From: Jeff Hollen <jeffh@ouderkirkhollen.com>
Date: September 15, 2023 at 9:47:08 AM PDT
To: Joy King-Cortes <JKing@srwd.org>
Cc: Adam Denlinger <ADenlinger@srwd.org>
Subject: RE: Board Meeting

Attachments: ORS 634.172 Claims1.pdf
ORS 634 Definitions.pdf
ORS 634.212 Protected Areas.pdf
42 USC 3001 Adminstrator Authority.pdf
Updated Guidance EPA1.pdf

Joy,

Attached are the materials which I referenced in yesterday's meeting. ORS 634.172 is the Oregon law that limits claims to "after" the loss or damage has occurred from "pesticides." The attached ORS Definitions includes "herbicide" in the definition of "pesticide." The attached statute ORS 634.212 allows landowners to form a protected area to prevent or regulate application of herbicides. Paragraph 6 of the Definitions identifies landowners as those having 3 or more acres. That appears to be the only action that citizens may take, and the decision to authorize that area as protected is made by the Dept. of Agriculture.

The federal statute 42 USC 3001 limits authority to enforce the federal safe water drinking law to the "Administrator." That is further described in the attached Updated Guidance, and the last page of that attachment states that no private citizen can enforce that law. In each of these situations, the damage must have already occurred, or expert evidence to prove imminent danger is required, and for the federal intervention, additional evidence must be provided that the State has not acted appropriately to safeguard the public.

Conclusion: the State must act to protect the public, and then the federal assistance must be sought, and otherwise the District and the public must await the damage or loss to occur before seeking a remedy, which is only a monetary remedy, not a preventative one. I would be more than happy to have someone point out a mistake in this analysis.

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42 U.S. Code § 300i - Emergency powers

(A)ACTIONS AUTHORIZED AGAINST IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH

Notwithstanding any other provision of this subchapter the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water, or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), which may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be 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 by persons who caused or contributed to the endangerment, and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

(b)PENALTIES FOR VIOLATIONS; SEPARATE OFFENSES

Any person who violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)(1) may, in an action brought in the appropriate United States district court to enforce such order, be subject to a civil penalty of not to exceed $15,000 for each day in which such violation occurs or failure to comply continues.

634.006 Definitions. As used in this chapter unless the context requires otherwise:

(1) "Antidote" means a practical immediate treatment in case of poisoning and includes first-aid treatment.

(2) "Brand" or "trademark" means any word, name, symbol or any combination thereof adopted or used by a person to identify pesticides manufactured, compounded, delivered, distributed, sold or offered for sale in this state and to distinguish them from pesticides manufactured, compounded, delivered, distributed, sold or offered for sale by others.

(3) "Department" means the State Department of Agriculture.

(4) "Device" means any instrument or contrivance containing pesticides or other chemicals intended for trapping, destroying, repelling or mitigating insects or rodents or destroying, repelling or mitigating fungi, nematodes or such other pests as may be designated by the department, but does not include equipment used for the application of pesticides or other chemicals when sold separately from such pesticides or chemicals.

(5) "Highly toxic" means a pesticide or device determined by the department to be capable of causing severe injury, disease or death to human beings.

(6) "Landowner" means a person:

(a) Owning three acres or more within a proposed protected area; and

(b) In the case of multiple ownership of land:

(A) Whose interest is greater than an undivided one-half interest in the land; or

(B) Who holds an authorization in writing from one or more of the other owners whose interest, when added to the interest of the person, are greater than an undivided one-half interest in the land.

(7) "Person" means:

(a) A person as defined in ORS 174.100;

(b) A public body as defined in ORS 174.109; and

(c) The federal government or any of its agencies.

(8) "Pesticide" includes:

(a) "Defoliant" which means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant with or without causing abscission;

(b) "Desiccant" which means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue;

(c) "Fungicide" which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus;

(d) "Herbicide" which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed;

(e) "Insecticide" which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever;

(f) "Nematocide" which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating nematodes;

(g) "Plant regulator" which means any substance or mixture of substances intended, through physiological action, to accelerate or retard the rate of growth or rate of maturation or to otherwise alter the behavior of ornamental or crop plants or the produce thereof, but does not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants or soil amendments; or

(h) Any substance, or mixture of substances intended to be used for defoliating plants or for preventing, destroying, repelling or mitigating all insects, plant fungi, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the department declares to be

a pest, which may infest or be detrimental to vegetation, humans, animals, or be present in any environment thereof.

(9) “Pesticide applicator” or “applicator” means an individual who:

(a)(A) Is using, spraying or applying restricted-use or highly toxic pesticides; or

(B) Is spraying or applying pesticides for others;

(b) Is authorized to work for and is employed by a pesticide operator; and

(c) Is in direct charge of or supervises the spraying or other use of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery during the spraying or other application of pesticides, either on the ground or, if certified under ORS 634.128, by aircraft.

(10) “Pesticide consultant” means a person who offers or supplies technical advice, supervision, aid or recommendations to the user of pesticides classified by the department as restricted-use or highly toxic pesticides, whether licensed as a pesticide dealer or not.

(11) “Pesticide dealer” means a person who sells, offers for sale, handles, displays or distributes any pesticide classified by the department as a restricted-use or highly toxic pesticide.

(12) “Pesticide equipment” means any equipment, machinery or device used in the actual application of pesticides, including aircraft and ground spraying equipment.

(13) “Pesticide operator” means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another.

(14) “Pesticide trainee” means an individual who:

(a) Is employed by a pesticide operator; and

(b) Is working and engaged in a training program under special certificate to qualify as a pesticide applicator.

(15) “Private applicator” means an individual who uses or supervises the use of any pesticide, classified by the department as a restricted-use or highly toxic pesticide, for the purpose of producing agricultural commodities or forest crops on land owned or leased by the individual or the employer of the individual.

