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ADDENDUM TO OPINION LETTER NO. 63 (1982)

Fred A. Lafser
Director
Department of Natural Resources
Post Office Box 176
Jefferson City, Missouri 65102

Dear Mr. Lafser:

This replies to your letter dated July 14, 1982, in which you requested an Attorney General's opinion on various questions relating to the authority of the State of Missouri to administer an underground injection control program which meets the requirements of the Federal Safe Drinking Water Act. We understand that the five questions that you submitted were in response to a request by the Environmental Protection Agency for further clarification of matters contained in our Opinion Letter No. 63, issued March 29, 1982. What follows is intended to supplement Opinion Letter No. 63. All statutory references are to the Revised Statutes of Missouri (RSMo 1978) unless otherwise indicated. All regulatory references are to the Code of State Regulations (CSR).

1. State statutes and regulations provide the authority to regulate Class III and Class V injection wells so as to ensure that the operation of such wells does not endanger underground sources of drinking water.

Citation of Laws and Regulations

Section 204.016

Section 204.026

Section 204.051

Section 204.076

10 CSR 20-7.015

10 CSR 20-7.031

(See also, authorities cited in Attorney General's Opinion Letter No. 63 at pp. 31, 40-41.)

Explanation of Authority

The question of the state's authority to regulate Class III and Class V injection wells so as to ensure the protection of underground sources of drinking water has been previously discussed in Attorney General's Opinion Letter No. 63, at pp. 30-39; 40-46. It is our opinion that a sufficient explanation of these issues is contained in Opinion Letter No. 63; nevertheless, we will attempt a further clarification.

Under Section 204.051.2, it is unlawful for any person to build or operate a water contaminant source that is subject to standards, rules or regulations unless he holds a permit from the Missouri Clean Water Commission. By definition, a well from which pollutants are or may be discharged is a water contaminant source (§ 204.016). Furthermore, standards, rules, and regulations have been promulgated by the Commission for subsurface waters (10 CSR 20-7.015(2); 10 CSR 20-7.031(3)). It therefore follows that Class III and Class V wells which discharge or which may discharge pollutants to subsurface waters are water contaminant sources for which permits from the Commission are required. Thus, in the absence of a permit, the use of a well which discharges or which may discharge pollutants is unlawful or, in the language of 40 CFR 123.051, "cannot legally occur." The operation of such a well without a permit would be enjoinable under Section 204.076 and would be subject to civil penalties of $10,000 per day under the same section.

In addition to the prohibition in Section 204.051 of the discharge of water contaminants from unpermitted sources, Regulations 10 CSR 20-7.015 and 10 CSR 20-7.031 contain water quality standards and effluent regulations for discharges to subsurface waters. Regulation 10 CSR 20-7.031(3) establishes general water quality criteria applicable to all waters of the state:

> (3) General Criteria: The following water quality criteria shall be applicable to all waters of the state at all times. No water contaminant, by itself or in combination with other substances, shall prevent the waters of the state from being--
>
> (A) free from substances in sufficient amounts to cause the formation of putrescent, unsightly or harmful bottom deposits, or interfere with beneficial uses;

(B) free from oil, scum, and floating debris in sufficient amounts to be unsightly or interfere with beneficial uses;

(C) free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or taste, or interfere with beneficial uses; and

(D) free from substances or conditions that have a harmful effect on human, animal, or aquatic life.

"Beneficial uses," as mentioned in 10 CSR 20-7.031(3)(A), (B), and (C), includes drinking water supplies (see definitions, 10 CSR 20-7.031(1)(B)(6)). Thus, any release of a water contaminant so as to interfere with the use of subsurface water as a drinking water source is proscribed by 10 CSR 20-7.031(3). We construe this proscription against the release of a water contaminant so as to interfere with the use of subsurface water as a drinking water source as equivalent to a prohibition against any injection practice which would endanger sources of drinking water.

