

Date Signed: November 30, 1992

MEMORANDUM

SUBJECT: Enforceability of Filtration Determinations Under the SWT Regulation

FROM: James R. Elder, Director
Office of Ground Water and Drinking Water

Frederick F. Stiehl
Enforcement Counsel for Water

TO: Water Management Division Directors
Regions I - X

Regional Counsels
Regions I - X

This letter finalizes attachment 1, the guidance on remaking filtration determinations under the Surface Water Treatment (SWT) Regulation. On September 9, 1992, a memorandum signed by Bob Blanco forwarded the guidance in draft for your review. Many of you forwarded comments, almost all of which we were able to incorporate in some form. The comments have been summarized and have been included as attachment 2.

The attached guidance addresses a potential problem with the enforceability of many of the filtration determinations that have been made under the Surface Water Treatment (SWT) Regulation. According to the Safe Drinking Water Act (SDWA) and our SWT Regulation, the State (i.e., the primacy agent) was required to determine, by December 1991, which surface water sources were required to filter and which could remain unfiltered. The States made most of the filtration determinations by this deadline but, in most cases, the State was not the primacy agent for the SWT Rule because EPA had not approved the State's primacy program revision. Therefore, the filtration determinations made by the States may not be federally enforceable, because no federal determination was ever made. EPA is now vulnerable to claims that we failed to make the filtration determinations as required by the SDWA.

The guidance covers four general scenarios under which filtration determinations could be declared invalid due to lack of authority, or on procedural grounds, if challenged in federal court, and identifies the steps that need to be taken to cure these defects. These potential problems were brought to our attention by a lawsuit filed by the Coalition of Watershed Towns against New York State, New York City and EPA. The first scenario involves a State that has made filtration determinations without appropriate authority. That is, the State did not have an effective SWT Regulation or any general authority under which the State could make an enforceable determination. This is the most serious of the four scenarios, as the filtration determinations are not

enforceable at the federal or State level and are effectively null and void. At least four States may have made filtration determinations that fall into this category. These four are Vermont, New York, Virginia, and Hawaii. We ask that you move as quickly as possible to determine whether the State in fact had authority to make determinations, and if not, to ensure that filtration determinations are made by EPA or are reissued by these States.

The second scenario involves filtration determinations that may be judged invalid on procedural grounds. In the majority of States filtration determinations were made under effective State regulations, but without primacy revisions approved by EPA. In these States, filtration determinations could be challenged in an EPA action brought to enforce the June 1993 deadline for the installation of filtration, even though the determinations are valid and enforceable under the State regulation. This is because the SDWA requires States to make filtration determinations but provides that if a State does not have primacy, EPA will have the same authority as the State.

Even if a State issued its determinations during the period covered by a State/EPA extension agreement, the determinations will not be federally enforceable. As a result of the National Wildlife Federation challenge to the Primacy Rule, the court, in its ruling, stated that an extension period is essentially a period of "split primacy." Under split primacy, the State retains primacy for those portions of its drinking water program that have been approved by EPA. Only EPA, however, may make filtration determinations until the State primacy revision for the SWT Regulation has been approved by EPA. After some careful consideration and consultation with all Regions, we decided **that the filtration determinations for the SWT Regulation are too valuable to risk to legal challenges, and therefore, all determinations must satisfy the SDWA and be federally enforceable.** Consequently, in the situation where a State has adopted regulations but had not had its primacy revision for the SWT Regulation approved at the time the determinations were made, the State's determinations must be ratified.

The third scenario involves the requirement for notice and opportunity for public hearing at the time of filtration determinations. The SDWA required this notice but it was not specifically included in the regulation. Guidance on public notification procedures was not issued until January 6, 1992. As a result, many States did not give notice and opportunity for public hearing when making filtration determinations. We are concerned that determinations made without such notice will be vulnerable to challenge and may be declared invalid on procedural grounds. We ask that you ensure that if notice for opportunity of public hearing was not given at the time of the filtration determination, such notice be given as soon as possible.

