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PROTECTION OF UNDERGROUND DRINKING WATER SUPPLIES—THE GONZALEZ AMENDMENT TO THE SAFE DRINKING WATER ACT

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On December 17, 1974, President Gerald R. Ford signed into law the Safe Drinking Water Act.⁸⁹ The Act for the first time establishes a timetable for the establishment of national drinking water standards. Through provisions of this Act, the Environmental Protection Agency (EPA) will begin the task of systematically defining and identifying the actual extent and severity of ground water contamination and will, in approximately one to two years, adopt appropriate National Primary Drinking Water Standards (NPDWS). These standards will define the maximum permissible contamination levels for a score of identifiable contaminants found in our nation's water supply. In turn, these maximum contaminant levels will be used by selected state agencies to execute their primary enforcement responsibilities under the regulatory provisions of the new Act.

Congress enacted the Safe Drinking Water Act in order to assure that public water systems complied with minimum water quality standards necessary to protect the public health.⁹⁰ Existing federal drinking water standards promulgated in 1962 under the 1893 Quarantine Act were deemed to be inadequate by Congress because, among other reasons, existing federal standards were interpreted by the Department of Health, Education and Welfare as permitting the enforcement of standards only with respect to contaminants which caused communicable diseases. The Safe Drinking Water Act establishes federal standards for protection from all harmful contaminants of every conceivable nature, and the standards are applicable to all public water systems serving the public.

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89. 42 U.S.C.A. § 300f (Supp. I, 1975).

90. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6454 (1974).

Another basic policy finding made by Congress was that the majority of the states had not adopted any drinking water standards, and among those who did adopt them, no uniform set of standards existed.⁹¹ Congress also found that numerous drinking water systems across the country were unable to adequately collect and treat water, were unable to hire or retain adequately trained personnel, were inadequately inspected and monitored, and generally tended to hide their shortcomings behind a "wall of community apathy."⁹² Finally, Congress took cognizance of a disturbing trend, indicated by recent studies, which revealed a cessation in 1951 in the decrease in the average number of water-borne outbreaks of communicable diseases and a subsequent slight increase in their incidence.⁹³

THE SAFE DRINKING WATER ACT

The ultimate aim of the Safe Drinking Water Act is to establish permanent national drinking water standards. Nonetheless, the Safe Drinking Water Act requires the EPA Administrator to publish proposed Interim Primary Drinking Water Standards within 90 days after enactment of the Act, and, within an additional 90 days, to promulgate Interim Primary Drinking Water Regulations.⁹⁴ Congress intended that these Interim Regulations be established quickly, and anticipated that they would, for the most part, be predicated on previously established USPHS drinking water standards.⁹⁵ The proposed regulations are to take effect not later than one and a half years after their promulgation, and the legislative history of this section reveals that Congress intended that public water systems not able to immediately comply with the Interim Primary Drinking Water Standards be given at least 18 months in which to do so.

As an initial step towards the adoption of permanent National Primary Drinking Water Standards, the Act requires that the Administrator contract with the National Academy of Sciences, or a similar agency, to conduct a study to determine the appropriate maximum contaminant levels for all substances to be permitted in drinking water so as to "protect the health of persons from any known or anticipated adverse

91. 5 ENVIRON. REP. 847 (Oct. 4, 1974).

92. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6454-60 (1974).

93. *Id.* at 6457.

94. 42 U.S.C.A. § 300g-1(a)(1) (Supp. I, 1975).

95. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6470 (1974).

effects” of such contaminants.⁹⁶ The National Academy of Sciences has two years in which to make its report to Congress, and upon receipt of this report, the EPA is required to publish regulations which embody the recommended maximum contaminant levels for all measurable pollutants. These recommended maximum contaminant levels are goals which are to “be set at levels which, in the Administrator’s judgment based on such report, no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety”⁹⁷

Concomitant with the setting of recommended maximum contaminant levels, the Administrator must publish in the Federal Register proposed revised national primary drinking water regulations, and within 180 days thereof promulgate such revised drinking water regulations.⁹⁸ Public water systems will then have a period of 18 months in which to comply with the revised primary drinking water regulations, unless such public water system sought and was granted a variance or exemption under the Act.⁹⁹ In adopting these revised national primary drinking water standards, the Administrator is under a duty to ensure that the revised maximum contamination levels under the revised national primary drinking water standards are “as close to the recommended maximum contaminant levels . . . as is feasible”¹⁰⁰

Finally, the Act requires the Administrator to promulgate national secondary drinking water regulations¹⁰¹ which are not federally enforceable. Thus, if the Administrator finds that a national secondary drinking water standard is being violated, he will be required to notify the state in which the violation takes place and provide that state “such advice and technical assistance . . . as may be appropriate to bring the system into compliance with such regulation or requirement by the earliest feasible time.”¹⁰²

State Enforcement of National Drinking Water Standards

In drafting the Safe Drinking Water Act, Congress clearly intended a

96. 42 U.S.C.A. § 300g-1(e)(1) (Supp. I, 1975).

97. *Id.* § 300g-1(b)(1)(A), (B).

98. *Id.* § 300g-1(b)(2).

99. *Id.* §§ 300g-4, 300g-5 (Supp. I, 1975).

100. *Id.* § 300g-1(b)(3) (Supp. I, 1975). The term “feasible” is understood to mean, under the Act, “feasible with the use of the best technology, treatment techniques, and other means, which the Administrator finds are generally available (taking cost into consideration).” *Id.*

101. *Id.* § 300g-1(e).

102. *Id.* § 300g-3(a)(1)(A) (Supp. I, 1975).

primary role of the states in assuming responsibility for implementing and enforcing the National Drinking Water Standards. While the Act assures the federal government a standard-setting role and further provides for federal back-up enforcement where needed,¹⁰³ the statute places upon those states determined by the Administrator to have complied with certain substantive conditions listed in section 1413(a), the full primary enforcement responsibility under the Act.¹⁰⁴

Assumption of enforcement responsibilities by a state has extensive value. For example, only those states with primary enforcement responsibility are given authority to grant variances and exemptions. In addition, only these states are given the right to be accorded prior notice of the commencement of a federal civil action against them, and only such states are entitled to receive all necessary federal advice and technical assistance needed to bring them into compliance with the Act. Furthermore, under section 1443, only those states that have or will assume primary enforcement responsibility qualify for funded grants to implement public water system supervision programs. Indeed, because of the extreme importance of the designation of authority to assume primary enforcement responsibility, Congress intended that the EPA not deny any such application unless there was evidence of a clear failure by the state to meet the requirements of the section.¹⁰⁵ The Act provides that a state's assumption of primary enforcement responsibility will be revoked upon determination that the specific conditions are no longer being met.

EPA's Enforcement Responsibilities

The EPA retains enforcement responsibility under the Act in all cases where states fail to apply or qualify for assumption of primary enforce-

103. *Id.* §§ 300g-1, 300g-3 (Supp. I, 1975).

