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Guidance on Enforcement of the Requirements of the Surface Water Treatment Rule

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

JUN 26 1992

MEMORANDUM

SUBJECT: Guidance on Enforcement of the Requirements of the
Surface Water Treatment Rule

FROM: James R. Elder, *[Signature]* Director
Office of Ground Water and Drinking Water

Frederick F. Stiehl *[Signature]*
Enforcement Counsel for Water

TO: Water Management Division Directors
Regions I - X

Regional Counsels
Regions I - X

The purpose of this memorandum is to provide guidance on enforcement of the Surface Water Treatment (SWT) rule and to resolve specific issues which have arisen over the past several months. This guidance covers only the portions of the SWT rule dealing with unfiltered systems remaining unfiltered and those unfiltered systems which must filter. Guidance on enforcement of the provisions of the rule dealing with filtered systems will be issued at a later date.

The SWT rule is one of the Office of Ground Water and Drinking Water's highest priorities for enforcement. The rule will protect a large portion of the U.S. population from microbiological contaminants as it covers systems in several major metropolitan areas as well as a great number of smaller systems. Given the importance of this rule to protecting public health, we are taking an aggressive approach to implementing and enforcing it and expect Regions and States to do the same. Filtration decisions for all surface systems should have been made by December 29, 1991. Systems that are required to filter must have filtration in place by the June 29, 1993 deadline or they will become significant noncompliers (SNCs) on that date.

Once a system becomes a SNC, our timely and appropriate guidance states that it must be addressed by an appropriate enforcement action within six months. In order to avoid having a large number of SNCs in June 1993, which would be very difficult to address by December 1993, our strategy is to begin and, where possible, complete actions on as many systems as possible prior to June 1993.

The SWT rule is different from other drinking water regulations in two respects. First, it requires installation of a treatment technique and operation of that treatment to meet specified performance criteria. Secondly, Section 1412(b)(7)(C) of the SDWA imposed a deadline for treatment installation. These factors substantially affect the manner in which we are able to enforce this regulation.

The statutory deadline requiring filtration by June 29, 1993, limits the Agency's flexibility in choosing an enforcement mechanism. Court decisions, as well as past Agency practice, state that judicial action is needed to extend a statutory deadline. The rationale for this considers the separation of powers -- the legislative branch imposed the deadline in the passage of the statute; the executive branch is responsible for implementing and enforcing the laws. It cannot, by itself, (i.e., in an administrative action) change a deadline set by the legislature; however, the courts can extend statutory deadlines within their equitable powers. Therefore, an enforcement action, taken before the statutory deadline has passed, which acts to extend that deadline, must be judicial. Once that deadline has passed, however, an executive agency is no longer acting to extend a deadline; rather, it is dealing with systems that have violated the deadline. In these instances, the agency may pursue either a judicial or an administrative action.

This case law and its interpretation pose some significant practical difficulties for enforcement. Our guidance on enforcement attempts to deal with these to the extent we have the flexibility.

The major points of our guidance are as follows:

- State or federal enforcement actions are appropriate; in fact, we encourage the Regions to work cooperatively with their States to divide the workload associated with this rule.
- Enforcement actions taken before June 29, 1993, should be brought judicially, because these actions will have the effect of extending the statutory deadline for the installation of filtration.

- Given resource constraints and the number of systems which should be addressed, Regions and States should consider the possibility of combining actions against several small systems into one judicial action.

- States and Regions should set priorities for judicial action based on system size, risk to public health, and available resources. All large systems (those serving 10,000 or more persons) should be incorporated into State or federal judicial actions.

- We recognize that, from a practical standpoint, neither EPA nor the States can address all systems with judicial actions. Moreover, we recognize the importance of aggressively working to get systems on schedules to install filtration. Therefore, we anticipate that some of the smaller systems (those serving less than 10,000 persons) may be addressed by administrative actions. However, we encourage States and Regions to work to file judicial actions on as many of the smaller systems as resources will permit.

Attachment 1 contains our guidance on enforcement of the SWT rule. We have discussed this guidance with your staff at national meetings, have received and considered numerous comments and have incorporated these where possible into the document. Attachment 2 is a summary of the comments we have received and our responses to those comments. We thank all of you for your efforts in assisting us in finalizing this guidance document.

