No. 18-5115

IN THE UNITED STATES COURT OF APPEALS
FOR SIXTH CIRCUIT

KENTUCKY WATERWAYS ALLIANCE; SIERRA CLUB,

Plaintiffs - Appellants,

v.

KENTUCKY UTILITIES COMPANY,

Defendant - Appellee.

On Appeal from the United States District Court for the Eastern District of Kentucky, Civil Action No. 5:17-292-DCR

BRIEF OF APPELLANTS KENTUCKY WATERWAYS ALLIANCE AND SIERRA CLUB

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Kentucky Waterways Alliance and Sierra Club certify that they are not subsidiaries or affiliates of a publicly owned corporation. There is not a publicly owned corporation, not party to the appeal, that has a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Kentucky Waterways Alliance and Sierra Club respectfully request oral argument to clarify the issues, respond to any questions, and otherwise assist the Court in the resolution of this appeal. The issues presented in this proceeding – regarding the ability of citizens to maintain an action to protect Herrington Lake from toxic coal ash pollution – are of significant jurisprudential and public concern.

JURISDICTIONAL STATEMENT

The Eastern District of Kentucky had jurisdiction pursuant to the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a), as well as 28 U.S.C. § 1331. The district court entered a final judgment on December 28, 2017. Plaintiffs-Appellants Kentucky Waterways Alliance and Sierra Club ("Citizen Groups") timely noticed their appeal on January 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

First, whether the district court erred in holding that citizen suit plaintiffs lack standing to challenge an "imminent and substantial endangerment" under the Resource Conservation and Recovery Act, based on a state agency's actions that do not satisfy the statute's diligent prosecution standard, and where the plaintiffs' members have suffered injuries that are redressable by relief that can be ordered by the court.

Second, whether this Court should exercise its discretion to hold that dismissal of an "imminent and substantial endangerment" claim under the doctrine of *Burford* abstention – as Defendant-Appellee sought in the alternative – would be improper, on remand, where timely and adequate state court review of the claim is not available and the claim would not interfere with any coherent state policy.

Third, whether the district court erred in holding that the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") requirements do not apply to the discharge of pollutants into a navigable water via a hydrologically connected groundwater conduit.

STATEMENT OF THE CASE

I. Unauthorized Discharge of Coal Ash Pollutants to Navigable Waters from E.W. Brown Station

Kentucky Utilities Company's ("KU's") E.W. Brown Station is a three-unit coal-fired power plant located in Mercer County, Kentucky, immediately adjacent to a dammed section of the Dix River known as Herrington Lake. Compl. ¶¶ 36-37, RE1, PageID#10. Coal combustion at E.W. Brown produces solid waste principally in the form of fly ash – fine particles that are carried up the smokestack by exhaust gases – and bottom ash – larger particles that fall to the bottom of the furnace. *Id.* ¶ 38, PageID#11. This coal ash waste contains a mix of toxic pollutants, including arsenic, selenium, lead, and cadmium, among others. *Id.* ¶ 43, PageID#12.

The plant's coal ash waste is disposed of, and/or stored, in two surface impoundments located on-site: the Main Ash Pond and the Auxiliary Ash Pond. *Id.* ¶¶ 38-41, PageID#11-12. The ash ponds receive coal ash waste from the plant's boilers through a wet sluice system and store the toxic wastewater within their embankments. *Id.* ¶ 39, PageID#11; 2012 Groundwater Assessment Plan 2-1,

RE16-4, PageID#251. By design, the ponds overflow into channels that discharge to Herrington Lake through a discrete, defined "outfall." Compl. ¶¶ 44-47, RE1, PageID#13. Discharges from this outfall are subject to a limited authorization set forth in the facility's NPDES permit, which is granted by a division of the Kentucky Energy and Environment Cabinet ("Cabinet") pursuant to delegated authority under the CWA, 33 U.S.C. § 1342(b). *Id.* ¶¶ 25, 44-47, PageID#8, 13.

The Main Ash Pond contains approximately 6 million cubic yards of coal ash waste that was generated by the plant between the 1950s and 2008. *Id.* ¶ 40, PageID#11. The Auxiliary Ash Pond has been the plant's active disposal site for coal ash wastewater since KU retired the Main Ash Pond in 2008. *Id.* Following the retirement, KU constructed a new dry ash landfill on top of the Main Ash Pond, a process which involved draining some of the water from the pond and installing a "cap" of compacted soil and a "geomembrane" liner to store the accumulated waste in place. *Id.* ¶ 41, PageID#11-12; Closure Plan 3-4, Figs. 1-4, RE16-2, PageID#224-25, 228-31. The Main Ash Pond itself has no bottom liner to separate its contents from the surrounding earth and groundwater. Compl. ¶ 40, RE1, PageID#11.

The ash ponds and other facilities at E.W. Brown discharge coal ash pollutants into Herrington Lake via groundwater. *Id.* ¶¶ 21, 42, 48-49, 65, PageID#7, 12-14, 17. KU's own sampling has identified two discrete locations –

HQ Spring (#046) and Briar Patch Spring (#057) – where pollutants from the ash ponds are detected discharging into HQ Stream, a surface water which flows into Herrington Lake.[1] *Id.* ¶¶ 49-51, PageID#14. These discharges occur via underground "karst" conduits through which groundwater flows, carrying with it coal ash pollutants from the E.W. Brown site to the adjacent surface waters. *Id.* ¶¶ 49-56, 63, PageID#14-15, 17; Ewers Memo, RE27-13, PageID#1367. "Karst" describes the limestone geologic system found beneath the E.W. Brown site. Compl. ¶ 63, RE1, PageID#17; Ewers Memo, RE27-13, PageID#1367. Karst is known for its unique hydrogeological properties which enable the formation of pipe-like conduits through the dissolving action of groundwater on rock. Compl. ¶ 63, RE1, PageID#17; Ewers Memo, RE27-13, PageID#1367. These groundwater pathways have been mapped by KU using dye trace studies. Compl. ¶ 51, PageID#14; *see also* 2012 Study 28-31, RE27-12, PageID#1294-97 (inferred groundwater routes based on recovery of dye from groundwater springs); 2011 Study 38-40, RE27-11, PageID#1198-200 (same). KU's sampling confirms the presence of coal ash pollutants in the springs, HQ Stream, and Herrington Lake. Compl. ¶¶ 52-56, RE1, PageID#14-15. Other facilities at the E.W. Brown site, including sluice channels and conveyances of coal ash wastewater, also discharge

[1] KU uses these numeric designations to identify particular groundwater springs in its reports. *See, e.g.*, 2012 Groundwater Assessment Plan, Fig. 4, RE16-4, PageID#269.

into Herrington Lake via karst conduits. Compl. ¶¶ 21, 65, RE1, PageID#7, 17. None of these discharges are authorized by KU's NPDES permit to discharge wastewater from the E.W. Brown Station. *Id.* ¶ 73, PageID#19.

II. Harm Resulting from Coal Ash Pollution in Herrington Lake

Coal ash contamination is widespread at the E.W. Brown site and inflicts harm on Herrington Lake and its fish and wildlife. *E.g.*, Compl. ¶ 67, PageID#17-18. Sampling conducted separately by KU, the Cabinet, and Citizen Groups has detected coal ash pollutants in groundwater, navigable waters, sediment, and fish. *Id.*; Lemly Decl. ¶¶ 8-9, 25-36, RE27-1, PageID#1042-43, 1047-55; Agreed Order ¶¶ 8-11, RE16-15, PageID#420-21; Notice of Violation, RE16-14, PageID#415-16; 2015 Groundwater Remedial Action Plan 2-5 to 2-7, RE16-1, PageID#162-64; 2012 Groundwater Assessment Plan 2-6 to 2-9, Tables 4-5, RE16-4, PageID#256-59, 282-89. These pollutants are present in concentrations known to produce toxic effects in aquatic organisms. Compl. ¶ 67, RE1, PageID#17-18; Lemly Decl. ¶¶ 8-9, 25-45, RE27-1, PageID#1042-43, 1047-78. Exposure to coal ash pollutants like arsenic, lead, cadmium, and others, can poison Herrington Lake fish and wildlife. Lemly Decl. ¶ 31, RE27-1, PageID#1053. Selenium exposure, which occurs through "bioaccumulation" of selenium in the aquatic food chain, can be fatal to

embryonic and young fish and produce skeletal deformities in developing fish.[2] Compl. ¶ 43, RE1, PageID#12; Lemly Decl. ¶¶ 16-18, RE27-1, PageID#1044-45. A study commissioned by Citizen Groups and published in a peer-reviewed scientific journal indicates a deformity rate in Herrington Lake fish that is 25 times greater than the reference condition, with 97% of deformed specimens exhibiting skeletal defects associated with toxic exposure to coal ash waste. Lemly Decl. ¶¶ 10, 41, RE27-1, PageID#1043, 1077.[3] In the studied population, mortality due to selenium exposure may exceed 25%. *Id.* ¶ 44, PageID#1077-78. A separate study by the Cabinet found fish tissue concentrations of selenium exceeded state standards in nine out of ten fish sampled. Notice of Violation 1-2, RE16-14, PageID#415-16; *see also* Lemly Decl. ¶ 42, RE27-1, PageID#1077 (selenium concentrations in fish tissue examined by Citizen Groups' expert uniformly exceeded the toxic threshold for mortality and reproductive failure).

Herrington Lake is a popular recreational destination for residents and tourists to swim, fish, and boat. Compl. ¶¶ 58-59, RE1, PageID#15; Dirksen Decl. ¶¶ 8-16, RE27-3, PageID#1092-94; Donnelly Decl. ¶¶ 9-26, RE27-4, PageID#1097-102; Shelley Decl. ¶¶ 7-16, RE27-5, PageID#1105-08. It is also the

[2] Bioaccumulation occurs when an organism absorbs a substance at a rate faster than the rate at which the organism excretes the substance. Lemly Decl. ¶ 15, RE27-1, PageID#1044.

[3] *See also* A. Dennis Lemly, *Selenium poisoning of fish by coal ash wastewater in Herrington Lake, Kentucky*, 150 Ecotoxicology & Envtl. Safety 49 (2018).

source of drinking water for tens of thousands of people, including many who live near E.W. Brown. Compl. ¶ 59, RE1, PageID#15. Moreover, impacts on the health of the Lake and its aquatic life diminish the enjoyment of Citizen Groups' members who use the Lake for recreation and treasure its aesthetic value. *Id.* ¶¶ 77, 84, PageID#20, 21; Dirksen Decl. ¶¶ 8-16, RE27-3, PageID#1092-94; Donnelly Decl. ¶¶ 9-26, RE27-4, PageID#1097-102; Shelley Decl. ¶¶ 7-16, RE27-5, PageID#1105-08.

III. Deficiency of Remedial Measures Undertaken by KU

Remedial measures proposed or undertaken by KU are inadequate to abate the coal ash contamination at E.W. Brown. *See* Compl. ¶¶ 50, 83, RE1, PageID#14, 21. Since 2011, KU has overseen a program of limited studies and corrective actions in connection with its permit to install and operate a landfill on top of the Main Ash Pond. *See id.* ¶ 50 & n.2, PageID#14. This has included reporting on the purported hydrogeology of the site and the presence of coal ash pollutants in groundwater and surface waters, as well as developing a so-called "Groundwater Remedial Action Plan," which sets forth certain, limited "remedial" measures. 2015 Groundwater Remedial Action Plan 4-1 to 6-2, RE16-1, PageID#171-83; 2012 Groundwater Assessment Plan 2-1 to 3-5, RE16-4, PageID#251-64; *see also* Compl. ¶¶ 50-52, 68, RE1, PageID#14, 18. Most of those measures have focused on reducing infiltration of water from above the

surface into coal ash buried beneath; none have directly addressed the ongoing flows of contaminated groundwater beneath the site that discharge via karst conduits to Herrington Lake. June 2015 Comments 4-9, RE16-10, PageID#380-85; June 2014 Comments 8-9, RE27-8, PageID#1135-36. Nor has KU undertaken any new dye trace studies or other assessments of the ongoing groundwater flows, despite acknowledging that its prior dye trace studies failed to identify the route of a critical groundwater pathway that flows through the base of the Main Ash Pond where the mixing of coal ash pollutants and groundwater occurs. Ewers Decl. ¶¶ 10-13, RE27-9, PageID#1142. The implication of this omission is that KU has failed to identify all of the pathways by which pollutants are discharged to Herrington Lake via groundwater. *Id.* ¶ 13, PageID#1142.

Citizen Groups have repeatedly advised Kentucky agencies of the coal ash contamination at E.W. Brown and the inadequacy of the remedial measures undertaken by KU. Citizen Groups submitted comments on the E.W. Brown landfill permit and groundwater assessment, explaining that that the site's coal ash ponds are discharging harmful pollutants into Herrington Lake via hydrologically connected karst conduits, and warning that installation of a coal ash landfill will exacerbate the problem. June 2014 Comments 4-6, 8-10, RE27-8, PageID#1131-33, 1135-37; December 2013 Comments 6-20, RE16-5, PageID#296-310; Boulding Report 5-28, RE16-6, PageID#317-40. The comments further explained

that KU's groundwater assessment inaccurately characterizes the nature and extent of the problem, in part because it inadequately mapped the underground pathways by which the contamination occurs. June 2015 Comments 4-11, RE16-10, PageID#380-87; June 2014 Comments 5-10, RE27-8, PageID#1132-37; December 2013 Comments 15-16, RE16-5, PageID#305-06; Boulding Report 11-14, 25-28, RE16-6, PageID#323-26, 337-40; *see also* Ewers Decl. ¶¶ 13-14, RE27-9, PageID#1142-43 ("[T]he Company's groundwater tracing studies do not fully identify all of the pathways by which pollutants entering the groundwater aquifer at the E.W. Brown site may be transported into Herrington Lake."). Moreover, Citizen Groups described the inadequacies of KU's remedial actions, in particular their failure to address the discharge of coal ash pollutants into Herrington Lake via karst conduits. June 2015 Comments 2015 4-11, RE16-10, PageID#380-87; June 2014 Comments 6-7, RE27-8, PageID#1133-34.

Similarly, Citizen Groups informed the Cabinet of deficiencies in a so-called "Corrective Action Plan" submitted by KU. *See* September 2017 Comments, RE27-7; *see also* Compl. ¶¶ 69, 83, RE1, PageID#18, 20-21. KU submitted the proposal in response to a 2017 Agreed Order that resolved an outstanding Notice of Violation issued by the Cabinet under state laws prohibiting harmful water pollution for KU's unlawful discharge of selenium to HQ Stream and Herrington Lake via HQ Spring and Briar Patch Spring. *See* Agreed Order, RE16-15,

PageID#418-34; Notice of Violation, RE16-14, PageID#414-16 (citing KRS 224.70-110, 401 KAR 10:031 Section 2). The Agreed Order required the company to submit two corrective action plans: one to assess the human health and ecological risks of selenium concentrations in Herrington Lake, identify the sources of selenium in the Lake, and consider remedial actions "if necessary"; and a second to document plans for compliance with federal wastewater and coal ash disposal regulations at the Auxiliary Ash Pond. Agreed Order ¶¶ 15-21, RE16-15, PageID#422-25. In comments to the Cabinet on the first plan, Citizen Groups questioned the need for a prolonged study whose results would merely reproduce the ample data already available documenting the contamination problem in Herrington Lake and its sources at E.W. Brown. September 2017 Comments 3-4, 10, 13, RE27-7, PageID#1115-16, 1122, 1125. Further, Citizen Groups pointed out that the plan contains numerous deficiencies, including that the ecological risk assessment relies on methods ill-suited for the study of bio-accumulation of selenium; the plan includes no groundwater studies to map the pathways by which the E.W. Brown site discharges pollutants to Herrington Lake via karst conduits; and too few samples are collected, particularly downstream of E.W. Brown and its discharges. *Id.* 5-10, PageID#1117-22. Finally, Citizen Groups criticized the lack

of transparency with which the Cabinet conducted the public comment process.[4] *Id.* 10-13, PageID#1122-25.

Finding KU's remedial measures inadequate to address the urgent, ongoing problem of coal ash contamination in Herrington Lake, Citizen Groups filed suit.[5] Compl. ¶¶ 68-69, 83, RE1, PageID#18, 20-21.

IV. Citizen Groups' Lawsuit

On July 12, 2017, Citizen Groups filed a citizen suit under 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(a), seeking declaratory and injunctive relief for KU's discharges of pollutants at the E.W. Brown site without authorization by a NPDES permit in violation of the CWA, 33 U.S.C. § 1311(a), and for KU having contributed or contributing to the handling, storage, treatment, transportation, or disposal of coal ash waste at the E.W. Brown site that may present an imminent and substantial endangerment to human health and the environment under RCRA, 42 U.S.C. § 6972(a)(1)(B). Compl. ¶¶ 70-85, RE1, PageID#19-21. Specifically, Citizen Groups seek cessation of unlawful discharges of coal ash pollutants from

[4] Citizen Groups did not file comments on the Auxiliary Ash Pond Corrective Action Plan because it involves only documentation of compliance measures already required by federal law. *See* Auxiliary Ash Pond Corrective Action Plan, RE16-19, PageID#558-61.

[5] At the time of filing the lawsuit, Citizen Groups had already reviewed both corrective action plans in draft form. *See* Agreed Order ¶ 15(A), (B), RE16-15, PageID#422-23 (proposed selenium plan due April 14, 2017; proposed Auxiliary Ash Pond plan due June 30, 2017).

the E.W. Brown site to Herrington Lake and HQ Stream via karst conduits, and full abatement of the endangerment associated with pollutants that have already migrated into groundwater, navigable waters, and sediments near the site. *Id.*, PageID#21-22 ("Prayer for Relief"). Citizen Groups further seek civil penalties to be assessed under 33 U.S.C. §§ 1319(d) & 1365, and 40 C.F.R. § 19.4, for violations of the CWA. *Id.* ¶ 75, Prayer for Relief, PageID#19, 21-22.[6]

On September 11, 2017, KU filed a motion to dismiss Citizen Groups' RCRA claim under Rule 12(b)(1) and their CWA claim under Rule 12(b)(6). Mot. 14-19, 25-38, RE16, PageID#118-23, 129-42. KU further argued for dismissal of Citizen Groups' RCRA claim under the doctrine of *Burford* abstention. *Id.* 20-25, PageID#124-29. The district court granted the motion on December 28, 2017, dismissing the RCRA claim on the ground that it is not redressable, such that Citizen Groups lack Article III standing. Op. 15-16, RE31, PageID#1785-86. Further, the district court dismissed the CWA claim on the ground that discharges of pollutants to navigable waters via hydrologically connected groundwater are not subject to the CWA's NPDES permit requirement. *Id.* 25, PageID#1795. The district court did not reach the issue of *Burford* abstention, but it noted that the

[6] Prior to filing the lawsuit, Citizen Groups notified KU of their intent to sue, as required by 33 U.S.C. § 1365(b)(1) and 42 U.S.C. § 6972(b)(2)(A). Compl. ¶¶ 7-10, 13-15, RE1, PageID#3-4, 5; October 2015 Notice Letter, RE1-2, PageID#32-37; November 2015 Notice Letter, RE1-1, PageID#25-30; October 2016 Notice Letter, RE1-3, PageID#39-45.

considerations that underlie the *Burford* abstention doctrine are similar to those underlying the court's dismissal of the RCRA claim for lack of redressability. *Id.* 16 n.1, PageID#1786.

STANDARD OF REVIEW

"Appellate review of a Fed.R.Civ.P. 12(b)(1) and/or 12(b)(6) motion[] is *de novo*." *Jones v. City of Lakeland, Tenn.*, 224 F.3d 518, 520 (6th Cir. 2000). "[T]h[e] Court must accept as true all material allegations contained in the complaint and liberally construe them in favor of the complaining party." *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 540 (6th Cir. 2004). The Court may dismiss a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Golden v. City of Columbus*, 404 F.3d 950, 959 (6th Cir. 2005) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). On a 12(b)(1) motion, the district court's factual findings are reviewed for clear error, while its application of law to facts is reviewed *de novo*. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996).

SUMMARY OF ARGUMENT

Over six million cubic yards of toxic coal ash are buried at the E.W. Brown site, in direct contact with flowing groundwater that discharges harmful pollutants from the ash into Herrington Lake and other nearby waters through subsurface

hydrological conduits. These discharges of pollution are unauthorized by E.W. Brown's NPDES permit, and a growing body of evidence indicates that toxic coal ash pollution from E.W. Brown is endangering water quality and aquatic life in Herrington Lake.

The district court erred in disregarding Citizen Groups' well-pleaded allegations and supporting evidence and dismissing their claims. First, Citizen Groups have asserted a well-pleaded "imminent and substantial endangerment" claim under RCRA and have demonstrated standing to pursue that claim on their members' behalf. The district court's dismissal of this claim relied on erroneous factual findings about KU's inadequate plan to continue studying Herrington Lake pollution instead of addressing it. The district court also misapplied this Court's precedent in *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), a case about *res judicata* and statutory preclusion, to the standing context. Under well-established Article III jurisprudence, the district court has the power to order relief that would redress Citizen Groups' injuries, by ordering KU to eliminate discharges of coal ash pollution to the Lake and take steps to promptly implement effective remedies for the harm that its pollution has already caused. Citizen Groups need show nothing further to establish redressability, and therefore the district court's decision must be reversed.

Nor is there any basis for *Burford* abstention from this claim, as the district court indicated it was inclined to do in the alternative. The Court should reach this issue in the interest of judicial economy and hold that *Burford* abstention is unwarranted here. No adequate or timely state court review is available, and Citizen Groups' RCRA claim does not collaterally attack a state permitting decision or otherwise interfere with efforts to establish a coherent state policy.

Finally, Citizen Groups have asserted a well-pleaded claim that KU's unauthorized discharges to Herrington Lake and adjacent waters through subsurface conduits violate the CWA. The district court applied an incorrect standard in granting KU's motion to dismiss, improperly relying on erroneous assertions about the "diffuse" nature of groundwater instead of taking as true at this stage Citizen Groups' allegations that KU is discharging from confined, discrete conveyances that are subject to the CWA. The district court also ignored plain statutory language, and decades of precedent, in holding that discharges that are conveyed through groundwater can never be subject to the CWA. The district court's decision must be reversed on this claim as well.

ARGUMENT

I. Citizen Groups Seek Relief Through Their "Imminent and Substantial Endangerment" Claim that Can Be Redressed by Federal Court Order.

A. Citizen Groups Have Asserted a Well-Pleaded "Imminent and Substantial Endangerment" Claim.

Citizen Groups allege that KU's handling, storage, treatment, transportation, and/or disposal of coal ash at E.W. Brown are contributing to conditions in Herrington Lake that may present an imminent and substantial endangerment to human health and the environment. Compl. ¶¶ 36-43, 48-69, 81, RE1, PageID#10-12, 13-18, 20. Available sampling data demonstrate that the ongoing contamination of Herrington Lake with coal ash pollution is likely having harmful toxic effects, such as developmental abnormalities and reproductive failure, on fish and wildlife. *Id.* ¶ 67, PageID#17-18; *see also* Lemly Decl. ¶¶ 9, 41-42, 44, RE27-1, PageID#1043, 1077-78. Although KU has taken some remedial steps at E.W. Brown in recent years, such as measures to reduce infiltration of water from above the surface into coal ash buried beneath, KU's actions have not addressed either the coal ash contamination already in Herrington Lake or the ongoing spread of contamination into the Lake and adjoining streams through groundwater flowing through coal ash beneath the site. Compl. ¶ 68, RE1, PageID#18; June 2015 Comments 4-9, RE16-10, PageID#380-85; June 2014 Comments 8-9, RE27-8, PageID#1135-36. KU and the Cabinet have also agreed on a plan for further

monitoring and study of Herrington Lake, but the plan – despite misleadingly being called a "Corrective Action Plan" – includes no commitment by KU to undertake any additional remedial actions at the site. Compl. ¶ 69, RE1, PageID#18; Lemly Decl. ¶¶ 9, 11, RE27-1, PageID#1043.[7]

RCRA allows citizens to bring suit against "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Congress added this provision to RCRA in 1984 to empower federal courts to grant affirmative equitable relief "to the extent necessary to eliminate any risks posed by toxic wastes." S. Rep. No. 98-284, at 59 (1983) (quoting *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982)); *see also Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2006); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 267 (3d Cir. 2005) ("*Honeywell*").

Courts interpret RCRA's "imminent and substantial endangerment" ("ISE") provision expansively. It is well established that the operative word in the

[7] As noted above, the Agreed Order required KU to submit two corrective action plans. *See supra* at 9-11. As used throughout the brief, "Corrective Action Plan" refers to the first of those two plans – which addresses selenium contamination in Herrington Lake – unless specified otherwise.

statutory phrase "may present an imminent and substantial endangerment" is "*may*." *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007); *Honeywell*, 399 F.3d at 258; *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992). The Supreme Court has held that a RCRA ISE plaintiff need not show that actual harm will occur immediately, as long as the risk of threatened harm is present now. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-86 (1996). And courts have held that "substantial" harm does not require precise "quantification of endangerment"; rather, it demands only a "reasonable cause for concern" that harm will result if remedial action is not taken. *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d at 1021. Courts do not require precise quantification of harm, but instead adopt a precautionary approach: "[I]f an error is to be made in applying the [ISE] standard, the error must be made in favor of protecting public health, welfare and the environment." *Honeywell*, 399 F.3d at 259; *see also Me. People's All.*, 471 F.3d at 288 (collecting cases). Moreover, "a private citizen suing under § 6972(a)(1)(B) [the ISE provision] could seek a mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste." *Meghrig*, 516 U.S. at 484. "[C]ourts have consistently held that" the ISE provision "is intended to give broad authority to the courts to grant all relief necessary to ensure complete protection of the public

health and the environment." *Little Hocking Water Ass'n v. E.I. DuPont de Nemours & Co.*, 91 F. Supp. 3d 940, 952 (S.D. Ohio 2015) (internal quotation marks and citation omitted).

Citizen Groups' complaint asserts a well-pleaded RCRA ISE claim under this body of precedent. KU did not argue otherwise in the district court below.

B. Citizen Groups Have Standing to Pursue Their Claim.

In addition, Citizen Groups made sufficient allegations (which, in response to KU's motion to dismiss, they also supported with affidavits) to demonstrate standing to pursue this claim. As non-profit membership organizations, Citizen Groups have standing to sue on behalf of their members in cases germane to their organizational interests when their members otherwise have standing to sue in their own right, and neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit. *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 489 (6th Cir. 2004) ("*ACLU*"); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("*Laidlaw*").

An individual has standing to sue in his own right where he "has suffered a concrete and particularized injury in fact that is fairly traceable to the defendant's actions and a favorable decision would redress his injury." *Am. Canoe Ass'n*, 389 F.3d at 540; *see also Laidlaw*, 528 U.S. at 181 (2000); *ACLU*, 375 F.3d at 489.

Environmental plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (citation omitted). Actual environmental harm from the defendant's conduct need not be shown; rather, "reasonable concerns" that harm will occur are enough. *Id.* at 183-84; *see also Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Plaintiffs need not prove to a scientific certainty that a defendant's waste caused the precise harm that they have suffered. *See, e.g.*, *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255, 263-64 (4th Cir. 2001); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3rd Cir. 1990). In addition, "[t]hreats or increased risk . . . constitute[] cognizable harm." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159-60 (4th Cir. 2000) (en banc).

Here, Citizen Groups have members who use and appreciate Herrington Lake and have a direct interest in its water quality and environmental health. Compl. ¶ 19, RE1, PageID#6. These members live near, and recreate in and around, Herrington Lake, including in the vicinity of E.W. Brown. *Id.* They reasonably believe that KU's past and present handling, storage, treatment, transportation, and/or disposal of coal ash at E.W. Brown may endanger their health, that of their families and communities, and their environment (including the

fish and wildlife they observe, consume, or enjoy). *Id.* These injuries are fairly traceable to KU's coal ash activities at E.W. Brown that have caused or contributed to contamination of Herrington Lake. *Id.* ¶ 21, PageID#7. They would be redressed by an order of the court requiring KU to take steps to abate the endangerment, *id.* ¶ 22, including steps to clean up contamination already in the Lake and stop further flows of contaminated groundwater into the Lake, neither of which are currently being undertaken by KU. *Id.* ¶¶ 68-69, PageID#18. These allegations are more than sufficient for Citizen Groups to establish their standing at the pleadings phase.[8]

As a supplement to these well-pleaded allegations, Citizen Groups submitted declarations from three of their members who are injured by KU's contamination of Herrington Lake with toxic coal ash. Dirksen Decl., RE27-3, PageID#1091-94; Donnelly Decl., RE27-4, PageID#1096-102; Shelley Decl., RE27-5, PageID#1104-08. All three own homes on or near Herrington Lake.[9] They enjoy fishing,

[8] The issues in this case are germane to Citizen Groups' mission to protect the environment and public health. *See* Compl. ¶¶ 17-18, RE1, PageID#5-6. In addition, neither the claims nor the relief sought in this litigation requires individual participation, and Citizen Groups do not seek private damages or injunctive relief that would be unique to any particular person. *See Neighborhood Action Coal. v. City of Canton, Ohio*, 882 F.2d 1012, 1017 (6th Cir. 1989) (granting standing to seek an injunction).

[9] Dirksen Decl. ¶ 2, RE27-3, PageID#1091; Donnelly Decl. ¶ 3, RE27-4, PageID#1096; Shelley Decl. ¶ 2, RE27-5, PageID#1104.

boating, swimming, and observing wildlife on Herrington Lake.[10] Each is concerned, however, by the impacts of coal ash pollution on water quality in Herrington Lake and on the fish and birds who live there.[11] These concerns harm the declarants by diminishing their enjoyment of Herrington Lake.[12]

These members' injuries are both fairly traceable to KU's contamination of Herrington Lake and redressable through a court ordering KU to abate the endangerment there. The causation requirements of traceability and redressability exist to "eliminate those cases in which a third party and not a party before the court causes the injury." *Am. Canoe Ass'n*, 389 F.3d at 542. In the environmental pollution context, "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Laidlaw*, 528 U.S. at 185-86. This Court has held that a defendant's claim that it is undertaking voluntary efforts to eliminate illegal pollution does not deprive injured citizen plaintiffs of the ability to seek redress

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[10] Dirksen Decl. ¶¶ 9, 14, RE27-3, PageID#1092, 1094; Donnelly Decl. ¶¶ 13-17, 23-24, RE27-4, PageID#1098-99, 1101; Shelley Decl. ¶¶ 7-9, RE27-5, PageID#1105-06.

[11] Dirksen Decl. ¶¶ 9, 14, RE27-3, PageID#1092, 1094; Donnelly Decl. ¶¶ 9, 18-22, 24-25, RE27-4, PageID#1097, 1099-102; Shelley Decl. ¶¶ 11-14, RE27-5, PageID#1106-07.

[12] Dirksen Decl. ¶¶ 10-16, RE27-3, PageID#1092-94; Donnelly Decl. ¶¶ 9, 18-22, 24-26, RE27-4, PageID#1097, 1099-102; Shelley Decl. ¶¶ 13-14, RE27-5, PageID#1107.

through injunctive relief. *See Am. Canoe Ass'n*, 389 F.3d at 543-44 (rejecting argument that citizen plaintiffs lacked redressability because defendant was pursuing a renovation project that it claimed would eliminate discharges of pollution).

Numerous courts hearing RCRA ISE claims have recognized that even when an administrative agency takes actions that the defendant claims address the risks of harm from pollution, injured citizen plaintiffs still have standing to seek redress through injunctive relief that goes beyond that ordered by the agency. *See Honeywell*, 399 F.3d at 257 (finding redressability where plaintiffs established "more than a substantial likelihood" that "injunctive relief will permanently end the endangerments . . . [or] at a minimum, . . . will materially reduce their reasonable concerns about those endangerments"); *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1209-10 (E.D. Wash. 2015) (finding redressability, notwithstanding U.S. EPA administrative consent order, where plaintiffs sought additional relief that would further reduce contamination); *Nat. Res. Def. Council, Inc. v. Cty. of Dickson, Tenn.*, No. 3:08-0229, 2010 WL 1408797, at *5 (M.D. Tenn. Apr. 1, 2010) (finding redressability, notwithstanding state agency actions, where plaintiffs alleged that agency actions "failed to eliminate the threat from . . . contamination"); *see also Little Hocking Water Ass'n*, 91 F. Supp. 3d at 955.

Applying these same principles here, Citizen Groups clearly established standing to pursue their RCRA ISE claim.

C. The District Court Erred in Holding That Citizen Groups' Injuries Are Not Redressable.

The district court held that the Cabinet's Agreed Order and KU's so-called "Corrective Action Plan" somehow wipe out Citizen Groups' standing to pursue injunctive relief in this case to redress the ongoing harms to their members from KU's contamination of Herrington Lake. Op. 15-16, RE31, PageID#1785-86. The district court's holding was based on both an erroneous characterization of the Corrective Action Plan and a misapplication of this Court's decision in *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), and it must be reversed.

1. The District Court Based Its Holding on Erroneous Findings of Fact.

The district court relied on two erroneous factual findings in support of its conclusion that, due to the Agreed Order and Corrective Action Plan, the injunctive relief requested by Citizen Groups was "not available to redress the alleged injuries." Op. 16, RE31, PageID#1786. First, the district court incorrectly found that the Corrective Action Plan "call[s] for extensive groundwater studies" at the E.W. Brown site. *Id.* 15, PageID#1785. This is untrue and unsupported by the record in this case. KU had previously performed a groundwater assessment at the site, which included two dye trace studies mapping some of the groundwater

pathways by which coal ash contaminants are conveyed to Herrington Lake and adjacent streams. 2012 Study, RE27-12, PageID#1263-365; 2011 Study, RE27-11, PageID#1157-261. However, although Citizen Groups identified serious deficiencies in these studies – in particular, that there are likely pathways by which contaminated groundwater is being discharged to Herrington Lake from the E.W. Brown site that the studies did not detect – the Corrective Action Plan does not include any new dye trace studies or similar groundwater assessments. Corrective Action Plan 17-39, RE16-16, PageID#459-81; *see also* June 2015 Comments 4-11, RE16-10, PageID#380-87; June 2014 Comments 5-10, RE27-8, PageID#1132-37; December 2013 Comments 15-16, RE16-5, PageID#305-06; Boulding Report 11-14, 25-28; RE16-6, PageID#323-26, 337-40.[13] Nothing in the Corrective Action Plan calls for KU to study further the pathways by which the E.W. Brown site discharges coal ash-contaminated groundwater to Herrington Lake and adjacent streams. The district court's finding otherwise is in error.

Second, the district court incorrectly stated that the Corrective Action Plan "require[s] KU to recommend remedial actions when the studies are complete." Op. 15, RE31, PageID#1785. That is not what the Plan actually requires. Although the Plan includes a chapter on "supplemental remedial actions," that

[13] The Agreed Order does require KU to continue its program of sampling groundwater at springs that was already in place. Agreed Order ¶¶ 4-5, 13, RE16-15, PageID#419, 422.

chapter states that an evaluation of potential remedies will only take place "if needed," without specifying the criteria by which such a "need" will be evaluated. Corrective Action Plan 40, RE16-16, PageID#482. Nor does the Plan establish a definite timeframe by which any evaluation of potential remedies might be completed, suggesting only that it may (or may not) be completed by "mid-2019." *Id.* 45, PageID#487. In other words, despite its name, the Corrective Action Plan imposes no certain requirements on KU to undertake any "corrective actions" at the E.W. Brown site or in Herrington Lake – or even evaluate whether to do so. *Id.* 40-45, PageID#482-87. At most, the Plan only holds open the possibility that the state agency, exercising its enforcement discretion, may decide to require KU to take additional remedial actions at an uncertain future date.

By contrast, Citizen Groups seek immediate injunctive relief through their RCRA ISE claim, based on existing data that already show that Herrington Lake in the vicinity of E.W. Brown is contaminated with selenium and other coal ash pollutants at levels exceeding the toxic thresholds for reproduction and survival of fish and wildlife. Compl. ¶ 67, RE1, PageID#17-18; Lemly Decl. ¶¶ 31-36, RE27-1, PageID#1053-55. Citizen Groups had requested that the district court, *inter alia*, order KU to "take all actions necessary to eliminate the endangerment to health and the environment in the vicinity of the E.W. Brown Station, including ordering that KU determine and implement the most expeditious, cost-effective,

and environmentally sound means to eliminate the ongoing migration of [coal ash] pollutants into groundwater, surface water, and sediments; and to fully abate the endangerment associated with [coal ash] pollutants that have already migrated into groundwater, surface water, and sediments near the site." Compl. 21-22, RE1, PageID#21-22 (Prayer for Relief (d)). While further proceedings before the district court would be necessary to determine the most appropriate remedy, potential further relief that the district court could order includes, for example, directing KU to excavate buried coal ash at the E.W. Brown site that is in contact with groundwater, and/or to implement an effective alternative that would prevent further contamination of the Lake. The district court could also direct KU to clean up coal ash pollution that is already in the Lake and harming fish and wildlife, such as by removing contaminated sediment wherever it is feasible to do so. None of these remedies is currently contemplated in the Corrective Action Plan, let alone required of KU.

Because the district court's findings that the Corrective Action Plan requires KU to undertake studies of contaminated groundwater flows and recommend remedies were clearly erroneous, they deserve no deference and must be disregarded. *See RMI Titanium Co.*, 78 F.3d at 1135 (factual findings on 12(b)(1) motion reviewed for clear error). The district court's conclusion that Citizen

Groups' requested injunctive relief is no longer "available" is based on incorrect factual premises.

2. The District Court's Holding is Legally Erroneous.

The district court's holding is also legally erroneous. Relying on *Ellis*, the district court held that the Agreed Order and the Corrective Action Plan somehow deprive Citizen Groups of standing, as a constitutional matter, to seek the relief that they requested. But *Ellis* did not even mention redressability or address Article III standing at all. The citizen plaintiffs in *Ellis* were also parties to a U.S. EPA enforcement action challenging the same violations of the Clean Air Act that the citizens sought to litigate in a separate lawsuit. 390 F.3d at 467-69. After the U.S. EPA action was resolved through a consent decree, this Court held that, under the Clean Air Act's statutory preclusion provision and common law *res judicata* principles, the plaintiffs were barred from seeking additional relief on claims that overlapped with the consent decree when those claims had been actually litigated and determined in the U.S. EPA lawsuit. *Id.* at 472-74. The Court also held that the consent decree's resolution of the *Ellis* plaintiffs' legal claims barred injunctive relief on post-decree violations, given that the consent decree provided prospective injunctive relief on those same claims. *Id.* at 475-76. At the same time, the Court noted that the plaintiffs were free to pursue any new legal claims that they had in a

new lawsuit, provided that it too was not barred by statutory preclusion (including the Clean Air Act's notice requirements). *Id.* at 476-78.

This case is fundamentally distinguishable. Unlike the plaintiffs in *Ellis*, Citizen Groups had no prior notice of the Cabinet's Agreed Order, let alone an opportunity to participate in any adjudicatory proceeding concerning it. There is thus no plausible claim that the Agreed Order precludes Citizen Groups' RCRA ISE claim under the *res judicata* doctrine – nor did the district court make such a finding. *See id.* at 473 (finding plaintiffs' claims precluded because they "had an opportunity to fully litigate the issues encompassed by the consent decree as intervenors in that law suit") (internal quotation marks omitted)).

Nor is there any statutory preclusion created by the Agreed Order, as the district court itself found. *See* Op. 12, RE31, PageID#1782. RCRA provides that an ISE claim is precluded by state agency action only if the agency is diligently prosecuting its own RCRA ISE lawsuit or has taken certain specified actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *See* 42 U.S.C. § 6972(b)(2)(C); *see also City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 657 (N.D. Ohio 1993) (holding that out-of-court state administrative enforcement action does not preclude ISE citizen suit because it is not an action that the statute specifies as preclusive, and collecting cases in accord); *accord Nat. Res. Def. Council, Inc.*, 2010 WL 1408797, at *3; *cf.*

Jones, 224 F.3d at 522 (holding that CWA citizen suit preclusion only applies to agency actions described by "the plain and unambiguous language" of the statute). By contrast, the Cabinet's Agreed Order was not the product of a RCRA lawsuit or CERCLA authority, but instead was issued under Kentucky law prohibiting harmful water pollution. Agreed Order ¶¶ 10-12, RE16-15, PageID#421-22. (citing KRS 224.70-110, 401 KAR 10:031). Even if the relief provided by the Agreed Order were equivalent to the relief sought by Citizen Groups through their RCRA ISE claim – which it is not – that would still in no way interfere with Citizen Groups' statutory rights to seek additional relief under RCRA to address the ongoing harms to their members from KU's contamination of Herrington Lake. *See, e.g.*, *Holt-Orsted v. City of Dickson*, No. 3:07-0727, 2009 WL 10679423, at *30-31 (M.D. Tenn. Mar. 25, 2009) (finding no statutory preclusion from state administrative action that defendant claimed was "functional equivalent" of an action specified in RCRA as preclusive).

Because Citizen Groups' RCRA ISE claim is not barred by *res judicata* or statutory preclusion, *Ellis* has no applicability to this case. This Court did not purport to interpret Article III standing requirements in *Ellis*, *see* 390 F.3d at 472-78, and the district court's suggestion to the contrary is erroneous. Although the district court relied on a decision from the Western District of Kentucky, *Little v. Louisville Gas & Elec. Co.*, 33 F. Supp. 3d 791, 803 (W.D. Ky. 2014), for the

proposition that courts "have applied *Ellis* in the standing context," Op. 14, RE31, PageID#1784, that case is also distinguishable.[14] Although superficially similar to this case, in that *Little* also involved an agreed order from a Kentucky state agency, the agreed order in *Little* required compliance with the same regulations that were at issue in the citizen suit. *Little*, 33 F. Supp. 3d at 800-01, 803. In this case, by contrast, the Agreed Order was issued under Kentucky law, not the federal RCRA standard at issue in Citizen Groups' claim, and it does not require the same types of relief that Citizen Groups are seeking. *See supra* at 9-11, 24-27. Accordingly, even if this Court agrees with the district court's holding in *Little*, it would not require dismissal of Citizen Groups' RCRA ISE claim in this case.

