ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 10-1233

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW

FINAL BRIEF FOR RESPONDENT

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July 12, 2011

RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties are accurately identified in Petitioners' Certificate.

B. Rulings Under Review

The instant petition seeks review of a statement on the web site maintained by Respondent United States Environmental Protection Agency ("EPA"): "Regulation of Hydraulic Fracturing by the Office of Water," http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm#safehyfr.

C. Related Cases

The statement on EPA's website at issue here has not previously been the subject of litigation in any court. There are no related cases pending before this Court.

Respectfully submitted,

/s/ Eileen T. McDonough
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July 12, 2011

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706
EPA	Respondent United States Environmental Protection Agency
JA	Joint Appendix
SDWA	Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26
UIC	Underground Injection Control

JURISDICTION

Petitioners Independent Petroleum Association of America and US Oil & Gas Association (jointly referred to as "the Associations") seek review of a statement on a web page maintained by the United States Environmental Protection Agency ("EPA"): "Regulation of Hydraulic Fracturing by the Office of Water," http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm#safehyfr (referred to as "Hydraulic Fracturing Regulation Web Page."). Joint Appendix ("JA") 34. This statement (referred to as the "EPA Web Statement") describes the existing legal requirements that are applicable to hydraulic fracturing operations that inject diesel fuels underground under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-26, and EPA's implementing regulations.

The Associations contend that this Court has jurisdiction over their petition under section 1448(a)(2) of the SDWA, which provides for judicial review in the circuit courts of appeals of "any . . . final agency action of the Administrator." 42 U.S.C. § 300j-7(a)(2). As explained in more detail in the Argument Section below, the Court is without jurisdiction because the Associations lack standing. In addition, the Court is without jurisdiction because the EPA Web Statement is not final agency action.

STATUTES AND REGULATIONS

The pertinent provisions are provided in the Addendum hereto.

STATEMENT OF ISSUES

1. Whether the Associations have standing, given that the injury they claim is traceable, not to the EPA Web Statement, but to the Energy Policy Act of 2005, Pub. L. No. 109-58, § 322 ("Amendment"), which amended the SDWA's definition of "underground injection" to exclude all hydraulic fracturing operations except those operations using diesel fuels, thereby clearly recognizing that hydraulic fracturing operations using diesel fuels must comply with the regulations applicable to underground injection operations, including the permitting requirements.

2. Whether the EPA Web Statement is final agency action imposing new legal obligations and so subject to review by this Court, given that the Statement is no more than a description of the consequences of the Amendment.

3. Whether the Court has jurisdiction to consider the claim that EPA failed to comply with procedural requirements and, if so, whether EPA was required to engage in rulemaking to implement Congress' action to exclude from the SDWA all hydraulic fracturing except hydraulic fracturing operations using diesel fuels.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This petition for review arises out of EPA's Web Statement on its Hydraulic Fracturing Regulation Web Page that hydraulic fracturing operations using diesel fuels are regulated by the Underground Injection Control ("UIC") provisions of the SDWA, 42 U.S.C. § 300h to 300h-8, and injection wells where such operations are undertaken are subject to the requirements for "Class II wells" imposed by EPA's regulations implementing the UIC program.[1/] The Associations, whose members include companies that operate oil and gas wells where hydraulic fracturing is used to make the wells more productive, contend that the EPA Web Statement is a "final agency action" subject to review by this Court under section 1448(a)(2) of the Act, 42 U.S.C. § 300j-7(a)(2). The Associations assert that, due to the Statement, their members will have to obtain UIC permits before conducting hydraulic fracturing operations using diesel fuels.

[1/] Hydraulic fracturing is a process used primarily by oil and gas companies to enhance the recovery of oil and gas from wells. The well operator pumps fluids, usually water and chemical additives, such as diesel fuels, into a geologic formation at high pressure in order to open or enlarge fractures in the rock. The fracturing enables the oil and gas to flow more freely, thereby maximizing the amount that can be pumped to the surface. *See infra* at 9 for a more detailed explanation.

The Court does not have jurisdiction to hear the petition. The Associations have failed to establish standing to challenge EPA's Web Statement. Any injury caused to their members is traceable to Congress, not EPA, and so could not be remedied by a favorable decision from this Court. Furthermore, because the Associations have failed to show, inter alia, that the EPA Web Statement imposed new legal obligations on their members, they have failed to show that it constitutes "final agency action" subject to judicial review. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). A careful review of the Act and EPA's implementing regulations demonstrates that the Web Statement simply describes the consequences of the Amendment to the SDWA's definition of "underground injection" in the Energy Policy Act and did not result in any obligations beyond those already imposed by Congress.

II. STATUTORY BACKGROUND

In 1974, in response to accumulating evidence that the nation's drinking water supplies contained unsafe levels of contamination, the Public Health Service Act was amended to include the Safe Drinking Water Act. *Environmental Def. Fund v. Costle*, 578 F.2d 337, 343 (D.C. Cir. 1978). The Act is designed to ensure "that water supply systems serving the public meet minimum national standards for

protection of public health." H.R. Rep. No. 93-1185, at 1 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6454.

A. Underground Injection Control

Part C of the SDWA, 42 U.S.C. § 300h to 300h-8, protects underground sources of drinking water. Congress required EPA to establish minimum standards for the control of underground injection processes to protect these sources. *Id*. § 300h. The States are primarily responsible for implementing UIC programs. *Id*. §§ 300h-1, 300h-4. The States must submit their programs to EPA, which will approve the program if it meets the federal minimum requirements. *Id*. EPA must establish and promulgate a federal UIC program in States without an approved state program. *Id*. § 300h-1(c). The UIC programs must prohibit underground injections not authorized by a permit. *Id*. § 300h-1(b)(1)(A). State programs must be revised if there is a change to the federal program, but only if that change makes the federal program more stringent; changes to the federal program that provide exemptions would not trigger mandatory state program revision. 40 C.F.R. §§ 145.32(a),145.1(g).

Congress established the scope of the UIC program through its definition of "underground injection" as "the subsurface emplacement of fluids by well injection." 42 U.S.C. § 300h(d)(1)(A). Congress has narrowed EPA's authority,

however, by establishing two exclusions from the definition: (1) "the underground injection of natural gas for purposes of storage" and (2) "the underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." *Id.* § 300h(d)(1)(B) (emphasis added). The exclusion for hydraulic fracturing operations other than hydraulic fracturing operations using diesel fuels was added to the Act in 2005 by the Amendment.

B. Judicial Review

The SDWA authorizes petitions for review to the United States Court of Appeals for the District of Columbia Circuit of "actions pertaining to the establishment of national primary drinking water regulations." *Id.* § 300j-7(a)(1). The Act further provides that petitions for review of "any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action." *Id.* § 300j-7(a)(2). Any petition for review must be filed within 45 days of the challenged agency action unless the petition is based only on grounds arising after that period has ended. *Id.* § 300j-7(a).

III. REGULATORY BACKGROUND

EPA's regulations implementing Part C of the SDWA are contained in 40 C.F.R. Pts. 144-47. Part 144 establishes the regulatory framework, including permitting requirements, for EPA-administered UIC programs. Part 146 sets out technical criteria and standards that must be met in permits and authorizations by rule as required by Part 144. Certain procedural requirements applicable to UIC permits are also found in 40 C.F.R. Part 124. The regulations set forth in Parts 144, 146, and 124 become the federal program when EPA implements it and also establish minimum requirements for State-run UIC programs. 40 C.F.R. § 144.1(b)(2). Part 145 contains the requirements that each State must meet in order to obtain primary enforcement authority for the UIC program in that State. The approved State programs are codified in 40 C.F.R. Pt. 147.

In 1980, EPA promulgated regulations establishing a system for classifying underground injection wells subject to the SDWA. 45 Fed. Reg. 42,472 (June 24, 1980). All such underground injection wells fit within the six well classes in EPA's well classification system. 40 C.F.R. §§ 144.6 and 146.5. Classes differ from each other according to the purpose and function of the well and the substance to be injected into it. For example, Class I wells are used "by generators

of hazardous waste . . . to inject hazardous waste." *Id*. § 144.6(a)(1). In relevant part, Class II wells are used "for enhanced recovery of oil or natural gas." *Id*. § 144.6(b)(2). Class III wells are used "for extraction of minerals," including sulfur, uranium, salts, and potash. *Id*. § 144.6(c). Class IV wells are used "to dispose of hazardous waste or radioactive waste into a formation which within one-quarter (1/4) mile of the well contains an underground source of drinking water" and are generally banned. *Id*. § 144.6(d)(1). Effective later this year, Class VI wells are for geological sequestration of carbon dioxide. 75 Fed. Reg. 77,230 (Dec. 10, 2010) (to be codified at 40 C.F.R. § 146, Subpart H). Class V wells are any underground injection well which does not fall within the definition of any other class. *Id*. § 144.6(e).

IV. ADMINISTRATIVE BACKGROUND

EPA maintains a web site that provides information to the general public, regulated entities, state and local agencies, and other interested parties regarding the Agency's mission and operations. http://www.epa.gov. One section of the web site addresses the functions of the Office of Ground Water and Drinking Water, which is responsible for administering a number of federal statutes pertaining to water quality, including the SDWA. http://water.epa.gov/drink. This Office

maintains web page sections on numerous topics of public interest, including hydraulic fracturing. http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/index.cfm. JA 35. On this web site, the process of hydraulic fracturing is described as follows:

> Hydraulic fracturing (HF) is a well stimulation process used to maximize the extraction of underground resources; including oil, natural gas, geothermal energy, and even water. The oil and gas industry uses HF to enhance subsurface fracture systems to allow oil or natural gas to move more freely from the rock pores to production wells that bring the oil or gas to the surface.
>
> The process of hydraulic fracturing begins with building the necessary site infrastructure including well construction. Production wells may be drilled in the vertical direction only or paired with horizontal or directional sections. Vertical well sections may be drilled hundreds to thousands of feet below the land surface and lateral sections may extend 1000 to 6000 feet away from the well.
>
> Fluids, commonly made up of water and chemical additives, are pumped into a geologic formation at high pressure during hydraulic fracturing. When the pressure exceeds the rock strength, the fluids open or enlarge fractures that can extend several hundred feet away from the well. After the fractures are created, a propping agent is pumped into the fractures to keep them from closing when the pumping pressure is released. After fracturing is completed, the internal pressure of the geologic formation causes the injected fracturing fluids to rise to the surface where it may be stored in tanks or pits prior to disposal or recycling. Recovered fracturing fluids are referred to as flowback. Disposal options for flowback include discharge into surface water or underground injection.

http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm ("Hydraulic Fracturing Background Information"). JA 35. The

Associations do not take issue with this description of hydraulic fracturing operations.

At the center of this litigation is the EPA Web Statement on the Hydraulic Fracturing Regulation Web Page, which explains that hydraulic fracturing operations using diesel fuels are subject to regulation by EPA primarily under the SDWA through the UIC program. In stating the scope of its authority, EPA quotes the statutory definition of "underground injection" as "the subsurface emplacement of fluids by well injection," except for "the underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." *Id*. (quoting 42 U.S.C. § 300h(d)(1)(A) and (B)(ii)) (emphasis added). EPA went on to explain:

> [w]hile the SDWA specifically excludes hydraulic fracturing from UIC regulation under SDWA § 1421(d)(1), the use of diesel fuel during hydraulic fracturing is still regulated by the UIC program. Any service company that performs hydraulic fracturing using diesel fuel must receive prior authorization from the UIC program. Injection wells receiving diesel fuel as a hydraulic fracturing additive will be considered Class II wells by the UIC program.

Hydraulic Fracturing Regulation Web Page.

V. LITIGATION BACKGROUND

The Associations filed the instant petition for review with this Court on August 12, 2010, which was within 45 days after the EPA Web Statement was posted. EPA moved to dismiss the petition. The Court did not rule on EPA's motion, but instead referred the motion to the merits panel for decision. Order (Jan. 11, 2011).

SUMMARY OF ARGUMENT

The Associations are without standing to challenge the EPA Web Statement. The injury they allege - that their members must obtain UIC permits in order to conduct hydraulic fracturing operations using diesel fuels - is not caused by the EPA Web Statement, but is properly traced to action by Congress. In the Amendment, Congress excluded most hydraulic fracturing operations from the UIC Program. Because Congress excepted hydraulic fracturing operations using diesel fuels from this broad exclusion, however, such operations are subject to the requirements of the SDWA and its implementing regulations. Furthermore, the claimed injury could not be remedied by this Court, since only Congress could expand the statutory exclusion to include hydraulic fracturing operations using diesel fuels.

The EPA Web Statement is not final action that is subject to review by this Court because the Statement does not impose any new obligations, but only describes the obligations and requirements made clearly applicable as a result of Congress' decision in 2005 to amend the SDWA's definition of "underground injection" to expressly exclude hydraulic fracturing other than hydraulic fracturing operations using diesel fuels from the UIC program. When Congress took this action, it clearly established that hydraulic fracturing operations using diesel fuels are subject to the full range of existing restrictions and requirements applicable to all UIC activities, including the prohibition against underground injection except as authorized by a UIC permit. Thus, the permit obligation was triggered by operation of the statute and EPA's preexisting regulations; no further regulatory or other action of the Agency was needed for hydraulic fracturing operations using diesel fuels to be subject to UIC permit requirements. That permit obligation remains unchanged following EPA's Web Statement.

Because there is no final agency action to review, the Court lacks jurisdiction to hear the Associations' claims that EPA failed to comply with the procedural requirements for rulemaking under the Administrative Procedure Act ("APA") and the SDWA. Moreover, these claims are unfounded. Because the Agency's Statement does not change the substantive law, the procedural

requirements for legislative rules under the APA do not apply. Finally, because the Amendment did not alter requirements applicable to underground injection of diesel fuel in hydraulic fracturing operations related to oil, gas, or geothermal production activities, nor result in more stringent standards, there was no need for EPA to require modification of state-programs subsequent to the Amendment.