104. *Id.* § 300g-2(a)(1)-(5) (Supp. I, 1975). These substantive conditions include:

(1) Adoption by the State of drinking water regulations at least as stringent as those of the National Primary Drinking Water Standards;

(2) Adoption and implementation by the State of procedures for enforcement of such State regulations and, additionally, procedures for monitoring and inspecting the State's water supplies;

(3) Demonstration of an intent to maintain an adequate record and report rendering system;

(4) Giving effect to a variance and exemption system which allows permits given or issued under such a system to be no less stringent than similar exemptions or variances possible under sections 1415 and 1416 of the Safe Drinking Water Act;

(5) Adoption by the State of an adequate plan to cover the imperilment of drinking water sources under emergency conditions.

105. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6474 (1974).

ment responsibility, or where such enforcement responsibility has been revoked due to failure to maintain the conditions of the grant of authority. The Act establishes those conditions that will initiate federal enforcement.¹⁰⁶

If the EPA Administrator finds any violation of the Act occurring within a state which has assumed primary enforcement responsibility, he must first notify that state of the alleged violation. If such noncompliance extends beyond a 30-day period, the Administrator is required to give public notice of the alleged violation and request that the state report on all remedial action within a 15-day period. If the alleged violation continues for a 60-day period beyond the date of notice, and the state either fails to submit the requisite 15-day report or submits the report but the Administrator, after considering the report, concludes that the state is abusing its discretion, the Administrator is then authorized to commence a civil action under Section 1414(b). It should also be noted that the EPA may initiate civil actions where the Administrator is requested to do so by the chief executive officer of the state or by the state's drinking water agency.¹⁰⁷ In all those cases where a state has not assumed enforcement responsibilities, the EPA Administrator may unilaterally initiate legal actions.

Another important feature of section 1414 is its requirement that public water system operators notify their customers and the news media at least every three months of any failure on their part to (1) comply with any of the National Primary Drinking Water Standards, (2) meet their monitoring requirements, or (3) notify their customers that they have been granted either a variance or exemption from the National Primary Drinking Water Standards by reason of their inability to meet the National Primary Drinking Water Standards.¹⁰⁸ With regard to these requirements, section 1414(c) provides for fines of up to \$5,000 for any willful failure to comply with the notice requirements of the Act. The notice requirement is intended to be an important feature of the Act, and its purpose is to educate the populace concerning the public water system's performance in relation to the goals and objectives of the Safe Drinking Water Act.¹⁰⁹ The EPA Administrator has the task of prescribing, by regulation, the form and manner for giving the requisite

106. 42 U.S.C.A. § 300g-3(a)(1)(A), (B) (Supp. I, 1975).

107. *Id.* § 300g-3(b)(2).

108. *Id.* § 300g-3(c).

109. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6476 (1974).

notice. Presumably, the Administrator will choose to differentiate between the section 1431 type of notice for "imminent and substantial endangerment" violations and less serious violations under other portions of the Act.¹¹⁰

The Act also allows the Administrator to hold public hearings whenever he makes a finding of "noncompliance"¹¹¹ with respect to a given public water system which has assumed primary enforcement responsibilities. The purpose of such public hearings is to enhance public awareness of the alleged problem, to gather information to determine ways in which the system can be brought into compliance within the earliest feasible time,¹¹² and to explore means by which protection of the public health during this period of noncompliance may be maximized.

Variances and Exemptions Under the Safe Drinking Water Act

Perhaps some of the most important features of the Safe Drinking Water Act are its provisions permitting states to grant variances from the National Primary Drinking Water Standards and other provisions governing the exemptions of certain public water systems from full and/or immediate compliance with the Act's mandatory drinking water standards.

There are two bases upon which a state, once having qualified to assume primary enforcement responsibilities under the Act, may grant variances to public water systems. So long as it will not result in an unreasonable risk to health, a state may grant a variance to any public water system which demonstrates to its satisfaction that due to particularly poor raw water characteristics, the water treatment facility will not be able to meet the National Primary Drinking Water Standards. States may also grant variances where they find that due to particularly good water quality standards, specialized treatment techniques are "not necessary to protect the health of persons"¹¹³

In the case of the first type of variance granted, the state must, within one year, prescribe for that public water system a schedule for compliance with the National Primary Drinking Water Standards. In addition it must also prescribe an implementation schedule describing such control measures as are required to insure compliance by that public

110. *Id.* at 6477.

111. 42 U.S.C.A. § 300g-3(a)(1)(A), (B) (Supp. I, 1975).

112. *Id.* § 300g-3(f)(1).

113. 42 U.S.C.A. § 300g-4(a)(1)(B) (Supp. I, 1975).

water system with the National Primary Drinking Water Standards by the end of the variance period. The statute provides that for each state granted variance, the accompanying schedule of compliance will be considered approved by the EPA Administrator unless the Administrator makes a finding that the state in question, "in a substantial number of instances, abused its discretion in granting variances"¹¹⁴ Thus, this section envisions relatively little EPA review of state-granted variances except in those instances where it is deemed necessary to assure effectuation of the Act's policies.¹¹⁵ This section further provides that prior to the time that any variance takes effect, public notice and an opportunity for a public hearing on the proposed variance must be provided.¹¹⁶ The EPA must receive notice of each variance granted by a state and the reasons for such a variance, including the factual findings necessary to support such a decision.

Any state granted primary enforcement responsibility may exempt a public water system from the National Primary Drinking Water Regulations where such water system was in operation at the time the requirement was imposed, or is unable to comply because of economic or other compelling reasons.¹¹⁷ As in the case of variances, the state is required to prescribe, within one year of the date the exemption was granted, a schedule of compliance and a delineation of those interim control measures which must be executed, "as expeditiously as possible," before such an exemption will be granted.¹¹⁸ Additionally, public water systems which have been granted exemptions from the Interim Drinking Water Standards must, in any event, achieve full and final compliance with the national standards no later than January 1, 1981; and an exemption from the Revised Drinking Water Standards must culminate in full compliance within seven years from the date of adoption of the revised rules. As an incentive to those public water systems which opt to integrate into a regional water system, Congress added an additional two years to the exemption period, making the compliance deadline for the Interim Drinking Water Standards January 1, 1983, and the final compliance deadline for an exemption from the revised drinking water standards nine years from the date of their adoption.

114. *Id.* § 300g-4(g)(1).

115. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6479 (1974).

116. 42 U.S.C.A. § 300g-4(c) (Supp. I, 1975).

117. *Id.* § 300g-5(a). Systems put into effect after the effective date are expected to comply with all Safe drinking Water Act requirements without exemptions.

118. *Id.* § 300g-5(b)(2)(A).