(16) “Professed standard of quality” means a plain and true statement of the name and percentage of each active ingredient and the total percentage of all inert ingredients contained in any pesticide.

(17) “Protected area” means an area established under the provisions of this chapter to prohibit or restrict the application of pesticides.

(18) “Public applicator” means an individual who is an employee of the State of Oregon or its agencies, counties, cities, municipal corporations, other governmental bodies or subdivisions thereof, irrigation districts, drainage districts and public utilities and telecommunications utilities and who performs or carries out the work, duties or responsibilities of a pesticide applicator.

(19) “Public trainee” means an individual who is an employee of the State of Oregon or its agencies, counties, cities, municipal corporations, other governmental bodies or subdivisions thereof, irrigation districts, drainage districts and public utilities and telecommunications utility and who performs or carries out the work, duties or responsibilities of a pesticide trainee.

(20) “Registrant” means a person registering any pesticide pursuant to this chapter.

(21) “Restricted area” means an area established under the provisions of this chapter to restrict, but not prohibit, the application of pesticides.

(22) “Restricted-use pesticide” means any pesticide or device that the department has found and determined to be so injurious or detrimental to humans, pollinating insects, bees, animals, crops, wildlife, land or environment, other than the pests it is intended to prevent, destroy, control or mitigate, that additional restrictions are required.

(23) “Weed” means any plant that grows where not wanted. [1973 c.341 §3; 1987 c.447 §134; 2015 c.833 §12; 2021 c.177 §1]

LIABILITY CLAIMS PROCEDURE

634.172 Procedure for making liability claim against landowner or pesticide operator; investigation of report of loss; claim procedure not waiver of governmental immunity. (1) No action against a landowner, person for whom the pesticide was applied or pesticide operator arising out of the use or application of any pesticide shall be commenced unless, within 60 days from the occurrence of the loss, within 60 days from the date the loss is discovered, or, if the loss is alleged to have occurred out of damage to growing crops, before the time when 50 percent of the crop is harvested, the person commencing the action:

(a) Files a report of the alleged loss with the State Department of Agriculture;

(b) Mails or personally delivers to the landowner or pesticide operator who is allegedly responsible for the loss a true copy of the report provided for under paragraph (a) of this subsection; and

(c) Mails or personally delivers to the person for whom the pesticide was applied a true copy of the report required under paragraph (a) of this subsection if that person is not the person commencing the action.

(2) Any person who claims to have sustained any loss arising out of the use or application of any pesticide by any state agency, county or municipality may file a report of loss with the department, and mail or personally deliver a true copy of such report of loss to the state agency, county or municipality allegedly responsible, within the time provided in subsection (1) of this section.

(3) Upon receiving a report of loss as provided by this section:

(a) The department may investigate, examine and determine the extent and nature of the damage alleged to have been caused to property or crops. The department shall not determine the source of the damage, the person who may have caused the damage or the financial extent of the loss or damage. The department shall prepare and file in its office a report of the investigation, examination and determination. Copies of the report made by the department may be given upon request to persons who are financially interested in the matter.

(b) The department at the request of, and without cost to, any persons financially interested in the matter may undertake to mediate an equitable settlement of the controversy.

(4) Upon receiving a request from any person, other than a person who may file a report of loss as provided by subsection (1) or (2) of this section, the department may investigate, examine and determine the extent and nature of damage alleged to have been caused to property or crops arising out of the use or application of any pesticide by any other person, provided that the person making such request reimburses the department for its work. The department shall not determine the source of the damage, the person who may have caused the damage or the financial extent of the loss or damage. The department shall prepare and file in its office a report of the investigation, examination and determination. Copies of the report made by the department may be given upon request to persons who are financially interested in the matter.

(5) Nothing in this section shall be construed as a waiver by the State of Oregon or any state agency, county or municipality of any immunity against suit that otherwise may exist.

(6) Notwithstanding ORS 634.006, as used in this section, "landowner" includes any person shown by records of the county to be the owner of land or having such land under contract for purchase. [1973 c.341 §23; 1991 c.351 §1; 1995 c.96 §2; 2015 c.833 §13]

634.212 Formation of protected areas; petition; filing fee; guidelines for determinations by director. (1) Upon receiving a petition of any 25 or more landowners, representing at least 70 percent of the acres of land, situated within the territory proposed to be a protected area, the State Department of Agriculture may establish a protected area, in accordance with the provisions of ORS 561.510 to 561.590 governing the procedures for the declaration of quarantines.

(2) The petition, referred to in subsection (1) of this section, shall include the following:

(a) The proposed name of the protected area.

(b) The description, including proposed boundaries, of the territory proposed to be a protected area.

(c) A concise statement of the need for the establishment of the protected area proposed.

(d) A concise statement of the pesticides and the times, methods or rates of pesticide applications to be restricted or prohibited and the extent such are to be restricted or prohibited.

(e) A request that a public hearing be held by the department.

(f) The name of the person authorized to act as attorney in fact for the petitioners in all matters relating to the establishment of a proposed protected area.

(g) A concise statement of any desired limitations of the powers and duties of the governing body of the proposed protected area.

(3) If more than one petition, referred to in subsection (1) of this section, is received by the department describing parts of the same territory, the department may consolidate all or any of such petitions.

(4) Each petition, described in subsection (1) of this section, shall be accompanied by a filing fee of $125. Upon receipt of such petition and payment of such fee, the department shall prepare and submit to the petitioners an estimated budget of the costs of establishing such proposed protected area, including cost of preparation of the estimated budget, of the hearing and of the preparation of required documents. Within 15 days of the receipt of the estimated budget, the petitioners shall remit to the department the difference between the filing fee and total estimated budget. If the petitioners fail to remit such difference, the department shall retain the filing fee and terminate the procedure for establishment of a proposed protected area. If, upon completion of the procedure for establishment of a proposed protected area, there remains an unexpended and unencumbered balance of funds received by the department under this section, such balance shall be refunded to the petitioners through their designated attorney in fact.

