

MEMORANDUM

TO: Ana Vohryzek, Britton Schwartz
FROM: Eric Moorman
DATE: October 5, 2016
RE: EPA's Emergency Authority Under §1431 of the Safe Drinking Water Act

I. QUESTION PRESENTED

To what extent does the emergency powers provision under §1431 of the Safe Drinking Water Act (SDWA) authorize the U.S. Environmental Protection Agency (EPA) to protect public drinking water supplies from contamination?

II. SHORT ANSWER

SDWA Section 1431 authorizes EPA to take any action it deems necessary—including the issuance of administrative orders or commencement of civil action—to protect public health if it receives information that a contaminant that has entered or is about to enter a water system may present “an imminent and substantial endangerment” to public health, and if state and local authorities have not acted to address the threat. This power is expansive and subject to few limitations. The courts and EPA have interpreted §1431 to confer broad authority on EPA to act quickly and preventatively to protect source water from imminent contamination, and both the text and legislative history of §1431 amply support this broad interpretation. Although EPA has invoked its emergency authority relatively infrequently—and, as the recent case of Flint, MI demonstrates, often belatedly—§1431 remains a potentially powerful tool with which EPA can provide for source water protection where states have failed to do so.

III. ANALYSIS

Under §1431 of the SDWA, the EPA Administrator may take administrative or civil action if he or she receives information that a contaminant presenting an “imminent and substantial

danger” to public health has entered or is likely to enter a public water system, and that state and local entities have not acted to protect public health from the threat. 42 U.S.C. §300i(a). Such action may include, but is not limited to, the issuance of emergency administrative orders “as may be necessary to protect the health of persons who are or may be users” of the threatened public water system, or commencing a civil action, which may include a restraining order or injunction. *Id.* Additionally, §1431(b) provides that any person who “violates or fails or refuses” to comply with an EPA emergency order issued under §1431(a) may be subject to an enforcement action in federal court and fined a maximum of \$15,000 “for each day in which such violation occurs or failure to comply continues.” §1431(b).

A. Section 1431 Grants EPA Broad Preventative Powers to Protect Source Water from Contamination

The text, regulations and legislative history of §1431 confer broad powers on the EPA to proactively prevent contamination of public drinking water supplies. *See* H.R. Rep. No. 93-1185 (1974), 35 (§1431 “reflects the Committee’s determination to confer completely adequate authority [on EPA] to deal promptly and effectively with emergency situations which jeopardize the health of persons.”); *see also* U.S. EPA, “Final Guidance On Emergency Authority under Section 1431 of the Safe Drinking Water Act” (1991), 3-4 (emphasizing that “Section 1431 has a broad application and provides EPA with an effective tool for handling public health endangerments concerning public water supplies” and “gives the Administrator *broad powers* to take appropriate enforcement action”). Each specific textual element of §1431 reflects this generous grant of power.

EPA defines “contaminant” in §1431 broadly to include contaminants not regulated under the SDWA. In its 1991 Guidance Document, EPA asserted that it could exercise its emergen-

cy powers to protect source water from a contaminant “even when the contaminant in question is *not* regulated by a National Primary Drinking Water Regulation (NPDWR) under the SDWA.” *Id.* at 5 (emphasis original). EPA relied on legislative history revealing Congress’ intent that EPA’s emergency authority extend to unregulated contaminants. *See, e.g.*, House Report No. 93-1185, 35 (stating that §1431 “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.”).

In its 1991 Final Guidance document, EPA defines “endangerment” as threatened or potential harm rather than actual harm, noting that “[n]o actual injury need ever occur.”¹ U.S. EPA, Final Guidance, 6. Likewise, danger is imminent, “if conditions which give rise to it are present, even though the actual harm may not be realized for years.” *Id.* Furthermore, EPA does not limit its §1431 emergency authority to acute health risks. Instead, it considers contaminants such as carcinogens that have many latent health effects after entering drinking water to pose an “imminent endangerment” that would authorize emergency action under §1431. *Id.* at 7.

Additionally, in determining whether a threat is “imminent” under §1431, 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.” *Id.* at 7. For instance, EPA may exercise its emergency authority even where a contaminant is not likely to enter a public water system for several months, since such a threat would be considered “imminent” in light of the time it would take EPA to effectively respond to the threat. *Id.*

¹ EPA draws this definition in large part from several federal court cases, which will be discussed subsequently in this memo.