Moreover, to the extent that *Little* can be read to favor dismissal here, that case was wrongly decided.[15] As noted above, numerous courts hearing RCRA ISE claims have held that state agency actions that do not fully redress a citizen plaintiff's injuries do not bar the plaintiff from seeking further relief. *See supra* at 23 (citing *Honeywell*, 399 F.3d at 257; *Little Hocking Water Ass'n*, 91 F. Supp. 3d at 955; *Nat. Res. Def. Council, Inc.*, 2010 WL 1408797, at *5; *Cmty. Ass'n for*

[14] The district court also cited *Laidlaw*, 528 U.S. at 181, in support of its redressability holding. Op. 14, RE31, PageID#1784. However, the cited page of *Laidlaw* merely describes background law concerning redressability; it does not support the district court's misapplication of *Ellis*.

[15] The district court's decision in *Little* was appealed to this Court, but only on issues not relevant here. *See Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 697-98 (6th Cir. 2015).

Restoration of the Env't, Inc., 80 F. Supp. 3d at 1209-10). Similarly, this Court has held that a defendant's plans to undertake actions to eliminate pollution do not eliminate a citizen plaintiff's standing where the harms to plaintiffs remain ongoing. *Am. Canoe Ass'n*, 389 F.3d at 543-44.

Allowing such lawsuits to go forward is consistent with well-established Article III standing doctrine, the purpose of which is to assure that plaintiffs have a sufficiently concrete stake in the proceeding and that the appropriate parties are before the court who can be ordered to take action that would likely redress plaintiffs' harms. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (redressability requirement exists "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"); *see also* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 687-88 (1990) (redressability required "to show that the defendant was the cause of the problem so that it could be assured that a favorable court decision was likely to remedy it"). Here, Citizen Groups presented sufficient allegations and evidence to demonstrate that their members have suffered concrete injuries which an order to KU to abate the endangerment would be likely to redress. *See supra* at 19-24. Nothing further is required to show redressability.

Because the district court's holding that the Agreed Order and Corrective Action Plan somehow eliminate this standing is factually and legally erroneous, its dismissal of Citizen Groups' ISE claim must be reversed.

II. The Court Should Reach and Reject KU's *Burford* Argument.

Although not reached by the district court, KU also argued below that the district court should decline to hear Citizen Groups' RCRA claim under the abstention doctrine established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Court should reach this issue and find that *Burford* abstention is inapplicable here. Ruling on that legal question now is appropriate and would serve judicial economy, particularly because the district court's opinion indicated an apparent (and erroneous) inclination to abstain as an alternative basis for dismissal. Op. 16 n.1, RE31, PageID#1786 ("Because the Court finds that the plaintiffs lack standing . . . , it need not consider the defendant's *Burford* abstention argument. However, the Court notes that the *Ellis* court's concerns . . . are similar to the considerations of federalism and comity that underlie [*Burford*], and courts in this circuit have abstained under *Burford* in circumstances similar to those presented in this case.").

For the reasons that follow, the Court should hold that abstention on remand would be improper.

A. This Court Should Reach the *Burford* Issue.

The Court should exercise its discretion to rule on the *Burford* question in the interest of judicial economy. *See, e.g.*, *Kerr for Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 933 (6th Cir. 2017) ("[T]his Court will decide an issue a lower court does not reach . . . if doing so is in the interest of judicial economy." (internal quotation marks and citation omitted)). Here, the district court has already stated that its analysis under *Burford* favors dismissal. *See* Op. 16 n.1, RE31, PageID#1786 (noting that *Burford* analysis is "similar" to the analysis under which Citizen Groups' RCRA claim was dismissed and listing cases in which courts abstained under "similar" "circumstances"). Citizen Groups will "almost certainly appeal" an adverse decision by the district court and this Court would "eventually be called upon to address these very issues." *Kerr for Kerr*, 874 F.3d at 933. Moreover, the matter will be "clearly and thoroughly briefed," for the Court, *id.*, review of *Burford* abstention is *de novo*, *Saginaw Housing Commission v. Bannum*, 576 F.3d 620, 625 & n.3 (6th Cir. 2009), and the Court has discretion to decide the matter without a prior ruling by the district court. *See*, *e.g.*, *Dykhouse v. Corporate Risk Mgmt. Corp*, 1992 WL 97952, at *2-3 & n.6 (6th Cir. May 8, 1992) (ruling on *Burford* abstention even though it was raised for the first time on appeal).

For these reasons, the Court should resolve the *Burford* issue now.

B. *Burford* Abstention Does Not Apply Here.

Burford abstention has no place in this case, where Citizen Groups' ISE claim seeks adjudication of an exclusively federal law claim, without asking the court to second-guess any state agency's permitting or other regulatory decisions.

Burford abstention is "'an extraordinary and narrow exception'" to federal courts' duty to adjudicate claims within their jurisdiction. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (citation omitted). The doctrine allows a federal court to abstain when adjudication of a claim "'would be disruptive of state efforts to establish a coherent policy'" or interfere with "'difficult questions of state law'" on matters of substantial public concern, and state court alternatively provides a timely and adequate forum for the claim. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 361 (1989) (citation omitted); *see also Quackenbush*, 517 U.S. at 723, 726-28; *Saginaw Hous. Comm'n*, 576 F.3d at 625-26.

Burford is thus concerned only with "undue federal interference"; it "does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (citation omitted); *see also Saginaw Hous. Comm'n*, 576 F.3d at 625. "[O]nly rarely" is abstention favored under *Burford*'s requisite balancing of state interests against "the strong federal interest in having certain

classes of cases, and certain federal rights, adjudicated in federal court." *Quackenbush*, 517 U.S. at 728.

Burford is inapplicable here because "timely and adequate state-court review" is unavailable. *NOPSI*, 491 U.S. at 361. There is no state law claim that Citizen Groups could pursue, nor any state agency action that Citizen Groups could have asked a state court to review, that would initiate a proceeding equivalent to Citizen Groups' ISE claim. Although Citizen Groups may be able to seek administrative review of the approval of KU's Corrective Action Plan, such proceeding would not be based on an equivalent legal standard or allow Citizen Groups to seek relief equivalent to that available under RCRA. *See Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 694 (3d Cir. 2011) (no adequate state review of ISE claim where no state statute authorized state court to hear cause under RCRA standard).

Further, even if state review were adequate, it would not be timely. Because there is no state cause of action equivalent to a RCRA ISE claim, Citizen Groups do not have a timely opportunity to raise this issue in state court. *See Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 32 (1st Cir. 2011) (no timely state review available for ISE claim, citing state's persistent failure to address harms and uncertainty in record whether or when state court would hear claim).

Independently, *Burford* abstention would be improper because federal jurisdiction over Citizen Groups' purely federal ISE claim would not unduly "'disrupt[] . . . state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *NOPSI*, 491 U.S. at 361 (citation omitted). This Court has only endorsed *Burford* abstention in environmental cases when the claim attacks state-issued permits, because they require a federal court to wade into state law and second-guess state decision-making. Only under those narrow circumstances does federal adjudication unduly threaten to disrupt efforts to establish coherent state policy, making *Burford* abstention appropriate. For example, in *Coalition for Health Concern v. LWD, Inc.*, the plaintiffs asserted RCRA claims alleging unlawful operation without a permit, failure by the state to issue or deny required permits, and violations of Kentucky regulations. 60 F.3d 1188, 1190-92 (6th Cir. 1995).[16] The Court applied *Burford* because, "in light of" Kentucky having been delegated federal authority to administer its own RCRA program, their claims "do not and cannot arise in isolation from state law issues nor are they premised solely on alleged violations of federal law," and were "based

[16] Plaintiffs separately asserted an ISE claim "alleging that even if [the facility] met all the federal and state criteria for the safe operation . . . and were subsequently issued a permit, the facility would continue to pose 'substantial endangerment,'" 60 F.3d at 1192 – a theory Citizen Groups do *not* assert. The Court did not abstain from that claim under *Burford*, but instead dismissed such ISE theory as precluded by RCRA's express statutory bar against claims "to restrain or enjoin the issuance of a permit," 42 U.S.C. § 6972(b)(2)(D). 60 F.3d at 1192-93 (emphasis omitted).

on assertions that the Secretary has failed to apply or misapplied his lawful authority under Kentucky law." *Id.* at 1194-95. Analogously, in *Ellis*, Kentucky administered its own Clean Air Act permit program, and plaintiffs sued emitters for failing to obtain what they alleged were required emissions permits. 390 F.3d at 467-68, 478. The Court held that *Coalition for Health Concern*'s abstention reasoning "applie[d] with equal force" because the claims "boil[ed] down to allegations that the Kentucky agency 'failed to apply or misapplied [its] lawful authority under Kentucky law.'" 390 F.3d at 480-81 (citation omitted).[17]

By contrast, Citizen Groups' ISE claim neither requires a federal court to second-guess state environmental permitting decisions, nor otherwise implicates state law or policy. The contamination alleged in this case was never authorized, expressly or implicitly, by state authorities – nor do Citizen Groups contend it should have been. Citizen Groups simply call on the federal court to adjudicate their federal rights and decide whether, at a single site, an unpermitted discharge has created an ISE as a matter of federal law. And "a 'strong federal interest' attaches" to Citizen Groups' claim, since it implicates a "federal statute or federal right" and has been "brought under [a] congressional grant of . . . jurisdiction."

[17] *See also Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897, 898, 905 (6th Cir. 1983) (finding Michigan had "complex system" of RCRA permitting, and abstention proper because plaintiffs "request[ed] that [the court] review two provisions of state law which are an integral part of this complex system of review").

Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co., 621 F.3d 554, 558, 562 (6th Cir. 2010) (quoting *Quackenbush*, 517 U.S. at 728). Moreover, that Congress expressly delineated specific circumstances in which federal courts must dismiss ISE citizen suits, *see supra* at 29-30, further militates against a federal court refraining from exercising its jurisdiction when, as here, statutory preclusion does not apply. *See Chico Serv. Station*, 633 F.3d at 31; *cf. Coal. for Health Concern*, 60 F.3d at 1192-95 (dismissing ISE claim based on statutory preclusion; by contrast, abstaining under *Burford* from claims asserting permit violations under separate heading).

Federal courts have adjudicated ISE claims in cases like this, rejecting the same *Burford* arguments that KU advanced in the district court below. In a Tennessee case where a landfill was polluting groundwater and plaintiffs asserted only ISE claims, then-Chief Judge Campbell held that abstention would be improper because plaintiffs "d[id] not challenge the States' permit process" and their "claims relate[d] directly to contamination of their water sources in violation of federal law and remedying current contamination as required by federal law." *Nat. Res. Def. Council, Inc.*, 2010 WL 1408797, at *7 (internal quotation marks and citation omitted) (distinguishing cases "involv[ing] State permit decisions under state law," whereas "Plaintiffs' [ISE claims] d[id] not challenge the States' permit process" (internal quotation marks and citation omitted)). Other courts of

appeals have also refused to abstain from ISE claims in these circumstances. *See, e.g.*, *Raritan Baykeeper*, 660 F.3d at 692-94 (ISE claims at issue "d[id] not amount to a 'collateral attack' on [a state] decision"); *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 503-07 (7th Cir. 2011) (reviewing Sixth Circuit precedent and noting that this Court's decisions regarding "improper collateral attacks on permitting decisions" "are easily distinguishable" from cases involving ISE claims that do not challenge state permitting decisions); *see also Chico Serv. Station*, 633 F.3d at 33-34.

Thus, *Burford* abstention would be improper in this case.

III. Citizen Groups Have Asserted a Viable Claim of Unauthorized Discharge in Violation of the CWA.

The CWA prohibits "the discharge of any pollutant" unless authorized, in relevant part, by a NPDES permit, 33 U.S.C. § 1311(a), forbidding "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). This scheme creates "a default regime of strict liability" for discharges of pollutants not authorized by a NPDES permit. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015). Any affected citizen may commence a civil action against a defendant "who is alleged to be in violation of . . . an effluent standard or limitation" under the CWA citizen suit provision. 33 U.S.C. § 1365(a)(1). Such violations include any discharge of a pollutant not authorized by a NPDES permit. *Id.* §§ 1311(a), 1342, 1365(f)(6). Under these provisions, a party without an

authorizing NPDES permit violates the CWA when the following elements are present: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

Citizen Groups pleaded sufficient facts to state a claim that KU unlawfully discharges coal ash pollutants from the E.W. Brown site into Herrington Lake. The Main Ash Pond, the Auxiliary Ash Pond, and other facilities at E.W. Brown are sources of coal ash waste that discharge pollutants into HQ Stream and Herrington Lake, which are navigable waters. Compl. ¶¶ 21, 65, RE1, PageID#7, 17. These discharges occur via underground karst conduits through which groundwater flows, conveying coal ash pollutants. *Id.* ¶¶ 49-56, 63, PageID#14-15, 17; Ewers Memo, RE27-13, PageID#1367.[18] Further, the discharges are not authorized under E.W. Brown's NPDES permit. Compl. ¶¶ 44-47, RE1, PageID#13. However, the district court dismissed this well-pleaded claim, holding that "the discharge of pollutants to a navigable water via hydrologically connected groundwater is not subject to the CWA's NPDES permit requirement." Op. 25,

[18] *See also supra* at 4 (noting that karst is known for unique hydrogeological properties that enable the formation of pipe-like conduits).

RE31, PageID#1795. The district court's holding is erroneous and must be reversed.

Citizen Groups have pleaded a valid CWA claim under either of two theories. First, Citizen Groups pleaded sufficient facts to establish that the karst conduits are "point source[s]" under 33 U.S.C. § 1362(14) that are discharging pollutants. The district court's rejection of this theory was in error because it improperly relies on factual claims about the "nature" of groundwater that contradict the allegations in the pleadings. Alternatively, Citizen Groups' allegations establish that the coal ash ponds and other facilities at the E.W. Brown site are "point source[s]" that are discharging pollutants. The district court's objection that discharges "via hydrologically connected groundwater" are "inconsistent with the text and structure of the CWA" was in error because, contrary to the plain language of the statute, it mistakenly reads exceptions into the CWA's prohibition against unpermitted point source discharges. Under either of the two theories, the pleadings state a valid claim of unlawful discharge.[19]

[19] Citizen Groups have standing to pursue their CWA claim, for similar reasons as they have standing to pursue their RCRA claim. *See supra* at 19-24; *see also* Compl. ¶¶ 17-22, RE1, PageID#5-7; Dirksen Decl., RE27-3, PageID#1091-94; Donnelly Decl., RE27-4, PageID#1096-102; Shelley Decl., RE27-5, PageID#1104-08. KU did not challenge Citizen Groups' standing on this claim below, and the district court did not address it, so Citizen Groups do not discuss it further here.

A. The Karst Conduits Beneath the E.W. Brown Site are Point Sources that Discharge Pollutants.

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Citizen Groups pleaded sufficient facts to establish that the karst conduits beneath the E.W. Brown site are "point source[s]" under the statute that are discharging pollutants. But the district court rejected this theory on grounds that "[g]roundwater is, by its nature, 'a diffuse medium' and not the kind of discernible, confined and discrete conveyance contemplated by the CWA's definition of 'point source.'" Op. 21, RE31, PageID#1791 (citing *26 Crown Assocs. v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *8 (D. Conn. July 11, 2017)). This reasoning, however, is in error because it improperly relies on assertions about the "nature" of groundwater that contradict allegations in the complaint. *See Wesley v. Campbell*, 779 F.3d 421, 427-28 (6th Cir. 2015) (allegations should be "accepted as true" at motion to dismiss stage).

The karst conduits beneath E.W. Brown are "point source[s]" under 33 U.S.C. § 1362(14) that are discharging pollutants. Citizen Groups allege that "a multitude of interconnected groundwater flows" in the karst beneath E.W. Brown "channel[s] [coal ash] pollutants away from the ash ponds and other sources at the

site, and ultimately discharge[s] those pollutants into surface waters." Compl. ¶ 63, RE1, PageID#17. In particular, Citizen Groups identified two points, HQ Spring (#046) and Briar Patch Spring (#057) – each named and numbered in KU's reports – where karst conduits discharge into HQ Stream, which flows into Herrington Lake.[20] *Id.* ¶¶ 49-51, PageID#14. The approximate routes of these groundwater flows have been mapped by KU using dye trace studies. *Id.* ¶ 51, PageID#14; *see also* 2012 Study 28-31 & Fig. 5.0, RE27-12, PageID#1294-97; 2011 Study 38-40 & Map 5.0, RE27-11, PageID#1198-200. Moreover, KU's groundwater sampling confirms the presence of coal ash pollutants in the springs, HQ Stream, and Herrington Lake.[21] Compl. ¶¶ 52-56, RE1, PageID#14-15. These facts, accepted as true, establish that the karst conduits that discharge coal ash pollutants from the E.W. Brown site into surface waters are "discernible, confined and discrete conveyance[s]." 33 U.S.C. § 1362(14); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'"); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373

[20] These two springs are likely not the only points at which coal ash pollutants are discharged from karst conduits into Herrington Lake. *See* Compl. ¶ 42, RE1, PageID#12; Ewers Memo, RE27-13, PageID#1368 (additional springs likely discharge coal ash pollutants "beneath the lake").

[21] Separate studies by KDOW and Citizen Groups independently confirm the presence of coal ash contaminants in Herrington Lake. *See supra* at 4-5.

(10th Cir. 1979) ("The concept of a point source . . . embrace[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.").

The district court erred in finding that the "'diffuse'" "nature" of groundwater precludes the karst conduits from meeting the statutory definition of a "point source." The district court took this mistaken proposition from *26 Crown Associates*, which stated that "[i]t is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil." Op. 21, RE31, PageID#1791 (quoting *26 Crown Assocs.*, 2017 WL 2960506, at *8). This assumption about groundwater, however, is contradicted by the specific allegations in Citizen Groups' complaint that the karst beneath E.W. Brown hosts discrete, confined groundwater flows that "channel" coal ash pollutants to nearby surface waters. Compl. ¶ 63, RE1, PageID#17; Citizen Groups' expert explained that the dissolving action of groundwater on karst forms "conduits" or "pipes." Ewers Memo, RE27-13, PageID#1367. These facts differentiate this case from *26 Crown Associates*, which did not involve karst.[22] *Compare 26 Crown Assocs.*, 2017 WL 2960506, *with Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d

[22] Moreover, *26 Crown Associates*' statements regarding the nature of groundwater rely on dubious authority: in particular, what appears to be an on-line primer for general audiences on basic water science. *See* 2017 WL 2960506, at *8 n.4 (citing U.S. Geological Survey, The Water Science School, Groundwater Discharge – The Water Cycle, *available at* https://water.usgs.gov/edu/watercyclegwdischarge.html).

775, 788, 818-19 (M.D. Tenn. 2017) (karst groundwater may flow through "[l]arge conduits or interconnected conduit systems" that flow through "tubular tunnels"). Moreover, the district court was required to take Citizen Groups' allegations as true; instead, it erroneously relied on factual statements from a different (and distinguishable) case. *See Thomas v. Noder-Love*, 621 Fed. App'x. 825, 828 (6th Cir. 2015) (on a Rule 12(b)(6) motion, a court may consider facts outside of those alleged in the complaint "only . . . if it does not require the court to 'weigh the evidence'" (quoting *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994))).

The district court further erred in asserting that discharges from the karst conduits constitute "non-point source pollution," *see* Op. 21, RE31, PageID#1791, because that term inaccurately characterizes the discharges alleged in the complaint. "Nonpoint source pollution," a term which is not expressly defined in the CWA, refers to "all water quality problems not subject" to NPDES requirements. *Consumers Power*, 862 F.2d at 582. This category is understood to include pollution that "does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." Op. 21, RE31, PageID#1791 (quoting *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 220 (2d Cir. 2009)). By contrast, the complaint alleges that coal ash wastewater is conveyed through underground karst conduits until discharged into navigable waters at

discrete locations, two of which are identified in the pleadings. *See S. Fla. Water Mgmt. Dist.*, 541 U.S. at 106 (noting that CWA expressly defines such "conveyances" as point sources). These discharges do not result from land runoff, precipitation, atmospheric deposition, or percolation. In determining that they constitute nonpoint source pollution, the district court erred in disregarding the facts alleged by Citizen Groups. *See Wesley*, 779 F.3d at 427-28.

Citizen Groups have asserted a valid claim that KU is discharging in violation of the CWA. *See Consumers Power*, 862 F.2d at 583. The allegations in their complaint establish that karst conduits at E.W. Brown are "point source[s]" under 33 U.S.C. § 1362(14). The district court lacked grounds for finding that the alleged discharges are "diffuse" or constitute nonpoint source pollution. Therefore, this Court must reverse the district court's decision.

B. The Coal Ash Ponds and Other Facilities at the E.W. Brown Site are Point Sources that Discharge Pollutants.

The coal ash ponds and other facilities at E.W. Brown are also point sources discharging pollutants subject to the CWA. However, the district court held that because these point sources discharge to navigable waters "via hydrologically connected groundwater," subjecting them to CWA requirements would be "inconsistent with the text and structure" of the statute. Op. 22, RE31, PageID#1792. This reasoning, however, is erroneous because it runs afoul of the text of the CWA.

The Main Ash Pond and Auxiliary Ash Pond are "discernible, confined and discrete" surface impoundments designed to hold accumulated coal ash waste and are, therefore, point sources. 33 U.S.C. § 1362(14); Compl. ¶¶ 39-41, RE1, PageID#11-12. The same is true of the sluice system that channels coal ash wastewater across the E.W. Brown site through a network of conveyances, as well as other on-site facilities where coal ash is handled, stored, treated, and/or disposed. Compl. ¶ 39, RE1, PageID#11. All of these point sources discharge pollutants via karst conduits to HQ Stream and Herrington Lake. Compl. ¶¶ 21, 42-43, 48-57, 63-65, RE1, PageID#7, 12-15, 17; Ewers Memo, RE27-13, PageID#1367. These facts, accepted as true, establish that the ash ponds and other facilities at E.W. Brown are "conveyance[s]" that are discharging pollutants subject to the CWA. 33 U.S.C. § 1362(12), (14).[23]

[23] Numerous courts have recognized that coal ash ponds and other industrial waste impoundments that discharge pollutants to navigable waters are point sources. *See, e.g.*, *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (mine runoff capture system); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (sediment basins); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979), *rev'd on other grounds*, 449 U.S. 64 (1980) (coal slurry ponds); *Earth Sciences, Inc.*, 599 F.2d at 374 (groundwater seeps from sump pit); *Tenn. Clean Water Network*, 273 F. Supp. 3d at 828-29 (coal ash pond discharges via groundwater); *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017) (coal ash pond discharges via groundwater); *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 443-44 (M.D.N.C. 2015) (coal ash pond discharges via groundwater); *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds collecting waste from landfill). Courts have

The district court's rejection of this theory is inconsistent with the plain language of the CWA. The statute defines "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). This definition is plainly broad, applying "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion) (quoting *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976)). Yet, the district court read into the statute a blanket exception to § 1362(12) for discharges via hydrologically connected groundwater – including, in this case, karst conduits – asserting that CWA regulation of such discharges would be "inconsistent with the [statutory] text." Op. 22, RE31, PageID#1792. But it is the district court's reading itself that is contrary to the CWA's plain language. *See Rapanos*, 547 U.S. at 743 (plurality opinion) ("The [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant

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similarly recognized that networks of conveyances that discharge pollutants to navigable waters are point sources. *See, e.g.*, *W. Va. Highlands Conservancy, Inc. v. Huffman*, 588 F. Supp. 2d 678, 687-88 (N.D.W. Va. 2009), *aff'd*, 625 F.3d 159 (4th Cir. 2010) (pipes, ditches, and channels that discharged pollutants at acid mine drainage treatment sites); *Earth Sciences, Inc.*, 599 F.2d at 374 ("We have no problem finding a point source here. The undisputed facts demonstrate the combination of sumps, ditches, hoses and pumps is a circulating or drainage system to serve this mining operation.").

to navigable waters.'" (emphasis in original) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A))); *see also Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 760-65 (9th Cir. 2018) ("indirect" discharges from point sources via groundwater violated CWA).

Further, the concerns that animate the district court's countertextual interpretation of the statute are speculative and disregard Citizen Groups' factual allegations. First, regulation of the discharges alleged here will not result in "any non-point-source pollution (such as ordinary surface run-off from the land into navigable waters) . . . invariably be[ing] reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants." Op. 22, RE31, PageID#1792 (quoting *26 Crown Assocs.*, 2017 WL 2960506, at *8). This hypothetical scenario does not fit the facts of this case; the alleged discharges here are not nonpoint source pollution of any kind, let alone "ordinary surface run-off." *See supra* at 46-47. The complaint alleges a direct causal chain that reaches from point sources discharging from the E.W. Brown site to adjacent navigable waters through hydrologically connected groundwater.[24] Compl. ¶ 51,

[24] Ordinary Article III standing principles apply here. *See Haw. Wildlife Fund*, 881 F.3d at 765 n.3. In satisfaction of those requirements, Citizen Groups have pleaded a "fairly traceable" connection between discharges of pollutants from the coal ash ponds and other point sources at the E.W. Brown site and the harms experienced by Citizen Groups' members. *See* Compl. ¶¶ 20-22, 51, 77, 84, RE1, PageID#6-7, 14, 20, 21.

RE1, PageID#14. For the same reasons, application of the CWA to KU's unauthorized discharges would not require the Court to "'effectively read the 'point source' requirement out of the Clean Water Act.'" Op. 23, RE31, PageID#1793 (quoting *26 Crown Assocs.*, 2017 WL 2960506, at *9). On the contrary, Citizen Groups identify several specific point sources and provide extensive factual allegations establishing that they are unlawfully discharging pollutants. Thus, at a minimum, the facts alleged in the pleadings, taken as true, *see Wesley*, 779 F.3d at 427-28, do not support the speculative concerns underlying the district court's alternative reading of the statutory text.

By contrast, the district court's countertextual reading would effectively exempt from regulation a wide range of point source discharges that courts have held violate the CWA. *See Rapanos*, 547 U.S. at 743 (plurality opinion) ("from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a)" (emphasis in original)); *see also Haw. Wildlife Fund*, 881 F.3d at 760-65 (discharge through groundwater); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152-53 (9th Cir. 2010) (discharge through stormwater drain system); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188-89 (2d Cir. 2010) (discharge through air); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005) (discharge through 2.5-mile tunnel); *Concerned*

Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994) (discharge from manure spreading vehicles through fields); *Sierra Club*, 620 F.2d at 45 (discharge through gravity flow of rainwater); *Velsicol Chem. Corp.*, 438 F. Supp. at 946-47 (discharge through municipal sewer system).

Regulation of the discharges alleged by Citizen Groups is consistent with the "federalist structure" of the CWA because it would not encroach on the states' regulatory authority over groundwater, contrary to the district court's claims. *See* Op. 23, RE31, PageID#1793. Regulation of discharges that are conveyed via groundwater, as in this case, is distinct from regulation of groundwater itself, which the CWA leaves to state jurisdiction.[25] *See Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 996 (D. Haw. 2014), *aff'd*, 881 F.3d 754 (noting that

[25] The four cases cited by the district court fail to support its conclusions regarding regulation of groundwater under the "federalist structure" of the CWA. *See* Op. 23, RE31, PageID#1793 (citing *Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987); *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014); *Kelley ex rel. Michigan v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985)). *Train* actually bolsters Citizen Groups' argument, because it recognizes the distinction between regulation of groundwater and regulation of discharges conveyed via groundwater. *See* 554 F.2d at 1312 n.1 (underscoring that ruling on well disposals did not decide the legal effect of groundwater hydrologically connected to surface waters). *Cape Fear* and *Kelley* mistakenly collapse that distinction. *See* 25 F. Supp. 3d at 810; 618 F. Supp. at 1107. *Oregon Natural Resources Council* is inapposite because Citizen Groups do not seek to enforce state water quality standards, which was the issue in that case. *See* 834 F.2d 842, 849. Moreover, to the extent it is relevant here, it has now been superseded by *Hawai'i Wildlife Fund*, discussed *supra*.

courts have suffered from "a lack of clarity . . . as to whether they are determining that groundwater itself may or may not be regulated under the [CWA] or are determining that groundwater may or may not be regulated when it serves as a conduit to water that is indeed regulated"). Thus, regulation of KU's unauthorized discharges does not encroach on state regulatory authority.

Finally, contrary to the assertions of the district court, *see* Op. 24, RE31, PageID#1794, regulation of the discharges alleged by Citizen Groups is consistent with the purposes of the CWA. Congress enacted the CWA with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by, among other things, achieving the goals of "eliminat[ing]" "the discharge of pollutants into the navigable waters" and "achiev[ing]" "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a); *see also Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 469-70 (6th Cir. 2008). Regulation of the discharges in this case is plainly consistent with Congress's intent. Moreover, because such regulation would not encroach upon state regulatory authority, it is consistent with the CWA's parallel objective to "preserv[e] . . . primary state responsibility for ordinary land-use decisions." Op. 24, RE31, PageID#1794 (quoting *Rapanos*, 547 U.S. at 755-56).

Citizen Groups have stated a viable claim that KU is discharging pollutants in violation of the CWA. *See Consumers Power*, 862 F.2d at 583. Based on the facts set forth in the pleadings, Citizen Groups have established that the ash ponds and other facilities at E.W. Brown are point sources that discharge coal ash pollutants into HQ Stream and Herrington Lake via karst conduits without a NPDES permit. Regulation of such discharges is required by the statute's plain language and consistent with its federalist structure and underlying purposes. Therefore, the district court's holding that KU's unpermitted discharges are not subject to the CWA must be reversed on this basis as well.

CONCLUSION

For the reasons set forth above, Citizen Groups respectfully request that this Court reverse the district court's order granting KU's motion to dismiss and remand the case with instructions that the district court exercise its jurisdiction.

Dated: March 28, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that the foregoing Appellants' Opening Brief contains 12,878 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(b)(1) and as counted by counsel's word processing system, and thus complies with the applicable word limit established in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). This document also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: March 28, 2018

Respectfully submitted,

/s/ Thomas Cmar
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2018, I served a copy of the foregoing electronically through the Court's CM/ECF system on the following registered counsel of record:

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RELEVANT DISTRICT COURT DOCUMENTS

Docket Entry #	*Document Description*	*Page ID Range*
RE 1	Kentucky Waterways Alliance and Sierra Club's Complaint (July 12, 2017)	**#1-23**
RE 1-1	Ex. A: 60-Day Notice of Intent to File Citizen Suit (Nov. 2, 2015)	**#25-30**
RE 1-2	Ex. B: 60-Day Notice of Intent to File Citizen Suit (Oct. 20, 2015)	**#32-37**
RE 1-3	Ex. C: 60-Day Notice of Intent to File Citizen Suit (Oct. 26, 2016)	**#39-45**
RE 16	Kentucky Utilities Company's Motion to Dismiss and Supporting Memorandum of Law (Sept. 11, 2017)	**#118-123, 129-142**
RE 16-1	Ex. 1: Sitewide Groundwater Remedial Action Plan (Feb. 27, 2015)	**#162-154, 171-183**
RE 16-2	Ex. 2: Main Ash Pond Closure Plan (Apr. 25, 2014)	**#224-225, 228-231**
RE 16-4	Ex. 4: Groundwater Assessment Plan (July 17, 2012)	**#251-264, 269, 282-289**
RE 16-5	Ex. 5: Sierra Club Comments to Kentucky Division of Waste Management (Dec. 20, 2013)	**#296-310**
RE 16-6	Ex. 6: Boulding Assessment Report for Application for Special Waste Landfill Permit (Dec. 20, 2013)	**#317-340**
RE 16-10	Ex. 10: Earthjustice Comments to Kentucky Division of Waste Management (June 5, 2015)	**#380-387**
RE 16-14	Ex. 14: Kentucky Division of Water Notice of Violation (Jan. 11, 2017)	**#414-416**
RE 16-15	Ex. 15: Agreed Order (Jan. 30, 2017)	**#418-434**

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RE 16-16	Ex. 16: Herrington Lake Corrective Action Plan (Aug. 2017)	**#459-482**
RE 16-19	Ex. 19: Auxiliary Ash Pond Discharge Corrective Action Plan Submittal (June 30, 2017)	**#558-561**
RE 27	Kentucky Waterways Alliance and Sierra Club's Memorandum in Opposition to Motion to Dismiss (Oct. 17, 2017)	**#998-1039**
RE 27-1	Ex. 1: Declaration of Dr. A. Dennis Lemly (Oct. 16, 2017)	**#1042-1045, 1047-1078**
RE 27-3	Ex. 2: Declaration of Richard Dirksen (Oct. 16, 2017)	**#1091-1094**
RE 27-4	Ex. 3: Declaration of Dalphna Donnelly (Oct. 14, 2017)	**#1096-1102**
RE 27-5	Ex. 4: Declaration of Cloyd Shelley (Oct. 15, 2017)	**#1104-1108**
RE 27-7	Ex. A to Ex. 5: Kentucky Waterways Alliance, Sierra Club, and Earthjustice Comments to Revised (Aug. 2017) Draft Herrington Lake Corrective Action Plan (Sept. 30, 2017)	**#1115-1116, 1122, 1125**
RE 27-8	Ex. B to Ex. 5: Kentucky Waterways Alliance, Sierra Club, and Earthjustice Comments to Revised (May 22, 2014) Draft Permit for Special Waste Landfill (June 23, 2014)	**#1131-1137**
RE 27-9	Ex. 6: Declaration of Dr. Ralph O. Ewers (Oct. 13, 2017)	**#1142-1143**
RE 27-11	Ex. B to Ex. 6: E.W. Brown Dye Trace Investigation (Aug. 2011)	**#1157-1261**
RE 27-12	Ex. C to Ex. 6: Phase II, E.W Brown Dye Trace Investigation (Oct. 2012)	**#1263-1365**

Docket Entry #	***Document Description***	***Page ID Range***
RE 27-13	Ex. D to Ex. 6: Memorandum from Ralph O. Ewers, Ph.D., Ewers Water Consultants Inc., to Thomas Cmar, Earthjustice	**#1367-1368**
RE 31	Memorandum Opinion and Order (Dec. 28, 2017)	**#1771-1795**
RE 32	Judgment (Dec. 28, 2017)	**#1796**
RE 33	Notice of Appeal (Jan. 26, 2018)	**#1797-1799**

STATUTORY AND REGULATORY ADDENDUM

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28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3424)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3080)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter I. Research and Related Programs (Refs & Annos)

33 U.S.C.A. § 1251

§ 1251. Congressional declaration of goals and policy

Currentness

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and

enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 101, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub.L. 95-217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub.L. 100-4, Title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, set out as a note under section 1321 of this title.

EXECUTIVE ORDER NO. 11742

<Oct. 23, 1973, 38 F.R. 29457>

Delegation of Functions to Secretary of State Respecting Negotiation of International Agreements Relating to Enhancement of Environment

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

Notes of Decisions (126)

33 U.S.C.A. § 1251, 33 USCA § 1251
Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1311

§ 1311. Effluent limitations

Currentness

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a

pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology

within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human

health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which

assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient

water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall

contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)

(A) Effect of filing

An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval

Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision

An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline

(A) In general

In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application

An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions

The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline

The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge

affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection--

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 301, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub.L. 95-217, §§ 42-47, 53(c), Dec. 27, 1977, 91 Stat. 1582-1586, 1590; Pub.L. 97-117, §§ 21, 22(a)-(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub.L. 97-440, Jan. 8, 1983, 96 Stat. 2289; Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f), 304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29-37; Pub.L. 100-688, Title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 103-431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub.L. 104-66, Title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

Notes of Decisions (318)

Footnotes

1 So in original. Probably should be “than”.

2 So in original. Probably should be “contractual”.

33 U.S.C.A. § 1311, 33 USCA § 1311

Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1319

§ 1319. Enforcement

Currentness

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person--

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this

title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)

(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who--

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of

violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly

falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, , [1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available--

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which--

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment--

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty--

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In

case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 309, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 859; amended Pub.L. 95-217, §§ 54(b), 55, 56, 67(c)(2), Dec. 27, 1977, 91 Stat. 1591, 1592, 1606; Pub.L. 100-4, Title III, §§ 312, 313(a)(1), (b)(1), (c), 314(a), Feb. 4, 1987, 101 Stat. 42, 45, 46; Pub.L. 101-380, Title IV, § 4301(c), Aug. 18, 1990, 104 Stat. 537.)

Notes of Decisions (386)

Footnotes

1 So in original.

33 U.S.C.A. § 1319, 33 USCA § 1319

Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1342

§ 1342. National pollutant discharge elimination system

Effective: February 7, 2014
Currentness

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate

corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to

section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES permit requirements for silvicultural activities

The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements

Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section [1] 1365(a) of this title does not apply to any non-permitting program established under 1342(p)(6) [2] of this title for the silviculture activities listed in 1342(l)(3)(A) [3] of this title, or to any other limitations that might be deemed to apply to the silviculture activities listed in 1342(l)(3)(A) [3] of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level

of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 402, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 880; amended Pub.L. 95-217, §§ 33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub.L. 100-4, Title IV, §§ 401 to 404(a), (c), formerly (d), 405, Feb. 4, 1987, 101 Stat. 65 to 67, 69; Pub.L. 102-580, Title III, § 364, Oct. 31, 1992, 106 Stat. 4862; Pub.L. 104-66, Title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub.L. 106-554, § 1(a)(4) [Div. B, Title I, § 112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; Pub.L. 110-288, § 2, July 29, 2008, 122 Stat. 2650; Pub.L. 113-79, Title XII, § 12313, Feb. 7, 2014, 128 Stat. 992.)

Notes of Decisions (242)

Footnotes

1 So in original. Probably should not be capitalized.

2 So in original. Probably should read “section 1342(p)(6)”.

3 So in original. Probably should read “section 1342(l)(3)(A)”.

33 U.S.C.A. § 1342, 33 USCA § 1342

Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1362

§ 1362. Definitions

Effective: October 1, 2014
Currentness

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters

(A) In general

The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions

The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material

(A) In general

The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions

The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator

The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production

The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel

(A) In general

The term "recreational vessel" means any vessel that is--

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion

The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works

The term "treatment works" has the meaning given the term in section 1292 of this title.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 502, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 886; amended Pub.L. 95-217, § 33(b), Dec. 27, 1977, 91 Stat. 1577; Pub.L. 100-4, Title V, §§ 502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub.L. 100-688, Title III, § 3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 104-106, Div. A, Title III, § 325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub.L. 106-284, § 5, Oct. 10, 2000, 114 Stat. 875; Pub.L. 109-58, Title III, § 323, Aug. 8, 2005, 119 Stat. 694; Pub.L. 110-288, § 3, July 29, 2008, 122 Stat. 2650; Pub.L. 113-121, Title V, § 5012(b), June 10, 2014, 128 Stat. 1328.)

Notes of Decisions (205)

33 U.S.C.A. § 1362, 33 USCA § 1362
Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1365

§ 1365. Citizen suits

Currentness

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,. [1]

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 505, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 888; amended Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), Feb. 4, 1987, 101 Stat. 49, 73, 75, 76.)

Notes of Decisions (838)

Footnotes

1 So in original.

33 U.S.C.A. § 1365, 33 USCA § 1365

Current through P.L. 115-140.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter VII. Miscellaneous Provisions

42 U.S.C.A. § 6972

§ 6972. Citizen suits

Currentness

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation to--

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to--

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606], [1]

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980[2] [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately

after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

CREDIT(S)

(Pub.L. 89-272, Title II, § 7002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2825; amended Pub.L. 95-609, § 7(p), Nov. 8, 1978, 92 Stat. 3083; Pub.L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268.)

Notes of Decisions (454)

Footnotes

1 So in original. The comma probably should be a semicolon.

2 So in original. Probably should be "1980".

42 U.S.C.A. § 6972, 42 USCA § 6972

Current through P.L. 115-140.

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Title XVIII. Public Health
Chapter 224. Environmental Protection (Refs & Annos)
Subchapter 70. Water Quality (Refs & Annos)

KRS § 224.70-110

224.70-110 General prohibition against water pollution

Currentness

No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.

Credits
HISTORY: 1978 c 257, § 1, eff. 6-17-78; 1974 c 355, § 4; 1972 1st ex s, c 3, § 10; 1950 c 69, § 7

Notes of Decisions (25)

KRS § 224.70-110, KY ST § 224.70-110
Current with emergency effective legislation through Chapter 8 of the 2018 Regular Session

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter A. General
Part 19. Adjustment of Civil Monetary Penalties for Inflation (Refs & Annos)

40 C.F.R. § 19.4

§ 19.4 Statutory civil penalties, as adjusted for inflation, and tables.

Effective: January 15, 2018
Currentness

Table 1 to § 19.4 sets out the statutory civil penalty provisions of statutes administered by EPA, with the original statutory civil penalty levels, as enacted, and the operative statutory civil penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015, and for violations that occurred after November 2, 2015, where penalties were assessed before August 1, 2016. Table 2 to § 19.4 sets out the statutory civil penalty provisions of statutes administered by EPA, with the third column displaying the original statutory civil penalty levels, as enacted. The fourth column of Table 2 displays the operative statutory civil penalty levels where penalties were assessed on or after August 1, 2016 but before January 15, 2017, for violations that occurred after November 2, 2015. The fifth column displays the operative statutory civil penalty levels where penalties are assessed on or after January 15, 2017 but before January 15, 2018, for violations that occur or occurred after November 2, 2015. The sixth and last column displays the operative statutory civil penalty levels where penalties are assessed on or after January 15, 2018, for violations that occur or occurred after November 2, 2015.