(5) When determining whether to amend or revoke a rule or order declaring a protected area, the Director of Agriculture shall consider, among other factors, the following:

(a) The agricultural and horticultural crops, wildlife or forest industries to be affected and their locations.

(b) The topography and climate, including temperature, humidity and prevailing winds, of the territory in which the proposed protected area is situated.

(c) The characteristics and properties of pesticides used or applied and proposed to be restricted or prohibited. [1973 c.341 §25; 1999 c.59 §185; 2005 c.22 §446; 2007 c.71 §197; 2009 c.98 §27]

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

Purpose of Guidance

Section 1431 has broad application and provides EPA with an effective tool to address public health endangerments concerning public water systems (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 taking action under Section 1431 and provides information on how to support and prepare an order. The Office of Enforcement and Compliance Assurance (OECA) is issuing this 2018 guidance update in response to the Office of Inspector General's (OIG) October 20, 2016 Management Alert entitled "Drinking Water Contamination in Flint, Michigan, Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public" (Report No. 17-P-0004).

Contents

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- Overview
- Elements of 1431 Authority
- Role of State and Local Authorities[1]
- Remedial Actions that May Be Ordered
- Relationship between Section 1431 and Other EPA Emergency Authorities
- Parties Over Whom Section 1431 Grants EPA Authority
- Taking Action Under Section 1431
- Attachment 1 - Section 1431
- Attachment 2 - House Report 93-1185 (1974)
- Attachment 3 - OIG's 2016 Management Alert
- Attachment 4 – Examples of Information to Support a SDWA Section 1431 Action

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

[1] For purposes of the SDWA, federally-recognized Indian tribes are considered "States" under Section 1401 and Section 1451. Similarly, when interpreting and applying Section 1431, EPA includes tribes, territories, and the District of Columbia under the "State and local authorities" element.

applying the law to the specific facts of the case. The Agency may take action at variance with this guidance.

Overview

Introduction

Drinking water sources can be contaminated by both naturally occurring contaminants or by activities in the watershed such as agriculture or industry. PWSs use treatment and monitoring to identify and protect consumers from such contaminants. Contaminants may be present in or released into the environment as a result of inadequate treatment of drinking water by a PWS, or potentially impact USDWs from sources like a leaking underground storage tank, or failure of an underground injection control (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[2] if he or she receives information that:

- A contaminant is present in or likely to enter a PWS or USDW, or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), and

- The contaminant or attack may present an "imminent and substantial endangerment" to human health, and

- The appropriate state and local authorities have not acted to protect public health.

The purposes of a Section 1431 action are to prevent an impending dangerous condition from materializing, or to reduce or eliminate a dangerous situation once it has been discovered. Section 1431 focuses on "imminent and substantial endangerment," 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.[3]

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[2] The legislative history of Section 1431 reflects the intent of Congress to confer broad power to the Administrator in Section 1431 actions. *See* 120 Cong. Rec. 37591 (1974) (stating the authority under Section 1431 is "broad in scope and provides a necessary enforcement tool for the Administrator").

[3] The preventative intent of Section 1431 is apparent in the legislative history, which states: "the Committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing." H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 35-36, *reprinted in*, 1974 U.S. Code Cong. & Ad. News 6454, 6488 (H.R. 93-1185). The discussion of Section 1431 in this 1974 House Report is shown in Attachment 2 of this Guidance.

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.[4] 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. But if the MCL exceedance may present an imminent and substantial endangerment, then an emergency action under Section 1431 may be appropriate in addition to or in place of any SDWA Section 1414 enforcement action. Examples under the UIC program would include a Class II well injection pressure exceedance that causes movement of fluid into an USDW, or 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 these generally would be enforced as a violation under Section 1423, a Section 1431 action also may be appropriate if an imminent and substantial endangerment may be present.

1986, 1996 and 2002 Amendments to Section 1431

The 1986 SDWA amendments 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" violated or failed or refused 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 7.

Additionally, in 1996, Congress changed the maximum civil penalty from $5,000 to $15,000 per day.[5] The 2002 SDWA amendments inserted language regarding terrorist attacks or other intentional acts designed to disrupt or adversely impact the safety of drinking water.

Delegation of Authority

In January 2017, the Administrator revised Delegation No. 9-17, which delegates the authority to take administrative action under Section 1431 to the Regional Administrators (RAs) and the Assistant Administrator (AA) for OECA. The January 2017 version of Delegation No. 9-17 supersedes

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[4] H.R. 93-1185, at 36, states that "Section 1431 reflects the Committee's determination to confer completely adequate authority to deal promptly and effectively with emergency situations which jeopardize the health of persons." The Report further states that the authority of Section 1431 should "not be used when the system of regulatory authority provided elsewhere in the bill could be used adequately to protect the public health." Id.

[5] The penalty numbers in SDWA Section 1431 (and other statutes) are annually updated for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. 28 U.S.C. Section 2461 note. *See* 40 C.F.R. Section 19.4 for the most up-to-date numbers.

the May 11, 1994 and July 25, 1984 SDWA Section 1431 related delegations. Among other things, the January 2017 revision added a requirement for Regions to consult with OECA before issuing orders under Section 1431. Further, Delegation No. 9-16 was also updated in January 2017. Delegation No. 9-16A requires Regions to notify OECA before commencing a judicial action under SDWA. Under the limited circumstances of a temporary restraining order issued under SDWA Section 1431, Delegation No. 9-16D applies and requires notification to OECA before Regions exercise this authority. While Delegation No. 9-16 specifies notification, Regions are expected to consult with OECA in these instances, as discussed below.

