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RESEARCH REPORT

Comparison of Federal- State Allocation of Responsibility in Five Environmental Statutes

1995

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**COMPARISON OF FEDERAL-STATE
ALLOCATION OF RESPONSIBILITY IN
FIVE ENVIRONMENTAL STATUTES**

Environmental Law Institute

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Comparison of Federal-State Allocation of Responsibility in Five Environmental Statutes
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Part One



Introduction

The purpose of this report is to provide a basis for understanding the legal requirements for oversight by the federal government of federally authorized state environmental programs. The report outlines the main statutory provisions allocating federal-state responsibility in five major environmental acts. It primarily examines the role of the U.S. Environmental Protection Agency (EPA) through analyzing provisions under the Safe Drinking Water Act, the Clean Air Act, the Federal Water Pollution Control Act, and the Resource Conservation and Recovery Act. In addition, the report will analyze the Surface Mining Control and Reclamation Act, for comparison with a statute with similar goals and structure, but administered by a different agency (the Office of Surface Mining within the Department of Interior).

Most environmental statutes give primary responsibility for implementing programs to EPA, which must report on its successes and failures to the U.S. Congress. The statutes allow the states to gain federal approval for primary implementation responsibility if a state meets certain criteria.

Oversight is the review by EPA officials of state performance under federally authorized programs. Oversight serves to assure Congress and citizens that the goals of the federal environmental statutes are being achieved. EPA, in cooperation with the states, has been working over the past several years to reform the oversight process to make it more efficient and less of an administrative burden on the states and on EPA. In addition, both EPA and the states are trying to develop an oversight process which more truly reflects the quality of the overall state environmental program.

In order to engage in oversight reform within the existing legal structure, it is essential to understand which parts of oversight are mandated by statute and which are discretionary. The statutes include detailed provisions as to what a state plan must contain in order to be approved or authorized. They provide less information concerning the required level of oversight. The statutes also make very little connection between the criteria which a state must meet in order to receive approval

in the first place and criteria for oversight. Although the statutes contain provisions concerning when EPA retains the right to take enforcement actions and when EPA may withdraw program approval, these situations are not clearly connected to criteria for oversight.

This report analyzes the statutory language concerning the authorization process, the oversight requirements, residual federal enforcement authority, grants and assistance to the states, and issues concerning state noncompliance and withdrawal of delegated programs. In addition, the report includes a comparative chart showing federal-state allocation of responsibilities under selected programs in the five statutes, as well as a chart of oversight requirements under selected statutory programs.

Part Two



**Comparative Chart:
Federal-State Allocation of Responsibilities**

Part Two



Comparative Chart: Federal-State Allocation of Responsibilities

STATUTE PROGRAM AGENCY	SDWA Public Water Systems EPA	CAA National Ambient Air Quality Standards EPA	CWA National Pollutant Discharge Elimination System EPA	RCRA Hazardous Waste Management EPA	SMCRA Surface Coal Mining DOI
<p>AUTHORIZATION</p> <ul style="list-style-type: none"> • STATE RESPONSIBILITY UNDER AUTHORIZED PROGRAM: • PROGRAMS ARE AUTHORIZED THROUGH: • AUTHORIZATION CRITERIA • Relationship of state program to federal program • State program must show following to meet criteria: • Key criteria 	<p>"primary enforcement responsibility"</p> <p>"determination"</p> <p>"no less stringent"</p> <p>"ability"</p> <ul style="list-style-type: none"> • "adequate" procedures for enforcement • recordkeeping and reporting • contingency plan for emergencies 	<p>"primary responsibility"</p> <p>"approval"</p> <p>"comply with"</p> <p>"completeness"</p> <ul style="list-style-type: none"> • "adequate" personnel, funding and authority • enforceable provisions and enforcement measures • reporting • monitoring • contingency plans • public participation • "adequate" provisions on substantive issues 	<p>(state may administer own program)</p> <p>"approval"</p> <p>"no less stringent"</p> <p>"adequate authority"</p> <ul style="list-style-type: none"> • enforcement means • inspections and reporting • monitoring • public participation • very specific permit rules and statutory compliance requirements 	<p>"in lieu of (state program as replacement for federal program)"</p> <p>"authorization"</p> <p>"no less stringent"</p> <p>"adequate" enforcement</p>	<p>"exclusive jurisdiction"</p> <p>"approval"</p> <p>"no less stringent"</p> <p>"capability"</p> <p>Legislation and institutions for:</p> <ul style="list-style-type: none"> • sanctions • "sufficient" administrative and technical personnel and funding • "effective" implementation, maintenance and enforcement

STATUTE PROGRAM AGENCY	SDWA Public Water Systems EPA	CAA National Ambient Air Quality Standards EPA	CWA National Pollutant Discharge Elimination System EPA	RCRA Hazardous Waste Management EPA	SMCRA Surface Coal Mining DOI
FEDERAL OVERSIGHT OF STATE PROGRAM COMPLIANCE	<ul style="list-style-type: none"> reporting 	<ul style="list-style-type: none"> reporting review of decisions (on non-compliance penalties) self-review of SIP with submission of results to EPA for "effectiveness" assessment 	<ul style="list-style-type: none"> permit review 	<ul style="list-style-type: none"> inspections inventory 	<ul style="list-style-type: none"> inspections
RESIDUAL FEDERAL ENFORCEMENT AUTHORITY	<ul style="list-style-type: none"> retains authority to enforce whether state has primary enforcement responsibility or not informational hearings compliance orders 	<ul style="list-style-type: none"> retains all authority to enforce compliance orders after notice can require recordkeeping monitoring inspections 	<ul style="list-style-type: none"> no limit on EPA enforcement authority compliance orders civil action assess penalties prior notice to state and violator 	<ul style="list-style-type: none"> no limit on EPA enforcement authority after notice given civil action with prior notice to states corrective actions suspension or revocation of permits assess civil penalty 	<ul style="list-style-type: none"> can only implement and enforce under state failure ten day notice before federal inspection public hearing
• SCOPE					
• SPECIFIC TOOLS					
GRANTS AND ASSISTANCE	<ul style="list-style-type: none"> for states with "primary enforcement responsibility" personnel training technical assistance supervision programs 	<ul style="list-style-type: none"> for agencies with "substantial responsibility" for carrying out SIP planning and control programs highway and infrastructure can withhold grants under statute can withhold highway grants (in coop. w/ DOT) 	<ul style="list-style-type: none"> program administration and enforcement (special for pollution prevention programs) withheld if under condition of federally assumed enforcement 	<ul style="list-style-type: none"> for "authorized" programs program development program implementation 	<ul style="list-style-type: none"> for "approved" program developing, administering, and enforcing state program
• Requirement					
• Purpose					
• As Sanctions					
• Other Assistance	<ul style="list-style-type: none"> advice and technical assistance when national standards not being met 				<ul style="list-style-type: none"> technical and inventory assistance

STATUTE PROGRAM AGENCY	SDWA Public Water Systems EPA	CAA National Ambient Air Quality Standards EPA	CWA National Pollutant Discharge Elimination System EPA	RCRA Hazardous Waste Management EPA	SMCRA Surface Coal Mining DOI
NON-COMPLIANCE AND WITHDRAWAL	<ul style="list-style-type: none"> • notification if state program is out of compliance • revocation of variances and exemptions if "abuse of discretion" by state 	<ul style="list-style-type: none"> • finding, determination, or disapproval with time to correct deficiency • period of "federally assumed enforcement" after notice 	<ul style="list-style-type: none"> • federal assumption of enforcement authority after notice • after public hearing and determination, state has 60 days to correct or EPA can withdraw program approval 	<ul style="list-style-type: none"> • program authorization can be withdrawn after Fed. 90-day notice and hearing • permit revocation after notice 	<ul style="list-style-type: none"> • notice and hearing with finding of failure • DOI takes over until state improves • federal program preemption

Part Three



**Comparative Chart of Selected
Statutory Oversight Requirements**

Part Three

*

Comparative Chart of Selected Statutory Oversight Requirements*

LEVEL OF DUTY	STATES SHALL	EPA MAY	EPA SHALL
<p>SDWA - Public Water Systems Program</p> <ul style="list-style-type: none"> • Reporting 	<ul style="list-style-type: none"> • make reports on their activities as EPA may require by regulation 	<ul style="list-style-type: none"> • require reporting by regulation 	
<p>CAA - National Ambient Air Quality Standards Program</p> <ul style="list-style-type: none"> • Reporting • Penalties 	<ul style="list-style-type: none"> • submit regular reports as EPA may require • give EPA notice of each penalty assessment • submit results of reviews of plan for major fuel burning sources (to determine long-term viability of energy sources) 	<ul style="list-style-type: none"> • require regular reports for assessing the effectiveness of the state implementation plan • review state decisions on non-compliance penalty assessments 	
<p>CWA - National Pollutant Discharge Elimination System</p> <ul style="list-style-type: none"> • Permit Review 	<ul style="list-style-type: none"> • give EPA a copy of each permit application • provide notice to EPA on every action taken in consideration of permit application 	<ul style="list-style-type: none"> • review permit applications • waive the requirements of permit application submission 	
<p>RCRA - Hazardous Waste Management Program</p> <ul style="list-style-type: none"> • Inventory • Inspection 	<ul style="list-style-type: none"> • submit to EPA an inventory describing the location of hazardous waste sites located within the state 		<ul style="list-style-type: none"> • annually inspect every state-operated treatment, storage, and disposal (TSD) facility required to have a permit

* This chart reflects those obligations and discretionary oversight-related actions that are directly given under selected programs under four environmental statutes managed by the U.S. Environmental Protection Agency.

