

November 25, 2003

MEMORANDUM

TO: Ken Babin, EH Supervisor
Panhandle District Health Department,
Paul E. Guenther, Director of Environmental Health
North Central District Health Department,
David Loper, Supervisor Land Development
Southwest District Health Department,
Tom N. Turco, Director of Environmental Health
Central District Health Department,
Dan Kriz, Director of Environmental Health
South Central District Health Department,
Steve Pew, Director of Environmental Health
Southeastern District Health Department,
Kellye Eager, Director of Environmental Health
District 7 Health Department

FROM:  Barry Burnell, REHS

SUBJECT: Permitting requirements for Federal and State Agencies

Federal and State Agencies are not exempt from complying with the Rules for Individual Subsurface Sewage Disposal (IDAPA 58.01.03).

This year the U.S. Forest Service claimed sovereign immunity with respect to being subject to permitting and permit fee requirements of the state. Keith Donahue, Deputy Attorney General, reviewed the Safe Drinking Water Act, and determined that there is an explicit waiver of sovereign immunity making the Federal Government and all agencies subject to state permitting and permit-fee requirements.

The key point is that an agency is conducting "an activity which may result in underground injection which endangers drinking water". See the SDWA, General Provisions; Section 300j-6 Federal Agencies

< <http://www4.law.cornell.edu/uscode/42/300j-6.html> >.

This provision waives federal sovereign immunity, and requires federal agencies operating in Idaho to comply with state rules; such as, the Rules for Individual Subsurface Sewage Disposal (IDAPA 58.01.03). The act of placing sewage into the environment, either through the use of standard septic tank and drainfield system, or from pit privy, large soil absorption system, or any other subsurface sewage system is an act that endangers drinking water, ground water and surface water, and is required to be conducted under an onsite permit issued by the Health Districts.

Additionally, the language in Section 300j-6 also authorizes the collection of permit fees. The agencies "shall be subject to, and comply with Federal, State, interstate and local requirements, both substantive and procedural (including any requirements for permits...).... in the same manner and to the same extent as any person is subject to such requirements, including the payment of reasonable service charges."

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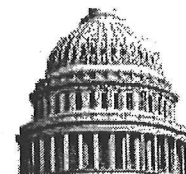
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DEQ Regional Engineering Managers



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[TITLE 42](#) > [CHAPTER 6A](#) > [SUBCHAPTER XII](#) > [Part E](#) > [Sec. 300j-6](#).[Prev](#) | [Next](#)**Sec. 300j-6. - Federal agencies****(a) In general**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government -

(1)

owning or operating any facility in a wellhead protection area;

(2)

engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area;

(3)

owning or operating any public water system; or

(4)

engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section [300h\(d\)\(2\)](#) of this title),

shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the protection of such wellhead areas, respecting such public water systems, and respecting any underground injection in the same manner and to the same extent as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but

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are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local regulatory program respecting the protection of wellhead areas or public water systems or respecting any underground injection. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court ^[1] with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local law concerning the protection of wellhead areas or public water systems or concerning underground injection with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State requirement adopted pursuant to this subchapter, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of 1 year, but additional exemptions may be granted for periods not to exceed 1 year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(b) Administrative penalty orders

(1) In general

If the Administrator finds that a Federal agency has violated an applicable requirement under this subchapter, the Administrator may issue a penalty order assessing a penalty against the Federal agency.

(2) Penalties

The Administrator may, after notice to the agency, assess a civil penalty against the agency in an amount not to exceed \$25,000 per day per violation.

(3) Procedure

Before an administrative penalty order issued under this subsection becomes final, the Administrator shall provide the agency an opportunity to confer with the Administrator and shall provide the agency notice and an opportunity for a hearing on the record in accordance with chapters 5 and 7 of title 5.

(4) Public review**(A) In general**

Any interested person may obtain review of an administrative penalty order issued under this subsection. The review may be obtained in the United States District Court for the District of Columbia or in the United States District Court for the district in which the violation is alleged to have occurred by the filing of a complaint with the court within the 30-day period beginning on the date the penalty order becomes final. The person filing the complaint shall simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General.

(B) Record

The Administrator shall promptly file in the court a certified copy of the record on which the order was issued.

(C) Standard of review

The court shall not set aside or remand the order unless the court finds that there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or that the assessment of the penalty by the Administrator constitutes an abuse of discretion.

(D) Prohibition on additional penalties

The court may not impose an additional civil penalty for a violation that is subject to the order unless the court finds that the assessment constitutes an abuse of discretion by the Administrator.

(c) Limitation on State use of funds collected from Federal Government

Unless a State law in effect on August 6, 1996, or a State constitution requires the funds to be used in a different manner, all funds collected by a State from the Federal Government from penalties and fines imposed for violation of any substantive or procedural requirement referred to in subsection (a) of this section shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

(d) Indian rights and sovereignty as unaffected; "Federal agency" defined**(1)**

Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute.

(2)

For the purposes of this chapter, the term "Federal agency" shall not be construed to refer to or include any American Indian tribe, nor

to the Secretary of the Interior in his capacity as trustee of Indian lands.

(e) Washington Aqueduct

The Secretary of the Army shall not pass the cost of any penalty assessed under this subchapter on to any customer, user, or other purchaser of drinking water from the Washington Aqueduct system, including finished water from the Dalecarlia or McMillan treatment plant

[1] So in original. Probably should not be capitalized.

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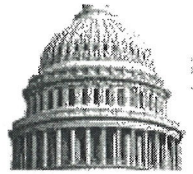
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