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# Federal Register

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## Part III

# Environmental Protection Agency

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40 CFR Part 142  
National Primary Drinking Water  
Regulations Implementation Primary  
Enforcement Responsibility; Proposed  
Rule

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 142**

[FRL-5028-8]

RIN 2040-AC19

**National Primary Drinking Water Regulations Implementation Primary Enforcement Responsibility**

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** EPA is giving notice that it is considering revisions to the regulation that sets forth EPA's process for initiating the withdrawal of a State's primary enforcement responsibility (primacy) for the Public Water System Supervision (PWSS) program under the Safe Drinking Water Act. The Agency proposes to revise the language of this regulation to clarify that once the Administrator has "formally determined" that a State is out of compliance with primacy requirements, EPA must initiate the primacy withdrawal process by notifying the State of why such determination was made, allowing the State 30 days to respond, and proceeding toward a final decision, including public notice and opportunity for hearing on final decisions to withdraw primacy. The Agency also proposes other minor revisions to the withdrawal regulation to simplify some of the rule language and clarify the points of EPA's discretion in determining when to initiate primacy withdrawal. The intended effect of this revision is to eliminate confusion about the Agency's primacy withdrawal policy. The Agency solicits public comment on the proposed revised language.

**DATES:** Written comments should be postmarked or delivered by hand by September 22, 1994.

**ADDRESSES:** Send written comments on the proposed rule to the Primacy Rule Comment Clerk; Water Docket MC-4101; Environmental Protection Agency; 401 M Street, SW., Washington, DC 20460. Commenters are requested to submit any references cited in their comments. Commenters also are requested to submit an original and 3 copies of their written comments and enclosures. Commenters who want receipt of their comments acknowledged should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted. The Agency would prefer for commenters to type or print comments in ink. Commenters should use a separate paragraph for each issue

discussed. Supporting documents for this proposed rulemaking are available for review at EPA's Water Docket; 401 M Street, SW. Washington, DC 20460. For access to the Docket materials, call (202) 260-3027 between 9 a.m. and 3:30 p.m. for an appointment.

**FOR FURTHER INFORMATION CONTACT:** The Safe Drinking Water Hotline, toll free (800) 426-4791, or Judy Lebowich; Enforcement and Program Implementation Division; Office of Ground Water and Drinking Water; EPA (4604), 401 M Street, SW., Washington, DC 20460; telephone (202) 260-7595.

**SUPPLEMENTARY INFORMATION:****A. Background**

40 CFR part 142, subpart B, sets out requirements for States to obtain primacy for the Public Water System Supervision program, as authorized by section 1413 of the Safe Drinking Water Act (SDWA). EPA first promulgated these regulations on January 20, 1976. Prompted by subsequent changes in the operation and scope of the PWSS program, largely due to the 1986 Amendments to the SDWA, on December 20, 1989, EPA published amendments to the primacy regulations. These regulatory amendments established explicit procedures that States need to follow to revise their approved primacy programs to adopt the requirements of new or revised EPA drinking water regulations. The rule allowed primacy States to request an extension of up to two years after the effective date of new EPA drinking water regulations to adopt the regulations as State law. The National Wildlife Federation (NWF), in a petition for review filed in the U.S. Court of Appeals for the District of Columbia Circuit (*National Wildlife Federation v. Reilly*, No. 90-1072), contended that this extension period, during which primacy responsibility is split between the federal and State governments, is prohibited by the SDWA. NWF argued that a State's primacy for the entire drinking water program necessarily ceases whenever a State fails to adopt a new EPA regulation by its effective date. On February 15, 1991, however, the Court upheld the extensions regulation and found that EPA's approach of allowing extensions is consistent with Congressional intent that the Act primarily be a State and locally run program. *National Wildlife Federation v. EPA*, 925 F.2d 470 (D.C. Cir. 1991). The 1989 rulemaking also modified the language of the regulation that concerns EPA's initiation of procedures that could lead to withdrawal of primacy status for States that EPA determines are

not continuing to meet the requirements for primacy (see § 142.17(a)(2)). The language of this provision is the subject of today's action.

As promulgated in December 1989, this provision reads as follows:

When, on the basis of the Administrator's review or other available information, the Administrator determines that a State no longer meets the requirements set forth in § 142.10, and the State has failed to request or has been denied an extension under § 142.12(b)(2) of the deadlines for meeting those requirements, or has failed to take corrective actions required by the Administrator, the Administrator may initiate proceedings to withdraw primacy approval. The Administrator shall notify the State in writing of EPA's intention to initiate withdrawal proceedings and shall summarize in the notice the information available that indicates that the State no longer meets such requirements.

