

Hydraulic Fracturing Groundwater Contamination Presumption of Liability Statutes

In response to concerns regarding groundwater contamination from oil or gas exploration and production, many states have introduced or passed legislation that creates a rebuttable presumption of operator liability in the event of contamination of nearby water sources. The statutes provide a list of affirmative defenses that operators may assert to rebut liability.

With some minor variations, the affirmative defenses available to operators are quite similar across the state statutes. Most affirmative defense provisions look something like this:

To rebut the presumption established under this section, a responsible party must prove by the preponderance of the evidence¹ any of the following:

- a) the pollution existed prior to the drilling, as determined by pre-drilling sampling;
- b) the landowner or owner of water supply in question refused to allow the operator access to conduct pre-drilling sampling;
- c) the water source is not within a certain distance² of the well;
- d) the pollution occurred more than a certain time period³ after the drilling, completion, treatment, or stimulation of the well; or
- e) the pollution occurred as the result of a cause other than the drilling, completion, treatment, or stimulation of the well.

Accompanying this brief memo is a spreadsheet that examines state statutes that have installed or authorized rules regarding a presumption of operator liability in the event of groundwater contamination. The chart lists and compares the three most important features of the statutes: (1) the liability distance, (2) the liability time period, and (3) the affirmative defenses available to operators.

While all efforts have been made to ensure the completeness and timeliness of the information in the chart, the information may not be exhaustive.

¹ Other standards employed by the various statutes include “clear and convincing evidence” and “affirmative proof.”

² Of the statutes surveyed, the distance for presumptive liability varies from 1,000 feet to 5,000 feet. A defeated Michigan bill contained vague “in the vicinity of a well” language.

³ Of the statutes surveyed, the temporal range for presumptive liability varies from six months to an indefinite period of time.

<u>State, Bill Number, Status, & Year</u>	<u>Distance From Well-Head</u>	<u>Liability Period</u>	<u>Affirmative Defenses</u>
Pending bills			
Colorado (to be introduced)	.5 mi (2,640 ft)	60 months following completion, treatment, or stimulation of well.	<ul style="list-style-type: none"> a. The pollution existed prior to the drilling, as determined by pre-drilling monitoring or sampling b. The surface or water well owner did not allow access to conduct predrilling monitoring or sampling c. The water supply is not within a half-mile of the oil and gas location. d. The pollution occurred more than 60 months after the drilling, completion, treatment, or stimulation of the well. e. The pollution occurred as the result of some cause other than drilling completion, treatment or stimulation of the well.
Illinois, HB 2615, introduced 2/21/2013	.28 mi (1,500 ft)	30 months following completion.	<p>Must prove by "clear and convincing evidence" any of the following:</p> <ul style="list-style-type: none"> a. The water source is not within 1,500 feet of the well site b. The pollution or diminution occurred prior to high volume horizontal hydraulic fracturing operations or more than 30 months after the completion of the high volume horizontal hydraulic fracturing operations c. The pollution or diminution occurred as the result of an identifiable cause other than the high volume horizontal hydraulic fracturing operations
Passed bills			
North Carolina, SB 820 (Session Law 2012-143), passed on veto override 7/02/2012	.95 mi (5,000 ft)	Indefinite	<p>Must prove "by a preponderance of the evidence" any of the following:</p> <ul style="list-style-type: none"> a. The contamination existed prior to the commencement of the drilling activities of the oil or gas developer or operator, as evidenced by a pre-drilling test of the water supply in question b. The surface owner or owner of the water supply in question refused the oil or gas developer or operator access to conduct a pre-drilling test of the water supply conducted in conformance with c. The water supply in question is not within 5,000 feet of a wellhead that is part of the oil or gas developer's or operator's activities. d. The contamination occurred as the result of a cause other than activities of the developer or operator.

Pennsylvania, HB 1950 ("Act 13"), signed 2/14/2012	Unconventional wells: .47 mi (2,500 ft) Conventional: .19 mi (1,000 ft)	Unconventional wells: 12 months following the later of completion, drilling, stimulation or alteration of well. Conventional: 6 months following completion of drilling or alteration of the oil or gas well	Must "affirmatively prove" any of the following: a. The pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey b. The landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey c. The water supply is not within [1,000 feet of a conventional well or 2,500 feet of an unconventional well] d. The pollution occurred more than [six months after completion of drilling or alteration activities for a conventional well or twelve months after completion of drilling or alteration activities for an unconventional well] e. The pollution occurred as the result of a cause other than the drilling or alteration activity
West Virginia, HB 401, passed 12/14/2011	.28 mi (1,500 ft)	6 months	Must prove "by a preponderance of the evidence" any of the following: a. The pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration water well test b. The landowner or water purveyor refused to allow the operator access to the property to conduct a predrilling or prealteration water well test c. The water supply is not within one thousand five hundred feet of the well d. The pollution occurred more than six months after completion of drilling or alteration activities e. The pollution occurred as the result of some cause other than the drilling or alteration activity
Maryland, HB 1123, signed 5/22/2012	.47 mi (2,500 ft)	12 months	Must prove "by a preponderance of the evidence" any of the following: a. The contamination is not the result of activities relating to the gas well b. The contamination existed before the commencement of activities allowed by the permit and was not worsened by those activities
Defeated bills			
Michigan, HB 4736, introduced 6/14/2011, died in House Judiciary	"[!]n vicinity of a well..."	None given.	None presented.