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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We want to thank the Regions for their thorough review of the draft guidance and valuable input.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)

Remedial Actions That May Be Ordered (Continued)

- a study to determine the extent of the contamination, including inventory and monitoring of PWSs and private wells or ground water
 - an engineering study proposing a remedy to eliminate the endangerment and a timetable for its implementation
 - the halting of the disposal of contaminants that may be contributing to the endangerment.
- Commencing a civil action for appropriate relief including a restraining order, or a temporary or permanent injunction. The injunction would require the PWS, UIC well owner or operator, or the responsible party to take steps to abate the hazard.

Use of Judicial vs. Administrative Orders

The Region will need to choose between a Section 1431 administrative order or a civil judicial action. A civil referral will 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. Because all 1431 referrals are indirect, the Region must first transmit them to the Headquarters (OGWDW and OE) for concurrence before sending them to the Department of Justice (DOJ). Headquarters will review and obtain the necessary concurrences as quickly as possible.

If immediate relief is necessary, an expedited referral is possible through the use of a telephone referral. The Region should send (via FAX) a very brief memorandum describing the problem, the potential or actual health effects, and the action required by the identified parties to Headquarters (OGWDW and OE) and DOJ. Upon receipt of the information, Headquarters will arrange a conference call with all involved parties and obtain necessary concurrences as soon as possible. Please note that DOJ has filed a complaint and a motion for a temporary restraining order in as little as one day.

A Section 1431 administrative order offers EPA some unique powers. Unlike compliance orders, 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 Procedures Act (APA). These require all Agency actions to be reasonable and not "arbitrary or

Remedial Actions That May Be Ordered (Continued)

capricious". 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 the administrative order may challenge the terms of the order. Under the judicial review provisions of Section 1448 of the SDWA, however, 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 the administrative order). If the recipient fails to meet this condition, he loses all rights to contest the terms of the order.

Any enforcement actions to require compliance with an administrative order or to seek civil penalties for its violation must be in District Court. A recipient who violates or fails or refuses to comply with the terms of the administrative order, may be subject to a civil penalty of not more than \$5,000 for each day in which the violation occurs or failure to comply continues.²⁸

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 exist under:

- Resource Conservation and Recovery Act (RCRA) - Section 7003
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) - Section 106
- Clean Water Act - 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, and CAA has been issued by the Agency.)²⁹ For example, Section 7003 of RCRA is very broad in that it allows for protection of the "environment". However, it is somewhat limited in that the threat must be caused by a "solid waste".

Relationship between Section 1431 and Other EPA Emergency Authorities (Continued)

Section 1431, on the other hand, is limited to the protection of a PWS or an USDW, but covers a broad universe of "contaminants". It is generally recommended that the Regions issue joint orders under more than one of these statutory authorities, when possible, in order to maximize the Agency's authority and minimize the risk of successful judicial challenge. 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.

An important exception to this recommendation is that it may be inadvisable to combine a CERCLA Section 106 or RCRA Section 7003 order with a SDWA Section 1431 order. One advantage of the CERCLA and RCRA orders is that they generally are not subject to "pre-enforcement" judicial review. That is, recipients of a CERCLA or RCRA order generally may not challenge that order in a court at the time they receive it, but must wait until EPA brings a court action to enforce the order. In contrast, SDWA Section 1431 orders generally are subject to "pre-enforcement" judicial review. Because "pre-enforcement" review of the Section 1431 portion of the order would be available, the Agency's ability to avoid "pre-enforcement" review of the rest of the order (*i.e.*, the portions issued under CERCLA or RCRA authorities) might be jeopardized. However, if the Region is reasonably confident that it will enforce the order expeditiously if the recipient refuses to comply, this issue may not arise.

Because of the importance of this issue, the Regions should not issue a SDWA Section 1431 Order jointly with a CERCLA Section 106 or RCRA Section 7003 Order without first consulting Headquarters (OGC and OE).

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 State or local government units, State or local officials, owners or operators of underground injection wells, area or point source polluters, or to any other person whose action or inaction requires prompt regulation to protect public health.³⁰ This authority authorizes the issuance of an order to a Tribal Government or Federal agency. (If the order involves a Tribal entity, the Region should consult the Agency's Indian policy and advise the Office of Federal Activities of orders issued against Federal facilities.)

Parties Over Whom Section 1431 Grants EPA Authority (continued)

In cases where the responsible party is not clearly known, the order should be issued 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. An example, is a PWS which is contaminated with benzene, toluene, and xylene. Five gasoline service stations are located near the PWS. An order could require each of the service stations to test for leaks in their underground storage tanks.

EPA may even use Section 1431 authority to reach parties that are not responsible for the endangerment. Orders to a nonresponsible party ordinarily should be limited to those instances where no responsible party exists or is suspected and the issuance of an order to a nonresponsible 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.

