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MEMORANDUM

SUBJECT: Final Guidance on Emergency Authority under Section 1431 of the Safe Drinking Water Act #80

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This memorandum transmits the Office of Ground Water and Drinking Water (OGWDW) and Office of Enforcement (OE) final guidance on invoking EPA's emergency authority, granted under Section 1431 of the Safe Drinking Water Act (SDWA), to address water supply hazards. This guidance has been reviewed and received concurrence from the Office of General Counsel (OGC). This final guidance replaces the EPA December 28, 1976 guidance (Water Supply Guidance No. 10), entitled "Regional Guidance - Emergency Action on Water Supply Hazards".

We want to thank the Regions for their thorough review of the draft guidance and valuable input. A summary of the comments received and our responses is included as an attachment to this memorandum. If you have any questions regarding this final document, please call Anne Jaffe Murray in OGWDW on 260-7358 or Alan Morrissey in OE on 260-2855.

Attachment

cc: Regional Drinking Water/Groundwater Protection Branch Chiefs

**GUIDANCE ON INVOKING EMERGENCY AUTHORITY
UNDER SECTION 1431 OF THE SAFE DRINKING WATER ACT**

Purpose of Guidance

This guidance is intended to emphasize that Section 1431 has a broad application and provides EPA with an effective tool for handling public health endangerments concerning public water supplies (PWSs) and underground sources of drinking water (USDWs). One of the purposes of this guidance is to encourage a more widespread use of EPA's Section 1431 authority by more fully explaining situations where this authority may be applied. In addition, this guidance discusses EPA's internal procedures for issuing Section 1431 Orders and provides information on how to support and prepare an order.

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Disclaimer

This guidance document on the application of EPA's emergency powers under Section 1431 of the SDWA is a statement of Agency policies and principles. It does not establish or affect legal rights or obligations. This guidance document does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the law and regulations to the specific facts of the case. The Agency may take action at variance with this guidance.

Overview

Introduction

Contaminants may be present in or released into the environment as a result of inadequate treatment of drinking water by a PWS, a leaking underground storage tank, or failure of an underground injection (UIC) well, to name a few. These incidents may result in contamination in or near a PWS or USDW that may pose an "imminent and substantial" endangerment to human health. Authority granted under SDWA Section 1431, 42 U.S.C. Section 300(i), gives the Administrator broad powers to take appropriate enforcement action if he receives information that:

- A contaminant is present in or likely to enter a PWS or USDW, and
- The contaminant may present an "imminent and substantial endangerment" to human health, and
- The appropriate State and local authorities have not acted to protect public health.¹

The purpose of a Section 1431 action is to prevent an impending dangerous condition from materializing, or to reduce or eliminate a dangerous situation once it has been discovered. Section 1431 does not require an emergency in the ordinary sense of the word. Instead, this provision focuses on "imminent and substantial endangerments", which is a broadly defined concept (see discussion below). For example, one major function of Section 1431 is its use as a preventative enforcement measure.²

As an "emergency" provision, however, Section 1431 should not be used as a substitute for other SDWA provisions, where such other provisions are adequate to protect public health.³ For example, under the Public Water System Supervision (PWSS) Program, violations of monitoring requirements or even of a maximum contaminant level (MCL) should generally be addressed through use of the enforcement authorities (including administrative order authority) in Section 1414. However, if the MCL exceedance may present an imminent and substantial endangerment, then an emergency action under Section 1431 may be appropriate in addition to any other SDWA Section 1414 enforcement action. An example under the UIC Program would be a Class V UIC well operator who is injecting contaminants that may be causing or contributing to an MCL exceedance or otherwise endangering an USDW. Although this generally would be enforced as a violation of Section 1423, a Section 1431 action also may be appropriate if an imminent and substantial endangerment may be present.

Overview (Continued)**1986 Amendments to Section 1431**

The SDWA Amendments of 1986 clarified EPA's existing authority to order the provision of an alternative water supply by persons who caused or contributed to the endangerment. In addition, the 1986 Amendments strengthened EPA's authority to enforce Section 1431. Previously, Section 1431 provided that EPA could enforce against any person who "willfully" violates or fails or refuses to comply with a Section 1431 Order. The 1986 Amendments removed the term "willfully", enabling EPA to enforce against any persons, whether or not their actions were willful. Also, the 1986 Amendments clarified EPA's authority to protect USDWs, as discussed on page 4. (Section 1431, as modified by the 1986 Amendments, is contained in Attachment 1.)

Delegation of Authority

On July 25, 1984 the Administrator delegated the authority to issue administrative orders under Section 1431 to the Regional Administrators (RAs) and the Assistant Administrator for Water (Delegation No. 9-17). In some Regions the RA has redelegated this authority to the division or branch level. The authority to make direct civil judicial referrals under Section 1431 has not been delegated by Headquarters to the Regions.

Elements of Section 1431 Authority

To apply the authority granted under Section 1431, two conditions must be met. First, the Administrator must have received "information that a contaminant which is present in or likely to enter a PWS or an USDW may present an imminent and substantial endangerment to the health of persons." Second, the Administrator must have received information that "appropriate State and local authorities have not acted to protect the health of such persons." To realize the full potential of Section 1431, the key elements of these conditions must be understood. These elements are: contaminants that are covered under Section 1431, the definition of "likely to enter", application to PWSs and USDWs, and the definitions of "imminent" and "substantial". Each element is discussed in greater detail in this section.