Both EPA and the legislative history of the SDWA emphasize the importance of Section 1431's preventative nature, favoring early emergency action even in the absence of absolute proof of contamination. Under §1431(a), EPA may exercise emergency powers upon receiving information that a contaminant that has entered or is likely to enter a public drinking water supply system may endanger public health. Section 1431 does not define the manner of receipt of this information, or how certain the Administrator must be of the information's veracity. *Id.* But tentative language such as "*likely to enter* a public water system," "*threatened or potential terrorist attack*," and "*may present* an imminent and substantial endangerment to the health of persons" strongly suggests that the EPA does not need concrete and incontrovertible "proof" to take action under its emergency powers. §1431(a) (emphases added). In fact, waiting for certainty would undermine §1431, because emergency orders "should ideally be issued early enough to *prevent* the potential hazard from materializing," EPA Guidance at 6, emphasis original; *see also* H.R. Rep. No. 93-1185 at p. 35 ("[a]dministrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing").

EPA reserves discretion to determine whether state or local authorities have taken sufficient action to protect public water supplies in an emergency. Section 1431 provides that the EPA may exercise its emergency powers when it determines that "appropriate State and local authorities have not acted to protect [public health]," but it does not specifically instruct EPA how to make this determination.² EPA's 1991 Guidance Document advises that EPA should take action under §1431 if it "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 Guidance, 9.

² EPA has not issued regulations interpreting this language.

EPA's §1431 authority is not limited to situations in which states refuse to act on an imminent threat to source water. States and local entities may choose to defer such authority to EPA for purposes of expediency, or work jointly with EPA in an emergency. In such cases, EPA may take action under §1431 even though states have not in the traditional sense "failed" or refused to combat the threat. *Id.* at 8.

B. EPA's Emergency Powers Override Other Limitations on its SDWA Authority

Congress intended for §1431 to override all limits on EPA authority contained in other provisions of the SDWA. Section 1431(a) sets forth the Administrator's emergency authority "[n]otwithstanding any other provision of [the SDWA]." §1431(a). The 1974 House Report on §1431 explained that "[t]he authority conferred by this section is intended to override *any limitations* upon the Administrator's authority found elsewhere in [the SDWA]." H.R. Rep. No. 93-1185, 35 (emphasis added). Furthermore, EPA should issue emergency orders under §1431 "notwithstanding the existence of any exemption, variance, permit, license, regulation, order or other requirement." *Id.*

Congress broadened this expansive authority in 1986, authorizing EPA emergency action not only for contaminants entering "public water systems," but also contaminants likely to enter "an underground source of drinking water." Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 *Stan. Envtl. L.J.* 43 (2008), 25. The 1986 amendments also authorized enforcement action against "any person" who violates, fails, or refuses to comply with an emergency order, rather than one who "willfully" refuses to do so, as the original 1974 Section specified. *Id.*³

³ Senate Bill 2019 attempted to dramatically expand EPA's emergency authority by removing the requirement that EPA determine whether state and local officials have taken adequate action against the public health threat, requiring instead that EPA simply notify state and local officials before taking emergency action. In proposing this

Congress again broadened EPA's §1431 emergency powers in the Public Health Security and Bioterrorism Preparedness Response Act of 2002. The 2002 amendments enhanced EPA's emergency authority under §1431 by authorizing EPA to take action where a "threatened or potential" terrorist attack—or other intentional act aimed at disrupting distribution of safe drinking water to the public—posed an imminent and substantial threat to public health. This amendment effectively eliminated the requirement—at least in cases of threatened terrorist activity—that EPA must wait to obtain information relating to contamination before exercising its emergency powers, and allowed EPA to take emergency action regardless of whether actual contaminants are entering, or likely to enter, the water system.⁴

C. Courts Have Interpreted EPA's Emergency Powers Broadly

Courts have generally interpreted §1431 to confer broad authority on EPA to exercise its emergency authority even in situations that do not resemble traditional emergencies. In *Trinity American Corp v. EPA*, the Fourth Circuit found that EPA permissibly exercised its emergency authority under §1431 when it ordered the operator of a polyurethane foam plant to sample groundwater near the plant's property to determine if the water met SDWA standards, and to provide bottled water to anyone living within three-quarters of a mile of the plant until the water samples met federal standards. 150 F.3d at 389. The plant was located near several aquifers that provided drinking water to approximately 100 homes. *Id.* at 390. Between 1985 and 1989, the state health department cited and fined Trinity for dumping waste containing chromium, latex

amendment, the Senate Committee on Environment and Public Works hoped to "eliminate procedural barriers that might prevent the Administrator from acting swiftly in the face of a public health emergency." S. Rep. No. 103-250 (1994), at p. 38. The bill, however, did not pass and the original language requiring EPA to determine the adequacy of state and local efforts remained in place.

