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## EPA Narrows Controversial Definition of “Diesel Fuels” in Hydraulic Fracturing Permitting Guidance

by

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As hydraulic fracturing continues to play a strong role in reviving the U.S. energy economy, pressure remains on Federal and state authorities to regulate the practice. To date, the U.S. Environmental Protection Agency’s (“EPA”) approach has been inconsistent. On the one hand, it has denied a petition to require testing by manufacturers and processors of chemicals used in fracturing on the grounds that there is an insufficient basis to require such testing.<sup>1</sup> On the other hand, it has undertaken studies to evaluate the practice’s drinking water impacts,<sup>2</sup> granted a petition to require manufacturers and processors to submit existing data on chemicals used in fracturing,<sup>3</sup> and has issued the first federal air standards for hydraulically fractured natural gas wells.<sup>4</sup>

With a February 12, 2014, Federal Register [notice](#), the Agency appears to have swung back on a more cautious track. The notice announces EPA’s publication of a final [interpretive memorandum](#) and [technical guidance document](#)

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<sup>1</sup> See “Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production; TSCA Section 21 Petition; Reasons for Agency Response,” 78 Fed. Reg. 41,768 (Jul. 11, 2013).

<sup>2</sup> See EPA Office of Research and Development “Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources” (Nov. 2011), [available at http://www2.epa.gov/sites/production/files/documents/hf\\_study\\_plan\\_110211\\_final\\_508.pdf](http://www2.epa.gov/sites/production/files/documents/hf_study_plan_110211_final_508.pdf).

<sup>3</sup> See *supra* note 1.

<sup>4</sup> See “Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final Rule,” 77 Fed. Reg. 49,490 (Aug. 16, 2012).

for permitting hydraulic fracturing wells using diesel fuels under the Safe Drinking Water Act’s (“SDWA”) Class II Underground Injection Control (“UIC”) Program.

Through the 2005 Energy Policy Act, Congress revised the SDWA to exclude all hydraulic fracturing activities from UIC permitting requirements “other than [those using] diesel fuels.”<sup>5</sup> At the time, diesel fuels were the fracturing fluids known to pose the greatest threat to underground sources of drinking water because they contain benzene, toluene, ethylbenzene and xylene (“BTEX”) compounds, which are highly mobile in ground water and can pose human health risks above certain levels.

The just-released interpretive memorandum seeks to set the scope of the fracturing exclusion by defining the statutory term “diesel fuels.” As we discussed in a previous [alert](#), environmentalists advocated a broad definition that would have captured a range of substances with properties similar to diesel fuels. In contrast, the petroleum industry recommended a narrower definition that would only encompass those substances with “diesel fuel” in their primary names, as listed on well-recognized chemical registries.<sup>6</sup>

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<sup>5</sup> SDWA § 1421 (d)(1).

<sup>6</sup> See EPA Office of Water “Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels: Response to Summary Comments,” pp. 35-39 (Feb. 2014), [available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/epa816d14001.pdf](http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/epa816d14001.pdf).

In its final guidance, EPA interprets the SDWA to prohibit using any amount of the following substances in fracturing wells without a permit: *Fuels, diesel* (CASRN 68334–30–5), *Fuels, diesel, no. 2* (CASRN 68476–34–6), *Fuel oil No. 2* (CASRN 68476–30–2), *Fuel oil, no. 4* (CASRN 68476–31–3) and *Kerosene* (CASRN 8008–20–6). Although, as requested by industry, the Agency removed *Distillates (petroleum), crude oil* (CASRN 68410–00–4) from the definition it originally proposed,<sup>7</sup> it retained No. 4 fuel oil and kerosene. According to EPA, however, this approach does follow the statute because the substances included in the definition either have the term “diesel fuel” as their primary name or as a synonym in well-known chemical registries.

For substances that are not captured by the new “diesel fuels” definition but are used in fracturing fluids, the Agency stated it would “explore approaches to promote voluntary use of safer alternatives.”<sup>8</sup> The interpretive memorandum also clarifies that diesel fuels used in oil and gas production applications *other than* injection, such as drilling muds or pipe joint compounds used in well construction, are not subject to Class II UIC permitting requirements.

As noted above, EPA also announced the issuance of the final technical permitting guidance, which did not change significantly from the proposal. The technical guidance covers the permit application and process, including requirements governing well construction and mechanical integrity testing, well operations, monitoring and reporting, public notice and financial responsibility. The guidance also expresses the Agency expectation that permit writers will have the authority to

exercise discretion and consider alternative best practices on a case-by-case basis. Please note that the technical guidance is binding only in the handful of “non-primacy” states where EPA exercises permitting authority. Nevertheless, “primacy” states with delegated permitting authority may view the technical guidance as persuasive authority or adopt it outright.

In contrast, the interpretive memorandum applies to all Class II UIC permitting programs, including those managed by the states. As a result, states that did not require Class II UIC permits for injection operations involving the types of fuels specified in the final memorandum must come into compliance or risk losing their primacy. How EPA will choose to enforce the new interpretation also remains an open question. In its “Response to Comments” document, EPA emphasized its authority to enforce the interpretation retroactively and specifically noted that it does not have an enforcement policy in place covering past “violations” involving the specified diesel fuels.<sup>9</sup> The lack of a specific enforcement policy, however, does not prevent companies from asserting all available defenses or, in the alternative, claiming mitigation for self-disclosure, prompt corrective action, and other compliance efforts. Moreover, the Agency did review voluntary databases of fracturing chemicals and found that fewer than two percent of hydraulically fractured wells used diesel fuels.<sup>10</sup> Thus, an Agency diesel enforcement initiative would seem to be unlikely at this time.

*To discuss the EPA guidance addressed in this article or any other aspect of EPA’s fuels regulations, please contact Jean-Cyril (JC) Walker ([walker@khlaw.com](mailto:walker@khlaw.com), (202) 434-4181) or Adrienne M. Timmel ([timmel@khlaw.com](mailto:timmel@khlaw.com), (202) 434-4164).*

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<sup>7</sup> See *id.* at 36.

<sup>8</sup> See EPA Office of Ground Water and Drinking Water Memorandum, “Implementation of the Safety Drinking Water Act’s Existing Underground Injection Control Program Requirements for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels,” p. 4 (Feb. 5, 2014).

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<sup>9</sup> See *supra* note 6, at 41.

<sup>10</sup> See EPA Office of Water, “Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels: Underground Injection Control Program Guidance #84,” p. 2 (Feb. 2014).