Procedure for Issuing a Section 1431 Order**Components of a 1431 Order****Administrative**

The recommended basic components of an administrative 1431 Order are:

- EPA's Statutory Authority
- Findings of Fact
- Conclusions of Law
- Conditions (or Actions) Ordered by the Emergency Order - (Should also contain a statement that requires the respondent to advise the Agency of his intentions to comply with the terms of the order in a specified short timeframe, e.g, 72 hours).
- Name and Address of EPA Contact

Attachments 3 and 4 are examples of Section 1431 administrative orders for the PWSS Program. Attachment 5 is an example of a Section 1431 administrative order for the UIC Program.

Procedure for Issuing a Section 1431 Order (Continued)**Components of a 1431 Order****Civil Judicial**

If a judicial order is sought, the Agency must still determine that an "imminent and substantial endangerment" exists. This should be done through a written determination or affidavit, provided by the RA or delegatee, that the conditions that support the need for an action under Section 1431 have been met.

Degree of Support**Development of a Record**

The issuance of a Section 1431 Order is an administrative action that must be supported by an adequate written record in order to survive a potential judicial challenge. 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, other background materials, and memoranda to the file. EPA also may need to present information in the form of affidavits from the responsible EPA officials.

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 taking action under Section 1431.³¹ 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 (URTH) level, data from toxicological studies, and the opinion of a toxicologist or other expert as evidence that an "imminent and substantial endangerment" may exist.

Procedure for Issuing a Section 1431 Order (Continued)**State and Local Authorities Have Not Acted**

As stated previously, before taking an action under Section 1431, EPA must receive information that demonstrates that State and local authorities have not acted to protect public health. The Region should have a written basis for this finding, which may consist of a telephone log or written communication(s), that serves to document contact between EPA and State and local authorities.

Headquarters Contact

The Region is not required to receive concurrence from Headquarters before issuing an administrative Section 1431 Order. However, the Region may elect to receive advice from Headquarters prior to issuing the order, especially those Regions with no or little experience in issuing Section 1431 Orders. Consulting in advance with Headquarters program staff and OGC and OE may protect against subsequent adverse judicial determinations. In particular, due to issues of "preenforcement" judicial review as discussed previously, the Regions should not issue a SDWA Section 1431 Order jointly with a CERCLA Section 106 or RCRA Section 7003 Order without first consulting OGC and OE. Headquarters intends to provide feedback to the Regions within 48 hours.

Headquarters has not delegated the authority under Section 1431 to the Region for a judicial referral. The Region must submit a Section 1431 civil judicial order to OE and OGWDW for concurrence. Headquarters also will strive to provide feedback within 48 hours for any expedited judicial referral. If however, the referral under Section 1431 is not of an "emergency nature" (i.e., has not been expedited), the referral will be processed by Headquarters in the usual 35-day period.

Regardless of whether the Region prepares an administrative or civil judicial order, OE and OGWDW request that the Region submit copies of all final orders for their central files.

No Citizen Suits under Section 1431

SDWA authorizes citizens suits against EPA when the Agency has failed to take actions that are mandatory under the statute. Because EPA's authority to take action under Section 1431 is discretionary, citizen suits to compel EPA to take action under Section 1431 are not authorized.³²

FOOTNOTES

- 1 Section 1431, 42 U.S.C. Section 300(i) (emphasis added).
- 2 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 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 protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.
- 3 Id. 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 administrative 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.
- 4 See Id. at 35 - 36.
- 5 While "USDW" is not defined in the statute, SDWA Section 1421(d)(2) makes it clear that the statute protects a broad category of waters. This section states that "[u]nderground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant..." (emphasis added).
- 6 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, 18 (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).
- 7 See Ethyl Corp. v. EPA, 541 F.2d at 13.

FOOTNOTES
(Continued)

- 8 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 CCC court, construing similar language in CERCLA, stated that the standard is especially lenient since it authorizes action "when there may be a risk of harm, not just when there is a risk of harm." Id. at 193 (emphasis in original).
- 9 See Ethyl Corp. v. EPA, 541 F.2d at 18.
- 10 See U.S. v. Conservation Chemical Co., 619 F. Supp at 193-94; B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (CERCLA action).
- 11 Dague v. City of Burlington, 935 F.2d 1343, 1356, (2d Cir. 1991); U.S. v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985).
- 12 695 F. Supp. 1072, 1076 (E.D. Cal. 1988).
- 13 See Conservation Chemical Corp., 619 F. Supp. at 194, citing legislative history of RCRA Section 7003.
- 14 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. H10789, H 10793-94, H10798-99, H10801-02 (daily ed. Nov. 19, 1974); 120 Cong. Rec. S20240 (daily ed. Nov. 26, 1974). This concern was reiterated and strengthened in subsequent Congressional reviews of the SDWA program. House Comm. on Interstate and Foreign 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).
- 15 This interpretation is supported by H. Rep. 93-1185.
- 16 See Id.; See B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (CERCLA action, quoting H. Rep. 93-1185).

