

Focus | Real Estate/Environmental Law

EPA Asserts Fracking Contaminated Water Wells

BY JAMES D. PAYNE

Controversy exists over whether hydraulic fracturing ("fracking") of shale gas formations causes contamination of private water wells and public drinking water aquifers. Fracking is the pressurized injection of a mixture of sand, water and chemicals into geologic formations, such as coalbeds or shales, to form fractures in those formations to increase the volume of gas or oil that can be extracted. Some alarming allegations have been made about the potential hazards of fracking, including private well owners claiming they are able to light their well water on fire after fracking has taken place.

The Barnett Shale, which underlies Fort Worth and surrounding counties, is in the middle of the fracking controversy. Indeed, several lawsuits have been filed recently alleging that fracking activities in the Barnett Shale have contaminated private water wells. The Environmental Protection Agency has become involved in the issue as well.

On December 7, 2010, claiming authority under the Safe Drinking Water Act (SDWA), the EPA issued an Emergency Administrative Order against Range Production Company (Range) asserting that Range "caused or contributed" to the contamination of the Trinity Aquifer (a source of public drinking water) and private water wells. The contaminants identified by the EPA's regional office are benzene, methane, toluene, ethane and propane. Among other things, the EPA ordered Range to identify gas flow pathways to the Trinity Aquifer, eliminate gas flow to the aquifer if possible, and remediate areas of the

aquifer that have been impacted. Range denies that it caused any contamination and has sued the EPA to force it to turn over data that the EPA claims links Range's production activities with the alleged contamination.

The EPA asserts that an isotopic fingerprint analysis of the methane obtained from a private water well drawing water from the Trinity Aquifer compared to an analysis of methane obtained from two of Range's gas wells near the private water well indicate that both gas samples are "likely to be from the same source." One of Range's experts has likened the EPA's analysis to trying to distinguish between birds and bats while using wings as the distinguishing characteristic. Both have wings, but they are not the same species.

The EPA has been directed by Congress to carry out a study on the potential impacts of hydraulic fracturing on drinking water resources. The EPA has prepared a draft study plan, and, as of February 8, 2011, that draft plan was presented to EPA's Science Advisory Board for review and comment. Initial research results are expected by the end of 2012 with a full report expected in 2014.

The emergency order by the EPA is an unusual development in the hydraulic fracturing controversy for several reasons. First, the EPA issued its emergency order well ahead of any conclusions being drawn from the EPA's hydraulic fracturing study, which is still in a formative stage. Also, the Texas Railroad Commission has conducted its own investigation into the alleged contamination and has not linked Range's activities to any alleged contamination as of

the writing of this article. Finally, as a result of the Energy Policy Act of 2005, fracking was specifically excluded from EPA authority under the SDWA unless diesel is used as a component of fracking fluid.

It is of note that the emergency order against Range does not mention fracking as the cause of any contamination. However, in an EPA news release issued at the same time as the emergency order, the EPA recognized fracking as one method of accessing natural gas and indicated that the EPA wants to "make sure natural gas development is safe."

The EPA's emergency order against Range is coming under congressional scrutiny. On February 14, 2011, Senator Inhofe (R-OK), the ranking member on the Senate Environment & Public Works committee, sent a letter to the

EPA's Inspector General requesting all EPA documents regarding the emergency order. Moreover, a recent agenda of the House Energy & Commerce Committee includes questions about the EPA's use of its drinking water emergency authority in Texas. House Republicans have promised oversight of the order.

Environmental litigation has already been initiated over allegations that hydraulic fracturing of the Barnett Shale causes contamination of drinking water supplies. The number of these cases, whether few or many, may depend upon the results of the EPA's hydraulic fracturing study expected in 2014. **HN**

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Justinian Award Luncheon

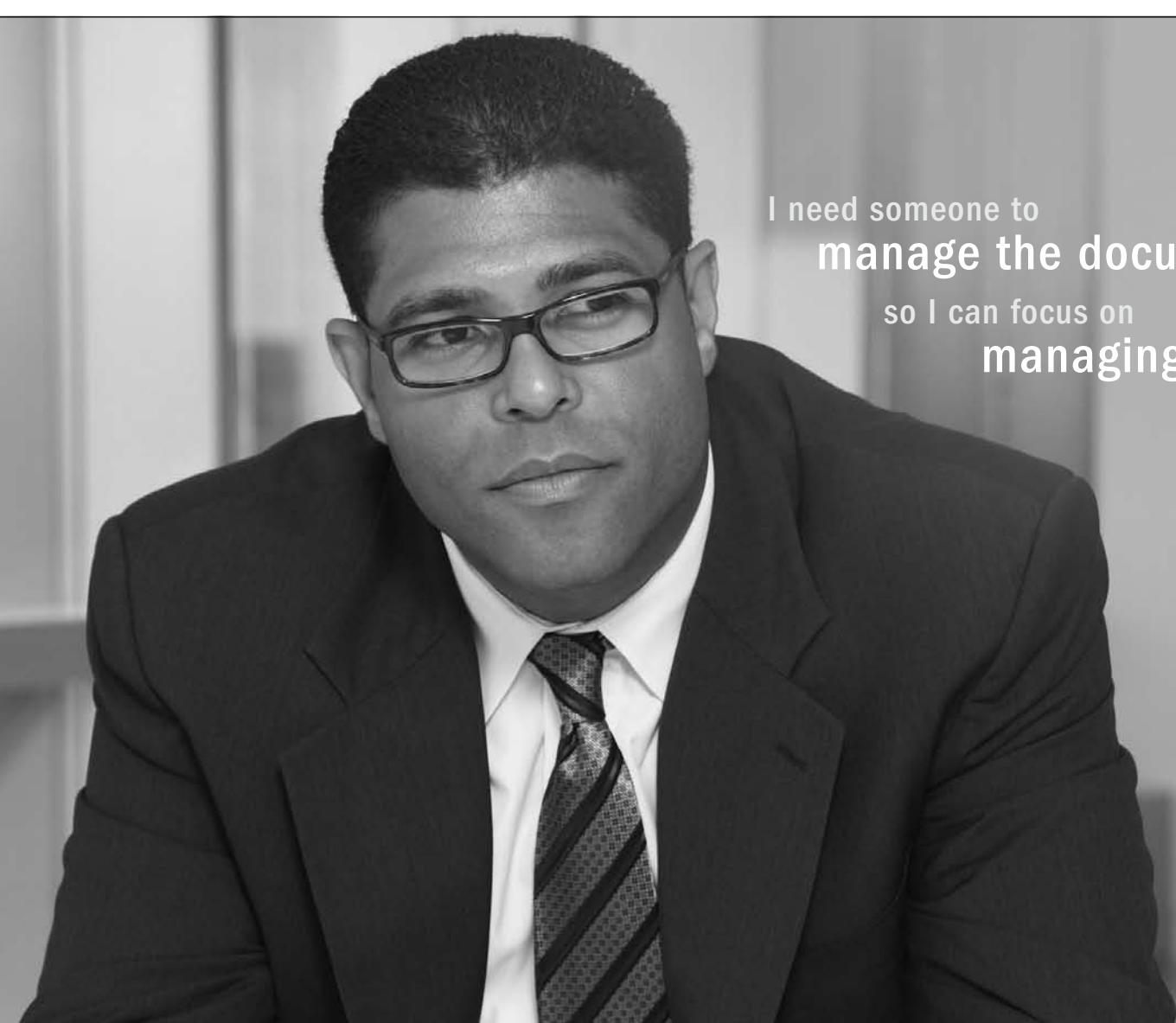
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