

## EXPERT ANALYSIS

### EPA's Use of Emergency Administrative Orders Under the Safe Drinking Water Act

By **Tim Bergere, Esq.**  
*Montgomery, McCracken, Walker & Rhoads LLP*

It will come as a surprise to absolutely no one that the U.S. Environmental Protection Agency issued an emergency administrative order to the city of Flint, Michigan, after high levels of lead were detected in its public water supply. The order, issued in January, came more than eight months after the presence of unsafe levels of lead in the PWS came into the public view. The EPA issued that EAO under Section 1431(a) of the Safe Drinking Water Act.<sup>1</sup> While the agency has had enhanced authority to issue and enforce EAOs under the SDWA since 1986, its use of that authority has been sparse — until now.

The EPA has most often directed its emergency order authority at public and private water suppliers. Among those, it is most often small community or tribal water suppliers that are targeted. Flint is an exception, as it has a sprawling municipal water supply system. The city's system was crippled in part by its dilapidated condition and in part by the malfeasance of regulators who may have been so focused on the financial side of system operations that they failed to consider the water quality implications of a decision to switch water sources.

However, the focus of this analysis is not on the EPA's use of EAOs directed at the owners and operators of public water supply systems. Instead, it focuses on the agency's use of EAOs against parties whose activities have impacted surface or groundwater resources used for PWS purposes. Historically, this class of EAO recipients has most often included commercial farm operations, with a particular focus on concentrated animal feeding operations. In those instances, the EPA usually focuses on coliforms and nitrate/nitrite associated with the management of manure and agricultural fertilizers.

For coliforms and other agricultural pollutants, the agency tends not to use its other authorities, such as Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act; Sections 3008(a) and (h), 3013, and 7003 of the Resource Conservation and Recovery Act; or Section 309 of the Clean Water Act. It does not do so because often there are legal obstacles to its exercise of authority under these other statutes, such as when the contaminants in question are not CERCLA hazardous substances or do not originate from a solid waste management activity, or where the threats do not impact "waters of the United States" (for example, surface waters).

One of the EPA's earliest uses of an EAO in this manner involved a W.R. Grace fertilizer plant in Lansing, Michigan, where a plume of ammonia-impacted groundwater migrated to a number of PWS wells operated by the city of Lansing. That EAO was the subject of litigation, the history of which is described in Judge Thomas L. Ambro's opinion for the 3rd U.S. Circuit Court of Appeals in *W.R. Grace v. EPA*, 261 F.3d 330 (3d Cir. 2001). The EPA also appears to have used an EAO to pursue a gas exploration company where well development activities were believed to be the source of methane gas in nearby water supply wells.



*It will come as a surprise to absolutely no one that in January the EPA issued an emergency administrative order to the city of Flint, Michigan, after high levels of lead were detected in its public water supply.*

Within the last 18 months, the agency has stepped up its use of EAOs to address the emerging problem of “unregulated pollutants” in the perfluorocarbon family, known as PFCs. PFCs are man-made compounds with multiple carbon-fluorine bonds that break down very slowly in the environment. They include a wide range of “subcompounds,” such as perfluorooctanoic acid and perfluorooctane sulfonate. PFCs are not yet a CERCLA hazardous substance, and the EPA has not established a drinking water standard for any of the compounds in the PFC family.

The agency became acutely aware of PFCs when it was dragged into a dispute between DuPont and neighbors of its Parkersburg, West Virginia, facility, where PFCs were a component of the company’s production of Teflon. Litigation surrounding the presence of PFCs in the local communities and their potential adverse health effects led to the 2006 entry of a Section 1431(a) EAO. The EAO was entered by consent by EPA Regions III and V due to the presence of PFCs in communities in West Virginia (Region III) and Ohio (Region V).

The DuPont situation created urgency at the EPA to assess the health impacts of these compounds. In 2009 the agency established provisional health advisory levels for two PFCs — PFOA and PFOS — in the low parts per trillion, an order of magnitude below SDWA maximum contaminant levels for chlorinated solvents such as PCE and TCE.

Health advisory levels are not drinking water standards, but the EPA and state and local officials use them as guidance; provisional HALs are one step below HALs and may more accurately reflect a HAL-in-development. HALs are supposed to reflect reasonable, health-based hazard concentrations above which action should be taken to reduce exposure. These are provisional guidelines as the EPA determines whether formal drinking water standards or maximum contaminant levels should be set.

