

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CT: Attorney General's Statement, Underground Injection Control Program (UIC), Ground Water Program Guidance #16

FROM: Alan Levin, Director
State Programs Division

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19,904

TO: Water Division Directors (Regions I - X)
Water Supply Branch Chiefs
UIC Representatives

PURPOSE

The purpose of this guidance is to provide a listing of all the elements considered necessary to demonstrate that the laws of the State that seeks to administer a UIC program provide adequate authority to carry out the program as described in 40 CFR 123.4. Each listing includes: an explanation of the Federal requirement; a section on the "State Statutory and Regulatory Authority" in which the State should list all relevant statutes and regulations; and a section for "Remarks of the Attorney General" which allows further legal explanation and clarification, including judicial decisions demonstrating adequate authority.

BACKGROUND

40 CFR 123.3 lists the Attorney General's statement as one of the elements necessary for the submission of an acceptable UIC program. This statement is a certification by a qualified representative of the State (or State Agency) stating that the State statutes, administrative regulations, and judicial decisions demonstrate adequate authority to administer a program for the protection of underground sources of drinking water. 40 CFR 123.5 (Attorney General's Statement) requires that the State demonstrate adequate authority to carry out the program submitted under § 123.4 and which meets the requirements of 40 CFR Parts 122, 123, 124, and 146.

This guidance is intended to apply to Class I, III, IV, and V wells, and also Class II wells submitted with a program meeting the requirements of 40 CFR Parts 122, 123, 124, and 146. Nevertheless, it may be used as an example for State programs submitted under Section 1425 guidance since the statement of legal authority may consist of a simple certification by the legal representative of that State, or a full analysis of the legal basis for the State program, including case law as appropriate. However, if the State

chooses to submit a certification, the program description should detail the legal authority on which the various elements of the State's program is based.

GUIDANCE

The guidance and index for the Attorney General's Statement is attached.

IMPLEMENTATION

The Water Supply Branch (WSB) Chief in coordination with the Regional Counsel shall follow this guidance to develop with the State an acceptable State Attorney General's Statement for the UIC program submission. All State statutes and regulations cited by the Attorney General or independent legal counsel shall be lawfully adopted State statutes and regulations at the time the statement is signed, and shall be fully effective at the time the program is approved. The attorney signing this Statement must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

FILING INSTRUCTIONS

This guidance should be filed as Ground Water Program Guidance No. 16.

ACTION RESPONSIBILITY

For further information on this guidance contact:

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INDEX
ATTORNEY GENERAL'S STATEMENT

	<u>Page</u>
1. <u>Prohibition of Unauthorized Injection</u>	1
2. <u>Prohibition of Endangering Drinking Water Sources</u>	1
3. <u>Prohibition of Movement of Fluid into a USDW</u>	2
4. <u>Authority to Issue Permits or Rule</u>	3
5. <u>Authority to Condition Authorized Injection Activities</u>	3
6. <u>Authority to Impose Compliance Evaluation Requirements</u>	4
7. <u>Authority for Enforcement Requirements</u>	5
8. <u>Authority for Public Participation in Permit Processing</u>	6
9. <u>Authority to Apply Technical Criteria and Standards for the Control of Underground Injection not less stringent than 40 CFR Part 146 (Section 1421(a)(1) and (b)(1)).</u>	6
10. <u>Classification of Injection Wells</u>	6
11. <u>Elimination of Certain Class IV Wells</u>	7
12. <u>Authority to Identify Aquifers that are Underground Sources of Drinking Water (USDW) and to Exempt Certain Aquifers (40 CFR §123.7(c)(4), §122.35 §122.3, and §123.4(g)(8) and (9)).</u>	8
13. <u>Authority Over Federal Agencies and Persons Operating on Federally Owned or Leased Property</u>	8
14. <u>State Authority over Indian Lands</u>	8
15. <u>Authority to Revise State Underground Injection Control Programs (Section 1422(b)(1)(B) and 40 CFR §123.13).</u>	9
16. <u>Authority to make and keep Records and make Reports on its Program Activities, all as prescribed by the Environmental Protection Agency (Section 1422(b)(1)(A)(ii), 40 CFR §123.6(b)(3), §123.10, and §122.18).</u>	9