STANDARD OF REVIEW

The Court's jurisdiction under section 1448(a)(2) of the SDWA, 42 U.S.C. § 300j-7(a)(2), is limited to review of EPA's actions that are "final agency action" under the standard articulated by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997). *See Manufactured Housing Inst. v. EPA*, 467 F.3d 391, 397 (4th Cir. 2006) (petition for review of SDWA policy guidance). In relevant part, *Bennett v. Spear* established that a particular agency action is final for purposes of review only if it imposes an obligation, denies a right, or fixes some legal relationship.[2/] 520 U.S. at 177-78. *See also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 28-29 (D.C. Cir. 2006).

[2/] *Bennett* further requires that the action must mark the consummation of a decisionmaking process by the agency. 520 U.S. at 177-78. EPA does not have any ongoing decisionmaking process with respect to the question of which type of UIC permit is necessary for parties seeking to conduct hydraulic fracturing operations using diesel fuels.

The Supreme Court defined the standard for the judicial interpretation of statutes in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* established that if a court, using the traditional tools of statutory construction, finds that Congress has "directly spoken to the precise question at issue," and the intent of Congress is clear, then that is the end of the matter. *Id*. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. With respect to the interpretation of agency regulations, the agency's interpretation of its own regulations is controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted). *See also Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 220 (D.C. Cir. 2007).

ARGUMENT

I. THE ASSOCIATIONS LACK STANDING

The Associations bear the burden of establishing that they have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In relevant part, the Associations must show that they have incurred (1) an "injury in fact" (2) that is "fairly traceable to the challenged action of the defendant, and not the result of the

independent action of some third party not before the court" and (3) can be redressed by a favorable decision. *Id*. (internal quotations omitted).

The injury in fact identified by the Associations is that their members will have to obtain UIC permits to conduct hydraulic fracturing operations using diesel fuels. Pet. Br. 21. First, there is a serious question as to whether a requirement to seek a permit is cognizable as an injury in fact for standing purposes. *Cf. FTC v. Standard Oil*, 449 U.S. 232, 242-43 (1980). More importantly, the fact that a UIC permit is required for hydraulic fracturing operations using diesel fuels is not due to the EPA Web Statement, since that Statement only recognized an existing duty under the SDWA and EPA regulations which was expressly retained by the Amendment. Congress chose to limit the exclusion for hydraulic fracturing operations by carving out an exception for hydraulic fracturing operations using diesel fuels, which are therefore subject to the same requirements as all other underground injection activities. An injury due to Congress' legislative action cannot be redressed by a favorable decision in this case. EPA has no authority, whether by rulemaking or otherwise, to exempt hydraulic fracturing operations using diesel fuels from UIC permitting requirements.

II. EPA'S WEB STATEMENT IS NOT FINAL AGENCY ACTION SUBJECT TO REVIEW UNDER THE SDWA

As noted above, jurisdiction in this matter depends on whether the EPA Web Statement imposes new legal obligations on companies engaged in hydraulic fracturing operations using diesel fuels or is simply a description of existing law based on the Amendment. *Bennett v. Spear*, 520 U.S. at 177-78. As this Court has explained, a statement "where 'an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party,'" is not final action subject to judicial review because such an expression has no concrete impact on any party. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (quoting *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). *See also Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731-32 (D.C. Cir. 2003).

The EPA Web Statement does not impose any obligations, but only summarizes the consequence of Congress' decision in 2005 to amend the SDWA to exclude hydraulic fracturing operations (other than hydraulic fracturing operations using diesel fuels) from the statutory definition of "underground injection." Therefore, the EPA Web Statement is not final agency action under *Bennett* and so is not subject to review by this Court under section 1448(a)(2) of the SDWA, 42 U.S.C. § 300j-7(a)(2).

A. Congress, Not EPA, Determined That Hydraulic Fracturing Operations Using Diesel Fuels Must Comply with the UIC Program, Including the Permitting Requirements, Established Under the SDWA.

As the Associations note, in the past there was considerable uncertainty as to whether the SDWA applied to hydraulic fracturing. EPA originally took the position that the SDWA was inapplicable. *See Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1478 (11th Cir. 1997) ("*LEAF I*") (rejecting EPA's position as inconsistent with the plain language of the statute). There was also a debate as to whether or not, assuming hydraulic fracturing operations were subject to the SDWA, these operations would fit into Class II of the well classification system in EPA's regulations.[3/] This dispute over classification was also presented to the Eleventh Circuit, which held that injection wells for hydraulic fracturing were Class II wells under the plain language of EPA's regulations defining the well classes, after rejecting EPA's arguments that fracturing wells were only "Class II like." *Legal Envtl. Assistance Found., Inc. v. EPA*, 276 F.3d 1253, 1263 (11th Cir. 2001) ("*LEAF II*").

These uncertainties were resolved by Congress in the Amendment, which revised the SDWA's definition of "underground injection" to exclude "the

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[3/] EPA's regulations classify "wells which inject fluids . . . [f]or enhanced recovery of oil or natural gas" as Class II wells. 40 C.F.R. § 144.6.

underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(d)(1)(A) and (B)(ii)) (emphasis added). By expressly omitting hydraulic fracturing operations using diesel fuels from the scope of this exclusion, Congress explicitly clarified that such operations are indeed subject to the existing requirements of the SDWA, including the statutory prohibition against underground injections not authorized by a permit. *Id.* § 300h(b)(1)(A). Since 1974, EPA has adopted regulations which also expressly require permits for all underground injections in each State. *See* 40 C.F.R. § 144.1(e) ("Once a program is established, [the] SDWA provides that all underground injections in listed States are unlawful unless authorized by a permit or a rule.").

The Associations take issue with the conclusion that the Amendment left hydraulic fracturing operations using diesel fuels subject to the existing UIC permitting requirements. They assert that the Amendment gave EPA the authority to regulate these operations, but "did not expressly require the regulation of diesel fuels-related activities or otherwise dictate how EPA must address such operations (or even if it should)." Pet. Br. 16. According to the Associations, the Amendment did not impose any obligations on hydraulic fracturing operations using diesel

fuels, but only gave EPA the authority to initiate rulemaking to establish a permitting program applicable to such operations at some future time if the Agency should choose to do so. *Id*.; *see also id*. at 37.

The Associations do not cite anything in the Amendment or elsewhere in the SDWA to support their contention that the effect of the Amendment is so limited. In reality, their description of the regulatory regime after 2005 is exactly backward -- under the Amendment, hydraulic fracturing operations using diesel fuels are automatically prohibited, and further administrative action (issuance of a permit) is required to authorize it.

As noted above, the SDWA expressly and unconditionally requires well injections that meet the statutory definition of "underground injection" to be prohibited unless permitted under a State program. 42 U.S.C. § 300h(b)(1)(A) and (D). EPA's regulations codify this requirement and impose such a permit requirement in all States. 40 C.F.R. § 144.1(e). In 2005, Congress expressly excluded all hydraulic fracturing except hydraulic fracturing operations using diesel fuels from the definition of "underground injection." Therefore, after 2005, by operation of statute alone, hydraulic fracturing operations using diesel fuels were completely prohibited except as authorized by an applicable rule or SDWA permit.

Against this background, the only question remaining after 2005 was what type of UIC permit a party desiring to conduct hydraulic fracturing operations using diesel fuels would need, not whether a permit is needed at all. New regulations are not necessary to answer this limited question. Because EPA's UIC regulations have permitting categories for all injections, including a "catch all" Class V category, there is no type of underground injection that requires new regulations prior to permitting. Of course, Congress clearly could have required EPA to promulgate new regulations, including a new classification, designed specifically to address issues particular to hydraulic fracturing operations using diesel fuels. But Congress did not do so. The Associations' claim that hydraulic fracturing operations using diesel fuels require a new regulatory regime cannot be squared with two realities: (1) such a new regime is not necessary given that the permit requirement and well classification scheme were triggered by operation of law under the existing statutory and regulatory structure; and (2) Congress chose not to require any special provisions for hydraulic fracturing operations using diesel fuels when it clarified that such fracturing operations are "underground injection."

It is well-established that the courts must "assume that Congress is aware of existing law when it passes legislation." *South Dakota v. Yankton Sioux Tribe*, 522

U.S. 329, 351 (1998) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). *See also Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute.") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Under this principle of statutory interpretation, the Court must assume that Congress was aware of the existing structure of the SDWA and its implementing regulations, including the well classification system, as well as the *Leaf I* and *Leaf II* decisions, when the Amendment was adopted.

As explained in *Leaf II*, all wells used for underground injection (as that term is defined by the statute) must fall within one of the categories established by EPA's regulations. 276 F.3d at 1263 (citing 40 C.F.R. § 144.6). *See also* Pet. Br. 9 ("Under the program established by EPA, all UIC wells are placed into one of [six]classes of wells for permitting and other purposes.").[4/] The Associations

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[4/] While EPA has conducted rulemakings to *change* a well from one classification to a new one (*e.g.* 75 Fed. Reg. 77,230 (Dec. 10, 2010) in which EPA moved carbon sequestration activities from Class II and Class V to a new Class VI), EPA has never conducted a rulemaking to determine which classification would apply to a specific underground injection well. Instead, to the extent there is any doubt about which type of permit is most appropriate in a particular case, that has been left to a case by case determination in particular permit proceedings. This fact undermines any argument that Congress could be presumed to have intended that EPA would undertake such a rulemaking for hydraulic fracturing operations using diesel fuels absent an instruction from Congress, especially where, as here, a Court of Appeals had previously ruled that hydraulic fracturing was covered by the (continued...)

define hydraulic fracturing as "a technique used by the oil and gas industry to stimulate the subsurface flow of oil or gas to wells in order to increase production from these wells." Pet. Br. 5. EPA's regulations classify "[w]ells which inject fluids . . . [f]or enhanced recovery of oil or natural gas" as Class II wells. 40 C.F.R. § 144.6(b). Applying the plain language of the regulation, *Leaf II* rejected EPA's argument that hydraulic fracturing did not fit into Class II.[5/] 276 F.3d at 1263. Congress, with full understanding of this background, made two relevant decisions in enacting the Amendment: (1) hydraulic fracturing operations using diesel fuels would not be excluded from the definition of underground injection; and (2) EPA would not be required to amend its long-standing well classification system. Thus, Congress maintained the existing regulatory structure, under which hydraulic fracturing operations using diesel fuels are classified as Class II wells.

[4/](...continued)
plain language of a particular well classification in EPA's existing regulations.

[5/] "Where the classification system sets forth five classes, one of which serves as a catch-all for any well not covered by the first four, EPA must classify hydraulic fracturing in one of those categories." 276 F.3d at 1263. Moreover, as *LEAF II* correctly notes, "wells used for the injection of hydraulic fracturing fluids fit squarely within the definition of Class II wells. Accordingly, they must be regulated as such." *Id*. As explained in note 4 above, in 2010, EPA expanded the number of classes from five to six.

B. EPA's Statements Prior to The Amendment on the Application of the SDWA to Hydraulic Fracturing Operations Using Diesel Fuels Do Not Provide Support for the Association.

The Associations correctly assert that, before the *LEAF I* and *LEAF II* decisions, EPA had taken the position that hydraulic fracturing was not regulated under the SDWA and that such operations were functionally different from the wells classified as Class II wells. Pet. Br. 10-17. As the Associations acknowledge, Congress was fully informed of the Agency's position before the Amendment was enacted. *Id*. at 14-15 (discussing Letter from B. Grumbles, EPA Acting Assistant Administrator, Office of Water, to Senator J. Jeffords (Dec. 7, 2004), *reprinted in* 151 Cong. Rec. S7277 (June 23, 2005) ("Grumbles Letter"). JA 17. In particular, the Associations cite Mr. Grumbles' statements that "[c]urrent federal UIC regulations do not expressly address or prohibit the use of diesel fuel" and that EPA did not plan to develop national regulations for hydraulic fracturing. Pet. Br. 15 (quoting Grumbles Letter at S7278-79). Mr. Grumbles also addressed *Leaf I* and *Leaf II*.

In the Amendment, Congress chose to adopt a different position with respect to hydraulic fracturing operations using diesel fuels. As discussed above, Congress redefined "underground injection" to exclude hydraulic fracturing operations other than hydraulic fracturing operations using diesel fuels. Congress did not require

EPA to promulgate new regulations to address any issues particular to such operations. The statements by Acting Assistant Administrator Grumbles cited by the Associations have no significance to the extent that they are inconsistent with the Amendment. Accordingly, the Associations' reliance on these statements is misplaced.

C. Nothing in EPA's Post-Amendment Actions Changed the State of the Law Following the Amendment.

The Associations point to various statements by EPA officials and to EPA's alleged failure to enforce UIC permitting requirements, as evidence that injection of diesel fluids was not regulated after the Amendment, and that additional regulatory action was required before hydraulic fracturing operations using diesel fuels could be regulated under the SDWA. Pet. Br. 16-17. Those statements, however, do not address the statutory and regulatory requirements applicable to these activities. For example, the Associations point to a 2008 letter from the Assistant Administrator for the Office of Water to Congressman Waxman which explained that EPA was focusing its attention on the injection wells that posed the greatest risk to underground sources of drinking water, rather than on hydraulic fracturing. Letter from B. Grumbles, EPA Assistant Administrator, Office of Water, to Hon. Henry A. Waxman, United States House of Representatives (Jan. 11, 2008). JA 20. Mr. Grumbles identified activities that the Agency considered

to be more risky than hydraulic fracturing and also explained that EPA considered hydraulic fracturing for coalbed methane gas to be riskier than activities at wells for conventional oil and gas production. EPA had addressed the risks from hydraulic fracturing for coalbed methane gas by entering into an agreement with the major operators that they would not use diesel fuels as an additive. *Id*.