The fourth scenario involves States with a mandatory filtration requirement. Where EPA has not approved such a State for primacy under the SWT regulation, the proposed solution for these systems is as set forth above. Alternatively, if EPA is close to approving the State's primacy revision application, it can reaffirm the State's filtration determinations simultaneously with approval of primacy.

Enforcement of filtration determinations is one of our highest priorities and the procedural and authority problems that we are facing are serious. However, we have the opportunity to

correct these problems now to avoid the risk of litigating them in subsequent enforcement actions. Although we can attempt to preserve the filtration determinations already made, the compliance schedules may not be enforceable if the original determinations contain any of the deficiencies discussed above. Consequently, because of the importance of the SWT Rule, we ask that you work with your States, using this guidance, to ratify, re-make, or co-sign filtration determinations that may be at risk.

For some of you, rapid approval of primacy revision is crucial to re-making filtration determinations. Therefore, we offer the services of the contractor that reviews primacy revision applications. The contractor has extensive experience with the SWT Regulation and can point out deficiencies in State regulations and special primacy condition submissions where they exist. Please contact Clive Davies for more information.

Please call either of us with questions. Your staff can contact Betsy Devlin of OGWDW at (202) 564-2245, Clive Davies of OGWDW at (202) 260-1421, or Mimi Guernica of OE at (202) 564-7048.

Attachment

cc: Drinking Water/Ground Water Protection Branch Chiefs
Vanessa Leiby (ASDWA)

FINAL GUIDANCE

ENFORCEABILITY OF FILTRATION DETERMINATIONS FOR THE SWT REGULATION

This guidance provides responses to address some potential problems with the enforceability of filtration determinations made by some States under the Surface Water Treatment (SWT) Regulation. The guidance discusses four general scenarios under which filtration determinations could be declared invalid either due to lack of authority or on procedural grounds, if challenged in federal court. The first two scenarios involve filtration determinations made by States that did not have the authority to make the determinations under State or federal law. The third scenario deals with States that made filtration determinations without allowing for notice and opportunity for public hearing. The fourth scenario discusses States with a mandatory filtration requirement.

- Scenario 1: Filtration determinations made by States without appropriate authority and**
Scenario 2: Filtration determinations made by States with effective regulations but without primacy revision approved by EPA

In scenario 1, a State has made filtration determinations without an effective SWT Regulation or the general authority that would make a "must filter" determination enforceable at the State level. This situation is very serious, as the filtration determinations are not enforceable at the State or federal level and are effectively null and void. The Regions must work as quickly as possible to ensure that all filtration determinations made without State authority are made by EPA or are reissued by the State. In the event the determinations are reissued by the States prior to primacy approval, the procedures described in scenario 2 must be followed.

Scenario 2 describes States that have made filtration determinations under the authority of effective State regulations, but without primacy approved by EPA. The majority of the States in the country fall into this category. Under this scenario, the State regulations may be complete and merely require EPA approval or the State regulations may need revision before approval.

The "solutions," or approaches, outlined below are options available to the Regions that will make filtration determinations enforceable at the federal level. The following paragraphs touch only briefly on each approach and the Regions will probably have to consider more issues than those discussed here because of problems unique to each State. We understand that differences in State laws and philosophies will be large factors as the Region decides which approach to take. One factor not addressed below is enforceability of any federal determination at the State level. Many States will argue that filtration determinations made at the federal level are enforceable at the State level once State regulations are in place. Other States will enforce only the filtration determinations that they have made. We encourage the Regions to consider State enforceability as filtration determinations are ratified. We are trying to be

sensitive to concerns such as these, and realize that the Regions are the appropriate party to choose a method to re-make the determinations on a case-by-case basis. However, we should be aware that for water systems required to install filtration and unable to do so within 18 months of the filtration determination as required by the SDWA, if the State fails to act, EPA will have to pursue enforcement actions. (For additional information on this subject, please refer to our June 26, 1992 "Guidance on Enforcement of the Requirements of the Surface Water Treatment Rule.")