For the time being, the EPA views PFCs as dangerous “emerging” contaminants. In at least two circumstances, it has advised local communities to switch to bottled water even where PFOA levels were found to be at only half the provisional HAL.<sup>2</sup> In 2012 the agency added a number of PFC compounds to its third Unregulated Contaminant Monitoring Rule under the SDWA, known as UCMR-3.<sup>3</sup>

UCMR-3 required PWS operators to add 28 compounds to their annual sampling programs. Six of the new compounds — including PFOA and PFOS — are in the PFC family. As data came in from these sampling events, the EPA discovered that PFCs were present in a number of public water supply systems, many of which were on or near former military installations.

In 2014 and 2015, in response to the detection of PFCs in PWSs, EPA Region III issued EAOs to both the U.S. Navy and Air Force for different air bases in Pennsylvania. Both had been closed and had already gone through full CERCLA records of decision that failed to account for PFCs. At the same time, EPA Region I issued an EAO to the Air Force for a former air base in New Hampshire.

In all three cases, the presence of PFCs was attributed to the use of firefighting foams that are typically used to extinguish or prevent flammable liquid fires associated with aviation fuels. But PFC groundwater impacts have also been found in association with industrial activities, such as DuPont’s activities in Parkersburg and certain manufacturing operations believed to be associated with PFC-using St. Gobain plants in Hoosick Falls, New York, and Merrimack, New Hampshire.<sup>4</sup>

Companies and firefighting organizations should expect EPA and state regulators to begin the process of identifying other manufacturers who have used PFCs as well as firefighting schools and historical fire sites where PFC foams were used. What environmental regulators will use to investigate these sites remains to be seen, but EAOs are likely to be at the fore. The EPA reportedly has already begun to contact groups of potentially responsible parties managing operations and maintenance at old co-disposal landfills to add PFCs to the list of compounds sampled for, just as 1,4 dioxane was added a few years back.

Not surprisingly, EPA’s EAOs to “third party polluters” of PWS systems read very much like CERCLA unilateral administrative orders and RCRA corrective action orders, including requirements that the recipient:

- Confirm its intention to comply.
- Retain a consultant to implement the work, and identify that consultant to the EPA for approval.
- Develop a remedial investigation/feasibility study investigative work plan.
- Develop remedial design/remedial action type information for remediation of the PFC impacts, once fully characterized.
- Include a certification of accuracy and completeness with formal submissions.

In addition to these basic investigative and remedial requirements, the EPA's EAOs under the SDWA go one significant step further by requiring the EAO recipient to take immediate action to replace the impacted water supply or supplies with supplies equal in quantity and quality to the water supply lost to PFC contamination, *at no cost to the consumer*. Thus, unlike RCRA and CERCLA orders, EAOs are being used to direct civil remedies for impacted public and private water supply owners.

In the case of PFCs, this is significant because they are not (yet) CERCLA hazardous substances. As a result, impacted parties may not (yet) be able to avail themselves of traditional cost recovery remedies under CERCLA. While common law remedies may be available, pursuing tort claims, especially against the United States, is considerably more difficult and implicates, *inter alia*, shorter statutes of limitations.

In EPA Region III, the Navy and Air Force quickly offered the affected municipalities "cooperative agreements" as an interim funding vehicle to get treatment systems installed on impacted municipal water supply wells, interconnect residents with private wells found to contain PFCs to the PWS, and reimburse the cost of replacement water purchased from neighboring PWSs. In the meantime, Navy and Air Force consultants are implementing remedial investigation/feasibility study level investigations focused on PFCs at both former bases.

What is less ambiguous to the recipients of EAOs is the path to judicial review. Where the path to pre-enforcement review under CERCLA, RCRA and the Clean Water Act is not always clear in the absence of an EPA action to enforce,<sup>5</sup> the SDWA provides for a direct appeal to a federal appellate court.<sup>6</sup> The applicable standard of review is whether the EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>7</sup>

However, review at the federal appeals court is limited to the administrative record. This means EAO recipients must be especially vigilant to get their "facts" and expert opinions into the administrative record as soon as possible during the lead-up to the EPA's issuance of the EAO. The same is true for owners of affected water supplies, which can benefit significantly from a more aggressive EPA approach toward the parties who released the PFCs. Practitioners must, therefore, understand the EAO issuance process.

