# WEST VIRGINIA

# UNDERGROUND INJECTION CONTROL PROGRAM

# PRIMACY APPLICATION

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# SECTION 1

# GOVERNOR'S LETTER OF REQUEST

STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
GOVERNOR

December 3, 1982

Dear Mr. Bibko,

The enclosed West Virginia Underground Injection Control Program application for primary enforcement responsibility is formally submitted for EPA approval. The application contains all the program elements required for submission under 40 CFR Part 123.3 and Section 1425 of the Safe Drinking Water Act.

An expeditious EPA review and approval will be appreciated. As lead agency, the West Virginia Division of Water Resources, Department of Natural Resources, is ready to implement the Underground Injection Control Program.

Sincerely,

John D. Rockefeller IV

Mr. Peter Bibko
Regional Administrator
U. S. Environmental Protection Agency
Region III
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106

Kirk

STATE OF WEST VIRGINIA
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**Bob Wise**
**Governor**

**MEMORANDUM**

**Paul L. Nusbaum**
**Secretary**

**TO:** Sanitarians
Local Health Departments

**FROM:** Ronald K. Forren, R.S., Director
Public Health Sanitation Division

**RE:** U.I C. Program (Class V Injection Wells)

**DATE:** June 27, 2001

The West Virginia Department of Environmental Protection (DEP) has been receiving increasing pressure from the Environmental Protection Agency to enforce the regulations associated with the Underground Injection Control Program (UIC) for Class V Injection Wells. We are soliciting your help in providing information to the DEP regarding this program.

The DEP will be making assessments on subsurface discharge of effluent on all potential septic tank soil absorption systems that are not single family dwellings. If you receive a subsurface discharge application for a system that serves a structure or a series of structures that may generate an industrial, sewage, or co-mingled waste, please mail or fax a copy of the application to the DEP to allow them to assess the situation to determine if an injection well permit will be needed. This includes any single family dwelling which contains a home based business, such as a photography lab or an auto repair shop. The application, along with the additional information sheet, should be mailed or faxed to:

The Department of Environmental Protection, Division of Water Resources
1201 Greenbrier Street
Charleston, WV 25311-1088.
Attn: Evelyn Hopkins
Phone: (304) 558-2108 or Fax: (304) 558-2780

**Single family dwellings without a home based business will not be affected.**

You will not be involved in the collection of DEP fees or the assessment of applications. The DEP has assured us that there will be a quick assessment and response back to you with regard to these applications. Your job will essentially remain the same; approving the application for the entity using the correct design standards and issuing an on-site sewage permit.

Again, please remember that these submissions will be for systems with subsurface discharge of effluent only. We would like for you to fully subscribe to this process on or before July 15, 2001. Any questions or comments about this policy should be referred to Mark S. Whittaker at (304) 367-2752 or myself.

**BUREAU FOR PUBLIC HEALTH**
**Office of Environmental Health Services**
815 Quarrier Street, Suite 418 (Morrison Building)
Charleston, West Virginia 25301-2616
Telephone: (304) 558-2981 FAX: (304) 558-1291

# SECTION 2

# ATTORNEY GENERAL'S STATEMENTS

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# ATTORNEY GENERAL'S STATEMENTS

# REGARDING

# THE

# STATE'S STATUTORY AUTHORITY

# TO

# IMPLEMENT

# THE

# UNDERGROUND INJECTION CONTROL PROGRAM

# UNDERGROUND INJECTION CONTROL PROGRAM
## ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to the provisions of Part C of the Safe Drinking Water Act (42 U.S.C. 3000 et seq., as amended) and 40 C.F.R. § 123.5(a), that in my opinion the laws of West Virginia provide adequate authority to apply for, assume and carry out the program set forth in the Program Description submitted by the Division of Water Resources, State Department of Natural Resources. The specific authorities provided, which are contained in lawfully enacted statutes or promulgated regulations which will be in full force and effect on the date of approval of the program include the following:

1. Prohibition of Unauthorized Injection.

State law, W. Va. § 20-5A-5, makes it unlawful for a person to operate a disposal well without a permit issued under the article. The State Water Resources Board has adopted regulations [Section 13.01(a)] which state that "underground injection is prohibited unless authorized by permit or rule." Section 13.00 contains all of the permit procedures and procedures for authorization by rule. The Board's authority for these regulations is contained in W. Va. § 20-5A-3(b)(2).

Individual well classes are described in Section 4.00 of the regulations. The requirements related to each of the well classes are contained in Sections 7.00, 8.00, 9.00, 10.00, 11.00 and 12.00 of the regulations.

2. Prohibition of Endangering Drinking Water Sources.

a. The State law contains the authority to condition permit issuance upon compliance with all applicable state and federal water quality standards and the rules and regulations of the State Board. W. Va. § 20-5A-5(a) and § 20-5A-7(b). The Board's authority for rule-making includes the promulgation of water quality standards and general performance standards to prevent, control, and abate pollution. W. Va. § 20-5A-3(b)(2).

The Board has adopted a regulation pursuant to the above authority to prohibit underground injection which endangers drinking water sources within the meaning of Section 1421(b)(1)(B)(i) of the SDWA and to place the burden of proof upon the applicant. Regulations, Section 13.01(b). This section applies to all well classes.

The definition of "underground source of drinking water" in the State regulations (§ 2.00) is the same definition as in the federal regulations.

b. The requirement that an underground injection activity not endanger drinking water sources also applies to activities authorized by rule. Regulation § 13.01(b).

3. Prohibition of Movement of Fluid into a USDW.

a. The statutory authority for this requirement is the same as in 2. above. Regulation § 13.01(b) and (c) contain the specific federal requirement.

b. Regulations, § 13.01(b) applies to all well classes and would therefore satisfy this requirement.

c. Corrective action for Class I, II or III wells is authorized in Regulations, § 13.01(c) and § 6.00. Statutory authority for the regulations is the same as that discussed above in 2. a.

d. Corrective action for Class V wells is authorized in Regulations, § 13.01(d) and (e).

4. Authority to Issue Permits or Rule.

The Division of Water Resources, State Department of Natural Resources, has the authority to require permits for all classes of injection wells in W. Va. § 20-5A-5(b)(7). The Board has the authority to regulate all well classes by rule under W. Va. § 20-5A-3(b)(2).

The Oil and Gas Division of the State Department of Mines also has authority to issue permits for injection wells under W. Va. § 22-4-1k and § 22-4-2b. The Oil and Gas Division will be assisting Water Resources in the regulation of Class II wells under a Section 1425 application for primacy. Water Resources will also require a permit or authorize by rule Class II wells.

The Board's regulations contain the permit requirements and authorization by rule requirements in Section 13.00.