FOOTNOTES
(Continued)

- 17 See In Re FCX, Inc. 96 B.R. 49, 55 (Bkrtcy., 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").
- 18 695 F. Supp. 1072, 1076 (E.D. Cal. 1988).
- 19 Conservation Chemical Corp., 619 F. Supp. at 194.
- 20 Id.
- 21 See H.R. 93-1185 at 35.
- 22 H.R. 93-1185 at 36.
- 23 United States v. Occidental Petroleum Corp., No. 79-989 (E.D. Cal. 1980).
- 24 See H.R. Rep. 93-1185 at 36. 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."
- 25 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. Id. at 22-23, 35; S. Rep. No. 93-231, 93rd Cong., 1st Sess. 9, 10 (1973); 120 Cong. Rec. H10789, H10793-94 (daily ed. Nov. 19, 1974); 120 Cong. Rec. S20241-42 (daily ed. Nov. 26, 1974).
- 26 The legislative history supports this view. See H.R. Rep. 1185, at 35 - 36.
- 27 See Id. The House Report specifically mentions a number of these listed actions as among those EPA may take.
- 28 SDWA Section 1431(b).

FOOTNOTES
(Continued)

- 29 Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, U.S. EPA, OSWER Directive No. 9833.0-1a, March 13, 1990. Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, U.S. EPA, May 13, 1982; Final Revised Guidance Memorandum On The Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA), U.S. EPA, September 26, 1984. 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.
- 30 See H.R. 93-1185 at 35.
- 31 See U.S. v. Conservation Chemical Corp., 619 F. Supp. at 193 (because of scientific and medical uncertainties, proof with certainty is impossible).
- 32 See U.S. v. Hooker Chemicals & Plastics Corp., 101 F.R.D. 451, 455 (W.D.N.Y. 1984).

ATTACHMENT 1

Citation from 42 USC 330i, (SDWA Section 1431)

SEC. 1431. (a) Notwithstanding any other provision of this title, 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 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) 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 \$5,000 for each day in which such violation occurs or failure to comply continues.

ATTACHMENT 2

Citation from H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess.

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 authority conferred by this section is intended to override any limitations upon the Administrator's authority found elsewhere in the bill. Thus, the section authorizes the Administrator to issue such orders as may be necessary (including reporting, monitoring, entry and inspection orders) to protect the health of persons, as well as to commence civil actions for injunctive relief for the same purpose.

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.

The authority conferred hereby is intended to be broad enough to permit the Administrator to issue orders to owners or operators of public water systems, to State or local governmental units, to State or local officials, owners or operators of underground injection wells, to area or point source polluters, and to any other person whose action or inaction requires prompt regulation to protect public health. Such orders may be issued and enforced notwithstanding the existence of any exemption, variance, permit, license, regulation, order, or other requirement. Such orders may be issued to obtain relevant information about impending or actual emergencies, to require the issuance of notice so as to alert the public to a hazard, to prevent a hazardous condition from materializing, to treat or reduce hazardous situations once they have arisen, or to provide alternative safe water supply sources in the event any drinking water source which is relied upon becomes hazardous or unusable.

Willful violation of the Administrator's order is made punishable by a fine of up to \$5,000 per day of violation.

ATTACHMENT 2
(Continued)

Citation from H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess.

In using the words "that appropriate State or local authorities have not acted to protect the health of persons," the Committee intends to direct the Administrator to refrain from precipitous preemption of effective State and local emergency abatement efforts. However, if State or local efforts are not forthcoming in timely fashion or are not effective to prevent or treat the hazardous condition, this provision should not bar prompt enforcement by the Administrator.

In using the words "imminent and substantial endangerment to the health of persons," the Committee intends that this broad administrative authority not be used when the system of regulatory authority provided elsewhere in the bill could be used adequately to protect the public health. Nor is the emergency authority to be used in cases when the risk of harm is remote in time, completely speculative in nature, or de minimis in degree. However, as in the case of U.S. v. United States Steel, Civ. Act. No. 71-1041 (N.D.Ala.1971), under the Clean Air Act, the Committee intends that this language be construed by the court 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. 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.

Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into the drinking water of contaminants that may cause health damage after a period of latency.

Among those situations in which the endangerment may be regarded as "substantial" are the following: (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).

ATTACHMENT 3

Model Section 1431 Administrative Order - PWSS Program

Docket no. PWS-EAO-90-013

ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:

UPPER LAKE POMO WATER
ASSOCIATION
dba Upper Lake Hardisty
Community Water System

PWS ID NO. 0605025

PROCEEDINGS UNDER Section
1431(a)(1) of the SAFE
DRINKING WATER ACT, 42 U.S.C.
§ 300i(a)(1)

FINDING OF IMMINENT AND
SUBSTANTIAL ENDANGERMENT
TO THE HEALTH OF PERSONS

AND

EMERGENCY ADMINISTRATIVE ORDER

Docket No. PWS-EAO-90-013

The following Findings are made and Order issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 1431(a)(1) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300i(a)(1). The authority to take these actions has been duly redelegated to the undersigned Chief, Drinking Water and Groundwater Protection Branch (formerly Drinking Water Branch), Water Management Division, Region IX.