Part Four
*
Safe Drinking Water Act

I. INTRODUCTION

The Safe Drinking Water Act (SDWA) (SWDA §1401-§1465, 42 U.S.C. §§ 300f-300j) is administered by EPA and consists of a program for state public water systems, and state underground drinking water systems. The underground drinking water system is further divided into several smaller programs detailed below. EPA sets technology-based water standards for the public water system program, and sets forth certain minimum requirements for the underground drinking water programs. States must then come up with plans to meet federal standards and submit them for EPA approval. If approved, the state has primary enforcement responsibility over the water systems. If the state fails to submit a program or fails to comply with a federal requirement, EPA must promulgate and implement a program for the state. EPA can also seek enforcement measures, including revocation of certain state authority.

II. AUTHORIZATION PROCESS

A. Public Water System

State Responsibility: EPA sets technology-based standards for water contaminant levels, treatment techniques, and filtration criteria. States may follow federal procedures and have "primary enforcement responsibility for public water systems" (SDWA §1412(b)(7)(C) on filtration criteria and § 1415 on variances).

State Plan Submission Process: The state applies to EPA for a "determination" that the criteria under SDWA §1413 have been met (see below). Primary enforcement responsibility can be determined by EPA "during any period" (SDWA §1413).

Plan Approval/Disapproval: Within 90 days of submitting the application, EPA "shall" either "make the determination applied for" or "deny the application" and notify the applicant of the reasons (SDWA §1413(b)(2)).

Criteria for Plan Approval: Regulations specify procedures for application, determination, and timeliness requirements. The SDWA §1413 criteria include:

- regulations which are "no less stringent" than national regulations;
- adoption and implementation of "adequate procedures" for enforcement, including monitoring and inspections;
- recordkeeping and reporting, as EPA requires by regulation;

- variance and exemption conditions which are "not less stringent" than those under SDWA; and
- contingency plan for emergencies.

B. Injection Control Program

State Responsibility: The state "shall have primary enforcement responsibility" for protection of underground sources of drinking water if its program is approved (SDWA §1422(b)(3)).

State Plan Submission Process: EPA makes a list of the states which must have an underground injection control program. Those states "shall apply" to EPA to have their program approved (SDWA §§1422(a) & (b)(1)).

Plan Approval/Disapproval: Within 90 days after the state's application, EPA "shall by rule" either approve, disapprove, or approve in part and disapprove in part, the state's program (SDWA §1422(b)(3)). In a state without an approved program, the EPA must develop a program.

Criteria for Plan Approval: The application must contain a "showing satisfactory" to EPA that the state has adopted and will implement an underground injection program which meets "minimum requirements" of SDWA §1421, and will keep records and make reports to EPA (SDWA §1422). The SDWA §1421 "minimum requirements" include:

- permit authorization;
- assurances of no endangerment;
- inspection, monitoring, recordkeeping, and reporting requirements; and
- application to federal agencies

C. Sole Source Aquifer Program

State Responsibility: States "may" enter a "cooperative agreement" with EPA to establish a program under SDWA §1427.

State Plan Submission Process: Any state "may apply" to have a certain area designated for special protection under the sole source aquifer demonstration program (SDWA §1427(c)).

Plan Approval/Disapproval: EPA "shall approve or disapprove" the application, based on a determination that the area satisfies the criteria listed below. Disapproval "shall" be accompanied with a written explanation. Any applicant "may modify and resubmit" any application not approved (SDWA §1427(i)).

Criteria for Plan Approval: An application for a demonstration program "shall meet each of the following requirements" (SDWA §1427(e)):

- boundaries proposed are within the applicant's jurisdiction;
- "adequate authority";
- public participation procedures;
- the application includes a "hydrogeologic assessment";
- a comprehensive management plan is proposed for the area along with a schedule of implementation;

D. Wellhead Protection Program

State Responsibility: Each state is responsible for submitting a wellhead protection program (SDWA §1428(a)).

State Plan Submission Process: "[E]ach state shall" submit to EPA a state program to protect wellhead areas within their jurisdiction from contaminants which may have an adverse effect on the public health (SDWA §1428(a)).

Plan Approval/Disapproval: The program submitted by the state "shall be deemed to be adequate" unless EPA makes a finding of inadequacy. If a program is inadequate, the state "shall modify and resubmit" the program (SDWA §1428(c)).

Criteria for Plan Approval: Each program submitted "shall, at a minimum" include (SDWA §1428(a)):

- specify institutional duties;
- determine each wellhead protection area;
- identify contaminant sources;
- include, "as appropriate," technical assistance, financial assistance, implementation of control measures, education, training, and demonstration projects
- include contingency plans for emergencies; and
- include requirement that consideration be given to all potential contaminants.

III. OVERSIGHT REQUIREMENTS

A. Public Water Systems

A state must make reports with respect to its activities "as [EPA] may require by regulation" (SDWA §1413(a)(3)). Regulations "shall require" monitoring of drinking water for unregulated contaminants. Notification of the availability of the results "shall be given" to EPA (SDWA §1445((a)(5))).

B. Injection Control System

A state that must submit an underground injection control program must make reports with respect to its activities "as [EPA] may require by regulation" (SDWA §1422(b)(1)(A)(ii)).

C. Sole Source Aquifer Program

Each state "shall submit" to EPA a "report assessing the impact of the program on ground water quality and identifying measures found to be effective in protecting ground water resources" (SDWA §1427(l)).

D. Wellhead Protection Program

Each state "shall submit" to EPA a biennial status report describing the state's progress in implementing the program (SDWA §1428(g)). EPA "shall conduct a review" of a state program with active wells using annular injection (SDWA §1428(i)(3)).

IV. FEDERAL RESIDUAL ENFORCEMENT AUTHORITY

A. Public Water System

EPA retains authority to enforce national primary drinking water standards, along with requirements for exemptions and variances, against individual violators even if the state has primary enforcement authority (SDWA §1414(a)(1)(A)), this includes emergency power authority (SDWA §1431).

The following enforcement tools are explicitly elaborated in the statute:

- **Notice:** EPA "shall" notify the public water system of a violation (SDWA §1414(a)(1)(A)).
- **Advice and Technical Assistance:** EPA "shall" provide advice and technical assistance to the public water system in order to bring the system into compliance (SDWA §1414(a)(1)(A)).
- **Administrative Order:** EPA can issue an administrative order (SDWA §1414(g)) if the public water system continues to violate federal requirements (SDWA §1414(a)(1)(B)).
- **Civil Action:** EPA can commence a civil action if the public water system continues to violate federal requirements (SDWA §1414(a)(1)(B)).

B. Underground Injection Program

EPA retains authority to enforce federal requirements against individual violators even if a state has an approved underground injection program (SDWA §1423(a)), this includes emergency power authority (SDWA §1431).

The following enforcement tools are explicitly elaborated in the statute:

- **Notice:** EPA "shall" notify the individual of violations (SDWA §1423(a)(1)).
- **Administrative Order:** EPA can issue an administrative order (SDWA §1423(c)) if the individual continues to violate a program requirement (SDWA §1423(a)(1)).
- **Civil Action:** EPA can commence a civil action against the individual if noncompliance continues (SDWA §§1423(a)(1)&(b)).
- **Criminal Actions:** EPA can commence a criminal action if the individual's noncompliance is willful (SDWA §1423(b)).

V. GRANTS AND ASSISTANCE TO STATES

A. Public Water System

EPA "shall" make grants for personnel training of state agencies where the state has primary enforcement responsibility (SDWA §1442(d)). EPA "is authorized" to provide technical assistance to small public water systems (SDWA §1442(g)). EPA "may" make grants to states to carry out public water system supervision programs (SDWA §1443(a)(1)).

B. Underground Injection Program

EPA "may make grants" to states to carry out underground water source protection programs (SDWA §1443(b)).

C. Sole Source Aquifer Program

EPA "may provide" a matching grant for up to 50% of the costs of implementing the program (SDWA §1427(j)).

D. Wellhead Protection Area Program

EPA "shall make grants" for between 50 and 90% of the costs incurred by the state in developing and implementing the program (SDWA §1428(k)).

VI. NONCOMPLIANCE AND WITHDRAWAL

A. Public Water System

If EPA finds that a state with primary enforcement responsibility is not complying with the program, EPA has the following tools at its disposal:

- *Notice:* EPA "shall notify" the state (SDWA §§1414(a)(1)(A) & 1414(d)).
- *Advice and Technical Assistance:* EPA also shall "provide such advice and technical assistance...as may be appropriate to bring the system into compliance" (SDWA §1414(a)(1)(A)).
- *Order:* If the state fails to comply, EPA "shall issue an order" to the state (SDWA §1414(g)) requiring compliance with requirements and regulations (SDWA §1414(a)(1)(B)).
- *Civil Action:* EPA can commence a civil action if the state continues to violate federal requirements (SDWA §1414(a)(1)(B)).
- *Public Hearings:* EPA may hold public hearings for the purpose of gathering information if a state is not in compliance with federal requirements (SDWA §1414(f)).
- *Revocation of variances:* EPA can revoke a state issued variance if it finds that a state has "in a substantial number of instances abused its discretion in granting variances" or that "in a substantial number of instances the state has failed to prescribe schedules" (SDWA §1415(a)(1)(G)).
- *Revocation of exemptions:* EPA can revoke a state-issued exemption if it finds that a state has "abused its discretion in granting exemptions" or "failed to prescribe schedules in accordance" with requirement (SDWA §1416(d)(2)(A)).