The Chief has the implied authority to issue permits on an area basis. This authority is implied from West Virginia § 20-5A-3(a)(1), which states that the Chief shall have the authority to "... perform any and all acts necessary to carry out the purposes and requirements of this article ..." The "area permit" is a reasonable administrative mechanism for issuing permits to wells within one area. The regulations contain the area permit requirements at Section 13.04.

The authority to issue a temporary permit for an imminent and substantial endangerment is an implied authority reasonably necessary to carry out the express purposes and requirements of the statute. See, § 13.05, Regulations.

5. Authority to Condition Authorized Injection Activities.

The Board may by regulation establish permit conditions to be included in all permits and on a case-by-case basis. W. Va. § 20-5A-3(b)(2). These regulations are contained at §§ 13.06, 13.07, 13.10 - 13.21.

Permits may be transferred in accordance with W. Va. § 20-5A-7(g) and the regulations, § 13.17. The authority to modify permits is found under W. Va. § 20-5A-7 and § 20-5A-8 and in § 13.18 and 13.20 of the regulations. The statutory sections allow the Chief to modify permits for cause; the Board has clarified what situations constitute good cause.

The authority to revoke and suspend permits is also found in W. Va. § 20-5A-7 and § 20-5A-8. The Board has specified causes for such actions in § 13.19 of the regulations.

6. Authority to Impose Compliance Evaluation Requirements.

The authority to enter a site, inspect, sample, and copy records is found under W. Va. § 20-5A-3(d). That section also provides authority to the State to require monitoring and reporting and the making and keeping of records by the permittee. Other sections of the law which provide this authority are W. Va. § 20-5A-3(a)(12) and (13) and § 20-5A-9. The regulations contain the inspection and entry requirements at § 13.12(i). Reporting and monitoring requirements for permittees are found under § 13.07(e), §13.12(j), (l), and in § 8.04, § 10.04, and § 11.04.

Application information which is required is specified in § 13.03 and § 13.10 of the regulations, as well as § 8.05 for Class I wells and § 10.05 for Class III wells. The Chief has authority to prescribe application forms under W. Va. § 20-5A-6.

7. Authority for Enforcement Requirements.

a. The authority to restrain immediately an unauthorized activity which is endangering public health or the environment is found under W. Va. § 20-5A-12a and W. Va. § 20-5A-17. Section 12a permits the Chief to require the cessation of an activity if it is a "clear present and immediate danger to the health of the public or, to the fitness of a private or public water supply for drinking purposes."

Section 17 authorizes a preliminary injunction to restrain an unauthorized activity. W. Va.'s statutes and rules of procedure regarding preliminary injunctions are comparable to the federal requirements.

b. This authority under Section 17 to sue for an injunction does not depend upon the prior revocation of a permit. West Virginia § 20-5A-17 states, inter alia:

> "An application for an injunction ... may be filed and injunctive relief granted notwithstanding that all of the administrative remedies provided for in this article have not been pursued ..."

Although not express in the statute, the Chief has the implied power to enjoin a "threatened" violation if there is reliable evidence that a violation is about to occur. The State Act is clearly preventive in nature and would allow this type action. [See, W. Va. § 20-5A-3(b)(2)(B)].

In addition to the Water Act's implied authority, the Director of the Department of Natural Resources has express authority to enjoin threatened violations under West Virginia § 20-7-5, which states:

> "The director shall be charged with the duty and responsibility of enforcing the provisions of this chapter and to this end may call upon the attorney general, the prosecuting attorneys of the several counties, the department of public safety and all other law-enforcement officers of the State. He shall have authority to compel compliance with and to prevent violations and threatened violations of any provisions of this chapter, lawful rules and regulations promulgated hereunder, and cease and desist orders issued pursuant hereto. He may invoke the processes of any court for coercive, remedial or preventive relief by injunction, mandamus or other appropriate proceedings." (Emphasis supplied.)

Therefore, threatened violations of the requirements of West Virginia § 20-5A-1 et seq., and regulations thereunder, could be enjoined under the above-quoted section, as well as directly under West Virginia § 20-5A-17.

State law contains additional authority to prevent "nuisances affecting the public health" under West Virginia § 16-3-6. Certain threatened violations of the UIC program could conceivably be "nuisances affecting the public health" and could therefore be enjoined under this provision as well as the others cited.

c. The Chief has the authority to sue for civil penalties for program violations involving all well classes in the amount of $10,000 per day. W. Va. § 20-5A-17. Criminal fines are recoverable for the violation of program requirements in an amount up to $1,000 per day, with all negligent or willful violations punishable

by a fine of from $2,500 to $25,000 per day. West Virginia § 20-5A-19. A comparison with the federal penalties under 40 C.F.R. § 123.9(a)(3) shows that the State penalties are more stringent.

d. The State has the authority to seek and agree upon civil penalties which are appropriate to the violation. The MOA between EPA and the State will contain this requirement.

e. The State will provide for citizen participation in enforcement by meeting the requirements of 40 C.F.R. § 123.9(d)(2). These requirements will be referenced in the MOA.

8. Authority for Public Participation in Permit Processing.

Each of the applicable federal requirements on public participation is enclosed in the regulations, §§ 13.24 - 13.32. The statutory authority for such regulations is found in W. Va. § 20-5A-5, as well as W. Va. § 20-5A-3(b)(2).

9. Authority to Apply Technical Criteria and Standards for the Control of Underground Injection Not Less Stringent than 40 C.F.R. Part 146.

The Board and Chief have broad authorities under the State Act to impose technical criteria which are designed to prevent, control and abate pollution. W. Va. § 20-5A-3(b)(2), § 20-5A-3(a), § 20-5A-5(a), and § 20-5A-7.

The requirements of 40 C.F.R. Part 146 are contained in the Board's regulations, § 8.00, 10.00, 11.00, and 12.00. Since the State is primarily regulating Class II wells under Section 1425 of the SDWA, the technical criteria relating to those wells under Part 146 have not been incorporated into the State regulations.

10. Classification of Injection Wells.

The State's scope of authority over wells extends to all UIC well types and classes.

The State Act requires permits for the discharge of pollutants from any point sources into state waters. § 20-5A-5. "State waters" includes ground water [§ 20-5A-2(e)] and the definition of "point source" includes wells [§ 20-5A-2(q)]. The term "well" includes all wells under the UIC program.

The main emphasis of Chapter 20-5A is the regulation of any and all discharges to prevent state waters from being polluted or contaminated, which is also the primary objective of the UIC program. In this regard, the UIC definition of the term "contaminant" is closely related to Chapter 20-5A's definition of "pollution" and "pollutants."

Section 122.3 of the federal regulations (May 19, 1980 Federal Register) defines "contaminant" as "any physical, chemical, biological or radiological substance or matter in water."

Chapter 20-5A-2(f) of the State Code defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the waters of the State."

And the term "pollutant" includes "industrial wastes, sewage, or other wastes" which are further defined as including "all other materials and substances ... which may cause or might reasonably be expected to cause or to contribute to the pollution of any of the waters of the State." [See, § 20-5A-2(j)].