⁴ See Varu Chilakamarri, *A New Instrument in National Security: the Legislative Attempt to Combat Terrorism via the Safe Drinking Water Act*, 91 Geo. L.J. 927 (2003), at p. 3 (arguing that the 2002 amendment expands EPA's emergency authority by authorizing EPA to "protect both the water supply and its physical infrastructure... from any type of terrorist or other intentional attack, regardless of whether the attack involves a contamination or not.").

and diesel fuel onto the ground outside the plant. *Id.* at 393. After discovering a number of other violations at the plant, the state health department entered into a consent decree with Trinity, under the terms of which Trinity was required to conduct regular sampling. *Id.* During an inspection, EPA discovered high levels of chlorinated solvents and petroleum hydrocarbons in private supply wells near the Trinity property. *Id.* EPA issued an emergency order under §1431, concluding that (1) “current use of the ground water may present an imminent and substantial endangerment to public health,” *id.*, and (2) the state’s efforts were “insufficient to protect the public health.” *Id.* at 394.

The court upheld the emergency order, finding it a permissible exercise of EPA’s emergency powers under §1431. *Id.* at 396. First, the court noted the broad emergency authority Congress intended to confer upon EPA. *Id.* at 395. Citing the 1974 House Report describing Congress’ intention that the EPA Administrator retain broad emergency powers,⁵ the court reasoned that “courts must ensure that [EPA’s] power under the Act remains ‘relatively untrammled’... [s]o that EPA can act promptly and effectively when a threat to public health is imminent.” *Id.* at 395 (citations omitted). Because of the clear legislative intent that EPA should retain flexibility and discretion in issuing emergency orders, the court sought to “approach challenges to an EPA emergency order with circumspection, recognizing such challenges result in a ‘diversion of time and resources as well as the risk that a court will err in evaluating the positions of [EPA] ... on technological and scientific questions at the outer limits of a court’s competence.’” *Id.* (citations omitted). Such judicial restraint, the court noted, was appropriate in light of Congress’ clear intent that EPA quickly to prevent public health crises. *Id.*

⁵ See H.R. Rep 93-1185 (1974), *supra*.

The court also dismissed Trinity's argument that the emergency order would illegally preempt the state's own authority to protect public health. The state argued that EPA's emergency order illegally displaced its own authority, since the state had taken *some* action to protect drinking water quality near the plant. *Id.* at 397. The court reasoned that such an argument would imply that "any action by a state—even if minor or ineffective—would strip EPA of its statutory emergency powers," a result that would be "at odds with the clear purpose of the statute—to preserve and protect the public health." *Id.* On the contrary, Section 1431 vests EPA and not the state with wide discretion to determine if the state's protective efforts were adequate. *Id.* at 398. The court noted ample evidence to support EPA's determination that the state, while acting in good faith to protect the public, had not done enough. *Id.*

Finally, the court rejected Trinity's argument that because there was no evidence that people living near the Trinity property were actually drinking contaminated water, there was no "imminent and substantial endangerment." Because the SDWA requires only imminent risk of harm, "EPA need not demonstrate that individuals are drinking contaminated water to justify issuing an emergency order;" it need only "demonstrate the 'imminent likelihood' that the public may consume contaminated water." *Id.* at 399 (citations omitted). The court concluded that EPA had clearly demonstrated an imminent threat to public health by finding dangerous levels of contaminants in Trinity's water supply which provided drinking water for nearly one hundred people. *Id.*

Several other cases support EPA's broad interpretation of its §1431 emergency powers. *See, e.g., U.S. v. Price*, 688 F.2d 204 (3rd Cir. 1982); *U.S. v. Midway Heights County Water District*, 695 F.Supp. 1072 (E.D. CA 1988); *U.S. v. Hooker Chemicals & Plastics Corp.* 749 F.2d 968, at 987 (2nd Cir. 1984) (recognizing that §1431 "confer[s] 'broad authority' on the Adminis-

trator to provide him with substantial flexibility needed to prevent imminent hazards,” and that “the proper exercise of this [emergency] authority requires that the Administrator’s discretion under this provision be left relatively untrammelled.”). In *U.S. v. Price*, the Third Circuit approved EPA’s application for preliminary injunction against owners of a former landfill from which chemicals were leaching into groundwater. 688 F.2d 204 (3rd Cir. 1982). As part of the injunctive relief, EPA required the landfill owners to fund a diagnostic study of the threat to the city’s water supply posed by toxic substances emanating from the landfill. *Id.* at 204. The court found this injunctive relief proper under EPA’s §1431 emergency powers, noting that Congress “sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threatened human health,” *id.* at 211, and that “[c]ourts should not undermine the will of Congress by either withholding relief or granting it grudgingly.” *Id.* at 214.