B. Underground Injection Control Program

If EPA finds a state with primary enforcement responsibility in violation of a requirement, EPA has the following tools at its disposal:

- *Notice:* EPA "shall" notify the state of violations (SDWA §1423(a)(1)).
- *Administrative Order:* EPA can issue an administrative order (SDWA §1423(c)) if the state continues to violate a program requirement (SDWA §1423(a)(1)).

- ***Civil Action:*** EPA can commence a civil action against the state if noncompliance continues (SDWA §§1423(a)(1)&(b)).

Part Five
*
Clean Air Act

I. INTRODUCTION

The Clean Air Act (CAA) (CAA §101-618, 42 U.S.C. §§7401-7671g) mandates attainment of certain national ambient air quality standards (NAAQS). The NAAQS apply to eight air pollutants and are set by EPA. It is up to the states to devise state implementation plans (SIPs) for reducing the levels of the eight pollutants to meet the NAAQS. In devising their SIPs, states must include the various programs listed below in order to control a variety of mobile and stationary air emission sources within the state. States submit their SIPs to EPA for approval. If the SIP is approved, the state is authorized to implement and enforce CAA requirements. EPA, however, retains authority to enforce ambient air quality attainment. EPA can also grant partial SIP approval and require the state to correct deficiencies. If a state has failed to submit a SIP, EPA must promulgate and administer its own program for that state. This is known as a Federal implementation program (FIP). If a state fails to comply with its approved SIP, sanctions can result, including loss of funding for highways, and withholding grants for construction of sewage treatment plants.

II. AUTHORIZATION PROCESS

A. National Ambient Air Quality Standards (NAAQS)

State Responsibility: Each state shall have the "primary responsibility" for assuring air quality within the entire geographic area that comprises the state (CAA §107).

State Plan Submission Process: Each state "shall have" primary responsibility for submitting an implementation plan specifying the manner in which the NAAQS will be "achieved and maintained" (CAA §107). Each state "shall" adopt and submit to EPA a state implementation plan (SIP) which provides for "implementation, maintenance, and enforcement" of such air quality standards (CAA §110).

Plan Approval/Disapproval: If a SIP is approved, a state can enforce the SIP along with EPA. If a SIP does not gain approval or is never completed, EPA must adopt a Federal Implementation Plan (FIP) (CAA §110(c)). EPA can give partial approval to a SIP (CAA §110(k)(3)) or EPA can give conditional approval, which becomes disapproval

if a state does not comply in the timeframe given (CAA §110(k)(4)). EPA can require a state to revise an approved SIP if it finds "substantial inadequacies" (CAA §110(k)(5)).

Criteria for Plan Approval: Even before EPA reviews a proposed SIP, it must meet "completeness" criteria (CAA §110(k)(1)). EPA regulations pursuant to CAA §110(a)(2) define what a complete SIP must include:

- enforceable provisions, control techniques, compliance schedules;
- establishment of monitoring systems;
- enforcement measures;
- "adequate" emission prohibitions;
- assurances of "adequate" personnel, funding and authority;
- require sources to install monitoring equipment, and reporting;
- contingency plans for emergencies;
- provisions for revision of the SIPs;
- consultation with other agencies requirements (CAA §121), notification requirements (CAA §127), and prevention of significant deterioration requirements; and
- local political subdivision consultation and participation.

B. New Source Performance Standards Program (NSPS)

State Responsibility: EPA "shall delegate" to a state "any authority it has under this chapter" to implement and enforce NSPS in an approved SIP (CAA §111(c)(1)).

State Plan Submission Process: After EPA establishes emissions standards for certain categories of new sources (per CAA §111(b)), each state also "may develop and submit" to EPA a "procedure" for implementing and enforcing NSPS (CAA §111(c)).

Plan Approval/Disapproval: If EPA finds a state's NSPS procedure "adequate," any authority held by EPA to implement and enforce NSPS shall be "delegated" to the state (CAA §111(c)(1)). If the state fails to enforce NSPS procedure, EPA must take over NSPS enforcement. If the state fails to formulate a NSPS procedure, EPA must formulate one.

Criteria for Plan Approval: Similar to those for SIPs in CAA §110 (section I.A.4). Specifically, all CAA §111(c) says is that the a state's NSPS procedure must establish standards of performance and provide for their implementation and enforcement.

C. Hazardous Air Pollutants (HAPs)

State Responsibility: A SIP submitted by a state can request "partial or complete delegation for implementation and enforcement of HAP emissions standards. HAP

program delegation "shall not" include authority to set standards "less stringent" than those promulgated by EPA (CAA §112(l)(1)).

State Plan Submission Process: Each state "may develop and submit" to EPA for approval a program for implementation and enforcement of HAP standards (CAA §112(l)(1)).

Plan Approval/Disapproval: After receiving a state HAP, EPA "shall either approve or disapprove such program" (CAA §112(l)(5)). EPA "shall disapprove" a program if it makes certain findings (see criteria below). If EPA disapproves a HAP program, it "shall notify" the state of any necessary revisions or modifications. The state "may" revise and resubmit its HAP program (CAA §112(l)(5)).

Criteria for Plan Approval: The criteria below enumerate what the plan must avoid for approval because EPA is instructed to *disapprove* the plan if the following items are found, (CAA §112(l)(5)). The substantive criteria to *avoid* include:

- authorities not "adequate" to assure compliance;
- "adequate" authority does not exist, or "adequate" resources are not available, to implement the program;
- implementation and compliance schedule is not "sufficiently expeditious"; or
- the program is not in compliance with EPA guidance, or is not likely to satisfy the objectives of the CAA.

D. Prevention of Significant Deterioration (PSD)

State Responsibility: Although there is no specific language on the amount of PSD authority that can be delegated to a state, a state's SIP must include a PSD plan, and upon SIP approval, a state can be delegated authority to enforce the SIP, which would include the PSD program (CAA §161). Also, a state has authority to and "may redesignate" an area as Class I, II, III.

State Plan Submission Process: In CAA §161, each "applicable implementation plan" submitted by the state shall contain emissions limitations necessary to ensure PSD for land designated "attainment" or "unclassifiable."

Plan Approval/Disapproval: EPA has the right to disapprove a state PSD plan as part of the SIP review process (see section I.A. (NAAQS) above and CAA §§110(c) & (k)). EPA "may" also disapprove the redesignation of any PSD area "only if he finds" that such redesignation does not meet the procedural requirements of CAA §164 or is "inconsistent" with requirements of CAA §§162(a) or 164(a) (see criteria below) (CAA §164(b)(2)).

Criteria for Plan Approval: For a state PSD plan to be approved, the SIP must meet the same basic criteria listed in the section I.A.4. (NAAQS).

E. Nonattainment (N/A)

State Responsibility: As in the PSD program, there is no specific language in this section on the amount of authority for N/A delegated to the state. Instead, it is implicit that if a state, obtains approval of its SIP which includes a plan for N/A, it would then have permitting and enforcement authority to enforce N/A standards.

State Plan Submission Process: If an area is designated "N/A" by EPA, the state where the N/A area is located "shall submit" (according to a schedule determined by EPA) a plan meeting the N/A section requirements (CAA §172(b)).

Plan Approval/Disapproval: If EPA requires a state to revise its SIP to cover a N/A area, the state "must correct the plan deficiency" and meet all other requirements of CAA §110 and the N/A section (CAA §172(d)).

Criteria for Plan Approval: The N/A plan submitted by the state must meet the requirements of CAA §110(a)(2) in section I.A.4., and CAA §172(c) which include, in general:

- reasonably available control measure (RACM);
- demonstration of reasonable further progress (RFP) toward attainment;
- comprehensive, accurate, and current inventory of actual emissions;
- identification and quantification of emissions;
- permits for the construction and operation of new or modified major stationary sources;
- enforceable emissions limitations, other control measures, and schedules and timetables for compliance;
- section 110(a)(2) compliance (see I.A.4.);
- approval of equivalence techniques unless EPA determines such measures are "less effective" in the aggregate; and
- contingency measures for emergencies.

F. Mobile Sources

State Responsibility (New Motor Vehicle Emissions): Only EPA can set the standards for new motor vehicle emissions unless a state applies for a waiver because it has adopted standards that will be, "in the aggregate, at least as stringent as the comparable federal standard" (CAA §§209(b)). A "waiver," if granted, can delegate authority to a state to control not only new motor vehicle emissions, but also fuel standards (CAA §211(c)(4)(B)). The same is true for aircraft emissions, only the state aircraft standards must be "identical" to EPA standards (CAA §233). In the case of any new motor vehicle to which state standards apply pursuant to a waiver, "compliance with such state standards shall be treated as compliance with applicable federal standards" (CAA §209(b)(3)).

State Responsibility (In-Use Motor Vehicle Emissions): A state has authority to control in-use motor vehicle emissions if that is one of the strategies included in its SIP in order to meet the NAAQS, as described in section I.A. above.

State Plan Submission Process: States may propose in-use motor vehicle emission strategies in their SIPs.

New Motor Vehicle Plan Approval/Disapproval: If state standards are not more stringent than federal standards, the federal standards for new motor vehicle emissions will be enforced.

In-use vehicles Plan Approval/Disapproval: If a state's SIP is approved, the state has "primary enforcement responsibility" for all SIP elements that relate to in-use vehicles.