From the above, one may conclude that Chapter 20-5A vests authority to regulate all materials and substances which may be discharged or released into state waters, and, therefore, all of the well classes under the UIC program.

In addition to this general authority, § 20-5A-5(b)(7) provides specific authority to require permits for disposal wells.

11. Elimination of Certain Class IV Wells.

Statutory authority for the elimination of Class IV wells exists in the remedial purposes of the State Act and the specific authorities to regulate pollution. The State Act is to be liberally construed to effectuate its purposes. City of Huntington v. State Water Commission, 135 W.Va. 568, 76 S.E.2d 1885 (1953).

a. The prohibition of all new Class IV wells is found in § 11.01(b) of the regulations.

b. The federal requirement that no injection occur in a Class IV well that was not in operation before July 24, 1980, is inapplicable since the State has no Class IV wells at present. Even if it did, these wells could be phased out first under the compliance schedule in § 11.03(b).

c. Any closure schedule under § 11.03(b) could ensure that no increase or change in the hazardous wastes is allowed.

d. The regulations, § 11.03(a) prohibit the operation of any existing Class IV well six months after the effective date of the State program.

e. The federal requirements for owners and operators of hazardous waste management facilities and generators of hazardous wastes are found at § 7.00 of the regulations. The State has added "location standards" in § 7.04.

12. Authority to Identify Aquifers that are USDW's and to Exempt Certain Aquifers.

The State Act provides the authority to identify certain aquifers as USDW's and to therefore furnish a higher degree of protection to those aquifers. This authority is found in W. Va. § 20-5A-3(b)(2)(C) and W. Va. § 20-5A-3a. The regulations, at §§ 2.00 and 3.00 supply the definition of "USDW" and the criteria for exempting an aquifer.

13. Authority over Federal Agencies and Persons Operating on Federally Owned or Leased Property.

The State program applies to all "persons" as that term is defined in W. Va. § 20-5A-2(d). The definition expressly includes "federal facilities."

14. State Authority over Indian Lands.

Not applicable.

15. Authority to Revise State UIC Program.

The State has the authority to revise the UIC program if necessary to reflect regulatory changes, etc. The MOA and other program documents, including the Attorney General Statement, may be revised as needed.

16. Authority to Make and Keep Records and Make Reports on Program Activities.

The State agency may make all reports required by EPA pursuant to the UIC program. This authority is found in the authority to cooperate with EPA in W. Va. § 20-5A-4 and the general powers and duties in W. Va. § 20-5A-3.

17. Confidential Information.

The State has authority to share all information with EPA, even if claimed confidential. Again, W. Va. § 20-5A-3(a) and § 20-5A-4 indicate to what extent the State and EPA must cooperate and share information. W. Va. § 20-5A-6 requires the State to protect "trade secrets" from public disclosure. We do not interpret this to include EPA, especially since EPA is also required to protect trade secrets under federal law.

18. Financial Responsibility.

The federal requirements on financial responsibility have been incorporated by reference into the Regulations, § 13.07(g). The Chief has authority to require financial assurances related to

plugging and abandonment under West Virginia § 20-5A-5(b)(7) and West Virginia § 20-5A-3(a)(1). The amount of any bond required will be determined by the Chief depending upon the type of well and the specific requirements for closure to be imposed under the Regulations, § 13.07(f).

The undersigned attorney does hereby certify that pursuant to the State law of West Virginia, she is counsel for the State Division of Water Resources, having full legal authority to independently represent said agency in court on all matters pertaining to the State program described herein with the terms and conditions of 40 C.F.R. Part 123.5.

Karen Green Watson

KAREN GREEN WATSON
ASSISTANT ATTORNEY GENERAL
ENVIRONMENTAL TASK FORCE

## UIC ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to the provisions of Part C of the Safe Drinking Water Act (42 U.S.C. 300 et seq., as amended) and 40 C.F.R. § 123.5(a), that in my opinion the laws of West Virginia provide adequate authority to apply for, assume, and carry out the program set forth in the Program Description submitted by the Office of Oil and Gas, State Department of Mines. The specific authorities are provided in the Program Description and are contained in lawfully enacted statutes and promulgated regulations which are currently in full force and effect.

Chauncey H. Browning

CHAUNCEY H. BROWNING
ATTORNEY GENERAL
STATE OF WEST VIRGINIA

U.S. EPA HEADQUARTERS

COMMENTS

ON THE

WEST VIRGINIA

UIC PROGRAM APPLICATION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: DEC 22 1982

SUBJECT: Headquarters Comments on West Virginia Final UIC Program Application

FROM: Phillip L. Tate
Headquarters Review Team (WH-550)

TO: Robert Blanco, Chief
Water Supply Branch, Region III



The Environmental Protection Agency (EPA) Headquarters Underground Injection Control (UIC) Primacy Review Team met to review the final West Virginia application on December 7, 1982. The final application was reviewed to determine if the Headquarters issues contained in the May 4, 1982, memo had been adequately addressed. Regional staff joined the Headquarters Team by speaker phone during the review.

The May 4 comments were reviewed in order.

1. The role and authority of each of the State agencies has been clarified, except as noted in paragraph 2 below.

2. We now understand the technical requirements which apply to Class II wells, and it is now clear that the permit requirements in 20-5A apply to Class II permits, and that DNR has the authority to impose them on Class II owner/operators. It would be helpful if the description regarding Class II wells made it clear that renewals of DNR permits where oil and gas permits are by rule will be handled in the same general manner as shown on page 13 of attachment to Section V.

3. We are now clear concerning which sections of the MOU apply to the 1425 program.

4. Is there a State regulation on the books which authorizes wells by rule and imposes obligations on them until they are permitted? It appears that the answer is negative. It may be that some form of general permit can be drafted and proposed to the public to take effect simultaniously with the effecive date of the program.

   In addition, can the Attorney General interpret that authorization by rule is a form of DNR permit? This is required since §20-5A-5 specifically permit to allow wastes to flow into the waters of the State.

5. We have been advised at the present time, no Class II or III wells are known to inject into a USDW. The Region assures us that if such a case were discovered, the DNR would carry out the procedures for exemption of that portion of the USDW affected by the injection. We would like a confirmation that the State currently has authority to prevent discharges from these classes into USDWs. The State of course, retains the option to have its requirements more stringent than EPA's.

6. We aksed for clarification of the authority of the Administrator to grant exemptions to the technical requriements. In the original application, in the Department of Mines regulations, Chapter 22-4, at 9.04, some wells are granted partial exemption. This does not appear in the final application. Is this an error or have the regulations been revised? If 9.04 is still in the regulations, a statement is required by the Attorney General that such variances will not be employed in such a way as to reduce environmental protection or violate Federal UIC requirements.

