UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 5
Date Signed: November 29, 1976
Revised: November 1998
Revised by: Ed Glick & Jennifer Melch

MEMORANDUM

SUBJECT: Approval of State Programs for Primary Enforcement Authority Under Subpart B of the Safe Drinking Water Act

FROM: John R. Quarles, Jr. (signed by John Quarles)
Deputy Administrator (A-100)

TO: Regional Administrators

As a follow-up to the recent Regional Administrators' meeting, attached is a document prepared by the Office of Water Supply for your guidance in reviewing applications for primary enforcement authority under the Safe Drinking Water Act, PL 93-523.

It is the firm policy of the Act and the Agency to encourage the States to exercise primary enforcement responsibility over the public water system program. Existing State statutory authority should be examined carefully to determine whether it is adequate to support the establishment of regulations which together with the statutory authority would allow the State to meet the requirements of 40 CFR §142.10. It is important to avoid the need for statutory changes, where possible, to avoid the delay and uncertainty in the legislative process. EPA is not attempting to burden the States with an "ideal" statutory or regulatory program. Rather, the objective of the State implementation program is to assure that all States have a drinking water program which is consistent with the requirements of Section 1413 of the Act and contains the minimum requirements necessary to protect and enhance the State's drinking water.

At the Regional Administrators' meeting a number of specific questions were raised with respect to the State implementation program. Below, I have attempted to restate and answer these questions.

1. Can EPA conditionally or partially approve a State program?

No. The legislation and Title 40 CFR §142.10 (Jan. 20, 1976) of the implementation regulations set out the minimum requirements for

primary enforcement responsibility and do not provide for approval of partial or conditional primacy.

2. Can EPA, under the existing regulations, approve a State program if all elements of a particular segment are not fully in place?

Yes, in some instances. Under 142.10(b)(1) and (2), a State must only begin to inventory and survey public water systems. The entire inventory and sanitary survey does not have to be completed for primacy to be granted. Under 142.10(b)(3), lab certification programs may be informally approved prior to the implementation of a national quality assurance program. Since EPA does not anticipate the implementation of such a program for at least a year, there should be a great deal of flexibility with respect to lab certification and primacy. Under 142.10(c), recordkeeping and reporting requirements (i.e., computer systems) need not be on line as of the date of primacy if it is apparent that the State systems will be "on line" so as to enable the State to fulfill the requirements of 142.14 and 142.15.

3. Can EPA contract out our responsibilities if a State does not assume primacy? Can EPA contract with the State?

Yes, to a limited extent. For example, EPA could contract with a private lab to handle laboratory certification or with the Indian Health Service to inspect reservations. However, I do not think that we could delegate our enforcement responsibilities. Grants may only be made to individuals or non-profit institutions (Section 1450(d)(2)).

Section 1442(b)(3) provides the Administrator with authority to make grants to, and enter into contracts with, any public agency for three broad purposes. We could also make grants to States for special demonstration projects under Section 1444. This authority is limited by two pragmatic constraints, however. First, our grant and contract funds are finite. Second, to the extent that we implement broad scale financial arrangements with non-primacy States, we would undercut the positive incentive (continuing grants) for primacy.

4. Must the General Counsel sign off on all approvals by the Regional Administrators of applications for primacy?

Yes. The Administrator delegated the authority to approve applications for primacy to the Regional Administrators subject to the concurrence of the Office of General Counsel. Delegation 9-4, July 21, 1976.

Absent this condition, I believe it would be difficult to obtain a reasonably consistent approach to primacy. As indicated in Bill Frick's memorandum of October 26, this

review should be completed within 15 days, and the scope of review will be designed to provide a reasonably consistent approach to State implementation, given the variations inherent between States. If any problems develop, Bill Frick personally will review the situation with the appropriate Regional Administrator or Regional Counsel.

5. Are EPA's lab certification requirements mandatory?

Certification issues that are mandatory are:

1. Must use a promulgated method, soon to be a moot point with the adoption of PBMS.
2. The lab must successfully analyze a PE sample annually for all contaminants for which it wants certification provided by EPA, the State, or a third party that is acceptable to the State or EPA.
3. The lab must pass the PE sample by the method they are using to report compliance data.
4. The lab must pass an on-site evaluation at least every three years.

Should you have any questions on the material in this memorandum, please call Victor J. Kimm, (202) 426-8847.

Attachment

INITIAL
APPROVAL OF STATE PROGRAMS

FOR

PRIMARY ENFORCEMENT AUTHORITY
UNDER SUBPART B OF THE SAFE
DRINKING WATER ACT

Under Subpart B of the Safe Drinking Water Act

This paper will describe the minimum requirements which must be met by a State before it can be granted primacy. It must be emphasized that there is no such thing as "shared primacy"; a State either has primacy or it does not. To obtain primacy a State must have at least the minimum program described in Section 142.10, and submit the information required in Section 142.11 for an initial determination of primary enforcement responsibility. Each specific item in Section 142.10 will be discussed.