Criteria for Plan Approval: EPA "shall" not grant the state a waiver for new motor vehicle emissions standards if EPA finds that (CAA §209(b)):

- the state's emission standard is arbitrary and capricious;
- standards are unnecessary; or
- the state standards and enforcement procedures are inconsistent with federal standards.

Opt-in Plans: States may opt-in certain federal mobile source programs. The opt-in programs include: reformulated gasoline program (CAA §211(k)(6)); and clean-fuel vehicle program (CAA §249(f)).

G. Acid Deposition

State Responsibility: This title provides sulfur dioxide (SO₂) emitting facilities (certain power plants) with "allowances" to emit limited amounts of SO₂. Allowances are specified in permits granted to facilities affected by this title. Permits can be issued by states with an approved operating permit program under Title V of the Act (CAA §408(a)).

State Plan Submission Process: A state shall submit a permit program to the EPA which allows the state to issue permits to SO₂ sources.

Plan Approval/Disapproval: Pursuant to CAA §408g, if its permit program is approved, a state has authority to issue operating permits to SO₂ sources. If a state permit program is not approved, the permits will be issued by EPA.

Criteria for Plan Approval: The permit program submitted by the state must meet the provisions of CAA §502(b) (see section I.H.4. below).

H. Operating Permit Program

State Responsibility: A state may only carry out permitting programs with approval by EPA (CAA §502).

State Plan Submission Process: The state "shall develop and submit" an operating permit program containing "minimum federal requirements" (CAA §502(d)).

Plan Approval/Disapproval: If a state permit program is approved by EPA, the standards are enforceable by the state and EPA. Partial permit program approval exists (CAA §502(f)). If the program is disapproved, in whole or in part, EPA "shall notify" the state of revisions and modifications necessary to approve the program, and the state "shall revise" (CAA §502(d)). If the state does not revise or the revision is disapproved, sanctions (highway funding and offsets in section VI.H.) apply.

Criteria for Plan Approval: EPA requires minimum substantive elements for permit program approval and the following implementation and enforcement mechanisms (CAA §502(b)):

- collection of permit fees sufficient to cover costs of the permit program;
- monitoring and reporting requirements;
- adequate personnel and funding to administer the program;
- "adequate" authority;
- "adequate, streamlined, and reasonable procedures"; and
- public availability provisions.

I. Stratospheric Ozone Protection

State Responsibility: There is no state role under this program. Only EPA implements and enforces Stratospheric Ozone Protection (Title VI); state laws are preempted (CAA §614).

State Plan Submission Process: not applicable.

Plan Approval/Disapproval: not applicable.

Criteria for Plan Approval: not applicable.

III. OVERSIGHT REQUIREMENTS

A. NAAQS

States submit regular reports, as EPA "may require" for assessing the "effectiveness" of SIP (CAA §110(p)).

States "shall" submit SIP revisions to EPA if it finds the applicable SIP is substantially inadequate to attain or maintain NAAQS (CAA §110(k)(5)).

EPA is authorized to review decisions of delegated states on noncompliance penalty assessments. State must give EPA notice of each penalty assessment, and EPA has 90 days to review and object (CAA §120(b)).

Each state must review the provisions of its own SIP which relate to major fuel burning sources to determine whether SIP compliance is dependent on the use of petroleum products and coal and to determine long-term viability of these energy sources. The state must submit the results of the review to EPA, and EPA can then require SIP revisions if needed to assure long-term compliance with the SIP. (CAA §124).

B. New Source Performance Standards Program

Same as SIP oversight mechanism (CAA §§110(p)&(k)(5)). As long as NSPS are included in the SIP, SIP procedures control oversight (CAA §111(c)).

C. Hazardous Air Pollutants

Same as SIP oversight mechanism (CAA §§110(p)&(k)(5)).

D. Prevention of Significant Deterioration

In general, the requirements are the same as SIP oversight mechanism (CAA §§110(p)&(k)(5)). For construction in PSD areas, a copy of each construction permit application "shall" be transmitted by the states to EPA, and notice of any state action considering the permit must also be provided to EPA (CAA §165(d)).

E. Nonattainment Areas

In general, the requirements are the same as SIP oversight mechanism (CAA §§110(p)&(k)(5)). Milestone reports required in 1996 for ozone (CAA §182(g)), carbon monoxide (CO) (CAA §187(d)), and particulate (PM10) (CAA §189(c)) N/A areas. EPA reviews the reports to determine if states have demonstrated compliance with the milestones.

F. Acid Deposition

EPA shall review the determinations to allocate allowances for energy conservation and renewable energy projects made by each State regulatory authority to encourage consistency among utilities and between states (CAA §404(f)(4)).

G. Operating Permit Program

In general, the requirements are the same as SIP oversight mechanism (CAA §§110(p)&(k)(5)). Each state permitting authority "shall transmit" to EPA a copy of each permit application and a copy of each permit to be issued (CAA §505(a)).

If EPA objects to a state permit, it cannot be issued unless it is revised and, if the state fails to make the revision or issues a permit before EPA objects, EPA "shall modify, terminate or revoke" the permit and then "shall issue or deny" the permit itself (CAA §505(b)&(c)).

IV. FEDERAL RESIDUAL ENFORCEMENT AUTHORITY

A. NAAQS

EPA retains authority to enforce its requirements against individual sources ("persons") for violation of a SIP or permit, or if the state fails to enforce its SIP or permit program. EPA has authority to enforce even under an approved state program (CAA §113(a)).

If EPA finds that a state has failed to implement and enforce its SIP or permit program, EPA can enforce federal requirements against individual sources ("persons") directly using the following tools (CAA §113(a)(2)):

- **Notice:** EPA "shall" give public notice regarding the violation (CAA §113(a)(2)).
- **Administrative Compliance Order:** EPA can issue an administrative compliance order requiring the "person" to comply with requirements (CAA §113(a)(2)(A)).
- **Administrative Penalty Order:** EPA can issue an administrative penalty order against the person (CAA §113(a)(2)(B)).
- **Civil Action:** EPA can bring a civil action against the person (CAA §113(a)(2)(C) and (b)).

In addition, EPA may assess *criminal penalties* (fines and imprisonment) against persons for knowingly violating a SIP, an order, an operating permit, etc. or for knowingly making false statements, etc. (CAA §113(c)) and EPA may require individual *recordkeeping and monitoring* and may carry out its own *inspections* and entry after notice to the state (CAA §114(d)).

EPA retains all its authority to assess and collect *noncompliance penalties* from individual sources if the state is not enforcing its plan or if the state does not have an approved plan (CAA §120(b)).

B. New Source Performance Standards Program

Even if a state has a delegated NSPS program under EPA retains authority to enforce the NSPS (CAA §111(c)(2)). Additionally, EPA retains its authority to take enforcement actions against sources located in states that are not in compliance with federal requirements (CAA §113(a)(5)).

The following enforcement tools are explicitly elaborated in the statute:

- **Order:** EPA can issue an administrative order prohibiting construction or modification of a source.
- **Administrative penalty:** EPA can assess an administrative penalty.
- **Civil action:** EPA can bring a civil action (CAA §113(a)(5)).

C. Hazardous Air Pollutant

Even if a state is delegated authority to regulate HAPs, EPA retains authority to enforce any applicable emission standard or requirement for hazardous air pollutants (CAA §112(l)(7)), and delegation of the HAP program does not affect EPA's authorities over operating permits under Title V (permitting programs).

The enforcement tools are the same as SIP authority listed above (CAA §§113(a)(1)&(a)(2)&(c)).

D. Prevention of Significant Deterioration

In addition to EPA's enforcement authority listed above, EPA retains authority to enforce its requirements against any "person" for violation of a PSD requirement, even if the program is approved by EPA (CAA §113(a)(3)).

In general, the requirements are the same as SIP authorities listed above (CAA §§113(a)(1) & (a)(2) & (c)).

Additional enforcement tools are available to EPA when it finds a person in violation of a requirement of PSD and N/A programs, acid deposition, operating permits, or stratospheric ozone (CAA §113(a)(3)). These include:

- **Administrative Penalty Order:** EPA may issue an administrative penalty order (CAA §113(a)(3)(A)).
- **Administrative Compliance Order:** EPA may issue an order requiring the person to comply with the requirement (CAA §113(a)(3)(C)).
- **Civil Action:** EPA may bring a civil action (CAA §113(a)(3)(C)).
- **Criminal Action:** EPA may request the Attorney General to commence a criminal action (CAA §113(a)(3)(D)).

E. Nonattainment Areas (N/A)

EPA retains authority to enforce its requirements against individuals for violation of a SIP or permit requirement, even under an approved state program. Additionally, for ozone N/A areas, even if a state develops and submits a plan for controlling VOCs, "nothing...shall prohibit" EPA from enforcing any applicable regulations to reduce VOCs (CAA §183(e)(7)).

The enforcement tools are the same as SIP tools (CAA §§113(a)(1) & (a)(2) & (c)) and the PSD tools (CAA §113(a)(3)).

F. Mobile Sources

EPA exercises sole enforcement authority over mobile sources, unless the SIP incorporates mobile source standards. For new motor vehicle standards, EPA lists prohibitions for individual motor vehicle manufacturers and retains enforcement authority to enforce those prohibitions (CAA §203).