At this time, we are uncertain that the original filtration determination date can be preserved where the State acted without an effective SWT Regulation. Because we are interested in obtaining compliance as soon as possible, however, we have drafted the attached model letters, in the alternative, to the public water systems. The letters reference the original determination date as the operative date, but provide that if the original date is declared invalid for any reason, a new determination is being made in the letter.

Solution 1: The State may ratify its earlier determinations.

This is probably the most palatable solution for all concerned, as it will minimize the Region's involvement and any State perception that EPA is taking too large a role. Before a State can ratify its own determinations, it must have adopted a State SWT Regulation and must have been granted primacy for the regulation. Unfortunately, in most States, revision of primacy has not been and will not be granted in the near future, making this approach impractical in most instances. However, in States such as Massachusetts, where approval of primacy is imminent, State ratification is a practical solution.

State ratification of a filtration determination could be accomplished through certified mail reminder letters to each system. The letter ratifying a filtration determination need not be a one purpose document. For example, the State could incorporate the ratification into a letter that establishes an installation schedule for filtration, or forwards the results of the on-site inspection. However, because the ratification letter should be sent out over the course of the next few weeks, it may require separate correspondence. A ratification letter should reaffirm the original filtration determination date and, if the system was required to filter, the date filtration is required. The letter should also provide that, if the original date is declared invalid for any reason, a new determination is being made in the letter. Also, the letter should be signed at the same signature level as the original filtration determination letter. If notice and opportunity for public hearing was not previously given, it must be issued at this time. (See discussion under scenario 3.)

Solution 2: The State and Region may ratify the State's earlier determination in a co-signed document.

We expect that most filtration determinations will be ratified using this method. Co-signing is an approach that allows the Region to concur on a State determination, showing faith in the State program. However, we understand and agree that a Region should not co-sign a determination without some level of review. After discussion with the Regions, we discovered that these reviews need not be resource intensive for at least two reasons. First, the Region may choose to ratify only "must filter" determinations. This is because the default in the federal SWT Regulation (if no filtration determination is made) is "unfiltered avoiding filtration." Specifically, the federal regulations, at 40 CFR 141.71 state that "a public water system must meet [the avoidance criteria in the rule] unless the State has determined that filtration is required." The Region should do a cursory review of at least the largest of these "no filter" determinations to ensure that they are appropriate. However, no action on our part would legally constitute a "no filter" determination and require the system to comply with the requirements of 40 *CFR* Subpart H that apply to unfiltered systems avoiding filtration. Second, most filtration determinations were made with a high level of Regional involvement. In fact, at least two Regions had representatives sitting on filtration determination panels.

A co-signed document is obviously more difficult to produce than a single party ratification letter, but, because of delays in primacy revision approval, co-signed documents should be used to ratify determinations in most States. Furthermore, if a State obtained primacy revision approval, but the State regulations did not specify the need for notice and opportunity for public hearing on filtration determinations, co-signed documents should be used and the State should be encouraged to amend its regulations to include the requirement for notice and availability of public hearing. If it is impractical for the State to amend its regulations, the region and State should agree, in writing, on procedures to ensure that public hearings are offered. Attached is an example of a co-signed ratification document that we recommend you use as a basis for developing ratification documents. The co-signed document should reaffirm the original filtration date, but provide that if the original date is declared invalid for any reason, a new determination is being made in the letter. The co-signed document should be sent certified mail and should be signed at the same level as the original filtration determination by the State and by the Region. The appropriate level of Regional signature should be decided for each State. The authority to sign rests with the Regional Administrators and can be re-delegated.

Solution 3: The Region may ratify the State's earlier determination.

