

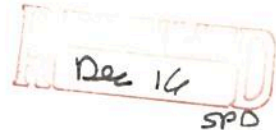
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: December 10, 1981

SUBJECT: Delegation Package - New Mexico Oil Conservation Division Underground Injection Control Program

FROM: Adelle V. Mitchell *Adelle Mitchell*
Chief, Water Supply Branch (6W-S)

TO: Phil Tate
Coordinator, Headquarters Review Committee (WH-550)



Region 6 has completed its review of the New Mexico Oil Conservation Division (OCD) application for primary enforcement responsibility of its Underground Injection Control (UIC) program over Class II wells. As you will note in the attached memorandum from Dick Whittington to Anne Gorsuch, Region 6 recommends approval of OCD's program. The Federal Register notice to delegate primary enforcement responsibility and our response to public comments concerning the program are attached to Mr. Whittington's memorandum. The Federal Register Typesetting Request Form, letters of clarification, revised Statement of Legal Authority, revised Memorandum of Agreement and extension agreement for the 90-day review period are attached to this memorandum.

The following elements were considered by the region in making the recommendation for approval:

1. The OCD primacy application, submitted September 15, 1981,
2. Responses by the State to the questions on the application presented by both the Headquarters Review Committee and the regional UIC work group, which are included in the letter of clarification and revised Statement of Legal Authority submitted November 6, 1981, and the letter of clarification and revised Memorandum of Agreement submitted December 8, 1981, and
3. Public comments received during the public comment period.

The Region 6 Division Directors and Regional Administrator have determined that the OCD program meets the requirements of the Safe Drinking Water Act. The UIC work group is available for any assistance you might require in meeting the February 1, 1982, extension to the statutory deadline.

If you have any questions concerning this material or the OCD program, please call me (FTS 729-2618) or Julie Coston (FTS 729-2774).

Attachments

Federal Register Typesetting Request Form
Letters of Clarification
Revised Statement of Legal Authority
Revised Memorandum of Agreement
Extension Agreement for the 90-day Review Period

cc: with attachments
Region 6 UIC Work Group
Myron Knudson (6W)



STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

BRUCE KING
GOVERNOR
LARRY KEHOE
SECRETARY

November 6, 1981

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(505) 827-2434

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EPA 6AWS
REGION VI

Dick Whittington, Regional Administrator
USEPA Region VI
1201 Elm Street
Dallas, Texas 75270

Dear Mr. Whittington:

Based upon Headquarters Comments dated November 3, 1981, on New Mexico's Primacy Application, the Division hereby submits the following clarification, point by point.

Issues

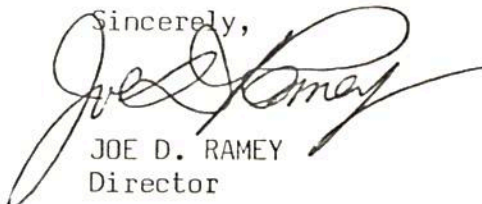
- (1) The legal certificate has been revised to satisfy the expressed concerns and is attached hereto. Please insert pages numbers 6 and 7 in place of those originally submitted September 15, 1981. Page 8 should now be deleted.
- (2) The Division is not requesting primary enforcement authority over Indian lands in New Mexico. The Division is agreeable to discussing an MOA with EPA Region VI concerning Indian lands.
- (3) The Division aquifer exemption program as agreed to in the MOA with Region VI meets the requirements of the Section 1425 guidance and 40 CFR Part 146.04. This issue evidently arises concerning the aquifer exemption discussion in the program description. I reiterate here that aquifer exemptions subsequent to program approval will be sent to EPA. Forty-five days will be provided for disapproval by the Administrator of any such exemption. Any such disapproval shall include the reasons therefor.
- (4) That the words higher quality as used in Rule 701 D 3 anticipate injection of naturally occurring produced brines which have TDS and major constituent levels less than the native fluids with no additives in the injected stream.
- (5) The word "variances" used as in the heading at "10" on page 26 of the application was used erroneously and should have stated "exemptions." The word(s) Variance(s), wherever found throughout the primacy application should be amended to read exemption(s).