Within OECA, the Office of Civil Enforcement's (OCE) Water Enforcement Division (WED) has been designated to consult with the Regions on SDWA Section 1431 actions, and the Federal Facilities Enforcement Office (FFEO) has been designated for actions involving federal agencies. OECA is committed to providing feedback to the Regions as soon as possible, which typically is within 24 to 48 hours, and has responded even earlier where the endangerment is acute. In some Regions, the authority to issue Section 1431 orders has been redelegated below the RA level.

Under OECA's February 1, 2017 "Revised Consolidated Procedures for Regional and Headquarters Coordination on Regulatory Enforcement Cases Involving Nationally Significantly Issues (NSIs)" List B, "any enforcement action invoking the imminent and substantial endangerment authority under SDWA Section 1431" requires consultation with OECA.[6]

If the order involves a federally recognized Indian tribe or Indian country entity, the Region should consult OECA's January 17, 2001 "Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy." Where EPA issues an emergency order in Indian country, such actions are generally considered "exigent circumstances" that would not need the concurrence of OECA's Assistance Administrator as provided for in the "Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy." However, consultation with OECA is still required before the Region takes a Section 1431 action.

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 public water system or an underground source of drinking water, or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), which may present an imminent and substantial endangerment to the health of persons."[7] Second, the Administrator

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[6] For federal facility matters, see the June 10, 2015 David J. Kling memorandum, "Revised Procedures for Determining Level of Federal Facility Enforcement Office Involvement in Formal Regulatory Enforcement Cases."
[7] It should be noted that unlike several of the imminent and substantial endangerment provisions in other statutes, SDWA Section 1431 uses the term "information" instead of "evidence."

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. Each element is discussed in greater detail below.

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) or listed in a National Secondary Drinking Water Regulation (NSDWR) under the SDWA (e.g., EPA has not issued a NPDWR for the contaminant or the regulation has been promulgated, but is not yet effective). This authority is supported by the SDWA legislative history.[8] Moreover, listing on EPA's Contaminant Candidate List, under the Unregulated Contaminant Monitoring Rule, or establishment of a health advisory, are similarly not required for a substance to be considered a contaminant, and are not prerequisites for use of Section 1431 authority.

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.[9]

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 C.F.R. 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). The ability to address the

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[8] H.R. 93-1185, at 35, states, "The authority to take emergency action is intended to be applicable not only to potential hazards presented by contaminants which are subject to primary drinking water regulations, but also to those presented by unregulated contaminants."

[9] "Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing. This means that 'imminence' must be considered in light of the time it may take to prepare administrative orders or moving papers, to commence and complete litigation, and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health." H.R. 93-1185, at 35–36.

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 water supplies that do not meet the threshold of 25 persons served or 15 service connections in the definition of "public water system" (for example, many private wells) that are at risk because of the contamination or threatened contamination of an USDW.

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" may include not only actual harm, but also a threatened or potential harm.[10] No actual injury need ever occur.[11] Therefore, while the threat or risk of harm must be "imminent" for EPA to act, the harm itself need not be.[12] 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.[13]

An endangerment is "imminent" if conditions which give rise to it are present, even though the actual harm may not be realized for years.[14] Courts have stated that an "imminent hazard" may be declared at any point in a chain of events that may ultimately result in harm to the public.[15] For

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[10] U.S. v. Conservation Chemical Co., 619 F. Supp. 162, 192 (W.D. Mo. 1985) (interpreting the term "endangerment" in CERCLA), citing Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), (en banc), cert. denied, E.I. Du Pont de Nemours & Co. v. EPA, 426 U.S. 941 (1976) (interpreting the language "will endanger" in the Clean Air Act).
[11] *See* Ethyl Corp. v. EPA, 541 F.2d at 13.
[12] *See* U.S. v. Reilly Tar and Chemical Corp., 546 F. Supp. 1100, 1109-10 (D. Minn. 1982) (quoting H.R. 93-1185); U.S. v. Conservation Chemical Co., 619 F. Supp. at 193-94. The Conservation Chemical Co. court, construing similar language in CERCLA, stated that the standard is especially lenient since it authorizes action "when there *may* be risk of harm, not just when there *is* a risk of harm." Id. at 193 (emphasis in original).
[13] *See* Ethyl Corp. v. EPA, 541 F.2d at 18.
[14] *See* U.S. v. Conservation Chemical Co., 619 F. Supp. at 193-94; B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988) (CERCLA action).
[15] Trinity Am. Corp. v. EPA, 150 F.3d 389, 399 (4th Cir. 1998) ("EPA need not demonstrate that individuals are drinking contaminated water to justify issuing an emergency order."); Dague v. City of Burlington, 935 F.2d 1343, 1356 (2nd Cir. 1991); U.S. v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985).

example, in U.S. v. Midway Heights County Water District,[16] 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.[17]

Endangerments can more readily be determined to be imminent where they involve contaminants that pose acute human health threats. Examples include (but are not limited to):

- A nitrate MCL violation when a sensitive population is exposed (e.g., infants less than six months of age).
- A waterborne disease outbreak with or without MCL violations.
- A microbiological MCL or turbidity treatment technique violation with or without a waterborne disease outbreak.
- Migration of untreated sewage directly into or near an USDW.
- A release of surficial contamination that may ultimately migrate to a usable aquifer.
- A reduction or loss of pressure in a distribution system (e.g., due to broken water mains or power outages) that increases the risk of contaminants entering water.
- A sanitary problem such as dead birds or rodents in finished water storage tanks.