In order to insure full and consistent enforcement and implementation of the SWT rule, we will be working closely with you and your staff over the next several months. We would appreciate being informed of actions being taken against large systems before they are final. Moreover, we will be analyzing the status of filtration determinations and needed enforcement actions for systems serving less than 10,000 persons this summer as all the data on these is due to FRDS by June 1, 1992.

Should you have any questions on this document please do not hesitate to call either one of us or have your staffs contact Betsy Devlin, PWSS Compliance and Enforcement Section (FTS 260-5550), Clive Davies, Regional Coordination Section (FTS 260-1421) or Mimi Guernica, Office of Enforcement (FTS 260-8320).

Attachment

cc: Drinking Water/Groundwater Protection Branch Chiefs
Office of Regional Counsel Water Branch Chiefs

ENFORCEMENT OF THE REQUIREMENTS OF THE SURFACE WATER TREATMENT RULE

EXECUTIVE SUMMARY

Implementation and enforcement of the SWT rule is one of the highest priorities of the Office of Ground Water and Drinking Water. Our goal is to have all surface systems:

- operating in accord with the requirements for unfiltered systems after meeting the avoidance criteria;
- have filtration installed and be operating in accord with the requirements for filtered systems; or
- be subject to a schedule for complying with the rule.

The rule itself and the deadline imposed by the SDWA limit somewhat our flexibility to choose an enforcement mechanism; however, EPA and the States will act aggressively to insure full implementation and enforcement of this rule.

Filtration Determinations

According to SDWA Section 1412(b)(7)(C), States were required to make filtration determinations on all surface water systems by December 29, 1991. In States which failed to make determinations for surface water systems, EPA will make those decisions. It is hoped that such decisions will, in fact, be agreed upon by both EPA and the State. In the case where EPA and the State are making the decision jointly, a letter, signed by both EPA and the State, is the appropriate means of notifying the system of the determination that it must filter or that it may remain unfiltered. If EPA acts on its own because the State has not made a determination and because the State has elected not to participate in the decision making process, a letter signed by EPA is the appropriate means of notifying the system of the filtration determination. Should EPA have information to suggest that the State has not applied the avoidance criteria properly, EPA will use the procedures specified in 40 CFR 142.80 and 142.81 to review and/or rescind State determination(s).

Systems that fail to submit information to the State to demonstrate that they meet the criteria to avoid filtration should be required to filter.

Violations

(1) Unfiltered Systems Allowed to Remain Unfiltered.

If a system is monitoring so that it may remain unfiltered, any failure to meet the avoidance criteria in 40 CFR 141.71 or the disinfection requirements for unfiltered systems in 40 CFR 141.72(a) on or after December 30, 1991 constitutes a violation of the SWT rule. (These violations may cause the system to be required to install filtration. See the SWT Implementation Manual for a detailed description of the violations that will trigger filtration.)

(2) Unfiltered Systems Required to Filter.

If a system is required to filter, a failure to meet the June 29, 1993 deadline (or the deadline 18 months after the State determines that filtration is required) for installing filtration or any failure to meet interim disinfection requirements specified by the State constitutes a violation of the SWT rule and causes a system to become a significant noncomplier (SNC). Once filtration is in place, these systems must meet the disinfection requirements for filtered systems in 40 CFR 141.72(b).

(3) Filtered Systems.

For systems with filtration already in place, a failure to meet the monitoring or performance requirements of the rule, including disinfection requirements for filtered systems, after June 29, 1993 is a violation of the SWT rule.

Responses to Violations

As with any violation, EPA and the States have several types of response actions at their disposal -- "informal" enforcement actions, formal enforcement actions, or exemptions under Section 1416 of the SDWA. Exemptions under Section 1416 of the SDWA may be granted for any of the requirements of the SWT rule, except the requirement for a continuous disinfectant residual of 0.2 mg/l at the entry point to the distribution system. This requirement is found at 40 CFR 141.72(a)(3) for unfiltered systems and 40 CFR 141.72(b)(2) for filtered systems. Variances are not available under the SWT rule as Section 1412(b)(7)(C)(ii) of the SDWA states that "in lieu of the provisions of section 1415 the administrator shall specify procedures by which the State determines which public water systems within its jurisdiction shall adopt filtration under the criteria of clause (i)."

The statutory deadline requiring filtration by June 29, 1993, limits the Agency's flexibility in choosing an enforcement mechanism. Court decisions, as well as past Agency practice,

state that judicial actions are needed to extend a statutory deadline. Enforcement actions taken before June 29, 1993, should be brought judicially because these actions will have the effect of extending the statutory deadline. After June 29, 1993, the States and EPA may pursue judicial or administrative actions. However, systems serving more than 10,000 persons should be addressed by judicial actions and we strongly encourage States and Regions to pursue judicial actions on a number of the smaller systems.