Elements of the 1431 Authority (Continued)

Contaminant

Section 1401(6) of the SDWA defines "contaminant" very broadly to include "any physical, chemical, biological, or radiological substance or matter in water." Under this broad definition, EPA may take action under Section 1431 even when the contaminant in question is not regulated by a National Primary Drinking Water Regulation (NPDWR) under the SDWA (i.e., EPA has not issued a NPDWR for the contaminant or the regulation has been promulgated but is not yet effective). This authority is clearly supported by the SDWA legislative history. (See H.R. Rep. No. 1185, 93rd Cong., 2d Sess., 35 - 36. The discussion of Section 1431 in this 1974 House Report is shown in Attachment 2 of this guidance.)

Likely to Enter

Application of the Section 1431 authority is not limited to existing contamination of a PWS or USDW but also may be used to prevent the introduction of contaminants that are "likely to enter" drinking water. Thus, Section 1431 Orders should ideally be issued early enough to prevent the potential hazard from materializing.

Underground Sources of Drinking Water

EPA's Section 1431 authority is not limited to the protection of PWSs. It also extends to the protection of all USDWs, whether or not the USDW currently supplies a PWS. The 1986 Amendments clarified EPA's existing authority to protect USDWs by making this authority explicit in the statute.

The agency has defined "underground sources of drinking water" in 40 CFR Section 144.3. Under this definition, "USDW" includes both aquifers that currently supply a PWS and those that simply have the potential to supply a PWS (according to the criteria in Section 144.3).⁵ The ability to address the contamination of USDWs (rather than only PWSs) broadens EPA's authority in two ways. First, it allows EPA to act under Section 1431 where the groundwater source in question is only a potential supplier of a PWS. Second, it allows the Agency to protect private wells that are at risk because of the contamination or threatened contamination of a USDW.

Elements of the 1431 Authority (Continued)

Imminent and Substantial Endangerment

Assuming EPA can show that a contaminant is "present in or likely to enter" the drinking water supply (either PWS or USDW), EPA also must show that a contaminant "may present" an "endangerment" and that the endangerment is both "imminent" and "substantial."

Imminent Endangerment

Section 1431 authorizes EPA to address "endangerments" that are "imminent". The case law that has developed on these terms (as used in the SDWA or in analogous provisions of other statutes), together with the SDWA legislative history, suggests the following guidance.

An "endangerment" is not actual harm, but a threatened or potential harm.⁶ No actual injury need ever occur.⁷ Therefore, while the threat or risk of harm must be "imminent" for EPA to act, the harm itself need not be.⁸ Public health may be endangered imminently and substantially both by a lesser risk of a greater harm and by a greater risk of a lesser harm; this will ultimately depend on the facts of each case.⁹

An endangerment is "imminent" if conditions which give rise to it are present, even though the actual harm may not be realized for years.¹⁰ Courts have stated that an "imminent hazard" may be declared at any point in a chain of events which may ultimately result in harm to the public.¹¹ For example, in U.S. v. Midway Heights County Water District,¹² individuals were exposed to microbiological and turbidity exceedances, but actual illnesses had not yet been reported. The court found that the presence of organisms that were accepted indicators of the potential for the spread of serious disease presented an imminent (and substantial) endangerment.

Endangerments can more readily be determined to be imminent where they involve contaminants that pose acute human health threats. Examples include:

- A nitrate MCL violation when a sensitive population is exposed (i.e., infants less than six months of age)
- A waterborne disease outbreak with or without MCL violations
- A microbiological or turbidity MCL violation with or without a waterborne disease outbreak

Elements of the 1431 Authority (Continued)**Imminent (Continued)**

- Injection of untreated sewage directly into an USDW that is used by a nearby drinking water well.

However, acute contaminants are not the only ones that might pose an imminent endangerment. Because an endangerment is created by the risk of harm, not necessarily actual harm, EPA should determine whether a risk of harm is imminent. Therefore, contaminants that lead to chronic health effects, such as carcinogens, also may be considered to cause "imminent endangerment"¹³ even though there is a period of latency before those contaminants, if introduced into a drinking water supply, might cause adverse health effects. In the SDWA legislative history, the House Report specifically states that an imminent endangerment may result from exposure to a carcinogenic agent.¹⁴

Section 1431 should not be used in cases where the risk of harm is remote in time or completely speculative in nature.¹⁵ However, in determining the imminence of a hazardous condition, EPA may consider the time it may require to prepare orders, to commence and complete litigation, to implement and enforce administrative or judicial orders to protect public health, and to implement corrective action under Section 1431.¹⁶ For example, even where a contaminant is not likely to enter a ground-water supply for several months or longer (as can be the case with a ground water plume moving toward a well), EPA may consider this hazard to be "imminent" in light of the time required to implement the actions described above. Further, even where a hazardous condition has been present for some time (even years), case law supports the view that EPA is not prevented from finding that the conditions present an imminent endangerment.¹⁷

In addition, Section 1431 may be used to address threats to health from other than direct ingestion of drinking water. For example, in U.S. v. Midway Heights County Water District,¹⁸ individuals were exposed to bacteriological and turbidity contamination. The court determined that although the water primarily was not used for drinking water, an imminent and substantial endangerment existed from "human consumption" through such normal uses as bathing, showering, cooking, dishwashing, and oral hygiene.