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Letter to Dick Whittington
November 6, 1981

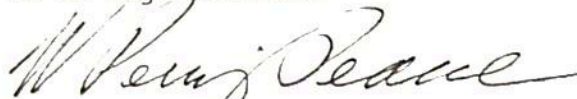
The end result of the exception process will be to permit non-standard activities, equipment, or processes which recognize unusual or unique conditions without endangering underground sources of drinking water.

The Division will accept the clarification in the two foregoing paragraphs in a revised MOA.

- (6) The primacy application fully discusses the manner in which the Division and the Geological Survey cooperate in UIC permitting and subsequent activities. In deferral, the requirements, actions, or policies which prevail are those which may be considered more rigorous, or equivalent but different, and which in a given situation will result in accomplishment of the common goal of protection of USDWS to an equal or greater degree.
- (7) For purposes of preventing endangerment to underground sources of drinking water under this program, the term "fresh water" and the term "USDW", as previously defined in the MOA, are equivalent.

Sincerely,

JOE D. RAMEY
Director

As to legal content:


W. PERRY PEARCE
Assistant Attorney General

Section 70-2-6 NMSA, 1978, it states in part:

"...it (Oil Conservation Division), shall have jurisdiction authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this Act or any other law of this State relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil and gas operations".

In addition to this general grant of authority over "all persons, matters or things, necessary or proper", Section 70-2-12 entitled "Enumeration of Powers" sets forth specifically the powers of the Division. Section 70-2-12 B. states in part:

"...Apart from any authority, expressed or implied, elsewhere given to or existing in the Division by virtue of this Act or the Statutes of this State, the Division is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz:

...

(14) "To permit the injection of natural gas or of any other substance into any pool in this State for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operations;

(15) "To regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of such water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the State Engineer;

The import of the statutory provisions is clearly that the State intends to control all underground injection activities within its boundaries and that the Legislature saw fit to provide the Oil Conservation Division with the appropriate authority to conduct such activities.¹

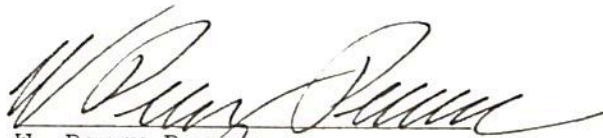
1. The case of Southern Union Company v. New Mexico Public Service Commission, 82 NM 405, 482 P.2d 913 (1971) held that at least under the terms of the Public Utility Act the word "person" did not include governmental entities. This decision applying to a different statute and a different jurisdictional agency is not determinative of the question of whether or not the State has jurisdiction over federal agency projects. The enabling and empowering sections of the Oil and Gas Act presently under consideration do not rely solely upon the word "person" in establishing the jurisdiction of the Oil Conservation Division. Although the word person or persons appears in the enforcement provisions of the Oil and Gas Act, such language does not disenable the Oil Conservation Division from acting in this case since the State could rely upon the broader scope of its enabling section.

In view of these authorities, underground injection projects conducted by Federal agencies are subject to State regulation.

The same logic and statutory authority should be applied to Part 2 of the question posed by 1421 (b) (1) (D) which is whether or not underground injections by any other person, whether or not occurring on property owned or leased by the United States are subject to control under the proposed underground injection plan. The State statutes set forth immediately above, 70-2-12B. (14) (15), clearly indicate jurisdiction in the State to control the injections. If the proposed injection project is conducted upon lands which are owned or leased by the United States and operated by a non-governmental entity, this analysis is once again applicable.²

The congress, as it has set forth in the Safe Drinking Water Act, has clearly indicated that this field has not been and was not intended to be pre-empted by the Federal Government. By allowing for the possibility of State primacy in the UIC program and requiring that federal agencies comply with state requirements, there is shown a contrary interest. That being the case, concurrent jurisdiction in the Federal and State Government lies and consequently the state program will apply to Federal agency projects or those conducted by any operator on federally owned or leased land.

