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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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September 27, 2012

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Dear Administrator Jackson:

We seek clarifications regarding the Environmental Protection Agency's (EPA) draft permitting guidance for oil and natural gas hydraulic fracturing activities using diesel fuels. Specifically, we are concerned with the impetus of this guidance, its vagueness and lack of certainty it provides to states and businesses, its impacts on states that have been delegated primacy for the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), and the additional requirements that will be imposed on permit writers in primacy states.

In the Energy Policy Act of 2005 (EPAct 05), Congress clarified that states or other local bodies should be the regulators of hydraulic fracturing. In doing so, Congress made clear that EPA did not have the authority to regulate hydraulic fracturing except when "diesel fuels" were used as "fluids or propping agents." As such, EPA's regulatory authority hinges on the definition of the term "diesel fuels." We are concerned that EPA's definition of "diesel fuels" is not precise and could jeopardize state primacy delegations under the SDWA. The lack of a proper definition creates uncertainty and does not allow operators to determine whether they are subject to EPA's proposal.

EPA has presented six potential Chemical Abstracts Service (CAS) numbers to define "diesel fuels" in EPA's draft guidance document. The six CAS numbers used by EPA are: (1) 68334-30-5, Primary Name: Fuels, diesel; (2) 68476-34-6, Primary Name: Fuels, diesel, no. 2; (3) 68476-30-2, Primary Name: Fuel oil No. 2; (4) 68476-31-3, Primary Name: Fuel oil, no. 4; (5) 8008-20-6, Primary Name: Kerosene; and (6) 68410-00-4, Primary Name: Distillates (petroleum), crude oil. Additionally, in the Federal Register, EPA questions whether a seventh

CAS number – such as 64741-44-2, Primary Name: Distillates (petroleum), straight-run middle – should be included.

Only two of the CAS numbers identified by EPA – 68334-30-5 and 68476-34-6 – have “diesel” as the primary name. We believe the additional four CAS numbers printed in EPA’s guidance document, as well as the seventh CAS number mentioned in the Federal Register, are not “diesel fuels” and, as such, plainly exceed the authority given to EPA in EPAct 05 to regulate hydraulic fracturing when diesel fuels are used under the SDWA.

EPA’s ever-evolving definition of “diesel fuels” raises serious questions relating to UIC programs managed by the states through primacy delegation granted by EPA under the SDWA. As you know, states have safely regulated and been the permitting authority for hydraulic fracturing operations for over 60 years. Generally, states have regulated hydraulic fracturing pursuant to state well construction standards and not under UIC programs. Therefore, EPA’s decisions to create a regulatory system under its UIC authority will not be similar to the current state regulatory systems and, as such, raise questions relating to states’ primacy authority.

Acting Assistant EPA Administrator Nancy Stoner testified before the House Committee on Oversight and Government Reform’s Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform on May 31, 2012. In her testimony, Acting Administrator Stoner indicated the permitting guidance was directly intended for use by EPA permit writers under the UIC program and that it was applicable in states where EPA directly implements the UIC Class II program.

Acting Assistant Administrator Stoner further testified that primacy programs are encouraged to review and consider the information and recommendations in the guidance. It is unclear what, if anything, primacy programs are required to do since states regulate hydraulic fracturing under well construction programs and do not regulate hydraulic fracturing under UIC programs. Also, nothing in the draft guidance alters EPA’s website statement:

While the SDWA specifically excludes hydraulic fracturing from UIC regulation under SDWA § 1421 (d)(1), the use of diesel fuel during hydraulic fracturing is still regulated by the UIC program. Any service company that performs hydraulic fracturing using diesel fuel must receive prior authorization through the applicable UIC program.

Since this website statement applies to any service company performing hydraulic fracturing using diesel fuel, it purports to apply in states with primacy where fracturing regulation is not within the UIC program.

Even if EPA itself does not challenge state primacy delegation under the SDWA, state regulatory systems could be open to legal challenge by outside groups, and there is precedent for this occurring. For example, in 1994, the Legal Environmental Assistance Foundation (LEAF) petitioned EPA to require the State of Alabama to regulate hydraulic fracturing in coalbed

methane operations under the UIC program. EPA rejected the petition, arguing that Congress never intended UIC to cover hydraulic fracturing. Subsequently, LEAF filed a Petition for Review of an order of the U.S. EPA. In doing so, LEAF challenged the denial of their petition for EPA to revoke Alabama's primacy for the UIC program (*Legal Environmental Assistance Foundation v. U.S. EPA*, 118 F.3d 1467 (11th Cir. 1997)). The Eleventh Circuit agreed with LEAF and concluded that hydraulic fracturing activities constituted "underground injection" under the SDWA. Under the decision, hydraulic fracturing of coalbeds came under the jurisdiction of the federal SDWA. Alabama was forced to promulgate new regulations addressing hydraulic fracturing of coalbeds under the SDWA.

We are concerned that EPA's draft permitting guidance for oil and natural gas hydraulic fracturing activities using diesel fuels could lead to similar litigation for states that have been delegated primacy under the SDWA. Therefore, we request EPA thoroughly consider the impacts this guidance document will have on states that have been delegated primacy under the SDWA and clarify in the final guidance that EPA's hydraulic fracturing regulatory scheme is not applicable to such states.

Additionally, Section 1421(b)(2) of the SDWA specifies that EPA may not prescribe requirements for state UIC programs which interfere with or impede oil and natural gas production "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." Administration officials, including yourself, have repeatedly confirmed that hydraulic fracturing has caused no proven incidents of ground water contamination. Considering such comments, how can the proposed requirements under EPA's draft permitting guidance be viewed as "essential" and comply with the express prohibition made by Congress under the SDWA?

Finally, we request clarification that diesel usage for purposes of freeze prevention will not be impacted by this rule. In freezing conditions, both wellbore and surface line integrity can require the use of diesel – and this has proven a safe practice which in fact protects the environment from rupture or other structural integrity risks.

When EPA conducted Congressional briefings regarding the draft guidance document, they indicated primacy states would be forced to meet certain requirements to comply with the guidance and retain primacy. In your response, we respectfully request a full description and

analysis of all requirements that will be imposed on states that have been delegated primary enforcement authority under the SDWA to comply with the guidance for oil and natural gas hydraulic fracturing activities using diesel fuels. Please provide a detailed explanation of how EPA plans to address any uncertainty created by the Agency's definition of "diesel fuels." We also request any and all documentation and rationale the Agency used to justify the "essential" nature of these requirements to protecting underground sources of drinking water.

Sincerely,



Senator James M. Inhofe
Ranking Member
Senate Committee on Environment
and Public Works



Senator Lisa Murkowski
Ranking Member
Senate Committee on Energy
and Natural Resources



Senator John Hoeven



Senator Mary Landrieu



Senator Joe Manchin III