In the same lawsuit, NWF challenged the primacy withdrawal language, both procedurally and substantively. The procedural challenge alleged that EPA provided insufficient opportunity for the public to comment on the revision to § 142.17(a)(2), in violation of requirements of the Administrative Procedure Act (APA). Substantively, NWF alleged that EPA was without statutory authority to promulgate a revision making explicit that it is within EPA's discretion whether to initiate proceedings to withdraw a State's PWSS primacy program.

In response to NWF's procedural complaint, the Agency issued a Notice of Proposed Rulemaking to allow additional public comment and reconsideration by EPA of the language of § 142.17(a)(2) (55 FR 49398, November 28, 1990). On June 3, 1991, the Agency published a notice of final rulemaking retaining in § 142.17(a)(2) the language on initiating primacy withdrawals that was previously adopted in the December 1989 rulemaking (56 FR 25046, June 3, 1991).

The U.S. Court of Appeals for the D.C. Circuit issued an opinion on December 11, 1992, in response to NWF's substantive challenge to § 142.17(a)(2). *National Wildlife Federation v. EPA*, 980 F.2d 765. The Court found that EPA has broad discretion under the SDWA on when to "determine" that a State is out of compliance with primacy requirements. The Court ruled, however, that once the Administrator has made this determination, the SDWA requires EPA to initiate the primacy withdrawal process by notifying the State of why such a determination was made, allowing the State 30 days to respond, and proceeding toward a final decision, including public notice and opportunity for hearing on final

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decisions to withdraw primacy. The Court found EPA's primacy withdrawal regulation to be invalid because it does not require the Agency to take these steps—instead, the regulation says that after “determining” that the State is out of compliance with primacy, the Administrator “may” initiate withdrawal proceedings. The Court therefore remanded the regulation to EPA for modification.

The Court emphasized that its review focused only on what EPA “may do following a formal determination of noncompliance and does not require delving into the Administrator's complex decision-making process regarding whether to make such a determination in the first instance.” *Id.* at 774. The Court acknowledged that the Agency is “free to decide that technical, temporary or otherwise unimportant violations of the primacy requirements do not warrant a ‘determination’ of noncompliance, or that the better approach for meeting the Act's goals is to negotiate with the offending state or to permit more time for the state to come back into compliance.” Thus, EPA may “negotiate with the state as long as necessary before determining that the primacy requirements are no longer met.” *Id.* at 771.

The Court also noted that “even where a ‘determination’ of noncompliance is made, the statute does not require the Agency to immediately withdraw primacy. Rather, the EPA is directed to provide notice and a public hearing before its determination of nonconformity with the primacy standards becomes effective. As a consequence of evidence adduced at the hearing, the EPA is entitled to conclude that its original decision was in error or that the State has remedied any deficiency and to decide against withdrawal.” *Id.* at 771 (citations omitted).

#### **B. EPA Response to Court Remand and Other Conforming Changes**

EPA proposes today to modify the language of § 142.17(a)(2) to respond to the Court remand by substituting the term “shall” for “may.” Specifically, the existing language of § 142.17(a)(2) states that the Administrator “may” initiate primacy withdrawal proceedings once he or she determines that a State's primacy program fails to continue to meet federal requirements for primacy. Under the proposed change, the Administrator would be required to initiate primacy withdrawal proceedings once this formal determination is made. Nevertheless, EPA emphasizes that under this proposed revision, the Agency still

retains full discretion to decide whether and when to reach this formal determination. For example, as explained further below, there may be no reason to formally determine that a State program is out of compliance if the State has missed a deadline for adopting new drinking water regulations but has been granted or is seeking an extension of that deadline under § 142.12. Similarly, there may be no reason to formally determine that a State program is out of compliance if the State is otherwise carrying out any corrective actions that EPA may have ordered that would eliminate the deficiency in the State program.

With the change to § 142.17(a)(2) proposed above, the primacy withdrawal process would consist of the following sequential steps.

1. EPA's receipt of information, either through its annual review of the State program (§ 142.17(a)(1)) or otherwise, that the State program may no longer be in compliance with the requirements for primacy.