- | | <u>Page</u> |
|--|-------------|
| 17. <u>The State must have authority to make available to EPA upon request, without restriction, any information obtained or used in the administration of the State program, including information claimed by permit applicants as confidential (40 CFR §123.10).</u> | 9 |
| 18. <u>Certification of Status as Independent Legal Counsel</u>

(To be used if State agency counsel has prepared the statement.) | 9 |
| 19. Signature of the Attorney General
or
Independent Legal Counsel | 9 |

UNDERGROUND INJECTION CONTROL PROGRAM
ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to the provisions of Part C of the Safe Drinking Water Act (42 U.S.C. 300f et seq., as amended) and 40 CFR 123.5(a), that in my opinion the laws of the State of (Name of State) provide adequate authority to apply for, assume and carry out the program set forth in the Program Description submitted by the (State or State Agencies, if partial). The specific authorities provided, which are contained in lawfully enacted statutes or promulgated regulations which will be in full force and effect on the date of approval of this program include the following:

1. Prohibition of Unauthorized Injection

Federal law prohibits any underground injection unless authorized by permit or rule (Section 1421(b)(1)(A) of the Safe Drinking Water Act (SDWA) and 40 CFR 122.33).

State Statutory and Regulatory Authority

By Permits:

By Rules:

By Class or Type:

Remarks of Attorney General

(Include effective date as applied to the program; must be effective by date of program approval. Explain how the above-cited prohibition applies by class of well and, where applicable, by type of well.)

2. Prohibition of Endangering Drinking Water Sources

- a. State authority, which provides authorization of underground injection by permit, shall require that the applicant for a permit to inject must satisfy the State that the underground injection will not endanger drinking water sources (Section 1421(b)(1)(B)(i)).

State Statutory and Regulatory Authority

[Include class of well(s) and show that all waters

meeting the Federal definition of drinking water sources will be protected.]

Remarks of Attorney General

- b. The SDWA requires that a State program, in the case of a program which provides for authorization by rule, include the prohibition that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources within the meaning of Section 1421(d)(2) (Section 1421(b)(1)(B)(ii)).

State Statutory and Regulatory Authority

Remarks of Attorney General

3. Prohibition of Movement of Fluid into a USDW

- a. The Federal program at 40 CFR 122.34(a)(1) requires State programs to prohibit any authorization of an underground injection by permit or rule, that causes or allows movement of fluid into a USDW, for Class I, II or III wells.

State Statutory and Regulatory Authority

Remarks of the Attorney General

- b. For Class IV or V wells, the Federal program requires State programs to prohibit any authorization by rule or permit that causes or allows movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation or may otherwise adversely affect the health of persons (40 CFR 122.34(a)(2)).

State Statutory and Regulatory Authority

Remarks of the Attorney General

- c. Corrective action must be imposed if any such movement is occurring from any Class I, II or III well. (40 CFR 122.34(b), and 122.44).

State Statutory and Regulatory Authority

Remarks of the Attorney General

- d. For Class V wells, the Director must take action in accordance with 40 CFR 122.34(c) and (d).

State Statutory and Regulatory Authority

Remarks of the Attorney General

4. Authority to Issue Permits or Rule

The SDWA requires State authority to issue permits or promulgate rules for underground injection not less stringent than regulations of the Environmental Protection Agency [Section 1422(b)(1)(A)(i) and 40 CFR Parts 122, 123, 124, and 146].

State Statutory and Regulatory Authority

- (1) By Permits, as applicable, by State Agency (§ 122.38)

Class I
Class II
Class III
Class IV
Class V

- (2) By rule, as applicable, by State Agency (§ 122.37 as amended)

- (3) Area permits (§ 122.39)

- (4) Emergency permits, if applicable (§ 122.40)

Remarks of Attorney General

[Include reference to other State agencies if not a part of this Statement.]

