UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

APR 3 1990

Mr. Michael Lewis, UIC Director
West Virginia Department of Energy
Division of Oil and Gas
322 70th Street, S.E.
Charleston, W.V. 25304

Re: Transfer of UIC Program from the Department of Natural Resources to the Department of Energy

Dear Mr. Lewis:

The Office of Regional Counsel (ORC) of EPA Region III has conducted a review of the legal sufficiency of the State of West Virginia's proposed transfer of jurisdiction of the UIC Program from the West Virginia Department of Natural Resources (DNR) to the West Virginia Department of Energy (DOE). This letter outlines the procedure for approval of program transfer and conveys our comments on the proposed program transfer.

States with approved programs must notify EPA when they propose to transfer all or any part of any program from the approved state agency to any other state agency, and must identify any new division of responsibilities. 40 C.F.R. § 145.32(c). The new agency is not authorized to administer the program until approval by the Administrator under § 145.32(b). Such approval is contingent on the state's submittal of 1) a modified program description, 2) Attorney General's statement, and 3) Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances. Organizational charts required under § 145.23(b) shall be revised and resubmitted. (These charts were not included in this submission.)

The transfer of a program from one state agency to another is considered to be a substantial program revision; therefore, EPA is required to issue public notice through direct mail to interested persons, and publication in the Federal Register and the largest newspapers in the state, and to provide an opportunity to comment for a period of at least 30 days before the revision is effective. The public notice shall summarize the proposed revisions and provide the opportunity to request a public hearing, which will be held if there is significant public interest. See 40 C.F.R. § 145.32(b).

The following comments address the sufficiency of each element of the State's submittal. Where no specific reference is made, ORC endorses the comments of the UIC Section, which were transmitted to you by letter dated October 19, 1989.

I. Modified Program Description

1. It is not clear why the Division of Oil and Gas and the Division of Mines and Minerals, both of DOE, are prepared to adopt nearly duplicative regulations. A clearer delineation of separate responsibilities would avoid confusion among the regulated community and between the regulating authorities themselves.

2. Although DOE proposes to incorporate by reference EPA's public notice requirements at 40 C.F.R. §124.10, DOE also requires permit applicants to notify coal owners, operators or lessees of the proposed location of a well. If this limited personal notice, which would be inadequate according to EPA's regulations, is in addition to the public notice required by 40 C.F.R. §124.10, then EPA's notice requirements will be satisfied.

3. Under Section II.C.3. of the program description, Objections and Comments, the Chief of the Division of Water Resources of the Department of Natural Resources is provided 30 days to file a written objection to the location of an injection well. This objection is apparently afforded the same consideration as any other objection by the interested public. An objection from the Chief of the agency division with the authority and mandate to protect water resources should have greater weight in the determination whether or not to issue a permit for an injection well. In making the final decision whether to issue a permit for an injection well, DOE should not automatically override DNR's objection if consensus is not reached.

4. Under Section II.E., Monitoring, Reporting and Record Keeping, the program description states that DOE requires "prompt" notice of mechanical failures according to West Virginia Code §22B-1-2. The only specific references to timing of the notice in such cases are in the regulations at §38-15-11.3.3 (Criteria and Standards Applicable to Class I Wells), which requires "immediate" reports of malfunctions which may allow fluid migration into or between USDWs, and §38-15-17.8, incorporating by reference 40 C.F.R. §144.51, which requires 24-hour notification. EPA requires 24 hour notification and would not accept any less stringent definition of "prompt."

5. Under Section II.M.9. Plugging and Abandonment, an additional bond of unspecified amount is required before plugging operations commence, to be released after the plugging is satisfactorily completed. Given the scarcity of resources of many of the small

operators in the Region, it may be counter-productive to require this additional bond on top of the original $10,000 per well at the time of permit application, required pursuant to West Virginia Code §22B-1-26, when the operator will most likely need cash flow to pay for materials and labor to plug the well.