2. EPA's formal determination, made at its discretion, that the State no longer complies with primacy requirements and notification to the State that primacy withdrawal is being initiated (§ 142.17(a)(2)).

3. The State's response to EPA's notice (§ 142.17(a)(3)).

4. Final EPA determination that the State is in or out of compliance and notification to the State, including a notice to the public and opportunity for a hearing when the EPA's final determination is that the States does not meet primacy requirements. (§ 142.17(a)(4)).

These provisions provide EPA broad discretion on when to “determine” that a State is out of compliance with primacy requirements. This discretion allows EPA to work with a State that is acting in good faith to rectify the deficiencies in its program without having the Agency spend needless time and resources on withdrawal proceedings when it appears that the State will soon resolve the problems with its program. The legal basis and policy considerations underlying this policy are further explained in the June 1991 rulemaking.

For reasons discussed below, EPA also is proposing several minor revisions to the language of §§ 142.17(a)(1), (a)(2), and (a)(4). The purpose of these revisions is to clarify the points of EPA's discretion in determining when to initiate primacy withdrawal and to simplify some of the rule language.

When 40 CFR part 142, subpart B, was amended in 1989, § 142.10 set forth the

requirements a State must meet to obtain/retain primacy. Some National Primary Drinking Water Regulations published since that time have added additional primacy requirements in other provisions, e.g., the Special Primacy Requirements listed in § 142.16. EPA therefore proposes to replace the references to “§ 142.10” contained in §§ 142.17(a)(1), (a)(2) and (a)(4) with references to “40 CFR part 142, subpart B.”

The language of § 142.17(a)(2) contains the clause, “\* \* \*”, and the State has failed to request or has been denied an extension under § 142.12(b)(2) of the deadlines for meeting those requirements, or has failed to take other corrective actions required by the Administrator, \* \* \*.” The intent of this clause is simply to indicate that, even though the State is out of compliance with primacy requirements, there are two cases when there generally is no reason to initiate primacy withdrawal. First, there generally is no reason to initiate primacy withdrawal when a State has missed the deadline for revising its drinking water regulations to incorporate new EPA regulations but has applied for, and has been granted, or is awaiting EPA's decision on, an extension of time in accordance with § 142.12(b)(2). Second, there generally is no reason to initiate primacy withdrawal when the State is out of compliance for any reason but is taking any corrective actions that may have been ordered by EPA to bring the program back into compliance.

The existing regulatory language was not addressed by the Court in its decisions, however, there could be some confusion over its meaning, as evidenced in NWF's briefs to the D.C. Circuit. NWF read this language as creating two “new” (and improper) conditions that must be met before primacy withdrawal may be initiated. For example, NWF stated, this language could be read to mean that EPA may not even consider sending a letter to the State reflecting a determination that the State is not meeting primacy requirements (and thereby initiating primacy withdrawal) unless EPA has first required the State to take certain corrective actions. NWF's interpretation is not what the language is intended to mean. EPA did not intend to create new conditions for primacy withdrawal with this language. EPA realizes there are cases in which neither extensions of time to adopt new regulations nor corrective actions will be relevant, in which case the existing regulatory language is not intended to have any effect.

EPA proposes to clarify its intent by revising the language to read as follows: "When, \* \* \*, the Administrator determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart B, the Administrator shall initiate proceedings to withdraw primacy approval. Among the factors the Administrator intends to consider as relevant to this determination are the following, where appropriate: Whether the State has requested and has been granted, or is awaiting EPA's decision on, an extension under § 142.12(b)(2) of the deadlines for meeting those requirements; and whether the State is taking corrective actions that may have been required by the Administrator."

In developing language to clarify the Administrator's discretion, the Agency considered two other alternatives. The Agency considered replacing the clause with the more general language: "\* \* \* and that the State is not taking steps acceptable to EPA toward meeting the requirements, \* \* \*." EPA believes, however, that the language of this option is overly vague and unnecessary given EPA's broad discretion to determine whether and when a State is out of compliance. The Agency also considered just deleting the clause. EPA believes, however, that States might inappropriately interpret this approach as a change in EPA's policy to attempt to negotiate or order corrective actions before it formally determines that a State program is out of compliance and initiates primacy withdrawal.

EPA also proposes to replace in § 142.17(a)(2) the term "of EPA's intention to initiate" with "that EPA is initiating" to be more direct about the action being taken. The Agency believes the phrase "intention to initiate" may be confusing since it does not clearly state whether EPA is or is not initiating withdrawal as of that date. The proposed revision does not affect the primacy withdrawal process itself, which includes an opportunity for the State to respond to the initial notification that primacy withdrawal is being initiated prior to the Agency making a "final determination" on State primacy.