EPA may use the following enforcement tools against manufacturers for violation of new motor vehicle standards and fuel/fuel additive requirements (CAA §205):

- **Civil Penalty:** EPA may assess a civil penalty against any "person" who violates certain prohibitions (CAA §205(a)).
- **Civil Action:** EPA may commence a civil action to assess and recover the civil penalty (CAA §205(b)).
- **Administrative Penalty:** In lieu of commencing a civil action, EPA may assess a civil penalty against the violator (CAA §205(c)).

G. Acid Deposition

Even if a state is delegated authority to regulate acid deposition sources, EPA retains authority to enforce federal requirements.

The enforcement tools are the same as PSD tools listed above (CAA §113(a)(3)).

H. Operating Permitting Program

Even if EPA is delegated authority to implement and enforce an operating permit program, EPA retains authority to enforce federal requirements.

In general, EPA can use the same enforcement tools as under the NAAQS and PSD programs listed above. In addition, EPA can use the following:

- **Permit Decisions:** If a state fails to "terminate, modify, revoke, or reissue" a permit for an individual source, EPA can, after notice to the source, "terminate, modify, or revoke and reissue the permit" (CAA §505(e)).
- **Individual Source Actions:** EPA retains authority to take action against an individual source which violates state operating permit conditions which are designated as "federally enforceable" (CAA §502(b)(5)(A)).

I. Stratospheric Ozone Protection

EPA retains all authority to enforce a delegated stratospheric ozone protection program. States do not enforce this program unless, after 1992, more stringent state standards have been adopted by the state (CAA §§116 & 614). In addition to retaining all enforcement authority, EPA has authority to regulate any ozone-depleting substance if it "endangers public health or welfare" (CAA §615).

The enforcement tools are the same as PSD authorities listed above (CAA §113(a)(3)).

V. GRANTS AND ASSISTANCE TO STATES

A. NAAQS

EPA provides grants for support of air pollution planning and control programs (CAA §105). EPA can withhold all or a part of the grants for support of air pollution planning and control programs (awardable under CAA §105), certain highway grants can be denied (in cooperation with DOT), and sewage treatment construction grants can be withheld or conditioned (CAA §179(b)).

B. New Source Performance Standards Program

See provisions for SIP grants (CAA §§105 & 179(b)).

C. Hazardous Air Pollutants

See provisions for SIP grants (CAA §§105 & 179(b)). In addition, EPA "may" make grants to states to develop or implement a HAP program (CAA §112(l)(4)).

D. Nonattainment Areas (N/A)

See provisions for SIP grants (CAA §§105 & 179(b)). EPA "shall make grants" to local elected officials responsible for transportation or air quality planning in ozone, CO, and PM10 N/A areas with approved SIPs (CAA §175). Assistance from all federal agencies will be denied for any activities that do not "conform" to an approved SIP (CAA §176(c)).

E. Mobile Sources

EPA is authorized to make grants to states for costs of developing and maintaining vehicle emission devices, vehicle maintenance and inspection, and emission testing programs (CAA §210). No such grant "shall be made" if the state program costs do not relate to air pollution costs, if the program is inconsistent with any highway safety program, or if the program does not include provisions to detect tampering with emission control (CAA §210).

F. Acid Deposition

See provisions for SIP grants (CAA §§105 & 179(b)).

G. Operating Permit Program

See provisions for SIP grants (CAA §§105 & 179(b)).

VI. NONCOMPLIANCE AND WITHDRAWAL

A. NAAQS

EPA can withdraw program approval (after notice to the state) if deficiencies found in state program are not corrected (30 days for SIP and 90 days for permit program). A "period of federally assumed enforcement" follows (CAA §113(a)(2)).

B. New Source Performance Standards Program

SIP noncompliance and withdrawal procedures apply (CAA §113(a)(2)).

C. Hazardous Air Pollutants

Same as operating permit program provisions detailed above (CAA §502(i)) when the state is not meeting operating permit requirements. EPA "shall withdraw" approval of a HAP program "whenever" EPA determines that a state is not administering and enforcing its approved program (CAA §112(l)(6)).

D. Prevention of Significant Deterioration

SIP noncompliance and withdrawal procedures apply (CAA §113(a)(2)). The operating permit program provisions apply when the state is not meeting operating permit requirements (CAA §502(i)).

E. Nonattainment Areas

SIP noncompliance and withdrawal procedures apply (CAA §113(a)(2)). The operating permit program provisions apply when the state is not meeting operating permit requirements (CAA §502(i)). For failure to meet milestones, EPA can require further SIP revision from the state.

F. Mobile Sources

SIP violation caused by in-use mobile sources could trigger SIP noncompliance and withdrawal procedures (CAA §113(a)(2)).

G. Acid Deposition

The operating permit program provisions apply when the state is not meeting operating permit requirements (CAA §502(i)).

H. Operating Permit Program

If EPA determines a state is not "adequately" administering and enforcing a permitting program (including HAP and Acid Deposition programs), it "may", after notice to the state, apply CAA §179(b) sanctions (highway sanctions and offsets) against the state (CAA §502(i)(1)).

Part Six



Federal Water Pollution Control Act

I. INTRODUCTION

The Federal Water Pollution Control Act (FWPCA § 101-§607, 42 U.S.C. §§1251-1387), otherwise known as the Clean Water Act (CWA), regulates the discharge of pollutants into the surface waters of the US. It consists of two key permitting programs, the National Pollution Discharge Elimination System (NPDES) and a permit program for dredged or fill material as well as several specialty programs that target pollution prevention in the nation's lakes and estuaries. EPA, under the Clean Water Act, is responsible for establishing a nationwide minimum standard for pollutant removal by requiring application of increasingly stringent control technologies. The Act also requires each state to set water quality standards for water within its jurisdiction. The two standards - the federal technology-based standards and the state environmental quality standards - are used to formulate effluent limitations. Under the two permitting programs, a state may seek approval by EPA to assume primary responsibility for the issuance of permits and for the administration and enforcement of the permit program within their jurisdictions. However, the statutory language suggests an intent that EPA maintain a strong enforcement presence in states with approved programs and a responsibility to enforce in the absence of an "appropriate" state enforcement effort.

II. AUTHORIZATION PROCESS

A. National Pollution Discharge Elimination System (NPDES)

State Responsibility: States assume primary responsibility for the issuance of permits and for the administration and enforcement of the NPDES program within their jurisdictions.

State Plan Submission Process: Each state desiring to administer its own NPDES permit program "may" submit a full and complete description of the program to EPA for approval (CWA §402b).

States may submit a permit program for a portion of discharges for EPA approval. The program shall cover at a minimum: administration of "a major category of the discharges" or "major components" of the permit program required under CWA §402(b). The criteria for partial program is representation of "significant and identifiable" part of subsection §402(b) requirements (CWA §402(n)).

Plan Approval/Disapproval: No later than 90 days after a state submits a program, EPA shall suspend the federal program as to those discharges subject to the state program unless EPA determines that the state program does not meet the requirements in §402(b). EPA will notify state of necessary revisions to conform (CWA §402(c)). However EPA shall not *approve* any state permit program under CWA §402 for any state which does not have an *approved* continuing planning process for setting water quality standards and effluent limitations (CWA §303(e)(2)).

Criteria for Plan Approval: EPA shall *approve* each program submitted by a state unless EPA determines "adequate authority" under state law does not exist (CWA §402(b)). The state permit program must also contain the following requirements:

- compliance with CWA §§302 - water quality effluent limitations, 303 - water quality standards, 306 - pretreatment standards, 307 - performance standards for industries, 403 - ocean discharge;
- permit limits not to exceed 5 years;
- provisions for permit modifications and termination;
- inspections, monitoring and reporting "to at least the same extent as" required in CWA 308;
- provisions for public hearing for permit applications;
- insure EPA receives notice of each permit application (including a copy);
- allow veto of permit by Secretary of Army if such discharge would impair work of Coast Guard; and
- options to handle violations such as civil or criminal penalties and other ways and means to enforce permit conditions;

B. Permits for Dredged or Fill Material

State Responsibility: States assume primary responsibility for the issuance of permits and for the administration and enforcement of the dredge and fill program within their jurisdictions.

State Plan Submission Process: Governor of any state desiring to administer a state permit program for discharge of dredge material may submit to EPA a full and complete description of the proposed program (CWA §404(g)(1)). EPA provides copies of state program to other federal departments such as the Secretary of the Interior for comments (CWA §404(g)(2)).

Plan Approval/Disapproval: No later than 120 days after EPA receives program proposal from the state and comments from other federal agencies, EPA shall determine whether the state has "authority" to issue permits (CWA §404(h)). If EPA determines that the proposed state program meets the conditions in CWA §404(h), it must approve the program. If EPA finds the state does not have the "authority", EPA will notify the state and allow state to resubmit its program. Failure by EPA to make a determination within the statutory deadline of 120 days, results in automatic approval

of the program (CWA §404(h)(3)). After approval, the Secretary of the Army will transfer any pending permit applications to the state (CWA §404(h)(4)) and will cease issuing permits under subsection (a) and (e) of CWA §404.

Criteria for Plan Approval: pursuant to CWA §404(h), each state proposed program must include:

- compliance with guidelines of this section and §§307 (toxic pretreatment) and 403 (ocean discharge);
- fixed permit terms, not to exceed 5 years;
- possibility to terminate permits for violations;
- compliance with CWA §308 (inspection and monitoring) or provides for inspections and monitoring "to at least the same extent as" required in CWA §308;
- assurance that EPA receives notice of each permit application and a copy;
- veto by Secretary of Army if permit holders activities interfere with operations of Coast Guard;
- methods set to deal with violations like civil and criminal penalties; and
- assurance of continued coordination with federal and federal-state water-related planning and review process.