6. Under Section II.M.10., Area of Review and Corrective Action, it is unclear how the fixed radius mapping by the permittee for the permit application of all other wells (active, drilling, or abandoned) overlaps with the area-of-review analysis performed by DOE. Will the permittee be required to provide records, maps and information for the area-of-review analysis? Will wells discovered during the area-of-review analysis be mapped on the plat? What is the purpose of the fixed-radius review? Does it simply provide a reasonable start for area-of-review mapping? If the well is to be drilled 3,000 feet or more but does not penetrate a coal seam, is the radius of review still 2,400 feet?

7. As to corrective action, the program description states that "DOE may establish a reasonable time to correct a violation or order cessation of the operation if endangerment to a USDW occurs." (West Virginia Code §22B-1-3(b) specifies that this "reasonable period of time shall not exceed seven days.") Since endangerment must occur before the operation is required to cease, this provision should be more protective and less reactive to prevent the possibility of endangerment.

8. Under Section II.M.[sic] Enforcement, criminal penalties for willful violations of the permit application requirements (§22B-1-6) or the article or regulations (§22B-1-34) range from $2,500 to $5,000, with maximum imprisonment of 12 months. In addition, §22B-1-7 imposes civil and criminal penalties ranging from $10,000 to $25,000 per day of violation for violations of orders, permits, and regulations issued pursuant to the Section. It is not clear whether the penalty authorities in §22B-1-34 and §22B-1-7 overlap. Further clarification of the applicability of these penalties is needed.

9. Under Section II.Q. Public Participation, no mention is made of inviting commenters to any public hearing held pursuant to the applicant's or the DNR's request. Interested persons should be invited to a hearing such as that referenced in Section II.C.3. Objections and Comments.

II. Attorney General's Statement

The Attorney General's statement is problematic in several respects. First it incorrectly references the statutory and regulatory sections of the Safe Drinking Water Act (SDWA) and its implementing regulations. Part C of the SDWA is limited to 42 U.S.C. §§ 300h - 300h-7. The section of the Code of Federal

Regulations which sets forth the requirement for a statement from the Attorney General certifying that the State has adequate legal authority to carry out the UIC program described in its submission is 40 C.F.R. § 145.24(a).

The Attorney General's statement also references a very limited sphere of authorities including the authority to "apply for, assume, and carry out the program notifications set forth in the Program Description." Certainly the authorities set forth in the program description are broader than mere "notifications."

Furthermore, according to 40 C.F.R. §145.24(a), the Attorney General's statement "shall include citations to specific statutes, administrative regulations, and...judicial decisions which demonstrate adequate authority." The Attorney General's statement does reference the Program Description, which includes a fairly detailed description of the statutory authorities relevant to energy related class II wells. See Program Description at pp. 2-3. However, a broader statement endorsing these authorities is necessary in the Attorney General's statement. Furthermore, as pointed out in the UIC Section's comments, the Attorney General must reassess the authorities in the statutes and regulations and evaluate their effectiveness to ensure proper administration of the total 1422 UIC Program.

Finally, the Attorney General's statement is not signed as required by 40 C.F.R. § 142.24(a).

III Memorandum of Agreement: DOE - EPA

West Virginia DNR's Memorandum of Agreement (MOA) with EPA executed in 1982 is updated by this document to transfer the duties and obligations agreed to by DNR in the original MOA pertaining to coal, oil and gas and other mineral resource operations in the State to DOE. For the purposes of this transfer the addendum to the MOA is adequate. However, as noted by the UIC Section, the MOA will require revision to reflect transfer of the total 1422 UIC program responsibility. The Program is correct to note the need to designate the Division within DOE which will administer the UIC Program.

The Regional Administrator, Edwin B. Erickson, should be substituted for Stanley L. Laskowski on the signature line.