The EPA is required to complete a comprehensive review of all previously granted exemptions and a complete review of the policies underlying administration of the exemption program within 18 months after the effective date of the Interim Drinking Water Standards. The findings of this comprehensive review will be studied and viewed in light of the underlying congressional purpose, which was to add to the Safe Drinking Water Act a substitute in the nature of an exemption program for a federal construction grants program, so that hard-pressed communities would be given the time needed to finance required improvements in their water supply systems. The construction grants program approach was rejected because of great uncertainty over the expected costs of required system improvements.¹¹⁹

PROTECTION OF UNDERGROUND WATER SOURCES

General Scheme of Part C of the Safe Drinking Water Act

A regulatory mechanism is set up by part C as additional protection for our nation's underground drinking water sources, to ensure that such underground sources of drinking water will not be degraded by actual or potential underground injections of contaminants and thereby be rendered unfit for consumption. Like the provisions of the Act dealing with surface drinking water sources, section 1422 establishes a federal-state system of creating and enforcing standards for the regulation of underground injection of contaminants. Under this section, the EPA must publish proposed regulations for state underground injection control programs and must promulgate guidelines for states to follow.

The term "underground injection" is defined as "the subsurface emplacement of fluids by well injection."¹²⁰ In proposing regulation for this operation, Congress expressed a concern about the significant hazards associated with an increasingly prevalent use of deep well injections as a method of industrial and municipal waste disposal. Thus, one of the major purposes of Part C of the Safe Drinking Water Act is to deal with the increasing tendency of municipalities and industries to inject sewage, sludge, and numerous wastes deep underground as a means of their disposal.¹²¹

119. 5 ENVIRON. REP. 1298 (Dec. 20, 1974).

120. 42 U.S.C.A. § 300h(c)(2) (Supp. I, 1975).

121. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6481 (1974).

The guidelines to be promulgated by the EPA will eventually require states to prohibit all unauthorized underground injection, i.e., all those not authorized by permit, three years after passage of the Safe Drinking Water Act.¹²² These directives will also require permit applicants to tender satisfactory proof to the state that the requested injections will not endanger drinking water sources and will require states to adopt inspection, monitoring, recordkeeping, and reporting systems in order to effectuate compliance with that part of the Act.¹²³ In any event, these regulations are not intended to have the effect of impeding or interfering with the underground injection of brine or other fluids which are used in connection with oil or natural gas production, or any other underground injection which is an adjunct to the secondary or tertiary recovery of oil or natural gas, unless "such requirements are essential to assure that underground sources of drinking water will not be endangered by such injections."¹²⁴

The legislative history of the term "underground injections" indicates that Congress intended that courts construe this term very broadly to include "any contaminant which may be put below ground level and which flows or moves, whether the contaminant is in semi-solid, liquid, sludge, or any other form or state."¹²⁵ Indeed, Congress' only constraint was expressed as follows: "While Congress does not intend this definition to apply to septic tanks or other individual residential waste disposal systems, it does intend that the definition apply to a multiple dwelling, community or regional system of injection of waste."¹²⁶ From this one can argue that Congress did not intend to limit "well injections" to those by the "classical well injection method," but intended that the definition include authority to regulate open pit, lagoons, man-made structures or excavations, or any other means of "implacing" contaminants below ground.

It is important to recognize that Congress had every intention of protecting not only "currently used sources of drinking water, but also potential drinking water sources . . . which are not presently accessible for use as a community drinking water supply source."¹²⁷ The House Committee in its report made it quite clear that actual contamina-

122. 42 U.S.C.A. § 300h(b)(1)(A) (Supp. I, 1975).

123. *Id.* § 300h(b)(1)(B).

124. *Id.* § 300h(b)(2).

125. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6483 (1974).

126. *Id.* at 6483.

127. *Id.* at 6484.

tion of a drinking water supply—the impacement of contaminants into such supply which exceeded the maximum contaminant levels described in the National Primary Drinking Water Standards—was “not a prerequisite either for the establishment of regulations or permit requirements or for the enforcement thereof.”¹²⁸ In the Committee’s opinion,

the definition would be met if injected material were not completely contained within the well, if it may hinder either a present or potential drinking water source, and if it (or some form into which it may be converted) may pose a threat to human health or render the water source unfit for human consumption.¹²⁹

Interim Regulation of Underground Injections

Section 1424 of the Act adds additional, though *temporary*, protection for underground sources of water where such sources emanate from underground watersheds known as aquifers and constitute the sole or principal supply of drinking water for a designated area. The method of protection differs, depending on which one of two procedures is selected in determining that an area has a sole or principal source aquifer which, if contaminated, would create a significant health hazard.

This section was designed to deal with a limited problem which may arise in the three-year period before state underground injection control programs become effective under section 1421.¹³⁰ More particularly, section 1424(a) calls for the creation of a temporary program of permitting new injection wells in a “designated” area only in those instances where the Administrator has issued a permit authorizing such an injection well.¹³¹ An area lying above an aquifer may be “designated” if such aquifer serves as the sole or principal source of drinking water for that area and, if contaminated, it would pose a significant hazard to the public health.¹³² In any event, any person may petition the Administrator to have an area overlying an aquifer designated as an area in which no new underground injection well may be operated until an applicable underground injection control program becomes effective.

Congress intended that a person seeking a permit under section 1424(a) bear the burden of proving that his underground injection will not contaminate the underground source of drinking water.¹³³ Despite

128. *Id.* at 6484.

129. *Id.* at 6484.

130. *Id.* at 6486.

131. 42 U.S.C.A. § 300h-3(b)(1) (Supp. I, 1975).

132. *Id.* § 300h-3(a).

133. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6487 (1974).

this onerous burden, however, the section does not define the phrase “a significant hazard to public health” nor does it otherwise establish standards or direct the Administrator to issue regulations defining applicable standards to be met by petitioners in discharging their burden of proof. The legislative history sheds little light, if any, on the quantum of “danger” which must exist before a proposed new well injection will be deemed to create a significant hazard to the public health. Without defining the standard, Congress did state that it fell “short of imminent and substantial endangerment,” which is the standard used in section 1431 of the Act to initiate administrative “emergency powers.” A more extensive discussion of the standards and methodology for determining when a significant hazard to the public health exists is presented below.

SECTION 1424(e)—THE GONZALEZ AMENDMENT

The Senate passed its version of the Safe Drinking Water Act (S-433) in June of 1973, without the Gonzalez Amendment. When the House version of the Act went to the House floor for congressional approval, however, Congressman Gonzalez sought to insert the following:

- (e) 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, could 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 (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone.¹³⁴

Gonzalez stated the main purpose of his amendment as follows:

My amendment simply says where you have a community that is dependent for its water source, its principal source or exclusive source of drinking water in an aquifer—and this is true in the case of my own hometown of San Antonio—then if the Administrator discovers that Federal funds are going into any particular purposes which would endanger that source of water, that he shall determine, and so does by publication in the Register, and after publication no commitments for Federal financial assistance would be entered into unless and until it is determined that no such dangerous impact exists.¹³⁵

134. 120 CONG. REC. 10787 (1974) (Act 10804).