Table 1 of Section 19.4—Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Statutory civil penalties for violations that occurred after December 6, 2013 through November 2, 2015, or are assessed before August 1, 2016
7 U.S.C. 136*l*.(a)(1)....	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).....	.....$5,000	.....$5,500	.....$6,500	..... $7,500	$7,500

7 U.S.C. 136*l*.(a)(2)	FIFRA	$500/$1,000	$550/$1,000	$650/$1,100	$750/$1,100	$750/$1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA)	$25,000	$27,500	$32,500	$37,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,000	$5,500	$7,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA)	$5,000	$5,500	$6,500	$7,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1319(g)(2)(A)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1319(g)(2)(B)	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(7)(A)	CWA	$25,000/$1,000	$27,500/$1,100	$32,500/$1,100	$37,500/$1,100	$37,500/$2,100
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(D)	CWA	$100,000/$3,000	$110,000/$3,300	$130,000/$4,300	$140,000/$4,300	$150,000/$5,300
33 U.S.C. 1414b(d)(1)[1]	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA)	$600	$660	$760	$860	$860
33 U.S.C. 1415(a)	MPRSA	$50,000/$125,000	$55,000/$137,500	$65,000/$157,500	$70,000/$177,500	$75,000/$187,500
33 U.S.C. 1901 note (see 1409(a)(2)(A))	CERTAIN ALASKAN CRUISE	$10,000/$25,000	$10,000/$25,000[2]	$10,000/$25,000	$11,000/$27,500	$11,000/$27,500

	SHIP OPERATIONS (CACSO)					
33 U.S.C. 1901 note (see 1409(a)(2)(B))	CACSO	$10,000/$125,000	$10,000/$125,000	$10,000/$125,000	$11,000/$137,500	$11,000/$147,500
33 U.S.C. 1901 note (see 1409(b)(1))	CACSO	$25,000	$25,000	$25,000	$27,500	$27,500
42 U.S.C. 300g-3(b)	SAFE DRINKING WATER ACT (SDWA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g-3(g)(3)(A)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g-3(g)(3)(B)	SDWA	$5,000/$25,000	$5,000/$25,000	$6,000/$27,500	$7,000/$32,500	$7,000/$32,500
42 U.S.C. 300g-3(g)(3)(C)	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300h-2(b)(1)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300h-2(c)(1)	SDWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
42 U.S.C. 300h-2(c)(2)	SDWA	$5,000/$125,000	$5,500/$137,500	$6,500/$157,500	$7,500/$177,500	$7,500/$187,500
42 U.S.C. 300h-3(c)	SDWA	$5,000/$10,000	$5,500/$11,000	$6,500/$11,000	$7,500/$16,000	$7,500/$16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500	$21,500
42 U.S.C. 300i-1(c)	SDWA	$20,000/$50,000	$22,000/$55,000 [3]	$100,000/$1,000,000	$110,000/$1,100,000	$120,000/$1,150,000
42 U.S.C. 300j(e)(2)	SDWA	$2,500	$2,750	$2,750	$3,750	$3,750
42 U.S.C. 300j-4(c)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300j-6(b)(2)	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300j-23(d)	SDWA	$5,000/$50,000	$5,500/$55,000	$6,500/$65,000	$7,500/$70,000	$7,500/$75,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	$10,000	$11,000	$11,000	$16,000	$16,000

42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(c)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 7413(d)(1)	CAA	$25,000/$200,000	$27,500/$220,000	$32,500/$270,000	$37,500/$295,000	$37,500/ $320,000
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 7524(a)	CAA	$2,500/$25,000	$2,750/$27,500	$2,750/$32,500	$3,750/$37,500	$3,750/ $37,500
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000	$320,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(a)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(b)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/ $117,500
42 U.S.C. 9609(c)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/ $117,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)	$25,000	$27,500	$32,500	$37,500	$37,500

42 U.S.C. 11045(b)(1)(A)[4]	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(2).	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(b)(3).	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(c)(1).	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(c)(2).	EPCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 11045(d)(1).	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 14304(a)(1).	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT)	$10,000	$10,000	$11,000	$16,000	$16,000
42 U.S.C. 14304(g).	BATTERY ACT	$10,000	$10,000	$11,000	$16,000	$16,000

Table 2 of Section 19.4—Civil Monetary Penalty Inflation Adjustments

U.S. Code citation	Environmental statute	Statutory civil penalties, as enacted	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after August 1, 2016 but before January 15, 2017	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2017 but before January 15, 2018	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2018
7 U.S.C. 136*l*.(a)(1).	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)	$5,000	$18,750	$19,057	$19,446
7 U.S.C. 136*l*.(a)(2)[1]	FIFRA	1,000/500/1,000	2,750/1,772/2,750	2,795/1,801/2,795	2,852/1,838/2,795

15 U.S.C. 2615(a)(1).....	TOXIC SUBSTANCES CONTROL ACT (TSCA).....	25,000	37,500	38,114	38,892
15 U.S.C. 2647(a).....	TSCA.....	5,000	10,781	10,957	11,181
15 U.S.C. 2647(g).....	TSCA.....	5,000	8,908	9,054	9,239
31 U.S.C. 3802(a)(1).....	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).....	5,000	10,781	10,957	11,181
31 U.S.C. 3802(a)(2).....	PFCRA.....	5,000	10,781	10,957	11,181
33 U.S.C. 1319(d).....	CLEAN WATER ACT (CWA).....	25,000	51,570	52,414	53,484
33 U.S.C. 1319(g)(2)(A)...	CWA.....	10,000/25,000	20,628/51,570	20,965/52,414	21,393/53,484
33 U.S.C. 1319(g)(2)(B)....	CWA.....	10,000/125,000	20,628/257,848	20,965/262,066	21,393/267,415
33 U.S.C. 1321(b)(6)(B)(i)	CWA.....	10,000/25,000	17,816/44,539	18,107/45,268	18,477/46,192
33 U.S.C. 1321(b)(6)(B)(ii).....	CWA.....	10,000/125,000	17,816/222,695	18,107/226,338	18,477/230,958
33 U.S.C. 1321(b)(7)(A)...	CWA.....	25,000/1,000	44,539/1,782	45,268/1,811	46,192/1,848
33 U.S.C. 1321(b)(7)(B)...	CWA.....	25,000	44,539	45,268	46,192
33 U.S.C. 1321(b)(7)(C)...	CWA.....	25,000	44,539	45,268	46,192
33 U.S.C. 1321(b)(7)(D)...	CWA.....	100,000/3,000	178,156/5,345	181,071/5,432	184,767/5,543
33 U.S.C. 1414b(d)(1).....	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).....	600	1,187	1,206	1,231
33 U.S.C. 1415(a).....	MPRSA.....	50,000/125,000	187,500/247,336	190,568/251,382	194,457/256,513
33 U.S.C. 1901 note (see 1409(a)(2)(A)).....	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).....	10,000/25,000	13,669/34,172	13,893/34,731	14,177/35,440
33 U.S.C. 1901 note (see 1409(a)(2)(B)).....	CACSO.....	10,000/125,000	13,669/170,861	13,893/173,656	14,177/177,200
33 U.S.C. 1901 note (see 1409(b)(1)).....	CACSO.....	25,000	34,172	34,731	35,440
33 U.S.C. 1908(b)(1).....	ACT TO PREVENT POLLUTION FROM SHIPS (APPS).....	25,000	70,117	71,264	72,718
33 U.S.C. 1908(b)(2).....	APPS.....	5,000	14,023	14,252	14,543

42 U.S.C. 300g-3(b).....	SAFE DRINKING WATER ACT (SDWA)...	25,000	53,907	54,789	55,907
42 U.S.C. 300g-3(g)(3)(A)	SDWA.....	25,000	53,907	54,789	55,907
42 U.S.C. 300g-3(g)(3)(B).	SDWA.....	5,000/25,000	10,781/37,561	10,957/38,175	11,181/38,954
42 U.S.C. 300g-3(g)(3)(C)	SDWA.....	25,000	37,561	38,175	38,954
42 U.S.C. 300h-2(b)(1).....	SDWA.....	25,000	53,907	54,789	55,907
42 U.S.C. 300h-2(c)(1).....	SDWA.....	10,000/125,000	21,563/269,535	21,916/273,945	22,363/279,536
42 U.S.C. 300h-2(c)(2).....	SDWA.....	5,000/125,000	10,781/269,535	10,957/273,945	11,181/279,536
42 U.S.C. 300h-3(c).....	SDWA.....	5,000/10,000	18,750/40,000	19,057/40,654	19,446/41,484
42 U.S.C. 300i(b).....	SDWA.....	15,000	22,537	22,906	23,374
42 U.S.C. 300i-1(c).....	SDWA.....	100,000/1,000,000	131,185/1,311,850	133,331/1,333,312	136,052/1,360,525
42 U.S.C. 300j(e)(2).....	SDWA.....	2,500	9,375	9,528	9,722
42 U.S.C. 300j-4(c).....	SDWA.....	25,000	53,907	54,789	55,907
42 U.S.C. 300j-6(b)(2).....	SDWA.....	25,000	37,561	38,175	38,954
42 U.S.C. 300j-23(d).....	SDWA.....	5,000/50,000	9,893/98,935	10,055/100,554	10,260/102,606
42 U.S.C. 4852d(b)(5).....	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.....	10,000	16,773	17,047	17,395
42 U.S.C. 4910(a)(2).....	NOISE CONTROL ACT OF 1972.....	10,000	35,445	36,025	36,760
42 U.S.C. 6928(a)(3).....	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).....	25,000	93,750	95,284	97,229
42 U.S.C. 6928(c).....	RCRA.....	25,000	56,467	57,391	58,562
42 U.S.C. 6928(g).....	RCRA.....	25,000	70,117	71,264	72,718
42 U.S.C. 6928(h)(2).....	RCRA.....	25,000	56,467	57,391	58,562
42 U.S.C. 6934(e).....	RCRA.....	5,000	14,023	14,252	14,543
42 U.S.C. 6973(b).....	RCRA.....	5,000	14,023	14,252	14,543
42 U.S.C. 6991e(a)(3).....	RCRA.....	25,000	56,467	57,391	58,562
42 U.S.C. 6991e(d)(1).....	RCRA.....	10,000	22,587	22,957	23,426

42 U.S.C. 6991e(d)(2)	RCRA	10,000	22,587	22,957	23,426
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	25,000	93,750	95,284	97,229
42 U.S.C. 7413(d)(1)	CAA	25,000/200,000	44,539/356,312	45,268/362,141	46,192/369,532
42 U.S.C. 7413(d)(3)	CAA	5,000	8,908	9,054	9,239
42 U.S.C. 7524(a)	CAA	25,000/2,500	44,539/4,454	45,268/4,527	46,192/4,619
42 U.S.C. 7524(c)(1)	CAA	200,000	356,312	362,141	369,532
42 U.S.C. 7545(d)(1)	CAA	25,000	44,539	45,268	46,192
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)	25,000	53,907	54,789	55,907
42 U.S.C. 9606(b)(1)	CERCLA	25,000	53,907	54,789	55,907
42 U.S.C. 9609(a)(1)	CERCLA	25,000	53,907	54,789	55,907
42 U.S.C. 9609(b)	CERCLA	25,000/75,000	53,907/161,721	54,789/164,367	55,907/167,722
42 U.S.C. 9609(c)	CERCLA	25,000/75,000	53,907/161,721	54,789/164,367	55,907/167,722
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)	25,000	53,907	54,789	55,907
42 U.S.C. 11045(b)(1)(A).	EPCRA	25,000	53,907	54,789	55,907
42 U.S.C. 11045(b)(2)	EPCRA	25,000/75,000	53,907/161,721	54,789/164,367	55,907/167,722
42 U.S.C. 11045(b)(3)	EPCRA	25,000/75,000	53,907/161,721	54,789/164,367	55,907/167,722
42 U.S.C. 11045(c)(1)	EPCRA	25,000	53,907	54,789	55,907
42 U.S.C. 11045(c)(2)	EPCRA	10,000	21,563	21,916	22,363
42 U.S.C. 11045(d)(1)	EPCRA	25,000	53,907	54,789	55,907
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT)	10,000	15,025	15,271	15,583
42 U.S.C. 14304(g)	BATTERY ACT	10,000	15,025	15,271	15,583

Credits

[74 FR 627, Jan. 7, 2009; 78 FR 66647, Nov. 6, 2013; 81 FR 43094, July 1, 2016; 82 FR 3635, Jan. 12, 2017; 83 FR 1192, Jan. 10, 2018]

SOURCE: 73 FR 75345, Dec. 11, 2008; 81 FR 43094, July 1, 2016, unless otherwise noted.

AUTHORITY: Pub.L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub.L. 104–134, title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub.L. 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub.L. 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599.

Notes of Decisions (18)

Current through March 22, 2018; 83 FR 12503.

Footnotes

1 Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

2 CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub.L. 106-554, 33 U.S.C. 1901 note.

3 The original statutory penalty amounts of $20,000 and $50,000 under section 1432(c) of the SDWA, 42 U.S.C. 300i-1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107-188 (June 12, 2002), to $100,000 and $1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule (“2004 Rule”), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

4 Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (i.e., 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

1 Note that 7 U.S.C. 136*l*.(a)(2) contains three separate statutory maximum civil penalty provisions. The first mention of $1,000 and the $500 statutory maximum civil penalty amount were originally enacted in 1978 (Pub. L. 95-396), and the second mention of $1,000 was enacted in 1972 (Pub. L. 92-516).

End of Document

Kentucky Administrative Regulations Currentness
Title 401a. Energy and Environment Cabinet - Department for Environmental Protection
Chapter 10. Water Quality Standards

401 Ky. Admin. Regs. 10:031

401 KAR 10:031. Surface water standards

Section 1. Nutrients Criterion. Nutrients shall not be elevated in a surface water to a level that results in a eutrophication problem.

Section 2. Minimum Criteria Applicable to All Surface Waters. (1) The minimum water quality criteria established in this administrative regulation shall be applicable to all surface waters including mixing zones, with the exception that toxicity to aquatic life in mixing zones shall be subject to the provisions of 401 KAR 10:029, Section 4. Surface waters shall not be aesthetically or otherwise degraded by substances that:

(a) Settle to form objectionable deposits;

(b) Float as debris, scum, oil, or other matter to form a nuisance;

(c) Produce objectionable color, odor, taste, or turbidity;

(d) Injure or are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish, and other aquatic life;

(e) Produce undesirable aquatic life or result in the dominance of nuisance species; or

(f) Cause fish flesh tainting.

(2) The concentration of phenol shall not exceed 300 µg/L as an instream value.

(3) The water quality criteria for the protection of human health related to fish consumption in Table 1 of Section 6 of this administrative regulation shall apply to all surface water at the edge of the assigned mixing zones except for those points where water is withdrawn for domestic water supply use.

(a) The criteria are established to protect human health regarding the consumption of fish tissue and shall not be exceeded.

(b) For those substances associated with a cancer risk, an acceptable risk level of not more than one (1) additional cancer case in a population of 1,000,000 people, or 1 x 10^{-6} shall be utilized to establish the allowable concentration.

Section 3. Use Designations and Associated Criteria. (1) Surface waters may be designated as having one (1) or more legitimate uses established in 401 KAR 10:026 and associated criteria protective of those uses. Nothing in this administrative regulation shall be construed to prohibit or impair the legitimate beneficial uses of these waters. The criteria in Sections 2, 4, 6, and 7 of this administrative regulation represent minimum conditions necessary to:

(a) Protect surface waters for the indicated use; and

(b) Protect human health regarding fish consumption.

(2) On occasion, surface water quality may be outside of the limits established to protect designated uses because of natural conditions. If this occurs during periods when stream flows are below the flow that is used by the cabinet to establish effluent limitations for wastewater treatment facilities, a discharger shall not be considered a contributor to instream violations of water quality standards, if treatment results in compliance with permit requirements.

(3) Stream flows for water quality-based permits. The following stream flows shall be utilized if deriving KPDES permit limitations to protect surface waters for the listed uses and purposes:

(a) Aquatic life protection shall be $7Q_{10}$;

(b) Water-based recreation protection shall be $7Q_{10}$;

(c) Domestic water supply protection shall be determined at points of withdrawal as:

1. The harmonic mean for cancer-linked substances; and

2. $7Q_{10}$ for noncancer-linked substances;

(d) Human health protection regarding fish consumption and for changes in radionuclides shall be the harmonic mean; and

(e) Protection of aesthetics shall be $7Q_{10}$.

Section 4. Aquatic Life. (1) Warm water aquatic habitat. The following parameters and associated criteria shall apply for the protection of productive warm water aquatic communities, fowl, animal wildlife, arboreous growth, agricultural, and industrial uses:

(a) Natural alkalinity as $CaCO_3$ shall not be reduced by more than twenty-five (25) percent.

1. If natural alkalinity is below twenty (20) mg/L $CaCO_3$, there shall not be a reduction below the natural level.

2. Alkalinity shall not be reduced or increased to a degree that may adversely affect the aquatic community;

(b) pH shall not be less than six and zero-tenths (6.0) nor more than nine and zero-tenths (9.0) and shall not fluctuate more than one and zero-tenths (1.0) pH unit over a period of twenty-four (24) hours;

(c) Flow shall not be altered to a degree that will adversely affect the aquatic community;

(d) Temperature shall not exceed thirty-one and seven-tenths (31.7) degrees Celsius (eighty-nine (89) degrees Fahrenheit).

1. The normal daily and seasonal temperature fluctuations that existed before the addition of heat due to other than natural causes shall be maintained.

2. The cabinet may determine allowable surface water temperatures on a site-specific basis utilizing available data that shall be based on the effects of temperature on the aquatic biota that utilize specific surface waters of the commonwealth and that may be affected by person-induced temperature changes.

a. Effects on downstream uses shall also be considered in determining site-specific temperatures.

b. Values in the following table are guidelines for surface water temperature.

Month/Date Period	Average (°F)	Average (°C)	Instantaneous Maximum (°F)	Instantaneous Maximum (°C)
January 1-31	45	7	50	10
February 1-29	45	7	50	10
March 1-15	51	11	56	13
March 16-31	54	12	59	15
April 1-15	58	14	64	18
April 16-30	64	18	69	21
May 1-15	68	20	73	23
May 16-31	75	24	80	27
June 1-15	80	27	85	29
June 16-30	83	28	87	31
July 1-31	84	29	89	32
August 1-31	84	29	89	32
September 1-15	84	29	87	31
September 16-30	82	28	86	30
October 1-15	77	25	82	28
October 16-31	72	22	77	25
November 1-30	67	19	72	22

December 1-31 52 11 57 14

3. A successful demonstration concerning thermal discharge limits carried out pursuant to Section 316(a) of the Clean Water Act, 33 U.S.C. 1326, shall constitute compliance with the temperature requirements of this subsection. A successful demonstration assures the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made;

(e) Dissolved oxygen.

1.a. Dissolved oxygen shall be maintained at a minimum concentration of five and zero-tenths (5.0) mg/L as a twenty-four (24) hour average in water with WAH use;

b. The instantaneous minimum shall not be less than four and zero-tenths (4.0) mg/L in water with WAH use.

2. The dissolved oxygen concentration shall be measured at mid-depth in waters having a total depth of ten (10) feet or less and at representative depths in other waters;

(f) Total dissolved solids or specific conductance. Total dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected;

(g) Total suspended solids. Total suspended solids shall not be changed to the extent that the indigenous aquatic community is adversely affected;

(h) Settleable solids. The addition of settleable solids that may alter the stream bottom so as to adversely affect productive aquatic communities shall be prohibited;

(i) Ammonia. The concentration of the un-ionized form shall not be greater than 0.05 mg/L at any time instream after mixing. Un-ionized ammonia shall be determined from values for total ammonia-N, in mg/L, pH and temperature, by means of the following equation:

$Y = 1.2 \text{ (Total ammonia-N)}/(1 + 10^{pKa-pH})$

$pk_a = 0.0902 + (2730/(273.2 + T_c))$

Where:

T_c = temperature, degrees Celsius.

Y = un-ionized ammonia (mg/L);

(j) Toxics.

1. The allowable instream concentration of toxic substances, or whole effluents containing toxic substances, which are noncumulative or nonpersistent with a half-life of less than ninety-six (96) hours, shall not exceed:

a. One-tenth (0.1) of the ninety-six (96) hour median lethal concentration (LC_{50}) of representative indigenous or indicator aquatic organisms; or

b. A chronic toxicity unit of 1.00 utilizing the twenty-five (25) percent inhibition concentration, or LC_{25}.

2. The allowable instream concentration of toxic substances, or whole effluents containing toxic substances, which are bioaccumulative or persistent, including pesticides, if not specified elsewhere in this section, shall not exceed:

a. 0.01 of the ninety-six (96) hour median lethal concentration (LC_{50}) of representative indigenous or indicator aquatic organisms; or

b. A chronic toxicity unit of 1.00 utilizing the IC_{25}.

3. In the absence of acute criteria for pollutants listed in Table 1 of Section 6 of this administrative regulation, for other substances known to be toxic but not listed in this administrative regulation, or for whole effluents that are acutely toxic, the allowable instream concentration shall not exceed the LC_1 or one-third (1/3) LC_{50} concentration derived from toxicity tests on representative indigenous or indicator aquatic organisms or exceed three-tenths (0.3) acute toxicity units.

4. If specific application factors have been determined for a toxic substance or whole effluent such as an acute to chronic ratio or water effect ratio, the specific application factors may be used instead of the one-tenth (0.1) and 0.01 factors listed in this subsection upon demonstration by the applicant that the application factors are scientifically defensible.

5. Allowable instream concentrations for specific pollutants for the protection of warm water aquatic habitat are listed in Table 1 of Section 6 of this administrative regulation. These concentrations are based on protecting aquatic life from acute and chronic toxicity and shall not be exceeded; and

(k) Total residual chlorine. Instream concentrations for total residual chlorine shall not exceed an acute criteria value of nineteen (19) µg/L or a chronic criteria value of eleven (11) µg/L.

(2) Cold water aquatic habitat. The following parameters and criteria are for the protection of productive cold water aquatic communities and streams that support trout populations, whether self-sustaining or reproducing, on a year-round basis. The criteria adopted for the protection of warm water aquatic life also apply to the protection of cold water habitats with the following additions:

(a) Dissolved oxygen.

1. A minimum concentration of six and zero-tenths (6.0) mg/L as a twenty-four (24) hour average and five and zero-tenths (5.0) mg/L as an instantaneous minimum shall be maintained.

2. In lakes and reservoirs that support trout, the concentration of dissolved oxygen in waters below the epilimnion shall be kept consistent with natural water quality; and

(b) Temperature. Water temperature shall not be increased through human activities above the natural seasonal temperatures.

Section 5. Domestic Water Supply Use. Maximum allowable in-stream concentrations for specific substances, to be applicable at the point of withdrawal, as established in 401 KAR 10:026, Section 5(2)(b), Table B, for use for domestic water supply from surface water sources are specified in Table 1 of Section 6 of this administrative regulation and shall not be exceeded.

Section 6. Pollutants. (1) Allowable instream concentrations of pollutants are listed as water column values in Table 1 of this section unless otherwise indicated.

Table 1

Image 1 within document in PDF format.

[1] CAS = Chemical Abstracts Service.

[2] Water quality criteria in µg/L unless reported in different units.

[3] Metal concentrations shall be total recoverable metals to be measured in an unfiltered sample, unless it can be demonstrated that a more appropriate analytical technique is available that provides a measurement of that portion of the metal present which causes toxicity to aquatic life.

[4] DWS = Domestic Water Supply Source.

[5] Fish = protecting human health regarding fish consumption.

[6] Acute criteria = protective of aquatic life based on one (1) hour exposure that does not exceed the criterion for a given pollutant.

[7] Chronic = protective of aquatic life based on ninety-six (96) hour exposure that does not exceed the criterion of a given pollutant more than once every three (3) years on the average.

[8] The chronic criterion for iron shall not exceed three and five tenths (3.5) mg/L (thirty-five hundred µg/L) if aquatic life has not been shown to be adversely affected.

[9] If fish tissue data are available, fish tissue data shall take precedence over water column data.

[10] This value is the concentration in µg/g (dry weight) of whole fish tissue.

[11] A concentration of five and zero tenths (5.0) µg/L or greater selenium in the water column shall trigger further sampling and analysis of whole-body fish tissue or alternately of fish egg/ovary tissue.

[12] This value is the concentration in µg/g (dry weight) of fish egg/ovary tissue.

*Hard = Hardness as mg/L $CaCO_3$.

(2) The following additional criteria for radionuclides shall apply for Domestic Water Supply use:

(a) The gross total alpha particle activity, including radium-226 but excluding radon and uranium, shall not exceed fifteen (15) pCi/L;

(b) Combined radium-226 and radium-228 shall not exceed five (5) pCi/L. Specific determinations of radium-226 and radium-228 are not necessary if dissolved gross alpha particle activity does not exceed five (5) pCi/L;

(c) The concentration of total gross beta particle activity shall not exceed fifty (50) pCi/L;

(d) The concentration of tritium shall not exceed 20,000 pCi/l;

(e) The concentration of total Strontium-90 shall not exceed eight (8) pCi/L; and

(f) The concentration of uranium shall not exceed thirty (30) µg/l.

Section 7. Recreational Waters. (1) Primary contact recreation water. The following criteria shall apply to waters designated as primary contact recreation use during the primary contact recreation season of May 1 through October 31:

(a) Fecal coliform content or Escherichia coli content shall not exceed 200 colonies per 100 ml or 130 colonies per 100 ml respectively as a geometric mean based on not less than five (5) samples taken during a thirty (30) day period. Content also shall not exceed 400 colonies per 100 ml in twenty (20) percent or more of all samples taken during a thirty (30) day period for fecal coliform or 240 colonies per 100 ml for Escherichia coli. Fecal coliform criteria listed in subsection (2)(a) of this section shall apply during the remainder of the year;

(b) pH shall be between six and zero-tenths (6.0) to nine and zero-tenths (9.0) and shall not change more than one and zero-tenths (1.0) pH unit within this range over a period of twenty-four (24) hours; and

(c) Fecal coliform content criteria listed in paragraph (a) of this subsection shall no longer apply beginning November 1, 2019.

(2) Secondary contact recreation water. The following criteria shall apply to waters designated for secondary contact recreation use during the entire year:

(a) Fecal coliform content shall not exceed 1,000 colonies per 100 ml as a thirty (30) day geometric mean based on not less than five (5) samples; nor exceed 2,000 colonies per 100 ml in twenty (20) percent or more of all samples taken during a thirty (30) day period; and

(b) pH shall be between six and zero-tenths (6.0) to nine and zero-tenths (9.0) and shall not change more than one and zero-tenths (1.0) pH unit within this range over a period of twenty-four (24) hours.

Section 8. Outstanding State Resource Waters. This designation category includes certain unique waters of the commonwealth. (1) Water for inclusion.

(a) Automatic inclusion. The following surface waters shall automatically be included in this category:

1. Waters designated pursuant to the Kentucky Wild Rivers Act, KRS 146.200-146.360;

2. Waters designated pursuant to the Federal Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287;

3. Waters that support federally recognized endangered or threatened species pursuant to the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531-1544.

(b) Permissible consideration. Other surface waters shall be considered for inclusion in this category if:

1. The surface waters flow through or are bounded by state or federal forest land, or are of exceptional aesthetic or ecological value or are within the boundaries of national, state, or local government parks, or are a part of a unique geological, natural, or historical area recognized by state or federal designation; or

2. The surface water is a component part of an undisturbed or relatively undisturbed watershed that can provide basic scientific data and possess outstanding water quality characteristics, or fulfill two (2) of the following criteria:

a. Support a diverse or unique native aquatic flora or fauna;

b. Possess physical or chemical characteristics that provide an unusual and uncommon aquatic habitat; or

c. Provide a unique aquatic environment within a physiographic region.

(2) Outstanding state resource waters protection. The designation of certain waters as outstanding state resource waters shall fairly and fully reflect those aspects of the waters for which the designation is proposed. The cabinet shall determine water quality criteria for these waters as established in paragraphs (a) through (d) of this section.

(a) At a minimum, the criteria of Section 2 and Table 1 of Section 6 of this administrative regulation and the appropriate criteria associated with the stream use designation assignments in 401 KAR 10:026, shall be applicable to these waters.

(b) Outstanding state resource waters that are listed as Exceptional Waters in 401 KAR 10:030, Section 1(2) shall have dissolved oxygen maintained at a minimum concentration of six and zero-tenths (6.0) mg/L as a twenty-four (24) hour average and an instantaneous minimum concentration of not less than five and zero-tenths (5.0) mg/L.

(c)1. If the values identified for an outstanding state resource water are dependent upon or related to instream water quality, the cabinet shall review existing water quality criteria and determine if additional criteria or more stringent criteria are necessary for protection, and evaluate the need for the development of additional data upon which to base the determination.

2. Existing water quality and habitat shall be maintained and protected in those waters designated as outstanding state resource waters that support federally threatened and endangered species of aquatic organisms, unless it can be demonstrated that lowering of water quality or a habitat modification will not have a harmful effect on the threatened or endangered species that the water supports.

(d) Adoption of more protective criteria in accordance with this section shall be listed with the respective stream segment in 401 KAR 10:026.

(3) Determination of designation.

(a) A person may present a proposal to designate certain waters pursuant to this section. Documentation requirements in support of an outstanding state resource water proposal shall contain those elements outlined in 401 KAR 10:026, Section 3(3)(a) through (h).

(b)1. The cabinet shall review the proposal and supporting documentation to determine if the proposed waters qualify as outstanding state resource waters within the criteria established by this administrative regulation.

2. The cabinet shall document the determination to deny or to propose redesignation, and a copy of the decision shall be served upon the petitioner and other interested parties.

(c) After considering all of the pertinent data, a redesignation, if appropriate, shall be made pursuant to 401 KAR 10:026.

Section 9. Water Quality Criteria for the Main Stem of the Ohio River. (1) The following criteria apply to the main stem of the Ohio River from its juncture with the Big Sandy River at River Mile 317.1 to its confluence with the Mississippi River, and shall not be exceeded.

(2) These waters shall be subject to all applicable provisions of 401 KAR 10:001, 10:026, 10:029, 10:030, and this administrative regulation, except for those criteria in paragraphs (a) and (b) of this subsection.

(a) Dissolved oxygen. Instream concentrations shall average at least five and zero-tenths (5.0) mg/L per calendar day and shall not be less than four and zero-tenths (4.0) mg/L except during the April 15 - June 15 spawning season when a minimum of five and one-tenth (5.1) mg/L shall be maintained.

(b) Maximum allowable instream concentrations for nitrite-nitrogen for the protection of human health shall be one and zero-tenths (1.0) mg/L and shall be met at the edge of the assigned mixing zone.

Section 10. Exceptions to Criteria for Specific Surface Waters. (1) The cabinet may grant exceptions to the criteria contained in Sections 2, 4, 6, 7, 8, and 9 of this administrative regulation for specific surface water upon demonstration by an applicant that maintenance of applicable water quality criteria is not attainable or scientifically valid but the use designation is still appropriate.

(2) The analysis shall show that the water quality criteria cannot be reasonably achieved, either on a seasonal or year-round basis due to natural conditions or site-specific factors differing from the conditions used to derive criteria in Sections 2, 4, 6, 7, 8, and 9 of this administrative regulation.

(a) Site-specific criteria shall be developed by the applicant utilizing toxicity tests, indicator organisms, and application factors that shall be consistent with those outlined in Chapter 3 of Water Quality Standards Handbook, EPA, 1994.

(b) In addition, an applicant shall supply the documentation listed in 401 KAR 10:026, Section 3.

(3) An exception to criteria listed in Table 1 of Section 6 of this administrative regulation for the protection of human health from the consumption of fish tissue may be granted if it is demonstrated that natural, ephemeral, intermittent, or low flow conditions or water levels preclude the year-round support of a fishery, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges.

(4) Before granting an exception to water quality criteria, the cabinet shall ensure that the water quality standards of downstream waters shall be attained and maintained.

(5) All exceptions to water quality criteria shall be subject to review at least every three (3) years.

(6) Exceptions to water quality criteria shall be adopted as an administrative regulation by listing them with the respective surface water in 401 KAR 10:026.

Section 11. Exceptions to Criteria for Individual Dischargers. (1) An exception to criteria may be granted to an individual discharger based on a demonstration by the discharger, that KPDES permit compliance with existing instream criteria cannot be attained because of factors specified in 401 KAR 10:026, Section 2(4)(a) through (f).

(2) The demonstration shall include an assessment of alternative pollution control strategies and biological assessments that indicated designated uses are being met.

(3) Before granting an exception, the cabinet shall ensure that the water quality standards of downstream waters shall be attained and maintained.

(4) All exceptions shall be submitted to the cabinet for review at least every three (3) years. Upon review, the discharger shall demonstrate to the cabinet the effort the discharger made to reduce the pollutants in the discharge to levels that would achieve existing applicable water quality criteria.

(5) The highest level of effluent quality that can be economically and technologically achieved shall be ensured while the exception is in effect.

(6) The Kentucky Pollution Discharge Elimination System permitting program shall be the mechanism for the review and public notification of intentions to grant exceptions to criteria.

Section 12. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) “Water Quality Standards Handbook-Chapter 3”, EPA August 1994, Publication EPA-823-B-94-005a, U.S. Environmental Protection Agency, Office of Water, Washington, D.C.; and

(b) “Interim Economic Guidance for Water Quality Standards Workbook”, EPA March 1995, Publication EPA-823-B-95-002, U.S. Environmental Protection Agency, Office of Water, Washington, D.C.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Division of Water, 300 Sower Boulevard, Frankfort, Kentucky, 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

Credits

Amended effective December 5, 1979; Amended effective April 9, 1985; Amended effective May 31, 1990; Amended effective Janaury 27, 1992; Amended effective December 8, 1999; Amended effective September 8, 2004; Technical amendment effective August 9, 2007; Recodified from 401 KAR 5:031 effective June 11, 2008; Amended effective July 6, 2009; Amended effective May 31, 2013; Amended effective February 5, 2016; Technical amendment effective July 8, 2016.

Current with amendments included in the Administrative Register of Kentucky, Volume 44, Number 9, dated March 1, 2018.

401 Ky. Admin. Regs. 10:031, 401 KY ADC 10:031

End of Document

Calendar No. 500

98TH CONGRESS
1st Session

SENATE

REPORT
No. 98-284

SOLID WASTE DISPOSAL ACT AMENDMENTS OF 1983

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

TO ACCOMPANY

S. 757

together with

ADDITIONAL VIEWS

OCTOBER 28 (legislative day, OCTOBER 24), 1983.—Ordered to be printed

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98TH CONGRESS 1st Session | SENATE | REPORT No. 98-284

SOLID WASTE DISPOSAL ACT AMENDMENTS OF 1983

OCTOBER 28 (legislative day, OCTOBER 24), 1983.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 757]

The Committee on Environment and Public Works, to which was referred the bill (S. 757) to amend the Solid Waste Disposal Act to authorize funds for fiscal years 1983, 1984, 1985, 1986, and 1987, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

RELATED LEGISLATIVE HISTORY

It is the intention of the Committee to offer the text of this bill as a committee-sponsored amendment to S. 1283. That bill, containing a one-year authorization for the Solid Waste Disposal Act, was reported May 16, 1983, in order to comply with requirements of the Congressional Budget Act. When the Senate adopts the committee-sponsored amendment to S. 1283, the legislative history of S. 1283 shall then include this report. S. 1283, as amended, will be known as the "Solid Waste Disposal Act Amendments of 1983".

GENERAL STATEMENT

The Resource Conservation and Recovery Act (RCRA) was enacted as an amendment to the Solid Waste Disposal Act (the Act) in 1976. The amendment established this Nation's basic hazardous

waste management system under subtitle C of the Act, and provided complementary authority to encourage the conservation and recovery of valuable materials and energy.

Since the date of enactment, attention has been focused on the implementation of the subtitle C program. In May 1980 the Agency published its first major package of regulations to implement subtitle C. These regulations put into place waste identification, manifesting, transportation and interim status treatment, storage and disposal requirements. While these requirements were long in coming, they represented an important step in bringing the management of hazardous waste under some control. Since May 1980 a semblance of a hazardous waste regulatory and enforcement program has begun to take shape with the promulgation of several proposed final standards for treatment, storage and disposal facilities, and financial responsibility requirements.

However, despite this progress, the disposal of wastes, epecially hazardous wastes, is a worsening national problem. The failure of the Environmental Protection Agency (EPA) to promulgate necessary regulations and, on occasion in recent years, the promulgation and revision of some regulations have exacerbated this problem. Two examples are the decision to exempt from regulation all generators who produce 1,000 kilograms per month or less of hazardous waste and the abrupt decision to suspend, on February 25, 1982, a ban on placing drums of liquid hazardous waste in landfills. The ban, which had been promulgated on May 19, 1980, and went into effect on November 19, 1981, was suspended without advance notice or opportunity for public comment. Fortunately, the Agency recognized its mistake and quickly reimposed the ban. Unfortunately, damage had already been done to both the environment and the Agency's credibility.

Preliminary findings from EPA's "National Survey of Hazardous Waste Generators and Treatment, Storage and Disposal Facilities Regulated under RCRA in 1981", published on August 30, 1983, highlight the need for amendments to the law. The scope of the problem and the inadequacies of the law and the current regulatory program appear to be worse than was originally estimated. For example, previous estimates stated that approximately 40 million metric tons of hazardous waste are produced in the United States each year. These estimates were among the factors influencing various regulatory decisions. The new preliminary findings, however, suggest that the correct figure is roughly 150 million metric tons of hazardous waste each year, almost four times the previous estimate. (One hundred fifty million metric tons equals 40 billion gallons.) Furthermore, the study indicates that less than 25 percent of the 60,000 firms that identified themselves to the Agency as hazardous waste generators were, in fact, subject to EPA's subtitle C regulations.

Additional shortcomings in the regulatory system are suggested by the preliminary estimates which indicate that less than 60 percent of the treatment, storage, and disposal facilities listed with the Agency managed hazardous waste in regulated processes during 1981. Approximately 68 million metric tons (15.6 billion gallons) of hazardous waste were disposed of in 1981 by the following methods: underground injection (57 percent); surface impoundment (38 per-

cent); landfill (3 percent); land treatment (1.4 percent); and other (0.6 percent).

In the 97th Congress, the Subcommittee on Environmental Pollution conducted two days of hearings on amendments to the Solid Waste Disposal Act. Testimony was received from more than 40 witnesses on the need to amend the Act. The Administrator of the Environmental Protection Agency submitted amendments to the Solid Waste Disposal Act which were introduced by request. Congress failed to act on the amendments last year.

During this session of Congress, the Subcommittee on Environmental Pollution held two additional hearings on the need to amend the Solid Waste Disposal Act. One bill, S. 757, provided the focus for the hearings. The Administrator did not submit proposed amendments. Testimony was received from more than 30 witnesses on a variety of subjects. A number of problems were identified and are addressed in the reported bill.

As the result of an EPA regulatory decision, small quantity generators (those who produce 1,000 kilograms per month (kg/mo) or less of hazardous waste) are currently exempt from subtitle C requirements and may dispose of their wastes into sanitary landfills and into sewers that are connected to publicly owned treatment works. Neither of these types of facilities is suited to the disposal or treatment of toxic organics or metals. In addition, such generators are not required to package the waste in a safe manner nor to notify the transporters that the waste being transported is hazardous. In addition to being toxic, many of the wastes are ignitable, reactive or corrosive and, therefore, create an occupational safety hazard for the unwitting transporter. Although the unregulated community may represent less than 10 percent of the universe, the Office of Technology Assessment has estimated that up to four million metric tons (one billion gallons) of hazardous waste per year are escaping effective control through this exemption.

Delayed promulgation of final regulations to implement subtitle C and prolonged use of interim status permits by EPA has allowed some facilities to operate without assurances that design and performance standards will utilize adequate and available control technology. The application of available technology, at a minimum, is necessary to minimize hazardous waste releases into the environment.

Current EPA regulations do not require facilities receiving permits under subtitle C to address all releases of hazardous wastes from solid waste management units at the facility. A facility which is causing, for example, groundwater contamination from inactive units could, therefore, seek a permit under current regulations and receive the permit without the permit addressing the contamination.

The process for listing hazardous wastes under section 3001 is a general screening to determine that a kind of waste typically can cause harm to human health and the environment if mismanaged. The delisting process set forth in current regulations allows petitioners (usually individual hazardous waste generators or treatment facilities) the opportunity to show that their wastes are significantly different—because of treatment, or because they are generated in a different process—from listed wastes of the same type.

Consequently, their wastes can be excluded—i.e. delisted—from the hazardous waste lists. Under the Agency's regulations, EPA will delist those wastes which do not, or no longer, meet the criteria for which the waste was listed.

EPA's listing regulations do not fully address the fact that wastes are frequently composed of numerous hazardous constituents. In some instances, because listing is a general screening process, EPA may not have taken all the hazardous constituents in a waste into consideration when the waste was originally listed. Although EPA has authority under the Act to reject a delisting petition based on the presence of these additional constituents, EPA's regulations currently do not allow the Agency to do so. This has resulted in some wastes which are still hazardous being exempted from the hazardous waste lists and consequently, from all subtitle C regulation

Under the Agency's present regulations, to be a hazardous waste, a waste must exhibit a characteristic of hazardous waste or be listed by name. None of the characteristics of hazardous waste promulgated so far—ignitability, corrosivity, reactivity, or extraction procedure toxicity—identifies wastes on the basis of organic toxicity. In addition, EPA's listing process has been virtually stalled for several years.

Currently, the Agency exempts from regulation facilities that burn hazardous waste for the primary purpose of energy recovery. EPA has estimated that 10 to 20 million metric tons of hazardous wastes are burned each year in boilers; a substantial amount of hazardous waste generated is burned in facilities not now regulated under subtitle C. The Agency has acknowledged that burning hazardous wastes for energy recovery is similar to incinerating them and "could pose a parallel or greater risk of environmental dispersal of hazardous waste constituents and products of incomplete combustion."

Fuel blending is one of several areas where EPA's failure to promulgate regulations had led to direct threats to human health and the environment. Hazardous wastes have been blended with heating oil and sold to unsuspecting customers who burn them under conditions which may not protect human health or the environment. The potential impact of this loophole is even more significant as more and more wastes may be burned in boilers, cement kilns, or other heat recovery units to avoid hazardous waste regulation and treatment costs.

Current law does not mandate that facilities that treat, store, and dispose of hazardous wastes be regularly inspected. Although officers, employees, and representatives of the States and EPA are authorized by section 3007(a) to enter and inspect any facilities where hazardous wastes are handled, too few inspections are being conducted to effectively monitor compliance with subtitle C and applicable regulations. Inspections that do occur are conducted under widely varying State formulated criteria regarding the qualifications of inspectors and the scope of the inspection.

Subtitle C provides criminal penalties for transporting waste to an unpermitted facility and for submitting false information in documents required to be filed under the Act. However, the statute presently does not specifically address the criminal liability of gen-

erators of hazardous waste who knowingly cause the waste to be transported to an unpermitted facility. It also does not address material omissions or the failure to file required reports. Similarly, where hazardous waste is knowingly transported without a manifest, there is no criminal liability unless the waste is subsequently delivered to an unpermitted facility. Although most facilities are operating under interim status permits, there is currently no criminal liability for knowing violations of such requirements. Portions of the current "knowing endangerment" provisions are redundant and unnecessarily restrictive.

Current regulations allow hazardous wastes to be exported from the United States with minimal notice to receiving countries. There is currently no requirement that receiving countries be fully apprised of the nature of the shipment nor a requirement that they consent to receipt of the shipment.

