to those in the Environmental Crimes Act (OS 27A, § 2-3-506(C)).

Under the Oklahoma Department of Agriculture's environmental jurisdiction, persons violating the Oklahoma Concentrated Animal Feeding Operations Act are guilty of a misdemeanor, as are owners and operators of animal feeding operations that fail to take reasonable and necessary actions to avoid pollution of any stream, lake, river, or creek (OS 2, § 9-212(A) & (B)).

Conclusion

The mass of statutes, rules, regulations, and ordinances governing environmental matters in the State of Oklahoma is not necessarily unique to Oklahoma. One unusual aspect of environmental regulation in Oklahoma, however, is the division of environmental jurisdiction and responsibilities among many state agencies. The jurisdiction and responsibilities of federal agencies, tribal governments, counties, and municipalities makes matters even more complicated.

Splintering environmental regulatory jurisdiction among numerous state agencies complicates matters for the regulated community and the professionals that render technical or legal advice as to environmental matters. For example, there are numerous activities with the potential to cause pollution or that may require permits that fit within more than one state environmental agency's regulatory jurisdiction. Such a state of affairs may result in inconsistent positions, policies, regulations, and enforcement practices. Further, it fosters turf battles among state environmental agencies desiring to increase their jurisdictional empire. It also creates an environment where certain activities go virtually unregulated as state environmental agencies play "hot-potato" with politically sensitive or highly technical issues. Reasonable minds can and do differ as to the wisdom of the current environmental regulatory landscape, but unless and until it is change, it remains Oklahoma's landscape.¹

References

Oklahoma Administrative Code (OAC). 1996, with annual supplements.

Oklahoma Constitution.

Oklahoma Statutes (OS). 1999, with annual supplements.

¹ The views expressed herein are not necessarily those of the State of Oklahoma or the Office of the Oklahoma Attorney General.