In summary, there appears to be no legal impediment and indeed there are clear state mandates authorizing the Oil Conservation Division to exercise jurisdiction over Class II Wells operated directly by the United States on public lands, operated by private individuals on federal lands or operated by private individuals on private lands. Upon approval of the New Mexico Underground Injection Control Plan, the State of New Mexico intends to exercise such jurisdiction to the extent authorized.



W. Perry Pearce,
Assistant Attorney General
General Counsel to the Oil
Conservation Division


2. Proof that the Oil Conservation Division exercises such jurisdiction over operators on federal land is found in Robert G. Cox v. New Mexico Oil Conservation Commission et al (unreported decision in Case # 11,618 entered May 4, 1978) which decision affirmed the Order of the Commission and the affirmation of the order by the District Court of Eddy County. This commission order denied applicant Cox the right to produce a well, which had been drilled under Department of Interior Permit, for violation of the order of the Commission.

In addition, in the case of OCC v. Roger C. Hanks cause No. 29778 in the District Court of Eddy County, the Commission sought penalty against defendant for operating a salt water disposal on federal land in violation of the terms of Order No. R-4158 of the Commission. This cause was settled upon payment of a fine of \$11,000 and correction of all violations.

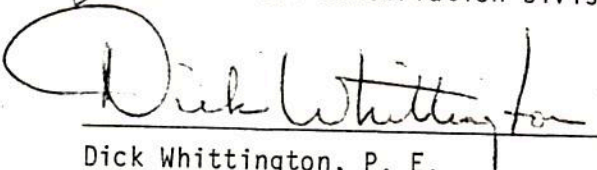
Agreement for Extension of the Underground Injection Control
90-Day Review Period

The New Mexico Oil Conservation Division (OCD) and the Environmental Protection Agency (EPA) agree to extend until February 1, 1982 the EPA review period for the OCD application for primary enforcement responsibility of the Underground Injection Control program submitted on September 15, 1981.

This extension is allowed by EPA guidance issued pursuant to Section 1425 of the Safe Drinking Water Act (F. R. 27336 Section 4.3 (a), May 19, 1981).


Joe D. Ramey, Director
New Mexico Oil Conservation Division

12/8/81
Date


Dick Whittington, P. E.
Regional Administrator
Region 6, Environmental Protection Agency

12/10/81
Date



STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

BRUCE KING
GOVERNOR
LARRY KEHOE
SECRETARY

December 8, 1981

POST OFFICE BOX 2088
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(505) 827-2434

Mr. Alan Levin, Director
State Programs Division
Office of Drinking Water (WH550)
US Environmental Protection Agency
401 M Street SW
Washington, DC 20460

Dear Mr. Levin: *Alan*

I had a productive meeting with Ed Wyatt of the USGS concerning the suggested changes (from the December 4 meeting) to the Memorandum of Understanding (MOU) between the USGS and the Oil Conservation Division. We agreed to most of the suggested changes. The MOU is currently being reviewed by both staffs. We expect the MOU to be final by February 1, 1982, or soon thereafter.

The attached Memorandum of Agreement (MOA) between EPA Region 6 and the Oil Conservation Division has been revised to address your concerns with Rules 1(b) and 701 (D)(3).

Concerning the two points requiring clarification; first, the Water Quality Control Commission and the State Engineer (who is an active member of the Commission) protect all water of less than 10,000 mg/l TDS for present and potential future use. (See WQCC regulations Part 3-101.)

Secondly, the items which you objected to having in the MOA concerning aquifer exemptions are not included in the attached MOA.

The EPA regional office and the Oil Conservation Division have agreed to the attached extension of the 90 day statutory review period.

Page 2
Letter to Mr. Alan Levin
December 8, 1981

I am confident that the Oil Conservation Division injection program meets the requirements of Section 1425 of the Safe Drinking Water Act. I trust that these additional clarifications will convince you of that also.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dick", written in dark ink.