This solution would be appropriate if, as in the case of New Hampshire, the State requested the Region to reinforce the earlier State determination. Also, this method would be used where the State would not or could not cooperate in ratifying determinations. Of course, for most States, the Regions will take this course of action only as a measure of last resort. We agree with this approach but emphasize that the filtration determinations must satisfy the mandates of the SDWA and must be federally enforceable. If the State cannot be convinced to cooperate, EPA must take the initiative and re-make the filtration determination alone.

An EPA document that ratifies a filtration determination can be modeled on the attached

document. The document should reaffirm the original filtration date, but provide that if the original date is declared invalid for any reason, a new determination is being made in the letter. The document should be sent certified mail. The appropriate level of signature can be decided by the Region. The authority to sign rests with the Regional Administrators and can be re-delegated.

Solution 4: The Region may change the State's earlier determination.

The high level of Regional involvement in making filtration determinations and the commitment shown by most States in making conscientious determinations makes it unlikely that the Regions will seek to change many State filtration determinations. In some cases, however, changing a State determination may be appropriate. Regions that had considered using 40 *CFR* 142.80 to review a State filtration determination may now choose to use their status as the primacy agent to make the filtration determination. If the Region believes that it may be appropriate to change a State filtration determination, then the Region should initiate review procedures, similar to those that would be used for a formal review under 40 *CFR* 142.80. The Region should, at a minimum, inform the system and State of the review, obtain the avoidance application from the State, give the system the opportunity to submit any additional information and set a schedule to make the determination.

Solution 5: EPA Administrative Order/Civil Judicial Action

Another option is for the Region to go directly to enforcement. If the Region wished to proceed with an enforcement action under Section 1414 of the SDWA, EPA would need to base its action on a currently effective regulation (e.g., the Total Coliform Rule, the Total Trihalomethane requirements, or the avoidance criteria in the SWT Rule.) Violations of the SWT Regulation's requirement to filter cannot be incurred until June 29, 1993 at the earliest, assuming the determinations were validly made. If alternative bases of jurisdiction could be found, EPA could file a judicial action, or pursue an administrative action, in accordance with our June 26, 1992 "Guidance on Enforcement of the Requirements of the Surface Water Treatment Rule." If EPA decided to proceed administratively, EPA would then, in the "findings" section of a Proposed Administrative Order (PAO) find: (1) the system in violation of a currently effective regulation; and (2) that filtration is the appropriate remedy. The order section would contain the requirement to filter, a schedule, and other items consistent with our June 26, 1992 guidance on enforcement of the SWT Rule.

Opportunity for public hearing would be covered by the opportunity granted with every PAO. EPA would move to a Final Administrative Order as quickly as possible.

Scenario 3: Filtration determinations made by States and Regions that did not provide notice and opportunity for public hearing

In scenario 3, the critical fact is that an opportunity for a public hearing on the filtration determination was not provided as required by Section 1412(b)(7)(C)(ii) of the SDWA. The solution to this procedural deficiency will depend on whether or not the determination was made with adequate authority.

If the filtration determination was made with adequate authority (i.e., the State had adopted the regulation and primacy revision had been approved) then the State should send a letter to the owner or operator of the system informing them that they have an opportunity to request a hearing on the determination. Such a letter should specify:

- Any request should be in writing within a certain number of days (we suggest 14);
- A request for a hearing does not stay the determination itself or the date by which filtration is required. The letter should provide, however, that if the original date is declared invalid for any reason, a new determination is being made in the letter.

If the determination was made without adequate authority and so the State or the Region is reaffirming the determination, then the opportunity for a hearing should be spelled out in the document reaffirming or ratifying the determination. (See the attached sample letters.)

In any event, so as to insure that the public is notified of the filtration determination and of their opportunity to request a hearing, a notice of the determination should be published in the local newspaper or should be posted in a conspicuous place in the community.