Finally, EPA proposes to make a minor change to the language of § 142.17(a)(4). As promulgated in December 1989, this provision reads as follows:

After reviewing the submission of the State, if any, made pursuant to paragraph (a)(3) of this section the Administrator shall either determine that the State no longer meets the requirements of § 142.10 or that the State continues to meet those requirements, and shall notify the State of his or her determination. Any determination that the

State no longer meets the requirements of § 142.10 shall not become effective except as provided in § 142.13.

EPA proposes to substitute the phrase "make a final determination either" for the phrase "either determine" and to substitute the phrase "Any final determination" for the phrase "Any determination" in § 142.17(a)(4).

The proposed change clarifies that the Administrator's "final determination" in § 142.17(a)(4) on whether the State is continuing to meet the requirements for primacy is distinct from the initial "formal determination" made under § 142.17(a)(2) and is preceded by an opportunity for public comment. Although the term "determination" is used in two sections of the current regulation, the different events that they refer to are clear in their respective contexts and this issue has not been a point of legal contention. Nevertheless, the Agency believes the minor adjustment proposed today would prevent misinterpretations in the future.

#### C. Request for Comments

The Agency invites all interested persons to submit comments within 45 days on all aspects of this proposal to revise the language of §§ 142.17(a)(2) and 142.17(a)(4). After carefully considering all public comments, EPA will promulgate final language for these provisions. If EPA decides to change the language today proposed, the Agency may also make minor conforming changes to other parts of Part 142 at the same time.

#### D. Executive Order 12866

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(a) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(b) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(c) Materially alter the budgetary impact on entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(d) Raise novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

#### E. Regulatory Flexibility Act

Pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), EPA certifies that this rule will not have a significant economic impact on a substantial number of small entities because it merely revises existing procedural requirements for initiating withdrawal of State primacy by clarifying the extent of EPA discretion in initiating the process; States are not considered small entities under this rulemaking for RFA purposes.

#### F. Paperwork Reduction Act

The proposed regulations contain no new or additional information collection activities and, therefore, no information collection request will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

#### List of Subjects in 40 CFR Part 142

Environmental protection, Administrative practices and procedures, Indians, Intergovernmental relations, Reporting and recordkeeping requirements, Water supply.

Dated: July 27, 1994.

Carol M. Browner,  
Administrator.

For the reasons set forth in the preamble, part 142, chapter 1, title 40 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

1. The authority citation for part 142 continues to read as follows:

**Authority:** 42 U.S.C. 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-4 and 300j-9.

2. Section 142.17 is amended by revising paragraphs (a)(1), (a)(2) and (a)(4) to read as follows:

#### § 142.17 Review of State programs and procedures for withdrawal of approved primacy programs.

(a)(1) At least annually, the Administrator shall review, with respect to each State determined to have primary enforcement responsibility, the compliance of the State with the requirements set forth in 40 CFR part 142, subpart B, and the approved State

primacy program. At the time of this review, the State shall notify the Administrator of any State-initiated program changes (i.e., changes other than those to adopt new or revised EPA regulations), and of any transfer of all or part of its program from the approved State agency to any other State agency:

(2) When, on the basis of the Administrator's review or other available information, the Administrator determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart B, the Administrator shall initiate proceedings to withdraw primacy approval. Among the factors the Administrator intends to consider as

relevant to this determination are the following, where appropriate: whether the State has requested and has been granted, or is awaiting EPA's decision on, an extension under § 142.12(b)(2) of the deadlines for meeting those requirements; and whether the State is taking corrective actions that may have been required by the Administrator. The Administrator shall notify the State in writing that EPA is initiating primacy withdrawal proceedings and shall summarize in the notice the information available that indicates that the State no longer meets such requirements.

\* \* \* \* \*

(4) After reviewing the submission of the State, if any, made pursuant to paragraph (a)(3) of this section, the Administrator shall make a final determination either that the State no longer meets the requirements of 40 CFR part 142, subpart B, or that the State continues to meet those requirements, and shall notify the State of his or her determination. Any determination that the State no longer meets the requirements of 40 CFR part 142, subpart B, shall not become effective except as provided in § 142.13.

\* \* \* \* \*

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