135. *Id.* at 10787.

There was hardly any discussion on the floor of the House concerning this amendment and certainly none pertaining to the possible nationwide impact of this amendment, nor any revealing of how the amendment was to coalesce, if at all, into the policy and procedural mechanics of section 1424 in view of the fact that this section was intended to be a stop-gap measure which would terminate as soon as states assumed primary enforcement authority for conducting their own underground injection control programs. Finally, no discussion occurred by Congressman Gonzalez or anyone else concerning what, if anything, his amendment would add to existing congressional authority under the NEPA.

Apparently questions such as those above were not raised because Representative Gonzalez stated that his amendment was aimed solely at rectifying an alleged local abuse which deserved the narrowest scope of congressional attention. Thus, in urging protection of underground water sources, he cited as an example the case of his congressional district which draws its water from an underground aquifer and stated: "perhaps it [his district] is a very unique situation in the country" ¹³⁶ In a further effort to characterize his amendment as a piece of legislation with strictly localized effects, he stated that San Antonio, Texas, which lies in his congressional district, had "developers who are anxious to drill into the aquifer and develop their extensions willy-nilly . . ." and he called these developers "unconscionable predators . . . oblivious to the danger of the basic water supply in our community, and . . . who are looking to Federal funds to carry out the projects . . ." ¹³⁷ Thus, the legislative history fails to reveal any national purpose, although the wording of the amendment, contrary to its intent, purports to apply nationwide.

Congress approved the Gonzalez Amendment by voice vote and thereafter on record voted and passed the main bill itself. At least a half-dozen Texas Congressmen opposed the bill, including the other two Congressmen representing portions of Bexar County, Congressman Kazen and Congressman Fisher.¹³⁸ Thereafter, the House version of the bill (H.R. 13002) was accepted by the Senate along with the Gonzalez Amendment. In the Senate, however, the Gonzalez Amendment itself was amended to read as follows:

136. *Id.* at 10787.

137. *Id.* at 10787.

138. Since taking over Congressman Fisher's seat, duly elected Congressman Krueger has also announced opposition to the Gonzalez Amendment. 120 CONG. REC. 20220 (1974).

(e) 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 (through a grant, contract, loan guarantee, or otherwise) 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, but a commitment for federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.*¹³⁹

Apparently, the Senate altered the Gonzalez Amendment in very significant ways. It substituted the word "would" in the first sentence of section 1424(e) for the word "could." The Senate also added a significant segment to the last sentence of the amendment which has the effect of completely exempting certain federal funds from the reach of section 1424(e) if the intended use of such funds is to ensure that the relevant project will be planned and designed to avoid contaminating such aquifer. On November 26, 1974, the Gonzalez Amendment, as amended, was adopted by the Senate, and the entire bill was returned to the House and adopted by the House on December 3, 1974.

The Scope and Operation of the Amendment

Congressman Gonzalez was under the impression that his district represented a "unique" situation. Yet, it is known that groundwater constitutes 2,000 to 3,000 times the amount of water represented by all surface water combined; and it is further estimated that groundwater represents 97 percent of all fresh water supplies in the United States upon which over 100 million Americans rely for some portion of their drinking water.¹⁴⁰ The exact amount of this underground water found in aquifers may yet be undetermined, though it is known, for example, that Texas itself has approximately six aquifers. The Edwards Aquifer, and the surface land which contributes recharge to it, alone covers several million acres and spans over 11 counties in Texas. The Edwards Aquifer was the subject of the Gonzalez Amendment.

Thus, potentially hundreds of communities within this eleven-county area face the possibility of being denied federal financial assistance for a

139. 42 U.S.C.A. § 300h-3(e) (Supp. I, 1975) (emphasis added).

140. See generally, EPA, NATIONAL SAFE DRINKING WATER STRATEGY (1975).

score of federal projects upon the triggering of section 1424(a) or section 1424(e). In fact, local environmental groups in the San Antonio metropolitan area have already filed a section 1424(e) determination petition with the EPA Administrator, seeking to have the Edwards Aquifer designated a sole or principal source of drinking water for the City of San Antonio. The concern most often expressed by such groups is that the supply of drinking water for the City of San Antonio will become unfit for use as the pace of development over the Edwards Aquifer quickens.

A close analysis of the amendment reveals how such a determination is to be made. First, the amendment's procedure is initiated unilaterally by the EPA Administrator, or upon the filing of a petition by an interested party. This condition being met, the Administrator must then determine if an area has: (1) an aquifer, (2) which is the sole or principal water source for the area, (3) and which, if contaminated, would create a significant hazard to the public health.

Where the facts so warrant, and the Administrator makes the requested determination, he must publish notice of that determination in the Federal Register. Upon publication of such notice, no federal financial assistance may be offered for any project which the Administrator subsequently determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health. The Gonzalez Amendment provides, however, that federal funds may be procured if they are to be used to plan or design the project to assure that it will not contaminate the aquifer.

How this amendment is to operate in practice is difficult, if not impossible, to discern. Congress' shortcomings or oversights in passing an amendment fraught with definitional gaps and without the slightest indication as to how it is to operate, not only within the context of the entire bill, but also within a constitutional context, are apparent.

Despite what ambiguities may now exist in the amendment itself, the EPA must soon decide whether a 1424(e) determination is warranted in the case of the Edwards Aquifer, by virtue of the fact that a 1424(e) petition was filed shortly after enactment of the Safe Drinking Water Act on behalf of the Sierra Club, the League Of Women Voters, and Citizens for a Better Environment of the City of San Antonio. Notice of the receipt of this petition was published in the Federal Register on March 6, 1975.¹⁴¹ This notice stated that data and references to rele-

141. 40 Fed. Reg. 10514 (1975).

vant sources of information would be welcome, and that if a significant public interest in this matter became apparent, the EPA would consider holding a public hearing. Such a hearing was deemed necessary and was held in San Antonio, Texas, on June 4, 1975. On that date over 50 persons from all levels of government and the private sector offered testimony concerning all aspects of the question of whether the Edwards Aquifer area should be "determined", pursuant to the amendment, to be a sole or principal drinking water source for the area which, if contaminated, would create a significant hazard to the public health.

Perhaps the threshold question in the minds of most participants, as well as the hearing examiners at the June 4, 1975, hearing was the question of whether or not the EPA Administrator had the discretion of not making a "determination" once all the information is accumulated. In other words, was there *any* state of affairs in which EPA would *not* be obligated to make a section 1424(e) determination under the Edwards petition?