Similarly, in *U.S. v. Midway Heights County Water District*, EPA invoked its emergency powers by issuing a preliminary injunction against a water district whose water supplies exceeded maximum SDWA contaminant levels. 695 F.Supp. 1072 (E.D. CA 1988). The water district argued that EPA had failed to demonstrate that the water system presented an “imminent and substantial” endangerment to public health because EPA had not shown that the water district’s noncompliance had *already* caused illness in water district consumers. *Id.* at 1076. The court rejected this argument and upheld the injunction, concluding that “[t]he widespread contamination of the system with [harmful microorganisms] presents the imminent and substantial endangerment. This court need not wait to exercise its authority until water district customers have actually fallen ill from drinking Midway Heights water.” *Id.* at 1076.

While courts have largely deferred to EPA in the exercise of its emergency powers under the SDWA—and have been reluctant to place limits on these powers—emergency orders issued

under §1431 are not immune to judicial review. In *W.R. Grace & Co. v. EPA*, the court struck down an SDWA emergency order requiring the operator of a fertilizer facility that had released ammonia into a source-water aquifer to take several ammonia-reduction efforts as “arbitrary and capricious.” 261 F.3d 330, 334 (3rd. Cir. 2001). Although it acknowledged the broad emergency authority Congress conferred on EPA in §1431, the court noted that, “the EPA’s emergency power is not without limitation.” *Id.* at 339. The court vacated EPA’s emergency order, finding no rational basis for EPA’s determinations that both (1) a particular ammonia cleanup standard and (2) a remediation scheme were necessary to protect public health. *Id.* at 339-343.⁶

D. A Cautionary Tale: In Flint, MI, EPA’s Untimely Invocation of its Emergency Powers Failed to Prevent Serious Contamination

Despite ample authority and clear legislative intent to prevent contamination of source water, EPA rarely invokes its emergency powers under §1431.⁷ In 2016, however, EPA invoked its emergency power by issuing an Emergency Order to the city of Flint, MI, to control rising levels of lead in the city’s drinking water. *See* U.S. EPA, “Emergency Administrative Order In the Matter of: City of Flint, Michigan” (2016). Because EPA waited nearly a year after it first became aware of the threat to invoke its §1431 authority, it was too little, too late.

In April 2014, the City of Flint ceased purchasing treated drinking water from Detroit, and began drawing water from the Flint River. *Id.* at 2. Between January and June 2015, city sampling revealed elevated levels of lead in the water supply. *Id.* Due to inadequate corrosion

⁶ The court’s decision in *W.R. Grace* has been criticized for misapplying the “arbitrary and capricious standards.” *See* Andrea Issod, *W.R. Grace & Co. v. EPA: An Arbitrary Outcome* (2003) 30 Ecology L.Q. 409.

⁷ At this point, this claim is not entirely supported. I have not been able to locate any resources that discuss the frequency with which EPA issues emergency orders under §1431, although judging from the small number of federal cases addressing the issue, the EPA likely issues very few of these orders.

control at the Flint Water Treatment Plant, the lead had begun to leach into drinking water from supply pipes. *Id.* at 3. In June of 2015, EPA communicated its concern about Flint’s lack of corrosion control, and offered technical assistance to the city in combatting the problem. *Id.* But it did not invoke its emergency powers.

In December 2015, Flint declared an emergency, and in January 2016 it requested federal aid. *Id.* at 5. EPA issued its emergency order in January 2016,⁸ finding that “water provided by the City to residents poses an imminent and substantial endangerment to the health of those persons,” *id.* at 7, and that Michigan and the city of Flint had “failed to take adequate measures to protect public health.” *Id.* at 8. EPA acknowledged that “while some progress has been made in addressing the drinking water crisis in the City, there continue to be delays in responding to critical EPA recommendations and in implementing the actions necessary to reduce and minimize the presence of lead and other contaminants in the water supply both now and in the near future.” *Id.* The order imposed a number of requirements on the city, such as reporting requirements, submission of sampling plans, adherence to treatment standards, and the formation of an independent advisory panel to make recommendations to the City. *Id.* at 8-17.

The crisis in Flint serves as both a cautionary tale and an illustration of how EPA might have invoked its emergency authority under §1431 of the SDWA to avert a public health crisis. The EPA could have chosen to invoke its §1431 emergency authority immediately after it became aware of the problem early in 2015. Yet it waited nearly a year to do so. By then, many Flint residents had already suffered from the effects of lead poisoning.