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"[18] even though there is a period of latency before those contaminants, if introduced into a drinking water supply, might cause adverse health effects. A factor that a Region may consider is the length of time a population has been or could be exposed to a contaminant. In the SDWA legislative history, the House Report specifically states that an imminent endangerment may result from exposure to a carcinogenic agent.[19]

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[16] 695 F. Supp. 1072, 1076 (E.D. Cal. 1988).
[17] Id.
[18] *See* Conservation Chemical Co., 619 F. Supp. at 194 (citing legislative history of RCRA Section 7003).
[19] *See* H.R. 93-1185, at 36. This view is underscored by the numerous other references in the legislative history to the discovery of carcinogens and potential carcinogens in an ever increasing number of water supplies. 1974 House Report, supra, at 6, 10-11, 35; 120 Cong. Rec. 36372, 36374-75, 36398-99, 36401 (1974). This concern was reiterated and strengthened in subsequent Congressional reviews of the SDWA program. House Comm. on Interstate and Foreign

Examples could include (but are not limited to):

- An exposure, or threat of exposure, to chronic contaminants at levels exceeding their MCLs or health advisory levels (e.g., PFOA).

- Exposures to chronic-type contaminants, such as lead, that are present at high enough concentrations to cause not only immediate, but also long-term health effects.

Section 1431 should not be used in cases where the risk of harm is remote in time or completely speculative in nature.[20] 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.[21] 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.[22]

In addition, Section 1431 may be used to address threats to health from exposure pathways other than direct ingestion of drinking water. For example, in U.S. v. Midway Heights County Water District,[23] individuals were exposed to bacteriological and turbidity contamination through uses such as bathing, showering, cooking, dishwashing, and oral hygiene. The court determined that, although the water primarily was not used for drinking water, an imminent and substantial endangerment existed from "human consumption." EPA has defined human consumption broadly to include these various uses.[24] Section 1431 may be invoked in situations where, for instance, the risks involve exposure to contaminants like *Legionella* or disinfection byproducts in water vapor from a shower.

Commerce, H.R. Rep. No. 96-186, 96th Cong., 1st sess. 4-6 (1979), and Senate Comm. on Environment and Public Works, S. Rep. No. 96-161, 96th Cong., 1st Sess. 3 (1979).

[20] This interpretation is supported by H. Rep. 93-1185. *See also* W.R. Grace & Co. v. United States EPA, 261 F.3d 330, 339 (3d Cir. 2001).

[21] *See* H. Rep. 93-1185, at 36; B.F. Goodrich v. Murtha, 697 F. Supp. at 96 (quoting H. Rep. 93-1185).

[22] *See* In re FCX, Inc., 96 B.R. 49, 55 (Bankr. E.D.N.C. 1989) ("even when there is an inordinate delay [by EPA], the court must find an immediate danger to public health if in fact one exists").

[23] 695 F. Supp. at 1076.

[24] *See* 40 C.F.R. Section 141.801.

Substantial Endangerment

The term "substantial endangerment" can apply to a range of existing or threatened hazards and should not be limited to extreme circumstances. Actual reports of human illness are not required to establish the presence of a "substantial" endangerment to water consumers.[25] One court, interpreting "substantial endangerment" as used in the Comprehensive Environmental Response, Compensation, and Liability Act (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)."[26] 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.[27] 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.[28]

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)."[29]

There is no bright line test for when Regions and OECA should consider emergency action; it is always a case specific decision based on the facts in a particular matter. It is important to remember that EPA may consider various types of "information" when determining whether a contaminant "may present an imminent and substantial endangerment to the health of persons." As part of the required consultation with OECA, a Region can discuss with OECA whether the information available is sufficiently credible and warrants the use of Section 1431's emergency powers. For a nonexhaustive list of appropriate, potential types of supporting information, see Attachment 4.

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[25] United States v. North Adams, 777 F. Supp. 61, 84 (D. Mass. 1991).
[26] Conservation Chemical Co., 619 F. Supp. at 194.
[27] Id.
[28] *See* H.R. 93-1185, at 35.
[29] Id. at 36.

Role of State and Local Authorities

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."[30] Generally, EPA considers the lack of sufficient actions of State and local officials to be a finding the Agency must make, supported by a record, when taking an action under Section 1431.[31] Accordingly, Section 1431 should not be used to deal with problems that are being handled effectively by state (including tribes or territories) or local governments in a timely fashion.[32] Effective and timely State and local actions could include the issuance of an administrative order containing enforceable compliance deadlines and, if necessary, the provision of alternative drinking water. In other situations, for instance where E. coli was detected at a child care facility, an example of a timely State action was the development of an action plan, approved by the Region, that included: discontinued use of the contaminated well; installation of a new, deeper well; provision of interim bottled water to employees; and delay of school start date until a new, safe well was online.

OECA recognizes there are sensitivities associated with determining whether a State or local authority has not acted to protect the health of persons. Section 1431 does not require any finding that a State or local authority has "failed" to act. [33] When assessing State and local actions, it is not a black and white test. Instead, there is often a range of potential responses to a specific situation. For example, State and local authorities intentionally may defer action to, or request action by, EPA because the Section 1431 authority may be more powerful or expeditious. In addition, the State or local authorities may not have acted due to lack of jurisdiction. In other cases, a State may have made a good faith effort to address an emergency, but EPA may determine the State actions have not been effective, or are no longer effective, to protect public health, and, thus, that additional actions are needed.[34] These additional actions may help fill a gap and could be included in an EPA Section 1431 action (e.g., State agency has only provided alternative water to a portion of an impacted area, but information indicates other people are at risk so EPA addresses the rest in a federal order). Further, State or local authorities may decide to act jointly with EPA. In such cases, EPA would determine that State and local authorities have not acted (on their own) to sufficiently 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 before 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

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[30] *See* Footnote 1.
[31] It should be noted one court has held that the receipt of such information is a jurisdictional prerequisite to action under this section. United States v. Occidental Petroleum Corp., No. 79-989 (E.D. Cal. 1980).
[32] *See* H.R. Rep. 93-1185, at 35. This implements legislative intent expressed in House Report 93-1185 to "direct the Administrator to refrain from precipitous preemption of effective State or local emergency abatement efforts."
[33] Reading the SDWA to say that any action by the state (even if minor or ineffective) deprives EPA of authority to act would strip EPA of its statutory emergency powers and be at odds with the clear purpose of the statute to preserve and protect the public health. Trinity Am. Corp. v. EPA, 150 F.3d at 397.
[34] Id. at 398-399.