To answer this question, the language of section 1424(e) should be compared with that of section 1424(a), which states that the Administrator "may" designate an area upon determining that the area has an aquifer which, if contaminated, would create a significant hazard to public health. Section 1424(e) is couched in similar terms. It reads that "if" the Administrator makes a determination, such as the one described in section 1424(a), he shall publish notice of that determination in the Federal Register and thereafter no commitment for federal financial assistance may be entered into for any project if the Administrator determines such project may contaminate the aquifer through a recharge zone.

Obviously, from the amendment's language the Administrator is imbued with a "threshold" level of discretion in that he must, at some point, determine whether the statute is to apply at all in a given factual situation. Thus, the Administrator must ascertain that (1) an area has an aquifer, (2) that such aquifer is the *sole or principal* water source for *that* area, (3) that if *contaminated*, the development project causing such contamination is being funded by federal financial sources, and (4) that such contamination *would* create (5) a *significant* hazard to the *public* health.

There are quite a number of factors involved in the Administrator's "threshold determination" under section 1424(e), and in the absence of any one of these factors the agency action described as a section

1424(e) “determination” will be precluded. Restated, these factors determine the threshold responsibility below which agency discretion *does* exist and is to be exercised whenever the Administrator attempts to ascertain whether a “determination” is justified. Support for this view of agency “threshold discretion” can be drawn from those cases which deal with the right of agencies to make threshold determinations in deciding whether or not to file environmental impact statements under the National Environmental Policy Act of 1969.¹⁴² Typical of these is the case of *Save Our Ten Acres v. Kreger*.¹⁴³ This action was a suit to enjoin the General Services Administration (GSA) from constructing a federal office building in downtown Mobile, Alabama. The sole basis for appeal of the trial court judgment against the plaintiffs was the alleged failure on the part of GSA to file a detailed environmental impact statement as required of all federal agencies with regard to any proposed major federal actions which significantly affected the quality of the human environment.¹⁴⁴

The GSA stipulated that no environmental impact statement had been filed, but took the position that none was needed because their federal action would not significantly affect the quality of the human environment. In its decision, the Court of Appeals for the Fifth Circuit recognized that federal agencies had a right to make a discretionary threshold determination as to whether or not their project constituted a major federal project which significantly affected the environment and, therefore, had a concomitant right to determine whether or not they were under a compulsion to file a environmental impact statement in any given case. The court, however, rendered its decision on the narrower issue of what constituted a proper standard for judicial review of such agency threshold discretion. The appellate court held that the lower court erred when it ruled that GSA’s threshold determination that

142. See, e.g., *Harlem Valley Transp. Ass’n v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Maryland-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973); *First Nat’l Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1974); *Jones v. U.S. Dept. HUD*, 390 F. Supp. 579 (E.D. La. 1974); *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974).

143. 472 F.2d 463 (5th Cir. 1973).

144. *Id.* at 464. See generally, 42 U.S.C.A. § 4332 (Supp. 1975).

its project would not significantly affect the quality of the environment could not be overturned except upon a showing that it was arbitrary or capricious, or constituted an abuse of discretion. Instead, the Court of Appeals for the Fifth Circuit ruled that a more relaxed standard of "reasonableness" of the agency decision was more appropriate in light of the congressional policy of evaluating all environmental projects to the fullest extent possible.¹⁴⁵

Given the similarity of the NEPA language construed by the federal court in *Save Our Ten Acres v. Kreger* and that found in the Safe Drinking Water Act, one can expect that the present position of the EPA Administrator under section 1424(e) will be deemed to be similar in many respects to that position held by agency heads under the NEPA, whenever they must determine whether or not their agency actions require the filing of a detailed environmental impact statement. Substantively, the question must be asked, what exactly are the threshold sub-determinations that must be made by the Administrator under a section 1424(e) "threshold determination"? The answer is not as clear as it might appear at first glance.

Heard quite frequently at the EPA hearing on the Edwards petition in San Antonio on June 4, 1975, was the viewpoint that once the EPA Administrator merely decided that the Edwards Aquifer served as the sole or principal drinking water source for the City of San Antonio, Texas, that he would thereafter, of necessity, have to publish notice of such a determination in the Federal Register, subsequent to that event all commitments of federal financial assistance would be contingent upon approval by the EPA that the particular project under review would not contaminate the aquifer so as to create a significant hazard to the public health. Such a viewpoint, of course, assumes the further elements necessary to be found by the EPA, i.e., that contamination will occur, and, if such contamination occurs, a significant health hazard would result. Such tautological reasoning eliminates any necessity for the EPA Administrator to investigate facts sufficient to determine that such contamination presently exists, or even if it does exist, that such contamination has any causal relation to any present or potential public health hazard.

The EPA will be unable to base its "threshold determinations" under section 1424(e) on such spurious grounds. In the writers' opinion, the development of case law under environmental statutes similar to the Safe

145. *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

Drinking Water Act reflects a strong trend and growing concern by our courts to ensure that environmental decisions made by the EPA are based on the most stringent of methodological grounds. In most of the cases reviewed by the writers, the EPA was required to empirically demonstrate the causal relationships between facts alleged and the causes and effects alleged to follow.¹⁴⁶ Thus, in the writers' opinion, before the Administrator can make a valid section 1424(e) determination, he will be required not only to show that an aquifer serves as a sole or principal drinking water source for a given area, but also that the various threshold sub-determinations discussed above have been met. Among other things, such sub-determinations must show that the aquifer is now contaminated or that the likelihood of its becoming contaminated has been raised to the level of certainty. The record will also have to show that the nature and magnitude of such contamination *will* create a direct, provable, and significant hazard to the health of a significant portion of the general public residing in such area. In the absence of such a factual chain of empirical evidence demonstrating a cause and effect relationship between the harm and risk perceived and the actual degree of damage created, it is the writers' opinion that the Administrator's determination will be susceptible to a successful legal challenge.

The fact that courts are imposing on the EPA increasingly rigorous standards of rationality and empirical proof in its decision-making process, is best illustrated by the case of *Ethyl Corp. v. EPA*,¹⁴⁷ which dealt with the section of the Clean Air Act permitting the EPA Administrator to:

[c]ontrol or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additives *will* endanger the public health or welfare¹⁴⁸

In this case the plaintiffs challenged the EPA's authority to issue regulations pursuant to the above quoted statutory provision on the grounds that the EPA incorrectly interpreted the provision and therefore used an incorrect legal standard when it made the initial threshold determinations upon which the EPA based the exercise of its right to promulgate regulations. The plaintiffs also argued that the evidence,

146. *Ethyl Corp. v. EPA*, 7 ERC 1353 (D.C. Cir. 1975). See also *Reserve Mining v. United States*, 498 F.2d 1073 (8th Cir. 1974).

147. 7 ERC 1353, 1357 (D.C. Cir. 1975).

