UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: UIC Permit Appeals Procedures -- UICPG #49

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This memorandum is intended to provide a description of the procedure which will be used for appeals of Underground Injection Control (UIC) permits for states with EPA-administered UIC programs. All previous guidance on the matter is superseded, but this guidance is not retroactive. This guidance is just that--guidance--and may be altered from time to time to suit individual circumstances. It does not provide any person with any rights, procedural or substantive, not provided by EPA regulations or applicable statutes.

The Regulations

The Agency's regulations provide that the Administrator may, at his discretion, review any condition of a UIC permit. The procedure for requesting such review is summarized in the rules:

> (a) Within 30 days after a ... UIC ... final permit decisions has been issued under §124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within

> which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:
>
> > (1) A finding of fact or conclusion of law which is clearly erroneous, or
> >
> > (2) An exercise of discretion or an important policy consideration which the Administrator should, in his or her discretion, review.
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> (b) The Administrator may also decide on his or her initiative to review any condition of any ... UIC ... permit issued under this part. The Administrator must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.
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> (c) Within a reasonable time following the filing of the petition for review, the Administrator shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Administrator under paragraph (a) or (b) of this section shall be given as provided in §124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

40 C.F.R. §124.19(a)-(c)(1985).

In the preamble to the regulations, the Agency stated that the review power should be "sparingly exercised" and that "most permit conditions should be finally determined at the Regional level ...." 45 Fed. Reg. 33412 (May 19, 1980). The regulations envision a two-tiered procedure when UIC permit decisions are appealed to the Administrator. First, the Administrator determines whether the petition for review raises issues warranting review. If the Administrator determines that such issues are not raised, or that some of the issues raised do not warrant review under the regulation's standard for review, he or

she may deny all or part of the petition. On the other hand, if the Administrator determines that certain issues do warrant review under the regulation, he or she may grant the petition in whole or in part. In addition, because the Administrator retains ultimate decision authority over all UIC permits, the Administrator may ask that the permit writer reconsider permit conditions or decisions without granting review, if it is determined that full briefing of the appeal is unnecessary.

The second tier of a UIC permit appeal occurs only if review is granted by the Administrator under section 124.19(c). The second tier begins with public notice of the grant of review, and proceeds with a full briefing of the appeal, pursuant to section 124.19(c).

The regulations provide that a petition for review of a permit decision is a prerequisite to obtaining judical review of the final agency action. Section 124.19(e), (f).

Procedures for Appeals

The following steps generally should be followed in the future to implement section 124.19:

(1) When a permit decision is issued, all persons who filed comments on the permit, who requested notice of the permit decision, or who participated in the public hearing, should be notified of the decision by certified mail, return receipt requested. If feasible, a copy of the final permit should be sent to those notified of the decision; however, if this is infeasible, those who testified or commented on the draft permit should be given the Agency's response to comments or a summary thereof, when they are notified of the permit decision. See §124.17. These notices should all be mailed by the Region simultaneously with the transmittal of the permit to the permittee. This procedure will simplify calculation of the 30-day period for petitions.1/

1/ The 30-day time period will be computed in accordance with section 124.20. Therefore, three days will be added to the 30-day time period where service is completed by mail. The actual date of receipt of the notification indicated on the certified return receipt is immaterial; certified mail return receipt requested is used only to assure actual receipt of notice.

(2) The notice sent to interested persons when the final permit decision is reached must include a reference to the procedures for obtaining review (see §124.15(a)), and should specify that any petition for review must be filed with the Administrator at 401 M Street., S.W., Washington, D.C. 20460, within 30 days after the permit decision, and that this time period will be calculated in accordance with §124.20. This notice should instruct the petitioner to serve a copy of the petition on the Regional Administrator at the same time it is filed with the Administrator. If the petition for review has been filed by someone other than the permittee, the Regional Administrator shall notify the permittee of the receipt of the petition. This notice should also state that final UIC permit decisions are reviewable only in accordance with section 1448(a)(2) of the SDWA, and EPA rules, including §§124.13 and 124.19(e) and (f), regarding the prerequisites to judical review of UIC permit decisions. The prerequisites to judicial review include the obligation to raise all issues before EPA to preserve them on appeal, and the obligation to exhaust administrative remedies. Of course, any failure by EPA to notify any person of these or other obligations does not excuse that person (or anyone else) from complying with applicable requirements for judicial review.

(3) The Judicial Officer will send a copy of all §124.19(a) petitions for review to the Assistant Administrator for Water and the General Counsel.

(4) Petitions for review filed under §124.19(a) and received anywhere other than the Administrator's office should be forwarded immediately to the Administrator.

(5) The Judicial Officer will, upon receipt of a petition for review, ask the Region to prepare a response to the petition, and request that the Region transmit the relevant portions of the administrative record to the Judicial Officer. The response should state the Region's position on whether review of the permit determination is appropriate, with emphasis on whether the criteria in §124.19(a) are met and on the petitioner's eligibility to file the petition. The record generally will include a fact sheet, the permit, a draft permit, a hearing transcript or tape (if any), all relevant comments and written materials submitted to EPA, responses to

comment, and other information. Only the parts of the record that are relevant to the issues raised on appeal generally need to be transmitted to the Judicial Officer. A deadline of 45 days will ordinarily be set for such a response and record transmittal from the Region.

(6) The Region's response to the petition for review should be served simultaneously on all those notified of the permit decision using a certificate of service. The Region should also place its response in the public file. This will assure that all interested persons are fully apprised of the Agency's actions. Upon request, any person may be granted leave by the Judicial Officer to file a brief reply to the Region's response document. Such a reply is not provided as a matter of right because interested persons are afforded ample opportunity to express their views during the comment period, during a public hearing, and, by petitioning the Administrator for review and discussing alleged errors in that petition.