IV. Memorandum of Understanding: DNR-DOE

ORC endorses the comments of the UIC Section. Presumably, with the transfer of the total 1422 UIC program, a great deal of the exchanging of annual reports and non-compliance reports and other information between DOE and DNR will not be necessary.

V. Governor's Proclamation

The second paragraph references the delegation of the NPDES program, which has nothing to do with the Safe Drinking Water Act. This must be a typographical error.

VI. Statutes

In order for DOE to administer the entire 1422 UIC Pogram, DOE must have the statutory authority to do so. The statute must be amended to reflect DOE's authority to regulate injection activities conducted by industries other than coal, oil and gas, and mineral resource developers.

Currently, there is overlap between the authorities of the DNR cited in Article 20 and those cited in Article 22, which purports to vest exclusive authority over matters dealing with coal, oil and gas, and mineral resources in the DOE. See §22-1-16. Upon approval of the program transfer, will the State repeal certain sections of Article 20 and expand the textual references to these authorities in Article 22?

VII Regulations

1. Incorporation by reference is not prohibited under West Virginia Law, so long as such incorporation does not attempt to include future amendments to federal regulations or statutes. However, ORC recommends that the DOE include the text of the regulations for clarity. These regulations will need to be updated as changes are made to the federal regulations, as such amendment is not automatic at the State level.

2. The regulations included with the submission omit a significant portion of the regulations relative to Class II wells, which is cited at § 38-15-12 and later references. These regulations must be included in a complete submission.

3. Part 148 of the federal regulations is incorporated by reference in the proposed Division of Mines and Minerals regulations at § 13. (These will need to be spelled out as text.)

4. There are several typographical errors in the Division of Mines and Minerals regulations referencing Section 17 instead of Section 18. (See §§ 18.4.3, 18.4.3.2, 18.4.3.3, and 18.4.4.)

5. The reference to Plugging and Abandonment requirements for Class II wells in § 10 of Division of Mines and Minerals regulations is unclear. Where is Series 1, Section 7 of the Division of Oil and Gas, 38 C.S.R. 15 § 7? In this submission, § 38-15-7 is "Corrective Action."

6. Technical experts in the program should confirm whether a blanket authorization to inject into wells at a pressure up to 90% of the breakdown pressure of the injection formation as provided by § 38-15-17.4.7 and ___, 18.4.7 is adequate to protect USDWs.

7. Apparently § 38-15-17.5.1, and ___, § 18.5.1, do not require an applicant for a Class V well to ensure that proper plugging and abandonment procedures will be followed. When new federal regulations addressing Class V wells are promulgated, DOE will need to update its regulations, including this provision.

8. Under "Public Access to Information" at § 38-15-17.19.2 and ___, § 18.19.2, DOE's regulations allow a permittee to claim as confidential information regarding permit applications, permits and effluent data if such information, if made public, would divulge methods or processes entitled to protection as trade secrets. EPA's regulations at 40 C.F.R. § 2.304(f) provide that all data relevant to the existence, absence, or level of contaminants in drinking water is to be made available to the public. (Also 40 C.F.R. § 2.302(e), specific to the Clean Water Act, states that information which is effluent data is not eligible for confidential treatment.) The regulations should be modified to specify that such information may not be held confidential.

9. According to 40 C.F.R. § 145.11, listing state program requirements, the authorities cited at 40 C.F.R. § 124.3(a) requiring an applicant for a permit to submit a complete permit application to the Director before the Director can begin to process the permit must be included in a state's program. There is no such section in DOE's regulations.

We are pleased with the work that the DOE has done to effectuate this program transfer, and we look forward to working with you as the primary enforcement agency for UIC matters in the State. If you have any questions regarding these comments please call me at (215) 597-9878, or contact Elizabeth Lukens of my staff at (215) 597-0387.

Sincerely,

Jed Z. Callen for

Neil Wise, Acting Chief
Water & Management Branch
Office of Regional Counsel

cc: Elizabeth Lukens (3RC30)
Karen Johnson (3WM43)