

CHAPTER 21

The Prosecution and Defense of a Water Well Contamination Case

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§ 21.01. Introduction.

Any mineral extraction activity has the potential to affect underground water sources. Digging or drilling deep into the earth inevitably cuts into and through water saturation zones. Some water saturation zones qualify as aquifers,⁽¹⁾ a geologic term for a water-bearing zone that produces sufficient water to sustain

domestic or agricultural uses. It has been noted that, while one-half of the population of the United States obtains its drinking water from groundwater, 97% of rural households rely on groundwater for potable drinking water.⁽³⁾

Groundwater is generally obtained for domestic and other uses by drilling a well, which is merely a hole bored into the ground. The hole ends within or slightly below a water bearing strata, i.e., aquifer; the hole is then cased with pipe and the water that accumulates within the hole and pipe is pumped to the surface for use.

Volumes have been written about "toxic torts," their prosecution and defense, and problems attendant to toxic tort litigation.⁽⁴⁾ Indeed, volumes have been written about groundwater pollution.⁽⁵⁾ This Chapter endeavors to provide but a brief overview of the plaintiff's and defendant's perspectives in a hypothetical water well contamination case. The general principles and analyses set forth below may be applicable to any case of a water source contaminated by mineral extraction activities. From the plaintiff's perspective, the Chapter will briefly discuss the potential sources of well water pollution from oil and gas operations, in particular Class II injection wells. Traditional common law theories of liability, as well as some possible state and federal statutory causes of action, will be considered, as will breach of contract. Plaintiff's choice of -- remedies, damages, injunctive relief, or some combination -- will be discussed, along with some common problems regarding plaintiff's evidentiary proof and suggestions of alternative evidentiary sources. The availability of statutory attorney fees, expert fees, and other costs will be included in this snapshot of the plaintiff's case. No personal injury from the contamination is presumed in the following discussion, although personal injury is highly probable where a domestic water supply well has been contaminated.

For the defense, this Chapter will advance a prevention strategy that could significantly reduce litigation claims of water well contamination by oil and gas operations. The Chapter will also explore traditional litigation defense strategy in such classic areas as liability, proof of causation, and damage determination.

Even where only a single water well is affected, that is obviously symptomatic of contamination of the aquifer supplying the water well, a matter of more than purely private concern.

§ 21.02. The Plaintiff's Perspective.

[1]--Sources of Contamination.

[a]--Oil and Gas Operations as a Source of Contamination.

Plaintiffs' attorneys undertaking representation of a landowner whose water supply well has been affected by an oil and gas operation must have passing familiarity with oil and gas operations to understand the various ways these operations can cause groundwater to be contaminated. Activities during oil and gas drilling and recovery operations that are likely to have an impact are activities conducted subsurface rather than on the surface.⁽⁶⁾ Of all activities involved in oil and gas recovery and storage operations, the injection of fluids into oil and gas wells to enhance recovery of oil and gas or to dispose of fluids, such as brine or process water, seem to be recurring sources of water well contamination claims.

Injection of fluids into oil and gas wells is a regulated activity in all states under the Safe Drinking Water Act⁽⁷⁾ (SDWA), and the Environmental Protection Agency's (EPA) implementing regulations.⁽⁸⁾ Wells used for injection by the oil and gas industry are classified as Class II injection wells.⁽⁹⁾

[b]--Class II Injection Wells.