Additonal comments to legal points are:

1. The A.G. addressed confidentiality. We have an additional requirement that confidentiality may not protect information on contaminants in drinking water from disclosure. The A.G.'s statement should include this provision.

2. It may be appropriate for the application to state that Oil and Gas will inform DNR of all violations.

3. There is a question of the penalties the Oil and Gas Commission may impose. Is the limit $2,000 total or $2,000 a day?

4. In the regulations 13.01 B reads the same as 122.34. As stated it imposes no obligation on owner/opertors. It binds the State. It should say that no owner/operator may conduct any activity which . . . etc.

ATTORNEY GENERAL'S RESPONSE

TO THE

U.S. EPA HEADQUARTERS COMMENTS

ON THE

WEST VIRGINIA

UIC PROGRAM APPLICATION

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHAUNCEY H. BROWNING, JR.
ATTORNEY GENERAL

February 4, 1983

Mr. John Cooper, Esq.
U.S. Environmental Protection Agency
Region III
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106

Re: Headquarters Comments on the W.Va. Final UIC Program Application

Dear Mr. Cooper:

This letter is in response to Mr. Phillip Tate's memorandum dated, December 22, 1982, regarding "Headquarters Comments on the W.Va. Final UIC Program Application." We would request that this response be considered a part of the State's Program Application for primacy.

Beginning with page 2 of Mr. Tate's memo and addressing the additional points first:

1. Confidentiality of information pertaining to contaminant levels.

As required by 40 CFR § 122.19, West Virginia's program states that claims of confidentiality dealing with "the existence, absence, or level of contaminants in drinking water" will be denied. W.Va. Administrative Regulations, Series IX, § 13.21(b)(2). This regulation proceeds from the authority in W.Va. Code § 20-5A-6, which states that "effluent data" may not be claimed confidential. In regards to the State sharing information with EPA, which has been claimed confidential, § 13.23(g) of the W.Va. Administrative Regulations clarifies that EPA is not considered part of the "public" when it comes to the question of disclosure of confidential information.

2. The current Program Application includes provisions for the Office of Oil and Gas and the Oil and Gas Conservation Commission to coordinate with the Division of Water Resources on the enforcement of the Class II well portion of the program. This coordination is provided for in the Memorandum of Understanding, which is contained in Section 5 of the Program Application. The DNR will review all program violations in the quarterly and annual reports which are

submitted by the oil and gas agencies to the DNR. Also the DNR will review monitoring reports and must be notified of any violations which are peculiar to the DNR's permit, as well as enforcement actions which the oil and gas agencies have taken. The State agencies believe that these provisions will ensure that enforcement of the Class II well portion of the program is both efficient and effective.

3. W.Va. Code § 22-4-1k and W.Va. Code § 22-4-17 provide for criminal penalties in an amount "not exceeding two thousand dollars" as well as imprisonment in jail not exceeding twelve months.

There is no express language in these two sections which indicates whether such a penalty may be imposed on a "per day" basis or not. Since the language is unclear on this point, the purpose and legislative intention behind the language must be reviewed. Although criminal statutes are to be strictly construed in favor of the defendant, the obvious intent of the legislature must be recognized in the construction of the statute. 17 Michie's Jurisprudence, "Statutes," § 67. It would be necessary to consider the particular type of offense which is involved and the overall purpose of the statute. With this kind of analysis, it may be possible to impose penalties on a "per day" basis under W.Va. Code § 22-4-1 et seq.

4. We do not understand EPA's concern with the language in § 13.01 (b) of the State regulations. First, the language is almost verbatim from the federal regulations, 40 CFR § 122.34 (the State regulation includes a reference to State Health Department primary drinking water standards). Secondly, federal regulations at 40 CFR § 123. 7 require the State to adopt said language or something equivalent. And thirdly, the language binds both the State and the operator. It binds the State in that no permit or rule may allow the movement of fluid, etc. But it also binds the operator since he/she cannot obtain a permit unless a showing is made that the requirements of the paragraph are met and since a permit or authorization by rule is necessary in order to construct or operate a well (§ 13.01 (a)).

We will now respond to Mr. Tate's other points, beginning with number 4 on page 1 of the memo:

4. Section 13.02 of the State regulations was intended to serve as the necessary regulatory authority for "authorizing by rule" existing wells until individual permits were obtained. We agree with EPA that the regulation as written required some further action to implement this "authorization by rule" mechanism.

Therefore, the State Water Resources Board has proposed a new procedural rule, to be effective upon assumption of the UIC-program, which effectively implements the provisions of Section 13.02 of the State regulations. A copy of this rule is attached for your information.

Concerning the statutory authority for the "authorization by rule" mechanism, the Board has the authority to adopt rules and regulations implementing and making effective the powers, duties and responsibilities vested in the Chief and preventing, controlling and abating pollution. W.Va. Code § 20-5A-3 (b) (2) (A) and (B). The Chief has the authority to issue permits under § 20-5A-5 and to do all acts necessary to carry out the purposes and requirements of the article under § 20-5A-3 (a) (1).

"Authorization by rule" is a necessary administrative device to allow existing facilities to continue operations until such time as individual permits under § 20-5A-5 are obtained. The authorization by rule imposes certain regulatory requirements which ensure that the facilities do not go "unregulated" during this transition period until full-fledged permits are obtained.

In short, the Chief and board have the "implied" authority to use the authorization by rule device as a means of temporarily "permitting" facilities in accordance with § 20-5A-5.

5. The State's current authority to prevent discharges from Class II and III wells into USDW's is governed by the same general provisions which were discussed previously in the Attorney General's Statement.

W.Va. Code § 20-5A-5 (b) (1) requires a permit to allow wastes from a point source to flow into State waters. This broad authority, as well as the more specific authority under § 20-5A- 5 (b) (7), allows permits to be issued for all injection wells. W.Va. Code § 20-5A-7 (b) allows the Chief to impose permit terms and conditions which ensure compliance with applicable regulations (including the UIC regulations, when effective), and which will prevent pollution.

The State UIC regulations provide that no authorization by rule or permit shall allow the movement of fluid containing any contaminants into USDW's. § 13.01 (b). If in the future the State finds wells which violate this prohibition it will take enforcement action to prevent the violation. The means for this enforcement action are specified in § 13.01 (c) of the State regulations. This enforcement

would proceed independently of any proceedings to exempt that portion of the USDW which is affected.

6. Section 9.04 is still contained in the Department of Mines' regulations. However, it should not have a significant effect on the State's implementation of the UIC program. The Department of Mines only knows of one injection well operation which qualifies for the exemption and it is in compliance with current technical standards.

Should other wells be discovered which would qualify for the exemption, the Department may require corrective action and current requirements if it is determined that the well is "leaking liquids to other wells or to the surface." In order to make this determination, the Department may require monitoring and inspect the facility to determine if leaks are occurring. With the above points in mind, Section 9.04 should not result in more lenient standards than the UIC program allows.