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").[35] Nevertheless, the Regions should be aware that EPA will need a basis in the record for the 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, then EPA must decide whether the action is timely and protective of public health.[36] If EPA determines that the action is insufficient and State and local agencies do not plan to take additional actions to ensure public health protection, in a timely way, then EPA should proceed with an action under Section 1431.[37]

Unlike under Sections 1414 or 1423, a notice of violation (NOV) need not be issued prior to taking a Section 1431 action. No violation of any requirement is needed for a 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. Rather, an NOV serves as a prerequisite under Sections 1414 or 1423 for the EPA to take certain enforcement actions in primacy states.

The Regions should note that they need to determine that neither State nor local authorities acted adequately to protect public health 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.

It is important to remember EPA is authorized to act under Section 1431 regardless of whether a State, territory or tribe has primary enforcement authority. EPA has invoked Section 1431 in cases where it is not the primacy agency, but is instead exercising its oversight authority and taking independent, federal action to address an emergency.

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[35] This language was added from an amendment offered during a House debate on November 19, 1974: "To the extent [the EPA Administrator] determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking." In explaining the amendment, Representative Murphy of Illinois stated that it "requires [] the Federal Administrator [to] consult with State and local authorities as to the emergency, what information it is based on, and what action he proposes to take, so that [EPA] can work hand in glove with the local and State authorities." *See* 120 Cong. Rec. 36400 (1974).

[36] "State health authorities, therefore, must not only have acted, but acted in a way adequate to protect the public health; and EPA, the agency with expertise in this area, determines if the state efforts were adequate." Trinity Am. Corp., 150 F.3d at 398.

[37] Congressional reports and floor debates support the view that Congress inserted this language in Section 1431 (and added certain procedural prerequisites before allowing federal enforcement in a primacy state) simply to avoid duplication between the federal and state enforcement and to preserve the primary responsibility for protecting the public at the state and local levels. H.R. Rep. 93-1185, at 22-34, 35; S. Rep. No. 93-231, 93rd Cong., 1st Sess. 9, 10 (1973); 120 Cong. Rec. 36372, 36374-75, 37591-92 (1974).

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, variances, permit, license, regulation, order, or other requirement that would otherwise apply.[38]

The actions that EPA may take may include (but are not limited to):[39]

- issuing orders as necessary to protect the health of persons who are or may be users of such system (including travelers), including orders that require:
  - 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, installing and maintaining treatment, drilling of new well(s), connecting to an existing PWS).
  - information about actual or impending emergencies (e.g., if standard information gathering tools like SDWA Section 1445 would not result in an expeditious response or may not apply in a certain case).
  - public notification of hazards (e.g., door-to-door, posting, newspapers, electronic media).
  - an investigation to determine the nature and extent of the contamination in the environment.
  - a survey to identify PWSs, private supply wells or ground water monitoring wells near potentially contaminated areas.[40]
  - monitoring of regulated or unregulated potential or identified contaminants.
  - development of a feasibility study to assess potential remedial actions to abate an endangerment.
  - an engineering study proposing a remedy to eliminate the endangerment and a timetable for its implementation.

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[38] The legislative history supports this view. *See* H.R. Rep. 93-1185, at 35.
[39] The House Report specifically mentions several of these listed actions as among those EPA may take.
[40] Portion of the emergency order mandating that Trinity identify all potential users of the contaminated wells in the three-quarter-mile area is not a "'limitless' or unduly burdensome task." Trinity Am. Corp., 150 F.3d at 401.

- control of the source of contaminants that may be contributing to the endangerment, including by halting disposal.

- cleanup of contaminated soils endangering an USDW.

- commencing a civil action for appropriate relief including a restraining order, or a temporary or permanent injunction. The injunction may require the PWS owner or operator, UIC well owner or operator, or the responsible party to take steps to abate the hazard.

Use of Judicial vs. Administrative Orders

Except where the responsible party is a federal agency, the Region may issue a Section 1431 administrative order and/or ask the Department of Justice to file a civil judicial action.[41] A civil referral may be preferable to a Section 1431 administrative order if the Region believes the responsible party will be uncooperative or recalcitrant or if the necessary relief is long-term or otherwise appropriate for supervision by a U.S. District Court (e.g., expected cost of relief is high).

A Section 1431 administrative order offers EPA some unique powers. EPA may issue unilateral Section 1431 orders or enter into administrative orders on consent. Unlike compliance orders (e.g., issued under Sections 1414 or 1423), Section 1431 orders enable the Agency (versus the courts) to order actual injunctive-type relief. This relief is limited only by the usual constraints of the Administrative Procedure Act (APA). The APA requires all Agency actions be reasonable and not "arbitrary or capricious."[42] Thus, by issuing an administrative order instead of filing a civil judicial action, the Agency rather than the District Court determines the scope and timing of appropriate relief in the first instance.

The recipients of an administrative order may challenge its terms. Under the judicial review provisions of SDWA Section 1448, the petition must be filed within 45 days in the appropriate Court of Appeals (a District Court does not have jurisdiction to hear challenges to a Section 1431 administrative order). If the recipient fails to meet this condition, he or she loses the right to contest the terms of the order.