R. L. STAMETS
Technical Support Chief

RLS/fd
enc.

UNDERGROUND INJECTION CONTROL PROGRAM FOR CLASS II WELLS
Memorandum of Agreement
Between
The State of New Mexico
and
The United States Environmental Protection Agency,
Region 6

I. General

This Memorandum of Agreement (Agreement) establishes policies, responsibilities, and procedures for the State of New Mexico Underground Injection Control Program for Class II injection wells (State Program) as authorized by Part C of Section 1425 of the Safe Drinking Water Act (Pub. L. 93-523, as amended) (SDWA or the Act).

This Agreement is entered into by the New Mexico Oil Conservation Division of the New Mexico Energy and Minerals Department and signed by Joe Ramey, Director of the Oil Conservation Division (the State) with the United States Environmental Protection Agency (EPA), Region 6 and signed by Dick Whittington, P. E., EPA Regional Administrator (EPA or Regional Administrator). After it is signed by the State and the Regional Administrator, this Agreement shall become effective the date the notice of State Program approval is published in the Federal Register.

This Agreement may be modified upon the initiative of the State or EPA. Modifications must be in writing and must be signed by the Director and the Regional Administrator. Modifications may be made by revision prior to the effective date of this Agreement or after the effective date by consecutively numbered and dated addenda attached to this Agreement.

This Agreement shall remain in effect until the State no longer has primary enforcement responsibility for the State program. EPA and the State may immediately renegotiate this Agreement upon learning that the State will become ineligible for Federal grant funding or that the level of Federal grant funding will become insufficient to carry out this Agreement. Beginning on the date that Federal grant funding to the State is cut-off or that Federal grant funds are no longer sufficient for full program operation, the State shall not be held responsible for those affected portions of this Agreement being renegotiated. However, this does not relieve the responsibility of the State under the Oil and Gas Act and ensuing regulations, or the EPA under the Safe Drinking Water Act (SDWA), to carry out and enforce the provisions of the acts.

When the State has a fully approved program, EPA will not take enforcement actions without providing prior notice to the State and otherwise complying with Section 1423 of the SDWA. Nothing in this Agreement shall restrict EPA's authority to take Federal enforcement action under Section 1423 of the SDWA.

The State shall administer the State Program in accordance with the program submissions, the SDWA, and the applicable regulations.

EPA shall promptly inform the State of the issuance, content, and meaning of Federal statutes, regulations, guidelines, standards, judicial decisions, policy decisions, directives, and any other factors which might affect the State Program.

The State shall promptly inform EPA of any proposed or pending modifications to laws, regulations, or guidelines, and any judicial decisions or administrative actions which might affect the State Program and the State's authority to administer the program. The State shall promptly inform EPA of any resource allocation changes (for example, personnel, budget, equipment, etc.) which might affect the State's ability to administer the program.

Prior to the use of an alternative test (a test not listed in Section d.3. of the Program Description) for mechanical integrity, the State shall submit a written request to the Regional Administrator and shall obtain his/her written approval. No approval shall be required for the State to conduct experimental test programs at any time.

An underground source of drinking water (USDW) shall be defined as an aquifer or portion thereof which supplies water for human consumption, or in which the ground water contains fewer than 10,000 mg/l TDS, and is not an exempted aquifer. An aquifer or portion thereof which would otherwise meet the definition of USDW and which is not otherwise exempt for the intended purpose under terms of the State Program may be exempted from protection under this program by the Director after public notice and opportunity for public hearing upon approval by the Regional Administrator. An aquifer or portion thereof may be exempted if it does not currently serve as a source of drinking water and it can not now and will not in the future serve as a source of drinking water because:

1. It is mineral, hydrocarbon or geothermal energy producing;
2. It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical;
3. It is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption;
or
4. It is located over a Class III Well mining area subject to subsidence or catastrophic collapse.

All aquifer exemptions subsequent to program approval shall be subject to public hearing and to approval by the Regional Administrator.