EPA’s delay in asserting its emergency powers in Flint effectively undermined the purpose of §1431. The text and legislative history of §1431 emphasize the preventative nature of

⁸ EPA appears to have issued the emergency order in direct response to the MI Governor’s declaration of a major emergency and request for federal aid on January 14, 2016. *See* Emergency Order, 5.

EPA's emergency powers; Congress clearly intended for EPA to invoke its §1431 authority when a public health crisis is "imminent"—before it occurs—rather than after it is already underway. By invoking its emergency powers nearly a year after it became aware of the imminent public health crisis in Flint, EPA effectively defeated the purpose of the emergency powers provision, undermining Congress' intent that emergency powers be used to prevent—rather than react to—imminent public health crises.

IV. RECOMMENDATIONS

Recommendation 1: EPA Should Invoke its Emergency Authority Preventatively. As the recent public health crisis in Flint illustrates, EPA often invokes its emergency powers too late to achieve the preventative effect that Congress intended. The EPA should instead invoke its emergency authority long before an actual public health crisis materializes, even in the face of relative uncertainty. Doing so would be entirely consistent with the text of §1431, congressional intent, and judicial precedent.

Recommendation 2. EPA Should Use its Emergency Authority Whenever a Drinking Water Source Is or May Be Contaminated. Numerous drinking water sources throughout the country are contaminated, or are in imminent danger of becoming contaminated. The EPA has the authority to stop new contamination and encourage clean up by invoking its emergency powers—and it should be doing so whenever a problem arises. That is precisely what Congress intended.

Recommendation 3: EPA Should Use the Threat of §1431 to Change State Behavior. In addition to directly invoking §1431, EPA should use the threat of exercising its emergency powers to encourage reluctant states to act early to prevent contamination of public water supplies. A more frequent and proactive invocation of emergency authority is consistent with the text, legislative

history, and judicial interpretations of §1431, and will allow EPA to realize its larger obligation under the SDWA “to assure that the public is provided with safe drinking water.”⁹

V. CONCLUSION

Section 1431 of the SDWA authorizes EPA to take any actions it deems necessary—including administrative orders or civil action—to protect public health if it receives information that a contaminant that has entered or is about to enter a water system may present “an imminent and substantial endangerment” to public health, and state and local authorities have not acted to address the threat. This power is expansive and subject to few limitations. The courts and EPA itself have interpreted §1431 to confer broad authority on EPA to act quickly to protect source water from imminent contamination, and both the text and legislative history of §1431 amply support this interpretation. Although EPA has invoked its emergency authority relatively infrequently—and, as the case of Flint, MI demonstrates, often belatedly—§1431 remains a potentially powerful tool with which EPA can provide for source water protection in the face of state inaction.

VI. RESEARCH TRAIL

Legislative History (Compiled through ProQuest Legislative Insight)

- H. Rep. No. 93-1185 (1974)
- S. Rep. No. 103-250 (1994)

Safe Drinking Water Act

- §1431 (“Emergency Powers” provision)

Federal Regulations

- There appear to be no regulations implementing §1431

EPA Guidance Documents/ Orders

⁹ Public Law 93-532 (1974).

- U.S. EPA, “Final Guidance On Emergency Authority under Section 1431 of the Safe Drinking Water Act” (1991)
- U.S. EPA, “Emergency Administrative Order In the Matter of: City of Flint, Michigan” (2016)

Federal Cases

- *Trinity American Corp v. EPA*, 150 F.3d 389 (4th Cir. 1998)
- *U.S. v. Price*, 688 F.2d 204 (3rd Cir. 1982)
- *U.S. v. Midway Heights County Water District*, 695 F.Supp. 1072 (E.D. CA 1988)
- *U.S. v. Hooker Chemicals & Plastics Corp.* 749 F.2d 968, at 987 (2nd Cir. 1984)
- *W.R. Grace & Co. v. EPA*, 261 F.3d 330 (3rd. Cir. 2001)

Law Review Articles/ Other Secondary Sources

- Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 *Stan. Envtl. L.J.* 43 (2008)
- Varu Chilakamarri, *A New Instrument in National Security: the Legislative Attempt to Combat Terrorism via the Safe Drinking Water Act*, 91 *Geo. L.J.* 927 (2003)
- Richard B. Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 *Harv. Envtl. L. Rev.* 298 (1979)
- Congressional Research Service, *Safe Drinking Water Act (SDWA): A Summary of the Act and its Major Requirements* (2010)
- Andrea Issod, *W.R. Grace & Co. v. EPA: An Arbitrary Outcome* (2003) 30 *Ecology L.Q.* 409