From a practical perspective we recognize that neither EPA nor the States can address all systems with judicial actions. Moreover, we recognize the importance of aggressively working to place systems on schedules to install filtration. Therefore, we anticipate that some of the smaller systems (those serving less than 10,000 persons) may be addressed by administrative actions. However, we encourage States and Regions to work to file judicial actions on as many of the smaller systems as resources will permit. We encourage the States and Regions to consider consolidating actions against several small systems into one judicial action.

In addition, due to resource constraints and a lack of administrative enforcement mechanisms in some States, we will permit the use of bilateral compliance agreements (BCAs) in very limited circumstances. First, they may be used only for systems serving less than 10,000 persons. Secondly, the BCAs should be used only in those States which lack administrative order authority. Finally, they must be signed by both the State and the system, contain a schedule with interim milestones, and must be used only with systems with a history of being in compliance with the SDWA and acting in good faith. Violations of the schedule in the BCA will be dealt with by a judicial enforcement action. Please note that although this guidance allows BCAs as a means of addressing the smaller systems, they are not formal enforcement actions and they will not act as a shield to protect systems from citizen suits under Section 1448 of the SDWA. This fact may affect a Region's or a State's decision on how to proceed.

The following guidance deals more specifically with the requirement for a State determination on which systems are required to filter and provides detail on the responses to the violations enumerated on pages 1 and 2 in this summary.

**ENFORCEMENT OF THE REQUIREMENTS OF THE
SURFACE WATER TREATMENT RULE**

Introduction.

The purpose of this document is to provide guidance on several specific issues relating to the enforcement of the Surface Water Treatment (SWT) Rule (40 CFR Subpart H). This guidance deals with the provisions of the SWT rule relating to unfiltered systems. Enforcement of the requirements relating to filtered systems will be dealt with in a later document.

The specific issues involve the action a State or EPA is to take to address the following:

- A. Requirement for a State filtration determination by December 29, 1991.
- B. PWSs monitoring to remain unfiltered, but not meeting the criteria for avoiding filtration.
- C. PWSs required to filter but cannot or will not meet the June 29, 1993 deadline for the installation of filtration.
- D. Systems which have not submitted to the State all of the required information to demonstrate that they meet (or will meet) the avoidance criteria in 40 CFR 141.71.

(A) Requirement for a State Filtration Determination by December 29, 1991.

According to SDWA Section 1412(b)(7)(C)(ii), EPA was required to specify procedures by which the State will determine which systems within its jurisdiction would be required to filter. EPA did this in the final Surface Water Treatment Rule which was promulgated on June 29, 1989.

Under SDWA Section 1412(b)(7)(C)(iii), States with primacy were to adopt regulations to implement EPA's regulations within 18 months of promulgation (i.e., by December 29, 1990). Within 12 months after that (i.e., by December 29, 1991), the State was to make determinations regarding filtration for all public water systems within its jurisdiction.

If a State has not made determinations for all PWSs within its jurisdiction, EPA will make those determinations. It is hoped that such a decision can be made jointly by EPA and the State. In the case where EPA and the State are making the decision jointly, a letter, signed by both EPA and the State is the appropriate means of notifying the system of the determination that it must filter or that it may remain unfiltered. If EPA acts on its own because the State has not made a determination and because the State has elected not to participate in the decision making process, a letter signed by EPA is the appropriate means of notifying the system of the filtration determination.

In addition, should EPA have information to suggest that the State has applied the avoidance criteria incorrectly or abused its discretion in making filtration determinations, the Agency will employ the procedures specified in 40 CFR 142.80 and 142.81 to review and/or rescind State determinations.

(B) PWSs Monitoring to Remain Unfiltered, But Not Meeting the Criteria for Avoiding Filtration.

(1) Background/Discussion of Statutory/Regulatory Requirements.

According to 40 CFR 141.71, a PWS must meet all the source water quality conditions [141.71(a)] and all the site specific conditions [141.71(b)] beginning on December 30, 1991, unless the State has determined in writing that filtration is required. As noted above, a State must have determined by December 29, 1991, which of its surface water systems must filter and which meet the criteria for avoiding filtration on a continuing basis.