Lastly, you asked me to address the "proviso" contained in W.Va. Code § 20-5A-3 (b)(2) and to explain whether it affects the State UIC regulations.

This section ends with the following language: "Provided, that no such rule and regulation adopted by the board shall specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant..."

This language was added to the Water Pollution Control Act by the 1974 Legislature at the same time major changes were made in the Act to enable takeover of the federal NPDES program. The Legislature's concern can be understood when one considers the emphasis placed on technology - based limits by the NPDES program in the effort to "reduce the discharge of pollutants." (Since the purpose of the UIC program is not to reduce the discharge of pollutants, but to prevent a discharge, it is questionable whether this proviso applies at all to the UIC rules).

Assuming arguendo that the proviso does apply and examining its language, we see that it prevents the board from specifying the design, type or method. The word particular is also used to modify method. These terms evidence the Legislature's intention to preclude the board from completely restricting a person's options in controlling pollution to one particular design of equipment, type of construction or method.

In reviewing the construction requirements in the UIC regulations (§ 8.02 and § 10.02), it can be seen that no particular type of construction is specified. Rather, the regulations are general in nature, establishing basic requirements and factors to be considered, and leaving specific terms and conditions to the Chief in the permit process. The Chief may specify types of construction or particular methods which he believes are necessary and appropriate to comply with the board's general requirements.

A review of the remainder of the UIC regulations has not revealed any sections which would violate the proviso.

If you desire any further explanation of the State's legal authority for the UIC program, please let me know. Also, I would hope that this letter could be included in the State's Program Application, so that no further submittals are necessary.

Very truly yours,

Karen G. Watson

Karen G. Watson
Assistant Attorney General
Environmental Task Force

KGW/rgf

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

STATE WATER RESOURCES BOARD

Chapter 20-5A-1 and Chapter 29A-3-1

Series X
(1983)

# REGULATIONS IMPLEMENTING THE AUTHORIZATION BY RULE PROVISION OF THE REGULATIONS FOR THE WEST VIRGINIA UNDERGROUND INJECTION CONTROL PROGRAM

WHEREAS, pursuant to the provisions of Chapter 20-5A-1 et seq. and Chapter 29A-3-1 et seq. of the West Virginia Code, 1931, as amended, the Board has approved and filed "Regulations for the West Virginia Underground Injection Control Program", West Virginia Administrative Regulations, Series IX, and

WHEREAS, Section 13.02 of said Regulations provides that certain facilities may be authorized by rule in accordance with the requirements of said section;

NOW, THEREFORE, the Board promulgates the following procedural rules for the implementation of Section 13.02 of the Board's West Virginia Administrative Regulations, Series IX:

1.01 Injection into existing Class I, II, and III wells shall be authorized by rule for periods up to five (5) years from the effective date of these regulations. All such wells must be issued permits within the five (5) year period or close down, at its end, unless the rule is continued under Section 1.02 of these regulations.

1.02 Rules under Section 1.01 of these regulations authorizing Class II and III wells or projects in existing fields or projects shall allow them to continue normal operations until permitted, including construction, operation, and plugging and abandonment of wells provided the owner or operator maintains compliance with all applicable requirements under the Board's West Virginia Administrative Regulations, Series IX.

1.03 Injection into existing Class IV wells shall be authorized for a period not to exceed six (6) months after the effective date of these regulations. Such rules shall apply the requirements of Section 7.03 and Section 11.04 of the Board's West Virginia Administrative Regulations, Series IX.

1.04 Injection into Class V wells shall be authorized for a period of five (5) years, subject to the requirements of Section 13.02(b) and (d) and Section 12.00 of the Board's West Virginia Administrative Regulations, Series IX. However, the Chief has authority to withdraw the authorization if required under Section 13.02 of said Regulations.

1.05 Any facility which is authorized by rule pursuant to these regulations shall meet the requirements contained in Section 13.02(b) of the Board's West Virginia Administrative Regulations, Series IX, no later than one (1) year after authorization by such rules.

1.06 These regulations do not supersede West Virginia Administrative Regulations, Series IX, and are solely intended as procedural regulations for the implementation of the provisions of Section 13.02 of the Board's

West Virginia Administrative Regulations, Series IX, and in the event of any inconsistency or conflict between any provision of these regulations and any provisions of Series IX, the provisions of Series IX shall control.

Adopted this 4th day of January, 1983, by the State Water Resources Board.

Attest:

John C. Ailes
Chairman

These regulations shall become effective upon assumption of the Underground Injection Control Program by the State.

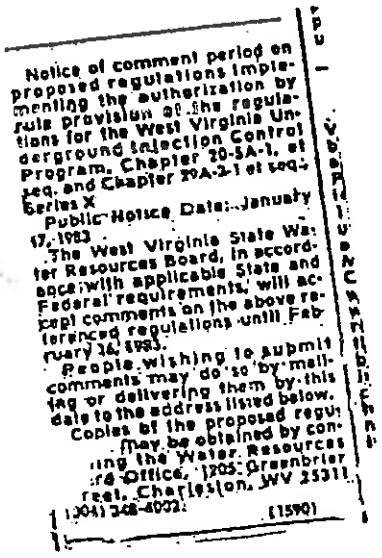
NOTICE OF COMMENT PERIOD ON PROPOSED REGULATIONS IMPLEMENTING THE AUTHORIZATION BY RULE PROVISION OF THE REGULATIONS FOR THE WEST VIRGINIA UNDERGROUND INJECTION CONTROL PROGRAM, CHAPTER 20-5A-1, et seq. and CHAPTER 29A-3-1 et seq., SERIES X

Public Notice Date: January 17, 1983

The West Virginia State Water Resources Board, in accordance with applicable State and Federal requirements, will accept comments on the above referenced regulations until February 16, 1983. People wishing to submit comments may do so by mailing or delivering them by this date to the address listed below.

Copies of the proposed regulations may be obtained by contacting the Water Resources Board Office, 1205 Greenbrier Street, Charleston, WV 25311 (304) 348-4002.

6B The Charleston Gazette, Monday, January 17, 1983 | LEGAL ADVERTISEMENT



Notice of comment period on proposed regulations implementing the authorization by rule provision of the regulations for the West Virginia Underground Injection Control Program, Chapter 20-5A-1, et seq. and Chapter 29A-3-1 et seq., Series X

Public Notice Date: January 17, 1983

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(1590)

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 1/17/83

# SECTION 3

# MEMORANDUM OF AGREEMENT

# BETWEEN

# THE STATE OF WEST VIRGINIA

# AND

# THE UNITED STATED ENVIRONMENTAL PROTECTION AGENCY

UNDERGROUND INJECTION CONTROL PROGRAM

MEMORANDUM OF AGREEMENT

BETWEEN

THE STATE OF WEST VIRGINIA

AND

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

# MEMORANDUM OF AGREEMENT

# BETWEEN

# THE STATE OF WEST VIRGINIA

# AND

# THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

# REGION III

## I. General

This Memorandum of Agreement ("Agreement") establishes policies, responsibilities, and procedures pursuant to 40 CFR Part 123, and Section 1425 of the SDWA for the State of West Virginia Underground Injection Control Program ("State Program") as authorized by Part C of the Safe Drinking Water Act (P. L. 93-523 as amended by P. L. 95-190 and 96-502) ("SDWA" or "the Act").