5. Authority to Condition Authorized Injection Activities

The SDWA requires State authority to condition permits in accordance with conditions applicable to all permits (40 CFR 123.7(a)(1) through (a)(17), §§ 122.41 and 122.42).

[Include process for establishing permit conditions for transfer, modification, and termination.]

State Statutory and Regulatory Authority

Remarks of Attorney General

6. Authority to Impose Compliance Evaluation Requirements

- a. The SDWA requires the State to have authority for entry in or onto a site or facility for the purpose of inspections (Section 1421(b)(1)(C) and 40 CFR 123.8(c)).

State Statutory and Regulatory Authority

Remarks of Attorney General

[Include comments on other investigations, record copying and procedures for insuring proper chain of custody of any records or samples.]

- b. The SDWA requires State authority to conduct inspections of facilities and activities subject to the program, and authority to require permittees and persons subject to authorization by permit or rule to conduct facility monitoring and reporting requirements in the manner prescribed by the Director (Section 1421(b)(1)(C) and 40 CFR 146.13, 146.23, and 146.33).

State Statutory and Regulatory Authority

Remarks of Attorney General

- c. The SDWA requires State authority to require permittees and persons subject to the underground injection control regulations to keep all records and make all reports required by the Director (Section 1421(b)(1)(C) and 40 CFR 122.7(j)(2), 122.41(b) and 123.8).

State Statutory and Regulatory Authority

Remarks of Attorney General

[Include record keeping by class of well; all application data, monitoring and other records (3 years); records on nature of fluids injected (5 years) from date of plugging and abandonment.]

7. Authority for Enforcement Requirements

- a. The State agency must have authority to immediately restrain any person from engaging in any unauthorized injection that is endangering or causing damage to public health or the environment (40 CFR 123.9(a)(1)).

State Statutory and Regulatory Authority

Remarks of Attorney General

[Include any other emergency response measures available to the State Agency(s).]

- b. The State agency must have authority to sue in courts of competent jurisdiction to abate any threatened or continuing violation of any program requirement or permit condition, without the necessity of prior revocation of a permit (40 CFR 123.9(a)(2)).

State Statutory and Regulatory Authority

Remarks of Attorney General

- c. The State agency must have authority to assess or sue to recover civil penalties and to seek criminal remedies (40 CFR 123.9(a)(3)).

(1) Civil penalties shall be recoverable in at least the amount of \$2,500 per day. For Class II wells, if applicable, civil penalties shall be recoverable for any program violation in at least the amount of \$1,000 per day.

(2) Criminal fines shall be recoverable in at least the amount of \$5,000 per day for willful violation. For Class II wells, if applicable, pipeline (production) severance shall be imposable against any person who willfully violates any program requirement.

State Statutory and Regulatory Authority

Remarks of Attorney General

- d. The State Agency must have authority to assess or seek civil penalties that are appropriate to the violation (40 CFR 123.9(c)).

State Statutory and Regulatory Authority

Remarks of Attorney General

[Include factors the State agency will consider in any assessment.]

- e. The State must provide for public participation in the State enforcement process by providing either (1) authority that allows an interested party to intervene as a matter of right in any civil or administrative action (40 CFR 123.9(d)(1)), or (2) assurance that the State agency will follow the procedures of 40 CFR 123.9(d)(2).

State Statutory and Regulatory Authority

Remarks of Attorney General

- 8. Authority for Public Participation in Permit Processing

The Federal program requires State authority to allow for adequate public involvement and participation in permit processing, including draft permits (if applicable), public comment, public hearing (if applicable), and response to comments on the final permit (§ 123.7(a)(18) through (21)).

State Statutory and Regulatory Authority

Remarks of Attorney General

- 9. Authority to Apply Technical Criteria and Standards for the Control of Underground Injection not less stringent than 40 CFR Part 146 (Section 1421(a)(1) and (b)(1)).

State Statutory and Regulatory Authority

Remarks of Attorney General

- 10. Classification of Injection Wells

- a. The State must have the authority to regulate all classes and types of wells as required for an underground injection control program (Section 1421(a)(1) and (b)(1), and 40 CFR 122.32).