This letter, however, did not establish a position by the Agency with respect to the application of the UIC program requirements to hydraulic fracturing operations using diesel fuels. Instead, Mr. Grumbles only described the Agency's then-current implementation priorities and plans. The Agency's discretion in employing its limited implementation and enforcement resources is not subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Agency is free to reprioritize its concerns at any point without going through rulemaking. Accordingly, Mr. Grumbles' letter adds no support to the Associations' claim that EPA considered hydraulic fracturing operations using diesel fuels to be outside the statutory and regulatory scheme under the SDWA prior to the Web Statement. The Web Statement reflects the statutory and regulatory scheme as codified by the Amendment.

The Associations also point to an EPA web page describing a number of types of wells associated with gas and oil production that are categorized as Class

II wells, and containing a graphic showing a number of the different types of wells with the statement that "[p]roduction wells are not regulated by the UIC program" to suggest that EPA is not consistent about applying the Class II requirements to hydraulic fracturing operations using diesel fuels. Pet. Br. 4 n.1, 17 n.5 (citing http://water.epa.gov/type/groundwater/uic/class2/index.cfm). JA 40. The cited statement is correct, but not relevant to the Associations' argument. The UIC program is limited to wells where fluids are injected into the well; EPA does not regulate wells that are solely used to recover materials coming up the well (production wells). *See also* http://water.epa.gov/type/groundwater/uic /basicinformation.cfm ("The UIC regulations address wells used for injection only; production wells are not regulated by the UIC Program."). JA 39.

III. BECAUSE THE ASSOCIATIONS HAVE NOT SHOWN THAT EPA'S WEB STATEMENT IS FINAL AGENCY ACTION, THE COURT HAS NO JURISDICTION TO ADDRESS WHETHER THE AGENCY WAS REQUIRED TO COMPLY WITH THE RULEMAKING PROCEDURES OF THE APA OR THE SDWA

The Associations argue that EPA could not make the pronouncement in the Web Statement without first complying with procedural requirements imposed by the Administrative Procedure Act ("APA") and the SDWA. Pet. Br. 32-36, 40-42. The limitation on the Court's jurisdiction imposed by section 1448(a)(2) of the SDWA, 42 U.S.C. § 300j-7(a)(2), requires that the Associations establish that the

Web Statement is final agency action before the Court can consider any issue under their petition. Because the Associations have not met this burden, the Court cannot consider their arguments pertaining to that Agency's noncompliance with allegedly applicable procedural requirements. Even if the Court did have jurisdiction, the Associations' procedural arguments are simply wrong.

A. The APA's Requirements for Notice and Comment Rulemaking Are Inapplicable.

The Associations seek to characterize the EPA Web Statement as a substantive change in the Agency's position that could be adopted only through the notice and comment procedures required by the APA for legislative rulemaking. Pet. Br. 29-31 (citing 5 U.S.C. § 553). These requirements are inapplicable, however, because the Web Statement is not a legislative rule.

To be considered as a legislative rule, an agency pronouncement must create rights or obligations and have the force of law. *See General Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (Legislative rulemaking procedures apply where "a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding or administer with binding effect."); *see also Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). The Web Statement does not impose any legally-enforceable requirements, but instead, as discussed above, merely describes the obligations

imposed by Congress through the Amendment and the manner in which EPA intends to treat hydraulic fracturing operations using diesel fuels for purposes of the UIC permit process. Such statements simply do not constitute regulations under applicable Circuit precedent. *See, e.g., Molycorp v. EPA*, 197 F.3d 543, 544-46 (D.C. Cir. 1999) (agency's advisory statements as to how it believes existing regulatory requirements apply to particular operations do not constitute a regulation); *Komjathy v. Nat'l Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir. 1987) ("The fact that the regulation merely reiterates the statutory language precludes any serious argument that the regulation affects [interested persons] in such a way as to require notice-and-comment procedures pursuant to 5 U.S.C. § 553.").[6/]

[6/] The Associations also contend that, under the APA, 5 U.S.C. § 552(a), EPA was required to publish the Web Statement in the Federal Register. Pet. Br. 40 n.13. Section 552(a) requires the publication in the Federal Register of "statements of general policy or interpretations of general applicability formulated and adopted by the agency." This requirement does not apply where, as here, the statement reflects a change imposed by Congress, not formulated by an agency. *See Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1318 (D.C. Cir. 1991) (section 552(a)(1) does not apply where limit is established by treaty); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n* , 400 F.3d 1352, 1370 (Fed. Cir. 2005) ("An agency interpretation that merely restates the requirements of a statute, on its face or as construed, need not be published, since it is the statutory directive, not the agency's interpretation, that governs in such cases.").

B. The SDWA's Procedures For EPA To Require Changes to Approved State UIC Programs Do Not Apply.

Congress' amendment to the definition of "underground injection" applies to state UIC programs, as well as to the federal program. The Act establishes specific procedures that EPA must use to impose new requirements on the state programs. 42 U.S.C. § 300h-1(b). The Amendment, however, simply maintained the status of hydraulic fracturing operations using diesel fuels as underground injection. Accordingly, the Amendment did not trigger any duty on the part of EPA to require statutory or regulatory changes in state programs to address hydraulic fracturing operations using diesel fuels. Moreover, the effect of the Amendment was to narrow the applicability of the federal UIC program (i.e., to exclude hydraulic fracturing (except hydraulic fracturing operations using diesel fuels) from the UIC program). States may have a broader scope of program than EPA. 40 C.F.R. § 145.1(g); *see also* 42 U.S.C. § 300h-2(d) (preserving state law). Therefore, States were not required to change their regulations to effectuate Congress' narrowing of the scope of the federal UIC program. Accordingly, the procedures to impose new program requirements do not apply.

CONCLUSION

For these reasons, the Associations' petition for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

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July 12, 2011

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Eileen T. McDonough

CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Final Brief was served via the Court's electronic filing system on July 12, 2011, upon:

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STATUTORY & REGULATORY ADDENDUM

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STATUTES

REGULATIONS

(4) Selection criteria

The Administrator shall select recipients of grants under this subsection on the basis of the following criteria:

(A) The small public water system technology assistance center shall be located in a State that is representative of the needs of the region in which the State is located for addressing the drinking water needs of small and rural communities or Indian Tribes.

(B) The grant recipient shall be located in a region that has experienced problems, or may reasonably be foreseen to experience problems, with small and rural public water systems.

(C) The grant recipient shall have access to expertise in small public water system technology management.

(D) The grant recipient shall have the capability to disseminate the results of small public water system technology and training programs.

(E) The projects that the grant recipient proposes to carry out under the grant are necessary and appropriate.

(F) The grant recipient has regional support beyond the host institution.

(5) Consortia of States

At least 2 of the grants under this subsection shall be made to consortia of States with low population densities.

(6) Authorization of appropriations

There are authorized to be appropriated to make grants under this subsection $2,000,000 for each of the fiscal years 1997 through 1999, and $5,000,000 for each of the fiscal years 2000 through 2003.

(g) Environmental finance centers

(1) In general

The Administrator shall provide initial funding for one or more university-based environmental finance centers for activities that provide technical assistance to State and local officials in developing the capacity of public water systems. Any such funds shall be used only for activities that are directly related to this subchapter.

(2) National capacity development clearinghouse

The Administrator shall establish a national public water system capacity development clearinghouse to receive and disseminate information with respect to developing, improving, and maintaining financial and managerial capacity at public water systems. The Administrator shall ensure that the clearinghouse does not duplicate other federally supported clearinghouse activities.

(3) Capacity development techniques

The Administrator may request an environmental finance center funded under paragraph (1) to develop and test managerial, financial, and institutional techniques for capacity development. The techniques may include capacity assessment methodologies, manual and computer based public water system rate models and capital planning models, public water system consolidation procedures, and regionalization models.

(4) Authorization of appropriations

There are authorized to be appropriated to carry out this subsection $1,500,000 for each of the fiscal years 1997 through 2003.

(5) Limitation

No portion of any funds made available under this subsection may be used for lobbying expenses.

(July 1, 1944, ch. 373, title XIV, §1420, as added Pub. L. 104–182, title I, §119, Aug. 6, 1996, 110 Stat. 1647.)

PART C—PROTECTION OF UNDERGROUND SOURCES OF DRINKING WATER

§ 300h. Regulations for State programs

(a) Publication of proposed regulations; promulgation; amendments; public hearings; administrative consultations

(1) The Administrator shall publish proposed regulations for State underground injection control programs within 180 days after December 16, 1974. Within 180 days after publication of such proposed regulations, he shall promulgate such regulations with such modifications as he deems appropriate. Any regulation under this subsection may be amended from time to time.

(2) Any regulation under this section shall be proposed and promulgated in accordance with section 553 of title 5 (relating to rulemaking), except that the Administrator shall provide opportunity for public hearing prior to promulgation of such regulations. In proposing and promulgating regulations under this section the Administrator shall consult with the Secretary, the National Drinking Water Advisory Council, and other appropriate Federal entities and with interested State entities.

(b) Minimum requirements; restrictions

(1) Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. Such regulations shall require that a State program, in order to be approved under section 300h–1 of this title—

(A) shall prohibit, effective on the date on which the applicable underground injection control program takes effect, any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);

(B) shall require (i) in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources, and (ii) in the case of a program which provides for such an authorization by rule, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;

(C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

(D) shall apply (i) as prescribed by section 300j–6(b)[1] of this title, to underground injections by Federal agencies, and (ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

(2) Regulations of the Administrator under this section for State underground injection control programs may not prescribe requirements which interfere with or impede—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas,

unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

(3)(A) The regulations of the Administrator under this section shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State.

(B)(i) In prescribing regulations under this section the Administrator shall, to the extent feasible, avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs which are in effect and being enforced in a substantial number of States.

(ii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed to disrupt a State underground injection control program only if it would be infeasible to comply with both such regulation and the State underground injection control program.

(iii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed unnecessary only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection.

(C) Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection.

(c) Temporary permits; notice and hearing

(1) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section) temporary permits for underground injection which may be effective until the, expiration of four years after December 16, 1974, if—

(A) the Administrator finds that the State has demonstrated that it is unable and could not reasonably have been able to process all permit applications within the time available;

(B) the Administrator determines the adverse effect on the environment of such temporary permits is not unwarranted;

(C) such temporary permits will be issued only with respect to injection wells in operation on the date on which such State's permit program approved under this part first takes effect and for which there was inadequate time to process its permit application; and

(D) the Administrator determines the temporary permits require the use of adequate safeguards established by rules adopted by him.

(2) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section), but after reasonable notice and hearing, one or more temporary permits each of which is applicable to a particular injection well and to the underground injection of a particular fluid and which may be effective until the expiration of four years after December 16, 1974, if the State finds, on the record of such hearing—

(A) that technology (or other means) to permit safe injection of the fluid in accordance with the applicable underground injection control program is not generally available (taking costs into consideration);

(B) that injection of the fluid would be less harmful to health than the use of other available means of disposing of waste or producing the desired product; and

(C) that available technology or other means have been employed (and will be employed) to reduce the volume and toxicity of the fluid and to minimize the potentially adverse effect of the injection on the public health.

(d) "Underground injection" defined; underground injection endangerment of drinking water sources

For purposes of this part:

(1) UNDERGROUND INJECTION.—The term "underground injection"—

(A) means the subsurface emplacement of fluids by well injection; and

(B) excludes—

(i) the underground injection of natural gas for purposes of storage; and

(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

(2) Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

(July 1, 1944, ch. 373, title XIV, §1421, as added Pub. L. 93–523, §2(a), Dec. 16, 1974, 88 Stat. 1674; amended Pub. L. 95–190, §6(b), Nov. 16, 1977, 91 Stat. 1396; Pub. L. 96–502, §§3, 4(c), Dec. 5, 1980, 94 Stat. 2738; Pub. L. 99–339, title II, §201(a), June 19, 1986, 100 Stat. 653; Pub. L. 104–182, title V, §501(b)(1), Aug. 6, 1996, 110 Stat. 1691; Pub. L. 109–58, title III, §322, Aug. 8, 2005, 119 Stat. 694.)

[1] See References in Text note below.

REFERENCES IN TEXT

Section 300j–6(b) of this title, referred to in subsec. (b)(1)(D), was repealed, and a new section 300j–6(b) relating to administrative penalty orders was added, by Pub. L. 104–182, title I, §129(a), Aug. 6, 1996, 110 Stat. 1660.

AMENDMENTS

2005—Subsec. (d)(1). Pub. L. 109–58 inserted heading and amended text of par. (1) generally. Prior to amendment, par. (1) read as follows: "The term 'underground injection' means the subsurface emplacement of fluids by well injection. Such term does not include the underground injection of natural gas for purposes of storage."

1996—Subsec. (b)(3)(B)(i). Pub. L. 104–182 substituted "number of States" for "number or States".

1986—Subsec. (b)(2)(A). Pub. L. 99–339 inserted "or natural gas storage operations" after "production".

1980—Subsec. (b)(1)(A). Pub. L. 96–502, §4(c), substituted "effective on the date on which the applicable underground injection control program takes effect" for "effective three years after December 16, 1974".

Subsec. (d)(1). Pub. L. 96–502, §3, inserted provision that such term does not include the underground injection of natural gas for purposes of storage.

1977—Subsec. (b)(3). Pub. L. 95–190 added par. (3).

§ 300h–1. State primary enforcement responsibility

(a) List of States in need of a control program; amendment of list

Within 180 days after December 16, 1974, the Administrator shall list in the Federal Register each State for which in his judgment a State underground injection control program may be necessary to assure that underground injection will not endanger drinking water sources. Such list may be amended from time to time.