We reiterate that there are presently no Class III injection wells in the State of Missouri (see Program Description). Should the need to regulate such wells arise in the future, the state has the authority under Section 204.026(8) to promulgate more specific rules to govern the discharge of water contaminants from Class III injection wells. At the present time, neither Class III nor Class V wells which discharge or which may discharge water contaminants could legally occur without a permit. Permitted or not, such wells could not lawfully operate so as to interfere with the use of groundwater as a drinking water source. We therefore conclude that state statutes and regulations provide the authority to regulate Class III and Class V injection wells so as to ensure that the operation of such wells does not endanger drinking water sources.

2. State statutes and regulations provide the authority to prohibit the injection of hazardous waste into oil or gas wells if such injection is unrelated to oil or gas well operations. The injection of produced fluids or fluids related to enhanced recovery operations is not prohibited, but is subject to the regulations of the Missouri Oil and Gas Council.

Citation of Laws and Regulations

Section 259.070

Section 260.355, RSMo Supp. 1981

Section 260.360, RSMo Supp. 1981

Section 260.395, RSMo Supp. 1981

Section 260.425, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

10 CSR 50-2.030

10 CSR 50-2.040

10 CSR 50-2.080

10 CSR 50-2.090

State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow, 69 S.W. 374 (Mo. 1902)

Explanation of Authority

Section 259.070(2) of the Oil and Gas Production Law gives the Missouri Oil and Gas Council the authority to regulate pursuant to rule:

> (b) the shooting and chemical treatment of wells;
>
> * * *
>
> (d) operations to increase ultimate recovery such as . . . the introduction of gas, water or other substances into producing formations; and
>
> (e) disposal of highly mineralized water and oil field wastes.

Pursuant to this authority, the Oil and Gas Council has promulgated rules to govern the permitting and drilling of injection wells (10 CSR 50-2.030, 10 CSR 50-2.040). Regulation 10 CSR 50-2.090 requires that the approval of the state geologist be obtained prior to the disposal of injected fluids. Regulation 10 CSR 50-2.080 requires that monthly reports be submitted to the state geologist for all disposal of injected fluids and for all enhanced recovery operations.

The Missouri Hazardous Waste Management Law is contained in Sections 260.350 to 260.430, RSMo 1978, as amended, RSMo Supp. 1981. Section 260.395.7 provides that it shall be unlawful for any person to construct, substantially alter or operate a hazardous waste facility without a permit from the Department of Natural Resources. "Hazardous waste facility" is defined in Section 260.360(10) as "any property that is intended or used for hazardous waste management including, but not limited to, storage, treatment and disposal sites." Disposal of hazardous wastes in an unpermitted disposal site is enjoinable and is punishable by a penalty of ten thousand dollars per day under Section 260.425.1. Exempted from the coverage of the Hazardous Waste Management Law are fluids injected or returned into subsurface formations in connection with oil or gas operations regulated by the Missouri Oil and Gas Council pursuant to Chapter 259 (Section 260.355). The same exemption for injected or returned fluids in connection with oil or gas operations is included in Section 577.155, which prohibits the construction and use of waste disposal wells.

Reading these provisions together, we conclude that the disposal of injected fluids in oil or gas wells is not prohibited by the Hazardous Waste Management Law or by Section 577.155, so long as such injection is directly related to oil and gas field operations. Such injection would be subject to the Oil and Gas Council regulations in 10 CSR 50-2. Disposal of hazardous wastes which are not either an oil field waste or a part of enhanced recovery operations would not be covered by the Oil and Gas Production Law, but would be proscribed by Section 577.155. Because such disposal would be absolutely prohibited under Section 577.155, the Department of Natural Resources could not grant a hazardous waste permit for this activity under Section 260.395.7. State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902).

3. State statutes and regulations impose adequate criminal and civil penalties for violations of the injection well statutes and regulations.