Before the EPA can issue an EAO, it must make several important findings. First, it must determine that there is a SDWA "contaminant" that is "present in or likely to enter" a public drinking water source (this includes "underground sources of drinking water"). The agency then must establish that the presence of that contaminant is an "imminent and substantial endangerment" to users of the water supply. EPA guidance issued to the regions argues that "endangerment" does not require actual harm but can include even the risk of harm,<sup>8</sup> including harm that might occur months or even years into the future as contaminants migrate to the PWS.

The EPA also must find that the response of state and local authorities is not adequate to address the harm. In most cases, state and local authorities are happy to welcome EPA enforcement action, but that is not always the case. Nevertheless, a party facing a potential enforcement action under Section 1431 might avoid such an action through a more cooperative and proactive arrangement with state and local officials while being mindful that the EPA may be courting the same officials for a more active role in endangerment resolution.

*The EPA has most often directed its emergency order authority at public and private water suppliers; and among those, it is most often small community or tribal water suppliers that are targeted.*

The EPA may still act if it is not satisfied that the state actions will sufficiently protect water users. In any event, EAO targets will need to look at the same causation issues as unilateral administrative order recipients and corrective action order recipients. They will also need to work to identify effective remedies, including potential interim actions to abate or at least mitigate any developing harm. Developing harms include contaminant plume migration.

In summary, SDWA Section 1431 provides the EPA with a significant enforcement tool that has elements not found in its CERCLA, RCRA or CWA authority. With emerging contaminants like PFCs – which are not yet CERCLA hazardous substances and whose presence in the environment may not be due to RCRA-regulated waste management activities – EAOs may find new traction within the EPA regions.

We also must consider the attention now focused on public water supply system safety by the disaster still unfolding in Flint, along with the recent spate of PFC findings in the Eastern United States. These developments are also likely to sharpen the EPA's focus on its SDWA authorities while providing besieged municipal and private water suppliers with assistance in pursuing responsible parties.

## NOTES

<sup>1</sup> 42 U.S.C.A. § 300i(a).

<sup>2</sup> According to EPA findings in a number of recent EAOs, PFOS and PFOA have a long half-lives ranging from two to nine years, depending on the study. Continued exposure could increase body burdens to levels that would result in adverse outcomes. Both PFOA and PFOS have a high affinity for binding to B-lipoproteins and liver fatty acid-binding protein. Several studies have shown that these compounds can interfere with fatty acid metabolism and may deregulate metabolism of lipids and lipoproteins. PFCs bio-accumulate, and studies indicate that continued exposure to low levels of PFCs in drinking water may result in adverse health effects.

<sup>3</sup> 77 Fed. Reg. 26072 (May 2, 2012).

<sup>4</sup> While the EPA appears to have the lead in the investigations in Hoosick Falls, following the Flint debacle the New York Department of Environmental Conservation jumped in with both feet and took emergency action to list PFCs as “hazardous substances” for purposes of state law. Presumably, New Hampshire officials, who have great familiarity with PFCs due to contamination at the former Pease Air Force Base, will work with the EPA to manage a new investigation in Merrimack.

<sup>5</sup> See, e.g., *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

<sup>6</sup> See 42 U.S.C.A. § 300j-7(a)(2).

<sup>7</sup> 5 U.S.C.A. § 706(2)(A); see *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 111 (3d Cir. 1997).

<sup>8</sup> See Memorandum from James R. Elder, Director, Office of Ground Water and Drinking Water, U.S. Evtl. Prot. Agency, and Frederick F. Stiehl, Enforcement Counsel for Water, Office of Enforcement, U.S. Evtl. Prot. Agency, to Waste Management Regional Directors and Regional Counsel (Sept. 27, 1991), at 6.



**Tim Bergere** is a partner and chair of the environmental and energy transaction practice group at **Montgomery, McCracken, Walker & Rhoads LLP** in Philadelphia. Prior to joining the firm, he spent five years as an assistant counsel and special deputy attorney general with the Pennsylvania Department of Environmental Resources, now the Department of Environmental Protection. For 28 years, he has been involved in a wide range of environmental remedial and cost-recovery matters across the country, including recent engagements involving PFCs and their impact on private and municipal water supply systems.