(b) State applications; notice to Administrator of compliance with revised or added requirements; approval or disapproval by Administrator; duration of State primary enforcement responsibility; public hearing

(1)(A) Each State listed under subsection (a) of this section shall within 270 days after the date of promulgation of any regulation under section 300h of this title (or, if later, within 270 days after such State is first listed under subsection (a) of this section) submit to the Administrator an application which contains a showing satisfactory to the Administrator that the State—

(i) has adopted after reasonable notice and public hearings, and will implement, an underground injection control program which meets the requirements of regulations in effect under section 300h of this title; and

(ii) will keep such records and make such reports with respect to its activities under its underground injection control program as the Administrator may require by regulation.

The Administrator may, for good cause, extend the date for submission of an application by any State under this subparagraph for a period not to exceed an additional 270 days.

(B) Within 270 days of any amendment of a regulation under section 300h of this title revising or adding any requirement respecting State underground injection control programs, each State listed under subsection (a) of this section shall submit (in such form and manner as the Administrator may require) a notice to the Administrator containing a showing satisfactory to him that the State underground injection control program meets the revised or added requirement.

(2) Within ninety days after the State's application under paragraph (1)(A) or notice under paragraph (1)(B) and after reasonable opportunity for presentation of views, the Administrator shall by rule either approve, disapprove, or approve in part and disapprove in part, the State's underground injection control program.

(3) If the Administrator approves the State's program under paragraph (2), the State shall have primary enforcement responsibility for underground water sources until such time as the Administrator determines, by rule, that such State no longer meets the requirements of clause (i) or (ii) of paragraph (1)(A) of this subsection.

(4) Before promulgating any rule under paragraph (2) or (3) of this subsection, the Administrator shall provide opportunity for public hearing respecting such rule.

(c) Program by Administrator for State without primary enforcement responsibility; restrictions

If the Administrator disapproves a State's program (or part thereof) under subsection (b)(2) of this section, if the Administrator determines under subsection (b)(3) of this section that a State no longer meets the requirements of clause (i) or (ii) of subsection (b)(1)(A) of this section, or if a State fails to submit an application or notice before the date of expiration of the period specified in subsection (b)(1) of this section, the Administrator shall by regulation within 90 days after the date of such disapproval, determination, or expiration (as the case may be) prescribe (and may from time to time by regulation revise) a program applicable to such State meeting the requirements of section 300h(b) of this title. Such program may not include requirements which interfere with or impede—

(1) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(2) any underground injection for the secondary or tertiary recovery of oil or natural gas,

unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection. Such program shall apply in such State to the extent that a program adopted by such State which the Administrator determines meets such requirements is not in effect. Before promulgating any regulation under this section, the Administrator shall provide opportunity for public hearing respecting such regulation.

(d) "Applicable underground injection control program" defined

For purposes of this subchapter, the term "applicable underground injection control program" with respect to a State means the program (or most recent amendment thereof) (1) which has been adopted by the State and which has been approved under subsection (b) of this section, or (2) which has been prescribed by the

Administrator under subsection (c) of this section.

(e) Primary enforcement responsibility by Indian Tribe

An Indian Tribe may assume primary enforcement responsibility for underground injection control under this section consistent with such regulations as the Administrator has prescribed pursuant to this part and section 300j–11 of this title. The area over which such Indian Tribe exercises governmental jurisdiction need not have been listed under subsection (a) of this section, and such Tribe need not submit an application to assume primary enforcement responsibility within the 270-day deadline noted in subsection (b)(1)(A) of this section. Until an Indian Tribe assumes primary enforcement responsibility, the currently applicable underground injection control program shall continue to apply. If an applicable underground injection control program does not exist for an Indian Tribe, the Administrator shall prescribe such a program pursuant to subsection (c) of this section, and consistent with section 300h(b) of this title, within 270 days after June 19, 1986, unless an Indian Tribe first obtains approval to assume primary enforcement responsibility for underground injection control.

(July 1, 1944, ch. 373, title XIV, §1422, as added Pub. L. 93–523, §2(a), Dec. 16, 1974, 88 Stat. 1676; amended Pub. L. 95–190, §6(a), Nov. 16, 1977, 91 Stat. 1396; Pub. L. 99–339, title II, §201(a), title III, §302(c), June 19, 1986, 100 Stat. 653, 666.)

AMENDMENTS

1986—Subsec. (c)(1). Pub. L. 99–339, §201(a), inserted "or natural gas storage operations, or" after "production".

Subsec. (e). Pub. L. 99–339, §302(c), added subsec. (e).

1977—Subsec. (b)(1)(A). Pub. L. 95–190 inserted provisions relating to extension of date for submission of applications by any State.

§ 300h–2. Enforcement of program

(a) Notice to State and violator; issuance of administrative order; civil action

(1) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources (within the meaning of section 300h–1(b)(3) of this title or section 300h–4(c) of this title) that any person who is subject to a requirement of an applicable underground injection control program in such State is violating such requirement, he shall so notify the State and the person violating such requirement. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order under subsection (c) of this section requiring the person to comply with such requirement or the Administrator shall commence a civil action under subsection (b) of this section.

(2) Whenever the Administrator finds during a period during which a State does not have primary enforcement responsibility for underground water sources that any person subject to any requirement of any applicable underground injection control program in such State is violating such requirement, the Administrator shall issue an order under subsection (c) of this section requiring the person to comply with such requirement or the Administrator shall commence a civil action under subsection (b) of this section.

(b) Civil and criminal actions

Civil actions referred to in paragraphs (1) and (2) of subsection (a) of this section shall be brought in the appropriate United States district court. Such court shall have jurisdiction to require compliance with any requirement of an applicable underground injection program or with an order issued under subsection (c) of this section. The court may enter such judgment as protection of public health may require. Any person who violates any requirement of an applicable underground injection control program or an order requiring compliance under subsection (c) of this section—

(1) shall be subject to a civil penalty of not more than $25,000 for each day of such violation, and

(2) if such violation is willful, such person may, in addition to or in lieu of the civil penalty authorized by paragraph (1), be imprisoned for not more than 3 years, or fined in accordance with title 18, or both.

(c) Administrative orders

(1) In any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation or other requirement of this part other than those relating to—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas,

the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $10,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both.

(2) In any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation, or other requirement of this part relating to—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas,

the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $5,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both.

(3)(A) An order under this subsection shall be issued by the Administrator after opportunity (provided in accordance with this subparagraph)

for a hearing. Before issuing the order, the Administrator shall give to the person to whom it is directed written notice of the Administrator's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) The Administrator shall provide public notice of, and reasonable opportunity to comment on, any proposed order.

(C) Any citizen who comments on any proposed order under subparagraph (B) shall be given notice of any hearing under this subsection and of any order. In any hearing held under subparagraph (A), such citizen shall have a reasonable opportunity to be heard and to present evidence.

(D) Any order issued under this subsection shall become effective 30 days following its issuance unless an appeal is taken pursuant to paragraph (6).

(4)(A) Any order issued under this subsection shall state with reasonable specificity the nature of the violation and may specify a reasonable time for compliance.

(B) In assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

(5) Any violation with respect to which the Administrator has commenced and is diligently prosecuting an action, or has issued an order under this subsection assessing a penalty, shall not be subject to an action under subsection (b) of this section or section 300h–3(c) or 300j–8 of this title, except that the foregoing limitation on civil actions under section 300j–8 of this title shall not apply with respect to any violation for which—

(A) a civil action under section 300j–8(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(B) a notice of violation under section 300j–8(b)(1) of this title has been given before commencement of an action under this subsection and an action under section 300j–8(a)(1) of this title is filed before 120 days after such notice is given.

(6) Any person against whom an order is issued or who commented on a proposed order pursuant to paragraph (3) may file an appeal of such order with the United States District Court for the District of Columbia or the district in which the violation is alleged to have occurred. Such an appeal may only be filed within the 30-day period beginning on the date the order is issued. Appellant shall simultaneously send a copy of the appeal by certified mail to the Administrator and to the Attorney General. The Administrator shall promptly file in such court a certified copy of the record on which such order was imposed. The district court shall not set aside or remand such order unless there is not substantial evidence on the record, taken as a whole, to support the finding of a violation or, unless the Administrator's assessment of penalty or requirement for compliance constitutes an abuse of discretion. The district court shall not impose additional civil penalties for the same violation unless the Administrator's assessment of a penalty constitutes an abuse of discretion. Notwithstanding section 300j–7(a)(2) of this title, any order issued under paragraph (3) shall be subject to judicial review exclusively under this paragraph.

(7) If any person fails to pay an assessment of a civil penalty—

(A) after the order becomes effective under paragraph (3), or

(B) after a court, in an action brought under paragraph (6), has entered a final judgment in favor of the Administrator,

the Administrator may request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus costs, attorneys' fees, and interest at currently prevailing rates from the date the order is effective or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(8) The Administrator may, in connection with administrative proceedings under this subsection, issue subpoenas compelling the attendance and testimony of witnesses and subpoenas duces tecum, and may request the Attorney General to bring an action to enforce any subpoena under this section. The district courts shall have jurisdiction to enforce such subpoenas and impose sanction.

(d) State authority to adopt or enforce laws or regulations respecting underground injection unaffected

Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter.

(July 1, 1944, ch. 373, title XIV, § 1423, as added Pub. L. 93–523, § 2(a), Dec. 16, 1974, 88 Stat. 1677; amended Pub. L. 96–502, § 2(b), Dec. 5, 1980, 94 Stat. 2738; Pub. L. 99–339, title II, § 202, June 19, 1986, 100 Stat. 654.)

AMENDMENTS

1986—Pub. L. 99–339, § 202(d), substituted "Enforcement" for "Failure of State to assure enforcement" in section catchline.

Subsec. (a)(1). Pub. L. 99–339, § 202(a)(1), substituted provisions which related to issuance of an order of compliance or commencement of a civil action by the Administrator if the State has not commenced enforcement against the violator for provisions directing the Administrator to give public notice and request that the State report within 15 days thereafter as to steps taken to enforce compliance and authorizing the Administrator to commence a civil action upon failure by the State to comply timely.

Subsec. (a)(2). Pub. L. 99–339, § 202(a)(2), substituted provision that the Administrator issue an order under subsec. (c) of this section or commence a civil action

under subsec. (b) of this section for provision that he commence a civil action under subsec. (b)(1) of this section.

Subsec. (b). Pub. L. 99–339, § 202(b), amended subsec. (b) generally, substituting provisions relating to jurisdiction of the appropriate Federal district court, entry of judgment, civil penalty of $25,000 per day, criminal liability and fine for willful violation for provisions which related to judicial determinations in appropriate Federal district courts, civil penalties of $5,000 per day, and fines of $10,000 per day for willful violations.

Subsecs. (c), (d). Pub. L. 99–339, § 202(c), added subsec. (c) and redesignated former subsec. (c) as (d).

1980—Subsec. (a)(1). Pub. L. 96–502 inserted reference to section 300h–4(c) of this title.

§ 300h–3. Interim regulation of underground injections

(a) Necessity for well operation permit; designation of one aquifer areas

(1) Any person may petition the Administrator to have an area of a State (or States) designated as an area in which no new underground injection well may be operated during the period beginning on the date of the designation and ending on the date on which the applicable underground injection control program covering such area takes effect unless a permit for the operation of such well has been issued by the Administrator under subsection (b) of this section. The Administrator may so designate an area within a State if he finds that the area has one aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health.

(2) Upon receipt of a petition under paragraph (1) of this subsection, the Administrator shall publish it in the Federal Register and shall provide an opportunity to interested persons to submit written data, views, or arguments thereon. Not later than the 30th day following the date of the publication of a petition under this paragraph in the Federal Register, the Administrator shall either make the designation for which the petition is submitted or deny the petition.

(b) Well operation permits; publication in Federal Register; notice and hearing; issuance or denial; conditions for issuance

(1) During the period beginning on the date an area is designated under subsection (a) of this section and ending on the date the applicable underground injection control program covering such area takes effect, no new underground injection well may be operated in such area unless the Administrator has issued a permit for such operation.

(2) Any person may petition the Administrator for the issuance of a permit for the operation of such a well in such an area. A petition submitted under this paragraph shall be submitted in such manner and contain such information as the Administrator may require by regulation. Upon receipt of such a petition, the Administrator shall publish it in the Federal Register. The Administrator shall give notice of any proceeding on a petition and shall provide opportunity for agency hearing. The Administrator shall act upon such petition on the record of any hearing held pursuant to the preceding sentence respecting such petition. Within 120 days of the publication in the Federal Register of a petition submitted under this paragraph, the Administrator shall either issue the permit for which the petition was submitted or shall deny its issuance.

(3) The Administrator may issue a permit for the operation of a new underground injection well in an area designated under subsection (a) of this section only, if he finds that the operation of such well will not cause contamination of the aquifer of such area so as to create a significant hazard to public health. The Administrator may condition the issuance of such a permit upon the use of such control measures in connection with the operation of such well, for which the permit is to be issued, as he deems necessary to assure that the operation of the well will not contaminate the aquifer of the designated area in which the well is located so as to create a significant hazard to public health.

(c) Civil penalties; separate violations; penalties for willful violations; temporary restraining order or injunction

Any person who operates a new underground injection well in violation of subsection (b) of this section, (1) shall be subject to a civil penalty of not more than $5,000 for each day in which such violation occurs, or (2) if such violation is willful, such person may, in lieu of the civil penalty authorized by clause (1), be fined not more than $10,000 for each day in which such violation occurs. If the Administrator has reason to believe that any person is violating or will violate subsection (b) of this section, he may petition the United States district court to issue a temporary restraining order or injunction (including a mandatory injunction) to enforce such subsection.