This agreement is entered into by the State of West Virginia and signed by David Robinson, Chief of the Division of Water Resources, hereafter "the State" or "Chief") with the United States Environmental Protection Agency Region III and signed by Peter N. Bibko, Regional Administrator (hereafter, "EPA" or "Regional Administrator"). This Agreement becomes effective upon the assumption of primacy for the Underground Injection Control ("UIC") program by the State.

### A. Lead Agency Responsibilities

The lead agency, the Division of Water Resources ("DWR") which receives the annual program grant, as designated by the Governor of the State, is also the lead agency to coordinate the State Program. This lead agency coordinates the State Program to facilitate communication between EPA and the State agencies having program responsibilities. These responsibilities include, but are not limited to, the submission of grant applications, reporting and monitoring results and annual report requirements. The Oil and Gas Conservation Commission and the Office of Oil and Gas, Department of Mines, are responsible for and have authority over all Class II injection wells, under Section 1425 of the SDWA. All Class II injection wells must also obtain an Underground Injection Control Permit from DWR before injection of fluids. The Division of Water Resources is responsible for and has authority over all Class I, III, IV and V injection wells. Each State agency is responsible for administering the State Program for the injection wells under its jurisdiction including, but not limited to, reports, permits, monitoring and enforcement actions.

The lead agency shall assure the equitable and efficient distribution of UIC grant funds to the participating agencies which have responsibilities under this Agreement for the UIC Program.

### B. Review and Modifications

This Agreement shall be reviewed annually as part of the annual program grant and State/EPA Agreement ("SEA") process. The annual program grant and the SEA shall be consistent with this Agreement and may not override this Agreement.

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MEMORANDUM OF AGREEMENT

C. Conformance with Laws and Regulations

The Chief shall administer the UIC program consistent with the State's submission for program approval, this MOA, the SDWA, current Federal policies and regulations, promulgated minimum requirements, priorities established as part of the annually approved State UIC grant, and any separate working agreements which shall be entered into with the Regional Administrator as necessary for the full administration of the UIC program.

D. Responsibilities of Parties

Each of the parties has responsibilities to assure that the UIC requirements are met. The parties agree to maintain a high level of cooperation and coordination between State and EPA staffs in a partnership to assure successful and effective administration of the UIC program. In this partnership, the Regional Administrator will provide to the Chief on a continuing basis technical and policy assistance on program matters.

The Regional Administrator is responsible for keeping the Chief apprised of the meaning and content of Federal guidelines, technical standards, regulations, policy decisions, directives, and any other factors which affect the UIC program.

The strategies and priorities for issuance, compliance monitoring and enforcement of permits, and implementation of technical requirements shall be established in the State's program description, the annual State/EPA agreement, or in subsequent working agreements. If requested by either party. meetings will be scheduled at reasonable intervals between the State and EPA to review specific operating procedures, resolve problems, or discuss mutual concerns involving the administration of the UIC program.

E. Sharing of Information

The Chief shall promptly inform EPA of any proposed, pending or enacted modifications to laws, regulations, or guidelines, and any judicial decisions or administrative actions which might affect the State Program and the State's authority to administer the program. The Chief shall promptly inform EPA of any resource allocation changes (for example, personnel budget, equipment, etc.) which might affect the State's ability to administer the program.

Any information obtained or used by the State under its UIC program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing EPA such information. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with 40 CFR Part 2. If EPA obtains information from the State that is not claimed to be confidential, EPA may make that information available to the public without further notice.

EPA shall furnish to the State the information in its files not submitted under a claim of confidentiality which the State needs to implement its approved program. EPA shall furnish to the State information submitted to EPA under a claim of confidentiality which the State needs to implement its approved program subject to conditions in 40 CFR Part 2.

F. Duty to Revise Program

Within 270 days of any amendment to any regulation promulgated at 40 CFR Parts 122, 123, 124 or 146 revising or adding any requirement respecting State UIC programs, the State shall submit notice to EPA showing that the State program meets the revised or added requirement, a longer period of time may be allowed if necessary to comply with the provisions of the State Administrative Procedures Act, Chapter 29A of the West Virginia Code, 1931, as amended.

If the Administrator revises or amends any requirement of a regulation under Section 1421, the State may demonstrate that the State program meets the requirements of Section 1421(b) and represents an effective program under Section 1425(b). The State may make this alternative showing under Section 1425, but still must do this within 270 days after such revision or amendment.

G. Definition and Exemptions of USDW

The State agrees to define an "underground source of drinking water" (USDW) as an aquifer or its portion:

(a) (1) which supplies any public water system; or
(2) which contains a sufficient quantity of ground water to supply a public water system; and

(i) currently supplies drinking water for human consumption;
(ii) contains fewer than 10,000 mg/l total dissolved solids; and

(b) which is not an exempted aquifer.

The State further agrees to exempt aquifers only in conformance with the following criteria:

An aquifer or a portion thereof which meets the criteria for an "underground source of drinking water" may be determined to be an exempted aquifer if it meets the following criteria:

(a) It does not currently serve as a source of drinking water; and
(b) It cannot now and will not in the future serve as a source of drinking water because:

(1) It is mineral, hydrocarbon or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for a Class II or III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible;

(2) It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical; or

(3) It is so contaminated that it would be economically or technologically impractical to render the water fit for human consumption; or

(4) It is located over a Class III well mining area subject to subsidence or catastrophic collapse; or

(c) The Total Dissolved Solids content of the ground water is more than 3,000 and less than 10,000 mg/l and it is not reasonably expected to supply a public water system.

The State will obtain EPA approval and will hold a public hearing prior to exempting an aquifer in conformance with the aforementioned criteria.

H. Duration of MOA

This agreement will remain in effect until such time as State primary enforcement responsibility is withdrawn by EPA, according to the provisions of 40 CFR Part 123.14.

I. General Provisions

Nothing in this agreement is intended to affect any UIC or program requirement, including any standards or prohibitions, established by State or local law as long as the State or local requirements are not less stringent than: (1) any set forth in the UIC regulations; or (2) other requirements or prohibitions established under the SDWA or applicable regulations.

Nothing in this agreement shall be construed to limit the authority of the EPA to take action pursuant to Sections 1421, 1422, 1423, 1424, 1425, 1431 or other Sections of the SDWA.