One of the underlying premises of the SWT rule is if a system cannot meet the avoidance criteria by December 1991, then that system should be required to filter. The issue which has arisen, however, is can a State (or a Region) allow a system which does not meet the avoidance criteria (but can demonstrate through engineering studies or other means discussed in (b) on the following pages that it will meet those criteria) additional time to meet the criteria? If so, what method(s) is a State or a Region to use to deal with such a system?

(2) Discussion of EPA Guidance.

A PWS that is monitoring to remain unfiltered and does not meet the avoidance criteria or the disinfection requirements for unfiltered systems on or after December 30, 1991, is in violation

of the SWT rule. The State or EPA should take an action to bring the system into compliance with the rule. There are two appropriate actions:

(a) a determination that the system must install filtration;

or

(b) an action which orders the system to correct the deficiency in its operations and therefore meet the avoidance criteria or the disinfection requirements.

(a) A Determination that the System Must Install Filtration.

Should the State determine that the system does not meet the avoidance criteria and from all the information available to the State, it is unlikely that the system will be able to do so (or will be able to do so in a reasonable time [generally 6 months to 1 year]), the State is to require the system to install filtration. For any determination made on or prior to December 29, 1991, the deadline for the installation of filtration is June 29, 1993. For any determination made after that date, the deadline for the installation of filtration is 18 months from the date the determination is made. (See SDWA Section 1412(b)(7)(C)(ii) and 40 CFR 141.71.)

Systems ordered to filter should be placed on schedules pursuant to consent decrees, administrative orders, or bilateral compliance agreements (only for systems serving less than 10,000 persons) as explained in Section C of this guidance.

The burden is on the system to demonstrate to the State that it meets (or will meet) the avoidance criteria. If the system has not made such demonstration, the State must order filtration.

(b) Orders to Comply with the Avoidance Criteria.

If the system has submitted information to the State that enables the State to determine that it is likely the system will be able to meet the avoidance criteria and/or disinfection requirements through modifications in its system in a reasonable time, the State may issue an order (or file a civil action) requiring the system to complete the modifications to its system as expeditiously as possible. The State should not allow the system any more than six months to one year for completion of these modifications.

If the State elects to use this option, the State would:

- (1) report that the system is in violation of the SWT (as soon as the violation occurs);
- (2) issue an administrative order or file a civil action to place the system on an enforceable schedule.

This option essentially grants the system additional time to meet the avoidance criteria and should therefore be used only in very limited cases; for example, where the system has submitted the results of engineering studies which show that through modifications to a clear well, the contact time (CT) multiplied by the disinfectant residual concentration will be increased so that the system will meet the requirements in 40 CFR 141.71. This option should not be used in cases where the system has not submitted information that demonstrates that through specific modifications it can meet the avoidance criteria.

Once a system incurs a violation of the SWT regulation, EPA can issue an administrative order or file a civil action to require compliance with the rule. It is expected that systems could experience such violations in approximately February or March of 1992.

A State or federal administrative order (or consent decree) granted under this option should generally contain at least the following elements:

- Specific steps (interim milestones) the system must take and deadlines for their completion.
- Stipulated penalties in State and federal consent decrees and in state orders (if allowed under state law) for violations of those milestones.
- A requirement that the system continue to comply with the monitoring/reporting requirements for unfiltered systems and any other monitoring/reporting that the State determines is necessary to insure protection of public health;
- A requirement that the system continue to meet the disinfection requirements in 40 CFR 141.72 or the interim disinfection requirements set by the State.
- A requirement to perform public notification as required by 40 CFR 141.32.

- A significant penalty for violations of the final date for compliance. Federal orders would contain the standard language on the consequences of violating a federal administrative order. The order should also state clearly that failure to comply may result in a determination that the system will be required to install filtration due to inability to meet the avoidance criteria.

We recognize that site-specific considerations will determine the precise terms of any order. This guidance is not meant to eliminate that flexibility; rather it emphasizes the need for standardized, aggressive action.

(C) PWSs Required to Filter but Cannot or Will Not Meet the June 29, 1993 Deadline for the Installation of Filtration.

(1) Background/Discussion of Regulatory Requirements.

According to 40 CFR 141.73, a public water system that does not meet all of the criteria in 141.71(a) and (b) for avoiding filtration must provide treatment consisting of both disinfection as specified in 141.71(b) and filtration by June 29, 1993 or within 18 months of the failure to meet any one of the criteria for avoiding filtration. We are aware that many systems will not be able to meet these deadlines due to construction schedules, lead time to obtain funding, etc. The issue that arises is what is the appropriate response by the primary agency.