Citation of Laws and Regulations

Section 204.016

Section 204.076

Section 260.395, RSMo Supp 1981

Section 260.425, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

Section 558.011

Section 560.016

Section 560.021

(See also, authorities cited in Attorney General's Opinion Letter No. 63, pp. 27, 29, 40.)

Explanation of Authority

The federal regulations at 40 CFR 123.9 require that a state administering an underground injection control program have the authority to sue for civil and criminal penalties for violations of the state program requirements. Under the regulations, civil penalties shall be recoverable in the amount of at least one thousand dollars per day for Class II injection wells and in the amount of at least two thousand five hundred dollars per day for Class I, III, IV, and V wells. Criminal penalties shall be recoverable in the amount of at least five thousand dollars per day.

State penalty provisions for Class II wells satisfy the requirements of 40 CFR 123.9, as discussed in Attorney General's Opinion Letter No. 63, at pp. 27-28. Class III and V wells are covered by Sections 204.006-204.141, the Missouri Clean Water Law, as discussed at pp. 30-36; 40-46 of Opinion Letter No. 63. Section 204.076 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five thousand dollars per day for violations of Sections 204.006-204.141. These penalty provisions also satisfy 40 CFR 123.9.

Class I and IV injection wells are prohibited by Section 577.155, and the construction and use of such wells is subject to criminal penalties. Civil penalties, however, are not available under Section 577.155. Under this section the construction or use of a waste disposal well is a Class A misdemeanor, punishable by a term of imprisonment of up to one year (Section 558.011), and/or a fine of up to one thousand dollars if the offender is a person, and a fine of up to five thousand dollars if the offender is a corporation (Sections 560.016, 560.021).

The penalty provisions under Section 577.155 for Class I and IV wells do not satisfy the requirement of 40 CFR 123.9, because of the absence of civil penalties and because the amount of the criminal fine is less than five thousand dollars for some offenders. Nevertheless, other sanctions which do meet the requirements of 40 CFR 123.9 are available to address Class I and IV wells.

Class I and IV wells which dispose of hazardous waste would be subject to the civil and criminal penalties of the Missouri Hazardous Waste Management Law, in addition to the sanctions of Section 577.155. The construction and use of Class IV wells, and Class I wells which dispose of hazardous waste, would violate Section 260.395.7, which prohibits the construction, alteration, or use of a hazardous waste facility without a permit. Of course, no permit could be issued for these wells in light of the prohibition in Section 577.155. Section 260.425 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five thousand dollars per day for violations of Sections 260.350-260.430. These penalties meet the requirements of 40 CFR 123.9.

Class I and IV wells which dispose of wastes which cannot be defined as hazardous wastes would be subject to the civil and criminal penalties of the Missouri Clean Water Law. Any such well which discharges or may discharge a pollutant to waters of the state would fall within the definition of both "point source" as defined in Section 204.016(6) and "water contaminant source" as defined in Section 204.016(13). As previously discussed in paragraph 1 of this letter, the operation of a water contaminant source without a permit from the Clean Water Commission is unlawful. No permit could be issued for those wells in light of the prohibition in Section 577.155. Section 204.076 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five dollars per day for violations of Sections 204.006-204.141. These penalties meet the requirements of 40 CFR 123.9.

4. State statutes and regulations provide the authority to regulate all injection well activities on federal lands and by federal agencies.

Citation of Laws and Regulations

Section 204.016

Section 260.360, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

(See also, authorities cited in Attorney General's Opinion Letter No. 63 at p. 15.)

Explanation of Authority

This question has previously been addressed in regard to Class II injection wells in Attorney General's Opinion Letter No. 63, at pp. 15-18. We expressed some reservation as to the state's authority to require a bond to be furnished for wells drilled on

federal lands. However, the inability to require a bond for operations on federal lands does not prevent the state from requiring compliance by the operator with all other Oil and Gas Council regulations. Furthermore, we find no requirement in the Safe Drinking Water Act or the regulations promulgated pursuant thereto that injection wells be bonded. Our conclusion remains that the state has the authority to regulate all Class II injection well activity on federal land.