Elements of the 1431 Authority -(Continued)

Substantial

The term "substantial endangerment" can apply to a broad range of existing or threatened hazards and should not be limited to extreme circumstances. One court, interpreting the term "substantial endangerment" as used in CERCLA, has stated that "the word 'substantial' does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree)."¹⁹ Instead, the court found, an endangerment is substantial if there is a reasonable cause for concern that someone may be exposed to a risk of harm. The court stated that a number of factors (e.g., the quantities of CERCLA hazardous substances involved, the nature and degree of their hazards, or the potential for human exposure) may be considered in determining whether there is a reasonable cause for concern, but in any given case, one or two factors may be so predominant as to be determinative of the issue.²⁰ Of course, the emergency authority of Section 1431 should not be used in cases where the risk of harm is completely speculative in nature or is de minimis in degree.²¹

House Report 93-1185 gives the following examples of what may be considered a "substantial" endangerment:

- "a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventative action is not taken"
- "a substantial statistical probability exists that disease will result from the presence of contaminants in drinking water"
- "the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants)."²²

Role of State or Local Authority

One of the crucial requirements of a Section 1431 enforcement action is that "appropriate State and local authorities have not acted to protect the health of such persons." One court has held that the receipt of such information is a jurisdictional prerequisite to action under this section.²³ Accordingly, Section 1431 should not be used to deal with problems that are being handled effectively by State or local governments (including Tribal governments) in a timely fashion.²⁴

Role of State or Local Authority (Continued)

The Regions should not view this standard - whether a State or local authority has acted to protect the health of persons - as an issue of whether these authorities have "failed" to protect public health. Instead, these authorities intentionally may defer action to EPA because the Section 1431 authority may be more powerful or expeditious. In addition, the State or local authorities may not have acted because they lack jurisdiction, as may be the case with actions involving Tribal entities. Further, State or local authorities may decide to take action jointly with EPA. In such cases, EPA would determine that State and local authorities have not acted (on their own) to protect the health of persons. Therefore, EPA may proceed with Section 1431 actions when State and local authorities are working jointly with EPA.

Section 1431 also provides that prior to taking action and to the extent practicable in light of the imminent endangerment, EPA shall consult with the State and local authorities to confirm the information on which EPA is basing the proposed action and to determine what action the State and local governments are taking or will take. Under Section 1431, then, it is not mandatory to consult with the State and local authorities (i.e., they should be contacted "to the extent practicable"). Nevertheless, the Regions should be aware that EPA will need a basis in the record for the finding in the Section 1431 Order that State and local authorities "have not acted to protect the health of persons." The Regions should ensure, therefore, that there is a written basis in the record for this finding. This written basis could be simply a log of a telephone conversation or correspondence between EPA and the State and local authorities.

If EPA has information that State/local agencies are going to act, EPA must decide whether the action is timely and protective of public health. If EPA determines that the action is insufficient and State and local agencies do not plan to take stronger or additional actions to ensure public health protection, in a timely way, EPA should proceed with an action under Section 1431.²⁵

Role of State or Local Authority (Continued)

Unlike under Section 1414 or 1423, a notice of violation (NOV) need not be issued prior to taking a Section 1431 action. Note that, because Section 1431 applies to threatened as well as existing harm, a regulatory violation may not yet exist at the time EPA issues the Section 1431 Order. An NOV, even if issued, would not be a means of consulting with the State and local authorities to determine whether they have acted in a timely and appropriate manner to protect the health of persons. An NOV serves only as a means of informing the State, PWSs, or UIC owner or operator of EPA's intention to take an action. However, the Region may want to issue an NOV (in addition to a Section 1431 Order) as part of developing a separate enforcement action under Section 1414 or 1423.

The Regions should note that they need to determine that both State and local authorities have failed to act before bringing a Section 1431 action. The State can be of assistance to EPA in making this determination because the State should be able to identify the appropriate local authorities and may be aware of whether these authorities have taken any actions.

Remedial Actions That May Be Ordered

Once EPA determines that action under Section 1431 is needed, a very broad range of options is available. The statute provides that EPA may take actions as may be necessary to protect the health of persons. Moreover, EPA may take such actions notwithstanding any exemption, variance, permit, license, regulation, order, or other requirement that would otherwise apply.²⁶

The actions that EPA may take may include (but are not limited to):²⁷

- Issuing orders as necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring:
 - the provision of alternative water supplies, at no cost to the consumer, by persons who caused or contributed to the endangerment (e.g., provision of bottled water, drilling of new well[s], connecting to an existing PWS)
 - information about actual or impending emergencies
 - public notification of hazards (e.g., door-to-door, posting, newspapers, electronic media)