148. *Id.* at 1361, 1363.

upon which the EPA sought to base its initial threshold determination, did not support the EPA's decision and at best was "speculative and inconclusive." The appellate court agreed with both contentions of the plaintiff. The court rejected the EPA's argument that the statutory standard of "will endanger the public health" was a delegation of a "quasi-legislative" power to the EPA Administrator and not a requirement that he reach a reasoned determination based solely on the available scientific and medical data. The court pointed out that the statute sets forth a strict standard of factual proof that must establish a causal connection between lead emissions and the resulting harm. In the absence of scientifically proven causation, the EPA's decision can only be arbitrary and capricious.¹⁴⁹

The *Ethyl* case which dealt with but one threshold sub-determination, i.e., that lead emission products will endanger the public health, makes it clear that the EPA in exercising its authority under section 1424(e) will have to construct a rigorous methodological basis for *at least* three threshold sub-determinations under that provision. First, the EPA will have to determine that an area has an aquifer which is the *sole* or *principal* drinking water source for that area. A second determination must be whether the aquifer *is contaminated* at present or with a high degree of probability is *about to become contaminated*, taking into account such factors as the rate of pollution-creating development over the aquifer balanced against the aggregate pollution abatement measures being implemented by various governmental bodies in that area. Third, the EPA will have to prove that where the aquifer is or is about to become contaminated, that such contamination *will* create a significant hazard to the public health.

The problem with making sub-determinations of this nature under the Gonzalez Amendment is that the amendment does not define what a sole or principal drinking water source is, nor what constitutes contamination. The amendment does not even define a legal standard for judging the quantum of proof needed to show that such contamination would create the type of harm which constitutes a "significant hazard" under section 1424(e). The amendment also does not define what is meant by "the public health." In addition to these shortcomings, the Gonzalez Amendment does not grant to the EPA the authority to define the substantive meaning of these terms by rule or regulation. Given this state of affairs and the fact that the string of threshold sub-determina-

149. *Id.* at 1376.

tions which will be required under the Gonzalez Amendment must meet minimal standards of rationality, one wonders how the EPA will be able to make a determination under 1424(e), at least until regulations are promulgated which clarify the definitional yardsticks to be used by the EPA in giving meaning to these terms. It should also be pointed out that section 1424(e) does not even require the Administrator to hold hearings in making determinations under this provision, nor is he required to even base his decision on a factual record.

The seriousness of the definitional problems can be illustrated by the ambiguity of meaning of the phrase "if contaminated." A question is raised as to whether the term means that the Administrator must determine that the aquifer is now contaminated, or whether it means that the probability that it will become contaminated has reached a high level of certainty. This latter view draws some support from the author of the amendment. Congressman Gonzalez, in his prepared statement read during the Edwards petition hearing, stated as follows:

The Safe Drinking Water Act, as a general proposition, recognizes and affirms that the provision of drinking water, and the assurance of its quality, is primarily the task of state and local government. But the Act also recognizes that where state and local government has been unable or unwilling to perform this task adequately, *and where the public health and safety are imperiled as a result, the Federal government may act.*¹⁵⁰

It is likely that Congressman Gonzalez was saying that a state of actual or near actual contamination would have to exist before a section 1424(e) determination could be made. To say otherwise would only mean that the EPA Administrator would be given license to deal in ephemeral presumptions. This is to say that one would have to presume a condition of contamination which in reality does not exist. To do this, however, is to commit the same error that the EPA committed in the *Ethyl* case where the agency omitted a "link" in the chain of causal evidence to reach the conclusion it did, and thereby took an "arbitrary jump in its logic to reach the conclusion"—such jump thus causing its decision to be both "arbitrary and capricious" and a "clear error of judgment."¹⁵¹

A second problem encountered with this very same phrase is that the word "contamination" is nowhere defined in Section 1424 or in Part C

150. *Id.* at 1368 (emphasis added). See also *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974).

151. *Ethyl Corp. v. EPA*, 7 ERC 1353, 1368 (D.C. Cir. 1975).

of the Safe Drinking Water Act. A more careful approach to the drafting of this amendment surely would have provided its precise meaning or related the meaning of this word in section 1424(e) more directly to the National Primary Drinking Water Regulations, to the effect that contaminant levels in excess of the National Primary Drinking Water Standards constituted "contamination" for purposes of section 1424(e). This was not done.

The next major problem faced by the Administrator is that of showing that whatever contamination actually exists in the aquifer, or is likely to exist in light of local and state failure to protect the waters from pollution, is of such nature and magnitude as to be certain that it *will create* a significant hazard to the public health.¹⁵² Whether the EPA will choose to follow as rigorous a methodology as that set out in the *Ethyl* case in making its determination under the Safe Drinking Water Act remains to be seen. If the Administrator does so choose, he will have to demonstrate to the satisfaction of the court that the present or expected levels of contamination of the Edwards Aquifer are of such nature and magnitude as to create a significant likelihood of producing the level of public harm specified by the statute.

It is extremely important to note that as originally proposed, the Gonzalez Amendment used a "could create" standard. This language was later amended to read "would create," and such language was adopted by both Houses of Congress. It is submitted that the substitution of the word "would" for "could" was intended by Congress to signify a very significant difference in the legal standard to be employed by the EPA in determining whether or not a significant hazard existed. It will be noted that the word "could" expresses a contingency that might be possible, whereas the word "would" expresses a greater certainty in the occurrence of a given event, or it may even be read to mean that it states a presumption that the event will occur.

Thus, two things are clear under the *Ethyl* case: first, the agency will have to show that the contamination under investigation is or will be the cause of a significant health hazard to the public at large; second, *some* level of contamination must presently exist. Section 1424(a) requires the Administrator to provide interested persons an opportunity to submit written data, views, or arguments in support of or against a given petition. Where the EPA chooses to adopt this procedure in conducting a section 1424(e) determination—as in the case of the Edwards Peti-

152. 42 U.S.C.A. § 300h-3 (Supp. I, 1975).

tion—then the EPA should evaluate its duties under the Gonzalez Amendment, not as a delegation of congressional responsibility, but rather as a mandate to base its threshold determinations on empirical facts and data rather than policy mandate.

One further definitional constraint in the phrase “if contaminated” should be discussed. A strong and credible argument can be made to the effect that a section 1424(e) determination was intended by Congress to apply *only* to special situations as described on the House floor and at the EPA hearings by Congressman Gonzalez: those situations where federal agencies were lending financial support to development projects which in turn began actually endangering the waters of an aquifer.¹⁵³ Congressman Gonzalez framed the operation of his amendment in such a manner that the causal origin of a section 1424(e) type of contamination would be one whose roots emanated from federal financial coffers. More simply, the Congress did not intend to give the EPA the authority to make a section 1424(e) type of determination where privately-financed development was causing contamination of the aquifer or was accounting for degradation of the drinking water. Such pollution presumably would be subject to control by section 1424(a) and not by section 1424(e). Rather, what Congressman Gonzalez was apparently trying to accomplish was to curtail private development which was being federally financed and which, by virtue of such assistance, was escaping regulation under section 1424(a) of the Act, or under the state regulatory scheme as provided by various provisions in the main bill.

