

EPA Emergency Order Alleging Groundwater Contamination from Methane Wells

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On December 7, 2010, EPA unveiled a potentially far-reaching new enforcement tool affecting the oil and gas industry. EPA Region VI (Dallas) issued an Emergency Administrative Order to an oil and gas operator under Section 1431 of the Safe Drinking Water Act, finding "an imminent and substantial endangerment to health," based on alleged contamination of private water wells from nearby natural gas production wells. Based on "isotopic fingerprint analysis" of the methane in the water wells and the natural gas wells, EPA concludes that both gases are "likely to be from the same source." Under threat of civil penalties of up to \$16,500 per day, EPA then orders the company to take a number of immediate actions:

- 48 hours: Deliver replacement potable water supplies to homeowners.
- 48 hours: Install explosivity meters in nearby homes.
- 5 days: Commence sampling all nearby drinking water wells to determine the extent of aquifer contamination.
- 14 days: Prepare plan to conduct soil gas surveys and indoor air concentration analyses of the properties and homes served by the contaminated wells.
- 60 days: Develop plan to identify the source of contamination and remediate impacted areas of aquifer.

This EPA Order is significant for a number of reasons, including:

1. It represents a novel exercise of EPA's authority under the Safe Drinking Water Act to force a company to conduct costly investigation and remediation measures on a highly expedited basis, based on EPA's unilateral technical findings, under threat of large daily penalties.
2. While we have not reviewed the technical data or background in this case, our experience with similar cases involving alleged cross-contamination of water wells by oil and gas operations shows that the scientific and causation issues in such cases are extremely complex, and require thorough analysis and expert evaluation before leaping to conclusions about who or how such contamination was caused.
3. The Texas regulatory agency and the company have been working together since August to complete a technical investigation of the

cause; nevertheless, EPA decided to take this unilateral enforcement action.

The oil and gas operator receiving the Order – who adamantly contests EPA's technical findings – is now faced with the difficult choice of either complying with the onerous requirements of EPA's Order, or appealing it to federal court under Section 300j-7 of the Safe Drinking Water Act.

This draconian new enforcement approach may be related to EPA's ongoing hydraulic fracturing study,¹ and implements EPA's stated intent to focus national enforcement for fiscal years 2011-2013 on the energy extraction sector.²

Do not hesitate to contact us if you have further questions or would like a copy of the EPA Order.

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