(d) "New underground injection well" defined

For purposes of this section, the term ''new underground injection well'' means an underground injection well whose operation was not approved by appropriate State and Federal agencies before December 16, 1974.

(e) Areas with one aquifer; publication in Federal Register; commitments for Federal financial assistance

If the Administrator determines, on his own initiative or upon petition, that an area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health, he shall publish notice of that determination in the Federal Register. After the publication of any such notice, no commitment for Federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for Federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

(July 1, 1944, ch. 373, title XIV, § 1424, as added Pub. L. 93–523, § 2(a), Dec. 16, 1974, 88 Stat. 1678.)

§ 300h–4. Optional demonstration by States relating to oil or natural gas

(a) Approval of State underground injection control program; alternative showing of effectiveness of program by State

For purposes of the Administrator's approval or disapproval under section 300h–1 of this title of that portion of any State underground injection control program which relates to—

(1) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(2) any underground injection for the secondary or tertiary recovery of oil or natural gas,

in lieu of the showing required under subparagraph (A) of section 300h–1(b)(1) of this title the State may demonstrate that such portion of the State program meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources.

(b) Revision or amendment of requirements of regulation; showing of effectiveness of program by State

If the Administrator revises or amends any requirement of a regulation under section 300h of this title relating to any aspect of the underground injection referred to in subsection (a) of this section, in the case of that portion of a State underground injection control program for which the demonstration referred to in subsection (a) of this section has been made, in lieu of the showing required under section 300h–1(b)(1)(B) of this title the State may demonstrate that, with respect to that aspect of such underground injection, the State program meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources.

(c) Primary enforcement responsibility of State; voiding by Administrator under duly promulgated rule

(1) Section 300h–1(b)(3) of this title shall not apply to that portion of any State underground injection control program approved by the Administrator pursuant to a demonstration under subsection (a) of this section (and under subsection (b) of this section where applicable).

(2) If pursuant to such a demonstration, the Administrator approves such portion of the State program, the State shall have primary enforcement responsibility with respect to that portion until such time as the Administrator determines, by rule, that such demonstration is no longer valid. Following such a determination, the Administrator may exercise the authority of subsection (c) of section 300h–1 of this title in the same manner as provided in such subsection with respect to a determination described in such subsection.

(3) Before promulgating any rule under paragraph (2), the Administrator shall provide opportunity for public hearing respecting such rule.

(July 1, 1944, ch. 373, title XIV, § 1425, as added Pub. L. 96–502, § 2(a), Dec. 5, 1980, 94 Stat. 2737; amended Pub. L. 99–339, title II, § 201(a), June 19, 1986, 100 Stat. 653.)

AMENDMENTS

1986—Subsec. (a)(1). Pub. L. 99–339 inserted "or natural gas storage operations, or" after "production".

§ 300h–5. Regulation of State programs

Not later than 18 months after June 19, 1986, the Administrator shall modify regulations issued under this chapter for Class I injection wells to identify monitoring methods, in addition to those in effect on November 1, 1985, including groundwater monitoring. In accordance with such regulations, the Administrator, or delegated State authority, shall determine the applicability of such monitoring methods, wherever appropriate, at locations and in such a manner as to provide the earliest possible detection of fluid migration into, or in the direction of, underground sources of drinking water from such wells, based on its assessment of the potential for fluid migration from the injection zone that may be harmful to human health or the environment. For purposes of this subsection, a class I injection well is defined in accordance with 40 CFR 146.05 as in effect on November 1, 1985.

(July 1, 1944, ch. 373, title XIV, § 1426, as added Pub. L. 99–339, title II, § 201(b), June 19, 1986, 100 Stat. 653; amended Pub. L. 104–66, title II, § 2021(f), Dec. 21, 1995, 109 Stat. 727; Pub. L. 104–182, title V, § 501(f)(2), Aug. 6, 1996, 110 Stat. 1691.)

AMENDMENTS

1996—Pub. L. 104–182 directed technical amendment of section catchline and subsec. (a) designation. The provision directing amendment of subsec. (a) designation could not be executed because section does not contain a subsec. (a).

1995—Pub. L. 104–66 struck out subsec. (a) designation and heading before "Not later than" and struck out heading and text of subsec. (b). Text read as follows: "The Administrator shall submit a report to Congress, no later than September 1987, summarizing the results of State surveys required by the Administrator under this section. The report shall include each of the following items of information:

"(1) The numbers and categories of class V wells which discharge nonhazardous waste into or above an underground source of drinking water.

"(2) The primary contamination problems associated with different categories of these disposal wells.

"(3) Recommendations for minimum design, construction, installation, and siting requirements that should be applied to protect underground sources of drinking water from such contamination wherever necessary."

§ 300h–6. Sole source aquifer demonstration program

(a) Purpose

The purpose of this section is to establish procedures for development, implementation, and assessment of demonstration programs designed to protect critical aquifer protection areas located within areas designated as sole or principal source aquifers under section 300h–3(e) of this title.

(b) "Critical aquifer protection area" defined

For purposes of this section, the term "critical aquifer protection area" means either of the following:

(1) All or part of an area located within an area for which an application or designation as a sole or principal source aquifer pursuant to section 300h–3(e) of this title, has been submitted and approved by the Administrator and which satisfies the criteria established by the Administrator under subsection (d) of this section.

(2) All or part of an area which is within an aquifer designated as a sole source aquifer as of June 19, 1986, and for which an areawide ground water quality protection plan has been approved under section 208 of the Clean Water Act [33 U.S.C. 1288] prior to June 19, 1986.

(c) Application

Any State, municipal or local government or political subdivision thereof or any planning entity (including any interstate regional planning entity) that identifies a critical aquifer protection area over which it has authority or jurisdiction may apply to the Administrator for the selection of such area for a demonstration program under this section. Any applicant shall consult with other government or planning entities with authority or jurisdiction in such area prior to application. Applicants, other than the Governor, shall submit the application for a demonstration program jointly with the Governor.

(d) Criteria

Not later than 1 year after June 19, 1986, the Administrator shall, by rule, establish criteria for identifying critical aquifer protection areas under this section. In establishing such criteria, the Administrator shall consider each of the following:

(1) The vulnerability of the aquifer to contamination due to hydrogeologic characteristics.

(2) The number of persons or the proportion of population using the ground water as a drinking water source.

(3) The economic, social and environmental benefits that would result to the area from maintenance of ground water of high quality.

(4) The economic, social and environmental costs that would result from degradation of the quality of the ground water.

(e) Contents of application

An application submitted to the Administrator by any applicant for a demonstration program under this section shall meet each of the following requirements:

(1) The application shall propose boundaries for the critical aquifer protection area within its jurisdiction.

(2) The application shall designate or, if necessary, establish a planning entity (which shall be a public agency and which shall include representation of elected local and State governmental officials) to develop a comprehensive management plan (hereinafter in this section referred to as the "plan") for the critical protection area. Where a local government planning agency exists with adequate authority to carry out this section with respect to any proposed critical protection area, such agency shall be designated as the planning entity.

(3) The application shall establish procedures for public participation in the development of the plan, for review, approval, and adoption of the plan, and for assistance to municipalities and other public agencies with authority under State law to implement the plan.

(4) The application shall include a hydrogeologic assessment of surface and ground water resources within the critical protection area.

(5) The application shall include a comprehensive management plan for the proposed protection area.

(6) The application shall include the measures and schedule proposed for implementation of such plan.

(f) Comprehensive plan

(1) The objective of a comprehensive management plan submitted by an applicant under this section shall be to maintain the quality of the ground water in the critical protection area in a manner reasonably expected to protect human health, the environment and ground water resources. In order to achieve such objective, the plan may be designed to maintain, to the maximum extent possible, the natural vegetative and hydrogeological conditions. Each of the following elements shall be included in such a protection plan:

(A) A map showing the detailed boundary of the critical protection area.

(B) An identification of existing and potential point and nonpoint sources of ground water degradation.

(C) An assessment of the relationship between activities on the land surface and ground water quality.

(D) Specific actions and management practices to be implemented in the critical protection area to prevent adverse impacts on ground water quality.

(E) Identification of authority adequate to implement the plan, estimates of program costs, and sources of State matching funds.

(2) Such plan may also include the following:

(A) A determination of the quality of the existing ground water recharged through the special protection area and the natural recharge capabilities of the special protection area watershed.

(B) Requirements designed to maintain existing underground drinking water quality or improve underground drinking water quality if prevailing conditions fail to meet drinking water standards, pursuant to this chapter and State law.

(C) Limits on Federal, State, and local government, financially assisted activities and projects which may contribute to degradation of such ground water or any loss of natural surface and subsurface infiltration of purification capability of the special protection watershed.

(D) A comprehensive statement of land use management including emergency contin-

gency planning as it pertains to the maintenance of the quality of underground sources of drinking water or to the improvement of such sources if necessary to meet drinking water standards pursuant to this chapter and State law.

(E) Actions in the special protection area which would avoid adverse impacts on water quality, recharge capabilities, or both.

(F) Consideration of specific techniques, which may include clustering, transfer of development rights, and other innovative measures sufficient to achieve the objectives of this section.

(G) Consideration of the establishment of a State institution to facilitate and assist funding a development transfer credit system.

(H) A program for State and local implementation of the plan described in this subsection in a manner that will insure the continued, uniform, consistent protection of the critical protection area in accord with the purposes of this section.

(I) Pollution abatement measures, if appropriate.

(g) Plans under section 208 of Clean Water Act

A plan approved before June 19, 1986, under section 208 of the Clean Water Act [33 U.S.C. 1288] to protect a sole source aquifer designated under section 300h–3(e) of this title shall be considered a comprehensive management plan for the purposes of this section.

(h) Consultation and hearings

During the development of a comprehensive management plan under this section, the planning entity shall consult with, and consider the comments of, appropriate officials of any municipality and State or Federal agency which has jurisdiction over lands and waters within the special protection area, other concerned organizations and technical and citizen advisory committees. The planning entity shall conduct public hearings at places within the special protection area for the purpose of providing the opportunity to comment on any aspect of the plan.

(i) Approval or disapproval

Within 120 days after receipt of an application under this section, the Administrator shall approve or disapprove the application. The approval or disapproval shall be based on a determination that the critical protection area satisfies the criteria established under subsection (d) of this section and that a demonstration program for the area would provide protection for ground water quality consistent with the objectives stated in subsection (f) of this section. The Administrator shall provide to the Governor a written explanation of the reasons for the disapproval of any such application. Any petitioner may modify and resubmit any application which is not approved. Upon approval of an application, the Administrator may enter into a cooperative agreement with the applicant to establish a demonstration program under this section.

(j) Grants and reimbursement

Upon entering a cooperative agreement under subsection (i) of this section, the Administrator may provide to the applicant, on a matching basis, a grant of 50 per centum of the costs of implementing the plan established under this section. The Administrator may also reimburse the applicant of an approved plan up to 50 per centum of the costs of developing such plan, except for plans approved under section 208 of the Clean Water Act [33 U.S.C. 1288]. The total amount of grants under this section for any one aquifer, designated under section 300h–3(e) of this title, shall not exceed $4,000,000 in any one fiscal year.

(k) Activities funded under other law

No funds authorized under this section may be used to fund activities funded under other sections of this chapter or the Clean Water Act [33 U.S.C. 1251 et seq.], the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.], the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. 9601 et seq.] or other environmental laws.

***(l)* Savings provision**

Nothing under this section shall be construed to amend, supersede or abrogate rights to quantities of water which have been established by interstate water compacts, Supreme Court decrees, or State water laws; or any requirement imposed or right provided under any Federal or State environmental or public health statute.

(m) Authorization of appropriations

There are authorized to be appropriated to carry out this section not more than the following amounts:

Fiscal year:	*Amount*
1987	$10,000,000
1988	15,000,000
1989	17,500,000
1990	17,500,000
1991	17,500,000
1992–2003	15,000,000.

Matching grants under this section may also be used to implement or update any water quality management plan for a sole or principal source aquifer approved (before June 19, 1986) by the Administrator under section 208 of the Federal Water Pollution Control Act [33 U.S.C. 1288].

(July 1, 1944, ch. 373, title XIV, § 1427, as added and amended Pub. L. 99–339, title II, § 203, title III, § 301(f), June 19, 1986, 100 Stat. 657, 664; Pub. L. 104–66, title II, § 2021(g), Dec. 21, 1995, 109 Stat. 727; Pub. L. 104–182, title I, § 120(a), title V, § 501(b)(2), (f)(3), Aug. 6, 1996, 110 Stat. 1650, 1691.)

REFERENCES IN TEXT

The Clean Water Act, referred to in subsec. (k), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, also known as the Federal Water Pollution Control Act, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Solid Waste Disposal Act, referred to in subsec. (k), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§ 6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in sub-

sec. (k), is Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, which is classified principally to chapter 103 (§ 9601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables.

AMENDMENTS

1996—Pub. L. 104–182, § 501(f)(3), made technical amendment to section catchline and subsec. (a) designation.

Subsec. (b)(1). Pub. L. 104–182, § 120(a)(1), struck out "not later than 24 months after June 19, 1986," after "by the Administrator".

Subsec. (k). Pub. L. 104–182, § 501(b)(2), substituted "this section" for "this subsection".

Subsec. (m). Pub. L. 104–182, § 120(a)(2), inserted table item relating to fiscal years 1992 through 2003.

