UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 9
Date Signed: November 9, 1977

MEMORANDUM

SUBJECT: Federal Facilities - Option for State Coverage Under Section 1413 of the Safe Drinking Water Act, As Amended

FROM: Lorraine Chang (signed by L. Chang)
Attorney
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TO: Victor J. Kimm
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Office of Water Supply (WH-550)

QUESTION

At the Seattle Regional Water Supply meeting in September, a question was raised as to the impact of the 1977 legislative amendments to the Safe Drinking Water Act on State primary enforcement responsibility over federal facilities. More specifically, the issue is whether Section 1447(a) of the Act requires a State to cover federal facilities as "public water systems" as a prerequisite for obtaining primary enforcement responsibility for the drinking water program under Section 1413 of the Act, or whether Section 1447(a) merely authorizes State jurisdiction over federal facilities whereupon a State would have the discretion as to whether or not to exercise such jurisdiction.

ANSWER

I have concluded that the applicable provisions of the Safe Drinking Water Act as amended require that a State exercise full jurisdiction over federal facilities as a prerequisite to primacy. The legal basis for this conclusion is set forth below.

DISCUSSION

Section 1447(a) of the SDWA as amended reads as follows:

> Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 1421(d)) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law .... (Emphasis added.)

The purpose of this amendment was to clarify State jurisdiction over federal facilities in light of two Supreme Court decisions* which required "clear and unambiguous" statutory language in order for such jurisdiction to be conferred. It was the opinion of this Office that the statutory language in the original SDWA failed to authorize in clear and unambiguous terms the State's authority to subject federal facilities to requirements more stringent than the national requirements.** The 1977 amendment to Section 1447(a) of the Act, in enabling States to impose any requirement on federal facilities (including those more stringent than the national requirements) and explicitly waiving sovereign immunity of federal agencies, effectively eliminates this bar against full State jurisdiction.

In directing federal facilities to be subject to and to comply with all State requirements "in the same manner, and to the same extent, as any non-governmental entity", the explicit language of the new Section 1447(a) demonstrates Congress' intention that federal facilities be treated as any other public water system covered by the Act. However, this is nothing new since the House Report accompanying the original Act specifically states:

> It is the intent of the Committee that the States with primary enforcement responsibility and EPA will treat Federally-owned or operated public water systems ... as any other public water system ... and will enforce applicable regulations to the same extent and under the same procedures. (House Report at p. 42)

That primary drinking water regulations must apply to all public water systems in the State is evidenced in both the statute and the legislative history. Section 1401(1)(A) clearly defines a "primary drinking water regulation" as one which "applies to public water systems." Section 1411 provides that the regulations "shall apply to each public water system in each State." The language in the House Report is to the same effect (see p. 1, 16-17). Thus, the new amendment merely clarified Congress'

intent to require States primary enforcement responsibility to exercise jurisdiction over federal facilities. Moreover, this is consistent with Congress' overall philosophy that the States take the lead role in "adopting standard reviewing compliance strategies, and where necessary bringing enforcement actions" with respect to public water systems. (See House Report, p. 21.)

In accordance with Section 1413(a)(1) of the Act which requires that State regulations be no less stringent than the national regulations as a condition for primacy, a State must apply its regulations to all "public water systems" within its jurisdiction***, and this must now also include federal facilities under Section 1447(a) of the Act, as amended. This requirement that the scope of coverage of State drinking water programs be as broad as is legally possible is embodied in the federal implementation regulations at 40 CFR.
§142.3(b) which states:

> In order to qualify for primary enforcement responsibility, a State's program for enforcement of primary drinking water regulations must apply to all other public water systems in the State, except for:
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> (1) public water systems on carriers which convey passengers in interstate commerce;
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> (2) public water systems on Indian land with respect to which the State does not have the necessary jurisdiction or its jurisdiction is in question; or
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> (3) public water systems owned or maintained by a Federal agency where the Administrator has waived compliance with national primary drinking water regulations pursuant to Section 1447(b) of the Act.

In addition, under Section 142.10(b)(6)(i), a State seeking primacy must demonstrate that it possesses the:

> Authority to apply State primary drinking water regulations to all public water systems in the State covered by the national primary drinking water regulations, except for interstate carrier conveyances and systems on Indian land with respect to which the State does not have the necessary jurisdiction or its jurisdiction is in question.

Based upon the foregoing analysis of the statutory provisions of the Safe Drinking Water Act and the federal implementation regulations, I therefore conclude that States do not have the discretion of excluding federal facilities from the scope of coverage of their drinking water programs but rather are required to exercise full jurisdiction over all public water systems, including those owned or maintained by federal agencies.

cc: Alan Levin

NOTES:

*Hancock v. Train, 426 U.S. 167 (1976); EPA v. State Water Resources Control Board, 426 U.S. 200 (1976).

** Thus, it was determined that enforcement responsibility in those States with requirements more stringent than the national regulations would be split between the States and EPA, with EPA taking primary enforcement responsibility as against federal facilities and the State taking such responsibility over all other public water systems. See August 17, 1976 memorandum from G. William Frick, General Counsel, to Director of Federal Activities.

*** See Water Supply Guidance Memorandum No. 56 (Memorandum of November 29, 1976 from John Quarles to Regional Administrators) which sets forth as a minimal requirement for primacy the condition that "The State must be able to apply State primary standards to all PWS's that are within the State's jurisdiction, in accordance with EPA regulations."