Exceptions under Rule 1(b) will be granted only if the applicant makes a showing satisfactory to the State that the exception will not result in a significant risk of movement of fluids into an underground source of drinking water. Additional safeguards, for example, monitoring, will be imposed on the operator when appropriate.

The term "higher quality" as used in Rule 701.D.3. is defined as "naturally occurring produced brines which have a total dissolved solids concentration and major constituent levels that are less than the native fluid in the injection zone and no substance has been added to the injection stream." Injection authorizations under Rule 701.D.3. will be avoided and, where necessary, such injection will be authorized with an aquifer exemption.

II. Responsibilities

A. Sharing of Information on Class II Operations.

All information and records obtained or used in the administration of the State Program, including all underground injection control (UIC) permit files, shall be available to EPA or its authorized representative upon request without restriction. Any information obtained from the State by EPA which is subject to a claim of confidentiality shall be treated by EPA in accordance with EPA regulations governing confidentiality (40 CFR Part 2).

EPA shall furnish to the State the information in its files which the State needs to implement the State Program, subject to EPA regulations governing confidentiality (40 CFR Part 2).

The State shall retain records used in the administration of the program for 5 years (the current year plus four) unless an enforcement action is pending. In that event, all records pertaining to such action shall be retained until such action is resolved.

B. State Reports on Class II Operations.

The State shall submit to the Regional Administrator a mid-year and an annual report on the operation of the State Program.

The State shall submit to EPA no later than 30 days after the first 6 months of the fiscal year a mid-year report of the first 6 months. This report shall include a detailed description of the State's implementation of its program, suggested program changes, a description of activities by program element, including summaries of monitoring, surveillance and enforcement programs, an estimate of expenditures by program element, and an account of all UIC related complaints reviewed by the State and action taken.

The State shall submit to EPA no later than 45 days after the end of the fiscal year an annual program report of the entire year with emphasis on the last 6 months. This report shall include a detailed description of the State's implementation of its program, suggested program changes, a description of activities by program element, including summaries of monitoring, mechanical integrity testing and inspection, corrective action, surveillance and enforcement programs, an estimate of expenditures by program element, an account of all UIC related complaints reviewed by the State and action taken, and an updated inventory of active underground injection operations.

The State shall submit all reports in the format requested by EPA. Report formats shall normally be furnished to the State prior to the award of grant funds and any substantive changes shall have the concurrence of the State.

C. Program Evaluation for Class II Operations.

EPA shall conduct an annual evaluation of the State Program using the State reports and requested information to determine State Program consistency with the program submission, the SDWA, the applicable regulations, and applicable guidance and policies. The evaluation will include a review of financial expenditures.

EPA shall submit a draft of the program evaluation to the State for their review and comment within 15 working days after the submission of the annual program report. The State shall have 15 working days to submit comments on the draft evaluation to EPA. EPA shall make recommendations to the State based on the program evaluation.

EPA may conduct a second evaluation during the year at their discretion.

D. Compliance Monitoring and Enforcement for Class II Operations.

The State shall enforce the State Program in accordance with the enforcement procedures outlined in the program submission. The State shall take timely and appropriate enforcement actions against any person in violation of any State Program requirement. Situations endangering human health will receive immediate and paramount attention.

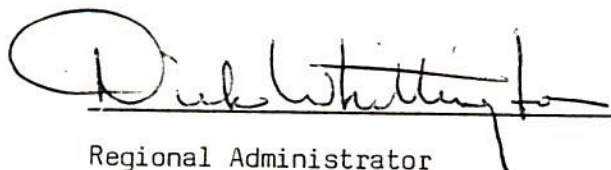
EPA shall conduct periodic site and activity inspections on Class II injection operations. The Regional Administrator will normally notify the State at least 7 days before any such inspection and allow opportunity for the State to accompany EPA on any such inspection.

OIL CONSERVATION DIVISION


Joe D. Ramey, Director

12/8/81
Date

ENVIRONMENTAL PROTECTION AGENCY, Region 6


Regional Administrator

12/10/81
Date