FINDINGS

1. The Upper Lake Pomo Water Association ("ULPWA" or "Respondent") is a nonprofit association formed, inter alia, for the purpose of owning, operating and maintaining facilities obtained through the Sanitation Facilities Act, including the public water system known as the Upper Lake Hardisty Community Water System ("ULHCWS"). On July 1, 1985, the Indian Health Service of the U.S. Department of Health and Human Services entered into a Transfer Agreement with Respondent, the Upper Lake Rancheria (formally known as the Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California (the "Rancheria")), and the Upper Lake Pomo Association ("ULPA"), whereby the Indian Health Service transferred to Rancheria and ULPA certain community facilities constructed by it pursuant to the Sanitation

Docket no. PWS-EAO-90-013

Facilities Act (Pub. L. 86-121, Sec. 7). Rancheria and ULPA thereupon transferred such facilities to the ULPWA. The Rancheria, an Indian Tribal Entity recognized and eligible to receive services from the United States Bureau of Indian Affairs, acts through the Chairperson of the Upper Lake Tribal Council (the "Tribal Council") and is an "Indian Tribe" within the meaning of Section 1401(14) of the Act, 42 U.S.C. § 300f(14). The ULPA, which acts through its President, is a nonprofit association formed for the purpose of holding and managing tribal lands and the water supply system serving such lands. The Rules and Regulations of the ULPWA were established under the tribal authority of the ULPA and require the management Committee of ULPWA to manage the ULPWA in accordance with the general plans and business policies approved by the members of the ULPA.

2. Respondent owns and operates, and Delvin Holder operates, ULHCWS, a public water system on the Hardisty Ranch portion of the Rancheria, which is located northwest of the town of Upper Lake, Lake County, California, approximately one mile north of State Highway 20 on Elk Mountain Road. Hardisty Ranch is the northernmost tract of the Rancheria.

3. Respondent provides piped water to the public for human consumption and regularly serves 16 service connections and a population of approximately 70 persons.

4. Respondent is a "person" within the meaning of §1401(12) of the SDWA and 40 C.F.R. §141.2 and a "supplier of water" as that term is defined in §1401(5) of the SDWA and 40 C.F.R. §141.2. Respondent owns and operates a "public water system" as defined by §1401(4) of the SDWA and 40 C.F.R. §141.2 and a "community water system" as defined by 40 C.F.R. §141.2.

5. Respondent's public water system utilizes a ground water source.

6. Respondent's public water system is subject to the Safe Drinking Water Act, 42, U.S.C. § 300f et seq., and the National Primary Drinking Water Regulations, 40 C.F.R. Part 141, promulgated pursuant thereto including, inter alia, the maximum contaminant levels at 40 C.F.R. § 141.14; the monitoring and analytical requirements at 40 C.F.R. §§ 141.21; and the reporting and public notification requirements at 40 C.F.R. §§ 141.31 and 141.32.

7. Respondent's public water system is located on Indian land with respect to which the State of California does not have the necessary jurisdiction or its jurisdiction is in question. Respondent's public water system is therefore subject to direct regulation by EPA pursuant to 40 C.F.R. § 142.3(b). The State authorities have not acted to protect the health of persons served by Respondent's public water system because the State authorities lack jurisdiction over Respondent. Both the Rancheria and the Tribal Council, the local authorities, have failed to act to protect the health of persons served by the public water system.

8. EPA has received information that levels of coliform bacteria in excess of the maximum contaminant level (MCL) permitted by law (see 40 C.F.R. §141.14) have been detected in seven of the twelve required monthly samples collected in 1989 pursuant to 40 C.F.R. §141.21(b). Individual samples have indicated coliform levels as high as 90 times the MCL. Respondent violated 40 C.F.R. §141.14 by exceeding the MCL for coliform bacteria for at least the following 6 (six) quarterly compliance periods: October, 1987 through December, 1987; April, 1988 through June, 1988; January, 1989 through March, 1989; April, 1989 through June, 1989; July, 1989 through September, 1989; and October, 1989 through December, 1989. In addition, EPA has received information that high levels of fecal coliform--up to greater than 16 coliforms per 100 ml, the highest amount detectable by the analytical test method used--have been detected in several water samples taken from the water system. Supplemental sampling performed in December 1989 by the U.S. Indian Health Service (IHS) has indicated that the coliform contamination is widespread throughout the distribution system. EPA has determined that the presence of coliforms, and in particular, fecal coliforms in drinking water, is a serious health concern. The presence of these bacteria indicate that the water may be contaminated with organisms that present a known potential for causing waterborne diseases.

9. Water system sanitary survey inspections conducted by EPA on November 30, 1987 and December 8, 1988, and site visits conducted by EPA and IHS on November 21, 1989, December 21, 1989 and February 15, 1990, revealed numerous deficiencies in Respondent's public water system. Based on these reviews, EPA has concluded that the system's deficiencies, which include, inter alia, inadequate maintenance of, and failure to continuously use, the chlorination system; lack of routine upkeep and maintenance of the distribution system; failure to correct cross-connections in

Docket no. PWS-EAO-90-013

the distribution system; lack of routine upkeep and maintenance of the wellhead and pumphouse; and a deteriorating and insufficiently protected water storage tank; continue to exist and have not been corrected.