Another point to consider in deciding whether or not section 1424(e) was intended to apply to situations other than federally financed developments causing pollution of aquifers is the fact that section 1424(a) is a *temporary* interim regulatory mechanism which for any given state terminates “on the date on which the applicable underground injection control program covering such area takes effect”¹⁵⁴ While section 1424(a) definitely is a temporary program, the status of section 1424(e) is unclear. It is true, unlike section 1424(a), Congress did not expressly limit the operation of section 1424(e) to a specified period of time, but section 1424(e) does fall, after all, within the section entitled “Interim Regulation of Underground Injections.”

On the one hand, if section 1424(e) does apply only to “unique situations” where federally assisted projects are causing the contamina-

153. Statement of Henry B. Gonzalez to EPA, San Antonio, Texas, June 4, 1975.

154. 42 U.S.C.A. § 300h-3(a) (Supp. I, 1975).

tion of an entire aquifer and which projects, for whatever reason, are escaping regulation under the Safe Drinking Water Act's main provisions, it is highly plausible that Congress intended it to be a permanent feature of the Safe Drinking Water Act to provide backup support which the bill's main provisions were failing to provide. On the other hand, if section 1424(e) has no more utility than section 1424(a), and no more utility than the main enforcement provisions of the bill, it is difficult to see why it should be upgraded by agency fiat to the status of being a permanent provision in light of its place within the bill, its scant legislative history, and its duplication of section 1424(a). It is the writers' view that one sub-determination inherent in section 1424(e) should be that the EPA must prove that the cause of contamination of the Edwards Aquifer is being promoted through the provision of federal financial assistance, and that failing to show this, no section 1424(e) determination can be made.

The next consideration is a scrutiny of the meaning of the phrase "significant hazard" found in section 1424(e). As this phrase is also found in section 1424(a), we may look to the legislative history of that section to see how the committee intended it to be construed. According to the committee report, a significant hazard to the public health is a hazard "short of imminent and substantial endangerment."¹⁵⁵ In discussing the phrase "imminent and substantial endangerment," found in section 1431 of the Act, the House report makes it clear that in using this phrase the committee did not intend the EPA administrative authority to

be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health. Nor is the emergency authority to be used in cases where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree¹⁵⁶

The test for a significant hazard is not, however, equivalent to that used to measure an imminent and substantial endangerment. Thus, the degree of harm needed to trigger section 1424(e) is less harm than that needed for the section 1431 test of endangerment, and presumably, it is greater than the harm produced by level of contamination equal to or less than those described by the maximum contaminant levels and published as part of the National Primary Drinking Water Standards.

155. Safe Drinking Water Act, H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. 6486 (1974).

156. *Id.* at 6487-88.

The reason one can assume that contaminant levels under section 1424(e) can exceed the National Primary Drinking Water Standards contaminant levels without creating a significant hazard to the public health is the fact that the Safe Drinking Water Act itself creates an elaborate system of variances and exemptions from National Primary Drinking Water Standards. This system suggests that the levels of contamination permitted to escape total prohibition under the Act can be used as a bench mark to demarcate those contaminant levels in excess of the National Primary Drinking Water Standards which admittedly constitute hazards, but which hazards are not unreasonable.¹⁵⁷ In other words, a significant hazard is one which can be expected to at least equal or approximate the contaminant level for a given contaminant in excess of the highest existing variance or exemption approved under sections 1415 or 1416 of the Safe Drinking Water Act.

Interestingly, Congressman Gonzalez propounded a strikingly novel definition of what constitutes a "significant hazard" under section 1424(e) at the San Antonio hearing on the Edwards Petition. There he stated:

The problem for the Environmental Protection Agency is to define what constitutes a hazard, under terms of this law.

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I believe that the law should be interpreted in this way: *the danger point is reached when any project or combination of projects threaten to degrade the water in the aquifer to the point that it would require further treatment than is now provided, in order to make the water safe for human consumption and other public uses.* In short, nothing should be allowed to degrade the water to the point where San Antonio and other communities dependent on the Edwards Aquifer would have to install water treatment plants that are any more advanced than are now used.¹⁵⁸

Congressman Gonzalez' statements reveal their utter incompatibility with the provisions and spirit of the Safe Drinking Water Act. The standard he advocates, simply put, is one which bears no relationship whatsoever to medical and scientific criteria, i.e., to what "harm" normally signifies to the average person, and, therefore, his standard bears no rational relationship to the danger sought to be avoided.

Finally, consideration should be given to the term "public health." It should be noted that this term is nowhere defined in section

157. See, e.g., 42 U.S.C.A. §§ 300g-4(a)(1)(A), 300g-5(a)(3) (Supp. I, 1975).

158. Statement of Henry B. Gonzalez to the EPA, San Antonio, Texas, June 4, 1975 (emphasis added).

1424(e) nor in the Act itself; yet, it constitutes another sub-determination that the EPA must make prior to making a section 1424(e) determination. The significance of this term can be quite important, since a simple health hazard is something less than a hazard to the "public health." If contamination creates something less than a "public hazard," though all other criteria under section 1424(e) would be satisfied, the Administrator may still not justify blanketing a multi-million acre area with a designation calculated to force all federal financial assistance to cease by virtue of such determination. Although it is unclear what the phrase "public health" means in the Gonzalez Amendment, one might reasonably assume that the pollution factor must affect a significant portion of the population drawing its water from the aquifer before a situation constitutes a hazard to the "public health."

This definitional issue was present in the *Ethyl* case, where the court pointed out that since Congress was considering the Clean Air Act simultaneously with the Occupational Safety & Health Act, it therefore could have intended

that a health hazard that affected only one or a few occupational groups should be dealt with as an occupational hazard, without subjecting the entire 213 million of the American general public to regulations when only a small percentage needed protection, and that protection could be afforded by actions less widespread in their effect.¹⁵⁹

The same reasoning could easily apply to the Gonzalez Amendment.

Apparently the main thrust of the Gonzalez Amendment is simply to prevent federal agencies from promoting a project which can harm the underground drinking water source of an area, and that a case-by-case project review will be necessary in order to determine which projects do and which do not contaminate such aquifer so as to create a significant hazard to the public health. The term "project" will have to be defined by the courts or by agency regulation to specify certain criteria, such as the type of facility and the effect of the location. EPA project review procedures will also have to be implemented, but it is not yet clear whether each project will have to bear the burden of proving that it is a safe project.