Even with the phaseout of the small quantity generator exemption, sizeable amounts of hazardous materials from such generators, household wastes, and illegal dumping are disposed of in municipal landfills. Current criteria for sanitary landfills are inadequate to deal with these facts. In addition, there is a need to provide for better implementation of the open dumping ban and upgraded criteria for sanitary landfills.

There is a need for more complete and reliable data on hazardous wastes facilities, sites, and exposures to and effects from releases.

Section 7003 currently authorizes suits to immediately restrain any person contributing to handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Though the issue of inactive waste sites is not addressed explicitly in section 7003, the Congress, most courts and every administration which has administered the Act has construed the section to apply to such sites. Notwithstanding an opinion from the U.S. Court of Appeals for the Third Circuit and several district court decisions upholding the government's position, two district courts have recently ruled to the contrary. Both cases are on appeal. The Administration testified that clarifying language amending section 7003 would be helpful.

The Administrator is authorized by section 7003 to sue to abate an endangerment whenever the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment. There is presently no comparable authority for citizen suits. As exemplied by the Superfund experience, the number of potential problem sites exceeds the Government's ability to take action each time such action is warranted. The problem is primarily one of inadequate resources.

The reported bill, the Solid Waste Disposal Act Amendments of 1983, authorizes appropriations to carry out the purposes of the Solid Waste disposal Act. Several amendments with significant policy implications are included to bring implementation of the Act closer to the original intent of the Congress. Two new and related program directions are included in the bill.

Land disposal of hazardous wastes has been the least expensive and, therefore, most widely used method of managing hazardous waste. It is undisputed that the problems of the present are a direct result of the disposal practices of the past. Unfortunately, these practices are continuing. Particularly troublesome are landfills and surface impoundments of highly toxic, mobile, persistent wastes and wastes that have the potential to bioaccumulate. For many wastes, alternative technologies exist, currently with excess capacity. Where the capacity does not exist it can be developed if a viable market can be assured.

These amendments reaffirm the Administrator's authority to prohibit land disposal methods that cannot be shown to be protective of human health and the environment and direct the Administrator to use that authority. Reliance on land disposal should be minimized and land disposal, particularly landfill and surface impoundments, should be the least favored method for managing hazardous wastes.

These amendments also recognize that safe disposal, storage and treatment opportunities are limited and that the most effective way to protect human health and the environment is to minimize the opportunities for exposure by reducing or eliminating the generation of hazardous waste as expeditiously as possible. Rather than creating a rigorous regulatory program, provisions are included to encourage generators to voluntarily reduce the quantity and toxicity of all wastes. The amendments do not authorize the EPA or any other organization or person to intrude into the production-process or production decisions of individual generators.

Taken as a whole, the reported bill emphasizes two concepts. First, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Second, waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

Section-by-Section Analysis

Short title

This Act may be cited as the Solid Waste Disposal Act Amendments of 1983.

Authorizations

This section authorizes appropriations under section 2007(a) of the Act as follows: $43,628,000 for fiscal year 1983; $45,000,000 for fiscal year 1984; and $47,000,000 per fiscal year for fiscal years 1985, 1986, and 1987. The authorization under this section includes the funds for EPA's basic program activities under the Act, including regulatory functions, permit processing, and enforcement.

Appropriations under section 3011(a) of the Act are authorized as follows: $46,000,000 for fiscal year 1983, $47,000,000 for fiscal year 1984; $50,000,000 for fiscal year 1985; and $52,500,000 per fiscal year for fiscal years 1986 and 1987. The authorization under this section funds grants to the States for purposes of assisting the

States in the development and implementation of authorized State hazardous waste programs.

SMALL QUANTITY GENERATOR REGULATION AND STUDY

The reported bill adds a new subsection (b) to section 3002 of the Solid Waste Disposal Act, closing out the administrative exemption of hazardous waste from small quantity generators from regulation under subtitle C. The amendment establishes requirements for notice to transporters and disposers of such waste and for proper containerization of such wastes. The Agency is required to conduct a study of wastes from generators of less than 1,000 kilograms (2,200 pounds) per month and to establish standards under subtitle C for those generators.

The purpose of this amendment is to correct a current regulatory exclusion from the subtitle C program that was not contemplated or intended by the Congress in enacting the 1976 Act. Under the existing regulations promulgated on May 19, 1980, the Agency conditionally excluded from hazardous waste control most generators who generate less than 1,000 kilograms per month. As discussed in the preamble to those rules, the decision to establish an exclusion limit of 1,000 kilograms per month was not based on a detailed evaluation of the risks associated with exempting small quantity generator wastes, but on considerations of administrative convenience. The Agency recognized the need to regulate these smaller quantity generators when it stated in that preamble that it would "initiate rulemaking within 2 to 5 years to phase in expanded Subtitle C coverage of small quantity generators down to those generating more than 100 kg/mo."

It is questionable whether such an exclusion is authorized by the Act, which requires all hazardous waste to be regulated to protect human health and the environment. The Committee registered its opposition to the 1,000 kilogram per month exclusion when the regulations were originally promulgated in 1980, having earlier objected to the proposal for a 100 kilogram per month exclusion. More recent evidence confirms the validity of those concerns.

As a consequence of the exclusion, most generators have chosen to manage these "small quantities" as conventional trash rather than as the hazardous waste which they are. A survey of one "small quantity generator" industry provided by the Chamber of Commerce of the United States indicated that 85 percent of the small quantity generators in that industry placed their hazardous waste in amongst their conventional solid wastes when they place those wastes for collection. As a direct result, there have been a series of serious accidents injuring unsuspecting trash collectors, destroying their vehicles, and jeopardizing the integrity of the sanitary landfills which receive these wastes. Testimony indicated solid waste collectors are not being told when hazardout waste is being placed for disposal. Hazardous wastes have been taken to sanitary landfills where disposal of these wastes represents an unanticipated environmental risk.

On the basis of the most recent estimates available to the Committee, as much as 15 million metric tons per year of hazardous

waste from "small quantity generators" may be excluded from regulation under subtitle C.

The reported bill responds to this problem in two stages. Within 270 days after enactment, several minimal requirements are placed on hazardous waste from small quantity generators. A major study of such wastes is mandated as well, to produce regulations more completely eliminating this regulatory exclusion by March 31, 1986.

There is an immediate need to provide notice to transporters, treaters, storers, and disposers of small quantities of hazardous waste of what they are handling or receiving. Such notices will enable the handlers of those wastes to properly manage them and be aware of the dangers they present. Accordingly, new section 3002(b)(1) requires that any off-site shipment of hazardous waste listed or identified under section 3001 that is generated by a generator who generates between 100 kilograms and 1,000 kilograms of hazardous waste in any calendar month must be accompanied by a copy of the Environmental Protection Agency's uniform hazardous waste manifest form signed by the generator. This requirement is intended to be self-implementing and becomes effective 270 days after enactment.

In using the uniform hazardous waste manifest, small quantity generators are not being required to fill out the entire form but only the following information:

1. Name and address of the generator of the waste;
2. The United States Department of Transportation (DOT) description of the waste (including the proper shipping name, hazard class, and identification number (UN/NA), if applicable) or, if the DOT description of the waste is not provided under the applicable DOT and EPA regulations, the EPA identification number or a generic description of the waste or a description of the waste by hazardous waste characteristics;
3. The number and type of containers;
4. The quantity of waste being transported; and
5. The name and address of the facility designated to receive the waste.

Care has been taken in assuring that there be no excessive burden in the notification requirements. Many hazardous wastes are required to be subject to the Hazardous Materials Transportation Act. This provision allows compliance with the written notice requirement under that Act to satisfy the requirements of this section. Alternatively, a generator can identify his waste in terms of the EPA identification number, a generic description of the waste such as "waste paint" or "used solvents", or merely by describing the waste in terms of its hazardous waste characteristic. Unless the Administrator finds that additional requirements are necessary to protect human health and the environment, this is the extent of the required notice under this section.

The Administrator is authorized to apply this notice requirement to hazardous waste from generators of levels of less than 100 kilograms per month. In exercising this authority, the Administrator is to establish a lower threshhold for the new section 3002(b)(1) notice requirement at that level necessary to protect human health and the environment.

None of the requirements in this amendment is intended nor should be construed to limit the Agency's authority to impose additional requirements on acutely hazardous wastes or to list additional wastes as acutely hazardous wastes. New section 3002(b)(6) specifically preserves the current regulations regulating acutely hazardous wastes generated in quantities of one kilogram per month or more.

New section 3002(b)(2)(A) requires that generators who generate between 100 kilograms and 1,000 kilograms of any hazardous waste identified under section 3001 on the basis of the characteristics of ignitability, reactivity, or corrosivity, or listed under section 3001 place those wastes in suitable, sound, non-leaking containers when they are transported off the premises on which generated. This requirement is effective 270 days after enactment. A suitable container is one that will not be adversely affected when the hazardous waste in placed in the container (i.e., the waste will not be incompatible with the container). The intent is that the containers prevent spills or leakage. Such containers as 55 gallon drums, if sound and non-leaking, could contain within them smaller containers which may or may not be intact (subject to new section 3004(c)). Of course, any container deemed appropriate for transporting particular wastes under EPA regulations applicable to other generators would be considered suitable for small quantity generators as well. The amendment allows the generator and the transporter of such wastes to mutually agree on the type of container or method of handling to be used. Under the provisions of this bill, hazardous waste identified on the basis of the characteristic of extraction procedure toxicity are not covered by these container requirements.

New section 3002(b)(2)(B) provides that until the Administrator completes the study and regulations required by paragraph (7)(A) and (B), or except as required under State law, no small quantity generator shall be subject to additional manifesting, recordkeeping, or reporting requirements beyond those in EPA regulations promulgated prior to January 1, 1983. The primary purpose of this provision is to limit the types of requirements which may be imposed on small quantity generators pending completion of the regulations required by paragraph (7)(B).

Paragraph (3) of new section 3002(b) requires that until the special small quantity generator regulations under paragraph (7)(B) go into effect, or until the fallback requirements of paragraph (7)(C) apply due to a failure a meet the statutory deadline for publishing those regulations, all hazardous waste from small quantity generators can be disposed of only in a facility which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste. This codifies the existing regulatory requirement, excluding from subtitle C regulation only those small quantity generator wastes which are disposed of in approved facilities. There is no delay in the effective date of this provision since it continues the current requirement.

This language does not allow these waste to go to any municipal or industrial disposal facility, but only to sanitary landfills or other facilities that are approved by the State to handle such wastes. Under current law, these facilities should comply with the sanitary landfill criteria under subtitle D.

New section 3002(b)(5) requires the Agency to modify the regulations for storage facilities under section 3004 to allow small quantity generators to store their waste on-site in tanks or containers for up to 180 days without a permit. If the generator must ship or haul such waste over two hundred road miles, small quantity generators may store wastes on-site without a permit for up to 270 days, up to a total accumulation of 6,000 kilograms of hazardous waste.

Certain generators may be located long distances from the appropriate treatment storage, disposal or recycling facility, and the additional time for storage and quantity of waste that can be stored without having to receive a permit is not unreasonable. The longer storage period provided by paragraph (5) will allow the generator to consolidate wastes into larger loads for shipment off the premises. The period 270 days for remote generators was chosen primarily to accommodate schools and universities, which could accumulate wastes through an academic year for a single shipment. Of course, the more liberal storage requirements also mean that a single shipment from a single "small quantity generator" could total 6,000 kilograms, or 13,200 pounds—over 6 tons.

Paragraph (7)(A) of new section 3002(b) requires the Administrator to conduct a study, in cooperation with the States, of all hazardous waste generated by small quantity generators. The study, to be submitted to Congress by March 31, 1985, is to include a characterization of the number and type of small quantity generators, the quantity and characteristics of hazardous waste generated by such generators, State requirements applicable to such generators, the waste management practices used by individual generators and by industry classes to manage such wastes, the potential costs of modifying those practices, any impact such modifications will have on treatment and disposal facility capacity on a national scale, and the threat presented to human health and the environment and the employees of transporters and solid waste management facilities posed by such hazardous wastes or such management practices. The study is also to consider whether the containerization requirement of new section 3002(b)(2) should be extended to wastes which are identified as hazardous on the basis of toxicity or additional characteristics which may be promulgated by the Agency. The Administrator may require from such generators any information as may be necessary to conduct the study. This statement simply clarifies that the authorities of section 3007 are available to the Administrator in conducting the study and developing regulations under this subsection.

This study is already underway. If, however, it proves difficult to complete by March 31, 1985, this should not be allowed to delay the promulgation of regulations by the statutory deadline. More than 20 States presently regulate hazardous wastes excluded from subtitle C regulations under the small quantity generator definition. The experience of these States should be a major focus of this study.

The basic standard of subtitle C is the protection of human health and the environment. While the exposure of some individuals to hazardous waste from small quantity generators occurs in a primarily occupational setting, protection of their health is still the object of subtitle C regulation. The provision directs the Agency in

conducting the study and preparing regulations, to give full consideration to the need to protect such employees.

New section 3002(b)(7)(B) requires the Administrator, no later than March 31, 1986, to promulgate additional regulations under sections 3002, 3003, 3004, and 3005 for hazardous waste from small quantity generators. These regulations must contain such requirements as are necessary to protect human health and the environment. The regulatory requirements can supplement those established by paragraphs (1) through (5) of this new subsection.

Many small quantity generators may be small businesses that may be adversely affected if the full set of subtitle C regulations are required. These quantities of wastes from smaller individual generators may cause potential harm if they are improperly managed. Given these considerations, the Agency should determine whether requirements for small quantity generators can be varied from those applicable to other generators while assuring protection of human health and the environment. In particular, the Administrator should examine whether, because of the smaller amount of waste involved, it is possible to simplify, reduce the frequency of, or eliminate the existing reporting and record keeping requirements and still provide adequate protection of human health and the environment. Distinctions may be made from requirements for larger generators, and among classes of small quantity generators or of wastes produced by them.

At the time the Agency promulgates standards for small quantity generators under this new subsection, notification would not be required under section 3010(a) because the Agency is not listing or identifying a hazardous waste under section 3001. However, in developing such standards, the Agency may, of course, use its authorities under section 3010 or 3002 to require small quantity generators to notify the Agency or obtain identification numbers if the Agency believes such requirements are necessary to protect human health and the environment.

The provision directs the Administrator in developing revised requirements for small quantity generators to consider State requirements applicable to small quantity generators. In the event the requirements developed by the Agency are different than those State requirements, the Administration must explain the basis for those differences. The purpose of this provision is to assure that the Agency fully considers the States' experience with small quantity generators in developing revised Federal regulations under paragraph (7)(B). Thus, where States have adopted alternative regulatory approaches and articulated a rationale for their requirements, it is appropriate for the Agency both to evaluate such approaches and explain its decision to impose different requirements in Federal regulations. On the other hand, if States have simply adopted EPA's existing small quantity generator regulations (or its 1978 proposal) by reference, it is not necessary to exhaustively analyze State requirements or to explain or to justify differences between State and Federal requirements.

While paragraph (7)(B) allows standards for waste from small quantity generators to vary from those for other generators' waste, some minimum requirements are specified for small quantity generator wastes. The notice requirement of paragraph (1) is a mini-

mum, as is the requirement for suitable containers under paragraph (2). In addition, standards for small quantity generators must also provide that all treatment, storage, and disposal of hazardous waste generated by small quantity generators must be at a facility with a permit under section 3005. This includes both facilities that have a subtitle C permit issued by either EPA or an authorized State or facilities with interim status, since interim status facilities are deemed to have a permit under the language of section 3005. Paragraph (7)(B), however, authorizes the Administrator to establish a level of total generation of waste by a generator, not to exceed 100 kilograms per month of hazardous waste, which the generator would be allowed to continue to manage at a facility which is permitted, licensed, or registered by a State to handle such waste (i.e., a subtitle D facility), if the Administrator determines that such practice will be adequate to protect human health and the environment for that quantity of waste. The Administrator may distinguish among classes or categories of wastes in establishing that level. Any use of this authority should be on the basis of the study of small quantity generator wastes: a 100 kilogram per month cutoff for this requirement should not become a general use. Along with the requirement that small quantity generator wastes go to a subtitle C-permitted facility, the Agency must promulgate whatever additions to the manifest requirement are necessary to enforce the adequate disposal facility requirement.

In the event the Administrator does not promulgate revised small quantity generator requirements by March 31, 1986, new section 3002(b)(7)(C) provides that three requirements (in addition to those set forth in paragraph (1) and (2) and (2)(A)) will automatically go into effect. First, under subparagraph (C)(1), effective March 31, 1986, all small quantity generator waste from a generator producing more than 100 kilograms in any month must be treated, stored, or disposed of at facilities with permits under section 3005. Again, this phrase encompasses not only facilities which have obtained individual permits from EPA for from an authorized State, but also those with interim status.

Second, also effective March 31, 1986, generators subject to subparagraph (C)(i) must begin filing manifest exception reports, although only twice a year. These reports should be filed with EPA in non-authorized States and with the appropriate State agency in authorized States. Similarly, the contents of the reports should be governed by Federal law in unauthorized States and State law in authorized States.

Finally, the generator must begin retaining a copy of the manifest form which has been signed by the designated facility. Consistent with EPA regulations, this copy must be kept for at least three years from the date the waste shipment was accepted by the initial transporter.

The Administrator is expected to promulgate small quantity generator regulations under paragraph (7)(B) by March 31, 1986. The Agency should seek whatever resources are necessary to allow it to complete this task and the others established by this legislation. After such regulations are promulgated as required by March 31, 1986, the requirements of paragraph (1) will remain in effect in authorized States as a Federal requirement until such time as the

States adopt regulations equivalent to EPA's and those regulations are approved by EPA under section 3006(b). Similarly, if the Administrator fails to meet the March 31, 1986, deadline and the requirements of paragraph (7)(C) go into effect automatically, the requirements of paragraph (1) and this subparagraph shall remain in effect in each authorized State until such time as the State issues regulations equivalent to those ultimately developed by the Administrator under paragraph (7)(B) and those State regulations are authorized by EPA under section 3006(b). The requirements of paragraph (7)(C) are not an indication of what is adequate to protect human health and the environment under paragraph (7)(B). Rather they are requirements of a minimum nature intended to provide some protection on an interim basis until the paragraph (7)(B) regulations are promulgated.

The first new requirements of new section 3002(b) come into effect 270 days after enactment. This period prior to implementation is necessary to assure sufficient time for small quantity generators to become aware of and prepare for their responsibilities under this provision.

To this end, under paragraph (7)(B) the Administrator is also required to undertake activities to inform and educate small quantity generators of their responsibilities. Since many small quantity generators are small businesses, they may not be aware of their legal responsibilities unless the Agency makes an effort to inform them. Unless small quantity generators are advised of their responsibility, many of them will not comply with the rules. Thus, the Agency is required to inform them of their responsibilities, to the extent possible, to help assure compliance. In doing so, the Agency should continue working closely with the appropriate trade associations and trade press to inform small quantity generators. In addition, the Agency may also find it helpful to hold public meetings, seminars or workshops as another means to advise small quantity generators of their responsibilities.

LAND DISPOSAL LIMITATIONS

This section amends section 3004 of the Act and establishes a program to reduce significantly current dependence on land disposal as a waste management practice by prohibiting the land disposal of certain hazardous wastes. This program is based upon a finding that land disposal in general is the least desirable form of waste management because of the problems associated with assuring long-term containment of hazardous wastes. Therefore, in order to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized and land disposal of hazardous wastes, particularly in landfills and surface impoundments, should be the least favored method for managing hazardous waste. Where treatment and recovery options are or will become available, there is no reason to accept the residual risk associated with land disposal facilities, even those meeting state-of-the-art standards.

Based upon these findings, new section 3004(b) directs the Administrator to promulgate regulations prohibiting the land disposal of hazardous wastes, except for those waste and land disposal

method combinations that the Administrator determines will be protective of human health and the environment. The section imposes on the Administrator a stringent standard for determining that the continued land disposal of certain wastes is advisable. The presumption will be against land disposal as a waste management technique.

A ban on one or more methods of land disposal for a specified waste does not necessarily mean that all methods of land disposal of that waste must be prohibited. For example, a particular hazardous waste might be prohibited from disposal in a surface impoundment or landfill but not from disposal in an injection well. Similarly, land treatment may be an acceptable disposal method for those hazardous wastes which can be biodegraded or transformed directly by the land treatment process or, if hazardous constituents remain after land treatment, where the hazardous constituents can be immobilized.

This scheme requires a two-step assessment. The first step involves an examination of the inherent characteristics of a waste. During this step, the Administrator shall consider the persistence, toxicity, mobility, and propensity to bioaccumulate of a particular hazardous waste or toxic constituents in the waste and the potential effect of the waste on the integrity of containment mechanisms (such as clay or synthetic liners or the fabric of an injection well or an injection zone). If a waste contains significant concentrations of one or more hazardous constituents that are highly toxic, highly mobile, or have a strong propensity to bioaccumulate, step one of the assessment results in a presumption that land disposal of that specific waste will be prohibited.

For each waste, these characteristics could be reviewed separately or in combination. For example, a particular waste or constituent may be so extremely toxic that the waste is a candidate for a ban on that basis alone. Another waste may be appropriate for a ban based on a combination of factors, for example because it is highly toxic and mobile. Also, a waste may not be mobile or toxic itself but could render other wastes more toxic or mobile, thus it may be appropriate to ban such a waste.

The Administrator shall also consider concentrations of waste constituents when reviewing a particular waste type. The concentration levels that are "significant" will, of course, differ for various constituents. The Administrator may establish "concentration limits" for waste constituents and then ban the land disposal of wastes which contain these constituents in excess of the stated concentration limits.

Step two of the assessment involves a consideration of wastes identified in step one in combination with the various land disposal technologies. A presumption for prohibition of a waste made in step one may be overcome with respect to a particular method of land disposal if the Administrator determines that the particular method of land disposal of such waste will be protective of human health and the environment. This determination may be made if the Administration finds, to a reasonable degree of certainty, that no migration of the highly mobile, highly toxic, or highly bioaccumulative constituents will occur from the disposal unit or injection zone, for as long as the waste remains hazardous.

Interested members of the regulated community may demonstrate that a method of land disposal will be protective of human health and the environment because there will be no migration for as long as the waste remains hazardous. The requirement for an application by an "interested person" is intended to place the burden on the applicant or industry to prove that a specified waste can be safely contained in a particular type of individual disposal unit or injection zone. This demonstration could be made either by an individual applicant for a particular facility, or alternatively, it could be made for a class of facilities with like containment mechanisms and natural hydrogeological conditions. Such a demonstration could be made by a State with an approved underground injection control program, for injection wells under such program which meet the test of new section 3004(b)(2). This is a limited variance, requiring the applicant to sustain the burden of meeting this standard without the use of artificial barriers such as liners. Artificial barriers cannot provide the assurances necessary to meet the standard.

Protection of human health and the environment requires a demonstration that the disposal practice in question provide a "reasonable degree of certainty" that the waste can not escape to cause damage to human health of the environment. Wastes chemically decompose in a land disposal facility, although often this decomposition occurs very slowly stretching over centuries. The Administrator is required to find that the nature of the facility and the waste will assure that migration of the wastes will not occur while the wastes still retain their hazardous characteristics in such a way that would present any threat to human health and the environment. Absent such a finding the waste in question is to be banned from that type of disposal. In determining appropriate confinement from which migration shall not be allowed to occur, the terms disposal unit or injection zones should be construed not in terms of the property ownership but in terms of the overall environmental integrity of the disposal practice, keeping in mind, in particular, the potential for contamination of groundwater or surface water resources. Injection of hazardous wastes into deep wells allow dispersion of these wastes in a defined strata deep beneath the surface in a pattern totally without regard to the land ownership of the surface above. The disposal practice must be viewed in terms of its environmental and human health consequences and assure that, to a reasonable degree of certainty, no migration of hazardous constituents can occur for as long as the wastes remain hazardous. The phrase "reasonable degree of certainty" is intended to discount only the unpredictable future events. Certain geologic events such as earthquakes and floods, the likelihood of which can be predicted, should be considered by the Administrator when determining if migration will occur.

If the Agency reviews a particular waste and finds that it does not meet the step one criteria, of if EPA determines that a prohibition is not warranted for certain methods of land disposal, it must publish the basis for that determination in the Federal Register. Thus, each time the Agency finds that a waste should not be prohibited from some or all methods of land disposals, it must publish

an explanation of why those methods of land disposal are protective of human health and the environment.

These are several key terms used in the step one standard for prohibiting wastes. These terms are "significant concentrations of hazardous constituents," "highly toxic," "highly mobile," and "a strong propensity to bioaccumulate." Because of their highly technical nature, definition of these terms is left to the Agency. However, the word "highly" or "strong" should not be read to be unduly restrictive. Land disposal is not appropriate for many wastes, particularly wastes containing hazardous constituents significantly in excess of existing ambient standards. The Agency may set up a ranking system for assigning priorities to wastes based on these characteristics and then determine the appropriate cut-off point for determining which wastes are candidates for prohibition. Alternatively, EPA could develop a set of characteristic tests for toxicity, mobility, and propensity to bioaccumulate, similar to the characteristic tests now used to determine whether a waste is hazardous. These characteristic tests would be used for determining which wastes are candidates for land disposal prohibitions.

A key term for step two, "injection zone" has an existing usage in the underground injection control program under the Safe Drinking Water Act. Its meaning here is intended to be same as defined in 40 CFR Part 146.3.

Treatment standards

Treatment of hazardous wastes will sometimes result in residuals that must be land disposed. Therefore, in combination with promulgation of rules prohibiting one or more methods of land disposal of a hazardous waste, the Administrator is directed to promulgate regulations establishing what would essentially be "pretreatment standards" for hazardous wastes prior to allowing land disposal. These pretreatment standards are essential to implementing a successful program of land disposal prohibitions.

For example, for a highly mobile waste, the Administrator could allow land disposal if the waste were stabilized so as to reduce its mobility. This type of standard could be expressed in various ways. It could be stated as a measure of the reduced mobility that must be achieved, or as the type of pretreatment that must be undertaken prior to land disposal, or as a maximum concentration of the waste constituents which contribute to the waste's mobility. In the latter case, this determination would be made in conjunction with the determination of significant concentrations in step one.

A requirement for treatment of hazardous constituents under other statutes is another factor that may be considered. For example, the Administrator should impose, as a condition of land disposal, a treatment requirement that is consistent with categorical pretreatment standards required pursuant to the Clean Water Act. Increased regulation under the Solid Waste Disposal Act should complement and reciprocally re-enforce regulations under the Clean Water and Clean Air Acts. It makes little sense to improve or accelerate regulations under those statutes only to have environmental goals frustrated by loopholes allowing less stringent treatment under the Solid Waste Disposal Act.

There are certain hazardous wastes with constituents (e.g., some heavy metals) that are highly toxic or bioaccumulative which cannot be transformed to a less hazardous chemical form through treatment. In these cases it would be preferable to recover these constituents. Where recovery is not technologically feasible, however, such wastes should be treated using the best available treatment technologies (e.g., stabilization or fixation) to immobilize the highly toxic or bioaccumulative constituents prior to land disposal.

The dilution of wastes by the addition of other hazardous wastes or any other materials during waste handling, transportation, treatment, or storage is not an acceptable method of treatment to reduce the concentration of hazardous constituents. Only dilution which occurs as a normal part of the process that results in the waste can be taken into account in establishing concentration levels.

Schedule

Paragraphs (4), (5), and (6) of new section 3004(b) contain schedules for the three phases of the program for making determinations as to which wastes to prohibit from which land disposal methods. The Agency has stated in hearings that it plans initially to review dioxin-containing hazardous wastes and spent solvent hazardous wastes numbered F001, F002, F003, F004, and F005 in regulations promulgated pursuant to section 3001 (40 C.F.R. 261.31). Therefore, these wastes have been selected to be reviewed first. The Agency is directed to determine by July 1, 1985, if prohibitions of one or more methods of land disposal of these wastes is appropriate.

Paragraph (5) contains a list of hazardous wastes the Administrator must review, within 32 months of enactment, and consider for land disposal prohibition. These hazardous wastes and specified concentration levels were selected primarily because the State of California has conducted a rulemaking procedure and begun implementing restrictions on these wastes. The specified concentration levels—10,000 times the Interim Primary Drinking Water Standards—are a conservative starting point for the analysis. These wastes at these concentrations clearly meet the "highly toxic" standard. The specified concentrations are not intended to be binding on the Agency. Indeed, the Administrator may substitute more stringent concentration levels for the levels specified in paragraph (5).

The Administrator may, in reviewing particular wastes on this list, determine that some subset of a listed waste such as halogenated organic compounds should be prohibited from certain forms of land disposal, while other examples of a generally listed category are appropriate for land disposal.

The schedule for the third phase of the program is contained in paragraph (6). This paragraph directs the Administrator to publish within 12 months of enactment a schedule for reviewing all hazardous wastes listed under section 3001. For the purposes of section 7002, the issuance of the schedule is a mandatory duty. This schedule must provide for review and determination of whether or not to prohibit land disposal of one-third of all listed wastes within 32 months of enactment, two-thirds of all listed wastes within 42

months of enactment, and all listed wastes within 52 months of enactment. Even if the schedule is issued late, these deadlines are binding. The wastes already covered in paragraph (4) shall not be included as part of this schedule. Any new wastes listed after enactment must be reviewed and a determination of whether or not to subject them to a land disposal prohibition must be made within 32 months after their listing. In addition, within 52 months of enactment, the Administrator must determine whether or not to prohibit the land disposal of hazardous wastes identified by any toxicity characteristic. This includes the existing extraction procedure toxicity characteristic or revisions to it as well as any additional toxicity characteristics that may be developed by the Agency prior to that time, including any characteristics developed under the amendments contained elsewhere in this bill.

In making these determinations, the Agency should not start from the point of having to justify the imposition of a land disposal restriction. The presumption is that land disposal is the least preferred management method. This makes the Agency's decision far simpler than if the Act were neutral as to different management options. The Agency should not start from an assumption that it must begin a new research effort or regulatory analysis before any determinations can be made. There is an information base at the present time to begin to make the phased determinations required by this section. This includes the information from the years of work EPA and others have devoted to developing a degree of hazard system and the extensive analysis on land disposal, including research and development on the effects of wastes on different liners and the behavior of wastes when placed in the ground, as well as the work done by the State of California. The Agency should also utilize its data on incidents of groundwater contamination from hazardous wastes, and wastes found in sites on the National Priority List.

Effective date of prohibitions

A prohibition of one or more methods of land disposal of a specified hazardous waste shall be effective immediately upon promulgation unless the Administrator determines that there does not exist adequate alternative treatment, recovery or disposal capacity which is protective of human health and the environment. The prohibitions should go into effect immediately upon promulgation whenever and wherever possible. The Agency should expend every effort to assure that unsafe practices are terminated as quickly as possible. The purpose of new section 3004(b)(3) is to assure that sufficient capacity for alternative treatment, recovery or disposal is available to accommodate the wastes affected by a prohibition. This provision allows the Administrator to grant a general two-year extension of the prohibition deadline if necessary to assure the availability of alternative treatment, recovery or disposal capacity. Additionally, the alternative capacity must be determined to be protective of human health and the environment. The availability of adequate storage capacity (either in or on the land or in tanks and containers) is not an acceptable alternative capacity for the purpose of determining whether to establish an early effective date. Rather, alternative capacity must be for the treatment, recovery

(including legitimate use, re-use, and recycling), or disposal of the waste.

Claims of inadequate capacity can become a "self-fulfilling prophecy" if the regulated community believes that land disposal deadlines will normally be extended and that immediate investment in development of alternative capacity will be premature and economically non-productive. Extensions based on capacity shortfalls should be infrequently granted. Given consistent regulatory and economic incentives, adequate capacity will be quickly developed.

The available capacity determination is to be done on a national basis. Otherwise, different regions of the country would be receiving varying degrees of protection and could be used as dumping grounds for the rest of the country. In addition to creating "pollution havens", an attempt to regionalize capacity considerations would place industries within regions subject to the prohibition at a competitive disadvantage. Furthermore, regionalization would generate the kind of self-fulfilling capacity shortfalls discussed above. A nationwide availability of capacity approach might necessitate the transportation of wastes to treatment facilities over significant distances; however, this kind of waste transportation is occurring today. With the elimination of cheap, unsafe land disposal alternatives, treatment capacity and inexpensive "milk run" style collection services will develop to meet regional demands.

In order to encourage the development and construction of alternative capacity, the effective date of prohibitions should not extend beyond two years except in narrowly defined circumstances. Therefore, extensions beyond an effective date established by the Administrator may only be granted on a case-by-case basis for one year and renewable for no more than one additional year (i.e., a maximum of two years total), where an applicant demonstrates to the Administrator that there is a binding contractual commitment to construct or otherwise provide such alternative capacity but due to circumstances beyond the control of the applicant, such alternative capacity cannot reasonably be made available by the effective date. This provision is intended only to accommodate those making a good faith effort to meet the effective date but who are unable to do so due to circumstances beyond their control.

The Administrator should use this discretion sparingly and only in cases of an extraordinary nature. It is not intended that a generating industry, for example, could be allowed to continue to have its wastes disposed of in an otherwise prohibited manner solely by binding itself to using a facility which has not been constructed. Thus, when an "alternate technology" facility is operating at less than maximum capacity, the Administrator should determine that alternative capacity is available whether or not an individual company applying for an extension is constructing its own alternative facility. In such cases, the company should be required to use the available alternative capacity until such time as its own capacity has been constructed and permitted.

Additional conditions

In order to assure timely and consistent application of the program of land disposal limitations, some additional conditions have

been included in paragraphs (8) and (9) of new section 3004(b). New section 3004(b)(8)(A) addresses the concern that hazardous wastes placed in treatment or storage surface impoundments comply with at least minimum standards to protect human health and the environment. Under this provision, a hazardous waste prohibited from disposal in a surface impoundment may be treated or stored in a surface impoundment only if the impoundment has at least one liner. (Because of new section 3004(f), this principally deals with existing impoundments.) The requirements of this section are a minimum and do not necessarily meet the Agency's responsibility to assure that the storage or treatment of the prohibited hazardous waste is protective of human health and the environment. Specifically, the reference to "at least one liner" in this section is intended to mean a liner of the type called for in 40 CFR 264. The Agency has defined a liner to mean any barrier which restricts the migration of a waste from the disposal zone. A loose interpretation of this language could mean that *in situ*, highly permeable soils could be interpreted to constitute a "liner" because even these soils would "restrict" the movement of wastes into groundwater. Such an interpretation, however, is unacceptable. The intent is to require at least a single liner either of a synthetic or natural material with a very low permeability such as that called for in the July 26, 1982, regulations. The Administrator may impose additional requirements on such impoundments as may be necessary to eliminate or minimize the potential for waste migration.

Under new section 3004(b)(8)(B) placement of hazardous wastes in a surface impoundment or waste pile for more than six months is to be regulated as disposal, whether the ostensible purpose is for treatment and storage or for disposal. Many surface impoundments and waste piles have been designated as long-term "storage" rather than "disposal" facilities, although they have indistinguishable environmental consequences. Thus, in new section 3004(b)(8), only short-term storage of up to six months or treatment performed within that same time period avoids being defined as disposal. Hazardous wastes may not be circulated during a six month period in a surface impoundment facility where the liner may become contaminated with the waste. In such cases the Agency shall require the facility operator to remove that contaminated portion of the liner within six months or discontinue use of the surface impoundment for storage or treatment.

As an overall strategy under paragraph (8), the Agency should encourage operators of unlined facilities to drain and retrofit these facilities as quickly as economically feasible. This paragraph is intended to prevent the use of unlined facilities or facilities whose liners may become contaminated with hazardous wastes from remaining in operation and receiving such wastes.

Paragraph (9) contains certain restrictions that apply if the Administrator fails to promulgate regulations regarding wastes referred to in paragraphs (4) (dioxin-containing hazardous wastes and spent solvent hazardous wastes numbered F001, F002, F003, F004, and F005) and (5) (the list of wastes adopted from the California program). If the Administrator fails to determine whether a land disposal prohibition is warranted for these wastes by the specified deadline (by July 1, 1985, for paragraph (4) and by the date thirty-

two months from the date of enactment for paragraph (5), then beginning not later than six months after these deadlines, such wastes may be disposed of in a landfill or a surface impoundment only if the unit is in compliance with the requirements of section 3004(f)(1), as added by these amendments. That section requires that new or expanded landfills and surface impoundments are at least double-lined and have a leachate collection system above (in the case of landfills) and between such liners or that the facility owner or operator demonstrates that alternative design and operating practices, together with locational characteristics, will prevent the migration of hazardous constituents into ground-water or surface water at least as effectively as such liners and leachate collection systems would at the same location. In addition, such units must be monitoring groundwater, consistent with the provisions of new section 3004(f). These requirements remain in effect until such time as the Administrator makes a determination that a prohibition of land disposal of these wastes is not warranted. This provision is intended to provide temporary protection against the migration of particularly dangerous wastes. However, it should not be considered a substitute for the land disposal prohibitions intended by this section. The Agency is expected and required to meet its statutory deadlines.

The requirements of paragraph (9) do not apply to contaminated soil and debris from the cleanup or removal of any release of a hazardous substance, even if that soil or debris would otherwise fall within one of the categories of waste referred to in paragraphs (4) and (5). This exception was included to assure that the clean-up of contaminated sites under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (Public Law 96-510) and removal and remedial actions and clean-ups undertaken pursuant to orders issued under section 7003 of the Act and section 106 of CERCLA could proceed in an orderly fashion.

A question was raised during the Committee's consideration of this bill as to whether the restrictions on land disposal contained in this section are intended to apply to uranium or thorium tailings subject to regulation under the "Uranium Mill Tailings Radiation Control Act of 1978" (UMTRCA), as amended. This section is not intended to affect the statutory program that has been established by Congress in UMTRCA, as amended. Under section 1004(27) of the Solid Waste Disposal Act, "solid waste" (the definition on which "hazardous waste" is based) excludes "source, special nuclear, or byproduct material as defined by the Atomic Energy Act". Section 11e of the Atomic Energy Act, as amended, defines "byproduct material" to include uranium and thorium tailings. Accordingly, uranium and thorium tailings are not hazardous wastes subject to the restrictions on land disposal contained in new section 3004(b). Requirements under section 84 and 275 of the Atomic Energy Act are to assure the protection of human health and the environment, and need not comply with the special provisions of new section 3004(b) of the Solid Waste Disposal Act.

Liquids in landfills

A new subsection (c) is being added to section 3004 to require the Agency to promulgate final regulations which minimize the dispos-

al of liquid hazardous waste in landfills. The Agency currently regulates liquid waste in two forms: (1) bulk liquids and (2) containerized liquids (e.g., 55 gal. drums containing liquids). Containerized liquids are of particular concern because metal drums ultimately, at some unpredictable time, decay. If the drums collapse or leak after the post-closure care period, significant uncontrolled releases and subsidence of the cover could occur at a time when the leachate collection and removal system is no longer operated, the ground water may no longer be routinely monitored, and the final cover is no longer maintained. Bulk liquid hazardous wastes in landfills are also of concern because wastes in liquid form are relatively mobile, landfill liners can be damaged during placement of wastes, and hydrostatic pressures increase the likelihood of leachate escaping. Alternative technologies are available to deliquify wastes prior to disposal in a landfill. Therefore, the Agency is directed to prohibit bulk liquid hazardous wastes and minimize containerized liquids in landfills.

Liquid wastes means both "liquids" in the conventional sense of the term (i.e., the state of matter in which a substance exhibits a characteristic readiness to flow, little or no tendency to disperse, and relatively high incompressibility) and the free flowing or liquid portion of sludges that readily separates under gravitational forces. The latter meaning EPA adequately refers to as "free liquids" which is defined in 40 CFR 260.10 as "liquids which readily separate from the solid portion of a waste under ambient temperature and pressure." The current hazardous waste landfill regulations promulgated by EPA use the term "free-standing liquid" as well as "free liquids" which EPA describes in the preamble (47 FR 12317, March 22, 1982) as "those (liquids) that form distinct pools or layers within a container." Thus, "free-standing liquid" is a subset of "liquid" and "free liquids" and, therefore, is covered by these two terms.

The Agency is currently evaluating two test protocols it is developing to define the term "free liquids": a paint filter test and an inclined plane test. Because of the technical aspects of this, the Agency is authorized, in promulgating its final regulation under this subsection, to define what is meant by liquids and free liquids, and to specify any test protocols the Agency deems appropriate. The term "minimize" is used in the amendment to give the Agency the flexibility to develop a test and rule that restricts or limits liquid hazardous waste or free liquids, yet is practical both to achieve and to measure for compliance determinations (as waste is received and disposed of during inspections). This flexibility is not intended to give authority to allow significant quantities of liquid hazardous wastes to be disposed of in landfills. Rather, it is intended to allow the Agency to deal from a practical standpoint with very small quantities of liquid wastes and with difficult wastes (e.g., gelatinous wastes and sludges with high moisture content but little free flowing moisture under gravitational forces).

As discussed previously, the goal of minimizing liquids is to reduce the potential migration and leachability of hazardous constituents, and the potential for subsidence. To this end, the preferred treatment methods are decanting or deliquifying (via centrifuge, vacuum drums or conveyor, or filter presses, etc.), and mixing

with agents (e.g., bentonites and chemical reagents) that result in a material that provides structural stability as well as removal of "free liquids." Unacceptable mixing agents include sawdust, municipal waste, shredded paper, and other absorbent materials that biodegrade, and thereby collapse and release free liquids. Also unacceptable are absorbent materials that have sponge-like behavior, i.e., that absorb liquids but readily release them again under pressure (as may be expected in a landfill), such as sawdust, fly ash, shreeded paper, and certain vermiculites. Such materials also tend to produce free-standing liquids in containers during shipment. The Agency is expected to develop and publish criteria distinguishing between acceptable and unacceptable mixing agents or to test and publish a list rating mixing agents and distinguishing between acceptable and unacceptable agents, based on the above guidance. These amendment require that free liquids be minimized by means other than the addition of absorbent material, where technologically feasible.