1995—Subsecs. (*l*) to (n). Pub. L. 104–66 redesignated subsecs. (m) and (n) as (*l*) and (m), respectively, and struck out heading and text of former subsec. (*l*). Text read as follows: "Not later than December 31, 1989, each State shall submit to the Administrator a report assessing the impact of the program on ground water quality and identifying those measures found to be effective in protecting ground water resources. No later than September 30, 1990, the Administrator shall submit to Congress a report summarizing the State reports, and assessing the accomplishments of the sole source aquifer demonstration program including an identification of protection methods found to be most effective and recommendations for their application to protect ground water resources from contamination whenever necessary."

1986—Subsec. (n). Pub. L. 99–339 added subsec. (n).

§ 300h–7. State programs to establish wellhead protection areas

(a) State programs

The Governor or Governor's designee of each State shall, within 3 years of June 19, 1986, adopt and submit to the Administrator a State program to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons. Each State program under this section shall, at a minimum—

(1) specify the duties of State agencies, local governmental entities, and public water supply systems with respect to the development and implementation of programs required by this section;

(2) for each wellhead, determine the wellhead protection area as defined in subsection (e) of this section based on all reasonably available hydrogeologic information on ground water flow, recharge and discharge and other information the State deems necessary to adequately determine the wellhead protection area;

(3) identify within each wellhead protection area all potential anthropogenic sources of contaminants which may have any adverse effect on the health of persons;

(4) describe a program that contains, as appropriate, technical assistance, financial assistance, implementation of control measures, education, training, and demonstration projects to protect the water supply within wellhead protection areas from such contaminants;

(5) include contingency plans for the location and provision of alternate drinking water supplies for each public water system in the event of well or wellfield contamination by such contaminants; and

(6) include a requirement that consideration be given to all potential sources of such contaminants within the expected wellhead area of a new water well which serves a public water supply system.

(b) Public participation

To the maximum extent possible, each State shall establish procedures, including but not limited to the establishment of technical and citizens' advisory committees, to encourage the public to participate in developing the protection program for wellhead areas and source water assessment programs under section 300j–13 of this title. Such procedures shall include notice and opportunity for public hearing on the State program before it is submitted to the Administrator.

(c) Disapproval

(1) In general

If, in the judgment of the Administrator, a State program or portion thereof under subsection (a) of this section is not adequate to protect public water systems as required by subsection (a) of this section or a State program under section 300j–13 of this title or section 300g–7(b) of this title does not meet the applicable requirements of section 300j–13 of this title or section 300g–7(b) of this title, the Administrator shall disapprove such program or portion thereof. A State program developed pursuant to subsection (a) of this section shall be deemed to be adequate unless the Administrator determines, within 9 months of the receipt of a State program, that such program (or portion thereof) is inadequate for the purpose of protecting public water systems as required by this section from contaminants that may have any adverse effect on the health of persons. A State program developed pursuant to section 300j–13 of this title or section 300g–7(b) of this title shall be deemed to meet the applicable requirements of section 300j–13 of this title or section 300g–7(b) of this title unless the Administrator determines within 9 months of the receipt of the program that such program (or portion thereof) does not meet such requirements. If the Administrator determines that a proposed State program (or any portion thereof) is disapproved, the Administrator shall submit a written statement of the reasons for such determination to the Governor of the State.

(2) Modification and resubmission

Within 6 months after receipt of the Administrator's written notice under paragraph (1) that any proposed State program (or portion thereof) is disapproved, the Governor or Governor's designee, shall modify the program based upon the recommendations of the Administrator and resubmit the modified program to the Administrator.

(d) Federal assistance

After the date 3 years after June 19, 1986, no State shall receive funds authorized to be appropriated under this section except for the purpose of implementing the program and requirements of paragraphs (4) and (6) of subsection (a) of this section.

(e) "Wellhead protection area" defined

As used in this section, the term "wellhead protection area" means the surface and subsurface area surrounding a water well or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward and reach such water well or wellfield. The extent of a wellhead protection area, within a State, necessary to provide protection from contaminants which may have any adverse effect on the health of persons is to be determined by the State in the program submitted under subsection (a) of this section. Not later than one year after June 19, 1986, the Administrator shall issue technical guidance which States may use in making such determinations. Such guidance may reflect such factors as the radius of influence around a well or wellfield, the depth of drawdown of the water table by such well or wellfield at any given point, the time or rate of travel of various contaminants in various hydrologic conditions, distance from the well or wellfield, or other factors affecting the likelihood of contaminants reaching the well or wellfield, taking into account available engineering pump tests or comparable data, field reconnaissance, topographic information, and the geology of the formation in which the well or wellfield is located.

(f) Prohibitions

(1) Activities under other laws

No funds authorized to be appropriated under this section may be used to support activities authorized by the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.], the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. 9601 et seq.], or other sections of this chapter.

(2) Individual sources

No funds authorized to be appropriated under this section may be used to bring individual sources of contamination into compliance.

(g) Implementation

Each State shall make every reasonable effort to implement the State wellhead area protection program under this section within 2 years of submitting the program to the Administrator. Each State shall submit to the Administrator a biennial status report describing the State's progress in implementing the program. Such report shall include amendments to the State program for water wells sited during the biennial period.

(h) Federal agencies

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any potential source of contaminants identified by a State program pursuant to the provisions of subsection (a)(3) of this section shall be subject to and comply with all requirements of the State program developed according to subsection (a)(4) of this section applicable to such potential source of contaminants, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable charges and fees. The President may exempt any potential source under the jurisdiction of any department, agency, or instrumentality in the executive branch if the President determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to the lack of an appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriations.

(i) Additional requirement

(1) In general

In addition to the provisions of subsection (a) of this section, States in which there are more than 2,500 active wells at which annular injection is used as of January 1, 1986, shall include in their State program a certification that a State program exists and is being adequately enforced that provides protection from contaminants which may have any adverse effect on the health of persons and which are associated with the annular injection or surface disposal of brines associated with oil and gas production.

(2) "Annular injection" defined

For purposes of this subsection, the term "annular injection" means the reinjection of brines associated with the production of oil or gas between the production and surface casings of a conventional oil or gas producing well.

(3) Review

The Administrator shall conduct a review of each program certified under this subsection.

(4) Disapproval

If a State fails to include the certification required by this subsection or if in the judgment of the Administrator the State program certified under this subsection is not being adequately enforced, the Administrator shall disapprove the State program submitted under subsection (a) of this section.

(j) Coordination with other laws

Nothing in this section shall authorize or require any department, agency, or other instrumentality of the Federal Government or State or local government to apportion, allocate or otherwise regulate the withdrawal or beneficial use of ground or surface waters, so as to abrogate or modify any existing rights to water established pursuant to State or Federal law, including interstate compacts.

(k) Authorization of appropriations

Unless the State program is disapproved under this section, the Administrator shall make grants to the State for not less than 50 or more than 90 percent of the costs incurred by a State (as determined by the Administrator) in developing and implementing each State program under this section. For purposes of making such grants there is authorized to be appropriated not more than the following amounts:

Fiscal year:	*Amount*
1987	$20,000,000

Fiscal year:	*Amount*
1988	20,000,000
1989	35,000,000
1990	35,000,000
1991	35,000,000
1992–2003	30,000,000.

(July 1, 1944, ch. 373, title XIV, §1428, as added and amended Pub. L. 99–339, title II, §205, title III, §301(e), June 19, 1986, 100 Stat. 660, 664; Pub. L. 104–182, title I, §§120(b), 132(b), title V, §501(f)(4), Aug. 6, 1996, 110 Stat. 1650, 1674, 1692.)

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in subsec. (f)(1), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Solid Waste Disposal Act, referred to in subsec. (f)(1), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in subsec. (f)(1), is Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, which is classified principally to chapter 103 (§9601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables.

AMENDMENTS

1996—Pub. L. 104–182, §501(f)(4), made technical amendment to section catchline and subsec. (a) designation.

Subsec. (b). Pub. L. 104–182, §132(b)(4), inserted before period at end of first sentence "and source water assessment programs under section 300j–13 of this title".

Subsec. (c)(1). Pub. L. 104–182, §132(b)(3), which directed substitution of "is disapproved" for "is inadequate" in third sentence, was executed by making the substitution in fourth sentence to reflect the probable intent of Congress and the amendment by Pub. L. 104–182, §132(b)(2). See below.

Pub. L. 104–182, §132(b)(2), inserted after second sentence "A State program developed pursuant to section 300j–13 of this title or section 300g–7(b) of this title shall be deemed to meet the applicable requirements of section 300j–13 of this title or section 300g–7(b) of this title unless the Administrator determines within 9 months of the receipt of the program that such program (or portion thereof) does not meet such requirements."

Pub. L. 104–182, §132(b)(1), amended first sentence generally. Prior to amendment, first sentence read as follows: "If, in the judgment of the Administrator, a State program (or portion thereof, including the definition of a wellhead protection area), is not adequate to protect public water systems as required by this section, the Administrator shall disapprove such program (or portion thereof)."

Subsec. (c)(2). Pub. L. 104–182, §132(b)(3), substituted "is disapproved" for "is inadequate".

Subsec. (k). Pub. L. 104–182, §120(b), inserted table item relating to fiscal years 1992 through 2003.

1986—Subsec. (k). Pub. L. 99–339, §301(e), added subsec. (k).

§ 300h–8. State ground water protection grants

(a) In general

The Administrator may make a grant to a State for the development and implementation of a State program to ensure the coordinated and comprehensive protection of ground water resources within the State.

(b) Guidance

Not later than 1 year after August 6, 1996, and annually thereafter, the Administrator shall publish guidance that establishes procedures for application for State ground water protection program assistance and that identifies key elements of State ground water protection programs.

(c) Conditions of grants

(1) In general

The Administrator shall award grants to States that submit an application that is approved by the Administrator. The Administrator shall determine the amount of a grant awarded pursuant to this paragraph on the basis of an assessment of the extent of ground water resources in the State and the likelihood that awarding the grant will result in sustained and reliable protection of ground water quality.

(2) Innovative program grants

The Administrator may also award a grant pursuant to this subsection for innovative programs proposed by a State for the prevention of ground water contamination.

(3) Allocation of funds

The Administrator shall, at a minimum, ensure that, for each fiscal year, not less than 1 percent of funds made available to the Administrator by appropriations to carry out this section are allocated to each State that submits an application that is approved by the Administrator pursuant to this section.

(4) Limitation on grants

No grant awarded by the Administrator may be used for a project to remediate ground water contamination.

(d) Amount of grants

The amount of a grant awarded pursuant to paragraph (1) shall not exceed 50 percent of the eligible costs of carrying out the ground water protection program that is the subject of the grant (as determined by the Administrator) for the 1-year period beginning on the date that the grant is awarded. The State shall pay a State share to cover the costs of the ground water protection program from State funds in an amount that is not less than 50 percent of the cost of conducting the program.

(e) Evaluations and reports

Not later than 3 years after August 6, 1996, and every 3 years thereafter, the Administrator shall evaluate the State ground water protection programs that are the subject of grants awarded pursuant to this section and report to the Congress on the status of ground water quality in the United States and the effectiveness of State programs for ground water protection.

(f) Authorization of appropriations

There are authorized to be appropriated to carry out this section $15,000,000 for each of fiscal years 1997 through 2003.

(July 1, 1944, ch. 373, title XIV, §1429, as added Pub. L. 104–182, title I, §131, Aug. 6, 1996, 110 Stat. 1672.)

PART D—EMERGENCY POWERS

§ 300i. Emergency powers

(a) Actions authorized against imminent and substantial endangerment to health

Notwithstanding any other provision of this subchapter the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water, or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), which may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment, and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

(b) Penalties for violations; separate offenses

Any person who violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)(1) of this section may, in an action brought in the appropriate United States district court to enforce such order, be subject to a civil penalty of not to exceed $15,000 for each day in which such violation occurs or failure to comply continues.

(July 1, 1944, ch. 373, title XIV, §1431, as added Pub. L. 93–523, §2(a), Dec. 16, 1974, 88 Stat. 1680; amended Pub. L. 99–339, title II, §204, June 19, 1986, 100 Stat. 660; Pub. L. 104–182, title I, §113(d), Aug. 6, 1996, 110 Stat. 1636; Pub. L. 107–188, title IV, §403(2), June 12, 2002, 116 Stat. 687.)

AMENDMENTS

2002—Subsec. (a). Pub. L. 107–188, in first sentence, inserted ", or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), which" after "drinking water".

1996—Subsec. (b). Pub. L. 104–182 substituted "$15,000" for "$5,000".

1986—Subsec. (a). Pub. L. 99–339, §204(1), (2), inserted "or an underground source of drinking water" after "to enter a public water system" and "including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment," after "including travelers),".

Subsec. (b). Pub. L. 99–339, §204(3), struck out "willfully" after "person who" and substituted "subject to a civil penalty of not to exceed" for "fined not more than".

§ 300i–1. Tampering with public water systems

(a) Tampering

Any person who tampers with a public water system shall be imprisoned for not more than 20 years, or fined in accordance with title 18, or both.

(b) Attempt or threat

Any person who attempts to tamper, or makes a threat to tamper, with a public drinking water system be imprisoned for not more than 10 years, or fined in accordance with title 18, or both.

(c) Civil penalty

The Administrator may bring a civil action in the appropriate United States district court (as determined under the provisions of title 28) against any person who tampers, attempts to tamper, or makes a threat to tamper with a public water system. The court may impose on such person a civil penalty of not more than $1,000,000 for such tampering or not more than $100,000 for such attempt or threat.

(d) "Tamper" defined

For purposes of this section, the term "tamper" means—

(1) to introduce a contaminant into a public water system with the intention of harming persons; or

(2) to otherwise interfere with the operation of a public water system with the intention of harming persons.

(July 1, 1944, ch. 373, title XIV, §1432, as added Pub. L. 99–339, title I, §108, June 19, 1986, 100 Stat. 651; amended Pub. L. 104–182, title V, §501(f)(5), Aug. 6, 1996, 110 Stat. 1692; Pub. L. 107–188, title IV, §403(3), June 12, 2002, 116 Stat. 687.)