The question that must be asked, however, is what will this review process add to the NEPA's own environmental impact statement (EIS) process already in affect, or how will it detract from such a review process? Since the EPA already has an EIS review process, one can

159. *Ethyl Corp. v. EPA*, 7 ERC 1353, 1357 (D.C. Cir. 1975).

assume that the EPA will either re-adapt this project review procedure to the section 1424(e) project review process or create an entirely separate project review procedure. It is uncertain, however, that the EPA will take upon itself the task of monitoring each and every project which may be thought to constitute a danger to a given aquifer, or whether it will, as under the NEPA, defer to federal agencies and permit them to make the type of initial threshold determinations discussed herein. This would have the benefit of imposing the burden on the involved federal agencies to prove that their projects were not of the type that would contaminate an aquifer, instead of placing the burden on the EPA to show that a given federal action will cause such contamination. This distinction is critical because it would mean that under section 1424(e), the EPA would bear the burden of proof on the initial threshold determination that leads to the designation of an entire area; once a "determination" is made, the burden will then rest on the respective federal agencies.

Support for this view is found in the legislative history recorded on the House floor and made prior to the passage of the Gonzalez Amendment. Congressman Gonzalez stated that once a determination is made, and is so made by publication in the Federal Register, then after such publication no commitment for federal financial assistance can be entered into *unless and until* it is determined that no dangerous impact exists.¹⁶⁰ On the other hand, since section 1424(e) nowhere directly ties into the NEPA, abdication by the EPA of the project review procedure may be open to attack as being in derogation of the congressional will and a delegation of its responsibilities to federal agencies not intended to be imbued with project review discretion. But if the EPA were to be made responsible itself for a project-by-project review, a massive burden on the EPA under section 1424(e)'s project review provision would thereby result. Regardless of who ultimately bears responsibility for the project review aspect of section 1424(e), it is clear that the EPA will at some point have to issue regulations defining the applicable thresholds for project review—something equivalent, in effect, to the term "major actions" in the NEPA; otherwise, the task will be too massive even for the EPA.

CONCLUSION

In view of the fact that the Edwards designation petition has been filed under section 1424(e), the EPA now must decide whether to

160. Statement of Henry B. Gonzalez to the EPA, San Antonio, Texas, June 4, 1975.

designate the multi-million acre tract of land overlying the Edwards Aquifer under section 1424(e) or to take some other more reasonable action that is correlative to the objectives of the Safe Drinking Water Act. The EPA Administrator may exercise one of three options: (1) take no action on the Edwards petition for determination; (2) deny the Edwards petition and thereby not designate the Edwards Aquifer under section 1424(e); or (3) make a determination under the Edwards petition as to some or all of the Edwards Aquifer.

In reality, the first option does not represent a viable alternative since the EPA Administrator must take *some* action under section 1424(e) when a petition for determination is submitted; that is, he must either designate or not designate. In the writers' opinion, the EPA must create some kind of record reflecting a reasoned judgment which supports its decision to designate or not designate a given area under the Gonzalez Amendment.

The second option available to the EPA is to formally deny the Edwards petition and thus decline to make a section 1424(e) determination at all. If the EPA took such an action, it could be expected to justify its decision on three general grounds. First, the EPA could decide that state and local pollution control programs offer sufficiently stringent safeguards and standards to prevent levels of contamination which can create a significant hazard to the public health. The EPA could determine that the Texas Water Quality Board Order 75-0128-20¹⁶¹ and/or other applicable national, county, or local water quality control programs, such as those currently being formulated by the City of San Antonio, are adequately preventing contamination of the Edwards Aquifer and its sensitive areas to the point where the threat of a significant hazard to the public health has been reduced to a de minimis level or a level approaching pure speculation.

The second ground for denying the Edwards petition, in whole or in part, could be based on deferral to the expressed desires of state and local interest which, in the case of the Edwards petition, strongly advocated no federal intervention unless and until state and local regulatory mechanisms failed in their enforcement responsibilities. At the Edwards petition hearing in San Antonio, Texas, most of the scheduled speakers spoke in opposition to the EPA's exercise of authority under the Gonzalez Amendment, and the vast majority of those officials present expressed a strong belief that state and local agencies were

161. Tex. Water Quality Bd. Order No. 75-0128-20 (1975).

sufficiently equipped and motivated to regulate sources of pollution that might spread in the Edwards Aquifer. It is reasonable to expect that the EPA should be seeking opportunities to work with state and local pollution control agencies, since it is they whom the EPA will rely upon in another context to enforce the main provisions of the Safe Drinking Act.

Finally, the EPA may decide not to make a determination under section 1424(e) simply because the available hydrologic, scientific, and medical evidence will not support the conclusion that the nature and magnitude of the contamination presently existing, or currently threatening the aquifer, will sufficiently endanger the public health, so as to pose a significant hazard to the public health.

The third option the EPA may exercise is that of making a "determination" under section 1424(e) that the Edwards Aquifer is the sole or principal source of drinking water supply which is now contaminated or is threatened with contamination of such nature and magnitude as to constitute a significant hazard to the public health. It is submitted that if the EPA makes the section 1424(e) determination under the Edwards petition, the EPA should: (1) not designate the entire area covered by the Edwards Aquifer but rather should designate only the upper basin above the Balcones Fault Line; (2) establish zones within boundaries of such aquifer ranked on the basis of pollution potential; (3) establish point source and non-point source standards; (4) establish threshold review procedures so that each federally assisted project lying over the aquifer will not have to be subjected to the EPA's section 1424(e) review process; (5) continue to review all "major federal actions" through the NEPA process; and (6) establish review procedures of all NPDWS applications.

In conclusion, it is the writers' belief that selection by the EPA of the second option will achieve the greatest number of the Safe Drinking Water Act's main objectives. It will certainly stimulate and nurture local control and responsibility for enforcement of the National Primary Drinking Water Standards which in turn will improve the operation and success of such local efforts. This strategy is consistent with the Safe Drinking Water Act's policy of increasing public reliance on state and local pollution control agencies and will permit the protection of a single city's drinking water supply to be closely protected by means which cast a less widespread and drastic effect upon an entire multi-county population. It would provide a remedy which is more closely tailored to the

specific danger sought to be eliminated, rather than impose on an entire multi-county area a federal edict designed to truncate the flow of federal financial assistance to all activities within that area, presumably until such time as the EPA can draft and promulgate regulations which define the scope and substance of such review procedure.

At this stage in the implementation of the Safe Drinking Water Act, the most prudent policy the EPA can pursue is that of working as closely as possible with state and local agencies so as to insure that the EPA will not lose the working rapport necessary to make the main provisions of the bill of the Safe Drinking Water Act manageable. The Edwards petition represents an important turning point in the development of an EPA policy under section 1424(e). It is important not only because it will set a precedent which will shape how the EPA interprets section 1424(e)'s provisions, but it will also serve as an extremely important indicator as to whether or not the EPA will abide by the congressional will, expressed in various provisions of the Safe Drinking Water Act as well as in its legislative history, that the federal government encourage maximum state initiative and responsibility with respect to carrying out all of the provisions of the Safe Drinking Water Act.