A public hearing may cover more than one filtration determination. Regions may combine all those in a given geographic area and hold only one hearing. Also, a public hearing should only be conducted in response to a substantive request. A substantive request for public hearing could involve presentation of new data or data that was overlooked by the State in making their determination. Of course the region may also wish to hold a public hearing if a large number of requests are received, even if no legitimate reason for holding a hearing is given.

Public hearings requested on filtration determinations are information gathering only; they are not adjudicatory. Regions should use the procedures outlined in guidance and regulations for requesting and holding hearings in conjunction with proposed administrative orders. The regulations are in 40 *CFR* 142 Subpart J. A copy of the guidance on this issue is attached for your reference.

States with a mandatory filtration requirement are considered to have provided an opportunity for public hearing in the process of promulgating the State regulation. Therefore, notice and opportunity for public hearing is not required in States with regulations that require all surface systems to filter.

Scenario 4: States with a mandatory filtration requirement

States with mandatory filtration requirements need to be looked at carefully. If EPA has not yet approved their primacy revision application and is not close to approving it, then they should be treated as all other States under the Scenarios above. In other words, all currently unfiltered surface water systems in the State should receive a letter that reaffirms the State requirement for them to filter. In the interest of federal enforceability of the SWT Regulation, all filtration determinations should be reaffirmed.

If, however, EPA is close to approving the State's primacy revision application, it is possible to use

that approval process to also approve or reaffirm all State determinations. The Region would do this when it publishes the notice in the Federal Register of its intent to approve the primacy revision. This announcement would make it clear that EPA approval of the State's primacy revision package constitutes approval of filtration determinations for all unfiltered surface water systems in that State.

Sample Letter Ratifying an Earlier Filtration Determination
Joint EPA-State Letter

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Name of Owner/Operator, Title
Facility Name
Address

Dear [Owner/Operator Name]:

On [insert date] you were formally notified that you were required to filter the surface water source(s) serving your public water system and that filtration was to be installed by [insert date]. Since the date of that initial determination [insert whether progress has been made or not].

The purpose of this letter is to reaffirm that original determination and to remind you of the requirements of the Surface Water Treatment (SWT) rule. Alternatively, in the event the State's initial determination is declared invalid for any reason, the State and EPA hereby notify you that your water system has been required to install filtration treatment in accordance with the requirements of 40 *CFR* Subpart H [and State regulations as applicable]. The drinking water programs at both the federal and State levels are working in close cooperation in this matter as we consider filtration one of the most positive steps you, as the water supplier, can take to protect the health of your consumers. [IF APPLICABLE:] We encourage you to continue your progress towards the installation of filtration in your system and towards full compliance with the SWT rule.

[IF NOTICE OF OPPORTUNITY FOR PUBLIC HEARING WAS NOT PREVIOUSLY GIVEN:]

You have the right to request a public hearing on this determination. EPA or the State may also conduct a public hearing if there is sufficient public interest to justify such a hearing. If you wish to request a public hearing, please submit a written request to [insert appropriate contact]. This request must be postmarked no later than fourteen days from the date of this letter.

Should you have any questions, please contact [insert appropriate State/Regional contacts]. We urge your prompt attention to this important matter and appreciate your continued cooperation.

Sincerely yours,

[State Director]

[EPA Official]

Sample Letter Ratifying an Earlier Filtration Determination
EPA Letter

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Name of Owner/Operator, Title
Facility Name
Address

Dear [Owner/Operator Name]:

On [insert date] you were formally notified by the State of [insert State] that you were required to filter the surface water source(s) serving your public water system and that filtration was to be installed by [insert date]. Since the date of that initial determination [insert whether progress has been made or not].

The purpose of this letter is to reaffirm your State's original determination and to remind you of the requirements of the Surface Water Treatment Rule (SWT) rule. Alternatively, in the event the State's initial determination is declared invalid for any reason, the State and EPA hereby notify you that your water system has been required to install filtration treatment in accordance with the requirements of 40 *CFR* Subpart H. EPA considers filtration one of the most positive steps you, as the water supplier, can take to protect the health of your consumers. We are working with your State office to insure the effective implementation of this rule. [IF APPLICABLE:] I encourage you to continue your progress towards the installation of filtration in your system and towards full compliance with the requirements of the SWT rule.

