EPA Releases Final Permitting Guidance for Fracing with Diesel Fuel

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Hydraulic fracturing (fracing) on private land has long been overseen by state regulators enforcing state-specific permitting, installation and other requirements. The one exception is wells fractured with diesel fuel, which remain subject to **U.S. Environmental Protection Agency (EPA) oversight under the Underground Injection Control (UIC)** rules of the federal Safe Drinking Water Act (SDWA). EPA typically has delegated its UIC oversight responsibility to state regulators and, for more than a year, has quietly been providing direction to these state regulators about what EPA wants to see as a condition to issuing drilling permits for wells that will be fractured with diesel. That direction now has been reduced to a <u>formal guidance document</u>, which the agency issued for public review and comment on May 10, 2012. While EPA's proposed guidance has attracted little media attention (principally because it was issued on the same day that the Department of Interior proposed long-awaited regulations for fracing on federal lands), EPA's latest initiative to regulate fracing is something that all stakeholders – whether they use diesel or not – need to be following closely for several reasons:

1. EPA has proposed defining "diesel" by reference to six Chemical Abstracts Service Registry Numbers (68334-3-5; 68476-34-6; 68476-30-2; 68476-31-3; 8008-20-6; 68410-00-4), all of which essentially describe different types of diesel fuel, fuel oil or kerosene. However, the EPA has also proposed as an alternative three broader definitions that focus on the chemical and physical characteristics of "diesel" and which, if adopted, could apply to substances like mineral oil. These alternative definitions of "diesel" could bring many more fracing fluids, and many more fracing stakeholders, under UIC and EPA regulatory control.

2. EPA has proposed significant changes to existing federal permitting requirements relating to (a) permit duration and well closure; (b) Area of Review analyses; (c) well monitoring and integrity analyses; (d) water quality testing and monitoring, including baseline groundwater testing before drilling; and (e) other data and information requirements for obtaining a permit including, potentially, requiring applicants to conduct expensive seismic surveys. While much of this information is already required by state regulatory authorities, it is clear that the permitting scheme being contemplated by EPA would be more costly, time-consuming and burdensome than the rules imposed by most states.

3. Finally, in a notable departure from its own prior pronouncements, at page 16 of its guidance, EPA suggests that fracing can open conduits in the subsurface that might allow fracing fluid to migrate

upward into shallow drinking water supplies: "Due to high injection pressures, there is potential to induce fractures that may serve as conduits for fluid migration ..." EPA's statement is troubling because it suggests that the agency is stepping back from decades of research (including studies by USGS and EPA itself) which demonstrates that deep fracing poses no threat to shallow groundwater located above thousands of feet of bedrock and other sub-strata. EPA's retreat on this important point potentially opens up a new line of attack on fracing and, again, is something stakeholders should be aware of and may consider commenting on.

Even for stakeholders fracing without diesel, EPA's guidance is relevant because it provides an early glimpse into some of the requirements that might be imposed under a permitting scheme controlled by EPA -- *i.e.*, if the UIC exemption were revoked by Congress so as to restore federal/EPA authority over hydraulic fracturing. All fracing stakeholders need to carefully consider whether it is worth commenting on this draft guidance now, as it may have broader application down the road. Comments are due by June 9, 2012.

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