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EPA Administrator Has Broad Discretion in SDWA Aquifer Designation

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RECENT DEVELOPMENTS

EPA ADMINISTRATOR HAS BROAD DISCRETION IN SDWA AQUIFER DESIGNATION

ADMINISTRATIVE LAW—SAFE DRINKING WATER ACT: The Fourth Circuit court of appeals upholds the Environmental Protection Agency's designation of seven drainage basins as a single aquifer under the Safe Drinking Water Act although each basin acts independently as a separate and distinct hydrogeologic unit. *Montgomery County Maryland v. Environmental Protection Agency*, 16 ENVIR. REP. (BNA) 1541 (1981).

In 1974, Congress passed the Safe Drinking Water Act¹ (SDWA) to assure that major public water supplies would meet minimum national standards for the protection of public health. The SDWA provides that the administrator of the Environmental Protection Agency (EPA) may determine that an area contains an aquifer which is its sole or principal source of drinking water and which, if contaminated, would create a serious health hazard to residents of that area.² After publication of this determination in the Federal Register, projects that may contaminate the aquifer through a recharge zone will not be eligible for federal financial assistance.³

Citizens of Montgomery County, Maryland, were concerned that a proposed landfill in their neighborhood would contaminate the local water supply. Consequently, two citizens' committees asked the EPA to designate a 40 square mile area as an aquifer pursuant to the SDWA.⁴ Thereafter, the EPA administrator determined that an aquifer, as defined by the SDWA, existed in the county.

The SDWA requires the existence of three essential elements before the EPA administrator designates an aquifer. First, the area must contain a single aquifer. Second, the aquifer must be the sole or principal drinking

1. 42 U.S.C. §§300f to 300j-9 (1976).

2. If the Administrator determines, on his own initiative or upon petition, that an area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health, he shall publish notice of that determination in the Federal Register. After the publication of any such notice, no commitment for Federal financial assistance . . . may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health. . . .

42 U.S.C. §300h-3(e) (1976).

3. *Id.*

4. The committees originally petitioned pursuant to §300h-3(a)(1), which deals exclusively with injection wells. The administrator allowed the committees to amend their petition to proceed under §300h-3(e), which applies to other possible sources of contamination.

water source for the area. Finally, the administrator must find that contamination of the aquifer could pose a significant health hazard to the area.⁵ The issue in *Montgomery County Maryland v. EPA*⁶ was whether a single aquifer existed in the area designated by the EPA administrator pursuant to the request of the citizens' committees.

EPA officials found that local geologic conditions in Montgomery County made identification of an aquifer difficult. Therefore, those officials asked the United States Geological Survey (USGS) to study a larger hydrogeologic area which included the 40 square mile area and determine whether its designation as an aquifer could be "scientifically justified."⁷ The USGS determined that the larger, 130 square mile area, which included seven separate drainage basins, was suitable for designation as an aquifer.⁸ The administrator, after notice, comment, and public hearings, designated that area as an aquifer under the SDWA and further found that it was a principal source of drinking water for the area.⁹ Therefore, any project seeking federal assistance, including the landfill, would have to show that it would not contaminate the underground water in any of the seven drainage basins to qualify for such assistance. Following the EPA administrator's action, the state denied Montgomery County a permit for the landfill.¹⁰

The county petitioned to the Fourth Circuit court of appeals for review of the administrator's action. The petition argued that the designation of seven basins as a single aquifer was unreasonable, arbitrary, and capricious because each basin acted as a separate and distinct hydrogeologic unit. Data in the USGS report which indicated an absence of groundwater movement between the individual basins supported the county's contention.¹¹ Pollution of one basin could not contaminate any other basin. The county argued that these seven basins therefore did not comprise a single aquifer.

The Fourth Circuit did not find this argument persuasive. The court noted that, because of varied hydrogeologic formations throughout the United States, Congress necessarily vested broad discretion in aquifer boundary determination with the EPA administrator. The court cited three points in support of the administrator's decision. First, each of the seven basins contributed to the groundwater in the original 40 square mile area. Second, the designated aquifer incorporated the minimum number of drainage basins necessary to encompass the aquifer. Third, the boundary

5. 42 U.S.C. §300h-3(e) (1976); see 8 ST. MARY'S L.J. 40 (1976).

6. *Supra*, note 4. 16 ENVIR. REP.

7. *Id.* at 1542.

8. *Id.*

9. *Id.* at 1543.

10. *Id.* at 1542 n. 6.

11. *Id.* at 1543.

of the designated aquifer followed the outer perimeter of the basins and could be readily identified and mapped.¹²

The court next addressed the question of whether the administrator had adequately demonstrated that the aquifer was a primary source of drinking water for the designated area. Proposed EPA regulations defined a primary source as one which supplies 50 percent or more of the drinking water in an area.¹³ The determination of the relative amount of water provided by the aquifer to the community posed a problem because most of the water was drawn through unmetered private wells. This fact forced the USGS to calculate the amount of drinking water taken from the aquifer by applying an average rate of per capita water consumption to the estimated population served by the individual and public wells. Comparison of this value with the amount of metered surface water supplied to residents of the area indicated that approximately 62 percent of the area's drinking water came from the underground aquifer.¹⁴

The county argued that this USGS estimate was flawed because the agency used 1971 and 1976 maps of the area as a basis for population determination instead of 1979 aerial photographs.¹⁵ However, the court found that any discrepancy in the older data had been compensated for by applying a reasonable growth rate to population figures calculated using the older maps.¹⁶ The county also argued that proposed regulations provided that alternative sources of drinking water to be considered before the designation of an aquifer as a principal source. The court found that these regulations did not require the administrator to consider the possible effect of a future expansion of the surface water system before making a principal source determination. This finding indicates that sources must be currently available before their consideration as an alternate supply is mandatory.

Congress has recognized the importance of safe drinking water to the people of this country and enacted the SDWA to preserve this resource. In *Montgomery County Maryland v. EPA*, the court overlooked inconsistencies of logic and questionable data to support the "rationality" of the EPA administrator's designation of seven distinct underground basins as a single aquifer. This decision indicates that, in the Fourth Circuit at least, the court will give great deference to administrative decisions which protect drinking water sources.

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*