[IF NOTICE OF OPPORTUNITY FOR PUBLIC HEARING WAS NOT PREVIOUSLY GIVEN:]

You have the right to request a public hearing on this determination. EPA may also conduct a hearing if there is sufficient public interest to justify a hearing. If you wish to request a public hearing, please submit a written request to [insert appropriate contact]. This request must be postmarked no later than fourteen days from the date of this letter.

Should you have any questions, please contact [insert appropriate State/Regional contacts]. I urge your prompt attention to this matter and appreciate your continue cooperation.

Sincerely yours,

[EPA Official]

REMAKING FILTRATION DETERMINATIONS RESPONSE TO REGIONAL COMMENT

Region I wrote that a State enforcement action should, in some cases, be allowed to take the place of re-making a filtration determination.

While we agree that, in some circumstances, a State enforcement action could reduce the need to re-make a filtration determination, it could not take the place of re-making a determination. It is possible that a city might sign a consent agreement and proceed with construction according to the agreement, but later, due to a change in local priorities, remove funding and stop construction. The State may, in such an eventuality, refer the case to the region. If the determination had not been re-made, the region would not be able to enforce until they had made a "must filter" determination and waited eighteen months for the water system to incur a treatment technique violation. We advise the regions to proceed with caution if they decide to exempt any water systems from the process of re-making determinations.

Region I pointed out that States with a SWT rule that requires filtration had effectively given notice and opportunity for public hearing in the process of promulgating their regulation.

We agree and have included this information in the guidance under scenario 3.

Region II made comments during the early development of this guidance. We believe that all Regional comments were included in the draft guidance.

Region III submitted a series of comments that centered on the resource demand for re-making filtration determinations.

We understand that re-making filtration determinations could be resource intensive. However, we reemphasize the importance of safeguarding the federal enforceability of these determinations. Under solution 2 we discuss how resources required to remake these determinations can be minimized. Also, in some cases, the regions may be able to make use of a headquarters contractor to perform a mass mailing. These determinations must be re-made!

Region VI pointed out that we have approved many primacy revision applications for the SWT regulation that did not include provision for notice of opportunity for public hearing. Some States may believe that it is inappropriate for them to give notice and would prefer for EPA to do so.

We understand the concern and would support regions that chose to give notice for the water systems.

In a follow-up concern, the region stated that an EPA public hearing would not support enforceability of the filtration determination in the State.

We agree, but point out that the purpose of the hearing is to ensure federal enforceability. If the determination is already enforceable at the State level, it may be appropriate in some cases for EPA to take a leading role in conducting the public hearing.

Region VIII commented that the guidance does not address States with conditional approvals or rejections of applications for revised primacy.

States with conditional approvals or rejections of applications for revised primacy have not had primacy approved by EPA. A State does not have primacy for a new regulation until EPA has published a notice of intent to revise primacy in the *Federal Register* and the 30 day comment period has expired. (See 40 *CFR* 142.13 (f) & (g).) Unless primacy has been officially approved by EPA, the State fits into scenarios 1 or 2.

Region VIII also brought up the issue of ground water under the direct influence of surface water.

We agree with the region that unless the State has primacy for the SWT rule, the region and State should co-sign all filtration determinations, including those made for systems with sources that are ground water under the direct influence of surface water. Also, the Region should co-sign any notice of opportunity for public hearing until the State has formally incorporated the requirement for the hearing into their regulations.

Region IX commented that they understood the guidance and are pursuing the most cost effective methods to implement it.

Region X commented that we had not explained the circumstances under which public hearings should be granted.

We have included a short explanation under scenario 3.