C. Disposal of Sewage Sludge

State Responsibility: States assume primary responsibility for the issuance of sludge disposal permits to publicly owned treatment works (POTWs) and for the administration and enforcement of the permit program to protect human health and the environment within their jurisdictions.

State Plan Submission Process: Each state desiring to administer its own permit program for disposal of sewage sludge (from treatment works) may do so in accordance with §402 NPDES permit program (CWA §405(c)). Which means the state shall submit to EPA a full and complete description of the program it proposes to establish and administer under state law to EPA for *approval*.

Plan Approval/Disapproval: EPA must determine that the state program assures compliance with any applicable requirements of this section in order to *approve* the program (CWA §405(f)).

Criteria for Plan Approval: Criteria for program approval follow the requirements for NPDES program approval in CWA §402(b).

D. Individual Control Strategies for Toxic Pollution

State Responsibility: State are responsible for listing waters and point sources and developing individual control strategies (in those states which are authorized to issue NPDES permits).

State Plan Submission Process: Each state shall submit the following to EPA for review, approval, and implementation under this subsection:

- lists of water segments that cannot attain water quality standards due to toxic pollutants'
- identification of point sources believed responsible; and
- control strategies for each water segment to reduce toxic discharges through establishing effluent limitations under §402 (NPDES) and water quality standards in combination with existing controls on point and non-point sources of pollution (CWA §340(1)(1)).

Plan Approval/Disapproval: No later than 120 days after submitting control strategy plan, EPA shall approve or disapprove the states plan (CWA §304(1)(2)).

Criteria for Plan Approval: No specific criteria for plan approval is stated under CWA §304(1).

E. Clean Lakes

State Responsibility: The state shall submit to EPA data on the status of water quality in publicly owned lakes within the state.

State Plan Submission Process: Each state shall prepare or establish and submit to EPA for approval a program that includes:

- identification and classification of eutrophic conditions of all publicly owned lakes;
- description of methods to control pollution in such lakes; and
- methods to restore the quality of such lakes (CWA §314(a)(1)).

Program Approval/Disapproval: Based on the information provided to EPA by the state, EPA shall approve a program, mainly for the purpose of awarding grant monies to carry out the work of data collection and to implement procedures to improve lake water quality. A specific time frame is not given in the statute.

Criteria for Plan Approval: No specific criteria for plan approval is stated under CWA §314.

F. Nonpoint Source Management Programs

State Responsibility: Each state notified by EPA is responsible for conducting an assessment of nonpoint source pollution and developing programs to control the pollution from these sources.

State Plan Submission Process: A state shall, after notice from EPA and public comment, prepare and submit a nonpoint source assessment report to EPA for *approval* that includes state/local programs for controlling pollution from nonpoint sources the state will implement (CWA §319(a)&(b)).

Program Approval/Disapproval: No later than 180 days after state submission, EPA shall either *approve* or *disapprove* the report or management program. EPA may *approve* a portion of the management plan. If EPA disapproves of a state's proposed program, within 6 months, EPA shall notify the state of any revision necessary to obtain approval. The state will have 3 months to submit revised program (CWA §319(d)(2)). If state does not submit a report required in CWA §319(a), EPA within 30 months after enactment of this section, will prepare a report for the state (CWA §319(d)(3)). If state fails to submit a management program or EPA does not *approve* of a program submitted, EPA shall assist a local public agency or organization to develop a program. This organization will submit a program for approval. If EPA *approves*, the organization is eligible to receive financial assistance (CWA §319(e)).

Criteria for Plan Approval: Specific requirements for a state's management plan *approval* include:

- identification of best management practices;
- identification of programs to achieve implementation;
- schedule with annual milestones;
- certificate from attorney general of the state that the laws of the state provide "adequate authority" to implement or a list of additional authorities needed to implement; and
- list of funding sources (CWA §319(b)(2)).

EPA shall disapprove a management program if:

- doesn't meet requirements in CWA §319(b)(2) or is not likely to satisfy in whole or part the goals of the act;
- "adequate authority" does not exist;
- the schedule is not expeditious;
- practices proposed are not adequate to reduce pollution; and
- sources of federal funding and other assistance other than the federal grants under CWA §319(h) (CWA §319(d)(2)).

For interstate management programs, these programs shall be "consistent with" federal and state law (CWA §319(g)).

G. National Estuary Program

State Responsibility: Any state may seek EPA *approval* and financial assistance to develop pollution prevention programs for estuaries within the state.

State Plan Submission Process: The governor of any state may nominate to EPA an estuary as nationally significant and request to convene a conference to develop a comprehensive management plan for the estuary (CWA §320(a)).

Plan Approval/Disapproval: No later than 120 days after public review/comment of a conservation management plan, EPA shall approve the plan if it meets requirements of this section and the state governor (CWA §320(f)).

Criteria for Plan Approval: Specific criteria for management plan approval is not given in statute.

III. OVERSIGHT REQUIREMENTS

A. National Pollution Discharge Elimination System (NPDES)

CWA §402(d), asserts that each state shall give EPA a copy of each permit application and provide notice to EPA on every action taken in consideration of permit application. No permit shall be issued if within 90 days after transmittal of application to EPA by the state EPA objects to the permit in writing (CWA §402(d)(2)). If EPA rejects a permit, the issuing state may request a public hearing. If EPA does not receive a revised permit in 30 days after the hearing, EPA may issue the revised permit anyway (CWA §402(d)(4)).

Several subsections under 402 provide a choice to EPA with respect to permit by permit reviews. In CWA §402(d)(3) EPA may waive the requirements in §402(d)(2). CWA §402(e) also states that EPA is "authorized" to waive §402(d) at time of state program approval. EPA can determine point-source categories that should not be subject to CWA §402(d) in any state with an *approved* program (CWA §402(f)).

B. Permits for Dredged or Fill Material

Permit reviews are used as oversight mechanisms similar to the NPDES program. CWA §404(j) asserts that each state with an *approved* program "shall transmit" to EPA copy of each permit application and provide notice to EPA on every action taken and a copy of each general permit a state proposes to issue. Schedules are specified for written comments from EPA to the state. A state cannot issue a permit until after receiving EPA comments or after 90 days which ever comes first. And a state cannot issue a permit if EPA, through written comments, objects to the permit application. On request, a state can call a public hearing if EPA objects the permit

application. If a state does not resubmit a revised permit application within 30 days after public hearing or within 90 days after EPA comments, the Secretary of the Army may issue the permit (revised) anyway.

As with the NPDES program, subsections under 404 provide a choice to EPA with respect to permit by permit reviews. EPA may waive requirements of permit review in subsection (j) at time of state program approval for any category of discharges (CWA §404(k)). EPA can determine discharge categories not to be subject to the requirement of subsection (j) in any state with an approved program (CWA §404(l)).

C. Disposal of Sewage Sludge

The section on the disposal of sewage sludge (CWA §405) refers to CWA §402 (NPDES) for oversight requirements.

D. Individual Control Strategies for Toxic Pollution

Under CWA §304(l), EPA must continually review a state's activities to *approve* or *disapprove* the state's actions in order to act where a state does not develop all necessary lists and individual control strategy requirements.

E. Clean Lakes

On a biennial basis, state must submit to EPA for approval reports that covers the topics covered for program approval above plus a list of lakes whose uses are impaired or have high acidity, and an assessment of trend in lake water quality in the state. EPA reviews these reports for continued program approval (CWA §314(a)(1)).

F. Nonpoint Source Management Programs

Each state shall report to EPA on an annual basis on the progress in meeting schedule of milestones submitted in CWA §319(b)(2) and information on reducing pollutant loading (CWA §319(h)(1)).

G. National Estuary Program

If a state or other organization receives federal grant under CWA §320(g), they must report on program progress to EPA no later than 18 months after receiving money and biennially after that (CWA §320(h)).

IV. FEDERAL RESIDUAL ENFORCEMENT AUTHORITY

A. National Pollution Discharge Elimination System (NPDES)

EPA's enforcement authority under CWA §402 is unlimited. Subsection 402(i) states "that nothing shall be construed to limit the authority of EPA to take action in accordance with section CWA §309 (federal authority)."

The following enforcement tools are explicitly elaborated in the statute:

- **Notice and Compliance Orders:** Stated in CWA §309(a)(1), if EPA finds violation of permit issued by a state under an *approved* program, EPA shall: proceed with its authority to issue compliance orders or bring civil action as stated in CWA §309(a)(3); or notify the violator and the state first. If after 30 days of notice, the state has not commenced "appropriate enforcement action," EPA shall issue a compliance order or bring civil action.
- **Penalties:** After discovering a violation of a permit issued by a state under CWA §§402 or 404, EPA may, after consultation with the state, assess a class I civil penalty or class II (CWA §309(g)).

B. Permits for Dredged or Fill Material

EPA's enforcement authority under CWA §404 is unlimited. Subsection 402(n) states that "nothing shall be construed to limit the authority of EPA to take action in accordance with CWA §309 (Federal Authority)."

The same enforcement tools apply as under the NPDES program.

C. Disposal of Sewage Sludge

The same residual federal enforcement applies as under the NPDES program.