The Administrator may continue to allow the disposal in landfills of small containers of hazardous waste placed in overpacked drums according to EPA specifications issued on November 17, 1981. This method of disposal—generally known as disposal by lab pack—is commonly used by laboratories which produce small amounts of many different wastes. These wastes are collected in small containers ranging in size from one ampule to five-gallon containers. This inside containers are surrounded by a sufficient quantity of compatible absorbent material, such as vermiculite, and overpacked in large drums (usually 55 gallon) prior to disposal in a secure landfill. EPA regulations require that the inside containers be of a design and constructed of a material that will not react dangerously with, be decomposed by, or be ignited by, the waste held therein. In addition, the placement of incompatible wastes in the same outside container is prohibited. The regulations also ban the landfill disposal of reactive wastes in lab packs unless the waste is rendered non-reactive prior to packaging.

Finally, language is included in these amendments to assure that the current regulations remain in effect and are not temporarily suspended pending further revisions or reviews.

Ban on dust suppression

A new subsection (d) is added to section 3004 to prohibit the use of contaminated waste or used oil or other material for dust suppression or road treatment. It was such use of oil mixed with dioxin that created the serious situation at Times Beach, Missouri. These amendments are designed to prevent the recurrence of such situations. Such use of hazardous waste contaminated materials is flatly banned, as a matter of Federal law.

Ban on certain wells

A new subsection (e) is added to section 3004 to prohibit the disposal of hazardous waste by underground injection into or above any formation which contains, within one-half mile of the well used for such underground injection, an underground source of drinking water. The one-half mile distance refers to the distance between the aquifer and the injection well, not the distance be-

tween the injection well and a withdrawal source. An "underground source of drinking water" means actual drinking water sources as well as high quality aquifers such as those containing water with less than 10,000 milligrams per liter of dissolved solids.

Liners and leachate collection and removal systems at interim status facilities

The current hazardous waste land disposal regulations require liners at landfills, surface impoundments, and waste piles, and leachate collection and removal systems at landfills and waste piles after permitting, unless exempted or waived. The bill amends section 3005(e) to require interim status facilities to install liners and leachate collection and removal systems prior to permitting at each new unit, each replacement unit, and at lateral expansions. Waste pile units must meet the liner and leachate collection system requirements of current regulations for new facilities. Landfill and surface impoundment units must meet the requirements of new section 3004(o). New units, replacement units, and lateral expansions are defined for purposes of the requirements of this amendment as those units or lateral expansions within the waste management area of a facility defined in the Part A permit application which first receive waste after enactment of these amendments. The requirements then apply to all such facilities which will receive waste after the date six months after enactment of the Solid Waste Disposal Act Amendments of 1983. Landfill trenches or cells, impoundments, or waste piles not operational by the date of enactment are required to meet standards for new units (including the new standards for landfills and impoundments) if the units will continue to receive hazardous waste six months after enactment. After that date, waste may still be received at units in existence at the time of enactment, but all new units, replacement units, and lateral expansions must have the required liner and leachate collection system to receive wastes after that date.

A replacement unit includes a surface impoundment that is taken out of service and emptied by removing all or substantially all the liquid and solid waste in it. Before this impoundment may be reused, it must be lined or otherwise designed according the new minimum technological requirements mandated in this bill. Similarly, a replacement unit can be a waste pile that is taken out of service and all or substantially all waste is removed from it. Before the pile may be reused, it must meet the liner and other design requirements of EPA's permit regulations.

Since the liner and leachate collection and removal system (or the possible demonstration of equivalent protection) may be implemented outside the permit process for interim status facilities, of the rules may not be adequately complied with. The Agency should not require retrofitting at the time of first permitting for units that were lined during interim status provided the liner and leachate collection and removal system were in compliance with the law and the Agency's regulations and guidance and were installed in good faith. (This does not preclude the Agency from requiring installation of new liners at some later time if, for example, the unit is in violation of the ground-water protection standard or liner requirements are strengthened.) Anyone who follows the EPA techni-

cal guidance documents for surface impoundments, landfills, or waste piles is presumed to have acted in good faith. Retrofit should be required in cases of fraud or gross noncompliance. Examples of fraud or gross noncompliance includes cases where: a liner was not installed or a liner not in compliance with EPA guidance document specifications was installed; a leachate collection and removal system was not installed or was not designed according to the formula presented in the technical guidance documents to meet the 30 cm (one foot) leachate depth requirement; or there is grossly inadequate documentation of any major design feature or construction activity.

The owner or operator of a new unit or lateral expansion is required to provide sixty days notice to the Administrator before the unit receives waste, so the unit can be inspected by EPA to assure compliance with the requirements of this subsection or so that EPA or the State can require full permitting before operation. Failure to provide EPA with the requisite notice will result in the elimination of the "good faith" protections of this provision.

The amendment to section 3005(e) of the Act requires liners, leachate collection and removal systems or, in the case of waste piles, a demonstration of equivalent protection. The reference to "equivalent protection" is to authorize the application of variances to the liner and leachate collection system that exist in current EPA regulations (other than the "existing portions" variance), to these units. For landfills and surface impoundments, new section 3004(f) allows the demonstration of the adequacy of alternative practices. However, waivers to the liner and leachate collection system requirements at new units, replacement units, and lateral expansions of all interim status facilities cannot be self implementing, i.e., there must be a mechanism for advance approval by EPA of a waiver demonstration. The Agency is directed to establish a mechanism for reviewing such demonstrations. No unlined new or replacement units or lateral expansions may take wastes after the date six months from the date of enactment unless they have an EPA-approved waiver.

It is recognized that EPA may revise the liner and leachate collection and removal system rules from time to time to increase protection for human health and the environment, and wording has been added to provide for this. Any such changes must apply equally to new units, replacement units, and lateral expansions at interim status facilities after the six month period and prior to permitting as well as after permitting.

Monitoring and corrective action

This amendment adds a new subsection (g) to section 3005 to correct a serious deficiency in land disposal facility regulations which allowed waste management units or entire facilities to escape monitoring and cleanup requirements simply by not accepting waste after January 26, 1983. Reference to "units" as opposed to "facilities" is designed to assure that partial closures of facilities are subject to monitoring and clean-up requirements.

The new subsection applies the requirements for corrective action, groundwater monitoring, and unsaturated zone monitoring, now applicable to new facilities, to all units of landfills, surface im-

poundments, land treatment facilties, or waste piles which received hazardous waste after July 26, 1982, the promulgation date of the land disposal regulations.

MINIMUM TECHNOLOGICAL REQUIREMENTS AND PERMIT LIFE

The reported bill adds a new section 3004(f) to the Solid Waste Disposal Act, establishing minimum technological requirements for landfills, surface impoundments, and incinerators. The purpose of this new subsection is to minimize the migration of hazardous wastes into the environment. Hazardous waste facility control and measurement technologies (including monitoring), as well as information on the capabilities and limitations of such technologies, are continually improving. This amendment requires the Administrator to revise the regulation under section 3004 from time to time as necessary to take into account those technological improvements. As information becomes available, the Agency is to expeditiously initiate rulemaking to amend or add to the treatment, storage, and disposal regulations.

Because of the necessity to minimize migration of hazardous waste, and the availability of particular technologies, the amendment establishes several minimum requirements for landfills, surface impoundments and incinerators.

Double liner requirement

Any landfill or surface impoundment permit issued after the enactment of these amendments for a new facility, or a new unit, replacement unit, or lateral expansion at an existing facility, must require the installation of two or more liners and a leachate collection system. In both landfills and surface impoundments, there must be a leachate collection system between the liners, operating in part as a leak detection system. In addition, a landfill must have a leachate collection system above the uppermost liner. Groundwater monitoring is also required for all landfills and surface impoundments, consistent with section 3004(l). This amendment is intended to correct the deficiency in the existing regulations allowing double liners and groundwater monitoring to be alternatives.

This requirement is applicable to each new landfill or surface impoundment (including each new landfill or surface impoundment unit at an existing facility), each replacement of an existing landfill or surface impoundment unit, and each lateral expansion of an existing landfill or surface impoundment unit, for which a completed application for a permit under section 3005(c) is received after the date of enactment of the Solid Waste Disposal Act Amendments of 1983. A completed application is what is known in the EPA regulations as a Part B application, that is found by the appropriate Regional Administrator or State to contain the applicable components of an application as identified in any Agency or State guidances, of acceptable quality for review

This multiple-liner and groundwater monitoring requirement applies to all waste received after issuance of a permit to any such landfill or surface impoundment unit. This means all new landfills and surface impoundments, and new units, lateral expansions, or replacement units at existing landfills and surface impoundments

must have multi-liners and groundwater monitoring. (See section 3005(e) as amended for application to interim status facilities.) Existing units with wastes in place on the date of enactment of these amendments need not be retrofitted to continue to receive waste. Where all or substantially all waste is removed, the unit is a replacement unit.

This provision does not require that both liners be of synthetic material. Well-designed compacted natural materials of very low permeability may be adequate. The Agency must define in regulations the type of liners (e.g., natural, synthetic, or both) and the specifications or performance criteria for the design of the liners, leachate collection and removal systems, and groundwater monitoring systems. However, to avoid bringing the permitting process to a standstill until such time as EPA issues these new regulations, permitting of new or replacement landfill and surface impoundments units in accordance with this amendment (i.e. with the required double liners and leachate collection systems) can continue under the existing section 3004 specifications. The Agency should revise the regulations as quickly as possible to specifically require the double liners, leachate collection systems, and groundwater monitoring mandated by this amendment. However, until new regulations are promulgated, permits may be issued incorporating the double liner systems described in the existing regulations in conjunction with the existing groundwater monitoring program (not currently required for double-lined facilities). Permit applicants can refer to existing EPA guidance documents for specifications for acceptable double liner systems.

The requirements of this provision do not apply to injection wells, waste piles (which by regulatory definition are only used for storage), or land treatment units. Land treatment units utilize a different control strategy for managing hazardous wastes than surface impoundments and landfills, thus liners are not required for land treatment units.

Alternative design and operating practices

The amendment authorizes exceptions to the double liner and leachate collection system requirement (but not the groundwater monitoring requirement) only in those cases where the owner or operator can demonstrate to the satisfaction of the Administrator on a case-by-case basis for a particular landfill or surface impoundment, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into groundwater or surface water at least as effectively as the prescribed liners and leachate collection systems. The test for granting this exception is whether the owner or operator can demonstrate that at that specific site, the proposed alternative technology can prevent migration at least as effectively as would double liners and leachate protection. The burden is on the owner or operator to make such a case. Knowledge of the fate and transport of hazardous constituents into the environment is limited, and uncertainties of evidence in this regard must be resolved in favor of the application of the statutory double-liner requirement.

There are currently a relatively few facilities located throughout the country which, because of their unique hydrogeological loca-

tions and type of operation, may successfully make this demonstration. One other possible candidate for this exemption would be monofills, or landfills containing a single type of waste, as described in the preamble to EPA's July 26, 1982, land disposal regulations. The Agency is evaluating the feasibility of monofilling various wastes, including foundry wastes, and determining what minimum landfill requirements should apply. Nothing in this new subsection should be seen to interfere with this evaluation.

In making and evaluating demonstrations under this provision it is important to keep in mind that liners are a necessary component in a system designed to detect and collect leachate containing hazardous constituents. Demonstrations for an exception should not be based exclusively on a showing that an alternative to the double liner and leachate collection system in conjunction with the naturally occurring locational characteristics will assure containment equivalent to synthetic or other emplaced liners in conjunction with the naturally occurring locational characteristics, since long-term or permanent containment is not the main objective of the double liner-leachate collection system requirements.

Mining wastes

Also included in this amendment is a provision which authorizes the Administrator to promulgate an exception to the double liner-leachate collection system requirement for certain wastes generated by the mining industry. The 1980 amendments to the Solid Waste Disposal Act (section 3001(b)(3)(A)(ii)) deferred from coverage under subtitle C, solid wastes from the extraction, beneficiation and processing of ores and minerals including phosphate rock, and overburden from uranium mining, pending completion of the studies mandated under section 8002 (f) and (p). Those EPA studies have not been completed. When the studies are completed, the EPA is required to determine which of those wastes should be regulated under subtitle C.

Solid wastes from mining and mineral beneficiation and processing are primarily waste rock from the extraction process and crushed rock, commonly called tailings, produced from concentrating steps such as grinding, crushing, sorting, sizing, classification, washing, dewatering, amalgamation, gravity treatment, flotation, agglomeration and cyanidation. The 1980 amendments covered wastes from the initial stages of mineral processing, where concentrations of minerals of value are greatly increased through physical means, before applying secondary processes such as pyrometalurgical or electrolitic methods. Smelter slag might also be included. Massive volumes of this waste ore are produced annually at mining and mineral processing facilities—roughly estimated by the American Mining Congress (AMC) to be approximately 1.75 billion tons in a typical year, which is clearly significantly greater in volume than the solid waste generated by all other industries combined. These wastes were considered "special wastes" under the 1978 proposed regulations as being of large volume and relatively low hazard.

On an individual mine basis, past AMC estimates for a typical lead/zinc underground mine producing 50,000 tons of metal per year requires removal of as much as 5,000–6,000 tons per day of

rock. That tonnage breaks down as follows: roughly 1,000 tons per day of development rock, which is the rock that has to be removed to reach the ore, and 4,000 to 5,000 tons of mineral bearing ore. Of that 4,000–5,000 tons of ore, 150 to 200 tons of mineral concentrate are produced. Because of such large volumes of waste and rock tailings, mine surface impoundments and landfills typically cover large areas close to the mine. These land disposal facilities, unlike those of other industries, often cannot be dredged, bulldozed or dug out of the earth, and cover very large areas where the corresponding natural features, such as boulders, trees, stumps, depressions, and elevations, cannot always be reasonably cleared or excavated in connection with disposal. Maintaining the integrity of a liner with the massive weight of typical mining waste would be extremely difficult. Consequently, lining such areas may be impractical in many cases.

If landfills and surface impoundments containing mining and mineral processing wastes are determined by the Administrator to be appropriate for regulation under subtitle C after conclusion of the studies mandated under section 8002 (f) and (p) of the Act, new section 3004(f) requires groundwater monitoring at the site and whatever other requirements are necessary for the landfill or impoundment to assure the protection of human health and the environment. The Administrator must determine, however, whether to modify the statutory double liner-leachate collection system requirement for such mining wastes, and if he determines that requirement is not necessary to protect human health and the environment, he may promulgate substitute requirements. The amendment, therefore, preserves the performance standards of subtitle C but provides the Agency with the flexibility it needs to determine the most appropriate approach to manage the particular hazardous waste at the site. The amendment does not preclude EPA from requiring double lining of landfills or surface impoundments for mining and mineral processing wastes in those cases where it is appropriate to do so.

In making a determination on whether or not an exception to the double liner requirement for mining waste is appropriate, EPA is to consider whether the modified requirements assure protection of human health and the environment. Practical or economic considerations can only be used to select among alternative requirements which assure protection of human health and the environment.

The mining waste modification authority of this amendment does not cover wastes specifically listed as hazardous wastes prior to the 1980 legislation because of their hazardous nature.

Incinerator requirements

New section 3004(f)(2) requires that all incinerators receiving permits after enactment of these amendments attain at least the destruction and removal efficiency required by the current regulations.

Incineration of hazardous waste must also be regulated in a way that minimizes migration of hazardous constituents into the environment, reflects the best available technology and thereby assures protection of human health and the environment. This is particu-

larly important given the prohibitions on land disposal required by this bill It is likely that the volumes of wastes that will be incinerated will increase significantly as a result of these bans.

The performance standard of 99.99 percent destruction and removal, efficiency required by the current regulations represents a performance level that is achievable by virtually any modern commercial incinerator. In view of the inherent uncertainty associated with analysis of impacts on human health, it is necessary to statutorily establish such a standard as a minimum. Higher performance levels may be established if analysis suggests that such higher levels are necessary to provide protection for human health and the environment. Regulations must also be revised to reflect improvements in control or measurement technology.

Locational criteria

New section 3004(f) also requires the Administrator to promulgate criteria for the acceptable location of new and existing treatment, storage, and disposal facilities. A significant deficiency in the current land disposal regulations is the lack of hydrogeological locational standards. Existing standards are limited to provisions dealing with flood plains and fault zones. Studies recently conducted by the Agency have emphasized the importance of locational factors in determining the environmental performance of hazardous waste facilities. The broadened criteria should address such factors as proximity to groundwater or surface waters and, in particular, potential drinking water supplies (including sole source aquifers), wetlands, and population concentrations. These criteria are to establish whether locations are acceptable for existing facilities, as well as for new facilities.

Permit life

The bill amends section 3005(c) of the Act to require that any permit for a treatment, storage, or disposal facility be for a fixed term, not to exceed ten years in the case of land disposal facilities, incinerators, or other treatment facilities. This amendment was in response to a recent EPA proposal to amend its current regulations and issue permits for the life of the facility. With the advancing state of technology and the long projected useful life of many of these facilities, it is preferable to limit permit life to the minimum period consistent with the cost and administrative burden of issuing a permit. Ten years is the maximum acceptable duration for permits involving land disposal, incinerators, or evolving treatment technologies.

Limited permit duration will assure that facilities are periodically reviewed and requirements for them upgraded to reflect the current state of the art. The amendment to section 3005(c) also requires the permitting authority in any permit renewal to consider improvements in the state of control technology and measurement technology, as well as changes in applicable regulations. Such improvements and changes must be incorporated in the renewed permit.

In addition, any permit for a land disposal facility must be reviewed after five years. This review, while not involving the full procedures of a permit renewal, must be thorough and based in

part on inspections of the facility. The required review of a land disposal facility permit every five years is intended to assure that no facility is allowed to operate in a manner which does not meet the standards of EPA's (or the State's) most current applicable regulations, which is not consistent with improvements made in hazardous waste control and management approaches for such facilities made since issuance of the permit, or which does not adequately protect human health and the environment. In conducting such reviews and in deciding whether or not to modify the permit, the Agency (or the State) shall consider any changes that may have occurred in operation of the facility since the permit was issued, standards and requirements of current regulations under sections 3004 and 3005, advances in hazardous waste control practices and technology since permit issuance, and other information concerning the impact of the facility on human health and the environment. The Agency (or the State) shall modify the permit if examination of any of these factors indicates that such action is appropriate. Where the Agency (or the State) determines that a permit modification is required, the Agency (or the State) shall follow its current procedures for such modifications. Nothing in the law or this amendment precludes the Administrator from modifying any permit at any time during its term.

This provision also gives the Administrator, or the State if it has been authorized to issue permits, the authority to add permit terms and conditions beyond those mandated in regulations, if, in the judgment of the Administrator (or the State, if the State is issuing the permit), such terms and conditions are necessary to protect human health and the environment. This amendment gives the Agency the authority to address special cases and unique circumstances. The provision is designed to deal with factors or situations different from those addressed in the regulations. It can also be used to address areas already covered by the regulations in order to incorporate new or better technologies or other new requirements in permits, where EPA intends to add such technologies or requirements to the regulations but has not yet issued a final regulatory amendment. The permitting authority is not required to impose every condition suggested by commentators on proposed permits.

CONTINUING RELEASES AT PERMITTED FACILITIES

The reported bill adds to section 3004 of the Act a new subsection intended to assure that appropriate corrective action is taken to protect human health and the environment from any past, present or future release of hazardous waste from a permitted hazardous waste facility.

New subsection 3004(g) requires that corrective action be taken in response to all releases of hazardous waste (or constituents of hazardous waste) from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit, regardless of when the waste was placed in the unit or when the release occurred. This requirement is effective immediately upon the enactment of the bill; the Administrator is directed to promulgate new standards implementing the requirement, but any permit issued

before the promulgation of regulations establishing those standards must require compliance with the statutory mandate for corrective action

Corrective action is required whether or not the unit at which a release occurred is still in operation. The owner or operator of a hazardous waste management facility will not be allowed to escape the responsibility to take corrective action by closing a unit at which a release has occurred and limiting the permit application for the facility to other units at the site.

The requirement for corrective action is a continuing one, applying not just to releases that have occurred prior to permit issuance, but also to any releases that occur after permit issuance.

To assure corrective action is taken in response to releases of hazardous wastes or constituents from an inactive unit at a facility seeking or having received a permit, the Administrator will need to revise groundwater monitoring requirements to detect possible releases from all inactive units from which a release could occur at a facility. It will be necessary to determine background groundwater quality at a point unaffected by any waste management activities at the facility.

The requirement for corrective action applies not just to releases of hazardous wastes, but also to releases of hazardous constituents, including hazardous constituents from solid waste and hazardous constituents that are reaction by-products.

The corrective action must be completed as expeditiously as practicable, including, whenever practicable, prior to issuance of the permit. Completion of the corrective action is the best guarantee that human health and the environment will be fully protected. However, if the corrective action cannot be completed prior to issuance of the permit, the Administrator may issue the permit so long as the permit contains schedules of compliance for completion of the corrective action as expeditiously as practicable and the permit applicant has satisfactorily demonstrated both a financial ability and a commitment to complete the corrective action.

LISTING/DELISTING MODIFICATIONS

Section 3001 of the Solid Waste Disposal Act requires the Environmental Protection Agency to list and identify wastes that are to be managed in accordance with the hazardous waste provisions of the Act. Until a waste is so listed or identified, it is not subject to regulation as a hazardous waste under the Act, regardless of how harmful it may actually be. Once a waste has been listed as hazardous, a company may petition the Administrator to exempt from regulation ("delist") a specific waste from a particular facility because that waste is significantly different from the listed or identified waste and is not hazardous.

The listing, identification and regulation of hazardous wastes has not proceeded as rapidly as the law contemplated. At the same time, exemptions from regulation have been granted for particular wastes without assurance that they do not constitute hazards. To clarify the intent of section 3001 in current law, this bill includes provisions to prescribe in greater detail the responsibilities of the

Agency with respect to listing and identifying hazardous wastes and granting exemptions from regulations.

The bill adds a new paragraph (4) to section 3001(b) to correct several deficiencies in the exemption, or delisting, process. In judging whether to delist a waste, the Agency's practice has been to consider only the constituents given as the original justification for the Agency's decision to list a waste. In many, if not all instances, the hazardous constitutents enumerated by EPA as a basis for listing specific wastes do not exhaust the universe of constituents which would justify such a listing. Thus, the petitioning company's waste could be nonhazardous with respect to a constituent used as a basis for listing and be exempted from regulation under recent EPA practices, but still constitute a hazard with respect to constituents not evaluated.

Before making a decision to delist waste from a particular facility, the Administrator is required by the bill to consider criteria, constituents and other factors which, in addition to those used as the original basis for listing, he has reason to believe could cause the waste to be listed as hazardous. If the Administrator denies the petition for exemption on the basis of additional constituents, he is required to amend the basis for the listing of such waste to indicate the additional constituents.

In the recent past the Agency has granted so-called "temporary" delistings without notice or opportunity for public comment and with no deadline for a final decision. The bill requires that every decision on a petition to exempt a waste—whether classified as temporary or final—must be preceded by notice and opportunity for public comment.

Temporary delisting decisions made before enactment of these amendments will cease to be in effect 12 months after they were made or six months after enactment, whichever is later, unless, within that period, a final decision to grant the delisting petition has been made after notice and opportunity for public comment. In making final determinations on these petitions, the Administrator must comply with the provision of the bill that requires him to consider all potentially hazardous constituents.

The Agency currently adheres to no standard as to what constitutes adequate information upon which to base a delisting decision. In particular, the Agency has no standardized procedure to assure that waste samples, which are taken by the petitioner and from which data are derived, are representative of the waste stream for which an exemption is sought. In order to provide a sound information base and one that is consistent for different petitioners, the bill directs the Agency to develop guidelines for the collection and submission of delisting information and requires that the information be certified by a responsible official of the petitioning company.

The bill adds a new paragraph (5) to section 3001(b) which specifies ways by which the Administrator is to improve the process for identifying and listing hazardous wastes.

New paragraph (5)(A) directs the Administrator to identify within six months of enactment those wastes for which a decision whether to list as a hazardous waste will be made within time periods of two and five years. It is expected that the schedule will be

an ambitious one. While the wastes should include those currently being studied by the Agency, this provision is intended to accelerate Agency action and commitment of resources beyond the inadequate level of the past several years. The Agency should also indicate those wastes and waste characteristics which may be hazardous but will not be listed, identified or studied within the next five years. Additionally, the Agency should identify any industries it intends to study and provide a general schedule for completing these studies.

New paragraph (5)(B) directs the Administrator to promulgate, in accordance with section 3001(b)(1), regulations listing as hazardous those wastes containing chlorinated dioxins and those containing dibenzofurans. The Agency proposed listing such wastes in April 1983; final action on this proposal, after review of public comment, is contemplated by this section. The bill requires the Agency to issue a regulation listing these wastes within six months. In light of the potency of these toxicants, the Agency should assure that these wastes are not excluded from regulation under the exemption provisions for small quantity generators or that for recycled hazardous wastes.

The Agency is also encouraged to list, where appropriate, additional wastes containing halogenated dioxins and dibenzofurans, again based on the listing criteria set forth in section 3001(b)(1), and to do so within two years of enactment.

Under the Agency's present regulations a waste must exhibit at least one of several specified characteristics or be listed by name before it may be regulated as a hazardous waste. The characteristics of hazardous wastes currently specified in regulations—ignitability, corrosivity, reactivity, or extraction procedure toxicity—are not comprehensive.

One serious deficiency is the lack of any characteristic which identifies wastes that pose a problem due to toxic organic constituents. Among the toxic compounds that have been found to cause serious damage to human health and the environment are halogenated solvents, pesticides, and vinyl chloride. All of these are organic compounds, and none of the existing characteristics would necessarily identify as hazardous those wastes which contain significant concentrations of these materials.

In order to improve the regulation of hazardous wastes, especially those containing hazardous organic constitutents, the bill adds a new paragraph (5)(C) to section 3001(b) directing the Administrator to promulgate regulations identifying additional characteristics of hazardous waste. There will be some technical problems involved in establishing regulatory thresholds for the broad group of toxic organic substances. However, the deficiencies in current regulatory coverage are severe enough to require action by the Agency. Where technical questions cannot yet be definitively answered, EPA should not delay but should make reasonable assumptions based on the need to protect human health and the environment. The Agency should give priority to expanding the identified hazardous waste characteristics to bring under control those wastes which pose a carcinogenic, teratogenic, mutagenic, reproductive or neurotoxic hazard. New subparagraph (C) also requires the Administrator not later than two years after enactment, either to promulgate

regulations listing each of the wastes identified under paragraph (5)(A) as candidates for listing decisions within two years or to publish a statement as to why a particular waste so identified does not warrant listing as a hazardous waste.

A new paragraph (5)(D) is added to require the Administrator to detemine in which situations use of the extraction procedure toxicity characteristic may be in sufficient to protect human health and the environment. The extraction procedure, which simulates the mobility of certain toxicants in a municipal landfill disposal situation, does not, in many cases in which it is used, represent a likely mismanagement situation, or may represent only one of several reasonable mismanagement scenarios. For example, the test does not address potential air emissions or surface water contamination from run-off. In addition, certain wastes which are inherently of moderate to high alkalinity, or which are placed in highly alkaline sites, may exhibit higher levels of leaching than the extraction procedure indicates.

In some instances involving wastes containing metals, the Agency has relied solely on the extraction procedure to evaluate delisting petitions. Because of the Agency's reliance on the procedure and its clear limitations, the bill directs the Agency, to determine, within six months, the appropriateness of continuing to use its current extraction procedure to evaluate delisting petitions. Short and long-term measures in lieu of or in addition to the existing procedure are needed. Possible corrective measures include revision of or supplements to the existing extraction procedure to represent more adequately the mobility of toxicants under a wider variety of specific conditions. Methods to estimate potential air and surface water contamination resulting from reasonable mismanagement scenarios may also be required. Furthermore, a pre-test may be appropriate to determine the specific leaching procedure to be followed, e.g., acid or alkaline. Finally, the extraction procedure is not very effective for evaluating the mobility of organic toxicants. The Agency should continue its policy of not using this test procedure in evaluating the leaching potential or organic contaminants. Rather, until the Agency develops, after notice and comment, a procedure for measuring the leaching potential of organic toxicants, any decision to delist wastes containing these toxicants should be based on their concentration in the waste.

The bill also requires that, within two years, EPA revise its extraction procedure toxicity characteristic where necessary in order that it reflect more accurately the concentrations of toxic metals that will leach from wastes subject to more aggressive leaching media than those used in the present test.

Pending development of new tests to determine the leaching potential of wastes, the Agency should, for waste identification purposes, continue to employ the extraction procedures currently used.

The bill also adds a new paragraph (6) to section 3001(b) to clarify the Agency's authority and specifically direct it to identify wastes which are hazardous solely because they contain constituents at levels in excess of those which adversely affect human health and the environment. Health data on substances that are carcinogenic, mutagenic, or pose other hazards are constantly updated and improved and will continue to be for the forseeable

future. It is necessary, however, to begin immediately to regulate on the basis of the best available information. As additional data is developed, by EPA and others, the Agency should use this information to revise its regulations, lowering concentrations where necessary and adding new toxicants to the characteristic.

BURNING AND BLENDING OF HAZARDOUS WASTE

This provision corrects a major deficiency in the present subtitle C regulations. The Environmental Protection Agency has adopted regulations that govern the burning of hazardous wastes in incinerators. These regulations, however, exempt facilities that burn hazardous wastes for the primary purpose of recovering usable energy. It has been estimated that some 10 to 20 million tons of the hazardous waste generated annually in this country are being burned as fuel, a practice that is now exempt from subtitle C regulation.

The reported bill amends various parts of subtitle C to direct the Agency to develop and implement a regulatory program that establishes requirements, as may be necessary to protect human health and the environment, for the burning and blending of hazardous wastes for energy recovery. The provisions of this bill reaffirm the Agency's full authority to regulate all hazardous wastes that are blended or burned for energy recovery—including hazardous wastes mixed with used oil—and to regulate the owners and operators of the blending, distributing, and burning facilities. This authority over these facilities should be exercised in an expeditious manner.

Under some circumstances, it may be difficult to determine if a waste-derived fuel should be classified as a used oil fuel or a hazardous waste fuel. For example, used oil contains contaminants, such as lead, that may be present either through use of the oil or through deliberate adulteration. Both hazardous waste fuel and contaminated used oil fuel should be regulated in accordance with these new provisions, as necessary, to protect human health and the environment. The Agency, however, has some discretion as to how to classify these types of fuel mixtures.

Notification

The bill adds a new sentence of section 3010 that requires the filing of a notice by anyone who is producing a hazardous waste-derived fuel, burning a hazardous fuel for energy recovery (other than in a single or two-family residence), or distributing and marketing a fuel produced from a hazardous waste. "Hazardous waste-derived fuel" means fuel derived from hazardous waste, used oil, or from a mixture of either hazardous waste or used oil and other materials. The notification requirement goes into effect twelve months after the date of enactment of this legislation. The notice, to be filed with the Administrator and the State (where there is an authorized State hazardous waste program), must include a statement containing the location and general description of the facility involved, the identified or listed waste involved, a description of the production or energy recovery activity being carried out, and such other information as the Administrator deems necessary. This notification requirement is self-implementing. All persons covered by

the provision are required to file a notification, unless the Administrator by regulation determines that such notification is not necessary to obtain sufficient information with respect to current practices of facilities using hazardous wastes for energy recovery.

The notification requirement applies to hazardous waste-derived fuels, fuels blended with hazardous wastes, and hazardous wastes burned without being blended as fuels. The term "hazardous wastes", as used in this provision, includes not only wastes identified or listed as hazardous under EPA's regulations, but also includes any commercial chemical product (and related materials) listed pursuant to 40 CFR 261.33, which is not used for its originally intended purpose but instead is burned or processed as fuel. (Under current EPA regulations, burning as fuel is not deemed to be a form of discard; hence listed commercial chemical products, unlike spent materials or by-products or sludges, are not deemed to be "wastes" when burned as fuel. They are only "wastes" when actually discarded or intended for discard. This amendment changes that interpretation.)

Hazardous waste or used oil generators, who do not deal directly with the persons who ultimately burn the waste (or used oil) as a fuel or offer the material for sale or use as a fuel and who do not burn these materials themselves, are not covered by this provision. Such generators neither market nor distribute a hazardous waste-derived fuel, and, therefore, they do not know and do not control the ultimate disposition of their waste.

All notifications filed under this provision will go both to EPA and to States with authorized hazardous waste programs rather than to one or the other, as with other notifications.

The notification is a prerequisite for interim status (see section 3005(e)(2)) if the Administrator later determines that these persons should be regulated as hazardous waste management facilities. This should create a strong incentive for persons subject to the notification requirement to comply.

The amendment also provides that activities involving special classes of waste material listed in section 3001(b)(3)(A), which are not now subject to regulation as hazardous wastes, are not subject to the notification requirements. For example, the high volume wastes generated from the combustion of coal or other fossil fuel, typical of the utility industry, are not covered. However, utilities that burn hazardous wastes such as spent solvents, spent acids, or corrosive boiler cleaning wastes in their boilers are subject to the notification requirement, and could be subject to the technical standards as well.

Standards, labeling, recordkeeping, and transportation

The reported bill amends section 3004 by adding three new subsections—(h), (i), and (j), to require standard setting, labeling and recordkeeping requirements, respectively. Section 3003 is also amended, by adding a new subsection requiring transportation standards.

Standards

Under new subsection 3004(h), the Administrator is directed to promulgate regulations as may be necessary to protect human

health and the environment, setting forth standards governing hazardous waste-derived fuel production, burning, distribution and marketing. Such regulations shall be promulgated no later than two years after the date of enactment of this legislation. These regulations shall apply to anyone required to submit a section 3010 notification in accordance with the provisions added by this bill, the owners and operators of any facility that produces, blends or burns hazardous wastes as fuel or anyone who markets or distributes hazardous waste-derived fuels. (Used oil, whether or not a hazardous waste, mixed with other hazardous wastes, can be regulated under these provisions, although the Agency has some discretion as to how to regulate difficult-to-classify contaminated used oil mixtures.) These regulations shall apply whether or not such persons are subsequently relieved by regulation of the requirement to file a section 3010 notification.

Standards established by these regulations may include the requirements listed in paragraphs (1) through (7) of subsection (a) of section 3004, as appropriate. The Agency may make different standards effective at different times within the two-year deadline. The technical standards applicable to facilities, or classes of facilities, burning hazardous wastes as fuel may vary based upon various factors, including but not limited to destruction efficiency of the burning unit and waste content of the fuel to be burned. The Administrator may find it necessary to regulate the burning of certain wastes to protect human health and the environment, while not regulating others. However, the Administrator, in controlling the burning of hazardous wastes and the emissions from facilities that burn such wastes, may not make distinctions solely on the basis of whether the facility is on the site of the generator or is an off-site facility.

The Administrator must make regulatory determinations for each type of combustion unit burning hazardous waste-derived fuel for energy recovery (e.g., boilers, cement kilns and other industrial furnaces) under the same ultimate standard that applies to other hazardous waste management facilities—regulations as may be necessary to protect human health and the environment. Some or all of these units may be therefore regulated under the same substantive requirements that apply to presently regulated treatment facilities. When a combustion unit, such as a cement kiln, operates like an incinerator (especially in terms of the type and volume of hazardous waste being burned), the Agency must apply the same substantive requirements that are applied to regulated incinerators.

The standards to be established under the authority of new subsection 3004(h) do not apply to the special classes of waste material for which subtitle C regulation is suspended under section 3001(b)(3)(A).

New subsection (h) of section 3004 provides for two exceptions to the technical standards, labeling and recordkeeping requirements—one involving petroleum refining wastes containing oil which are converted to petroleum coke and the other involving de minimis quantities of hazardous wastes burned as fuel.

New section 3004(h)(2)(A) exempts petroleum refinery wastes containing oil which are converted into petroleum coke at the same fa-

cility where they are generated, unless the resulting coke product itself would be identifiable as a hazardous waste on the basis of one or more of the characteristics promulgated under section 3001.

This provision exempts petroleum coke, a commercial industrial fuel product, from regulation as a hazardous waste fuel even where hazardous wastes from petroleum refining are used in the production of the coke. It is normal practice in a refinery to recycle oily waste, such as wastewater treatment sludge, by introducing the material into the coking process. In this way, the carbon value of these wastes is utilized, and the waste need not be disposed of. This exemption applies only to oily refining wastes; the exemption does not apply, for example, to a waste generated by the production of petrochemicals such as pesticides or solvents, regardless of whether these wastes might happen to be generated at a facility which is also a petroleum refinery. Also, wastes such as out-dated pesticides or spent solvents generated at a refinery site are not covered by the exemption. These wastes are not unique to refineries and should be regulated if necessary under this Act when used as fuel, regardless of their point of generation.

This provision exempts the actual petroleum coke product from regulation as hazardous waste fuel. Hazardous wastes used in making coke are exempted only when they are actually converted into coke, not when managed in other ways (such as by disposal, or recycling by being placed on the land). In addition, the exemption for hazardous waste to be converted to coke begins with actual introduction to the conversion process. For example, hazardous sludges being stored in a surface impoundment pose the same risk whether they are to be recycled or disposed of, and thus should be regulated accordingly. The exemption applies only to the full coke product, not any waste that may sometime be used in coke production, and only to petroleum coke that is actually used as a final product. Certain commercial specifications are routinely used by producing industries to control the quality of coke products. If a refinery produces coke that does not meet these standards, and therefore must be disposed of on the land or by burning in an incinerator, this disposal remains subject to all subtitle C rules.

Under the second exemption in new subsection 3004(h), the Administrator may exempt from regulation facilities burning de minimis quantities of hazardous wastes as fuel provided the waste is generated and burned on-site (i.e., at the same facility or at a facility in close geographic proximity and under common ownership and control), the waste is burned to recover useful energy, and the waste is burned in a manner sufficient to protect human health and the environment, based on the type of waste being burned and the combustion unit used for burning. This provision applies to hazardous wastes being burned directly, or burned after mixing with other materials (such as used oil). Subject to these generation conditions, if the Administrator decides to exempt from regulation facilities burning de minimis quantities of hazardous wastes, the Agency must establish administratively what de minimis levels are, and the circumstances under which safe burning of de minimis quantities of hazardous wastes can occur.

The de minimis provision, however, is not intended to allow large boilers to burn hazardous wastes in small amounts, relative to total

wastes burned, if the burning of hazardous wastes in such facilities is not protective of human health and the environment.

Labeling

Under new subsection 3004(j), any person who owns or operates a facility that produces a hazardous waste-derived fuel or any person who distributes or markets a fuel produced from a hazardous waste must include on the invoice or bill of sale accompanying such fuels a warning label indicating that the fuel contains hazardous wastes and listing the wastes contained in the fuel. The labeling requirement goes into effect ninety days after the enactment of this legislation and remains in effect until such time as the Administrator promulgates standards under section 3004(h) that specifically supercede this subsection.

The labeling requirement addresses the concern that people are unknowingly burning fuels blended with hazardous wastes in uncontrolled circumstances, resulting in health and environmental risks. Transporters also may be unaware that they are carrying hazardous waste-derived fuel. The interim labeling requirement would have the effect of warning the user (and transporter or other intermediary) that the fuel contains hazardous wastes and identifying those wastes.

The requirement to list the wastes in the fuel can be satisfied by identifying wastes by generic classes (for instance, "chlorinated solvents") rather than by the precise chemical name ("spent trichloroethylene"). This provision need no longer apply, at the Administrator's discretion, once the Agency promulgates substantive standards for hazardous waste fuels.

Although this provision is self-implementing (regulations are not needed to effectuate the requirement), the requirement is tied to the notification provisions of this bill. Thus, if the Agency acts to limit the class of blenders and distributors required to notify, these persons may not have to prepare warning labels if the Agency determines such labels would not be needed to protect human health and the environment and to carry out the intent of this provision in requiring a label.

The provision applies not only in those States where EPA is operating a hazardous waste program, but in States with authorized programs as well. This will assure that users and transporters of hazardous waste-derived fuels in authorized States will not have to wait until their States adopt labeling legislation or regulations—a process that could take several years—before they receive the warnings required by this section.

The labeling requirement provision contains a limited and conditional exemption for certain fuels produced from petroleum refining waste containing oil or from used oil resulting from normal petroleum refining production and transportation practices. Refineries often take oily refining wastes and refining transportation wastes and reintrodue these wastes into the refining process where the oil component is incorporated into a product and contaminants are removed. Refineries should not automatically have to place a warning label on these fuels.

The exemption from the labeling requirement is narrow. The Agency may still explicitly require a warning label for these fuels

as may be necessary to protect human health and the environment. The exemption does not apply to other wastes generated at a refinery such as spent solvents or discarded pesticides. Finally, these wastes must be introduced into the refining process at a point prior to where contaminants are removed. (This standard is drawn from the definition of "re-refined oil" contained in section 1004 (39) of the Act.)

Recordkeeping

This provision directs the Administrator to promulgate regulations, within twelve months after this legislation is enacted, requiring those who produce, burn, distribute or market hazardous waste-derived fuel to keep appropriate records of their activities, as may be necessary to protect human health and the environment. Such records will be needed if the other provision of these amendments are to be enforceable.

Standards for transporters

The bill amends section 3003 by adding a new subsection (c) that requires the Administrator, no later than two years after enactment of this legislation, to promulgate regulations, as may be necessary to protect human health and the environment, to regulate transporters of hazardous waste-derived fuels. In developing these standards, the Agency may require transporters to meet the requirements contained in paragraphs (1) through (4) of subsection (a) of section 3003, but may vary these requirements, or adopt different ones, as may be necessary to protect human health and the environment.

MANDATORY INSPECTIONS

Regulatory inspections of treatment, storage and disposal facilities are a necessary element of an effective hazardous waste control program. Officers, employees and representatives of the States and EPA are authorized by section 3007(a) of the Act to enter and inspect any facility where hazardous waste is being handled. However, too few inspections are being conducted to effectively monitor compliance with the Act and applicable regulations at treatment, storage and disposal facilities, and the Act does not currently require regular inspections. In addition, the nature of the qualifications of inspectors and the scope of the inspections vary widely, depending to an extent on the State where they are conducted.

The reported bill adds a new subsection (b) to section 3007, requiring inspections at least every two years at all treatment, storage, and disposal facilities. The purpose of this amendment is to increase the numbers of inspections and improve the quality of the inspections. A mandatory program assuring frequent, periodic and uniformly high quality inspection is necessary to assure the public that hazardous waste facilities are operating safely and that health and the environment are being protected. The amendment requires that every facility that treats, stores or disposes of hazardous waste (whether or not a permit has already been issued by EPA or an authorized State) be thoroughly inspected on a regular basis and no less frequently than once every two years. The Administrator must

promulgate regulations governing the frequency and manner of inspections and may distinguish among classes and categories of facilities, commensurate with the risk posed by each class or category.