Section 1431 administrative orders have long been considered final agency action subject to review under Section 1448. Following the Supreme Court's 2012 decision in *Sackett*,[43] on March 21, 2013, OECA issued guidance to the Regions about "Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA*." In

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[41] In the case of a federal agency recipient, the action will be a Section 1431 administrative order.
[42] 5 U.S.C. Section 706(2).
[43] Sackett v. EPA, 132 S. Ct. 1367 (2012).

the March 2013 guidance, OECA provided specific language to be included in unilateral orders, such as Section 1431 orders (i.e., respondent may seek federal judicial review) and administrative orders on consent (i.e., respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review). Regions should include the appropriate *Sackett* language in their administrative actions (whether unilateral or on consent).

Except where the responsible party is a federal agency, any enforcement actions to require compliance with an administrative order or to seek civil penalties for its violation must be in District Court. Where the recipient is a federal agency, EPA may issue an administrative penalty order under Section 1447(b) of the SDWA for the federal agency's failure to comply with a Section 1431 administrative order.[44] A recipient who violates or fails or refuses to comply with the terms of the administrative order, may be subject to a civil penalty pursuant to Section 1431(b); a federal agency recipient may be subject to a penalty pursuant to Section 1447(b).[45]

Relationship between Section 1431 and Other EPA Emergency Authorities

A Section 1431 order can be taken in conjunction with emergency orders under other statutes. Emergency provisions include:

- Resource Conservation and Recovery Act (RCRA) - Section 7003
- CERCLA - Section 106[46]
- Clean Water Act (CWA) – Sections 504(a) and 311
- Toxic Substances Control Act - Section 7
- Clean Air Act (CAA) - Sections 112(r)(9) or 303

Although similar in general terms, each of the emergency provisions of these statutes is somewhat different. Guidance on EPA's authority to address imminent and substantial endangerment under CERCLA, RCRA, CWA and CAA have been issued by the Agency.[47] For example, Section

[44] For more information about EPA's federal facility penalty authority under the SDWA, see "Guidance on Federal Facility Penalty Order Authority Under the Safe Drinking Water Act, as amended in 1996," signed on May 29, 1998 by Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (Steven A. Herman memorandum).
[45] *See* Footnote 5 above regarding annual adjustments for inflation. Also note that for federal agency recipients, "As a matter of practice, EPA will seek penalties against a Federal agency which violates or fails or refuses to comply with a § 1431 order not to exceed [the maximum penalty for non-federal parties] for each day in which such violation occurs or failure to comply continues." Steven A. Herman memorandum, Footnote 5.
[46] CERCLA Section 106 orders against Executive Branch agencies require the concurrence of the Attorney General.
[47] "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial

7003 of RCRA is very broad in that it allows for protection of the "environment."[48] However, it is somewhat limited in that the threat must be caused by a "solid waste." Section 1431, on the other hand, is limited to the protection of a PWS or an USDW, but covers a broad universe of "contaminants." Regions may consider issuing joint orders under more than one of these statutory authorities, or separate orders that complement each other. When issuing orders under more than one authority, Regions should be sure to coordinate with each appropriate office. However, if the order is being unduly delayed by coordination difficulties, the Region should proceed with the Section 1431 order, followed by an order under the other statute or statutes.

Parties over Whom Section 1431 Grants EPA Authority

Section 1431 by its terms gives EPA broad discretion to issue any orders necessary to protect the health of persons. EPA may issue Section 1431 orders not only to an owner or operator of a PWS, but also, for example, to federal, state, tribal, territorial or local governments; owners or operators of underground injection wells; area or point source polluters; or to any other person whose action or inaction requires prompt regulatory intervention to protect public health.[49]

In cases where the responsible party is not clearly known, one option is to issue the order to the most likely contributor(s) based on the type of contaminant(s) found in the PWS and/or USDW compared to current and past land practices in the area. As part of the order, EPA can require that a study be performed to more clearly determine the responsible parties. In such a case, additional orders may be issued as knowledge accumulates. Thus, an initial Section 1431 order may merely request records, samples, or other existing data/documents to help clarify what or who caused the endangerment before ordering other actions be taken, and a subsequent order(s) would

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Actions," U.S. EPA, OSWER Directive No. 9833.0-1a, March 7, 1990. "Guidance on CERCLA Section 106 Judicial Actions," U.S. EPA, OSWER Directive No. 9835.7, February 24, 1989. "Issuance of Administrative Orders for Immediate Removal Actions," U.S. EPA, OSWER Directive No. 9833.1, February 21, 1984. "Use of CERCLA § 106 to Address Endangerments That May Also be Addressed Under Other Environmental Statutes," U.S. EPA, January 18, 2001. "Endangerment Assessment Guidance," U.S. EPA, OSWER Directive 9850.0-1, November 22, 1985. "Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes," U.S. EPA, May 11, 1982. "Guidance on the Use of Section 7003 of RCRA," U.S. EPA, October 20, 1997. "Guidance on Using Order Authority under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use with Other Order and Enforcement Authorities," U.S. EPA, April 17, 1991. "Guidance on Use of Section 303 of the Clean Air Act," U.S. EPA, September 15, 1983. "Guidance on Use of Section 504, the Emergency Powers Provision of the Clean Water Act," U.S. EPA, July 30, 1993. "Final Guidance on the Issuance of Administrative Orders Under Section 311(c) and (e) of the Clean Water Act," U.S. EPA, July 1, 1997. "Toxic Substances Control Act: Compliance/Enforcement Guidance Manual," U.S. EPA, August 1984.

[48] Under Section 7003 of RCRA, EPA may "'authorize[] the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment[,]' but that it 'could not order the cleanup of a waste disposal site which posed no threat to health or the environment.' Because the 'authority conferred . . . by section 1431 of SDWA is quite as broad as that conferred by RCRA,' we believe the limitations under the latter provision are equally applicable to the former. As is the case with RCRA, EPA cannot order cleanup under section 1431 of SDWA when there is no threat to the public's health." W.R. Grace & Co., 261 F.3d at 340 (citing United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982)).