V. GRANTS AND ASSISTANCE TO STATES

A. National Pollution Discharge Elimination System (NPDES)

Specific grant assistance is not found under CWA §402. Rather grants are made available in CWA §106 for pollution prevention programs. The money is to assist states in "administrating programs for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate state law enforcement officers or agencies." One grant condition under CWA §106 is that "federally assumed

enforcement" not be in effect in a state requesting grant assistance.

B. Permits for Dredged or Fill Material

Specific grant assistance is not found under CWA §404.

C. Disposal of Sewage Sludge

Specific grant assistance for developing and implementing sewage sludge program is not found under CWA §405. However, grant monies are made available for demonstration projects for beneficial re-use of sewage sludge in parks, recreational areas, etc.

D. Individual Control Strategies for Toxic Pollution

Specific grant assistance is not found under CWA §304(l).

E. Clean Lakes

CWA §314 specifically ties grant assistance to the approval of a state program. CWA §314(b) states that "EPA shall provide financial assistance to states to carry out procedures approved by EPA in 314(a)." Also in CWA §314(a)(4) in order to receive grant assistance, a state must have submitted the information required in §314(a).

F. Nonpoint Source Management Programs

CWA §319 leaves conditions on grant assistance up to EPA. CWA §319(h) states that grants are available subject to terms and conditions as EPA considers appropriate. No grant may be made to a state which in the preceding fiscal year received a grant unless EPA determines that such state has made "satisfactory progress" (CWA §319(h)(8)). Yet if state has an *approved* program, it can receive money for groundwater protection activities (CWA §319(i)).

G. National Estuary Program

Funds are available to states or regional agencies, state coastal zone management agencies or individuals to implement *approved* plans (CWA §320(g)).

VI. NONCOMPLIANCE AND WITHDRAWAL

A. National Pollution Discharge Elimination System (NPDES)

After a public hearing, EPA determines the state is not administrating the program in accordance with the statute, and if corrective action has not been taken within 90 days of notice by EPA, EPA may withdraw program *approval*, partial or whole (CWA §402(c)). Also, a state may "return" a program (CWA §402(c)(4)).

If EPA find violations so widespread that result from failure of the state to enforce, EPA shall notify the state. If failure extends beyond 30 days after notice, EPA will give public notice. From this point of giving public notice, this period is known as "federally assumed enforcement" where EPA shall enforce any permit condition until the state satisfies EPA that it will and can enforce such requirements (CWA §309(a)(2)).

B. Permits for Dredged or Fill Material

Whenever EPA determines after public hearing that the state is not administrating a program in accordance with this section including guidelines in (b)(1), EPA shall notify the state.

If appropriate corrective action is not taken within 90 days, EPA shall withdraw *approval* and notify Secretary of the Army to resume issuing permits until EPA "determines" the state is approved again (CWA §404(I)).

C. Individual Control Strategies for Toxic Pollution

If state fails to submit control strategies or EPA does not approve, then in 1 year EPA, in cooperation with the state after notice and public hearing, shall implement the requirements in CWA §304(l)(1) in such state (CWA §304(l)(3)).

Part Seven



Resource Conservation and Recovery Act

I. INTRODUCTION

The Resource Conservation and Recovery Act (RCRA §1001-11012, 42 U.S.C. §§6901-6992k) is administered by the Environmental Protection Agency (EPA) and governs waste management. The main programs included within the Act are described below, and include a hazardous waste management program, a non-hazardous waste and landfill program, and an underground storage tank program. Generally, EPA sets minimum requirements for each of these programs. States then come up with their own programs based on federal requirements, submit them to EPA, and if approved, have implementation and enforcement authority for that program. In some programs, the state program operates "in lieu of" the federal program. EPA, however, may still enforce its requirements, even if the state has an authorized program in place. Each program allows EPA certain enforcement tools in case the state fails to comply with federal requirements. As an incentive for states to adopt and implement authorized programs, EPA has authority to grant financial and other assistance to states with authorized programs.

II. AUTHORIZATION PROCESS

A. Hazardous Waste Management

State Responsibility: A state with an "authorized" program can implement and enforce a hazardous waste program "in lieu of" the federal program (RCRA §3006(b)). This responsibility includes issuing treatment, storage and disposal permits under RCRA §3005).

State Plan Submission Process: A state that wishes to administer and enforce a hazardous waste program "may develop and submit" a program for EPA "authorization" (RCRA §3006(b)).

Plan Approval/Disapproval: A state with an approved program may enforce it "in lieu of" a federal program. If the state program is disapproved a federal program will exist for the state.

Criteria for Plan Submission:

EPA "may not authorize" a program if certain findings are made. The following criteria are what a program must *avoid* to receive authorization (RCRA §3006(b)):

- state program "is not equivalent to" the federal program;
- state program "is not consistent with" federal or state programs applicable in other states; and
- state program does not provide "adequate" enforcement of compliance with the requirements.

States with hazardous waste programs already in place are authorized to "carry out" 1984 Amendment requirements if evidence submitted shows the state requirement to be "substantially equivalent" to the federal requirements (RCRA §3006(g)).

No state may impose requirements in a program that are "less stringent" than those authorized under this section (RCRA §3009).

B. Non-Hazardous Waste and Landfills

State Responsibility: Each state is responsible for planning and implementing solid waste management plan activity. (RCRA §4006(b)).

State Plan Submission Process: Each state "shall" come up with a solid waste management plan that "identifies" its responsibilities (RCRA §4006(b)).

Plan Approval/Disapproval: EPA "shall" approve or disapprove the entire plan (RCRA §4007(a)). EPA may also grant partial approval (RCRA §4005(c)(1)(C)). EPA may withdraw its approval if it determines that a state program no longer meets the minimum requirements (see below) (RCRA §4007(a)).

Criteria for Plan Approval: EPA "shall" approve the plan if a "determination" is made that (RCRA §4007(a)) the plan meets certain RCRA §4003 requirements including:

- identification of responsibilities;
- prohibition of new open dumps and disposal requirements;
- closing or upgrading all existing open dumps;
- establishment of necessary state regulation authority;
- no prohibitions on long term contracting; and
- environmentally sound methods will be used.

C. Underground Storage Tanks

State Responsibility: The state will have "primary enforcement responsibility" of an approved program which will operate "in lieu of" a federal program (RCRA

§9004(d)(2)). States have authority to adopt regulations and requirements "more stringent than" the requirements adopted by EPA (RCRA §9008).

State Plan Submission Process: "[A]ny State may submit" an underground storage tank (UST) release detection, prevention, and correction program (RCRA §9004(a)).

Plan Approval/Disapproval: EPA "shall make a determination" of approval or disapproval. An "approved" state program will operate "in lieu of" a federal program. If the program is disapproved, a federal program will govern USTs.

Criteria for Plan Approval: EPA "determines" whether the state program "complies" with the provisions of this section and provides "adequate" enforcement of compliance with the requirements and standards listed below (RCRA §9004(d)(2)). The requirements (called "elements" in RCRA §9004(a)) must be "no less stringent" than federal requirements (RCRA §9004(b)(1)). RCRA §9004(a) sets out minimum substantive elements and the following implementation and enforcement mechanisms:

- maintaining monitoring records and a leak detection system;
- reporting and taking corrective action for any releases;
- maintaining evidence of financial responsibility; and
- notice to state authorities of UST existence and other required information.

III. OVERSIGHT REQUIREMENTS

A. Hazardous Waste Management (RCRA §§3001-3023)

Inventory: Each state "shall...compile, publish, and submit" to EPA an inventory describing the location of hazardous waste sites located within the state (RCRA §3012(a)).

Inspection: EPA "shall annually" inspect every state-operated treatment, storage, and disposal (TSD) facility required to have a permit (RCRA §3007(d)), and "shall commence" a program to biannually inspect other permitted TSD facilities (RCRA §3007(e)).

B. Non-Hazardous Waste and Landfills

Review: EPA "shall review" state plan guidelines "from time to time" but not less frequently than every three years (RCRA §§4002(b) & 4007(a)).

C. Underground Storage Tanks

Each state "shall make" 2 separate inventories (petroleum and other regulated substances) of all USTs located within the state and submit the data to EPA (RCRA §9002(c)).

IV. FEDERAL RESIDUAL ENFORCEMENT AUTHORITY

A. Hazardous Waste Management

EPA retains authority to enforce in states with authorized programs where a violation of requirements occurs.

The following enforcement tools are explicitly elaborated in the statute:

- **Notice and Order:** EPA may issue an order or commence a civil action after giving notice to states (RCRA §3008(a)(2)).
- **Corrective action orders:** EPA "may issue" an order to an interim status facility requiring corrective action if there has been a release of hazardous waste (RCRA §3008(h)).
- **Revocation:** If a violation of requirements is not corrected after notice, EPA "may" suspend or revoke an operator's permit whether it was issued by EPA or the state (RCRA §3008((a)(3)).

B. Non-Hazardous Waste and Landfills

EPA has authority to enforce against individual violators in states with authorized programs only where a violation of requirements may present an "imminent and substantial endangerment to health or the environment" (RCRA §7003(a)). However, once a EPA determines a state has not adopted an "adequate" program, it may use all of its enforcement authority (RCRA §§3007-3008) against individual violators (RCRA §4005(c)).

If EPA "determines" that a state has not adopted an "adequate" program that includes establishing a permit system for sanitary landfills receiving household hazardous waste or small quantity generator hazardous waste, EPA "may use" the enforcement measures available to it under RCRA §§3007 (*inspections*) & 3008 (*orders and hearings*) (RCRA §4005(c)).