This provision authorizes the Administrator to require that all inspections be conducted by an inspector certified as competent and qualified by the Administrator. Unless the Administrator determines that the problems of unqualified inspectors and inspections of uneven quality being conducted throughout the United States can be remedied more effectively by other means at his disposal he should establish such a certification program.

EPA's current goal of inspecting land disposal facilities and incinerators once a year, storage facilities once every four years, and remaining generators and transporters once every ten years is inadequate. The proper minimum frequency is to be decided after a rulemaking process which should begin as soon as possible. If additional resources are required to perform the requisite number of inspections, EPA should inform the Committee about such resource needs. EPA is not to assume that existing resources cannot be increased for the purposes of conducting this rulemaking, but rather should determine what is necessary to protect human health and the environment.

The Administrator must also prepare a report on the potential for using non-government inspectors to supplement the inspections being conducted by officers, employees or representatives of EPA and authorized States, and submit this report to Congress within 6 months after enactment of this amendment. The report is to be prepared in cooperation with States, insurance companies offering environmental impairment liability insurance, independent companies providing inspection services, and other groups that the Administrator determines are appropriate.

The report is to examine the validity of an idea presented during hearings: utilizing non-government inspectors to supplement the enforcement work of EPA and the States. EPA should examine the pros and cons of this idea, including, but not limited to, the role of such inspectors in enforcement procedures, whether the government or the owner/operator should choose who will inspect a particular facility, whether the use of non-governmental inspectors will present potential conflict-of-interest problems, and whether other mechanisms can better provide additional inspection capability, such as a fee system to fund PA and State enforcement activities. Other areas of interest involve questions of confidentiality and the latitude which non-governmental inspectors would have to withhold the results of their inspections from the public and the Agency.

The report is to contain such background information as well as recommendations on provisions and requirements for a program of private inspections, including safeguards necessary to protect against conflicts of interest or the appearance of such conflicts and appropriate provisions for the establishment of an inspector certification program such as necessary training and examinations. The report should also discuss the establishment of a schedule of fees which would be charged for examination and certification of inspectors that would make the program self sufficient.

The study the Administrator performs should be focused on the issue at hand- how to procure uniform, high quality inspections of treatment, storage and disposal facilities at little or no cost to State and Federal governments. The product of the Administrator's study should be a complete report, evaluating alternative solutions to the problem and containing recommendations as to the most appropriate solution. It should contain detailed recommendations for legislation or regulations necessary to implement the recommended alternative.

FEDERAL FACILITIES

This section of the bill contains provisions dealing with Federal facilities and Federal inspection of State and local facilities. Existing information on facilities owned or operated by agencies or departments of the Federal government and by State and local governments indicates that there are large numbers of such facilities at which hazardous waste are treated, stored or disposed.

The bill requires the Administrator of the Environmental Protection Agency to inspect every facility at which hazardous wastes are treated, stored or disposed and which are owned or operated by an agency or department of the Federal government. The Administrator is required to conduct this inspection at least once every two years. While State officials in States with authorized hazardous waste programs are authorized by the bill to conduct such inspections, the Administrator's duty to conduct the inspection is mandatory. The Administrator may not delegate his responsibility outside the Environmental Protection Agency. The Administrator must inspect the Federal facilities and determine their compliance with the requirements of this subtitle and regulations promulgated thereunder.

The bill also requires the Administrator to inspect every treatment, storage and disposal facility which is operated by a State or local government and which is required by section 3005 of the Act to have a permit.

It is extremely important that the Administrator, as the Federal official designated to implement the hazardous waste laws of this Nation, assure that the facilities owned and operated by agencies and departments of the Federal government are in compliance with those laws. Section 6001 of the Solid Waste Disposal Act specifically provides that all branches of the Federal government owning or operating a solid waste management facility are subject to and must comply with Federal, State, and local hazardous waste laws including permitting and inspection requirements. This new inspection requirement will assure that the Administrator compiles compliance data on all Federal facilities, thereby enabling the Agency, States and private citizens to assess the performance of the Federal government in meeting its obligation under the hazardous waste laws.

It is also important that there be a thorough and objective evaluation of conditions at State and locally operated hazardous waste sites. The bill requires EPA, as the Federal agency with responsibility for overseeing hazardous waste disposal, to conduct such an

inspection and evaluation, and to make the results of its inspections available to the public.

This section of the bill also amends the Solid Waste Disposal Act by adding a new section 3015. This new section provides that all agencies of the Federal government undertake a continuing program to compile, publish and submit to the Administrator of the Environmental Protection Agency, and to authorized States, an inventory describing all sites owned or operated by such agencies where hazardous wastes have at any time been treated, stored or disposed. The inventory is to include sites where hazardous wastes were treated, stored or disposed at time other than when said agencies owned or operated the sites. It would be helpful if the inventory could include information on sites previously but no longer owned or operated by a Federal agency, such as reported under section 103(c) of CERCLA.

Some of the information required by the inventory may currently be available to the Administrator pursuant to the notification requirements in section 3010 of the Act or section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). While these notification requirements applied to active (section 3010) as well as inactive (section 103(c)) sites, these notifications have been considered to be one-time requirements. The section 3015 inventory establishes an ongoing requirement to compile and continuously update the inventory.

Since the time the original notifications under section 103(c) were prepared, several agencies have established programs to determine further the existence and nature of hazardous waste sites on Federal lands. The Environmental Protection Agency also has begun an initiative to inspect facilities to evaluate identified sites and determine if additional unreported sites may exist. The section 3015 inventory will provide a statutory framework for these efforts assuring that as more detailed investigations reveal additional sites or information on previously identified sites, this information is routinely added to agency inventories which are forwarded to the Administrator.

The duty to compile and submit the inventory to the Administrator is a mandatory, nondiscretionary duty. Should an agency fail to carry out the inventory requirements, section 3015 requires the Administrator to compile the inventory. The Administrator's duty is also nondiscretionary. Either a noncomplying agency of the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suite against "any person, including the United States . . .".

These new inspection and inventory requirements also will provide documentation as to the condition or existence of hazardous waste sites on Federal lands. Such documentation, which there is reason to believe has not been adequately developed in the past, will be extremely useful in determining the need for response action under CERCLA.

The Comprehensive Emergency Response, Compensation and Liability Act established a program for responding to releases of hazardous substances on Federal or non-Federal lands. Section 107(g)

of CERCLA makes clear that the provisions of the law apply to all branches of the Federal government. However, the President, in Executive Order 12316, delegatd to various Federal agencies the authority to assess whether a release has occurred on their lands and what actions, if any, are necessary to respond to such releases. This delegation of authority has resulted in the disturbing situation in which the potentially liable agency is also the agency juding the existence and extent of its liability. The inspection and inventory requirements of this bill will serve the function of "shining a light" on these sites and providing the Administrator and the public with essential information to assess the need for CERCLA response at Federal facilities and the extent of Federal agency liability at such sites.

Except where the government is expressly singled out for preferential treatment, it is to abide by the requirements of this law as would any private citizen.

FEDERAL ENFORCEMENT

The reported bill amends section 3008 in several ways to improve hazardous waste enforcement. The amendment to section 3008(d)(1) clarifies the criminal liability of persons, including generators of hazardous waste, who knowingly cause hazardous waste to be transported to an unpermitted facility. Because the generator is in the best position to know the nature of his waste material, the regulatory scheme established by subtitle C places a duty on the generator in the first instance to make appropriate arrangements to transport and dispose of his waste properly. The Federal government's ability to obtain criminal penalties against generators and other persons who knowingly cause the transportation of hazardous waste to an unpermitted facility is essential to the regulatory scheme.

The amendments to section 3008(d)(2) add violations of interim status standards to those violations of subtitle C for which criminal penalties are available. A large number of hazardous waste management facilities currently are operating under interim status standards, rather than final permits. Knowing violations of interim status standards can present significant human health and environmental problems. In the most serious situations, the government's ability to obtain criminal penalties for such violations will be a necessary enforcement tool.

Although States are not required to have analogues to the Federal interim status standards (i.e., they may require that all facilities obtain permits before construction or operation), where States do have such standards, violation of those standards will also be subject to this section.

Section 3008(d)(3) provides criminal penalties for the submittal of false information in documents required to be filed under the Act. However, the statute presently does not specifically address material omissions or the failure to file required reports. These actions may have significant impact on the regulatory process. The conduct can be as serious in nature as falsification of information submitted. These amendments are proposed to clarify that criminal penalties are provided for this conduct.

Only "material" omissions, i.e., omissions which will have a tendency to influence Agency action, are included, assuring against the application of this section to incidental or insignificant violations. Similarly, the amendments provide criminal penalties only for a knowing failure to file required material. Failure to file or incomplete filing due to accident or mistake is not covered by this provision.

The amendments also clarify the fact that section 3008(d)(4) applies to records or other documents required by State regulation in a State with an authorized subtitle C program. Finally, the amendments affirm that this provision apply to exporters of hazardous waste, as well as generators, storers, treaters, transporters, disposers and other handlers of hazardous waste.

A new paragraph (5) is added to section 3008(d) by these amendments to provide criminal penalties where hazardous waste is knowingly transported or caused to be transported without a manifest. Without this provision, criminal liability would not attach to conduct resulting in the unmanifested transportation of hazardous waste unless the waste is subsequently delivered to an unpermitted facility, a violation of section 3008(d)(1).

These amendments are intended to simplify the current language of section 3008(e) and to extend its coverage to all criminal violations specified in section 3008(d).

Section 3008(e)(1)(B)(ii) is deleted from the "Knowing Endangerment" provision in the statute because that paragraph is redundant once violations of interim status standards are included in subsection (d)(2). Rather than reiterate those actions which constitute the predicate for the crime of knowing endangerment, section 3008(e) is amended to reference paragraphs (d)(1)–(5). The further effect of this change is that the making of false material statements or representations; the destruction, alteration or concealment of, or failure to file, records, applications, manifests, reports and other documents; and the transportation of hazardous waste without a manifest, have been added to those actions subject to the knowing endangerment provisions of section 3008(e).

In addition, this amendment eliminates the language of subsection (e)(2) (A) and (B) from section 3008. In the past, there has been confusion over the meaning of and the distinction between (e)(2)(A and (e)(2)(B). This element of proof renders section 3008(e) unduly restrictive and may well have contributed to the fact that since its enactment in 1980, there has not been a single indictment under this provision. With the deletion of this language the provision retains numerous safeguards and there still remains a sufficiently strenuous burden to prove knowing endangerment to prevent unwarranted prosecutions.

Finally, the increased maximum prison sentences for violations of section 3008(e) and section 3008(d) (1) and (2) reflect the Congress' explicit intention that criminal violations of this Act should not be treated lightly. As the implementation of other provisions of this bill restrict land disposal of hazardous wastes and require safer methods of handling and treatment, there will be a significantly greater incentive to dispose of toxic waste illegally. These improved criminal provisions and enhanced penalties are intended to provide EPA and the Department of Justice with the necessary

enforcement tools to combat increased criminal activity in this area.

EXPORT OF HAZARDOUS WASTES

This section of the reported bill adds a new section 3016 to subtitle C, to address problems which have arisen and are expected to arise involving the export of hazardous wastes generated in the United States.

Under current EPA export regulations, persons who wish to export hazardous wastes are required each year to notify EPA four weeks prior to the initial shipment of a given hazardous waste. This notification includes EPA and Department of Transportation classification numbers as well as the names and addresses of the generator and the consignee. The notification does not include any reference to the amounts to be exported; the frequency of exports; the points at which the waste will enter the receiving country; the methods of storage, treatment or disposal in the receiving country; or the ultimate destination of the waste.

The existing notification system is inadequate to address the present and potential environmental, health, and foreign policy problems which occur when wastes are exported to nations which do not wish to receive them, or lack sufficient information to manage them properly. Accordingly, the Administrator is directed to exercise increased authority over hazardous waste exports. In the absence of a bilateral agreement between the U.S. and the government of the receiving country setting forth specific notice, export, and enforcement procedures for the transportation, treatment, storage and disposal of wastes, no person shall export hazardous wastes unless (1) such person has notified the Administrator of the plan to export; (2) the government of the receiving country has agreed, in writing, to this plan; (3) a copy of the receiving country's written consent is attached to the manifest accompanying each waste shipment; and (4) the shipment conforms with the terms of such receiving country's consent.

The notification provided to EPA by the person who intends to export a hazardous waste, and forwarded by the government of the U.S. to the government of the receiving country, will enable that government to make an informed decision as to whether it will accept the waste and, if so, how it will deal with that waste.

The notification shall include (1) the name and address of the exporter; (2) the types and estimated quantities of hazardous waste to be exported; (3) the estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported; (4) the ports of entry; (5) a description of the way in which the waste will be transported to and treated in the receiving country; and (6) the name and address of the ultimate treatment, storage or disposal facility.

A receiving country's written consent must be obtained prior to shipment and attached to the manifest accompanying each waste shipment. This will provide the foreign country with the option of rejecting, accepting or accepting with conditions the waste, and will facilitate enforcement of that decision. Without the receiving country's written consent, the shipment cannot take place.

In order for the notice to be managed properly and effectively, the Administrator, working with the Secretary of State, should establish a procedure for forwarding information to the foreign country regarding the shipment and pertinent U.S. law. Also, the procedure should include a request for the receiving country to provide the Secretary with a written copy of the consent or rejection.

Where there exists an international agreement between the United States and the government of each receiving country that establishes notice, export, and enforcement procedures for the transportation, treatment, storage and disposal of hazardous wastes, such an agreement shall govern direct shipments of hazardous waste from the United States to the receiving country. Such agreement may or may not require the receiving country's prior written consent on a shipment-by-shipment basis.

Effective monitoring and enforcement programs must be part of any agreement between the United States and a receiving country. Such a bilateral agreement should describe joint efforts to monitor and spotcheck shipments of hazardous waste to assure that they conform with the terms of the agreement. Shipments must conform with the terms of the agreement to satisfy the requirements of this section. A bilateral agreement should also describe responsibilities for enforcement and prosecution of the terms of the agreement.

Any person who exports any hazardous waste after enactment of this section must report on an annual basis on all exports of such waste to any country. These reports will be useful in more accurately assessing the volume, frequency and destination of hazardous waste exports from the United States.

Although the Agency has up to two years to fully implement the new hazardous waste export policy, such implementation can probably be accomplished in a shorter period of time and the Administrator should promptly begin the implementation task. Until this section is fully implemented, any person who intends to export a hazardous waste should follow existing hazardous waste export notification procedures as required under the present subtitle C regulations. However, twelve months from the date of enactment of this bill any person who wishes to export will be required to comply with the provisions of this section.

As in the other provisions of subtitle C, public oversight is necessary to assure proper implementation. Accordingly, the public should be given full access to information and documents produced under this section. Citizens, upon request, should be given access to all notices filed under subsection (c), comments on such notices returned by the receiving country, a copy of the receiving country's final consent returned under subsection (e), and all annual reports filed under subsection (g).

The requirements of this section should be vigorously enforced using all the tools of section 3008. To accomplish this, the Agency should work with the U.S. Customs Service to establish an effective program to monitor and spotcheck international shipments of hazardous waste to assure compliance with the requirements of the section. Violations should then be vigorously pursued.

SUBTITLE D IMPROVEMENTS

The reported bill adds a new paragraph to section 4004(a), a part of subtitle D of the Solid Waste Disposal Act. New section 4004(a)(2) requires the Administrator within twenty-four months after enactment of these amendments to promulgate revisions of the criteria for distinguishing sanitary landfills and open dumps under sections 1008(a)(3) and 4004(a)(1). These revisions are to reflect the need to protect human health and the environment, and improvements in the state of control and measurement technology.

Substantial quantities of material of a hazardous nature finds its way into subtitle D disposal facilities (i.e., all those not required to have a permit under subtitle C). This includes hazardous wastes not required to go to a subtitle C permitted facility because they come from "small quantity generators." While the exact quantity of such wastes is not yet known, it clearly totals millions of tons each year, and can exceed tens of thousands of gallons per year at a single facility. Also, the household waste exclusion allows hazardous materials to enter subtitle D facilities. Because of the currently inadequate procedures for identifying, listing, and delisting hazardous wastes, many troublesome materials currently unregulated under subtitle C will go to subtitle D facilities. These include infectious wastes and wastes delisted through marginal neutralization of their corrosivity characteristic. Illegal dumping of hazardous wastes is regulated under subtitle C, but the likelihood of such dumping at subtitle D facilities must be considered.

Many sites addressed by the cleanup program under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) were originally municipal landfills. To avoid creating another round of Superfund candidates through our current subtitle D disposal practices, the subtitle D facility criteria must be revised. New section 4004(a)(2) requires such revisions to take into account the potential receipt by subtitle D facilities of hazardous waste in household waste and from small quantity generators and the possibility of illegal dumping. As directed by section 1008(a), such revised criteria should include information for deciding the adequate location, design, and construction of subtitle D facilities, including the consideration of regional, geographic demographic, and climatic factors.

A principal purpose of these revised criteria is the protection of ground and surface water and drinking water supplies. Appropriate closure requirements should be part of the revised criteria. The Agency is expected to examine improvements in waste disposal control and measurement technology. EPA must also consider the appropriate standards to protect human health and the environment, taking into account the size of the facility, its location relative to populated areas and the degree of industrialization, the proximity of ground and surface water, the disposal method, and the amounts and characteristics of the waste received.

The Agency is granted some discretion in determining the appropriate design and operating standards for various subtitle D facilities. For example, smaller and more remote facilities, especially those not close to drinking water sources, seem less likely to cause public health problems than large facilities or those near populated

areas or receiving wastes from industrialized areas. The multiple liner-leachate collection system requirements of new section 3004(f) applicable to subtitle C facilities are not to be automatically incorporated in revised criteria for landfills or surface impoundments which are subtitle D facilities.

The impetus for requiring these revisions is primarily the concern for potential disposal of hazardous materials with nonhazardous wastes. Therefore, in revising the criteria the Agency should focus initially on municipal landfills and subtitle D surface impoundments where this is most likely to occur. For facilities potentially receiving hazardous waste in household waste or from small quantity generators the revised criteria at a minimum must require groundwater monitoring, and provide for corrective action where necessary to protect ground or surface water or otherwise prevent release of hazardous materials into the environment. Groundwater monitoring requirements can contain the flexibility currently provided in the subtitle C regulations. This requirement does not apply to facilities which only receive wastes the regulation of which is suspended under section 3001(b)(2) or (3).

To make it clear that the prohibition of facilities not in compliance with the subtitle D criteria is a direct Federal requirement, not dependent on the approval of a State plan containing that requirement, section 4004(c) is amended by striking any reference to State plan approval.

As originally conceived in the 1976 amendments to the Solid Waste Disposal Act, subtitle D was intended to provide a comprehensive program for the management and disposal of solid waste. The development and implementation of State plans are to address both hazardous and nonhazardous wastes. The ban on open dumping of section 4005 applies to solid waste and hazardous waste. Subtitle D, however, provides the Act's only regulatory framework for the environmentally sound disposal of solid waste at landfills and impoundments not subject to subtitle C permits. The purpose of these amendments is to strengthen State and Federal oversight of subtitle D facilities, particularly those which might receive hazardous wastes from small quantity generators or in household wastes. These subtitle D improvements require action at both the Federal and the State level.

The reported bill adds a new subsection to section 4005 of the Act, requiring each State to adopt an enforceable system of prior approval and conditions (e.g., a facility permit program) to assure compliance with the revised criteria by each solid waste management facility which may receive hazardous waste in household solid waste or from small quantity generators. Each State must begin to enforce such a system no later than forty-two months after enactment of these amendments. Most States already have in place permit systems for solid waste disposal facilities. Since these systems are likely to require modifications to incorporate the revised criteria, the bill provides time after the deadline for revising the criteria for States to make such modifications.

The Agency is expected to work with the individual States to assist them in adopting appropriate and enforceable permit or other systems for assuring compliance with the revised criteria. States should make use of the open dump inventory, and permits

issued under such systems should reflect or constitute the compliance schedule required by section 4005(a). The Agency is expected to make funds available to the States, through performance-based grants under section 4008(a)(1) or an augmented section 3011 program, to assist State progress in revising their regulations and solid waste management plans and their permit and enforcement programs. Such funding should be stable over a period of years, for the States to reliably make use of it.

Experience with the original subtitle D program indicates that some States may be unable or unwilling to adopt an enforceable program to assure compliance with the criteria at all facilities. To provide for this contingency, under new section 4005(c) the Environmental Protection Agency is authorized to enforce the prohibition of section 4005(a) with respect to facilities receiving hazardous wastes in household or from small quantity generators, in any State which fails to adopt and enforce the required compliance assurance program within forty-two months after enactment of these amendments. The Agency will determine a State's compliance with the requirements of section 4005(c) through the review and approval of State solid waste management plans under section 4003.

The Agency may use the enforcement authorities of sections 3007 and 3008 to enforce the prohbition on open dumping and the revised criteria. Under section 3007 EPA employees or representatives can enter, inspect, and obtain samples at any facility to the same extent that the authority exists for hazardous waste facilities regulated under subtitle C. This authority will allow EPA to evaluate against the revised Federal criteria any disposal facility which may receive hazardous waste in household waste or from small quantity generators. Under section 3008 the Administrator has the authority to issue compliance orders and to assess civil and criminal penalties for violations of the criteria. Citizens may continue to use the enforcement authority of section 7002 to enforce the prohibition on open dumping and the revised criteria.

BIENNIAL REPORT

This provision amends section 3004(a) to require the Agency to periodically prepare and submit to Congress and the President a report characterizing hazardous waste generation, storage, treatment, and disposal nationwide. The report must be submitted no less frequently than every two years and describe the quantities of specific types of wastes regulated under subtitle C that are being generated as well as the disposition of those wastes and the number of firms engaged in such hazardous waste generation, storage, treatment, and disposal activities. The first such report shall be submitted to Congress no later than March 31, 1985, and shall cover the 1983 reporting year.

This information is necessary to identify trends in hazardous waste management, establish resource needs and priorities, and to assist in evaluating the impact of the hazardous waste regulations.

The report shall summarize the information obtained by the Agency under reporting requirements promulgated pursuant to sections 3002(a)(5) and 3004(a) (1) and (2) which require hazardous waste handlers to submit biennial reports to EPA for all odd-num-

bered calendar years. The Agency will not obtain these reports directly from hazardous waste handlers located in States that have received interim or final authorization. States with interim or final authorization are therefore directed to assist the Administrator in preparing such report for Congress in a form and manner to be prescribed by the Administrator. The Administrator may request copies of those reports received by the States or may specify a format for submission of aggregated data from the individual States. The Administrator may also rely on his existing authority under section 3007 of the Act to obtain the necessary information.

AWARD OF FEES

This section provides for the awarding of costs of litigation in citizen suits under section 7002(e) of the Act to prevailing or substantially prevailing parties.

The purpose of this section is to clarify the circumstances under which costs may be awarded to parties to citizen suits. In *Sierra Club* v. *Gorsuch*, 672 F. 2d 33 (D.C. Cir. 1982), the Court of Appeals held that it was "appropriate" under the Clean Air Act to award attorney's fees to the petitioner even though the government prevailed on all issues. This decision was later reversed by the Supreme Court in *Ruckelshaus* v. *Sierra Club*, 103 S. Ct. 3274 (1983).

It is not reasonable or appropriate to compel either the government or a private party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on any of the issues. Accordingly, this amendment is intended to endorse the Supreme Court's decision in *Ruckelshaus* v. *Sierra Club*, confirm its applicability to the Solid Waste Disposal Act, and provide further guidance to the courts in determining the circumstances under which it is appropriate to consider awarding costs of litigation.

This amendment is not intended to preclude an award of costs to a partially prevailing party with respect to the issues on which that party has prevailed, if such an award is deemed appropriate by the court. Conversely, although the amendment does authorize an award of costs to a party who intervenes in a case and is technically on the prevailing side, such an award would not be appropriate if the intervenor failed to make a substantial contribution to the successful outcome of the case. A party may "prevail" by achieving a successful settlement.

JUDICIAL REVIEW

This section of the reported bill revises section 7006, the provision of the Solid Waste Disposal Act governing judicial review of certain actions of the Administrator.

Section 7006(a) of the Act is amended to provide that a petition for review of the promulgation of final regulations under the Solid Waste Disposal Act or the denial of a petition for the promulgation, amendment, or repeal of a regulation under the Act may be filed either in the U.S. Court of Appeals for the District of Columbia or in any U.S. Court of Appeals for a circuit in which the petitioner resides or transacts business which is directly affected by such action. The petition must be filed within 120 days from the date of the action complained of unless it is based solely on

grounds arising after 120 days. An Agency action which could have been reviewed under this subsection shall not be subject to judicial review in enforcement proceedings.

The principal purpose of this amendment is to allow the filing of petitions for review of nationally applicable actions of the Administrator under the Solid Waste Disposal Act in U.S. Courts of Appeals other than the U.S. Court of Appeals for the District of Columbia, which currently has exclusive jurisdiction over such petitions.

The justification for the current centralized judicial review of environmental laws is that it eliminates the possibility of conflicting interpretations of the law in different circuits and allows a single court to develop expertise in this area of the law. However, these advantages are insufficient to offset the disadvantages of centralized judicial review, which include inconvenience to litigants who do not reside in Washington, D.C., and a concentration of power in a single intermediate appellate tribunal, which may in turn generate narrow political pressures on the appointment of judges. Centralizing review in a single court also deprives the law of diverse views on complex legal issues, and as a result may make the task of the Supreme Court more difficult. Although other circuit courts of appeals may not possess the technical expertise of the D.C Circuit, the reponsibility of the courts is to review actions of EPA for conformity with the law, not to undertake technical review of the details of regulations, and there is no reason to believe that other courts of appeals lack competence to review regulations and other actions for conformity with the Solid Waste Disposal Act and other applicable laws.

The purpose of changing the period within which a petition must be filed form 90 to 120 days is to assure that persons who will be significantly affected by an action of the Administrator have an ample opportunity to assess the consequences of such action and, if necessary, file a petition for review prior to the expiration of the time period. This issue was previously reviewed by the Committee in a similar context (Senate Report No. 97–666 at pp. 94–5) and it was determined that 120 days is a reasonable period within which to require the filing of a petition for review.

Section 7006(b) is amended to provide that a petition for review of the issuance, denial, modification, or revocation of a permit under section 3005, or the grant, denial, or withdrawal of autorization or interim authorization under 3006, may be filed by any interested person in the U.S. Court of Appeals for a circuit in which the petitioner resides or transacts business which is directly affected by such action. As under section 7006(a), the period within which a petition must be filed is changed from 90 to 120 days.

Currently, section 7006(b) provides for venue in the Circuit Court of Appeals of the United States for the Federal judicial district in which the petitioner "resides or transacts such business", a phrase which is drawn from section 509(b)(1) of the Federal Water Pollution Control Act. This phrase is inherently ambiguous because the word "such" has no antecedent. The legislative history of this phrase is also ambiguous and is not consistent with the plausible interpretation, urged by the Department of Justice, that the words "such business" refer to business which is directly affected by the

action which is the subject of the application for review. The two courts of appeals which have sought to construe this phrase, the Fifth Circuit in *Tenneco Oil Co. v. EPA*, 592 F. 2d 897 (1979), and the Eighth Circuit in *Peabody Coal Co. v. EPA*, 522 F. 2d 1152 (1975), ultimately avoided ruling on its meaning and, therefore, proper venue for section 509(b) cases and section 7006(b) cases remains unsettled. In order to eliminate, or at least reduce, the potential for threshold litigation over proper venue, the amendment changes the venue provisions so that the language conforms to the reading of current law which has been suggested by the Department of Justice. The filing of an application for review shall be proper in the circuit in which the applicant resides, i.e., has his principal place of business, or where he transacts business which is directly affected by the action of which he complains. For example, in a case in which the action complained of is a denial of a permit for a proposed facility, the direct effect of the action would be felt only at the location of the proposed facility, even though indirect effects of the action might be felt at other facilities of the company. In a case involving review of a regulatory action under section 7006(a) the direct effect of the action would be felt at the location of the facility or activity subject to the requirements of the regulation.

The new subsection (c) of section 7006 simply relocates the current provision governing the adducing of additional evidence in the course of judicial review of an agency action, previously section 7006(a)(2), and does not change its meaning or applicability.

New subsection (d) of section 7006 establishes a random selection procedure, to be administered by the Administrative Office of the United States Courts, to determine the court of appeals in which an agency action is to be reviewed when petitions for review have been filed in two or more courts of appeals within a 30 day period. Following the selection of a court of appeals, other courts in which petitions have been filed are directed to promptly transfer such petitions to the court in which the agency record has been filed. Notwithstanding the outcome of the random selection procedure, any court in which a petition has been filed would retain the power to transfer the petition to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.

The purpose of the random selection procedure is to eliminate the "race to the court house" phenomenon and provide for an orderly means of consolidating petitions for review of the same agency action. This process is in no way intended to preclude or discourage any court of appeals from exercising its inherent power to transfer a petition for review to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.

New subsection (d)(2) provides new authority for any court of appeals to grant a temporary stay of the effective date of a final agency action pending selection of the court of appeals in which the action will be reviewed. However, stays should not be granted unless the same requirements that ordinarily apply to a petition for a stay of an agency action are fully satisfied.

New subsection (e) would authorize the awarding of costs of litigation under section 7006 on the same basis and subject to the

same limitations which apply in the case of citizen suits (section 7002(e) as amended by this bill).

CITIZEN SUITS

The reported bill amends section 7002 to authorize the Federal courts, in actions initiated by citizens under section 7002, to apply civil penalties under section 3008 and to authorize citizens to seek relief, including abatement, where the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

The conditions placed on such suits are intended to assure that they will complement, and not interfere with, Federal regulatory and enforcement programs. Citizen suits under these amendments may only be initiated one hundred twenty days after the citizen has notified the Administrator, the State in which the alleged endangerment may occur, and the persons alleged to have contributed or to be contributing to the activities which may present the endangerment, that there may be an endangerment. As with other citizen suits under the Act, suits respecting a violation of subtitle C may be brought immediately after such notification. If the United States has commenced and is diligently prosecuting an action under section 7003, or has settled an action to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment, an action under the new provision cannot be filed. If a State has commenced and is diligently prosecuting an action under the new provision, a citizen cannot file such an action. It is recognized that one hundred twenty days is not sufficient time for the Agency to conduct all studies necessary to initiate an enforcement action. Nevertheless, based on current experience, one hundred twenty days should provide enough time for the Agency to conduct an investigation satisfactory to the private parties, so that EPA and the private parties should be able to work out a mutually acceptable way to proceed.

A determination as to whether the Administrator or a State "has commenced and is diligently prosecuting" an action is, by necessity, a case-by-case determination. With respect to the new cause of action for citizens, "commencement" of an action, as used in these amendments, means having actually filed suit or having issued an administrative order. An action has not been "commenced" in a case that is merely under investigation or a case where only notice or warning letters have been sent. The scope of the relief being sought by the Administrator and the opportunity for citizens to intervene are factors to be considered when determining if a case is being "diligently prosecuted." A suit filed in court to obtain partial abatement of a situation presenting an endangerment may be deemed to be a bar to an independent citizens' suit under these amendments. An example is a suit to obtain surface cleanup of a site without addressing cleanup of contaminated groundwater. By exercising the statutory right to intervene, the citizen could adequately protect his interest and seek a judicial order for complete abatement. An administrative order encompassing only a portion

of a site, on the other hand, may be deemed to not be a bar to an independent citizens' suit. An example of an administrative order encompassing only a portion of a site is an order addressing the cleanup of surface contamination without addressing the cleanup of surface contamination. Even with the new requirements for public participation in settlements, participation short of intervention does not provide citizens with the same opportunities to protect their interests or to seek a judicial order for complete abatement. A decision to bar such an opportunity should not be taken lightly.

An additional limitation is contained in the provision that no person, other than a State or local government, may bring such an action with respect to the siting of a hazardous waste treatment, storage or disposal facility. Other legal authority is appropriate for addressing questions arising from the permitting process. This section is not intended to be used to reopen or frustrate the permit process. Finally, this amendment does not affect recognized requirements regarding legal standing.

The amendments are not intended to limit in any way the clear right of intervention provided to the Administrator. For example, if the Administrator believes a citizen suit under the provision is not being prosecuted in the public interest, he may exercise the right to intervene in such action and seek from the court restrictions or conditions upon the citizen suit, in order to assure that the means of prosecution and the relief sought are in the public interest. EPA and the Department of Justice are responsible for taking necessary steps to assure orderly and consistent development of case law and legal interpretations, and technical consistency for hazardous waste enforcement. In view of the Agency's expertise in this area, courts will accord some deference to the Agency's technical findings concerning the nature and extent of endangerment. The Administrator and the Department of Justice are encouraged to file amicus curiae briefs with the court, where appropriate.

These amendments provide any person with a statutory right to intervene as a party to section 7003 suits filed by the Administrator, or new section 7002(a)(1)(B) suits filed by a State, "unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties." The rules on intervention are intended to assure that persons living in close proximity to a site (persons potentially at risk) which is the subject of a government-initiated imminent hazard action will be able to intervene as a matter of right unless the Administrator or the State can demonstrate that they are adequately representing those persons' interests. The purpose of the amendments is to make it easier for individuals who may be assuming an imminent and substantial risk as a result of the defendant's activities to participate in these suits, particularly in fashioning the appropriate remedy for eliminating the risk. By requiring the government to demonstrate that the applicant's interests are already represented, this amendment reverses the normal presumption of Rule 24 of the Federal Rules of Civil Procedure.

These amendments are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United State under section 7003. *United*

States v. Diamond Shamrock Corporation, Civ. No. C80-1857 (N.D. Ohio, E.D. May 29, 1981). Any differences in language between these amendments and section 7003 are not intended to reflect a difference in such claims, but to merely clarify that citizens will have the same claim presently available to the United States. Nor do these amendments limit existing rights. Providing citizens with the same claim presently available to the United States is not meant to imply that citizens be accorded the same deference on technical issues that the courts might accord the EPA or the Department of Justice.

Some liable parties have erroneously asserted that the United States must exhaust all viable alternatives to injunctive relief before it may seek such relief under section 7003. Just as the United States need not utilize resources available to it under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Public Law 96-510) or prove that such resources are unavailable before it may seek injunctive remedial relief under section 7003 or similar authorities, citizens need not exhaust or rely upon other resources or remedies, before seeking relief under these amendments. As with section 7003, these amendments are to be an alternative and supplement to other remedies. Nevertheless, injunctive relief is an equitable remedy and, although there is no requirement to exhaust other remedies, courts should be cognizant of and consider the availability of such alternatives when awarding equitable relief.

Although these amendments do not prohibit a court from allowing a citizen to litigate pendent claims under State law in a section 7002 action, it is intended that citizens and courts will exercise discretion concerning such claims so that they will not unduly delay or complicate Federal court proceedings or in any other way frustrate or delay the primary purpose of these amendments and section 7003—which is the protection of health and the environment from solid and hazardous waste endangerments. Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a Federal court should hesitate to exercise jurisdiction over State claims, even though bound to apply State law to them. If it appears that the State issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the State claims may be dismissed without prejudice and left for resolution to State tribunals. Pendent jurisdiction, in the sense of judicial power, need not be exercised in every case in which it is found to exist.

All penalties awarded pursant to these amendments, which allow courts in which citizen suits are brought ". . . to apply any appropriate civil penalties under section 3008 (a) and (g)," are to be paid into the United States Treasury. Litigation of any such request or the granting of any such award will not, in any way, limit or preclude the right of the United States to seek or obtain the payment of penalties arising out of the same or related violations, except that the maximum penalty to be paid for each violation shall not exceed that provided for in section 3008.

IMMINENT HAZARD

The reported bill amends section 7003(a) to clarify the breadth of section 7003 as to the persons, conditions and acts it covers. The amendments clearly provide that anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to the equitable authority of section 7003, without regard to fault or negligence. Such persons include, but are not limited to, past and present generators (both off-site and on-site) of hazardous wastes, past and present owners and operators of waste treatment, storage, or disposal facilities, and past and present transporters of solid or hazardous wastes. In addition, section 7003 is clarified to establish that it applies to any act, whether past or present, which has resulted in or may result in an imminent and substantial endangerment to health or the environment. The Environmental Protection Agency and the Department of Justice have used the equitable authority and orginally granted in section 7003 to seek court orders directing those persons whose past or present acts have contributed to or are contributing to the existence of an imminent and substantial endangerment to abate such conditions. This has been an intended use of section 7003 since 1976. These amendments ratify this practice and confirm that the abatement authority vested in EPA and the courts extends to both past and present acts contributing to an imminent and substantial endangerment.

As evidenced by the definition of "disposal" in section 1004(3), which includes the "leaking" of hazardous wastes, section 7003 has always provided the authority to require the abatement of present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional. These endangerments may be immediate or long-term problems. The section may be used to address any solid or hazardous wastes that fall within the definitions of section 1004 of the Act or have been identified in published regulations.

Moreover, because section 7003 focuses on the abatement of conditions threatening health and the environment and not a particular human activity, it has always reached those persons who have contributed in the past or are presently contributing to the endangerment, including but not limited to generators, regardless of fault or negligence. The amendment, by adding the words "have contributed" is merely intended to clarify the existing authority. Thus, for example, non-negligent generators whose wastes are no longer being deposited or dumped at a particular site may be ordered to abate the hazard to health or the environment posed by the leaking of the wastes they once generated and which have been deposited on the site. The amendment reflects the long-standing view that generators and other persons involved in the handling, storage, treatment, transportation, or disposal of hazardous wastes must share in the responsibility for the abatement of the hazards arising from their activities. The section was intended and is intended to abate conditions resulting from past activities. Hence, the district court decisions in *United States* v. *Wade*, 546 F. Supp. 785 (E.D. Pa. 1982) and *United States* v. *Waste Industries*, No. 80-4-Civ-7 (E.D. N.C. Jan. 3, 1983), which restricted the application of

section 7003, are inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments.

In addition, due to the nature of the hazards presented by disposal sites, section 7003 is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." *United States* v. *Price*, 688 F. 2d 204, 213-214 (3d Cir. 1982). An endangerment means a risk of harm, not necessarily actual harm, and proof that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment is grounds for an action seeking equitable injunctive relief. *United States* v. *Price, supra*, and *United States* v. *Vertac Chemical Corp.*, 489 F. Supp. 870, 885 (E.D Ark., W.D 1980). The primary intent of the provision is to protect human health and the environment; hence, the courts should consider both the nature of the endangerment which may be presented and its likelihood, recognizing that risk may be "assessed from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as 'fact.'" *United States* v. *Vertac Chemical Corp., supra* at 885, citing *Ethyl Corporation* v. *Environmental Protection Agency* No. 73-2205 (D.C. Cir. Jan. 28, 1975) (dissenting op. at 11, 31-33), reversed en banc at 541 F. 2d 1 (D.C. Cir. 1976), cert. den. 426 U.S. 941, (1976). An endangerment is "imminent" and actionable when it is shown that it presents a threat to human health or the environment, even if it may not eventuate or be fully manifest for a period of many years—as may be the case with drinking water contamination, cancer, and many other effects. *United States* v. *Price*, supra, and *United States* v. *Reilly Tar & Chemical Corp.*, Civ. No. 4-80-469 (D. Minn. Aug. 23, 1982) at 10-13.

Some liable parties have erroneously asserted that the United States must exhaust all viable alternatives to injunctive relief, before it may seek such relief under section 7003. The United States need not utilize resources available to it under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Public Law 96-510) or prove that such resources are unavailable, before it may seek injunctive remedial relief under section 7003 or similar authorities. Section 7003 is an alternative and supplement to other remedies. Nevertheless, section 7003 provides for the awarding of equitable relief and, as with any equitable remedy, requires the court to consider all circumstances of the case and to carefully balance all relevant factors. Cf. *United States*. v. *Price*, supra, at 211.

PUBLIC PARTICIPATION IN SETTLEMENTS

This amendment, adding a new subsection to section 7003, builds upon existing practice in judicial settlements and extends the requirement for public participation in settlements to administrative settlements such as those issued in the form of administrative orders. The Department of Justice and the EPA are required to publish notice of the government's intention to settle any claim it may have under section 7003, provide an opportunity for a public

meeting in the affected area, provide a reasonable opportunity for public comment and withhold final consent to any such agreement or settlement until such time as the requirements of this section have been met.

Currently, the regulations of the Department of Justice require the Attorney General or his designee to publish notice of the government's intention to enter into a consent decree in any suit to enjoin the discharge of pollutants. This procedure has been implemented by lodging consent decree with district courts for thirty (30) days while notification of their lodging is given to the public by publication in the Federal Register. The consent decree is available to the public upon request and the Department of Justice withholds its final consent to the decree until such time as comments are received from any interested person. In the event comments are received, the Department of Justice files such comments with the court. The Department reserves the right to withdraw or withhold its consent to the proposed judgment if the comments, views and allegations concerning the judgment disclose facts for consideration which indicate that the proposed judgment is inappropriate, improper or inadequate.

These procedures have been a useful vehicle for receiving public comment in the past. By filing such comments with the court, together with its written responses to the comments, the Department has supplied the basis for subsequent judicial hearings on the propriety of the entry of specific consent decrees.

The process established pursuant to these amendments is meant to be flexible. For example, less than thrity (30) days for review and comment may be appropriate in, for example, emergency situations where clean up should proceed earlier. Informal public meetings, as opposed to formal public hearings, are required.

In providing public notice under this section, EPA and the Department should use public notice measures such as local newspapers and radio that will effectively reach the affected community. Such notice should supplement publication of notice in the Federal Register.

These amendments do not establish new substantive rights to obtain review or to make the government's exercise of its prosecutorial discretion in deciding whether to enter into a consent decree, covenant not to sue or other agreement subject to judicial review under the Administrative Procedure Act or under the Solid Waste Disposal Act. However, the terms of the agreement are reviewable to assure that they are fair and adequate and are not unlawful, unreasonable, or against public policy.

In some cases, actions under section 7003 of the Solid Waste Disposal Act can also be undertaken pursuant to section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Public Law 96-510)(CERCLA). The government should not bypass this provision by taking all future actions pursuant to section 106 of CERCLA. To the extent that section 106 actions could have been pursued under section 7003 it is intended that such actions should be subject to the requirements of this provision.