[49] *See* H.R. 93-1185, at 35.

address the potential harm. For example, if a PWS is contaminated with benzene, toluene, and xylene, and there are five gasoline service stations located near the PWS, an initial order could require each of the service stations to test for leaks in their underground storage tanks. However, Regions should keep in mind that the delay involved with such an approach (e.g., a series of orders) must be weighed against the danger posed by the contaminant(s) in the water, the need to protect public health as soon as possible and concerns with issuing a broader initial order with additional requirements. For instance, in an area with karst geology and more than one source of nitrate contamination, the Agency, to protect public health, has the authority to issue multiple formal administrative orders containing enforceable milestones (e.g., control discharges) and, if necessary, requirements for the provision of alternative drinking water until compliance is achieved. Issues like this should be discussed during the required consultation with OECA before taking Section 1431 action.

EPA may even use Section 1431 authority to reach parties that are not responsible for the endangerment. Orders to a non-responsible party ordinarily should be limited to those instances where no responsible party exists or is suspected and the issuance of an order to a non-responsible party is the most appropriate means to protect or mitigate the endangerment. For example, an order may require a PWS, contaminated by unknown polluters, to filter or relocate its water source.

Taking Action Under Section 1431

Components of an Administrative Order

The recommended basic components of a Section 1431 order are:

- EPA's Statutory Authority
- Findings of Fact
- Conclusions of Law
- Conditions or Actions Required by the Emergency Order - Should also contain a statement that requires the respondent to advise the Agency of his or her intentions to comply with the terms of the order in a specified short time frame (e.g., 24 hours)
- General provisions to address issues such as modification, termination and judicial review (e.g., the *Sackett* language described above)
- Name and Address of EPA Contact

- Opportunity to Confer for Orders Against Federal Agencies[50]

Civil Judicial Action

If a judicial order is sought, the Agency must still determine that an "imminent and substantial endangerment" exists. If proceeding judicially, the Region, OECA and DOJ will draft and discuss the appropriate court filings.

Degree of Support

Development of a Record

The issuance of a Section 1431 order as an administrative action must be supported by an adequate written record. Therefore, the Regions should ensure that the findings of fact in the order are adequately supported by documents in the record showing the basis for EPA's technical determinations. Similarly, before bringing a judicial action under Section 1431, Regions should ensure that sufficient information has been compiled and can be presented to a court to support the action. This information would take the form of technical documents (e.g., such as statements from a toxicologist), other background materials, such as records of correspondence indicating the State and local authorities are not acting sufficiently to protect public health or have requested that EPA act on their behalf, and memoranda to the file. Regions should refer to OECA's May 16, 2013 "Guidance on Developing Administrative Records for Unilateral Administrative Enforcement Orders." Additionally, EPA issued general guidance on administrative records ("EPA's Action Development Process: Administrative Records Guidance," September 2011).

Absolute Proof Not Required

Even though EPA should strive to create a record basis to support its Section 1431 actions, the Regions should recognize that EPA does not need uncontroverted proof that contaminants are present in or likely to enter the water supply or that an imminent and substantial endangerment may be present before acting under Section 1431.[51] Similarly, EPA does not need uncontroverted proof that the recipient of the order is the person responsible for the contamination or threatened contamination. Courts generally will give deference to EPA's technical findings of imminent and substantial endangerment. The purpose of Section 1431 actions is to prevent harm from occurring. Extensive efforts to document the available information should be avoided, where the delay in obtaining such information or proof could impair attempts to prevent or reduce the hazardous situation. The Region may use, for example, sampling data from public and/or private wells, the exceedance of the unreasonable risk to health level, data from toxicological studies, and/or the opinion of a

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[50] *See* Steven A. Herman memorandum.

[51] *See* U.S. v. Conservation Chemical Co., 619 F. Supp. at 193 (because of scientific and medical uncertainties, proof with certainty is impossible).

toxicologist or other expert as evidence that an "imminent and substantial endangerment" may exist.[52]

State and Local Authorities Have Not Acted

As stated previously, before taking an action under Section 1431, EPA must explain and document, as necessary, why the ordered action is needed even if state or local governments may have taken or are taking actions to protect public health. As highlighted above, EPA makes this determination in each specific case and, significantly, when assessing the actions of a State, tribal, territory or local authority, potential responses may vary based on particular factual circumstances. This is another important issue to discuss with OECA during the consultation process when contemplating a Section 1431 action in a particular matter. The Region should have a written basis for its finding that federal action is necessary notwithstanding action by a State, tribal, territorial or local authority; that state or local authorities requested assistance; or that EPA is working with the State or local authority. This may consist of a telephone log or written communications (e.g., emails or letters), that serves to document contact between EPA and State and local authorities.

Headquarters Contact

The Region must consult with OECA before issuing an administrative Section 1431 order or referring a Section 1431 matter to DOJ. OECA will coordinate with other Headquarters offices as appropriate (e.g., OW, OGC). OECA is committed to providing feedback to the Regions as soon as possible, which typically is within 24 to 48 hours, and has responded even earlier where the endangerment is acute. Consulting with OECA staff in advance may protect against subsequent adverse judicial determinations.

Regardless of whether the Region prepares an administrative order or requests that a court issue a judicial order, OECA requests that the Region submit copies of all final orders for its central files. The Region's emergency action should also be reflected in the Agency's Integrated Compliance Information System (ICIS). ICIS is the database of record for all federal enforcement actions.

No Citizen's Suits To Compel EPA Action Under Section 1431

SDWA Section 1449 authorizes citizen's suits against EPA when the Agency has failed to take actions that are mandatory under the statute. Because EPA's authority to act under Section 1431 is discretionary, citizen's suits to compel EPA to act under Section 1431 are not authorized.[53]

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[52] *See* Attachment 4.
[53] *See* U.S. v. Hooker Chemicals & Plastics Corp., 101 F.R.D. 451, 455 (W.D.N.Y. 1984).