AMENDMENTS

2002—Subsec. (a). Pub. L. 107–188, §403(3)(A), substituted "20 years" for "5 years".

Subsec. (b). Pub. L. 107–188, §403(3)(B), substituted "10 years" for "3 years".

Subsec. (c). Pub. L. 107–188, §403(3)(C), (D), substituted "$1,000,000" for "$50,000" and "$100,000" for "$20,000".

1996—Pub. L. 104–182 made technical amendment to section catchline and subsec. (a) designation.

§ 300i–2. Terrorist and other intentional acts

(a) Vulnerability assessments

(1) Each community water system serving a population of greater than 3,300 persons shall conduct an assessment of the vulnerability of its system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe and reliable supply of drinking water. The vulnerability assessment shall include, but not be limited to, a review of pipes and constructed conveyances, physical barriers, water collection, pre-

(d), and struck out former subsecs. (a) and (b) which related to compliance by Federal agencies with Federal, State, and local requirements respecting provision of safe drinking water and respecting underground injection programs, liability for civil penalties, and waiver of compliance requirements when necessary in interest of national security.

Subsec. (e). Pub. L. 104–182, §129(c), added subsec. (e).

1977—Subsec. (a). Pub. L. 95–190, §8(a), substituted provisions relating to compliance by Federal agencies having jurisdiction over federally owned or maintained public water systems, or engaged in underground injection activities with Federal, State, and local requirements, etc., for provisions relating to compliance by Federal agencies having jurisdiction over federally owned or maintained public water systems with national primary drinking water regulations.

Subsec. (c). Pub. L. 95–190, §8(d), added subsec. (c).

§ 300j–7. Judicial review

(a) Courts of appeals; petition for review: actions respecting regulations; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

A petition for review of—

(1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

(2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement. In any petition concerning the assessment of a civil penalty pursuant to section 300g–3(g)(3)(B) of this title, the petitioner shall simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General. The court shall set aside and remand the penalty order if the court finds that there is not substantial evidence in the record to support the finding of a violation or that the assessment of the penalty by the Administrator constitutes an abuse of discretion.

(b) District courts; petition for review: actions respecting variances or exemptions; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

The United States district courts shall have jurisdiction of actions brought to review (1) the granting of, or the refusing to grant, a variance or exemption under section 300g–4 or 300g–5 of this title or (2) the requirements of any schedule prescribed for a variance or exemption under such section or the failure to prescribe such a schedule. Such an action may only be brought upon a petition for review filed with the court within the 45-day period beginning on the date the action sought to be reviewed is taken or, in the case of a petition to review the refusal to grant a variance or exemption or the failure to prescribe a schedule, within the 45-day period beginning on the date action is required to be taken on the variance, exemption, or schedule, as the case may be. A petition for such review may be filed after the expiration of such period if the petition is based solely on grounds arising after the expiration of such period. Action with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement.

(c) Judicial order for additional evidence before Administrator; modified or new findings; recommendation for modification or setting aside of original determination

In any judicial proceeding in which review is sought of a determination under this subchapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such term and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(July 1, 1944, ch. 373, title XIV, §1448, as added Pub. L. 93–523, §2(a), Dec. 16, 1974, 88 Stat. 1689; amended Pub. L. 99–339, title III, §303, June 19, 1986, 100 Stat. 667; Pub. L. 104–182, title I, §113(c), Aug. 6, 1996, 110 Stat. 1636.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–182, §113(c)(2), (3), in concluding provisions, substituted "or any other final Agency action" for "or issuance of the order" and inserted at end "In any petition concerning the assessment of a civil penalty pursuant to section 300g–3(g)(3)(B) of this title, the petitioner shall simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General. The court shall set aside and remand the penalty order if the court finds that there is not substantial evidence in the record to support the finding of a violation or that the assessment of the penalty by the Administrator constitutes an abuse of discretion."

Subsec. (a)(2). Pub. L. 104–182, §113(c)(1), substituted "any other final action" for "any other action".

1986—Subsec. (a)(1). Pub. L. 99–339, §303(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "action of the Administrator in promulgating any national primary drinking water regulation under section 300g–1 of this title, any regulation under section 300g–2(b)(1) of this title, any regulation under sec-

PART 144—UNDERGROUND INJECTION CONTROL PROGRAM

Subpart A—General Provisions

Subpart B—General Program Requirements

Subpart C—Authorization of Underground Injection by Rule

Subpart D—Authorization by Permit

Subpart E—Permit Conditions

Subpart F—Financial Responsibility: Class I Hazardous Waste Injection Wells

Subpart G—Requirements for Owners and Operators of Class V Injection Wells

AUTHORITY: Safe Drinking Water Act, 42 U.S.C. 300f *et seq;* Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

SOURCE: 48 FR 14189, Apr. 1, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 144.1 Purpose and scope of part 144.

(a) *Contents of part 144.* The regulations in this part set forth requirements for the Underground Injection Control (UIC) program promulgated under Part C of the Safe Drinking Water Act (SDWA) (Pub. L. 93–523, as amended; 42 U.S.C. 300f *et seq.*) and, to the extent that they deal with hazardous waste, the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 as amended; 42 U.S.C. 6901 *et seq.*).

(b) *Applicability.* (1) The regulations in this part establish minimum requirements for UIC programs. To the extent set forth in part 145, each State must meet these requirements in order to obtain primary enforcement authority for the UIC program in that State.

(2) In addition to serving as minimum requirements for UIC programs, the regulations in this part constitute a part of the UIC program for States listed in part 147 to be administered directly by EPA.

(c) The information requirements located in the following sections have been cleared by the Office of Management and Budget: Sections 144.11, 144.28(c)(d)(i), 144.31, 14.33, 144.51(j)(m)(n), 144.52(a), 144.54, 144.55, 144.15, 144.23, 144.26, 144.27, 144.28(i)(k), 144.51(o), 146.52. The OMB clearance number is 2040–0042.

(d) *Authority.* (1) Section 1421 of SDWA requires the Administrator to promulgate regulations establishing minimum requirements for effective UIC programs.

(2) Section 1422 of SDWA requires the Administrator to list in the FEDERAL REGISTER "each State for which in his judgment a State underground injection control program may be necessary to assure that underground injection will not endanger drinking water sources" and to establish by regulation a program for EPA administration of UIC programs in the absence of an approved State program in a listed State.

(3) Section 1423 of SDWA provides procedures for EPA enforcement of UIC requirements.

(4) Section 1431 authorizes the Administrator to take action to protect the health of persons when a contaminant which is present in or may enter a public water system or underground source of drinking water may present an imminent and substantial endangerment to the health of persons.

(5) Section 1445 of SDWA authorizes the promulgation of regulations for such recordkeeping, reporting, and monitoring requirements "as the Administrator may reasonably require * * * to assist him in establishing regulations under this title," and a "right of entry and inspection to determine compliance with this title, including for this purpose, inspection, at reasonable time, or records, files, papers, processes, controls, and facilities * * *."

(6) Section 1450 of SDWA authorizes the Administrator "to prescribe such regulations as are necessary or appropriate to carry out his functions" under SDWA.

(e) *Overview of the UIC program.* An UIC program is necessary in any State listed by EPA under section 1422 of the SDWA. Because all States have been listed, the SDWA requires all States to submit an UIC program within 270 days after July 24, 1980, the effective date of 40 CFR part 146, which was the final element of the UIC minimum requirements to be originally promulgated, unless the Administrator grants an extension, which can be for a period not to exceed an additional 270 days. If a State fails to submit an approvable program, EPA will establish a program for that State. Once a program is established, SDWA provides that all underground injections in listed States are unlawful and subject to penalties unless authorized by a permit or a rule. This part sets forth the requirements governing all UIC programs, authorizations by permit or rule and prohibits certain types of injection. The technical regulations governing these authorizations appear in 40 CFR part 146.

(f) *Structure of the UIC program*—(1) *Part 144.* This part sets forth the permitting and other program requirements that must be met by UIC Programs, whether run by a State or by EPA. It is divided into the following subparts:

(i) Subpart A describes general elements of the program, including definitions and classifications.

(ii) Subpart B sets forth the general program requirements, including the performance standards applicable to all injection activities, basic elements that all UIC programs must contain, and provisions for waiving permit of rule requirements under certain circumstances.

(iii) Subpart C sets forth requirements for wells authorized by rule.

(iv) Subpart D sets forth permitting procedures.

(v) Subpart E sets forth specific conditions, or types of conditions, that must at a minimum be included in all permits.

(vi) Subpart F sets forth the financial responsibility requirements for owners and operators of all existing and new Class I hazardous waste injection wells.

(vii) Subpart G of this part sets forth requirements for owners and operators of Class V injection wells.

(2) *Part 145.* While part 144 sets forth minimum requirements for all UIC Programs, these requirements are specifically identified as elements of a State application for primacy to administer an UIC Program in part 145. Part 145 also sets forth the necessary elements of a State submission and the procedural requirements for approval of State programs.

(3) *Part 124.* The public participation requirements that must be met by UIC Programs, whether administered by the State or by EPA, are set forth in part 124. EPA must comply with all part 124 requirements; State administered programs must comply with part 124 as required by part 145. These requirements carry out the purposes of the public participation requirement of 40 CFR part 25 (Public Participation), and supersede the requirements of that part as they apply to the UIC Program.

(4) *Part 146.* This part sets forth the technical criteria and standards that must be met in permits and authorizations by rule as required by part 144.

(g) *Scope of the permit or rule requirement.* The UIC Permit Program regulates underground injections by five classes of wells (see definition of "well injection," §144.3). The five classes of wells are set forth in §144.6. All owners or operators of these injection wells must be authorized either by permit or rule by the Director. In carrying out the mandate of the SDWA, this subpart provides that no injection shall be authorized by permit or rule if it results in the movement of fluid containing any contaminant into Underground Sources of Drinking Water (USDWs—see §144.3 for definition), if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR part 141 or may adversely affect the health of persons (§144.12). Existing Class IV wells which inject hazardous waste directly into an underground source of drinking water are to be eliminated over a period of six months and new such Class IV wells are to be prohibited (§144.13). For Class V wells, if remedial action appears necessary, a permit may be required (§144.25) or the Director must require remedial action or closure by order (§144.12(c)). During UIC Program development, the Director may identify aquifers and portions of aquifers which are actual or potential sources of drinking water. This will provide an aid to the Director in carrying out his or her duty to protect all USDWs. An aquifer is a USDW if it fits the definition, even if it has not been "identified." The Director may also designate "exempted aquifers" using the criteria in 40 CFR 146.4. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Therefore, they are not USDWs. No aquifer is an "exempted aquifer" until it has been affirmatively designated under the procedures in §144.7. Aquifers which do not fit the definition of "underground source of drinking water" are not "exempted aquifers." They are simply not subject to the special protection afforded USDWs.

(1) *Specific inclusions.* The following wells are included among those types of injection activities which are covered by the UIC regulations. (This list is not intended to be exclusive but is for clarification only.)

(i) Any injection well located on a drilling platform inside the State's territorial waters.

(ii) Any dug hole or well that is deeper than its largest surface dimension,

where the principal function of the hole is emplacement of fluids.

(iii) Any well used by generators of hazardous waste, or by owners or operators of hazardous waste management facilities, to dispose of fluids containing hazardous waste. This includes the disposal of hazardous waste into what would otherwise be septic systems and cesspools, regardless of their capacity.

(iv) Any septic tank, cesspool, or other well used by a multiple dwelling, community, or Regional system for the injection of wastes.

(2) *Specific exclusions.* The following are not covered by these regulations:

(i) Injection wells located on a drilling platform or other site that is beyond the State's territorial waters.

(ii) Individual or single family residential waste disposal systems such as domestic cesspools or septic systems.

(iii) Non-residential cesspools, septic systems or similar waste disposal systems if such systems (A) Are used solely for the disposal of sanitary waste, and (B) have the capacity to serve fewer than 20 persons a day.

(iv) Injection wells used for injection of hydrocarbons which are of pipeline quality and are gases at standard temperature and pressure for the purpose of storage.

(v) Any dug hole, drilled hole, or bored shaft which is not used for the subsurface emplacement of fluids.

(3) The prohibition applicable to Class IV wells under §144.13 does not apply to injections of hazardous wastes into aquifers or portions thereof which have been exempted pursuant to §146.04.

(h) *Interim Status under RCRA for Class I Hazardous Waste Injection Wells.* The minimum national standards which define acceptable injection of hazardous waste during the period of interim status under RCRA are set out in the applicable provisions of this part, parts 146 and 147, and §265.430 of this chapter. The issuance of a UIC permit does not automatically terminate RCRA interim status. A Class I well's interim status does, however, automatically terminate upon issuance to that well of a RCRA permit, or upon the well's receiving a RCRA permit-by-rule under §270.60(b) of this chapter. Thus, until a Class I well injecting hazardous waste receives a RCRA permit or RCRA permit-by-rule, the well's interim status requirements are the applicable requirements imposed pursuant to this part and parts 146, 147, and 265 of this chapter, including any requirements imposed in the UIC permit.

[48 FR 14189, Apr. 1, 1983, as amended at 49 FR 20181, May 11, 1984; 52 FR 20676, June 2, 1987; 52 FR 45797, Dec. 1, 1987; 53 FR 28147, July 26, 1988; 64 FR 68565, Dec. 7, 1999; 67 FR 39592, June 7, 2002]

§144.2 Promulgation of Class II programs for Indian lands.

