

ALERT

MAY 18, 2012

Energy, Environmental and Utilities Group

News Concerning
Recent Developments in Energy and Environmental Law



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EPA Issues Draft Guidance for Hydraulic Fracturing with Diesel Fuel

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Acting pursuant to its authority under the Safe Drinking Water Act (SDWA), the U.S. Environmental Protection Agency (EPA) on May 10, 2012, released draft permitting guidance for hydraulic fracturing during oil and natural gas production activities, but which applies only where diesel fuel is a component of the fracturing fluid. The EPA will take public comment on the proposed guidance through July 9, 2012.

As discussed in more detail below, the guidance does not apply in states, tribes and territories with primary enforcement authority (or primacy) over the SDWA's Underground Injection Control (UIC) program. Nevertheless, permit writers in primacy states have full discretion to consider and incorporate the federal guidance as they see fit.

Regulation of Injection Wells

Underground injection wells generally are subject to the requirements of the UIC program that governs injection well construction, operation, permitting and closure. Thirty-three states and three territories have primacy over all classes of wells under the program, and EPA's new guidance would not directly apply. States and territories in which the EPA either shares UIC program authority or retains full enforcement authority, and to which this guidance directly applies, include Pennsylvania, New York, Virginia, Arizona, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Tennessee, Washington, D.C., American Samoa, the Virgin Islands and most Indian tribes.

Oil and gas-related injection wells (i.e., enhanced recovery, disposal and storage wells) are regulated as Class II injection wells. However, stimulation of such wells through hydraulic fracturing typically is not regulated under the UIC program. This is because the Energy Policy Act of 2005 amended the SDWA definition of "underground injection" at Section 1421(d)(1)(B) to specifically exclude the "underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." The term "diesel fuels" was left undefined in the legislation. As a result, hydraulic fracturing operations have not been subject to regulation under the UIC program, and it is not until very recently that the EPA has begun to assert its limited authority over the use of diesel fuel in such operations.

Draft Guidance

In the draft guidance, the EPA has proposed that its permitting authority extends to any hydraulically fractured well in which any portion of the fracturing fluid contains one of six listed Chemical Abstract Service Registry Numbers (CASRN)s¹ or is referred to as "diesel fuel" in its primary name or as a common synonym. This includes where the diesel is injected as the carrier fluid or as a component of another fracturing fluid. Interestingly, the EPA's guidance would not consider the use of unblended biodiesel in hydraulic

¹ These include 68334-30-5 (diesel fuel), 68476-34-6 (diesel fuel no. 2), 68476-30-2 (fuel oil no. 2), 68476-31-3 (fuel oil no. 4), 8008-20-6 (kerosene), and 68410-00-4 (petroleum distillates/crude oil).

fracturing operations as regulated under the UIC program because biodiesel contains “lower levels of chemicals of concern compared to petroleum-derived fuels.” In any case, the guidance document’s definition of diesel fuel appears to cast a wide net, providing the EPA with authority over a potentially broad universe of wells.

With respect to specific requirements for wells hydraulically fractured using diesel fuel, EPA’s guidance addresses, among other things, the application and review process, public notification, delineation/evaluation of the relevant area of review (AoR), well construction, closure and abandonment, mechanical integrity testing, monitoring and reporting, and financial responsibility. As a general matter, information requirements are increased considerably. The EPA’s guidance suggests that permit writers should seek additional information such as maps and cross sections of the AoR, a plugging and abandonment or monitoring plan, detailed chemical plans, and baseline geographic information wherever necessary to ensure underground sources of drinking water are adequately protected. At a minimum, these enhanced informational requirements could significantly increase costs.

A timeframe for the permit application and review process is not proposed, but the EPA advises that permit writers should require operators to submit an application within a “reasonable amount of time” prior to the start of well

construction. The draft guidance goes on to suggest that sufficient time be allocated for a full review of proposed construction, operation and monitoring plans, with an opportunity for public notice and comment emphasizing environmental justice considerations. By increasing the amount of information to be considered during application review, it is widely expected that implementation of the guidance’s recommendations would extend the permitting process considerably.

What’s Next?

The agency is inviting public input during the 60-day comment period, which ends on July 9. The EPA has specifically requested comment on the following topics: (1) diesel fuels description, (2) diesel fuels usage information, (3) permit duration and well closure, (4) area of review, (5) information submissions, and (6) monitoring. Although the guidance is directly applicable only where the EPA is the primary permitting authority for Class II wells, primacy states may nevertheless consider and implement the guidance as they see fit, making early engagement with state and local authorities advisable. That being said, the use of diesel fuel as an additive in hydraulic fracturing operations already has been on the decline, and the potential impacts associated with this new guidance may become immaterial in the face of shifting industry practice.