Section 142.10(a). State primary drinking water regulations no less stringent than Federal regulations.

The Interim Primary Drinking Water Regulations became effective June 24, 1977. Primacy determinations must evaluate State Primary Drinking Water Regulations to determine that they have standards for all the constituents, the Maximum Contaminant Levels (MCLs) are as stringent, samples must be obtained as frequently, and the analytical methods must be equal to those in the Federal regulations or as described in the OW PBMS Rule.

After June 24, 1977 States which have primacy and States which apply for primacy must adopt regulations which are no less stringent than the interim or any revised National Primary Drinking Water Regulations.

Section 142.10(b)(1). Adequate State procedures to maintain an inventory of public water systems.

The State applying for primacy must have either a manual or automatic data processing system in place to comply with the reporting requirements of Section 142.15(a). The system must be capable of maintaining records on all public water systems for which the State has primacy. The system must maintain at least those data elements which must be transmitted to EPA. Finally, the system must be able to extract the necessary data for the annual report to EPA.

Section 142.10(b)(2). The State must have a systematic program for sanitary surveys.

The State applying for primacy must have a procedure to allocate resources for sanitary surveys. All public water supplies must be considered for sanitary surveys and priority must be given to those which are not in compliance with the State's primary drinking water regulations.

Section 142.10(b)(3). The State must have a laboratory certification or approval program.

EPA has a national certification program in operation, and the State must use this program unless it has an equal or more stringent certification program. If the State conducts all analyses in its own laboratory, which is certified by EPA, then a State approval or certification program is not necessary.

Section 142.10(b)(4). The State must have access to laboratory facilities approved (on an interim basis) or certified by EPA.

The State applying for primacy must have a laboratory(ies) available to it which is capable of analyzing drinking water for all of the contaminants of the State primary drinking water regulations. This laboratory can be part of the agency designated by the governor to have primary enforcement authority, a laboratory operated by another State agency, any laboratory under contract to or having an agreement with the State or a combination of these. These laboratories must be approved or certified by EPA. Under exceptional circumstances, the Regional Administrator may offer to conduct temporarily certain analyses in EPA laboratories to assist a State. A list of analyses required must be submitted, showing the laboratory which will do each and its approval status.

Section 142.10(b)(5). The State must have an activity to assure that new or substantially modified Public Water Supplies (PWSs) are capable of complying with the primary regulations.

There must be an enforceable regulation requiring that plans and specifications be reviewed by an agency or person responsible to the State to ascertain that the proposed facilities will be able to produce water meeting the requirements of the primary regulations. The State must specify who has the authority to approve the plans and specifications. Assurance that new and substantially modified PWSs will be able to comply with the primary standards is essential because these facilities are not eligible for an exemption.

Section 142.10(b)(6)(i). The State must be able to apply State primary standards to all PWSs that are within the State's jurisdiction, in accordance with EPA regulations.

The State's definition of Public Water System, Community Water System, and Non-Community Water System must be the same or more inclusive than the EPA definition (Section 142.3).

Section 142.10(b)(6)(ii). The State must have authority to sue in courts of competent jurisdiction to enjoin any violation of State Primary Drinking Water Regulations.

The State must include a copy of a State statute or clear common law precedent generally authorizing the appropriate agency to bring an action in courts of competent jurisdiction to enjoin violations of State primary drinking water regulations. States should be encouraged (not required) to adopt a statute which expressly authorizes an appropriate party to seek an injunction of any threatened or actual violation of a State primary drinking water regulation. The State should prepare a summary of its existing legislation and regulations, together with any State Supreme Court decisions and/or opinions of the State Attorney General or Agency Counsel interpreting the law, for evaluation for adequacy by the Regional Office.

Section 142.10(b)(6)(iii). Right of entry and inspection of public water systems, including the right to take water samples regardless of whether the State has evidence that the system is in violation.

This authority must be clearly spelled out in a State Safe Drinking Water Act or in State regulations. If the authority is not clearly spelled out, the State should prepare a summary of its existing legislation and regulations, together with any State Supreme Court decisions and/or opinions of the State Attorney General or Agency Counsel interpreting the law, for evaluation for adequacy by the Regional Office. If a warrant is required, the State should demonstrate that it has minimal burden of proof with respect to probable cause in order to obtain a warrant.

Section 142.10(b)(6)(iv). Authority to require suppliers of water to keep appropriate records and make appropriate reports.