(2) EPA Guidance.

(a) SNC Definition.

As we have stated in earlier documents, a system that is required to install filtration and disinfection by June 29, 1993 and does not bring filtration on line by that date will become a significant noncomplier (SNC) immediately. This reflects our belief in the importance of fully implementing this regulation. As you are aware, once a system becomes a SNC, the States or EPA have six months to take an appropriate enforcement action against the system. So that we will not have a large number of systems to deal with in June 1993, we have strongly urged States (and EPA where there is jurisdiction for a federal enforcement action) to begin (and complete where possible) actions on as many of these systems as possible before the June 29, 1993, deadline. Any system subject to an action as described below by June 29, 1993 will be considered an "addressed SNC".

(b) Appropriate Actions.

(1) Background.

The SWT rule is different in two important respects from other drinking water regulations which require compliance with maximum contaminant levels (MCLs). First, it requires installation of a treatment technique and operation of that treatment to meet specified performance criteria. Secondly, Section 1412(b)(7)(C) of the SDWA imposed a deadline for treatment installation. These factors substantially affect the manner in which we are able to enforce this regulation.

The statutory deadline requiring the installation of filtration by June 29, 1993, limits the Agency's flexibility in choosing an enforcement mechanism. Court decisions, as well as past Agency practice, state that judicial action is needed to extend a statutory deadline. The rationale for this considers the separation of powers -- the legislative branch imposed the deadline in the passage of the statute; the executive branch is responsible for implementing and enforcing the laws. It cannot, by itself (i.e., in an administrative action) change a deadline set by the legislature; however, the courts can extend statutory deadlines within their equitable powers. Therefore, an enforcement action taken before the statutory deadline has passed, which acts to extend that deadline, must be judicial. Once that deadline has passed, however, an executive agency is no longer acting to extend a deadline; rather, it is dealing with systems that have violated the deadline. In these instances, the agency may pursue either a judicial or an administrative action.

This case law and its interpretation pose some significant practical difficulties for enforcement. This guidance attempts to deal with these to the extent we have the flexibility.

(2) Enforcement Actions.

One of the fundamental principles of this guidance is that State or federal enforcement actions are appropriate for enforcing the requirements of the SWT rule. Regions and States should work cooperatively to divide the workload associated with this rule.

Enforcement actions taken before June 29, 1993, should be brought judicially because such enforcement actions will have the effect of extending the statutory deadline for compliance. Administrative actions may be appropriate for enforcing other requirements in the regulation, for example, disinfection requirements or monitoring and reporting requirements.

After June 29, 1993, both EPA and the States have the flexibility to pursue either judicial or administrative actions for systems which do not have filtration in place. While judicial actions are resource intensive, they have many benefits, such as the imposition of a schedule enforceable by a court and stipulated penalties for violations of the schedule. In addition, the presence of a consent decree can act to insure that needed financing or rate increases are approved by local authorities.

In determining whether to pursue a judicial or administrative action, EPA Regions and States should carefully consider the advantages of judicial actions as well as the following factors: size of the system, the length of the compliance schedule, "good faith efforts" of the system to comply, the appropriateness of a penalty, the financial condition of the system (for example, the need by the system to raise rates or sell bonds), and the strength of State administrative authorities (for example, the ability of a State to assess stipulated penalties for violations of interim milestones in an administrative order).

Due to resource constraints and a lack of administrative enforcement mechanisms in some States, States will be permitted to use bilateral compliance agreements (BCAs) in very limited circumstances. First, a BCA may only be used to address systems serving less than 10,000 persons. Secondly, a BCA should only be used by those States that lack administrative order authority or an effective judicial process. Finally, a BCA must conform to the requirements stated in EPA's timely and appropriate guidance; that is it must:

- Be signed by both parties;
- Contain a compliance schedule with interim milestones;
- Not be used with a recalcitrant or repeat violator.

Moreover, the BCA should specify any monitoring and interim disinfection requirements. Failure to adhere to the schedule or other terms of the BCA should result in a prompt formal enforcement action by the State or EPA.

Please note that although this guidance allows BCAs as a means of addressing the smaller systems, they are not enforceable and are not formal enforcement actions. Therefore, they will not act as a shield to protect systems from citizen suits under Section 1448 of the SDWA.