COMPATIBILITY OF RECYCLING AND ENERGY RECOVERY

The reported bill amends sections 4001 and 4003, dealing with State or regional solid waste management planning, to require the potential for recycling and materials recovery in an area to be taken into consideration in planning a waste-to-energy facility. Dependence on a certain waste stream as fuel for an energy recovery facility should not be allowed to interfere with the Act's goal of encouraging materials recovery and resource conservation.

CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION

The reported bill adds a subsection (d) to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under section 3001.

Second, such facilities cannot accept hazardous wastes identified or listed under section 3001 from commercial or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste.

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REQUIREMENTS IN AUTHORIZED STATES

Several new requirements in the bill are scheduled to take effect upon enactment or by specific dates following enactment. The bill adds a new section 3006(f) to the Act to assure that, for the listed provisions, the requirements apply simultaneously in every State whether or not a State has been authorized to administer and enforce a program under section 3006.

The States that are currently authorized to administer their own programs under section 3006(b) retain that authority with respect to existing program elements. The Environmental Protection Agency will implement the new statutory requirements in each and every State until such State is authorized, in accordance with section 3006, to operate its own equivalent program with respect to those new requirements.

Section 3006 should be administered so as to encourage each State to assume or continue primary responsibility for program administration and to recognize and accommodate the various means by which States may choose to conduct their programs. In this regard, the term "equivalent" as used in section 3006 should not be interpreted to mean "identical", thus requiring an absolute likeness between the State and Federal program requirements. State program requirements and procedures which achieve the same result intended by the requirements of subtitle C should be deemed "equivalent". State provisions can differ as long as they address the Federal program requirements and include State requirements at least as stringent as those of the Federal program. Where the results of different State requirements and procedures cannot be readily measured reasonable judgment should be used to avoid impeding the authorization of State programs by requiring that those programs bear an absolute likeness to the Federal program. Section 3006(a) requires the Administrator to make findings regarding the standards for program approval. Therefore, an analysis more sophisticated than merely requiring verbatim reproduction of Federal provisions is required.

Prior to States' being authorized to administer these new provisions as part of their own programs, the administrator is to work with those States that already have authorized programs to develop, as expeditiously as possible, cooperative agreements to delegate enforcement of these new Federal program elements. As provided in section 3009, nothing in these amendments shall be construed to prohibit any State from imposing any requirements which are more stringent than those imposed by Federal regulation. Therefore, in working with States to develop cooperative enforcement agreements the Administrator is to delegate and accept adequate enforcement of compliance with equivalent State requirements that are more stringent than the new Federal requirements as adequate enforcement of compliance with such new requirements.

The new requirements to be directly applied in every State are those contained in the following sections as amended by this bill: section 3002(b)(1) (notification by small quantity generators of shipments containing hazardous wastes); section 3002(b)(7)(C) (requirement for disposal after March 31, 1986, of hazardous wastes from small quantity generators only in facilities permitted under section

3005); section 3004(h) (deadlines for limiting or prohibiting land disposal of certain wastes); section 3004(d) (ban on dust suppression); section 3004(e) (ban on injection of wastes into certain underground formations); section 3004(f) (minimum technological standards for landfills, surface impoundments and incinerators); section 3004(g) (requirement for correction of continuing releases of hazardous wastes at permitted facilities); section 3004(i) (labeling requirements for fuels produced from hazardous wastes or used oil); section 3005(c) (permit review and renewal requirements for hazardous waste treatment, storage or disposal facilities); section 3005(e) (requirements for owners or operators of land disposal facilities under interim status authorizations); and section 3007(b)(1) (mandatory inspections of treatment, storage or disposal facilities).

AIR EMISSIONS FROM LAND DISPOSAL FACILITIES

This amendment amends section 3004 of the Act to require the Administrator within 30 months after enactment to promulgate regulations for monitoring and control of air emissions from hazardous waste facilities as may be necessary to protect human health and the environment.

There is a considerable body of information indicating that emissions into the air from hazardous waste facilities pose a significant threat to health and the environment. Emissions of volatile chemicals from treatment, storage and disposal of wastes have been estimated to be of a similar magnitude as emissions of the same compounds from industrial processes. Studies of hazardous waste surface impoundments and landfills report that significant quantities of hazardous constituents in the wastes may be emitted into the air. In fact, one quarter of the remedial action sites on the National Priority List under the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA) are included at least in part because of potential threats to health and the environment from emissions of hazardous pollutants into the air.

Proposals to regulate emissions from hazardous waste facilities have been published on several occasions since passage of the Resource Conservation and Recovery Act in 1976. Final regulations have never been issued. The Agency also has authority to regulate emissions of hazardous air pollutants under the Clean Air Act, but its performance under that Act has been appallingly slow.

The bill, therefore, requires regulatory action within 30 months under the Solid Waste Disposal Act, providing substantial flexibility to the Agency in establishing needed controls, so long as they meet the basic requirements of the Act, to protect human health and the environment. Levels of control may be based on such factors as volatility and toxicity of wastes and the type of process being regulated.

Monitoring should be required at hazardous waste facilities where necessary to protect human health and the environment. The Agency is currently monitoring air emissions at a significant number of CERCLA sites. It would be entirely appropriate for the Agency to issue monitoring regulations on an expedited basis, while preparing a control strategy. Such an approach might facili-

tate the gathering of data on the nature and extent of the problem posed by air emissions.

GROUND WATER MONITORING

The reported bill adds to section 3004 of the Act a new subsection (l), which ends certain exceptions from the requirements that hazardous waste treatment, storage, and disposal facilities must monitor ground water near the facility to detect any releases of hazardous constituents from the facilities. New subsection 3004(l) requires that the ground water monitoring requirements must be complied with whether or not: a facility is located entirely above the seasonal high water table; the facility has two liners and a leachate collection system; or the facility's liner (or liners) are periodically inspected.

This section has the effect of nullifying several portions of the regulations adopted by the Agency under section 3004. Current regulations (40 C.F.R. 264 222) exempt a surface impoundment from the ground water monitoring requirement if certain conditions are met, principally that the impoundment is located entirely above the seasonal high water table and has two liners. A similar exemption is provided for waste piles (40 C.F.R. 264.252), and for landfills (40 C.F.R. 264.302). These exemptions, on their face, do not meet subtitle C's basic requirement of protecting human health and the environment. There is evidence that a leak could occur even from a double-lined disposal facility, and that hazardous constituents can migrate into ground water even if the facility is located entirely above the seasonal high water table. Similarly, current regulations (40 C.F.R. 264.253) exempt a waste pile from the ground water monitoring requirements if it meets certain conditions, principally that the waste pile is located above the seasonal high water table, has a liner, and the wastes are periodically removed and the liner is inspected for cracks. Again, this exemption allows situations to exist that would not be protective of human health and the environment. For example, if an inspection shows a liner is cracked, the owner or operator is required only to repair the crack, not to detect and clean up any releases that may have occurred before the crack was discovered.

The amendment made by this section of the bill does not make any changes to the Agency's regulations concerning ground water monitoring standards other then deleting the indicated exemptions. The provision does not affect other exemptions from the standards. For example, the regulations provide that the owner or operator need not monitor ground water if the Regional Administrator finds "there is no potential for migration of liquid from a regulated unit to the uppermost aquifer during the active life of the unregulated unit (including the closure period) and the post-closure care period". This exemption is not affected by the bill.

The amendment also does not limit the Agency's authority to revise the ground water monitoring regulations now in effect; it merely provides that whatever regulations are or will be in effect shall apply to facilities that, because of the conditions described in the bill, are now exempted from ground water monitoring requirements.

WASTE MINIMIZATION

A statement of national policy is added to section 1003 of the Act, and a requirement that hazardous waste generators certify that they have programs to reduce the amount and toxicity of their waste and that they are using methods to minimize the threat of their wastes to human health and the environment is added to sections 3002 and 3005 of the Act.

The national policy statement emphasizes two concepts. First, Congress declares that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Second, waste that is nevertheless generated should be treated, stored or disposed of so as to minimize the present and future threat to human health and the environment.

Current laws emphasize the need to properly treat, store, and dispose of hazardous wastes. While this continues to be a primary element of the Solid Waste Disposal Act and other pollution control laws, additional emphasis must be directed toward (1) minimizing the generation of hazardous wastes and (2) utilizing the best treatment, storage and disposal techniques for each waste.

According to preliminary estimates from recent studies, 160 million metric tons of hazardous waste is generated each year in the United States, and currently subject to subtitle C regulations. This is an enormous volume of pollution requiring the continuing development of environmentally sound treatment, storage, and disposal facilities.

Regardless of the care with which such facilities are managed and the regulatory or legal responsibilities imposed on these facilities, assuring protection of public health and the environment long after the active phase of a facility's existence has ended is a difficult task. The need to minimize the volume and toxicity of all hazardous waste is clear and is made an explicit national policy in this bill. Recycling pollutants contained in effluents, emissions, wastes or other pollution streams is one, but by no means the only, way of implementing this national policy.

For wastes that are generated, the need to employ technologies that minimize present and future threats of harm is reflected in other provisions of this bill (e.g., those that regulate small quantity generators, place limitations on land disposal, establish minimum technological requirements, and regulate the burning and blending of hazardous waste). The statement of national policy broadens and makes explicit the intent of Congress that is implicit in this bill and in existing law.

In addition to the statement of national policy, the Committee adopted several provisions regarding waste minimization: (1) A provision requiring on the manifest required by section 3002 of the Act a certification by the generator that he has a program in place to reduce the volume or quantity and toxicity of hazardous waste to the degree determined by the generator to be economically practicable and that the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment; (2) modifications to the reporting requirement of section 3002, and (3) a requirement for similar self-

certification regarding waste minimization as a condition for on-site storage, treatment, or disposal facility permits after September 1, 1984.

These sections are designed to encourage generators to voluntarily reduce the quantity and toxicity of all waste. While these provisions encourage the reduction of hazardous waste generated, they are directed at the generators of such waste and do not authorize the Environmental Protection Agency or any other person or organization to interfere with or intrude into the production process or production decisions of individual generators. To assure this, it is important to explain in detail the meaning of key elements of the new provisions.

First, both of the certification requirements refer to a certification by a generator that it has a program to minimize waste and as to its treatment, storage or disposal practices. While the requirement to make this certification is mandatory, the nature of the criteria for the certification and the determination of compliance with those criteria are to be made solely by the generator.

Second, the provisions include the term "economically practicable." This is a concept that has been used or alluded to in several laws. However, in this instance, other than defining the phrase, in the statute, the determination of "economically practicable" will be made by the generator and is not subject to subsequent re-evaluation. The generator has the flexibility to determine what is "economically practicable" for the generator's circumstances. Whether this determination is made for all of its operation or on a site-specific basis is for the generator to decide.

Third, explanation of the phrase "the proposed method of treatment, storage or disposal is that practicable method currently available to the generator . . ." is essential. This language is not intended to require the retrofitting of existing facilities, nor is it intended to require the installation or use, either on-site or off-site, of new technologies as they become available. A generator may, of course, choose to retrofit or otherwise utilize new technologies. Use of the term "practicable" in conjunction with the term "currently available" should result in generators choosing alternative treatment, storage, or disposal methods (beyond those generally required to comply with subtitle C), when they are economically practicable. Again, these judgments are to be made solely by the generator.

Fourth, the two determinations that must be certified can be balanced in different ways by a generator. For example, some generators may develop programs that first minimize waste that is generated and then identify and utilize a disposal technology that satisfies the second test. Others may find that the reduction of waste volume would result in increased toxicity. They may find that the present and future threat to human health and the environment is better addressed in the use of treatment, storage, and disposal methods than in the employment of certain waste reduction methods. Moreover, these provisions are not intended to discourage the recycling of materials. A fundamental premise of the Act is and continues to be to encourage reuse of materials.

There are substantial differences among hazardous waste generators that must be considered. For example, there are important

differences between a manufacturer whose process creates hazardous wastes that are capable of being recycled in the process and a generator who performs a service using products manufactured elsewhere, the residue from which is a hazardous waste. Clearly, the opportunities to minimize waste can be vastly different between these types of generators. The bill does not require waste minimization programs where such programs are not practicable, such as for those generators that are merely utilizing material where there is no practicable method for recycling the residue.

The difficulties in developing waste minimization programs also can be greatly exacerbated with regard to small quantity generators. The waste minimization requirements are not intended to result in a significant paperwork burden for small quantity generators. Prior to the promulgation of additional regulations for small quantity generators required by other provisions of the bill, the waste minimization requirements do not apply to generators of less than 1000 kilograms per month. The special manifest requirement for small quantity generators is imposed by section 3002(b), not by section 3002(a)(5). In developing regulations under the small quantity generator regulation and study provisons of this bill, the Administrator is directed to give special consideration to minimizing any unduly burdensome aspects of these requirements. The Administrator may conclude that neither the reporting or certification requirements of the waste minimization section should be applied to small quantity generators, or specific classes or categories of small quantity generators.

With respect to the certification requirement, this section does not create civil or criminal consequences. Thus, for example, such certifications are not to be treated as a "material statement" under new section 3008(d)(3) of the Act. Nor is the content of these certifications to be cause for challenge regarding the issuance of permits. In keeping with the concept of these provisions, judgments made by the generators are not subject to external regulatory action.

In implementing the biennial reporting requirement, the Agency should not require reports that duplicate the Agency's existing biennial reports. In particular, to the extent that the existing report will provide all or some information required by this subsection, submission of that report should be deemed sufficient to comply with some or all reporting requirements of this subsection. Additionally, it is recognized that the volume and quantity and toxicity of wastes can vary significantly with respect to the production levels of the products associated with the waste and that this can certainly distort the implications of information presented under new section 3002(a)(6)(D).

This section of the reported bill includes two provisions intended to assist Congress, during the next reauthorization of this Act and of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, in considering further measures to achieve the national policy established by this section.

The first provision would add a new subsection 8002(r) to the Act, requiring the Administrator to submit to Congress by October 1, 1986, a report on the feasibility and desirability of expanding the subtitle C program to include requirements for generators of hazardous waste to reduce the volume or quantity and toxicity of the

waste they generate. One such type of requirement which the Agency should evaluate in this report would be substantive standards of performance, similar to those under the Clean Air Act, which would require all generators in a certain category to reduce the volume or quantity and toxicity of their hazardous waste at least as much as could be achieved through the application of measures that are available to generators in that category. The Agency should also evaluate other methods of requiring generators to reduce the volume and toxicity of their hazardous waste, including possible changes to the requirements established by this section's amendments to section 3002 and 3005 of the Act.

The report to Congress also is to include an assessment of the feasibility and desirability of standards prescribing particular management practices that must be followed with respect to particular hazardous wastes. Such required management practices, or similar measures, would be a step beyond the prohibitions on certain methods of land disposal which will be established under section 3004(b) of the Act, as added by this bill; instead of just prohibiting certain management practices because they are not protective of human health and the environment, establishing preferred or required management practices might assure that hazardous wastes are managed only in those ways which the Agency determines are most protective of human health and the environment.

The report addressing these possible changes in the nature of the subtitle C program is to be submitted to Congress by October 1, 1986—one year before the expiration of the authorization for appropriations for the program.

For similar reasons, the second provision accelerates by six months the deadline for the President's comprehensive report to Congress on the initial implementation of the Superfund program and possible changes to it. That report, required by section 301(a)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is currently required to be submitted within four years of the enactment of CERCLA, or by December 11, 1984. The bill would require the report to be filed within forty-two months of the enactment of CERCLA, or by June 11, 1984. This will assure that Congress has adequate time to review the report in advance of making decisions on revising or extending the Superfund program.

The Superfund report is to include an assessment of the feasibility and desireability of revising the taxes levied under CERCLA so they are based on the likelihood of a release of a hazardous substance and the degree of hazard and risk resulting from any such release, so that the taxes create incentives for proper handling, recycling, incineration, and neutralization of hazardous wastes and disincentives to improper or illegal handling or disposal of hazardous materials. The Agency should consider the potential for "waste-end" taxes to create such incentives and disincentives, as well as the revenue such taxes would produce, when studying the feasibility and desirability of revising the Superfund tax schedule.

TECHNICAL CORRECTIONS

This amendment makes two technical corrections to the Act as amended in 1980 and one correction to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

The first two corrections redesignate a section and a subsection that were improperly identified in the 1980 amendments to the Act. The third correction makes it clear that CERCLA's tax sunset provision was not intended to apply to taxes for the Post Closure Liability Trust Fund under that Act.

REPORT TO CONGRESS

This amendment requires that the Environmental Protection Agency conduct an inventory of hazardous waste injection wells and report to the Congress not later than March 15, 1984. This provision is necessary because even though preliminary estimates indicate that 57 percent of the hazardous waste generated in the United States is disposed of through deep well injection, virtually no reliable information exists as to these wells and the activities surrounding them. Elsewhere in this bill, the disposal of hazardous waste though injection into or above an aquifer which serves as a drinking water supply is prohibited. An inventory was ordered in order to improve the information base relating to wells below drinking water aquifers.

In conducting the inventory, the Environmental Protection Agency may rely upon information which is already in existence. It is expected that much of the necessary information will be found in the files of State and local agencies. Some of the information, however, will not be found so easily and, for at least twenty wells, the Agency is required to conduct a comprehensive survey.

The inventory and comprehensive survey are to provide the following information:

1. The location and depth of each well;
2. Engineering and construction details of each, including the thickness and composition of its casting, the width and content of the annulus, and pump pressure and capacity;
3. The hydrogeological characteristics of the overlying and underlying strata, as well as that into which the waste is injected;
4. The location and size of all drinking water aquifers penetrated by the well, or within a one-mile radius of the well or within two hundred feet below the well injection point;
5. The location, capacity, and population served by each well providing drinking or irrigation water which is within a five-mile radius of the injection well;
6. The nature and volume of the waste injected during the one-year period immediately preceding the date of the report;
7. The dates and nature of the inspections of the injection well conducted by independent third parties or agents of State, Federal, or local government;
8. The name and address of all owners and operators of the well and any disposal facility associated with it; and

9. Such other information as the Administrator may, in his discretion, deem necessary to define the scope and nature of hazardous waste disposal in the United States through underground injection.

COMMUNITY RELOCATION

This amendment expands the statutory definition of "removal" in section 101(23) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) to provide the Agency with the discretion to fund as part of removal: permanent relocation of businesses, residences, and community facilities; payment of principal and interest on business debts during a temporary relocation (until temporary relocation ends or until permanent relocation is accomplished); and payment of unemployment compensation to individuals unemployed as a result of an evacuation or a relocation. The amendments authorize the Agency to provide permanent relocation as the most appropriate remedy at a site even when the site is not on the National Priorities List. The payment of principal and interest on business debts is limited to those businesses which are located in the area of an evacuation or relocation.

The language is added to clarify the Agency's authority and flexibility to deal with situations such as that presented by dioxin contamination in Missouri. Specifically, the amendment provides that the Agency can move immediately to permanently relocate the residents of a contaminated site if such a step is found to be cost-effective or may be necessary to protect health or welfare. For example, in some cases it may make more sense—economically and socially—to buy up and seal off a highly contaminated residential area immediately, rather than locate the residents indefinitely in temporary housing during a protracted, possibly impractical cleanup.

The amendment also gave the Agency the authority to pay the interest and principal on business debt during a period of temporary relocation. Temporary relocation is intended to protect the residents of a contaminated area, but when a community is evacuated, businesses are cut off from their customers. Their income abruptly ceases, while their obligations continue unabated. Thus, they are not protected, but are harmed. This amendment seeks to hold them harmless with respect to business debt only. There is no intent to make up for lost income.

The Agency also would have specific authority to provide special assistance to individuals unable to work as a result of such an evacuation. In effect, the same assistance would be available as is already available in natural disasters—unemployment and reemployment assistance, food stamps, and grants to meet necessary expenses or serious needs not covered by other aid programs. As under the Disaster Relief Act, this assistance would be provided by Federal agencies with appropriate programs and expertise, using money from the Superfund, and not directly by the Environmental Protection Agency.

This is a clarifying amendment, not substantially altering the scope or intent of the Superfund program.

Cost of Legislation

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. A copy of that statement follows:

U.S. Senate,
Congressional Budget Office,
Washington, D.C., October 27, 1983.

Hon. Robert T. Stafford,
Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 757, the Solid Waste Disposal Act Amendments of 1983. The analyses of the impact of this bill on state and local governments has not been completed, and will be provided separately.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Rudolph G. Penner,
Director.

Congressional Budget Office—Cost Estimate

1. Bill number: S. 757
2. Bill title: Solid Waste Disposal Act Amendments of 1983.
3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works, July 28, 1983.
4. Bill purpose: This bill amends the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act (Public Law 94-580), and authorizes appropriations for fiscal years 1984-1987 for the Environmental Protection Agency (EPA) to administer related programs.

The bill establishes new requirements for generators of small quantities of hazardous wastes, and directs the EPA Administrator to conduct a study and to promulgate additional regulations applicable to such generations. The bill also establishes new requirements regarding land disposal, air emissions from land deposit facilities, groundwater monitoring, and the export of hazardous waste. In addition, the bill directs the EPA Administrator to compile an inventory of all U.S. wells into which hazardous wastes are injected. S. 757 also amends the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to allow use of superfund money to pay permanent and related costs to residents and businesses and to extend certain disaster relief provisions to individuals unemployed as a result of relocation.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Authorization level	92	97	100	100	.....
Less: Amounts appropriated to date	58	.....	.....	.....	.....
Net additional authorization	.....	37	100	100	.....
Estimated outlays	.....	52	80	88	43

The costs of this bill fall within budget function 300.

Basis of estimate: The authorization levels are stated in the bill. For purposes of this estimate, it is assumed that the entire amounts authorized for fiscal years 1985 through 1987 will be appropriated prior to the start of each fiscal year. Because 1984 appropriations for these programs have already been enacted, there is no additional budget impact as a result of the 1984 authorizations. Outlays were estimed based on historical spending patterns for these and similar programs administered by the EPA.

The authorization for use of superfund money for relocation and related costs could result in additional demand for superfund expenditures—but there is currently no basis for estimating the amounts of such additional expenditures.

6. Estimated cost to State and local governments: No yet available.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Anne E. Hoffman.

10. Estimate approved by: C. G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

Rollcall Votes

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during consideration of the bill be announced in this report.

During the Committee's consideration of S. 757 on July 28, 1983, four rollcall votes were taken, including the Committee vote to report the bill which is announced as 14–1.

Voting in the affirmative to report S. 757 from the full Committee were Senators Stafford, Baker, Chafee, Simpson, Durenberger, Abdnor, Humphrey, Randolph, Bentsen, Burdick, Hart, Moynihan, Mitchell and Baucus. Voting in the negative was Senator Symms.

A motion to adopt an amendment offered by Senator Randolph as a substitute for an amendment offered by Senator Durenberger relating to regulation of small quantity generators was defeated by a vote of 6–9. Voting in the affirmative were Senators Stafford, Chafee, Randolph, Hart, Mitchell, and Moynihan. Voting in the negative were Senators Abdnor, Baker, Baucus, Bentsen, Burdick, Durenberger, Humphrey, Simpson and Symms.

A motion to adopt an amendment offered by Senator Durenberger relating to regulation of small quantity generators was adopted by a vote of 10–5. Voting in the affirmative were Senators Abdnor, Baker, Baucus, Bentsen, Burdick, Durenberger, Hum-

phrey, Moynihan, Simpson and Symms. Voting in the negative were Senators Stafford, Chafee, Randolph, Hart and Mitchell.

A motion to adopt a package of amendments offered by Senator Stafford relating to waste minimization was adopted by a vote of 9-2. Voting in the affirmative were Senators Stafford, Chafee, Durenberger, Randolph, Bentsen, Hart, Mitchell, Moynihan, and Baucus. Voting in the negative were Senators Humphrey and Symms. Voting present were Senators Abdnor and Simpson.

Hearings

The Subcommittee on Environmental Pollution held hearings in both the 97th and 98th Congress on the Solid Waste Disposal Act. Over twelve hundred pages of testimony and exhibits have been included in the hearing record. All hearings have been conducted in Washington, D.C.

In the 98th Congress, the Subcommittee had two mark-up sessions, June 23 and July 20. The Committee conducted two mark-up sessions, July 26 and 28, and on July 28, 1983, voted to order the bill reported.

On May 16, 1983, the Committee reported S. 1283, a bill to amend the Solid Waste Disposal Act to authorize funds for fiscal year 1984. The issues raised by this piece of legislation are addressed in S. 757.

Evaluation of Regulatory Impact

In compliance with section 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the reported bill.

Most of the provisions of the reported bill are more specific applications of regulatory authority already available to the Administrator under subtitle C of the Solid Waste Disposal Act. Generally no new regulatory burden is created by this bill. Some of these amendments, however, are intended to specifically overrule administrative exclusions or suspensions of regulations.

A principal example is new section 3002(b), closing out an administrative exemption and requiring standards for small quantity generators of hazardous waste. Thousands of individual businesses, including many small businesses, are likely to be affected by this provision. The exact number, and the likely range of costs imposed, is not known. The study required by section 3002(b)(7) will provide this information. The Committee has made an effort, however, to minimize the amount of additional paperwork and recordkeeping which would be imposed on individuals or businesses by these provisions, limiting such requirements to those necessary to protect human health and the environment.

The reported bill is not expected to have any impact on the personal privacy of individuals.

ADDITIONAL VIEWS OF SENATOR HUMPHREY

I was very pleased to be able to vote for Committee passage of the Solid Waste Disposal Act Amendments of 1983, and I commend the bill to the full Senate for prompt consideration and passage. This bill represents a substantial and important piece of work by the Committee, which should close many of the loopholes extant in current law and provide greater protection of human health and the environment.

The Committee has properly recognized that while much remains to be done to ensure proper treatment, storage and disposal of hazardous wastes, the future challenge lies in reducing the total amount of waste generated. Indeed, two amendments to the bill attempt to address this very point. While I fully intend to support these measures on the floor, I am concerned that the Committee received no testimony directly on the issue of waste minimization. I fear, therefore, that we may be legislating in something of a vacuum. It worries me that we may be imposing a substantial paperwork burden on American industry, but perhaps will have nothing to show for it.

By moving from the questions of properly storing, treating and disposing of hazardous wastes to the challenge of reducing their actual generation, we have taken a bold and important step. But I wonder whether our efforts are properly directed. Shortly after the Committee reported this bill, the EPA released the preliminary findings of a study entitled, "National Survey of Hazardous Waste Generators and Treatment, Storage, and Disposal Facilities Regulated under RCRA in 1981." This survey indicates that American industry is generating about 150 million metric tons of hazardous waste per year—nearly four times more than earlier estimates. Perhaps more significant is the fact that only one percent of the generators produce nearly 90 percent of the total amount of hazardous waste. Just as important, only 4 percent of the 40 billion gallons of hazardous wastes generated in 1981 were recycled, according to the study.

These figures suggest that the problem is a very large and important one, and lead me to question whether the best initial approach is indeed a mandatory reporting scheme that applies to all generators, but that provides precious little guidance for them as to what should be reported or what is expected. We run the risk here of creating a false public impression that we have dealt with the problem, when in fact we have not. There is also a danger of a backlash from some segments of industry (small companies in particular) that may perceive this as another senseless bureaucratic and regulatory headache and expense. Needless to say, the effect of such a reaction could be counterproductive to the result the Committee is trying to achieve.

At the very least, I hope the Committee will recognize that we have only just begun our work on the issue of waste minimization. An important step will be to find a suitable means by which to ensure that EPA will use the returned reports to develop a good statistical base on which to consider future changes. It is also my hope that the Committee will hear some testimony from expert witnesses on the specific issue of waste minimization.

My support for the Solid Waste Disposal Act Amendments of 1983 is in no way lessened by my concerns about the issue of waste minimization. Indeed, I am fully prepared to speak on behalf of waste minimization provisions on the floor of Senate. However, I do think it is important that the members of the Committee spend substantially more time on this issue in future years. Protection of human health and the environment is a weighty charge, but in the area of waste minimization we have only just begun to fulfill our mandate.

GORDON J. HUMPHREY.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman:

THE SOLID WASTE DISPOSAL ACT

(Public Law 94-580)

AN ACT To provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials and for the safe disposal of discarded materials, and to regulate the management of hazardous waste

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

TITLE II—SOLID WASTE DISPOSAL

SUBTITLE A—GENERAL PROVISIONS

* * * * * * *

OBJECTIVES *AND NATIONAL POLICY*

SEC. 1003. *(a)* OBJECTIVES. The objectives of this Act are to promote the protection of health, and then environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved meth-

ods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment;

(5) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(6) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(7) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(8) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) NATIONAL POLICY.—The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

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SUBTITLE B—OFFICE OF SOLID WASTE; AUTHORITIES OF THE ADMINISTRATOR

* * * * * * *

ANNUAL REPORT

SEC. 2006. *(a) ACTIVITIES OF THE OFFICE.—* * * *

(b) HAZARDOUS WASTE.—(1) The Administrator shall transmit to the Congress and the President, periodically but no less often than every two years a report describing quantities and types of hazardous waste generated, stored, treated, and disposed of. The Administrator shall compile and update such information comparable to that required under section 3002(a)(6) and section 3004(a)(1) and (2).

(2) States with authorized programs under section 3006 shall make available those reports they have received or compiled to assist the Administrator in preparing such report for Congress. The first such report shall cover calendar year 1983 and shall be transmitted to the Congress no later than March 31, 1985.

(3) The authority of section 3007 of this Act shall be available in the implementation of this subsection.

GENERAL AUTHORIZATION

SEC. 2007. (a) GENERAL ADMINISTRATION.—There are authorized to be appropriated to the Administrator for the purpose of carrying out the provisions of this Act, $35,000,000 for the fiscal year ending September 30, 1977, $38,000,000 for the fiscal year ending September 30, 1978, $42,000,000 for the fiscal year ending September 30, 1979, $70,000,000 for the fiscal year ending September 30, 1980, $80,000,000 for the fiscal year ending September 30, 1981, [and] $80,000,000 for the fiscal year ending September 30, 1982, *$43,628,000 for the fiscal year ending September 30, 1983, $45,000,000 for the fiscal year ending September 30, 1984, $47,000,000 per fiscal year for the fiscal years ending September 30, 1985, September 30, 1986, and September 30, 1987.*

* * * * * * *

SUBTITLE C—HAZARDOUS WASTE MANAGEMENT

IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

SEC. 3001. (a) CRITERIA FOR IDENTIFICATION OR LISTING.—Not later than eighteen months after the date of the enactment of this Act, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subtitle, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

(b)(1) IDENTIFICATION AND LISTING.—Not later than eighteen months after the date of enactment of this section, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 1004(5)), which shall be subject to the provisions of this subtitle. Such regulations shall be based on the criteria promulgated under subsection (a) and shall be revised from time to time thereafter as may be appropriate.

* * * * * * *

(4)(A) The regulations promulgated under paragraph (1) shall provide that, when evaluating a petition to exclude a waste generated at a particular facility from being regulated as a hazardous waste, the Administrator shall consider criteria, constituents, or other related factors, other than those for which the waste was listed, if the Administrator has a reasonable basis to believe that such additional criteria, constituents, or other related factors could cause such waste to be listed as a hazardous waste. The Administrator shall grant or deny such petitions only after notice and opportunity for

public hearing. If the basis for denial of such petition is the presence of additional constituents which could cause such waste to be hazardous, the Administrator shall amend the basis for the listing of such waste to indicate the additional constituents.

(B) The temporary granting of such a petition prior to the enactment of the Solid Waste Disposal Act Amendments of 1983 without the opportunity for public comment and the full consideration of such comment shall not continue for more than twelve months after the date such petition is granted or six months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, whichever is later. If a final decision to grant or deny such a petition has not been promulgated after notice and opportunity for public comment within the time limit prescribed by the preceding sentence, any such temporary granting of such petition shall cease to be in effect.

(C) Any petition to exclude from regulation a waste generated at a particular facility shall be accompanied by adequate information to evaluate such petition, including information on samples of such waste determined to be representative on the basis of guidelines for the development and submission of such information published by the Administrator. Such information shall be certified by a responsible official of such facility (as determined under regulations promulgated under section 3005) to be accurate, complete, and representative, within the knowledge of employees or contractors of such facility.

(5) For the purpose of assuring the timely completion of regulations identifying the characteristics of hazardous waste and the listing of additional particular hazardous wastes, as required by paragraph (1) of this subsection, the Administrator shall—

(A) not later than six months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, identify those particular wastes for which the Agency intends to decide whether to list as hazardous waste within two years after such date of enactment, and those particular wastes for which the Agency intends to decide within five years after such date of enactment;

(B) not later than six months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, promulgate regulations listing chlorinated dioxin- and dibenzofuran-containing wastes as hazardous wastes in accordance with paragraph (1) of this subsection; and

(C) not later than two years after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, (i) promulgate regulations identifying additional characteristics of hazardous waste, including measures or indicators of toxicity; and (ii) reach decisions on all wastes identified in accordance with subparagraph (A) for decision within two years and for each such waste either promulgate regulations listing such particular hazardous waste or publish a statement as to why such waste should not be listed as hazardous waste; and

(D) not later than six months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, determine the appropriateness of using the extraction procedure toxicity characteristic for evaluating petitions to exclude a waste gener-

ated at a particular facility from being regulated as a hazardous waste, and, not later than two years after such date of enactment, make such changes as are necessary in the extraction procedure toxicity characteristic to predict the leaching potential of wastes upon exposure to leaching media more aggressive than the media utilized in the regulation in effect as of such date of enactment.

(6) The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subtitle solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratogens) at levels in excess of levels which endanger human health.

(c) PETITION BY STATE GOVERNOR.—At any time after the date eighteen months after the enactment of this title, the Governor of any state may petition the Administrator to identify or list a material as a hazardous waste. The Administrator shall act upon such petition within ninety days following his receipt thereof and shall notify the Governor of such action. If the Administrator denies such petition because of financial considerations, in providing such notice to the Governor he shall include a statement concerning such considerations.

(d) CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION.—A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if such facility—

(1) receives and burns only (A) household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and (B) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(2) such facility does not accept hazardous wastes identified or listed under this section and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

SEC. 3002. *(a) STANDARDS.*—Not later than eighteen months after the date of the enactment of this section, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subtitle, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting—

(1) * * *

* * * * * * *

[(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out an authorized permit program pursuant to this subtitle) at such times as

the Administrator (or the State agency if appropriate) deems necessary, setting out—

[(A) the quantities of hazardous waste identified or listed under this subtitle that he has generated during a particular time period; and

[(B) the disposition of all hazardous waste reported under subparagraph (A).]

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries a permit program pursuant to this subtitle) at least once every two years, setting out—

(A) the quantities and nature of hazardous waste identified or listed under this subtitle that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparision with previous years, to the extent such information is available for years prior to enactment of this subparagraph.

(b) HAZARDOUS WASTE FROM SMALL QUANTITY GENERATORS.—(1) Beginning two hundred and seventy days after the enactment of the Solid Waste Disposal Act Amendments of 1980, any hazardous waste listed or identified under section 3001 which is part of a total quantity generated by a generator generating greater than one hundred kilograms but less than one thousand kilograms during one calendar month and which is shipped off the premises on which waste is generated shall be accompanied by a copy of the Environmental Protection Agency uniform hazardous waste manifest form signed by the generator. This form shall contain the following information:

(A) the name and address of the generator of the waste;

(B) the United States Department of Transportation description of the waste, including the proper shipping name, hazard class, and identification number (UN/NA), if applicable;

(C) the number and type of containers;

(D) the quantity of waste being transported; and

(E) the name and address of the facility designated to receive the waste.

If subparagraph (B) is not applicable, in lieu of the description referred to in such subparagraph (B), the form shall contain the Environmental Protection Agency identification number, or a generic description of the waste, or a description of the waste by hazardous waste characteristic. Additional requirements related to the manifest shall apply only if determined necessary by the Administrator to protect human health and the environment. The Administrator is authorized to apply the requirements of this paragraph to hazardous waste which is part of a total quantity generated by a generator generating less than one hundred kilograms during one calendar month.

(2)(A) Any hazardous waste identified in accordance with section 3001 on the basis of the characteristic of ignitability, reactivity, or

corrosivity or listed under section 3001, which is part of a total quantity generated by a generator generating greater than one hundred kilograms but less than one thousand kilograms during one calendar month when such waste is transported off the premises on which such waste is generated, shall be placed in suitable, sound, nonleaking containers as follows:

(i) off-specification materials, residual materials, and materials from spill cleanup may be placed in the original containers of such materials, or in equivalent containers labeled with the same information as the original containers and suitably constructed to contain such materials;

(ii) a waste may be placed in a Department of Transportation specification hazardous material container with prescribed labeling in compliance with the Hazardous Materials Transportation Act; and

(iii) other wastes may be placed in a container or otherwise handled by a method (including a method of identification or labeling consistent with this subparagraph) mutually agreed by the generator and the transporter of such wastes.

Wastes that are not incompatible may be aggregated in such suitable containers. For the purpose of this subparagraph, aggregation means the mixing of two or more types of wastes within the innermost container.

(B) Except as provided in paragraph (7) or under State law, a generator generating waste subject to this paragraph shall not be subject to additional requirements for manifesting, recordkeeping, or reporting beyond those in regulations promulgated prior to January 1, 1983.

(8) Until the effective date of regulations promulgated under paragraph (7), or as specified in paragraph (7)(C), any hazardous waste identified or listed under section 3001 generated by any generator during any calendar month in a total quantity less than one thousand kilograms, which is not treated, stored, or disposed of at a hazardous waste treatment, storage, or disposal facility with a permit under section 3005, shall be disposed of only in a facility which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste.

(4) The provisions of paragraphs (2) and (3) shall take effect on the date two hundred and seventy days after the enactment of the Solid Waste Disposal Act Amendments of 1980.

(5) Requirements under section 3004 for storage of hazardous waste identified or listed under section 3001 which is generated by any generator during any calendar month in a total quantity less than one thousand kilograms shall provide for onsite storage in tanks and containers of such hazardous waste for up to one hundred and eighty days, unless the generator must ship or haul such waste over two hundred miles in which case such requirements shall provide for onsite storage for up to two hundred and seventy days of up to six thousand kilograms of such hazardous waste.

(6) Nothing in this subsection shall be construed to affect, modify, or render invalid any requirements applicable to any acutely hazardous waste identified or listed under section 3001 which is generated by any generator during any calendar month in a total quantity less than one thousand kilograms, in regulations promulgated

prior to January 1, 1983. Any additional acutely hazardous waste listed under section 3001 after January 1, 1983, shall be subject to all regulations applicable to acutely hazardous wastes.

(7)(A) The Administrator in cooperation with the States shall conduct a study of hazardous waste identified or listed under section 3001 of this Act which is generated by individual generators in total quantities for each generator during any calendar month of less than one thousand kilograms. The Administrator may require from such generators information as may be necessary to conduct the study. Such study shall include a characterization of the number and type of such generators, the quantity and characteristics of hazardous waste generated by such generators, State requirements applicable to such generators, the individual and industry waste management practices of such generators, the potential costs of modifying those practices and the impact of such modifications on national treatment and disposal facility capacity, and the threat to the protection of human health and the environment and the employees of transporters or others involved in solid waste management posed by such hazardous wastes or such management practices. Such study shall specifically address whether the requirements of paragraph (2) should apply to hazardous wastes identified on the basis of the characteristic of extraction procedure toxicity or additional characteristics promulgated under section 3001(b)(5). Such study shall be submitted to the Congress not later than March 31, 1985.

(B) Based upon the study required by subparagraph (A) and other information available to the Administrator and after consultation with the States, the Administrator shall promulgate not later than March 31, 1986, additional regulations establishing such requirements under this section and sections 3003, 3004, and 3005 of this Act for hazardous waste identified or listed under section 3001 which is generated by a generator during any calendar month in a total quantity less than one thousand kilograms, as may be necessary to protect human health and the environment. Such requirements may supplement the requirements of paragraphs (1) through (5) of this subsection and may distinguish among classes and categories of generators or waste, and may vary from the requirements applicable to hazardous waste generated in quantities greater than one thousand kilograms during any calendar month, to the extent the Administrator determines such standards are adequate to protect human health and the environment. The Administrator shall consider State requirements applicable to generators of hazardous wastes which generate such wastes in a total quantity less than one thousand kilograms per month in promulgating such regulations and shall explain differences between State requirements and regulations promulgated under this subparagraph. Except as provided in paragraph (5), regulations promulgated under this paragraph shall provide that treatment, storage, or disposal of a hazardous waste identified or listed under section 3001 generated by a generator during any calendar month in a total quantity less than one thousand kilograms occur only at a treatment, storage, or disposal facility with a permit under section 3005. The Administrator may establish in such regulations a total quantity of wastes generated by a generator during any calendar month, not to exceed one hundred kilograms, for which disposal may occur in compliance with para-

graph (3) rather than the preceding sentence, if the Administrator determines that such compliance will be adequate to protect human health and the environment. Such quantity may vary for different wastes or classes of wastes.

(C) In the case no regulations in accordance with subparagraph (B) of this paragraph have been promulgated prior to March 31, 1986, after such date—

(i) all treatment, storage, or disposal of any hazardous waste identified or listed under section 3001 generated by a generator during any calendar month in a total quantity greater than one hundred kilograms but less than one thousand kilograms shall occur only at a treatment, storage, or disposal facility with a permit under section 3005;

(ii) generators of such waste shall file manifest exception reports as required by generators producing quantities greater than one thousand kilograms per month except that such reports shall be filed by January 31, for any waste shipment occurring in the last half of the preceeding calendar year, and by July 31, for any waste shipment occurring in the first half of the calendar year; and

(iii) generators of such waste shall retain for three years a copy of the manifest signed by the designated facility that has received the waste.

(D) The Administrator shall undertake activities to inform and educate waste generators of their responsibilities under this section during the period after enactment to help assure compliance.

(c) WASTE MINIMIZATION.—Effective September 1, 1984, the manifest required by subsection (a)(5) shall contain a certification by the generator that—

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE

SEC. 3003. (a) * * *

* * * * * * *

(c) FUEL FROM HAZARDOUS WASTE.—Not later than two years after the date of enactment of the Solid Waste Disposal Act Amendments of 1983 and after opportunity for public hearing, the Administrator shall promulgate regulations establishing standards, applicable to transporters of fuel produced (1) from any hazardous waste identified or listed under section 3001, or (2) from any hazardous waste identified or listed under section 3001 and any other material, as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (4) of subsection (a) as may be appropriate.

STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

SEC. 3004. *(a) STANDARDS.*—* * *

(h) LAND DISPOSAL LIMITATIONS.—(1) The Congress finds that certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and that to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes. Therefore, the Administrator shall, after notice and opportunity for hearings and after consultation with appropriate Federal and State agencies, promulgate regulations prohibiting the land disposal of hazardous wastes, except for methods of land disposal of one or more such wastes which the Administrator determines will be protective of human health and the environment. If the Administrator determines that a method of land disposal of a hazardous waste will be protective of human health and the environment, he shall promptly publish in the Federal Register notice of such determination together with an explanation of the basis for such determination. The Administrator shall take into account the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous waste, and the potential effect of such waste on the integrity of containment mechanisms.

(2) For the purposes of this subsection, if a specified waste contains significant concentrations of one or more hazardous constituents that is highly toxic, highly mobile, or has a strong propensity to bioaccumulate, a method of land disposal may not be determined to be protective of human health and the environment for such specified hazardous waste, unless upon application by an interested person it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of such constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(3) A prohibition in regulations under this subsection shall be effective immediately upon promulgation, unless the Administrator establishes another effective date with respect to a specific hazardous waste on the basis of the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available, which shall in no event be later than two years after the date of promulgation. The Administrator, after notice and opportunity for comment and after consultation with appropriate State agencies in all affected States, may grant an extension of such effective date on a case-by-case basis for up to one year, renewable for no more than one additional year, where the applicant demonstrates that there is a binding contractual commitment to construct or otherwise provide such alternative capacity but due to circumstances beyond the control of such applicant such alternative capacity cannot reasonably be made available by such effective date.

(4) Not later than July 1, 1985, the Administrator shall promulgate regulations in accordance with paragraph (3) for dioxin-containing hazardous wastes and those hazardous wastes numbered

F001, F002, F003, F004, and F005 in regulations promulgated by the Administrator under section 3001 (40 C.F.R. 261.31), as those regulations are in effect on July 1, 1983;

(5) Not later than thirty-two months after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate regulations in accordance with paragraph (1) for the following hazardous wastes:

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following dissolved metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:

(i) arsenic and/or compounds (as As) 500 mg/l;

(ii) cadmium and/or compounds (as Cd) 100 mg/l;

(iii) chromium (VI and/or compounds (as CR VI)) 500 mg/l;

(iv) lead and/or compounds (as Pb) 500 mg/l;

(v) mercury and/or compounds (as Hg) 20 mg/l;

(vi) nickel and/or compounds (as Ni) 134 mg/l;

(vii) selenium and/or compounds (as Se) 100 mg/l; and

(viii) thallium and/or compounds (as Th) 130 mg/l.

(C) Liquid hazardous waste having a pH less than or equal to two (2.0)

(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

When necessary to protect human health and the environment, the Administrator shall substitute more stringent concentration levels than the levels specified in subparagraphs (A) through (E).

(6)(A) Not later than twelve months after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall publish a schedule for deciding whether or not to prohibit in accordance with paragraph (1) the land disposal of each hazardous waste listed under section 3001. Such schedule shall require that the Administrator must make such decisions for at least one-third of all such listed wastes by the date thirty-two months after the date of such enactment, for at least two-thirds of all such listed wastes by the date forty-two months after the date of such enactment, and for all such listed wastes by the date fifty-two months after the date of such enactment.

(B) Not later than the date specified in subparagraph (A) for each waste on the schedule published under such subparagraph, the Administrator shall promulgate regulations in accordance with paragraph (1) for each such waste.

(C) Not later than fifty-two months after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate regulations in accordance with paragraph (1) for each hazardous waste identified on the basis of any toxicity characteristics.

(D) Not later than thirty-two months after the listing of a hazardous waste listed after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate regulations in accordance with paragraph (1) for such waste.

(7) Simultaneously with the promulgation of regulations under paragraph (1) prohibiting one or more methods of land disposal of a particular hazardous waste, and as appropriate thereafter, the Administrator shall, after notice and an opportunity for hearings and after consultation with appropriate Federal and State agencies, promulgate regulations specifying those methods of treatment, if any, which are necessary before such method or methods of disposal of such hazardous waste would be protective of human health and the environment. Notwithstanding the provisions of subsection 3010(6), immediately upon the promulgation of regulations under this paragraph, the disposal of such hazardous waste by such method or methods is allowed if such hazardous waste has first been treated by a method specified in regulations promulgated under this paragraph.

(8)(A) Any hazardous waste prohibited under this subsection from disposal in a surface impoundment may be treated or stored in a surface impoundment only if that impoundment is equipped with at least one liner.

(B) For the purposes of this section, "disposal" shall include the placement of hazardous waste in a surface impoundment or a waste pile for a period of more than six months, regardless of whether it is intended that the hazardous waste will be removed before closure of the facility.

(9) If the Administrator fails to promulgate regulations under paragraph (1) with respect to a waste referred to in paragraph (4) or in paragraph (5) by the deadline specified in such paragraph, effective six months after such deadline, and until the Administrator promulgates regulations under paragraph (1), such waste may be disposed of in a landfill or a surface impoundment only if such facility is in compliance with the requirements of section 3004(f)(1) of this Act. This paragraph shall not apply to contaminated soil and debris from the cleanup or removal of any release of a hazardous substance.

(c) LIQUIDS IN LANDFILLS.—Not later than one year after the enactment of the Solid Waste Disposal Act Amendments of 1984, the Administrator shall promulgate final regulations which minimize the disposal of liquid containerized hazardous waste in landfills (including the minimization of free liquids by other means than the addition of absorbent material, where technologically feasible), and which prohibit the disposal of bulk or noncontainerized liquid hazardous wastes in landfills. Prior to the promulgation of such final regulations, the requirements in regulations under this section respecting the disposal of landfills of liquid hazardous waste and free liquids contained in hazardous waste in effect as of October 1, 1983, shall remain in effect.

(d) BAN ON DUST SUPPRESSION.—The use of waste or used oil or other material, which is contaminated or mixed with dioxin or any other hazardous waste identified or listed under section 3001 (other than a waste identified solely on the basis of ignitability), for dust suppression or road treatment is prohibited.

(e) BAN ON CERTAIN WELLS.—Effective one hundred and eighty days after the enactment of the Solid Waste Disposal Act Amendments of 1983, no hazardous waste may be disposed of by underground injection into or above any formation which contains, within one-half mile of the well used for such underground injection, and underground source of drinking water.

(f) MINIMUM TECHNOLOGICAL REQUIREMENTS.—The regulations under subsection (a) of this section shall be revised from time to time to take into account improvements in the technology of control and measurement. At a minimum, such regulations shall require, and a permit issued after the date of enactment of the Solid Waste Disposal Act Amendments of 1983 by the Administrator or a State shall require—

(1) for each new landfill or surface impoundment, each new landfill or surface impoundment unit at an existing facility, each replacement of an existing landfill or surface impoundment unit, and each lateral expansion of an existing landfill or surface impoundment unit, for which a completed application for a permit under section 3005(c) is received after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, with respect to all waste received after the issuance of such permit, the installation of two or more liners and a leachate collection system above (in the case of a landfill) and between such liners (unless the owner or operator demonstrates to the Administrator, and the Administrator finds for such landfill or surface impoundment, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into the groundwater or surface water at least as effectively as such liners and leachate collection systems), together with ground water monitoring; and

(2) for each incinerator which receives a permit under section 3005(c) after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, the attainment of the minimum destruction and removal efficiency required by regulations in effect on June 24, 1982.

In addition, such regulations shall specify criteria for the acceptable location of new and existing treatment, storage, or disposal facilities as necessary to protect human health and the environment. The Administrator shall determine whether to modify the requirements of paragraph (1) for liners and leachate collection systems in the case of landfills or surface impoundments receiving solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore, if such solid waste is subject to regulation under this subtitle, and shall, if he so determines, so modify such requirements to the extent such modified requirements assure protection of human health and the environment.

(g) CONTINUING RELEASES AT PERMITTED FACILITIES.—Standards promulgated under this section shall require, and a permit issued after the date of enactment of the Solid Waste Disposal Act Amendments of 1983 by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or dispos-

al facility seeking a permit under this subtitle, regardless of the time at which waste was placed in such unit. Permits issued under section 3005 shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

(h) HAZARDOUS WASTE USED AS FUEL.—(1) Not later than two years after the date of the enactment of the Solid Waste Disposal Act Amendments of 1980, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations establishing such—

(1) standards applicable to the owners and operators of facilities which produce a fuel, (A) from any hazardous waste identified or listed under section 3001, or (B) from any hazardous waste identified or listed under section 3001 and any other material;

(2) standards applicable to the owners and operators of facilities which burn, for purposes of energy recovery, any fuel produced as provided in paragraph (1) or any fuel which otherwise contains any hazardous waste identified or listed under section 3001; and

(3) standards applicable to any person who distributes or markets any fuel which is produced as provided in paragraph (1) or any fuel which otherwise contains any hazardous waste identified or listed under section 3001.

as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (7) of subsection (a) as may be appropriate. Nothing in this subsection shall be construed to affect or impair the provisions of section 3001(b)(3). For purposes of this subsection, the term "hazardous waste listed under section 3001" includes any commercial chemical product which is listed under section 3001 and which, in lieu of its original intended use, is (A) produced for use as (or as a component of) a fuel, (B) distributed for use as a fuel, or (C) burned as a fuel.

(2)(A) This subsection, subsection (i), and subsection (j) shall not apply to petroleum refinery wastes containing oil which are converted into petroleum coke at the same facility at which such wastes were generated, unless the resulting coke product would exceed one or more characteristics by which a substance would be identified as a hazardous waste under section 3001.

(B) The Administrator may exempt from the requirements of this subsection, subsection (i), or subsection (j) facilities which burn de minimis quantities of hazardous waste as fuel, as defined by the Administrator, if the wastes are burned at the same facility at which such wastes are generated; the waste is burned to recover useful energy, as determined by the Administrator on the basis of the design and operating characteristics of the facility and the heating value and other characteristics of the waste; and the waste is burned in a type of device determined by the Administrator to be designed and operated at a destruction and removal efficiency sufficient such that protection of human health and environment is assured.

(i) LABELING.—(1) Notwithstanding any other provision of law, until such time as the Administrator promulgates standards under subsection (h) specifically superceding this requirement, it shall be unlawful for any person who is required to file a notification in accordance with paragraph (1) or (3) of section 3010 to distribute or market any fuel which is produced from any hazardous waste identified or listed under section 3001, or any fuel which otherwise contains any hazardous waste identified or listed under section 3001 if the invoice or the bill of sale fails—

(A) to bear the following statement: "WARNING: THIS FUEL CONTAINS HAZARDOUS WASTES", and

(B) to list the hazardous wastes contained therein.

Beginning ninety days after the enactment of the Solid Waste Disposal Act Amendments of 1983, such statement shall be located in a conspicuous place on every such invoice or bill of sale and shall appear in conspicuous and legible type in contrast by typography, layouts, or color with other printed matter on the invoice or bill of sale.

(2) Unless the Administrator determines otherwise as may be necessary to protect human health and the environment, this subsection shall not apply to fuels produced from petroleum refining waste containing oil if (A) such materials are generated and reinserted onsite into the refining process; (B) contaminants are removed; and (C) such refining waste containing oil is converted along with normal process streams into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products and which is classified as a number SIC 2911 facility under the Office of Management and Budget Standard Industrial Classification Manual.

(3) Unless the Administrator determines otherwise as may be necessary to protect human health and the environment, this subsection shall not apply to fuels produced from used oil, resulting from normal petroleum refining production and transportation practices, if (A) contaminants are removed; and (B) such used oil is converted along with normal process streams into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products and which is classified as a number SIC 2911 facility under the Office of Management and Budget Standard Classification manual.

(j) RECORDKEEPING.—Not later than twelve months after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate regulations requiring that any person who is required to file a notification in accordance with subparagraph (1), (2), or (3), of paragraph 3010(a) must maintain such records regarding fuel blending, distribution, or use as may be necessary to protect human health and the environment.

(k) AIR EMISSIONS.—Not later than thirty months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate such regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities, including but not limited to open tanks, surface impoundments, and landfills, as may be necessary to protect human health and the environment.

(l) GROUND WATER MONITORING.—The standards under this section concerning ground water monitoring which are applicable to

surface impoundments, waste piles, land treatment units, and landfills shall apply to such a facility whether or not—

(1) the facility is located above the seasonal high water table;

(2) two liners and a leachate collection system have been installed at the facility; or

(3) the owner or operator inspects the liner (or liners) which has been installed at the facility.

PERMITS FOR TREATMENT, STORAGE, OR DISPOSAL OF HAZARDOUS WASTE

SEC. 3005. (a) * * *

* * * * * * *

(c) PERMIT ISSUANCE.—Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 3004, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 3004, the permit shall specify the time allowed to complete the modifications. *Any permit under this section shall be for a fixed term, not to exceed ten years in the case of any land disposal facility, incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 3004. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.*

* * * * * * *

(e) INTERIM STATUS.—Any person who—

(1) owns or operates a facility required to have a permit under this section which facility is in existence on November 19, 1980,

(2) has complied with the requirements of section 3010(a), and

(3) has made an application for a permit under this section shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. *The owner or operator of a waste pile qualifying for the authorization to operate under this subsection shall be subject to the same requirements for liners and leachate collection systems or equivalent protection provided in regulations*

promulgated by the Administrator under section 3004 before October 1, 1982, or revised under section 3004(f), for new facilities receiving individual permits under subsection (c) of this section, with the respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under this section, and with respect to waste received beginning six months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983. The owner or operator of a landfill or surface impoundment qualifying for the authorization to operate under this subsection shall be subject to the requirements of section 3004(f), with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under this section, and with respect to waste received beginning six months after such date of enactment. The owner or operator of each such unit shall notify the Administrator (or the State, if appropriate) at least sixty days prior to receiving waste. The Administrator (or the State) shall require the filing of a completed permit application within six months of receipt of such notice, for each facility submitting such notice. In the case of any unit in which the liner and leachate collection system has been installed pursuant to the requirements of this subsection and in good faith compliance with the Administrator's regulations and guidance documents governing liners and leachate collection systems, no liner or leachate collection system which is different from that which was so installed pursuant to this subsection shall be required for such unit by the Administrator when issuing the first permit under this section to such facility. The Administrator may, under section 3004, amend the requirements for liners and leachate collection systems required under this subsection as may be necessary to provide additional protection for human health and the environment.

* * * * * * *

(g) The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 3004 to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) which receives hazardous waste after July 26, 1982.

(h) Waste Minimization.—Effective September 1, 1984, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste on the premises where such waste was generated that the permittee certify, no less often than annually that—

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

AUTHORIZED STATE HAZARDOUS WASTE PROGRAMS

SEC. 3006. (a) * * *

* * * * * * *

(f) IMMEDIATE IMPLEMENTATION.—The requirements of sections 3002(b)(1), 3002(b)(7)(C), 3004 (b), (d), (e), (f), (g), and (i), 3005 (c) and (e), and 3007(b)(1) shall apply directly in all States, including each State with a program authorized under this section, until the program of such State is authorized to operate in lieu of the Federal program with respect to such requirement.

INSPECTIONS

SEC. 3007. (a) * * *

(b) MANDATORY INSPECTIONS.—(1) Beginning twelve months after the enactment of the Solid Waste Disposal Act Amendments of 1983, every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 3005 of this title shall be thoroughly and regularly inspected no less often than every two years as to its compliance with this subtitle and the regulations promulgated thereunder. The Administrator shall, after notice and opportunity for public comment, promulgate regulations governing the minimum frequency and manner of such inspections, including the manner in which records of such inspections shall be maintained. The Administrator may distinguish between classes and categories of facilities commensurate with the risks posed by each class or category.

(2) Not later than six months after the enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall submit to the Congress a report on the potential for inspections of hazardous waste treatment, storage, or disposal facilities by nongovernmental inspectors as a supplement to inspections conducted by officers, employees, or representatives of the Environmental Protection Agency or States having authorized hazardous waste programs or operating under a cooperative agreement with the Administrator. Such report shall be prepared in cooperation with the States, insurance companies offering environmental impairment insurance, and independent companies providing inspection services, and other such groups as appropriate. Such report shall contain recommendations on provisions and requirements for a program of private inspections to supplement governmental inspections.

[(b)](c) * * *

(d) FACILITIES OPERATED BY A FEDERAL AGENCY.—Beginning twelve months after enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall, and the State, in the case of a State with an authorized hazardous waste program, may undertake no less often than every two years a thorough inspection of each facility for the treatment, storage, or disposal of hazardous waste which is operated by a Federal agency as to its compliance

with this subtitle and the regulations promulgated thereunder. The records of such inspections shall be available to the public as provided in subsection (c).

(e) STATE-OPERATED FACILITIES.—The Administrator shall undertake a thorough inspection of every facility for the treatment, storage, or disposal of hazardous waste which is operated by a State or local government for which a permit is required under section 3005 of this title. The records of such inspection shall be available to the public as provided in subsection (c).

FEDERAL ENFORCEMENT

SEC. 3008. (a) * * *

* * * * * * *

(d) CRIMINAL PENALTIES.—Any person who—

(1) knowingly transports *or causes to be transported* any hazardous waste identified or listed under this subtitle to a facility which does not have a permit under [section 3005 (or 3006 in case of a State program)] *this subtitle,* or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052),

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle [either]—

(A) without having obtained a permit under [section 3005 (or 3006 in the case of a State program)] *this subtitle* or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052); or

[(B) in knowing violation of any material condition or requirement of such permit;]

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

[(3) knowingly makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with this subtitle; or

[(4) knowingly generates, stores, treats, transports, disposes of, or otherwise handles any hazardous waste (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, or conceals any record required to be maintained under regulations promulgated by the Administrator under this subtitle shall, upon conviction, be subject to a fine of not more than $25,000 ($50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.]

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste required by regulations promulgated under this subtitle (or by a State in the case of a State program authorized under this subtitle) to be accompanied by a manifest; or

(6) knowingly exports a hazardous waste identified or listed under this subtitle without the consent of the receiving country

shall upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

[(e) KNOWING ENDANGERMENT.—Any person who knowingly transports, treats, stores, or disposes of any hazardous waste identified or listed under this subtitle—

[(1)(A) in violation of paragraphs (1) or (2) of subsection (d) of this section, or

[(B) having applied for a permit under section 3005 or 3006, and knowingly either—

[(i) has failed to include in his application material information required under regulations promulgated by the Administrator, or

[(ii) fails to comply with the applicable interim status regulations and standards promulgated pursuant to this subtitle,

who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, and

[(2)(A) if his conduct in the circumstances manifests an unjustified and inexcusable disregard for human life, or

[(B) if his conduct in the circumstances manifests an extreme indifference for human life.

shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than 2 years, or both, except that any person who violates subsection (e)(2)(B) shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than 5 years, or both. A defendant that is an organization shall, upon conviction of violating

this subsection, be subject to a fine of not more than $1,000,000.]

(e) KNOWING ENDANGERMENT.—Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subtitle in violation of paragraph (1), (2), (3), (4), or (5) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

* * * * * * *

RETENTION OF STATE AUTHORITY

SEC. 3009. * * *

EFFECTIVE DATE

SEC. 3010. (a) PRELIMINARY NOTIFICATION.—Not later than ninety days after promulgation of regulations under section 3001 identifying by its characteristics or listing any substance as hazardous waste subject to this subtitle, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 3006) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. *Not later than twelve months after the date of the enactment of the Solid Waste Disposal Act Amendments of 1980—*

(1) the owner or operator of any facility which produces a fuel (A) from any hazardous waste identified or listed under section 3001, (B) from such hazardous waste identified or listed under section 3001 and any other material, (C) from used oil, or (D) from used oil and any other material;

(2) the owner or operator of any facility (other than a single- or two-family residence) which burns for purposes of energy recovery any fuel produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 3001; and

(3) any person who distributes or markets any fuel which is produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 3001

shall file with the Administrator (and with the State in the case of a State with an authorized hazardous waste program) a notification stating the location and general description of the facility, together with a description of the identified or listed hazardous waste involved and, in the case of a facility referred to in paragraph (1) or (2), a description of the production or energy recovery activity carried out at the facility and such other information as the Administrator deems necessary. For purposes of the preceding sentence, the

term 'hazardous waste listed under section 3001' also includes any commercial chemical product which is listed under section 3001 and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed for use as a fuel, or (iii) burned as a fuel. Notification shall not be required under the second sentence of this subsection in the case of facilities (such as residential boilers) where the Administrator determines that such notification is not necessary in order for the Administrator to obtain sufficient information respecting current practices of facilities using hazardous waste for energy recovery. Nothing in this subsection shall be construed to affect or impair the provisions of section 3001(b)(3). Nothing in this subsection shall affect regulatory determinations under section 3014 (as amended by the Used Oil Recycling Act of 1980). In revising any regulation under section 3001 identifying additional characteristics of hazardous waste or listing an additional substance as hazardous waste subject to this subtitle, the Administrator may require any person referred to in the preceding [sentence] *provisions* to file with the administrator (or with States having authorized hazardous waste permit programs under section 3006) the notification described in the preceding [sentence.] *provisions.* Not more than one such notification shall be required to be filed with respect to the same substance. No identified or listed hazardous waste subject to this subtitle may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

(b) * * *

AUTHORIZATION OF ASSISTANCE TO STATES

SEC. 3011. (a) AUTHORIZATION.—There is authorized to be appropriated $25,000,000 for each of the fiscal years 1978 and 1979, $20,000,000 for fiscal year 1980, $35,000,000 for fiscal year 1981, [and] $40,000,000 for fiscal year 1982 *, $45,000,000 for the fiscal year 1983, $47,000,000 for the fiscal year 1984, $50,000,000 for fiscal year 1985, and $52,500,000 per fiscal year for fiscal years 1986 and 1987* to be used to make grants to States for purposes of assisting the States in the development and implementation of authorized State hazardous waste programs.

(b) * * *

* * * * * * *

HAZARDOUS WASTE SITE INVENTORY

SEC. 3012. * * *

MONITORING, ANALYSIS, AND TESTING

SEC. 3013. * * *

RESTRICTIONS ON RECYCLED OIL

SEC. [3012.] *3014.* Not later than one year after the date of the enactment of this section, the Administrator shall promulgate regulations establishing such performance standards and other requirements as may be necessary to protect the public health and

the environment from hazards associated with recycled oil. In developing such regulations, the Administrator shall conduct an analysis of the economic impact of the regulations on the oil recycling industry. The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil.

INVENTORY OF FEDERAL AGENCY HAZARDOUS WASTE FACILITIES

SEC. 3015. (a) FEDERAL AGENCY INVENTORY.—Each Federal agency shall, within one year after the enactment of the Solid Waste Disposal Act Amendments of 1980, undertake a continuing program to compile, publish, and submit to the Administrator and the State (in the case of States having an authorized hazardous waste program) an inventory describing the location of each site which the Federal agency owns or operates where hazardous waste has at any time been treated, stored or disposed of. Such inventory shall contain—

(1) a description of the location of the sites at which any such treatment, storage, or disposal has taken place before the date on which permits are required under section 3005 for such storage or disposal;

(2) such information relating to the amount, nature, and toxicity of the hazardous waste at each such site as may be practicable to obtain and as may be necessary to determine the extent of any health hazard which may be associated with such site;

(3) the name and address and responsible agency for each such site, determined as of the date of preparation of the inventory;

(4) an identification of the types of techniques of waste treatment, storage, or disposal which have been used at each site; and

(5) information concerning the current status of the site, including information respecting whether or not hazardous waste is currently being treated, stored, or disposed of at such site (and if not, the date on which such activity ceased) and information respecting the nature of any other activity currently carried out at such site.

(b) ENVIRONMENTAL PROTECTION AGENCY PROGRAM.—If the Administrator determines that any Federal agency under subsection (a) is not adequately providing information respecting the sites referred to in subsection (a), the Administrator shall notify the chief official of such Agency. If within ninety days following such notification, the Federal agency has not undertaken a program to adequately provide such information, the Administrator shall carry out the inventory program for such agency.

EXPORT OF HAZARDOUS WASTE

SEC. 3016. (a) GENERAL.—Beginning twenty-four months after the date of enactment of the Solid Waste Disposal Act Amendments of 1980, no person shall export any hazardous waste identified or listed under this subtitle unless (1) such person has provided the notification required in subsection (c) of this section, (2) the Government of the receiving country has consented to accept such hazardous waste, (3) a copy of the receiving country's written consent is at-

tached to the manifest accompanying each waste shipment, and (4) the shipment conforms with the terms of the consent of the Government of the receiving country required pursuant to subsection (e), or (5) the United States and the Government of the receiving country have entered into an agreement as provided for in subsection (f).

(b) REGULATIONS.—Not later than twelve months after the date of enactment of the Solid Waste Disposal Act Amendments of 1983, the Administrator shall promulgate the regulations necessary to implement this section. Such regulations shall become effective one hundred and eighty days after promulgation.

(c) NOTIFICATION.—Any person who intends to export a hazardous waste identified or listed under this subtitle after the date beginning twelve months after the date of enactment of Solid Waste Disposal Act Amendments of 1983, shall, before such hazardous waste is scheduled to leave the United States, provide notification to the Administrator. Such notification shall concern the following information:

(1) the name and address of the exporter;

(2) the types and estimated quantities of hazardous waste to be exported;

(3) the estimated frequency or rate at which such waste is to be exported, and the period of time over which such waste is to be exported;

(4) the ports of entry;

(5) a description of the manner in which such hazardous waste will be transported to and treated, stored, or disposed in the receiving country; and

(6) the name and address of the ultimate treatment, storage or disposal facility.

(d) PROCEDURES FOR REQUESTING CONSENT OF THE RECEIVING COUNTRY.—Within thirty days of the Administrator's receipt of a complete notification under this section, the Department of State, acting on behalf of the Administrator, shall—

(1) forward a copy of the notification to the government of the receiving country;

(2) advise the government that United States law prohibits the export of hazardous waste unless the receiving country consents to accept the hazardous waste;

(3) request the government to provide the Secretary with a written consent or objection to the terms of the notification; and

(4) forward to the Government of the receiving country a description of the Federal regulations which would apply to the treatment, storage, and disposal of the hazardous waste in the United States.

(e) CONVEYANCE OF WRITTEN CONSENT TO EXPORTER.—Within thirty days of receipt by the Department of State of the receiving country's written consent or objection (or any subsequent communication withdrawing a prior consent or objection), the Administrator shall forward such a consent, objection, or other communication to the exporter.

(f) INTERNATIONAL AGREEMENTS.—Where there exists an international agreement between the United States and the Government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal

of hazardous wastes, only the requirements of subsection (g) shall apply.

(g) REPORTS.—After the date of enactment of the Solid Waste Disposal Act Amendments of 1983, any person who exports any hazardous waste identified or listed under this subtitle shall file with the Administrator no later than March 1 of each year, a report summarizing the types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year.

(h) OTHER STANDARDS.—Nothing in this section shall preclude the Administrator from establishing other standards for the export of hazardous wastes under section 3002 or section 3003 of this subtitle.

SUBTITLE D—STATE OR REGIONAL SOLID WASTE PLANS

OBJECTIVES OF SUBTITLE

SEC. 4001. The objectives of this subtitle are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. *In developing such comprehensive plans, it is the intention of this Act that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process.*

FEDERAL GUIDELINES FOR PLANS

SEC. 4002. * * *

REQUIREMENTS FOR APPROVAL OF PLANS

SEC. 4003. (a) * * *

(b) ENERGY AND MATERIALS CONSERVATION AND RECOVERY FEASIBILITY PLANNING AND ASSISTANCE.— * * *

[(b)**]** *(c)* DISCRETIONARY PLAN PROVISIONS RELATING TO RECYCLED OIL.— * * *

(d) SIZE OF WASTE-TO-ENERGY FACILITIES.—Notwithstanding any of the above requirements, it is the intention of this Act and the planning process developed pursuant to this Act that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process.

CRITERIA FOR SANITARY LANDFILLS; SANITARY LANDFILLS REQUIRED FOR ALL DISPOSAL

SEC. 4004. (a) CRITERIA FOR SANITARY LANDFILLS.—(1) Not later than one year after the date of enactment of this section, after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste as such facility. Such regulations may provide for the classification of the types of sanitary landfills.

(2) Not later than twenty-four months after the enactment of the Solid Waste Disposal Act Amendments of 1980, the Administrator shall promulgate revisions of the criteria promulgated under paragraph (1) and section 1008(a)(3) to reflect improvements in the state of control and measurement technology and the need to protect human health and the environment. Such revisions shall take into account the potential receipt by such facilities of hazardous waste in household waste and from small quantity generators under section 3002(b), and the possibility of illegal dumping of hazardous wastes in such facilities. At a minimum such revisions for facilities receiving such wastes should require groundwater monitoring, and provide for corrective action as appropriate.

(b) DISPOSAL REQUIRED TO BE IN SANITARY LANDFILLS, ETC.—For purposes of complying with section 4003(2) each State plan shall prohibit the establishment of open dumps and contain a requirement that disposal of all solid waste within the State shall be in compliance with such section 4003(2).

(c) EFFECTIVE DATE.—The prohibition contained in subsection (b) shall take effect on the date six months after the date of promulgation of regulations under subsection (a) [or on the date of approval of the State plan, whichever is later].

UPGRADING OF OPEN DUMPS

SEC. 4005. (a) * * *

* * * * * * *

(c) CONTROL OF HAZARDOUS DISPOSAL.—Not later than forty-two months after the enactment of the Solid Waste Disposal Act Amendments of 1980, each State shall adopt and begin to enforce a permit program or other system of prior approval and conditions, to assure that each solid waste management facility within such State which may receive hazardous waste in household waste or due to the provisions of section 3002(b) for small quantity generators (otherwise not subject to the requirement for a permit under section 3005 of this Act) will comply with the criteria revised under section 4004(a)(2). In any State which does not adopt such a program for such facilities by the date forty-two months after the enactment of the Solid Waste Disposal Act Amendments of 1980, the Administrator shall use the authorities available under sections 3007 and 3008 of this

title to enforce the prohibition in subsection (a) of this section with respect to such facilities. For purposes of this paragraph, the term "requirement of this subtitle" in section 3008 shall be deemed to include criteria promulgated by the Administrator under sections 1008(a)(3) and 4004(a) of this title, and the term "hazardous wastes" in section 3007 shall be deemed to include solid wastes received at such facilities.

PROCEDURE FOR DEVELOPMENT AND IMPLEMENTATION OF STATE PLAN

SEC. 4006. * * *

SUBTITLE E—DUTIES OF THE SECRETARY OF COMMERCE IN RESOURCE AND RECOVERY

* * * * * * *

SUBTITLE F—FEDERAL RESPONSIBILITIES

* * * * * * *

SUBTITLE G—MISCELLANEOUS PROVISIONS

EMPLOYEE PROTECTION

SEC. 7001. * * *

CITIZEN SUITS

SEC. 7002. (a) IN GENERAL.—Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, *prohibition,* or order which has become effective pursuant to this Act; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred *or the alleged endangerment may occur.* Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occured or in the District Court of the District of Colum-

bia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, [to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.] *to enforce the permit, standard, regulation, condition requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008 (a) and (g).*

[(b) ACTIONS PROHIBITED.—No action may be commenced under paragraph (a)(1) of this section—

[(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

[(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order: *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.]

(b) ACTIONS PROHIBITED.—No action may be commenced under subsection (a)(1) of this section—

(1) prior to sixty days after the plaintiff has given notice of the violation or prior to one hundred and twenty days after the plaintiff has given notice of the endangerment (A) to the Administrator; (B) to the State in which the alleged violation occurs or in which the alleged endangerment may occur; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, or any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act; or

(2) with respect to an action under subsection (a)(1)(A) of this section, if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order: Provided however, That in any such action in a court of the United States, any person may intervene as a matter of right, or

(3) with respect to an action under subsection (a)(1)(B) of this section, if the Administrator has commenced and is diligently prosecuting an action under section 7003 of this Act or has set-

tled such action to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment, or if the State has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section: Provided, however, That in any such action in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties. No action may be commenced under subsection (a)(1)(B) by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(c) NOTICE.—* * *

(d) INTERVENTION.—* * *

(e) COSTS.—The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantially prevailing* party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) OTHER RIGHTS PRESERVED.—* * *

IMMINENT HAZARD

SEC. 7003. (a) AUTHORITY OF ADMINISTRATOR.—Notwithstanding any other provision of this Act, upon receipt of evidence that the *past or present* handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court [to immediately restrain any person] *against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is* contributing to such handling, storage, treatment, transportaton or disposal [to stop] *to restrain such person from* such handling, storage, treatment, transportation, or disposal [or to take such other action as may be necessary], *to order such person to take such other action as may be necessary, or both.* The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) VIOLATIONS.—* * *

(c) Whenever the United States or the Administrator proposes to covenant not to sue or to forbear from suit or to settle any claim arising under this section, notice, and opportunity for a public meet-

ing in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be afforded to the public. The decision of the United States or the Administrator to enter into or not to enter into such Consent Decree, covenant or agreement shall not constitute a final agency action subject to judicial review under this Act or the Administrative Procedure Act.

PETITION FOR REGULATIONS; PUBLIC PARTICIPATION

SEC. 7004. * * *

SEPARABILITY

SEC. 7005. * * *

JUDICIAL REVIEW

[SEC. 7006. (a) REVIEW OF FINAL REGULATIONS AND CERTAIN PETITIONS.—Any judicial review of final regulations promulgated pursuant to this Act and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this Act shall be in accordance with sections 701 through 706 of title 5 of the United States Code, except that —

[(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this Act or denying any petition for the promulgation, amendment or repeal of any regulation under this Act may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days for the date of such promulgation or denial or after such date if such petition for review is based solely on grounds arising after such ninetieth day; action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement, and

[(2) in any judicial proceeding brought under this section in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if a party is seeking review under this Act applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his recommendation, if any for the modification or setting aside of his original order, with the return of such additional evidence.

[(b) REVIEW OF CERTAIN ACTIONS UNDER SECTIONS 3005 AND 3006.—Review of the Administrator's action (1) in issuing, denying,

modifying or revoking any permit under section 3005, or (2) in granting, denying, or withdrawing authorization or interim authorization under section 3006, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Such reivew shall be in accordance with sections 701 through 706 of title 5 of the United States Code.]

SEC. 7006. (a) REVIEW OF FINAL REGULATIONS AND CERTAIN PETITIONS.—A petition for review of the promulgation of final regulations under this Act and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this Act may be filed in the United States Court of Appeals for the District of Columbia or in any United States Court of Appeals for a circuit in which the petitioner resides or transacts business which is directly affected by such promulgation or denial, and such petition shall be filed within one hundred and twenty days from the date of such promulgation or denial, unless such petition is based solely on grounds arising after such one hundred and twentieth day. Any action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(b) REVIEW OF CERTAIN ACTIONS UNDER SECTIONS 3005 AND 3006.—A petition for review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 3005, or (2) in granting, denying, or withdrawing authorization or interim authorization under section 3006, may be filed by any interested person in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business which is directly affected by such action, and such petition shall be filed within one hundred and twenty days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such petition is based solely on grounds which arose after such one hundred and twentieth day. Any action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding brought under this section in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if a party seeking review under this Act applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his rec-

ommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(d)(1) If petitions for review of the same agency action have been filed in two or more United States Courts of Appeals and the Administrator has received written notice of the filing of the first such petition more than thirty days before receiving written notice of the filing of the second petition, then the record shall be filed in that court in which the first petition was filed. If petitions for review of the same agency action have been filed in two or more United States Courts of Appeals and the Administrator has received written notice of the filing of one or more petitions within thirty days or less after receiving written notice of the filing of the first petition, then the Administrator shall promptly advise in writing the Administrative Office of the United States Courts that petitions have been filed in two or more United States Courts of Appeals, and shall identify each court for which he has written notice that such petitions have been filed within thirty days or less of receiving written notice of the filing of the first such petition. Pursuant to a system of random selection devised for this purpose, and within three business days after receiving such notice from the Administrator, the Administrative Office thereupon shall select the court in which the record shall be filed from among those identified by the Administrator. Upon notification of such selection, the Administrator shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the Administrator, the record shall be filed in the United States Courts of Appeals which remanded such action.

(2) Where petitions have been filed in two or more United States Courts of Appeals with respect to the same agency action and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such petitions have been filed shall promptly transfer such petitions to the United States Courts of Appeals in which the record has been filed. Pending selection of a court pursuant to subsection (1), any court in which a petition has been filed may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed.

(3) Any court in which a petition with respect to any agency action has been filed, including any court selected pursuant to subsection (d)(1), may transfer such petition to any other United States Courts of Appeals for the convenience of the parties or otherwise in the interest of justice.

(e) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

GRANTS OR CONTRACTS FOR TRAINING PROJECTS

SEC. 7007. * * *

PAYMENTS

SEC. 7008. * * *

LABOR STANDARDS

SEC. 7009. * * *

SUBTITLE H—RESEARCH, DEVELOPMENT, DEMONSTRATION, AND INFORMATION

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SPECIAL STUDIES; PLANS FOR RESEARCH, DEVELOPMENT, AND DEMONSTRATIONS

SEC. 8002. (a) * * *.

* * * * * * *

(r) MINIMIZATION OF HAZARDOUS WASTE.—The Administrator shall compile, and not later than October 1, 1986, submit to the Congress, a report on the feasibility and desirability of establishing standards of performance or of taking other additional actions under this Act to require the generators of hazardous waste to reduce the volume or quantity and toxicity of the hazardous waste they generate, and of establishing with respect to hazardous wastes required management practices or other requirements to assure such wastes are managed in ways that minimize present and future risks to human health and the environment. Such report shall include any recommendations for legislative changes which the Administrator determines are feasible and desirable to implement the national policy established by section 1003.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

AN ACT To provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.

TITLE I—HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

DEFINITIONS

SEC. 101. For purpose of this title, the term—

* * * * * * *

(23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, *costs of permanent*

relocation of residents where it is determined that such permanent relocation is cost effective or may be necessary to protect health or welfare, action taken under section 104(b) of this Act, and any emergency assistance which may be provided under the Disaster Relief Act of 1974[;]. *In the case of a business located in an area of evacuation or relocation, the term may also include the payment of those installments of principal and interest on business debt which accrue between the date of evacuation or temporary relocation and thirty days following the date that permanent relocation is actually accomplished or, if permanent relocation is formally rejected as the appropriate response, the date on which evacuation or temporary relocation ceases. In the case of an individual unemployed as a result of such evacuation or relocation, it may also include the provisions of the assistance authorized by sections 407, 408, and 409 of the Disaster Relief Act of 1974;*

* * * * * * *

RESPONSE AUTHORITIES

SEC. 104. (a) * * *

* * * * * * *

(c)(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, obligations from the Fund, other than those *for permanent relocation or* authorized by subsection (b) of this section, shall not continue after $1,000,000 has been obligated for response actions or six months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

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TITLE II—HAZARDOUS SUBSTANCE RESPONSE REVENUE ACT OF 1980

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SEC. 232. POST-CLOSURE LIABILITY TRUST FUND.

(a) CREATION OF TRUST FUND.—There is established in the Treasury of the United States a trust fund to be known as the "Post-closure Liability Trust Fund", consisting of such amounts as may be appropriated, credited, or transferred to such Trust Fund.

(b) EXPENDITURES FROM POST-CLOSURE LIABILITY TRUST FUND.—Amounts in the Post-Closure Liability Trust Fund shall be available only for the purposes described in sections 107(k) and 111(j) of this Act (as in effect on the date of the enactment of this Act).

(c) ADMINISTRATIVE PROVISIONS.—The provisions of sections 222 and 223 *(other than section 223(c)(2)(D))* of this Act shall apply with

respect to the Trust Fund established under this section, except that the amount of any repayable advances outstanding at any one time shall not exceed $200,000,000.

TITLE III—MISCELLANEOUS PROVISIONS

REPORTS AND STUDIES

SEC. 301. (a)(1) The President shall submit to the Congress, within [four years] *forty-two months* after enactment of this Act, a comprehensive report on experience with the implementation of this Act, including, but not limited to—

* * * * * * *

EXPIRATION, SUNSET PROVISION

SEC. 303. Unless reauthorized by the Congress, the authority to collect taxes conferred by this Act *(other than under section 4681 of the Internal Revenue Code)* shall terminate on September 30, 1985, or when the sum of the amounts received in the Treasury under section 4611 and under 4661 of the Internal Revenue Code of 1954 total $1,380,000,000, whichever occurs first. The Secretary of the Treasury shall estimate when this level of $1,380,000,000 will be reached and shall by regulation, provide procedures for the termination of the tax authorized by this Act and imposed under sections 4611 and 4661 of the Internal Revenue Code of 1954.

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THE SAFE DRINKING WATER ACT

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PUBLIC WATER SYSTEMS

SEC. 2. (a) The Public Health Service Act is amended by inserting after title XIII the following new title:

TITLE XIV—SAFETY OF PUBLIC WATER SYSTEMS

* * * * * * *

PART C—PROTECTION OF UNDERGROUND SOURCES OF DRINKING WATER

* * * * * * *

UNDERGROUND INJECTION OF HAZARDOUS WASTE

SEC. 1426. (a) The Administrator, in cooperation with the States, shall compile and, not later than March 15, 1984, submit to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives, an inventory of all wells in the United States which inject hazardous wastes. The inventory shall include the following information:

(3) engineering and construction details of each, including the thickness and composition of its casing, the width and content of the annulus, and pump pressure and capacity;

(4) the hydrogeological characteristics of the overlying and underlying strata, as well as that into which the waste is injected;

(5) the location and size of all drinking water aquifers penetrated by the well, or within a one-mile radius of the well or within two hundred feet below the well injection point;

(6) the location, capacity, and population served by each well providing drinking or irrigation water which is within a five-mile radius of the injection well;

(7) the nature and volume of the waste injected during the one-year period immediately preceding the date of the report;

(8) the dates and nature of the inspections of the injection well conducted by independent third parties or agents of State, Federal, or local government;

(9) the name and address of all owners and operators of the well and any disposal facility associated with it; and

(9) such other information as the Administrator may, in his discretion, deem necessary to define the scope and nature of hazardous waste disposal in the United States through underground injection.

(b) In fulfilling the requirements of subsections (a)(3)–(5), the Administrator need only submit such information as can be obtained from currently existing State records and from site visits to at least twenty facilities containing wells which inject hazardous waste.

(c) The States shall make available to the Administrator such information as he deems necessary to accomplish the objectives of this section.

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