This authority must be clearly spelled out in a State Safe Drinking Water Act or in State regulations. If the authority is not clearly spelled out, the State should prepare a summary of its existing legislation and regulations, together with any State Supreme Court decisions and/or opinions of the State Attorney General or Agency Counsel interpreting the law, for evaluation for adequacy by the Regional Office.

Section 142.10(b)(6)(v). Authority to require public water systems to give public notice of violations of State primary drinking water regulations to the extent set forth in Section 142.16.

The State must have this authority clearly spelled out in a State Safe Drinking Water Act or in enforceable regulations. At a minimum, the authority must correspond with the detailed requirements set out in Section 142.16, and include authority to require additional notification in appropriate circumstances.

It should be pointed out that the Federal notice requirements apply to all public water systems, including those in States which have primary enforcement responsibility. Therefore, even though a State does not have to have the same public notification requirements in order to qualify for primary enforcement responsibility, it is highly desirable that State public notification requirements be substantially the same as the Federal requirements (141.32) to avoid a split in enforcement responsibilities.

Section 142.10(b)(6)(vi). The State must have authority to assess either civil or criminal penalties for violation of its Primary Drinking Water Regulations and Public Notification Requirements.

The authority to assess penalties must be clearly spelled out in a State Safe Drinking Water Act or in State regulations applicable to the drinking water program. If the penalty maximum limitations are less than $25,000 civil penalty per violation, they will be evaluated in the context of the overall enforcement capability. The penalties should allow for either daily or multiple assessments if the violation continues, but this requirement is not mandatory if the State's enforcement program is otherwise adequate. The States should be urged to adopt the same maximum level of civil penalties as have been adopted in the Act. However, States should also be encouraged (not required) to adopt strict liability civil penalty provisions (with lower penalties). Any type of civil penalty should be encouraged over criminal penalties. The State should be aware of the following paragraph from the preamble to the implementation regulations, Federal Register, 41, 2917, January 20, 1976:

> If the Administrator approves a State program with a maximum level of penalties below that contained in the Safe Drinking Water Act, but subsequently determines that the lower level of maximum penalties has had a significant adverse effect on the adequacy of the State's procedures for enforcement of its primary drinking water regulations, the Administrator will inform the State that it must immediately initiate action to raise the maximum level of penalties in order to retain primary enforcement responsibility.

The State should prepare a summary of its existing authority, including opinions of the State Attorney General and/or Agency Counsel, together with its enforcement experience, showing that its authority is adequate to secure compliance for evaluation for adequacy by the Regional Office.

Section 142.10(c). The State must establish and maintain record-keeping and reporting of its activities in compliance with Sections 142.14 and 142.15.

The State must submit details of the system for compiling and maintaining the records required by Sections 142.14 and 142.15. The plan must show that the records will be kept current and in a form admissible as evidence in State enforcement proceedings. The plan must detail how the records will be maintained and made available for public inspection. The state may require that the records be made available for public inspection by the suppliers of water in accordance with Section 142.14(f).

Section 142.10(d). Variance and exemption requirements.

Although the State does not have to have variance and exemption regulations, the Regional Offices should strongly urge all States to provide for variances and exemptions in as much as the flexibility afforded by these provisions is very desirable. Any State variance and exemption regulations must provide that variances and exemptions will be granted under conditions and in a manner which are no less stringent than those contained in Sections 1415 and 1416 of the Public Health Service Act. The State application for primacy must provide evidence that it has authority to grant variances or exemptions and sufficient details to permit a determination that the procedure is consistent with the Act. The guidance document on variances and exemptions will be helpful in making this determination.

Section 142.10(e). The State must have provision for safe drinking water under emergency conditions.

The State application for primacy must be accompanied by a brief description of its emergency plan. The plan may be general or detailed but it must provide assurance that the State is prepared to cope with emergency conditions such as earthquakes, floods, hurricanes, and other natural disasters.

Section 142.10(f). The State must have adopted authority for administrative penalties.

The State must have the authority to assess administrative penalties for all violations of their approved primacy program, unless prohibited by the State constitution. States must have the authority to impose a maximum penalty per day per violation for systems serving a population greater than 10,000 individuals and this maximum must be $1,000 or greater. However, States are not required to assess this maximum per day per violation penalty for every violation, so long as they retain the authority to.

For public water systems serving a population of 10,000 or fewer individuals, States must have penalties that are adequate to ensure compliance with State regulations. In determining a level or levels of administrative penalties which will ensure compliance, a State may take into consideration such

factors as the special challenges that some smaller systems face, their financial capability to pay the penalty, any economic advantage gained through noncompliance, the gravity of the violation, and whether the violation was a single instance or a repeat violation.