10. The presence of these contaminants in Respondent's public water system, i.e., coliform greatly in excess of the applicable MCL, and high levels of fecal coliform, present an imminent and substantial endangerment to the health of persons because the water supplied by Respondent is subject to immediate use and consumption by Upper Lake Hardisty residents and their guests. The endangerment posed is substantial because of the known potential for waterborne disease these contaminants present. EPA believes that based on the lack of proper operation and maintenance and the physical deficiencies of the system, the violations of the bacteriological MCL and the presence of fecal coliform in the water supply will continue unless action is taken.

11. 40 C.F.R. §141.21(d) requires that when coliform bacteria in a single sample exceed certain levels (four per 100 milliliters in the Membrane Filter Test, or three or more 10 milliliter portions of a five-tube Multiple Tube Fermentation test) that at least two consecutive daily check samples be taken and analyzed from the same sampling point, and that additional check samples be taken daily, until two consecutive check samples show less than one coliform bacteria, or no positive tubes.

12. Respondent violated 40 C.F.R. §141.21(d) by failing to take required check samples for at least the following months: April 1986, December 1987, June 1988, January 1989, May 1989, June 1989, August 1989, October 1989 and November 1989.

13. 40 C.F.R. §141.36 (1988) contains the public notification requirements that public water systems were required to meet until April 28, 1989. 40 C.F.R. §141.36 required suppliers of water who own or operate community water systems to provide notice to both the public and to water system users whenever the system fails to comply with an applicable maximum contaminant level established in Subpart B or G, and required notice to be provided to water system users, inter alia, whenever the system fails to comply with an applicable testing procedure established in Subpart C or fails to perform any required monitoring.

Note: Findings 11 & 12 are not necessary to support the findings of an "imminent and substantial endangerment". Instead, they refer strictly to violations and would be more suitable in a Section 1414 order.

Docket no. PWS-EAO-90-013

14. Respondent violated 40 C.F.R. §141.36 by failing to notify the public and water system users that it failed to comply with the provisions of 40 C.F.R. Part 141, Subpart B (MCLs), as set forth in paragraph 8.

Based on the foregoing, I hereby find that contaminants are present in or are likely to enter Respondent's public water system and may present an imminent and substantial endangerment to the health of persons. State authorities do not have jurisdiction to act to protect the health of such persons and the local authorities have failed to act.

ORDER

Pursuant to the authority granted to EPA by Section 1431(a)(1) of the SDWA, I HEREBY ORDER:

NOTICE OF INTENTION TO COMPLY

1. Within five (5) business days of the effective date of this Order, Respondent shall inform EPA, in writing, of its intention to comply, and a general statement of the methods it will use to comply, with each of the elements of this Order.

PUBLIC NOTIFICATION

2. Within ten (10) days of the effective date of this Order, and every thirty (30) days thereafter, Respondent shall advise all customers of the past year's history of MCL violations and of the presence of fecal coliform in the water supply, and shall mail or personally deliver a copy of the enclosed public notification, without additions or deletions, to every customer's billing address. A certification that this task has been completed shall be sent to EPA within one (1) day of mailing or delivery, as the case may be.

MICROBIOLOGICAL COMPLIANCE

3. Respondent shall comply within thirty (30) days from the effective date of this Order and at all times thereafter with the requirements of 40 C.F.R. §141.14 by meeting the MCLs set for coliform bacteria. If this cannot be achieved, an alternate source of approved water for human consumption must be provided within thirty (30) days of the effective date of this Order to all customers served by the system in sufficient quantity for all

reasonable domestic uses. The customer shall not be required to pay an up-front fee in order to obtain the alternate source of water for human consumption, which shall be in the form of bottled water, or one or more tank trucks of water from an approved potable water source. Bottled or bulk water shall be of sufficient quality to comply with the National Primary Drinking Water Regulations, 40 C.F.R. Part 141, and shall be provided in a location and in a manner convenient to consumers. If an alternate source of water for human consumption is provided, Respondent must continue to provide the alternate source of potable water until such time as EPA Region IX certifies in writing that the primary water supply available to the consumers of the ULHCWS consistently meets the quality standards of the National Primary Drinking Water Regulations, 40 C.F.R. Part 141.

COLIFORM MONITORING

4. Commencing upon the effective date of this Order, in addition to meeting the microbiological sampling and analytical requirements of 40 C.F.R. §141.21(b) and 40 C.F.R. §141.21(d), Respondent shall be required to sample and test twice each month (approximately once every two weeks) at representative points in the distribution system, for total coliform. Respondent shall arrange with the testing laboratory so that all samples taken (regular, check samples and supplementary samples) which test positive at any level for total coliform shall be further tested for the presence of fecal coliform.