(7) Office of Drinking Water staff at Headquarters will assess the petition for review, the relevant portions of the Administrative record, and the Region's response. ODW staff, in consultation with OGC and the Judicial Officer will then prepare a draft recommendation and decision document for the Administrator; those draft documents will be put into final form by the Judicial Officer for the Administrator's review.

(8) The Administrator will then reach a decision as to whether the review should be granted or denied under section 124.19(c). Any decision granting review must, under the regulations, be transmitted to the public by the Region as provided in §124.10. A decision granting review must set forth a briefing schedule for the appeal and must explain that any interested person may file an amicus brief. Any denial of review, in part or in whole, should be served by the Judicial Officer simultaneously upon the person(s) requesting review, and to all persons notified of the permit decision, by certified mail return receipt requested. The Region shall supply the Judicial Officer the list of persons who should be served. A certificate of service should be used.

(9) In unusual circumstances, the Administrator may simply remand a UIC permit for reconsideration without granting or denying review if he or she determines that full "second tier" review under section 124.19(c) is unnecessary. If such a remand is ordered, the remand decision document should be served simultaneously upon all persons notified of the permit decision; a certificate of service should be used.

(10) When review is granted, and second tier review is completed, the Administrator may reach one of three decisions on the merits. First, the Administrator may find that the permit decision was correct, and may approve it as final. Second, the Administrator may find that the permit decision should be altered, and may order a change in the final permit without remanding it to the Region. Such an alteration of the final permit decision may be accomplished without a remand proceedings when the altered permit determination is supported by the administrative record and remand is not necessary. See §124.19(f)(1)(ii).

Third, the Administrator may decide on the merits that a remand to the Region is appropriate. In general, remand proceedings will include issuance of another draft permit, with public comment and a new final permit decision. The Administrator may specify in the remand order that an appeal of the new permit decision (reached after remand) is required in order for a person to exhaust administrative remedies. See §124.19 (f)(1)(iii). A remand order also may limit the issues to be reopened in the remand proceedings, to avoid unnecessary further discussion of issues already adequately addressed.

Stays of Contested Permit Decisions

Appealing a permit changes its effective date. If there were no public comments requesting a change in the draft permit the permit becomes effective immediately upon service of notice of the final permit issuance. If there were comments requesting a change in the draft, the permit is usually effective 30 days

after service of the notice. However, if the decision is appealed within the 30 day period, the entire permit is stayed while the Administrator decides whether to entertain the appeal. See 40 CFR 124.15(b). An existing well may continue to operate under the terms of the prior permit or authorization by rule.

If the petition for review is denied, the permit becomes effective immediately and is final Agency action. If granted, the contested conditions (and any others which are not severable) continue to be stayed pending final Agency action. The Regional Administrator has the responsibility of identifying the stayed provisions. 40 CFR 124.16(a)(2). An existing well may continue to operate under a combination of the conditions which are not stayed and prior permit or rule conditions. See 40 CFR 124.16(c).

If a permit for a new well is appealed, the entire permit is stayed pending decision on the merits of the appeal. Unless the operator has obtained an emergency permit under 40 CFR 144.34, he may not begin construction until the appeal is completed.

Separation of Functions and Ex Parte Contacts

The phrase "separation of functions" refers to a principle of administrative law which provides that an agency employee who acts as an advocate for one position at one point in an agency proceeding usually should not participate in judging the outcome of the final decision. The Administrative Procedure Act (APA) only codifies the separation of functions principle where a formal adjudication is required to be held by statute. 5 U.S.C. §554(d). Permit appeals in the UIC program pursuant to section 124.19 are not formal adjudications, and therefore the express separation of functions requirement in sectin 554(d) of the APA does not apply to such UIC appeals.

In addition, the APA's express prohibitions upon so-called "ex parte contacts"-- or off the record contacts between the decisionmaker and certain other persons regarding the decision at issue-- do not apply to UIC permit appeals, again because the Act's express prohibitions only apply to formal adjudications and formal rulemakings. 5 U.S.C. §§554(d), 557)d). See Hercules Inc. v. EPA, 598 F.2d 91, 124-27 (D.C. Cir. 1978); Environmental Defense Fund v. EPA, 598 F.2d 62, 74 (D.C. Cir. 1978). See also, Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1179 n. 151 (D.C. Cir. 1980); United Steel Workers of America v. Marshall, 647 F.2d 1189, 1212-13 (D.C. Cir. 1980).

However, while it is clear that the strict separation of functions and ex parte contacts requirements of the APA do not apply to UIC permit proceedings, it is desirable to avoid any appearance of impropriety, partiality, or unfairness. Therefore, although the Judicial Officer and Headquarters staff who are developing the decision documents for the Administrator may seek expert advice on how to interpret the administrative record from those who had been involved with the permit, they should not discuss any material or arguments which are not in the administrative record. In addition, the Administrator has issued a memorandum regarding off the record contacts with the decisionmaker. (Attached) Therefore, when an appeal has been filed, the Judicial Officer and others involved in processing the appeal should not discuss the substance of the appeal with interested persons outside the Agency. Furthermore, those who were involved in processing the original permit in the Regions may not draft or participate in drafting any of the decision documents presented to the Administrator in the appeal (although those Regional staff may assist in drafting the Region's response to the petition noted in paragraph 5 above).

Effect of This Guidance

Because this guidance is not intended to provide any person with any rights, substantive or procedural, not otherwise guaranteed by regulation or statute, any failure by EPA to comply with this guidance shall not be deemed prejudicial or reversible error.

Attachment