C. **Underground Storage Tanks**

EPA retains authority to enforce in states with authorized programs where a violation of requirements occurs.

EPA "may issue" a *compliance order* or commence *civil action* in a state with an authorized program only after giving prior notice to the state (RCRA §9006(a)).

V. **GRANTS AND ASSISTANCE TO STATES**

A. **Hazardous Waste Management**

Grants are provided to states to assist in the development and implementation of authorized hazardous waste programs (RCRA §3011).

B. **Non-Hazardous Waste and Landfills**

Grants are available to states that apply and have an approved plan. Upon withdrawal of approval of a state plan, EPA "shall withhold" federal financial and technical assistance until approval is reinstated (RCRA §4007(b)).

EPA "is authorized to provide" financial assistance to states for implementation of programs to provide solid waste management, resource recovery, resource conservation services, and hazardous waste management (RCRA §4008(a)(2)).

EPA "may provide" technical assistance to states to develop and implement state plans (RCRA §4008(d)).

EPA "shall make grants" to states to provide rural community assistance (RCRA §4009)).

VI. **NONCOMPLIANCE AND WITHDRAWAL**

A. **Hazardous Waste Management**

"Whenever" EPA determines that a state is not administering and enforcing an authorized program, EPA "shall notify" the state (RCRA §3006(e)).

After notice, if the state fails to comply, EPA "shall withdraw authorization" of the state program and establish a federal program (RCRA §3006(e)).

B. Non-Hazardous Waste and Landfills

EPA must provide notice and public hearing to the state if its plan is not meeting minimum requirements (RCRA §4007(a)).

EPA "shall withdraw" approval of a plan, after notice and public hearing, if it fails to meet minimum criteria (RCRA 4007(a)).

C. Underground Storage Tanks

"Whenever" EPA determines (after public hearing) that a state is not administering and enforcing an authorized program, EPA "shall notify" the state (RCRA §9004(e)).

After notice, if the state fails to comply, EPA "shall withdraw authorization" of the state program and reestablish the federal program (RCRA §9004(e)).

Part Eight



Surface Mining Control and Reclamation Act

I. INTRODUCTION

The Surface Mining Control and Reclamation Act (SMCRA) (SMCRA §101-908, 30 U.S.C. §§1201-1328) is administered by the Office of Surface Mining within the Department of Interior (DoI). There are three major authorization programs under the Act, including (1) the Abandoned Mine Reclamation, (2) Surface Coal Mining regulatory program, and (3) Federal lands. States submit programs to DoI for approval, and if approved, have "exclusive jurisdiction" over mining activity within the state, although this is limited by federal oversight and a certain level of federal residual authority. Approved programs must meet certain federal requirements. If there is no federal program in place, DoI must promulgate and implement one for the state.

The Surface Coal Mining regulatory program is the main authorized program under SMCRA. It is a regulatory and permitting program designed to require active coal mining operations to comply with detailed environmental performance standards and reclamation requirements. States devise with programs, and if approved, have regulatory and permitting authority over the coal mining operations.

II. AUTHORIZATION PROCESS

A. Abandoned Mine Reclamation

State Responsibility: Each state shall have "exclusive responsibility and authority" to implement the provisions of an approved program (SMCRA §405(d)).

State Plan Submission: Each state "may" submit to DoI a State Reclamation Plan and annual projects (SMCRA §405(b)).

Plan Approval/Disapproval: If approved, the state has exclusive responsibility and authority to implement plan provisions (SMCRA §405(d)). If disapproved, the state cannot receive federal funding assistance for reclaimed areas.

Criteria for Plan Approval: A state must have a delegated a Surface Coal Mining Regulation program (Title V) in order to qualify for an Abandoned Mine Reclamation program. Once a Title V program is delegated to the state, DoI determines

if the state has developed a program for reclamation and "has the ability and necessary state legislation to implement" it (SMCRA §405(d)).

B. Surface Coal Mining Regulation

State Responsibility: With an approved program, a state obtains "exclusive jurisdiction" over the regulation of surface coal mining and reclamation operations (SMCRA §503(a)). However, "exclusive" here means "primary" as it is bound by federal oversight and potential direct federal enforcement.

Additionally, a state can assume "primary regulatory authority" over areas designated unsuitable for surface coal mining pursuant to SMCRA §503.

State Plan Submission: If a state "wishes" to have jurisdiction over coal mining it "shall" submit a program for DoI approval (SMCRA §503).

In addition to a Surface Coal Mining Regulatory program, in order to be eligible for "primary regulatory authority," over designation of areas unsuitable for coal mining, the state "shall establish" a planning process to determine areas unsuitable for surface coal mining operations. (SMCRA §522).

Plan Approval/Disapproval: If approved, the state assumes "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" (SMCRA §503(a)). If the program is disapproved, or if the state does not have a program, the DoI "shall promulgate and implement" a federal program for the state (SMCRA §504(a)). A plan may be approved or disapproved in whole or in part (SMCRA §503(b)).

Criteria for Plan Approval: The program "shall" be approved if it "demonstrates" that the state "has the capability of carrying out the provisions" through (SMCRA §503(a)):

- law regulating the substance;
- law with sanctions for violations the civil and criminal penalty provisions of the plan shall be "no less stringent" than federal provisions (SMCRA §518(i)); and
- the enforcement provisions shall, "at a minimum", incorporate sanctions "no less stringent" than those set forth in this section (SMCRA §521(d));
- state regulatory authority with "sufficient administrative and technical personnel, and sufficient funding"; and
- law providing for "effective" implementation, maintenance, and enforcement of permit systems.

C. Federal Lands

State Responsibility: A cooperative agreement between the state and DoI will "provide for state regulation of surface coal mining and reclamation operations on federal lands within the state" (SMCRA §523(c)).

State Plan Submission Process: A state with an approved program (SMCRA §503) "may elect" to enter into a cooperative agreement (SMCRA §523(c)).

Plan Approval/Disapproval: If disapproved, the state would not regulate federal lands within the state.

Criteria for Plan Approval: The state must have the "necessary personnel and funding to fully implement" the cooperative agreement (SMCRA §523).

III. OVERSIGHT REQUIREMENTS

A. Abandoned Mine Reclamation

DoI will "monitor the progress and quality" of the reclamation program (SMCRA §406(i)).

DoI "shall require" annual reports "as may be necessary" to be submitted by the state (SMCRA §406(j)).

A state with an approved state program "shall report to the Congress" on operations under the fund (SMCRA §412).

B. Surface Coal Mining Regulation

The DoI "shall" make inspections of operations "as are necessary to evaluate the administration of approved State programs" (SMCRA §517(a)).

IV. FEDERAL RESIDUAL ENFORCEMENT AUTHORITY

A. Abandoned Mine Reclamation

DoI "shall have the power and authority, if not granted it otherwise" to engage in "any work and to do all things necessary" to implement the provisions of this subchapter (SMCRA §413(a)).

DoI may "do all things necessary including promulgation of rules and regulations" (SMCRA §413(a)).

B. Surface Coal Mining Regulation

DoI "may provide" for the federal enforcement of that part of the state program not being enforced, and may also enforce mine-by-mine (SMCRA §§504(b) & 521(b)).

Ten day notification period from DoI to state and then federal inspection. Where there is imminent danger and the state has failed to take appropriate action, DoI can act without notification (SMCRA §521(a)(1)).

C. Federal Lands

Incorporation of state program requirements into permits "shall not...limit in any way" the authority of DoI to issue new regulations or revise a federal land program (SMCRA §523(b)).

With respect to cooperative agreements, "[n]othing in this subsection shall be construed as authorizing [DoI] to delegate to the States" the duty to approve mining plans on federal lands (SMCRA §523(c)).

V. GRANTS AND ASSISTANCE TO STATES

A. Abandoned Mine Reclamations

States with an approved program (under SMCRA §503 on control of environmental impacts) can apply to the federal abandoned mine reclamation fund to get a grant for their own state fund (SMCRA §§401(a) & 405(c)).

B. Surface Coal Mining Regulation

Annual grants to state for purpose of assisting state in developing, administering, and enforcing state programs. DoI can also give technical assistance and assistance with inventories (SMCRA §705).

C. Federal Lands

See Surface Coal Mining provisions.

VI. NONCOMPLIANCE AND WITHDRAWAL

A. Abandoned Mine Reclamation

DoI can withdraw "approval and authorization" if state program is not in compliance with the procedures, guidelines, and requirements under SMCRA §405(a) (SMCRA 405(d)).

B. Surface Coal Mining Regulation

Whenever a federal program is implemented for a state, any statutes or regulations of the state which are in effect and "interfere with the achievement of the purposes and requirements of the federal program" are "preempted and superseded" by the federal program (SMCRA §504(g)).

If a state "fails to implement, enforce, or maintain its approved State program", the DoI "shall" implement a federal program (SMCRA §504(a)(3)).

If a state is not enforcing any part of an approved program, DoI may provide for the federal enforcement of that part of the state program not being enforced (SMCRA §504(b)).

Prior to implementation of any federal program, DoI "shall give" notice and hold a public hearing (SMCRA §504(c)).

If failure of state to enforce program "effectively", DoI gives notice and holds hearing. DoI must find (1) violations, (2) failure of state to enforce effectively, and (3) state has not "adequately" demonstrated its "capability and intent" to enforce. DoI gives public notice of finding and takes over enforcement until state improves (SMCRA §521(b)).

C. Federal Lands

See Surface Coal Mining provisions.