5. Respondent shall immediately comply upon the effective date of this Order and at all times thereafter with the requirements of 40 C.F.R. §141.31(a) and report to the EPA the results of monitoring and analysis of water samples within the first ten (10) days following the month in which the result is received or within the first ten (10) days following the end of the required monitoring period, whichever is sooner. Any monitoring and analysis results which indicate the presence of total coliform and/or fecal coliform shall be reported to EPA within 48 hours of the test results being received.

CHLORINATION AND CHLORINE RESIDUAL MONITORING

6. Within 10 days of receipt of this Finding and Order Respondent shall begin operating the disinfection/chlorination system to an extent sufficient to meet a chlorine residual of at least 0.5 mg/l throughout the distribution system. Samples for

Docket no. PWS-EAO-90-013

chlorine residual analysis shall be taken every week at at least two representative points in the distribution system. Respondent shall report the results of the chlorine residual analyses to EPA immediately upon receipt.

PLAN SUBMITTAL

7. a) Respondent shall submit within thirty (30) days from the effective date of this Order a plan to achieve the requirements set forth in paragraphs 3, 4, 5 and 6 of this Order. The plan shall be submitted to the address listed in paragraph 10 of this Order.

b) Suggestions for plan preparation:

The plan to be submitted shall include a list of actions that will be completed setting forth the specific dates on which the actions will be complete. The plan shall also include actions that will temporarily eliminate problems while a long-term solution is being assessed. Respondent shall list in the plan remedial actions such as: disinfection of the well (if applicable), disinfection of the pump and distribution system, disinfection of the storage tank, flushing of various units in the system, installation of a back-flow prevention system and various methods of chlorination, such as hand chlorination and direct in-line injection. The plan could include a change of water sources, or remediation of the current water source, to eliminate contamination coming from the source. The plan could include replacement or refurbishment of parts or all of the distribution system, including pipes, appurtenances, and any water storage facilities. The plan should include an operations and maintenance schedule for the water system, and a plan for financing needed improvements, operations and maintenance, and routine monitoring required of the system. The plan should also include dates for the purchase and installation of equipment and arrangements with analytical laboratories and consulting firms.

USER NOTIFICATION

8. Respondent shall comply immediately upon the effective date of this Order and at all times thereafter with the public notification requirements of 40 C.F.R. §141.32* by providing timely notice to persons served by the system whenever the system fails to comply with an applicable MCL, fails to comply with a required treatment technique, fails to perform monitoring re-

Docket no. PWS-EAO-90-013

quired by the Act or fails to comply with an applicable testing procedure. Such notice shall meet all the requirements of 40 C.F.R. §141.32. Copies of all such notices shall be submitted to the EPA at the address listed in paragraph 10 of this Order.

*The revised public notification requirements, codified at 40 C.F.R. §141.32, became effective on April 28, 1989. See 52 Fed. Reg. 41546 (Oct. 28, 1987). The public notification requirements at 40 C.F.R. §141.32 superseded and replaced the public notification requirements at 40 C.F.R. §141.36.

ALL OTHER REQUIREMENTS

9. Immediately upon receipt of this Order and at all times thereafter Respondent shall comply with all other applicable requirements of the SDWA and the regulations promulgated thereunder (40 C.F.R. Parts 141 and 142).

ADDRESSES FOR SUBMITTALS

10. All submittals required by this Order shall be mailed to the following address:

U.S. EPA, Region IX
Water Management Division
1235 Mission Street
San Francisco, CA 94103
Attn: Barry Pollock W-6-1
(PWS-EAO-90-013)

Docket no. PWS-EAO-90-013

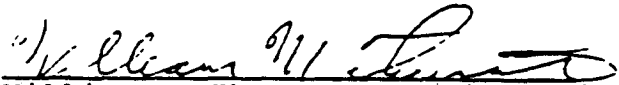
GENERAL PROVISIONS

1. This Order does not constitute a waiver, suspension or modification of the requirements of 40 C.F.R. §141.14, §141.21, §141.31, §141.32 or of the Safe Drinking Water Act and any of the regulations promulgated thereunder, which remain in full force and effect. Issuance of this Order is not an election by EPA to forego any civil or criminal action otherwise authorized under the SDWA.

2. Violation of any term of this Order, or failure or refusal to comply with this Order, may subject Respondent to a civil penalty of up to \$5,000 per day per violation for each such day in which a violation occurs as assessed by an appropriate United States district court under Section 1431(b) of the SDWA, 42 U.S.C. §300i(b).

3. This Order shall be effective upon receipt. This Order shall remain in effect until there have been nine (9) consecutive months of compliance with the Order, the Safe Drinking Water Act and all the regulations promulgated thereunder.

Dated this 21st day of February, 1990.