(3) Priorities.

Due to the number of systems that are affected by the SWT rule and the limited State and federal enforcement resources, States and Regions should set priorities for enforcement action based on system size and risk to public health. This guidance recognizes that States and Regions will not be able to address all systems with judicial actions. However, it is important to aggressively work to place systems on schedules to install filtration. Therefore, EPA anticipates that administrative actions against some of the smaller systems (those serving less than 10,000 persons) will not be completed until after June 1993. However, Regions and States should use the time before June 1993 to negotiate these schedules so that issuing the final administrative action can take place as soon as possible after the expiration of the statutory deadline. However, as noted above, States and Regions are encouraged to file judicial actions on as many systems as resources will permit. In addition, States and Regions are encouraged to combine actions against a number of small systems into one judicial action.

(4) Content of Consent Decrees or Administrative Orders Requiring the Installation of Filtration.

Having specified the types of enforcement action that can be taken, it is now appropriate to consider what items should be in a consent decree settling a civil judicial action or in an administrative order.

An order or consent decree requiring the installation of filtration should generally contain the following:

- A schedule for the installation of filtration/disinfection with interim milestones;
- Interim disinfection requirements;
- Monitoring/reporting requirements, including the requirement for periodic progress reports to insure that the system is complying with the schedule for installation of filtration and with interim disinfection requirements;
- Stipulated penalties in State and federal consent decrees and in State administrative orders (if allowed under State law) for violations of the milestones, the interim disinfection requirements, and the monitoring requirements.

- An "up-front" penalty in State and federal consent decrees and in State administrative orders (if allowed under State law) for violations of the regulations. The penalty should be determined in a manner consistent with Agency penalty policy and should cover the economic benefit of noncompliance plus a component for the gravity of the violations.

- A final date for compliance, with substantial penalties for missing that date.

Site specific considerations will determine the precise terms in any order or consent decree. This guidance is not meant to decrease the flexibility needed to deal with individual systems.

(c) Other Issues.

(1) Penalties.

In civil judicial cases, the up front penalty should cover the economic benefit of noncompliance plus a gravity component. Stipulated penalties for violations of interim milestones and for violations of the final compliance date should be included in the consent decree with the amounts dependent on the individual facts in the case. The stipulated penalties should be reasonable, but should be sufficiently high to compel compliance with the agreed upon schedule.

In administrative actions, penalties should be assessed for violations of the law or regulations where the State has the authority to do so. EPA does not currently have the authority to assess a penalty in an administrative order, but will assess penalties for violations of terms of final administrative orders.

(2) Exemptions.

Section 1416 of the SDWA provides States the authority to grant exemptions from any maximum contaminant level or treatment technique requirement upon a finding that:

- due to compelling factors the PWS is unable to comply;
- the PWS was in operation on the effective date of the regulation or, for a system that was not in operation on that date, that no reasonable alternative source is available; and
- the granting of the exemption will not result in an unreasonable risk to health.

The SWT rule states that exemptions may be granted for all requirements except the requirement for a continuous disinfectant residual of 0.2 mg/l at the entry point to the distribution system. This requirement is found at 40 CFR 141.72(a)(3) for unfiltered systems and 40 CFR 141.72(b)(2) for filtered systems.

Under SDWA Section 1416, if the State grants an exemption, at the time the exemption is granted, the State must prescribe a compliance schedule. Such schedule must require compliance within 12 months after the issuance of the exemption. This date may be extended for up to two years if the system establishes certain items listed in Section 1416. In addition, for systems serving less than 500 service connections, the exemption may be renewed for one or more additional 2 year periods if it establishes that it is taking all practicable steps to meet the requirements.

Any requirement of an exemption may be enforced by EPA under Section 1414 as if it were a national primary drinking water regulation.

If a State elects to grant exemptions to the requirements of the SWT rule, EPA should oversee these closely. Exemptions with tight compliance schedules (with penalties for missing deadlines if allowed under State law) may be effective in some states. EPA should monitor compliance with the terms of exemptions; if these are violated, an administrative or judicial formal enforcement action should be taken promptly against the system.

(3) Federal Actions in Advance of June 29, 1993 Deadline.

We have considered the authority of the Agency to initiate enforcement actions in advance of the June 29, 1993 deadline for the installation of filtration. For EPA to pursue either a unilateral administrative or civil action under Section 1414, there must be a violation of a national primary drinking water regulation or of a requirement of a variance or an exemption.

