



May 17, 2012

## EPA ISSUES DRAFT PERMITTING GUIDANCE FOR HYDRAULIC FRACTURING ACTIVITIES USING DIESEL FUELS

On May 4, 2012, with the public fearing everything including earthquakes and industry fearing hidden agendas, U.S. EPA proposed “guidance” on permitting fracking by diesel fuel injection for oil and gas production activities. Fracking operations make natural gas operations feasible in previously inaccessible deposits. Importantly, EPA states that “natural gas plays a key role in our nation’s clean energy future”. The permitting is proposed for Class II wells under the Safe Drinking Water Act’s Underground Injection Control (UIC) Program or deep wells. Only underground injection of fluids or propping agents (which keeps fractures open) other than diesel, are excluded from the UIC program, under the 2005 Energy Policy Act (the so-called “Halliburton Loophole” at 42 U.S.C. §300h(d)(1)(B)). Diesel is used as carrier or additive for other fluids. However, EPA did not explain fully how the UIC program applied to diesel fracking until now.

This is the third recent endeavor by EPA to further regulate the energy industry. In March 2012, EPA proposed rules under the Clean Air Act for new coal and natural gas plants for control of greenhouse gas emissions, as well as proposing new controls for nitrogen oxide and sulfur dioxide for the oil and gas industry in April 2012, including for hazardous air pollution. The Interior Department has recently rolled out chemical disclosure rules for companies fracking on public land. Now, EPA is going to protect underground sources of drinking water or aquifers under the Safe Drinking Water Act. Its concern is about the potential migration of fluids from various pathways (faulty casings, annulus, injection zones, etc.).

EPA’s latest UIC guidance is on its [website](#) and it has asked for public comments on its proposal within sixty days of publication in the Federal Register. A brief outline of EPA’s main recommendations follows.

### **Diesel**

EPA asks how should it define “diesel” for the UIC program. It recommends using chemical abstracts for diesel, diesel No. 2, fuel oil No. 2, fuel oil No. 4, kerosene and crude oil. It also discusses other alternatives which may cover a different or broader range of chemicals. It further asks whether it should specify a low threshold concentration or diesel percentage to qualify diesel injection for a de minimis level of exclusion from UIC regulations.

### **Area Permits**

EPA recommends area permits for multiple Class II wells using diesel fuel, providing that all applicable guidelines including public notification are satisfied.

### **Permit Duration and Closure**

Rather than issuing a diesel injection permit for the operating life of the plant, EPA recommends setting a short duration for the permit upon completion of diesel hydraulic fracturing, i.e., during production, or assigning the well as “temporarily abandoned” status during production. Under the first approach, a non-endangerment demonstration is required. Under the second approach, the operator may again fracture, with reduced monitoring and reporting during production, but the well must still be finally plugged and abandoned.

### **Area of Review**

The zone of endangering influence of the well must be established to ensure there are no conduits in the vicinity of the injection well that may enable fluids to migrate into aquifers after well closure. Rather than defaulting to a one-quarter mile fixed radius around the well, EPA recommends that site-specific determinations of the zone of endangering influence be made (Appendix B to the guideline provides approaches to modifying the fixed radius approach).



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### **Permit Applications**

Besides routine information required in 40 C.F.R. 144-146, EPA recommends that additional information be obtained for diesel hydraulic fracturing well applications, including maps, cross-sections, plugging and abandonment plans, chemical plans, baseline geochemical information, seismic data and geomechanical characteristics of the subsurface confining zone.

### **Construction**

EPA recommends, in addition to existing design standards to prevent movement of fluids that could endanger aquifers (40 C.F.R. 144.52 and 146.22), additional requirements include extending surface casing, cementing, and taking extra precautions (e.g., description of geologic formations, characteristics of formation fluids, location of other active injection wells, etc.).

Noteworthy, diesel injection for wells already constructed prior to the new EPA guidance, EPA says owners and operators must still demonstrate that there is no movement of fluids into aquifers or otherwise they must take “corrective measures” (e.g., replacing well tubing or cementing across specific sections) in order to obtain a Class II permit. If they fail, the permit will be denied. This leaves open the question of enforcement, but EPA subtly references its rules at 40 C.F.R. §144.12, which references both closure and enforcement action under subparagraphs (c) and (d).

### **Mechanical Integrity, Mentoring and Responding**

EPA recommends that existing regulatory requirements apply (40 C.F.R. 146) and modifications thereof to ensure adequate information exists (e.g., pump rate, pressure, volume, viscosity, etc.).

### **Financial Responsibility**

Requirements at 40 C.F.R. 144.52 apply, and EPA recommends self-insurance options be examined carefully and the total number of wells in an area permit be covered.

### **Public Notification**

EPA uses its Plan EJ 2014 to ensure that sufficient notice is given of each new injection well in order to protect overburdened communities from pollution.

### **Conclusion**

The EPA diesel fracking guidance does not automatically apply to state-run UIC programs, depending on the details of how EPA granted each state primacy, but EPA recommends states use its guidance. States with Safe Drinking Water Act UIC programs may need to modify their program under state law to regulate diesel fracturing.

EPA is using guidance rather than formal rule-making to impose regulatory requirements on the regulatory community, some retroactively, making some question their statutory authority for doing so. Are they interpreting existing rules or making new ones?

EPA itself runs the UIC program directly in only twelve states, two territories and some Indian lands. Other states, like Louisiana (via LDNR), Alabama (via its Oil and Gas Board and ADEM), Mississippi (via its Oil and Gas Board and MDEQ), Florida (via its DEP), and Texas (via its Railroad Commission), must decide what to do next. Some states already have their own limited rules, e.g., Texas Railroad Commission hydraulic fracturing fluid disclosure requirements (February 12, 2012). However, it is best to comment on the new EPA guidance before it becomes final.

– [Michael B. Donald](#) and [David M. Hunter](#)



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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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