William M. Thurston, Acting Chief
Drinking Water and Groundwater
Protection Branch
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

Re: Upper Lake Pomo Water Association
Upper Lake Hardisty Community Water System
Emergency Administrative Order Docket No. PWS-EAO-90-013

I certify that the foregoing Emergency Administrative Order
was sent this day in the following manner to the below addressee:

Original by Certified Mail
P 841 396 339
Return Receipt Requested

Mr. Delvin Holder
Upper Lake Pomo Water Association
POB 405
Upper Lake, CA 95485

Copy by Certified Mail
P 841 396 386

Mrs. Phyllis Harden
Acting Tribal Vice-Chairperson
Upper Lake Band of Pomo Indians
POB 245272
Sacramento, CA 95824

Copy by Regular Mail

Mr. Kirk Dooley
Indian Health Service
IHS Ukiah Field Office
169 Mason Street, Suite 400
Ukiah, CA 95482

Copy by Regular Mail

Ms. Leedesta
DHUD/OIP
450 Golden Gate Avenue, Room 7425
POB 36003
94102-3446

Dated: 2/21/90 2/21/90

Barry F. Pollock E.R.
Barry F. Pollock
Environmental Engineer
Region 9

CERTIFICATE OF SERVICE

Re: Upper Lake Pomo Water Association
Upper Lake Hardisty Community Water System
Emergency Administrative Order Docket No. PWS-EAO-90-013

I certify that the foregoing Emergency Administrative Order was sent this day in the following manner to the below addressee:

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Upper Lake Band of Pomo Indians
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Indian Health Service
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169 Mason Street, Suite 400
Ukiah, CA 95482

Copy by Regular Mail

Ms. Leedesta
DHUD/OIP
450 Golden Gate Avenue, Room 7425
POB 36003
94102-3446

Dated: 2/21/90 2/21/90

Barry F. Pollock E.P.
Barry F. Pollock
Environmental Engineer
Region 9

CERTIFICATE OF SERVICE

Re: Upper Lake Pomo Water Association
Upper Lake Hardisty Community Water System
Emergency Administrative Order Docket No. PWS-EAO-90-013

I certify that the foregoing Emergency Administrative Order
was hand delivered this day to the below addressee:

Mr. Delvin Holder
Upper Lake Pomo Water Association
POB 405
Upper Lake, CA 95485

Dated: Feb. 23, 1990

By F. Pollock
Barry F. Pollock
Environmental Engineer
Region 9

ATTACHMENT 4

Model Section 1431 Administrative Order - PWSS Program
(involving unregulated contaminants)

MAY 16 1984

Ref: SRC

CERTIFIED MAIL
RETURNED RECEIPT REQUESTEDST. MARY ENTERPRISES, INC.
C/O Margaret Black
St. Mary, Montana 59417Re: Administrative Order issued
under the emergency powers of the
Administrator of Environmental
Protection Agency in §1431 of
the Safe Drinking Water Act,
42 U.S.C. Section 300i(a)

Dear St. Mary Enterprises, Inc.:

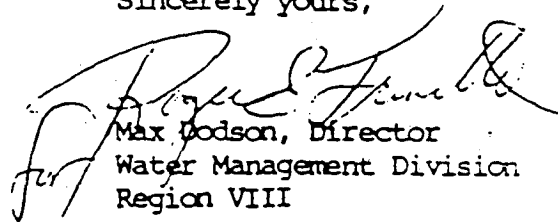
The Administrator of the Environmental Protection Agency (the Administrator) is in receipt of information that a contaminant is present in a public water system in St. Mary, Montana and that the contaminant may present an imminent and substantial endangerment to the health of persons in the area. Under the authority granted in Section 1431 of the Safe Drinking Water Act (the Act) 42 U.S.C. Section 300i(a), the Administrator, upon receipt of such information as that outlined above, may take such actions and issue such ORDERS as may be necessary to protect the health of persons who are or may be users of such public water systems containing the contaminant.

Benzene is a contaminant as defined in the Act and a principal component of gasoline. It has been detected in unnaturally large quantities in a public water system in the immediate vicinity of your underground gasoline storage tanks. On the basis of information available to us, we have reason to believe that leakage from underground gasoline storage tanks such as those owned and operated by you may be the cause of this benzene infiltration. Accordingly, the enclosed ORDER is issued under the above cited authority.

Any person who willfully violates or fails or refuses to comply with any ORDER issued under the above cited authority may, in an action brought in the appropriate United States district court to enforce such ORDER, be fined five-thousand dollars (\$5,000.00) for each day in which such violation occurs or failure to comply continues.

If you have any questions concerning this letter or the enclosed ORDER, please contact William E. Engle at (406) 449-5414.

Sincerely yours,


Max Godson, Director
Water Management Division
Region VIII

Enclosure

cc: Blackfeet Reservation
c/o Mr. Phillip E. Roy, Esquire
P.O. Box 849
Browning, MT 59417

State of Montana
Water Quality Bureau
Cogswell Building
Helena, MT 59620
ATTN: Steve Pilcher

John Wardell, Director
Montana Operations Office
Environmental Protection Agency
Federal Office Building Drawer 10096
301 So. Park
Helena, MT 59626-0026

Alan Morrissey, Attorney
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Nancy Wentworth
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

IN THE MATTER OF:)
)
ST. MARY ENTERPRISES, INC.) EMERGENCY ADMINISTRATIVE)
))
) ORDER)
)
Proceedings Under)
Section 1431(a) of the Safe)
Drinking Water Act)
42 U.S.C. Section 300i(a))
)

The following Findings of Fact are made and this ORDER is issued pursuant to authority granted in Section 1431(a) of the Safe Drinking Water Act (the Act), 42 U.S.C. Section 300i(a), to the Administrator of the United States Environmental Protection Agency (hereinafter "EPA"). This authority has been delegated to the Director of the Water Management Division, Region VIII.