II. Permitting

A. General

The State is responsible for expeditiously drafting, circulating, issuing, modifying, reissuing, and terminating UIC permits and shall do so in accordance with 40 CFR Part 123.7 and applicable State regulations. The Chief shall review and issue permits bssed on the permit conditions required under 40 CFR 123.7 and applicable State regulations. Permits shall be issued which comply with applicable Federal and State requirements.

B. Transfer of Responsibility from EPA

The Regional Administrator shall transfer from EPA to the State any pending permit, applications and any other information relevant to program operation not already in the possession of the Chief when the State assumes primacy for the program.

C. Coordination with EPA

EPA and the State may coordinate when appropriate the processing of permits for facilities or activities that require permits from both EPA and the State under different programs.

D. Consolidation of Permit Issuance

The State and EPA may agree on provisions for joint processing of permits for facilities or activities which require permits from both EPA and the State

under different programs. The State and EPA may consolidate draft permits, fact sheets, public comment periods, and any public hearings on those permits which are jointly processed. The Director shall not, however, proceed with joint processing of permits if this would result in unreasonable delay in the issuance of one or more permits.

E. Compliance Schedules and Reports

The Chief agrees to establish compliance schedules in permits where appropriate and to require periodic reporting on compliance with compliance schedules and other permit conditions.

III. Compliance Monitoring

A. General

The State shall operate a timely and effective compliance monitoring system to track compliance with permit conditions and program requirements. For purposes of this Agreement the terms "compliance monitoring" or "compliance evaluation" shall refer to all efforts associated with determining conpliance with UIC program requirements.

B. Compliance Schedule

The State agrees to maintain procedures to receive, evaluate, retain and investigate all notices and reports that are required by permit compliance schedules and program regulations. These procedures shall also include the necessary elements to investigate the failure of persons required to submit such notices and reports. The State shall initiate appropriate compliance actions when required information is not received or when the reports are not submitted.

C. Review of Compliance Reports

The State shall conduct a timely and substantive review of all such reports to determine compliance status. The State shall operate a system to determine if: (1) the reports required by permits and program regulations are submitted; (2) the submitted reports are complete and accurate; and (3) the permit conditions and program requirements are met. The reports and notices shall be evaluated for compliance status in accordance with the State compliance program and the program requirements.

D. Inspection and Surveillance

The Chief agrees to have inspection and surveillance procedures to determine compliance or noncompliance with the applicable requirements of the UIC program. Surveys or other methods of surveillance shall be utilized to identify persons who have not complied with permit applications or other program requirements. Any compilations, index, or inventory obtained for such facilities or activities shall be made available to the Regional Administrator upon request.

The Chief shall conduct periodic inspections of the facilities and activities subject to regulatory requirements. These compliance monitoring inspections shall be performed to assess compliance with all UIC permit conditions or UIC program requirements and include selecting and evaluating a facility's monitoring and reporting program. These inspections shall be conducted to determine the compliance or noncompliance with the issued permits, verify the accuracy

of the information submitted by the permittees in reporting forms and monitoring data, and to verify the adequacy of sampling, monitoring and other methods to provide the information.

The State agrees to witness each year at a minimum, 25% of the mechanical integrity tests conducted by permittees.

E. Information from the Public

The Chief shall establish a mechanism for the public to submit information on violations, and to have procedures for receiving, investigating and ensuring proper consideration of the information.

F. Authority to Enter

The Chief (and other State officials) engaged in compliance monitoring and evaluation have the authority to enter any site or premises subject to regulation, and to review and copy the records of relevant program operations where such records are kept in accordance with State regulations (Chapter 25-A3(d) of the West Virginia Code, 1931, as amended).

G. Admissibility

Any investigatory inspections shall be conducted and samples and other information collected in a manner to provide evidence admissible in an enforcement proceeding or in court.

IV. Enforcement

A. General

The State is responsible for taking timely and appropriate enforcement action against persons in violation of program requirements, compliance schedules, technical requirements, permit conditions, and other UIC program requirements. This includes violations detected by State or Federal inspections.

Failure by the State to initiate appropriate enforcement action against a substantive violation may be the basis for EPA's determination that the State has failed to take timely enforcement action in accordance with Section 1423 of the SDWA.

B. Enforcement Mechanisms

The State shall have the mechanisms to restrain immediately and effectively any person engaging in any unauthorized activity or operation which is endangering or causing damage to public health or the environment as applicable to the program requirements. The State shall also have the means to sue in courts of competent jurisdiction to prohibit any threatened or continuing violation of any program requirement. Additionally, the State agency administering the program shall have the mechanism to assess or sue to recover in court civil penalties and criminal remedies as established in 40 CFR Part 123.9.

C. Public Participation

The State shall provide for public participation in the State enforcement process by providing assurance that the State agency or enforcement authority will: (i) investigate and provide written responses to all citizen complaints; (ii)

not oppose intervention by any citizen when permissive intervention may be authorized by statutes, rule, or regulation; and (iii) publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

Nothing in this agreement shall affect EPA's authority or responsibility to take enforcement actions under Section 1423 of the SDWA.

D. EPA Enforcement

When the State has a fully approved program the EPA will not take enforcement actions without providing prior notice to the State and otherwise complying with Section 1423 of the SDWA. EPA retains primary enforcement responsibility whenever the State program is disapproved in whole or in part. A State which has a partially approved program has the authority to enforce against any violation of the approved portion of its program. A State whose program has been approved under Section 1425 has primary enforcement responsibility for that part of the program.

E. Assessment of Fines

The State shall agree to seek civil penalties in amounts appropriate to the violation as required in Section 123.9(c) of the regulations.

V. EPA Oversight

A. General

EPA shall oversee the State's administration of the UIC program on a continuing basis to assure that such administration is consistent with this MOA, the State UIC grant application, and all applicable requirements embodied in current regulations, policies and Federal law.

In addition to the specific oversight activities listed in this section, EPA may, from time to time request, and the State shall submit specific information and provide access to files necessary for evaluating the Chief's administration of the UIC program.

B. Quarterly Noncompliance Reports

The State shall submit to the Regional Administrator quarterly noncompliance reports (as specified in 40 CFR Part 122.18(a)) on major facilities as determined in accordance with the following schedule:

| Quarter | Report Due to Regional Administrator* |
|---|---|
| January, February, March | - due May 31 |
| April, May, June | - due August 31 |
| July, August, September | - due November 30 |
| October, November, December | - due February 28 |

*The reports are also to be made available to the public on this date for inspection and copying.

The State shall submit the noncompliance reports in the required format (40 CFR Part 122.18(a)(1)) including the current status and outcome of any actions taken by the Chief against those who are not in compliance.

For purposes of the program reporting requirements under Section 122.18, the Chief and EPA shall use Ground Water Program Guidance #18 to define injection operations as major or minor facilities. This guidance is attached.

