



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 15 1982

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Guidance for Determining Adequacy of State
Underground Injection Control (UIC) Program
Elements

FROM: Frederic A. Eidsness, Jr., Assistant Administrator
for Water (WH-556)

TO: Regional Administrators
Regions I - X

Victor Kimm's memorandum of March 9, 1982, discussed a number of recurring problems that surfaced in our review of State applications for primacy over the Underground Injection Control (UIC) Program. That memo also offered alternative ways of resolving these problems.

Since that time, we have encountered additional issues in our review of State applications. Also, several Regional Administrators have requested guidance on certain Federal requirements as to what State program elements may be considered acceptable. After consultation with the Office of Legal and Enforcement Counsel, we have reached positions on several of the issues most critical to the State program approval process. These issues are: the minimum State penalty authorities sufficient to comply with Federal requirements; the circumstances, if any, in which a State provision requiring issuance of a permit within a specified time may be acceptable; the general standard of review to be used in determining the sufficiency of any State program elements; and the demonstration necessary for a State to assert jurisdiction over Indian lands.

I understand that questions about these issues have delayed UIC program approvals. Now that the Agency's position has been clarified, I hope we can move at least some of these applications expeditiously.

Penalty amounts

Section 123.9 of the UIC Regulations requires any State agency administering a program to have the authority to impose penalties or fines for program violations of at least \$2,500 in civil penalties (\$1,000 for Class II) and \$5,000 in criminal fines (or, for Class II, the ability to impose pipeline severance). Based on the unequivocal language of this section and the explanatory preamble, the Environmental Protection Agency (EPA) must require that States have authority to impose both civil and criminal penalties in at least the specified amounts.

Notwithstanding this basic standard, the Federal regulations allow variations from the penalty amount requirements in certain limited circumstances. The following paragraphs set out EPA's position on what the penalty requirements are under various circumstances.

- ° Full penalty amounts required for Class I, II, III and IV programs.

Where a State is trying to qualify a program for Classes I - IV, the State must have the full penalty authority specified in Section 123.9. (If a State chooses to submit its Class II program for review under the alternative standard established under Section 1425 of the Safe Drinking Water Act (SDWA), however, the penalty provisions need only meet the standard of what constitutes an effective program.)

- ° Exception for banned classes of wells.

If a State demonstrates that no wells of Class I, II, or III exist in the State and new wells of the class are effectively banned, the State need not have the authority to impose full penalty amounts as to that class of wells. This exception to the penalty amount requirement is established by §123.51(d), which provides that, except for Class IV, a State need not develop a program for a class of wells meeting the above demonstration. Since a program is not required, full penalty amounts are not necessary. Injunctive authority is necessary, however, as an element of an effective ban. The State must always have full penalty authority for Class IV wells.

- Exception for Class V.

Wherever possible, a State should have the authority to impose the full penalty amounts set forth in §123.9 for Class V wells. A legal argument can be constructed, however, based on an interpretation of the treatment of Class V wells in the regulations, that a State program without full penalty authority for this class may be approved. Consequently, where full penalty authority for Class V wells cannot be obtained for a particular State, the State program may be approved without such authority.

- Penalty amounts supplied by alternative State authority.

Where a State lacks a statutory provision establishing sufficient penalty authority explicitly for UIC Program violations, the State may nevertheless be able to demonstrate adequate penalties by utilizing other State authorities. Other environmental statutes, general State penalty authority, statutory nuisance law, and even common law may, in some cases, provide the penalty authority necessary to meet the Federal requirements. Such alternative authority will be acceptable if the State Attorney General certifies that monetary penalties can be imposed under such authority for any UIC Program violation in at least the amounts required by Federal regulation. Headquarters and the Regions should increase efforts to work with State Attorneys General to use such alternative authorities wherever they may exist.

Default permits

Several States have statutes which require permit applications to be acted upon within a stated period of time. Such requirements are of great concern to the Agency and should be scrutinized with care. Whether they are acceptable turns on the effect of such deadlines on the permit that is issued.

The effect of such a section could be to force the State to authorize an injection well as requested by the applicant. Such an effect would not be acceptable to the Agency since the State could be compelled to authorize an injection well which could endanger underground sources of drinking water.

On the other hand, the deadline may simply compel the State to act. If despite expiration of the deadline the State can require all necessary conditions to assure that the well complies with UIC program requirements, and if within the deadline the State can assure adequate public participation and prepare adequate permit conditions, a deadline for permit issuance may be acceptable. The Attorney General's Statement should explicitly address the effect of such statutory sections and certify that the State is required in all cases to impose the appropriate conditions or even deny the permit if warranted.

State jurisdiction over Indian lands

Several States have asserted jurisdiction over Indian lands in their UIC Program applications. The Office of Legal and Enforcement Counsel has informed us that pursuant to Federal law, we cannot approve a State's assertion of jurisdiction over Indian lands absent a clear and unambiguous expression of intent to confer State jurisdiction through either a Federal statute ^{2/} or an applicable treaty with an affected tribe. In the absence of such a Federal statute or treaty, EPA has exclusive jurisdiction over Indian lands.

It has been suggested that where a State asserts jurisdiction but fails to support the assertion with a Federal statute or a treaty, EPA could approve the program and remain silent on the State's assertion of jurisdiction over Indian lands. Such an approach cannot be allowed. By approving the State's application, EPA would, by implication, endorse the State's assertion over Indian lands. To do this when there is insufficient basis for the State's assertion would contravene Federal law.

2/ SDWA itself cannot be deemed such an expression of intent.

General standard of review

The SDWA and the UIC Regulations make it clear that State programs must meet the Federal requirements and that each State program element must be at least as stringent as the corresponding Federal requirement. It should be noted as well that numerous UIC Program requirements are also necessary for assumption by States of other EPA permitting programs, and that allowing departure from a requirement in one program would undermine requiring it for another. In particular, the Agency must take care to avoid relaxation of any requirement in the UIC Program that may undermine the RCRA requirements for hazardous waste disposal.

However, there is room for some variation from the precise letter of the Federal requirements. Specifically, departures that can legitimately be considered de minimis in substance are acceptable. In addition, a State need not impose a requirement by precisely the same language or in precisely the same way as the Federal regulations, if the State can demonstrate that its provision imposes an identical or more stringent substantive requirement. Finally, some of the Federal regulations on their face allow some latitude as to what specific State elements would meet the Federal requirements. EPA frequently has worked with States to develop creative solutions within these bounds, and continues to encourage similar efforts to establish that a State program meets all Federal requirements.