For systems that are required to install filtration, there will be limited violations of the SWT regulations prior to June 1993. However, violations of the total coliform regulation, the TTHM MCL, or the turbidity monitoring/reporting requirements could form the basis of a federal action.

Even if EPA cannot take a formal action prior to the June deadline, it is important to develop a record that will support either an administrative or judicial action after June 1993. To this end, Regions should begin planning which systems may be appropriate for federal actions and begin developing and maintaining the appropriate records for judicial or

administrative actions. We encourage each Region to contact the systems it is planning to address and to begin the process of negotiating schedules for inclusion in consent decrees or final administrative orders. In addition, we encourage the Regions to develop litigation reports for those systems for which judicial actions will be pursued and, with headquarters involvement as appropriate, pursue pre-referral or pre-filing negotiations prior to June 1993. Then, after June, the Region will be able to refer, file, and settle a civil case or issue a final administrative order more quickly than if all of the preparation were left until the statutory deadline had passed.

Headquarters will be working with the Regions to target appropriate systems for this effort. Initially, we will be looking at those systems serving more than 10,000 persons.

(4) 1431 Actions.

EPA always has the option of taking actions under Section 1431 where there is or may be an imminent and substantial endangerment to health. This authority is independent of any regulatory deadlines or other requirements. Under this authority, EPA may order whatever actions are necessary to protect the health of persons, including the installation of filtration. See Water Supply Guidance Number 87 for additional details on using Section 1431 authorities. Please note, however, that the presence of the statutory deadline will limit us to taking 1431 judicial actions prior to June 1993.

(5) Criminal Actions.

In addition, should EPA or the State suspect that a system has or is falsifying its monitoring results or other information about its system, EPA or the State should begin a criminal investigation. Criminal charges should be brought if warranted by the evidence uncovered in the investigation. Such investigations can be done at any time and are not dependent on a violation or on the passage of the June 1993 statutory deadline. Such criminal actions would not supersede a civil action requiring installation of filtration.

(6) Data Verifications/Review of System Records/Site Visits.

We encourage EPA Regions and/or the States to review system records through data verifications or on site visits. These reviews will assist EPA or the States in confirming the facility's compliance with the SWF rule or they may provide EPA or the State the information needed for an enforcement action.

(D) Systems that have not submitted to the State all of the required information to demonstrate that they meet (or will meet) the avoidance criteria in 40 CFR 141.71.

By December 29, 1991, States were required to determine whether all systems using surface waters must filter or may avoid filtration. According to 40 CFR 141.71, the system was required to submit information to the State that demonstrates that it meets the avoidance criteria. If a system has not submitted complete information (e.g., 12 months of monitoring data, a complete description of its watershed control program), it is in violation of the monitoring and reporting requirements in 141.75; however, the State is still required to make a determination. In this case, the State should make a determination based on the available information.

The burden of proof is on the system to show it can avoid filtration; the State does not need to demonstrate to the system why it must filter. Three situations arise:

(1) The system has submitted data, but it does not constitute a comprehensive or convincing argument for continuing to avoid filtration: the State should require the system to filter.

(2) The system has not submitted any data: the State should move aggressively to order the system to filter and insure that the system installs filtration. The State should also find the system in violation of the monitoring and reporting requirements of the SWT rule.

(3) The system has made a convincing demonstration that it meets the "subjective" criteria for avoiding filtration, i.e., that it has an adequate watershed control program. Further, the system has submitted some (but not all) of the required monitoring data and that data seem to indicate that the system will meet the remaining criteria for avoiding filtration. In this case, the State should first find the system in violation of the monitoring and reporting requirements. Secondly, the State may either: (a) order the system to filter since it has not submitted all of the required information to allow it to remain unfiltered; or (b) order it to submit the remaining data as soon as possible but no later than a certain date (6 months should be the maximum time allowed). The order could also state that if the system fails to submit the required data on time, it will be ordered to filter.

Should that system later incur violations or monitoring data indicates that the system needs to filter, the State would so notify the system. In that case, the deadline is 18 months from that determination. The State should proceed in accord with the guidance presented earlier in this document.

Disclaimer.

This document on enforcement of the surface water treatment rule is a statement of Agency policies and principles. It does not establish or affect legal rights or obligations. This guidance document does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the law and regulations to the specific facts of the case. The Agency may take action at variance with this guidance.