State Statutory and Regulatory Authority

Remarks of Attorney General

- b. If the State program is not applicable to one or more classes of injection wells because there are no such wells within the State, the State:
 - (1) must have the authority explicitly banning new injections for that class (classes) not covered by the State program, or certify that such new injections cannot legally occur until the State has developed an approved program for that class (classes) (40 CFR 123.51(d)), and
 - (2) must demonstrate that there are no underground injections for those one or more classes of wells within the State. Reference should be made here in the Attorney General's Statement to the section in the program description where the State demonstrates that there are no underground injections within the State for the one or more classes of injection wells as discussed in (1) above.

State Statutory and Regulatory Authority

Remarks of Attorney General

NOTE: The State must submit a program to regulate both those classes of wells known to be within the State, and Class IV wells (40 CFR 122.36, 122.45 and 123.51(d)).

11. Elimination of Certain Class IV Wells

- a. the State must prohibit the construction of any Class IV well for the injection of hazardous waste directly into an underground source of drinking water (USDW) (40 CFR 122.36(a)(1)).

- b. the State must prohibit the injection of a hazardous waste directly into a USDW through a Class IV well that was not in operation prior to July 24, 1980 (effective date of Part 146 pg. 42472) (40 CFR 122.36(a)(2)).
 - c. the State must prohibit any increase in the amount of hazardous waste or change in the type of hazardous waste injected into a well injecting hazardous waste directly into a USDW (40 CFR 122.36(a)(3)).
 - d. the State must prohibit the operation of any Class IV well injecting hazardous waste directly into a USDW after six (6) months following approval of any UIC program for the State (40 CFR 123.7(c)(5), 122.36(a)(4), and 122.45).
 - e. the State must require the owners or operators of hazardous waste management facilities and all generators of hazardous waste to comply with the requirements of Section 122.45 (40 CFR 122.45).
- State Statutory and Regulatory Authority

Remarks of Attorney General

12. Authority to Identify Aquifers that are Underground Sources of Drinking Water (USDW) and to Exempt Certain Aquifers (40 CFR 123.7(c)(4), 122.35, 122.3, and 123.4(g)(8) and (9)).

State Statutory and Regulatory Authority

Remarks of Attorney General

13. Authority Over Federal Agencies and Persons Operating on Federally Owned or Leased Property

The SDWA requires that the State program must apply to underground injection by Federal agencies and to any underground injection by any other person whether or not occurring on property leased or owned by the United States (Sections 1421(b)(1)(D) and 1447(b)).

State Statutory and Regulatory Authority

Remarks of Attorney General

14. State Authority over Indian Lands

When the State asserts authority over activities on Indian lands, the State authority must demonstrate it is able to regulate those activities within the State, and give an appropriate analysis of the State Authority (§ 123.5(b)).

State Statutory and Regulatory Authority

Remarks of Attorney General

15. Authority to Revise State Underground Injection Control Programs (Section 1422(b)(1)(B) and 40 CFR 123.13).

State Statutory and Regulatory Authority

Remarks of Attorney General

16. Authority to make and keep Records and make Reports on its Program Activities, all as prescribed by the Environmental Protection Agency (Section 1422(b)(1)(A)(ii), 40 CFR 123.6(b)(3), 123.10, and 122.18).

State Statutory and Regulatory Authority

Remarks of Attorney General

17. The State must have authority to make available to EPA upon request, without restriction, any information obtained or used in the administration of the State program, including information claimed by permit applicants as confidential (40 CFR 123.10).

State Statutory and Regulatory Authority

Remarks of Attorney General

18. Certification of Status as Independent Legal Counsel

(To be used if State agency counsel has prepared the statement.)

The undersigned attorney(s) does (do) hereby certify that pursuant to (State law citation) and other laws of the State of (Name State), he/she is counsel for the (State agency(s)), having full legal authority to independently represent said (department, agency, board, etc.) in court in all matters pertaining to the State program described herein within the terms and conditions of 40 CFR 123.5.

19. Signature of the Attorney General

or

Independent Legal Counsel