C. Annual Noncompliance Reports

The State shall submit an annual noncompliance reports (as specified in 40 CFR Part 122.18(c)(1) on nonmajor permittees. The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

D. Immediate Reporting on Noncompliance

The Chief shall immediately notify the Regional Administrator by telephone, or otherwise, of any major, imminent hazard to public health resulting from the endangerment of an underground source of drinking water of the State by well injection.

E. Annual Program Report

The State shall submit an annual program report to the Regional Administrator in accordance with Section 122.18(c)(4)(i). This report shall be for the calendar year ending December 31, with the report completed and available to the public no more than 60 days later.

As part of this Memorandum of Agreement, the State shall agree to submit to EPA an annual report on the operation of its Class II program in accordance with Section 1425 of the SDWA. Under Section 1425, the annual report may cover noncompliance reporting and reporting for the mid-course evaluation. This report shall cover the calendar year ending December 31, and be available to the public and submitted to the Regional office no more than 60 days later.

F. Mid-Course Evaluation Reports

In addition to the annual program report and noncompliance reports, the State shall submit the mid-course evaluation information (as required by 40 CFR Section 122.18(c)(4)(ii) and Sections 146.15, and 146.35) to EPA by February 28 and August 31 of each of the first two years of program operation after State Program approval. The August 31 submission shall be for the six-month reporting period from January through June and the February 28 submission shall be for the six-month reporting period from July through December. After the first submission, the subsequent three reports may reference the original submission.

G. Class V Reports

Within 3 years of program approval, the Chief shall complete and submit to EPA a report on Class V wells in the State as specified in Section 146.52(b).

H. Review of Permits

The following arrangement has been made between the Regional Administrator and the State Director for the yearly review and comments by EPA on a sampling

of draft and issued permits. The circumstances upon which EPA will want to review and comment on State permits and the number of permits per category follows:

(1) All well permits issued with special conditions or additional requirements incorporated in a permit and prescribed by the Director to prevent the migration of fluids into an USDW (40 CFR Parts 122.34(b), 122.40(b)(6), 122.42(f), and (i), and 122.44(a));

(2) All permits issued by the Director through a waiver of the requirements (40 CFR 122.43);

(3) The issuance and reissuance of all class I and emergency permits;

(4) The issuance and reissuance of 10% of the class II enhanced recovery and Hydrocarbon (liquid) storage permits;

(5) The issuance and reissuance of 30% of the Class III and Class II disposal permits;

(6) All permits issued whereby all relevent facts were not considered, misrepresented, or were not fully disclosed (40 CFR Part 122.16(a)(2));

(7) All facilities permitted under more than one program and found to be in noncompliance (40 CFR Part 122.18(a)(ii));

(8) All permits issued on an area basis (40 CFR Part 122.39);

This arrangement is subject to modification upon the agreement of both parties.

I. Inspection and Surveillance by EPA
(Discretionary)

Provisions also may be made within the context of the MOA for the Regional Administrator to select facilities and activities within the States for EPA inspection.

The following priorities should be considered in selecting facilities for inspection and review as a function of EPA's responsibility:

(1) Class I injection wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous wastes, other than Class IV wells;

(2) Class II wells permitted on an area permit basis;

(3) Class II salt water disposal wells;

(4) Permits issued under a waiver (Section 122.43);

(5) Class II wells authorized by rule.

EPA may conduct such inspections jointly with the State. The Chief shall give the Regional Administrator adequate notice to participate in any compliance evaluation inspection scheduled by the State.

The Regional Administrator may also choose to conduct inspections independently of the State's schedule. In such cases, the EPA shall normally notify the State at least seven (7) days before any inspection which EPA determines to be necessary. However, if an emergency exists, or for some other reason it is impossible to give advance notification, the Regional Administrator may waive advance notification to inspect a facility. In keeping with Section 1445(b)(2) of the SDWA, the State undertakes not to use such information to inform the person whose property is to be entered of the pending inspection.

J. Annual Performance Evaluation

EPA shall conduct, at least annually, performance evaluations of the State program using the State quarterly reports, annual noncompliance reports, program reports, and other requested information to determine State program consistency with the program submission, SDWA and applicable regulations, and applicable guidance and policies. The review will not only include a review of financial expenditures, but reviews on progress towards program implementation, changes in the program description, and efforts towards progress on program elements.

The Environmental Protection Agency shall submit a copy of the evaluation findings to the State outlining the deficiencies in program performance, and recommendations for improving State operations within thirty days of receipt of the annual program report. The report also might provide guidance for the development of upcoming grant application. The State shall have 15 working days from the date of receipt to concur with or comment on the findings and recommendations.

VI. Signatures

West Virginia Division of
Water Resources

By: David A. Robinson
Chief

Date: 5/11/87

U. S. Environmental
Protection Agency

By: _____
Regional Administrator

Date: _____

ATTACHMENTS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: MAY 15 1981

SUBJECT: Definition of a Major Facility
Underground Injection Control (UIC)
Ground-Water Program Guidance #18 (GWPB #18)

FROM: Alan Levin, Director
State Programs Division

TO: Water Supply Branch Chiefs
UIC Representatives Regions I-X

## Purpose

40 CFR 122.3 defines a major "facility or activity"[1] as one that has been so classified by the Administrator and/or the Director. The purpose of this guidance is to define which facilities should be classified as major for the purpose of reporting and permitting in the Underground Injection Control (UIC) program.

## Background

The difference in whether a facility is classified as a major or a minor only comes into play in the non-compliance reports (40 CFR 122.18) and in the permit requirement for a fact sheet (40 CFR 124.8). In the former, quarterly non-compliance reports are required of all major facilities while only annual reports are required from the other facilities (this is a federal reporting requirement). In the latter, fact sheets are only required from majors for the purpose of permitting.

On page 23742 of the preamble of the proposed UIC Regulations (40 CFR Part 146, April 20, 1979) Class I and IV wells are referred to as "major" facilities.

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1. Facility or activity is defined as any "... UIC 'injection well' ..., or any other activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs"

## Guidance

For the purposes of quarterly reports and fact sheets for permits, only Class I and IV wells will be majors. In State Programs, each State can vary from the above definition and target other well classes or portions thereof for additional requirements. For example: Certain Class II operations, such as tertiary recovery and some Class III operations, such as uranium solution mining, because of their area of influence, pressure gradient, location and potential direct impact on an Underground Source of Drinking Water (USDW) may be deemed as candidates for special treatment under the State's UIC program.

## Implementation

This guidance goes into effect as soon as it is received by the Region and State offices. After a classification has been made of the injection well, a notification should go to all other programs holding permits on the facility for concurrence.

## Filing Instructions

This guidance should be filed as Ground-Water Program Guidance #18 (GWPB #18).

## Action Responsibility

For further information on this guidance memorandum contact:

Mario Salazar
Environmental Protection Agency
Office of Drinking Water (WH-550)
401 M Street, SW
Washington, D.C. 20460
(202) 426-3983