Notwithstanding the requirements of this part or parts 124 and 146 of this chapter, the Administrator may promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands. In promulgating such a program the Administrator shall consider the following factors:

(a) The interest and preferences of the tribal government having responsibility for the given reservation or Indian lands;

(b) The consistency between the alternate program and any program in effect in an adjoining jurisdiction; and

(c) Such other factors as are necessary and appropriate to carry out the Safe Drinking Water Act.

§144.3 Definitions.

Terms not defined in this section have the meaning given by the appropriate Act. When a defined term appears in a definition, the defined term is sometimes placed within quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in approved States, including any approved modifications or revisions.

Appropriate Act and regulations means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA); or Safe

(1) The name and address of any permit applicant or permittee;

(2) Information which deals with the existence, absence, or level of contaminants in drinking water.

§ 144.6 Classification of wells.

Injection wells are classified as follows:

(a) *Class I.* (1) Wells used by generators of hazardous waste or owners or operators of hazardous waste management facilities to inject hazardous waste beneath the lowermost formation containing, within one-quarter mile of the well bore, an underground source of drinking water.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(3) Radioactive waste disposal wells which inject fluids below the lowermost formation containing an underground source of drinking water within one quarter mile of the well bore.

(b) *Class II.* Wells which inject fluids:

(1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an intergral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

(c) *Class III.* Wells which inject for extraction of minerals including:

(1) Mining of sulfur by the Frasch process;

(2) In situ production of uranium or other metals; this category includes only in-situ production from ore bodies which have not been conventionally mined. Solution mining of conventional mines such as stopes leaching is included in Class V.

(3) Solution mining of salts or potash.

(d) *Class IV.* (1) Wells used by generators of hazardous waste or of radioactive waste, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous waste or radioactive waste into a formation which within one-quarter (¼) mile of the well contains an underground source of drinking water.

(2) Wells used by generators of hazardous waste or of radioactive waste, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous waste or radioactive waste above a formation which within one-quarter (¼) mile of the well contains an underground source of drinking water.

(3) Wells used by generators of hazardous waste or owners or operators of hazardous waste management facilities to dispose of hazardous waste, which cannot be classified under paragraph (a)(1) or (d) (1) and (2) of this section (e.g., wells used to dispose of hazardous waste into or above a formation which contains an aquifer which has been exempted pursuant to §146.04).

(e) Class V. Injection wells not included in Class I, II, III, or IV. Specific types of Class V injection wells are described in §144.81.

[48 FR 14189, Apr. 1, 1983, as amended at 52 FR 20676, June 2, 1987; 64 FR 68565, Dec. 7, 1999]

§ 144.7 Identification of underground sources of drinking water and exempted aquifers.

(a) The Director may identify (by narrative description, illustrations, maps, or other means) and shall protect, except where exempted under paragraph (b) of this section, as an underground source of drinking water, all aquifers or parts of aquifers which meet the definition of an "underground source of drinking water" in §144.3. Even if an aquifer has not been specifically identified by the Director, it is an underground source of drinking water if it meets the definition in §144.3.

(b)(1) The Director may identify (by narrative description, illustrations, maps, or other means) and describe in geographic and/or geometric terms (such as vertical and lateral limits and gradient) which are clear and definite,

Subpart A—General Program Requirements

§ 145.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 1422 (underground injection control—UIC) of SDWA, and includes the elements which must be part of submissions to EPA for program approval and the substantive provisions which must be present in State programs for them to be approved.

(b) State submissions for program approval must be made in accordance with the procedures set out in subpart C. This includes developing and submitting to EPA a program description (§ 145.23), an Attorney General's Statement (§ 145.24), and a Memorandum of Agreement with the Regional Administrator (§ 145.25).

(c) The substantive provisions which must be included in State programs to obtain approval include requirements for permitting, compliance evaluation, enforcement, public participation, and sharing of information. The requirements are found in subpart B. Many of the requirements for State programs are made applicable to States by cross-referencing other EPA regulations. In particular, many of the provisions of parts 144 and 124 are made applicable to States by the references contained in § 145.11.

(d) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the Safe Drinking Water Act and any comments received.

(e) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. Where an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the federally approved program.

(h) Section 1451 of the SDWA authorizes the Administrator to delegate primary enforcement responsibility for the Underground Injection Control Program to eligible Indian Tribes. An Indian Tribe must establish its eligibility to be treated as a State before it is eligible to apply for Underground Injection Control grants and primary enforcement responsibility. All requirements of parts 124, 144, 145, and 146 that apply to States with UIC primary enforcement responsibility also apply to Indian Tribes except where specifically noted.

[48 FR 14202, Apr. 1, 1983, as amended at 53 FR 37412, Sept. 26, 1988; 59 FR 64345, Dec. 14, 1994]

§ 145.2 Definitions.

The definitions of part 144 apply to all subparts of this part.

Subpart B—Requirements for State Programs

§ 145.11 Requirements for permitting.

(a) All State programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements.

(1) Section 144.5(b)–(Confidential information);

(2) Section 144.6—(Classification of injection wells);

(3) Section 144.7—(Identification of underground sources of drinking water and exempted aquifers);

(4) Section 144.8—(Noncompliance reporting);

(5) Section 144.11—(Prohibition of unauthorized injection);

(6) Section 144.12—(Prohibition of movement of fluids into underground sources of drinking water);

(1) Be circulated in a manner calculated to attract the attention of interested persons. Circulation of the public notice shall include publication in enough of the largest newspapers in the State to attract Statewide attention and mailing to persons on appropriate State mailing lists and to any other persons whom the agency has reason to believe are interested;

(2) Indicate when and where the State's proposed program submission may be reviewed by the public;

(3) Indicate the cost of obtaining a copy of the submission;

(4) Provide for a comment period of not less than 30 days during which interested persons may comment on the proposed UIC program;

(5) Schedule a public hearing on the State program for no less than 30 days after notice of the hearing is published;

(6) Briefly outline the fundamental aspects of the State UIC program; and

(7) Identify a person that an interested member of the public may contact for further information.

(b) After complying with the requirements of paragraph (a) of this section any State may submit a proposed UIC program under section 1422 of SDWA and §145.22 of this part to EPA for approval. Such a submission shall include a showing of compliance with paragraph (a) of this section; copies of all written comments received by the State; a transcript, recording or summary of any public hearing which was held by the State; and a responsiveness summary which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received, and responds to these comments. A copy of the responsiveness summary shall be sent to those who testified at the hearing, and others upon request.

(c) After determining that a State's submission for UIC program approval is complete the Administrator shall issue public notice of the submission in the FEDERAL REGISTER and in accordance with paragraph (a)(1) of this section. Such notice shall:

(1) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the hearing. The notice may require persons wishing to present testimony to file a request with the Regional Administrator, who may cancel the public hearing if sufficient public interest in a hearing is not expressed;

(2) Afford the public 30 days after the notice to comment on the State's submission; and

(3) Note the availability of the State submission for inspection and copying by the public.

(d) The Administrator shall approve State programs which conform to the applicable requirements of this part.

(e) Within 90 days of the receipt of a complete submission (as provided in §145.22) or material amendment thereto, the Administrator shall by rule either fully approve, disapprove, or approve in part the State's UIC program taking into account any comments submitted. The Administrator shall give notice of this rule in the FEDERAL REGISTER and in accordance with paragraph (a)(1) of this section. If the Administrator determines not to approve the State program or to approve it only in part, the notice shall include a concise statement of the reasons for this determination. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received, and explains the Agency's response to these comments. The responsiveness summary shall be sent to those who testified at the public hearing, and to others upon request.

§145.32 Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The state shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as

EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held is there if significant public interest based on requests received.

(3) The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Safe Drinking Water Act.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approval by the Administrator under paragraph (b) of this section. Organizational charts required under §145.23(b) shall be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) The State shall submit the information required under paragraph (b)(1) of this section within 270 days of any amendment to this part or 40 CFR part 144, 146, or 124 which revises or adds any requirement respecting an approved UIC program.

§145.33 Criteria for withdrawal of State programs.

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets their requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under §145.24.

§145.34 Procedures for withdrawal of State programs.

(a) A State with a program approved under this part may voluntarily transfer program responsibilities required by Federal law to EPA by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession

reasonably expected to supply a public water system.

(Clean Water Act, Safe Drinking Water Act, Clean Air Act, Resource Conservation and Recovery Act: 42 U.S.C. 6905, 6912, 6925, 6927, 6974)

[45 FR 42500, June 24, 1980, as amended at 47 FR 4998, Feb. 3, 1982; 48 FR 14293, Apr. 1, 1983]

§ 146.5 Classification of injection wells.

Injection wells are classified as follows:

(a) *Class I.* (1) Wells used by generators of hazardous waste or owners or operators of hazardous waste management facilities to inject hazardous waste beneath the lowermost formation containing, within one quarter (¼) mile of the well bore, an underground source of drinking water.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(3) Radioactive waste disposal wells which inject fluids below the lowermost formation containing an underground source of drinking water within one quarter mile of the well bore.

(b) *Class II.* Wells which inject fluids:

(1) Which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

(c) *Class III.* Wells which inject for extraction of minerals including:

(1) Mining of sulfur by the Frasch process;

(2) In situ production of uranium or other metals. This category includes only in-situ production from ore bodies which have not been conventionally mined. Solution mining of conventional mines such as stopes leaching is included in Class V.

(3) Solution mining of salts or potash.

(d) *Class IV.* (1) Wells used by generators of hazardous waste or of radioactive waste, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous waste or radioactive waste into a formation which within one quarter (¼) mile of the well contains an underground source of drinking water.

(2) Wells used by generators of hazardous waste or of radioactive waste, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous waste or radioactive waste above a formation which within one quarter (¼) mile of the well contains an underground source of drinking water.

(3) Wells used by generators of hazardous waste or owners or operators of hazardous waste management facilities to dispose of hazardous waste, which cannot be classified under § 146.05(a)(1) or § 146.05(d) (1) and (2) (e.g., wells used to dispose of hazardous wastes into or above a formation which contains an aquifer which has been exempted pursuant to § 146.04).

(e) *Class V.* Injection wells not included in Class I, II, III, or IV. Specific types of Class V injection wells are also described in 40 CFR 144.81. Class V wells include:

(1) Air conditioning return flow wells used to return to the supply aquifer the water used for heating or cooling in a heat pump;

(2) Cesspools including multiple dwelling, community or regional cesspools, or other devices that receive wastes which have an open bottom and sometimes have perforated sides. The UIC requirements do not apply to single family residential cesspools nor to non-residential cesspools which receive solely sanitary wastes and have the capacity to serve fewer than 20 persons a day.

(3) Cooling water return flow wells used to inject water previously used for cooling;

(4) Drainage wells used to drain surface fluid, primarily storm runoff, into a subsurface formation;

(5) Dry wells used for the injection of wastes into a subsurface formation;
(6) Recharge wells used to replenish the water in an aquifer;
(7) Salt water intrusion barrier wells used to inject water into a fresh water aquifer to prevent the intrusion of salt water into the fresh water;
(8) Sand backfill and other backfill wells used to inject a mixture of water and sand, mill tailings or other solids into mined out portions of subsurface mines whether what is injected is a radioactive waste or not.
(9) Septic system wells used to inject the waste or effluent from a multiple dwelling, business establishment, community or regional business establishment septic tank. The UIC requirements do not apply to single family residential septic system wells, nor to non-residential septic system wells which are used solely for the disposal of sanitary waste and have the capacity to serve fewer than 20 persons a day.
(10) Subsidence control wells (not used for the purpose of oil or natural gas production) used to inject fluids into a non-oil or gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water;
(11) Radioactive waste disposal wells other than Class IV;
(12) Injection wells associated with the recovery of geothermal energy for heating, aquaculture and production of electric power.
(13) Wells used for solution mining of conventional mines such as stopes leaching;
(14) Wells used to inject spent brine into the same formation from which it was withdrawn after extraction of halogens or their salts;
(15) Injection wells used in experimental technologies.
(16) Injection wells used for in situ recovery of lignite, coal, tar sands, and oil shale.

[45 FR 42500, June 24, 1980, as amended at 46 FR 43161, Aug. 27, 1981; 47 FR 4999, Feb. 3, 1982; 64 FR 68573, Dec. 7, 1999]

§ 146.6 Area of review.

The area of review for each injection well or each field, project or area of the State shall be determined according to either paragraph (a) or (b) of this section. The Director may solicit input from the owners or operators of injection wells within the State as to which method is most appropriate for each geographic area or field.

(a) *Zone of endangering influence.* (1) The zone of endangering influence shall be:

(i) In the case of application(s) for well permit(s) under §122.38 that area the radius of which is the lateral distance in which the pressures in the injection zone may cause the migration of the injection and/or formation fluid into an underground source of drinking water; or

(ii) In the case of an application for an area permit under §122.39, the project area plus a circumscribing area the width of which is the lateral distance from the perimeter of the project area, in which the pressures in the injection zone may cause the migration of the injection and/or formation fluid into an underground source of drinking water.

(2) Computation of the zone of endangering influence may be based upon the parameters listed below and should be calculated for an injection time period equal to the expected life of the injection well or pattern. The following modified Theis equation illustrates one form which the mathematical model may take.

$$r = \left(\frac{2.25\,KHt}{S10^{x}}\right)^{1/2}$$

where:

$$X = \frac{4\pi KH\left(h_w - h_{bo} \times S_p G_b\right)}{2.3Q}$$

r=Radius of endangering influence from injection well (length)
k=Hydraulic conductivity of the injection zone (length/time)
H=Thickness of the injection zone (length)
t=Time of injection (time)
S=Storage coefficient (dimensionless)
Q=Injection rate (volume/time)
h_{bo}=Observed original hydrostatic head of injection zone (length) measured from the base of the lowermost underground source of drinking water
h_w=Hydrostatic head of underground source of drinking water (length) measured from the base of the lowest underground source of drinking water