Class I, III, IV, and V wells are regulated by one or more of the following statutes: Sections 204.006-204.141 (Missouri Clean Water Law), Sections 260.350-260.430 (Missouri Hazardous Waste Management Law), and Section 577.155 (waste disposal wells). In Section 204.016(5), "person" is defined to include "any agency, board, department, or bureau of the state or federal government." "Person" is defined in the same manner in Section 260.360(13). Section 577.155 provides that "no person, firm, corporation or political subdivision shall construct or use any waste disposal well located in this state." Each of these statutes applies to federal agencies in the same manner as it does to any other person or legal entity.

5. State statutes and regulations provide authority for any information contained or used in the administration of the state underground injection control program, including information submitted to the state under a claim of confidentiality, to be available to EPA upon request without restriction.

Citation of Laws and Regulations

Section 204.026

Section 259.070

10 CSR 50-2.050

Explanation of Authority

Two statutes affect the disclosure of information which may be obtained by the state related to injection wells. The disclosure of information related to Class III and Class V injection wells is controlled by the provisions of the Missouri Clean Water Law, Sections 204.006-204.141; that related to Class II injection wells is controlled by the Missouri Oil and Gas Production Law, Chapter 259. Because Class I and IV injection wells are unlawful under Section 577.155, no information concerning them would be subject to confidentiality requirements.

Section 204.026(20) governs the disclosure of information obtained by the Department of Natural Resources or the Clean Water Commission under the Missouri Clean Water Law. The general rule is that all information will be made available to the public. However, if the information constitutes trade secrets or confidential information, other than effluent data, it shall be kept confidential unless disclosure is required under any federal water pollution control act.

Oil and Gas Council Regulation 20 CSR 50-2.050, promulgated pursuant to Section 259.070, limits the disclosure of information related to Class II injection wells. It provides that sample cuttings, cores, and logs related to the drilling of wells are required to be submitted to the state geologist. Such data shall be considered confidential for one year when so requested in writing by the owner.

We note that certain information submitted to EPA under the federal program is also subject to nondisclosure requirements. EPA has promulgated regulations at 40 CFR Part 2 governing the handling of information submitted under claim of confidentiality. One of the categories of information which is subject to federal confidentiality requirements is confidential business information. 40 CFR 2, Subpart B. We read the federal regulations to provide protection for as broad a category of business information as is protected by Section 204.026(20) and 10 CSR 50-2.050. See 5 U.S.C. § 552(b)(4); 40 CFR 2.201(e), 2.208(c), and 2.208(e)(1). Geological and geophysical information concerning wells is also exempted from mandatory disclosure under federal law. 5 U.S.C. § 552(b)(9); 40 CFR 2.118(a)(9). We believe that sample cuttings, cores, and logs required to be submitted to the state geologist under 10 CSR 50-2.050 fall within this category of exempted information.

In light of the fact that federal regulations at 40 CFR Part 2 facially provide the same degree of protection for trade secrets, confidential business information, and geotechnical information as is provided by the state statute, we believe that Section 204.026(10) and 10 CSR 50-2.050 do not prohibit the state from sharing such information with EPA. So long as EPA can protect the information to the same extent as the state, assuming protection is warranted, we do not view EPA as being a part of the "public," as that term is used in Section 204.026(20). Under such circumstances, EPA would be entitled to information submitted to the state, even if submitted to the state under a claim of confidentiality. Of course, all information not subject to confidentiality claims would be available to EPA, the same as any other person, without restriction.

Our opinion in regard to the above is premised exclusively on the protection facially afforded by 40 CFR Part 2 against improper disclosure of confidential information. Should EPA amend 40 CFR Part 2 to materially lessen the protections afforded thereunder, or should it appear that EPA is not following its own regulations, we would have to reexamine our opinion.

The foregoing addendum to Opinion Letter No. 63 (1982), which I hereby approve, was prepared by my assistant, Kirk Lohman.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General