FINDINGS OF FACT

1. St. Mary Enterprises, Incorporated (a private non-Indian corporation) owns and operates a business in St. Mary, Montana which includes, but is not limited to, several gasoline stations.

2. St. Mary is in Glacier County, Montana, on the Blackfeet Reservation.

3. The gasoline stations owned and operated by St. Mary Enterprises, store their gasoline in underground storage tanks.

4. Many of these tanks are located up-gradient of Kip's Beer Garden, which is just east of Divide Creek which runs north - south through the area.

5. The flow of ground water in the area east of Divide Creek is generally from east to west.

6. Kip's Beer Garden is a public water system within the meaning of Section 1401(4) of the Safe Drinking Water Act, 42 U.S.C. Section 300f(4).

7. Kip's Beer Garden is located immediately down-gradient of the gasoline tanks in question.

8. The analysis of samples taken from the well serving Kip's Beer Garden revealed high levels of Benzene.

<u>Sample date</u>	<u>Benzene concentration</u>
November 16, 1983	0.72 mg/l
February 24, 1984	3.6 mg/l

9. Benzene is a contaminant within the meaning of Section 1401(6) of the Act, 42 U.S.C. Section 300f(6), and a principal component of gasoline. The EPA Office of Drinking Water has issued a health effects advisory for benzene of 0.23 mg/l for 10 day exposure and 0.07 mg/l for long term exposure. Exposure to benzene has been closely linked to leukemia in humans.

It is a suspected mutagen (causing change in genetic information capable of transmission to subsequent generations of affected genes and chromosomes) and a mitotic poison (affecting the process of cell division). Benzene can affect the central nervous system and cause respiratory failure, circulatory collapse, and at high doses, death. The toxicity of benzene may be influenced by interaction with chlorinated hydrocarbons. For the maximum protection of human health from the potential carcinogenic effects due to exposure of benzene, the ambient water concentration should be zero. EPA's Water Quality Criteria document for benzene states that under certain conditions, a concentration of benzene of 0.66 mg/l would be expected to result in an increase of one additional case of cancer per one million people.

10. The State of Montana has taken no action on this matter because it lacks jurisdiction over these facilities on the Blackfeet Reservation.

11. The Blackfeet Reservation Tribal Council, as the local governing authority has not taken action on this matter.

DETERMINATION

On the basis of the FINDINGS OF FACT recited above, EPA has reason to believe: that the handling and storage of gasoline on St. Mary Enterprises' property have given rise to conditions which may present imminent and substantial endangerment to the health of persons;

that the contaminant, benzene, is present in a public water system as a result of the handling and storage of gasoline on the St. Mary Enterprises compound; and that amelioration of the situation can be achieved by identifying the gasoline tanks that are leaking so that a plan can be developed to contain and clean up contamination of the wells supplying the public water systems. Although EPA believes that the up-gradient tanks are the principal source of this contamination, any of the tanks owned and operated by St. Mary Enterprises could be contributors to the contamination.

ORDER

Pursuant to Section 1431(a) of the Safe Drinking Water Act, 42 U.S.C. Section 300(i)(a), Respondent, St. Mary Enterprises is hereby Ordered to take the following actions:

I. Immediately make arrangements with a professional tank testing company to have all gasoline tanks and associated dispersing lines operated by St. Mary Enterprises, in the St. Mary community, pressure tested in accordance with National Fire Protection Association standard 329-1983, Underground Leakage of Flammable and Combustible Liquids, and

A. The test method to be used shall be capable of detecting a loss of 0.05 gallons per hour and shall take into account the following factors:

- (i) The gross volume change in a given period of time;
- (ii) The temperature change of the liquid during that same time period; and,
- (iii) The movement of tank ends as pressure is increased.

B. Contact William E. Engle of the EPA Montana Operations Office (406) 449-5414, before the actual testing is conducted.

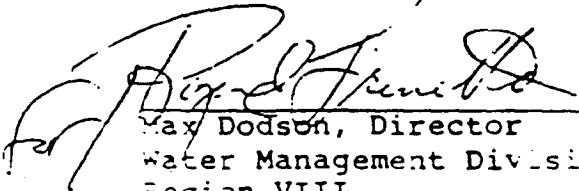
C. Submit to EPA at:

Environmental Protection Agency
Montana Operations Office
Federal Office Building, Drawer 10096
301 South Park
Helena, Montana 59626-0026
Attention: William E. Engle

the results of such testing within twenty-four (24) hours of its actual receipt or notice of its contents.

D. However, in no event shall any of the above cited items be completed later than thirty (30) days after the effective date of this Order.

Effective Date: 15th May, 1984.


Max Dodson, Director
Water Management Division
Region VIII