

United States Senate

WASHINGTON, DC 20510

December 21, 2011

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

Dear Administrator Jackson:

We write to express our growing concerns about the Environmental Protection Agency's (EPA) actions related to the regulation of hydraulic fracturing, a technology that is playing an important role in strengthening America's energy security and creating millions of jobs across the country. For decades, primary responsibility for the regulation of hydraulic fracturing has remained with the states, but today it appears that your agency may be adding new and potentially unworkable requirements at the federal level.

Specifically, we are concerned about EPA's intention to regulate hydraulic fracturing under the Safe Drinking Water Act (SDWA) when diesel fuel is used. From a practical standpoint, a key issue is whether EPA's actions will cause unnecessary confusion and open the door for states to lose their primacy for UIC permitting programs.

The Energy Policy Act of 2005 (EPA 05) clarified the SDWA to specifically exclude from the scope of the Underground Injection Control (UIC) definition "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." A close reading of this provision clearly demonstrates that Congress intended to keep primary authority for the regulation of hydraulic fracturing in energy production with the states, while addressing the narrow issue of diesel fuel use in hydraulic fracturing.

Prior to the passage of EPA 05, EPA held that the SDWA was never intended to regulate hydraulic fracturing. For five years following its passage, EPA took no action to implement the discretionary authority that it had been granted. Last year, however, EPA reversed its position. This began with a website notice that it would consider all hydraulically fractured wells where diesel fuel is used Class II wells under the SDWA UIC program, and was followed by the initiation of a process to develop guidance for implementing its SDWA authority.

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We believe the UIC Class II wells for which EPA is developing guidance are a strange fit for hydraulic fracturing regulation. As you may know, Class II injection wells are used to dispose of fluids associated with oil & gas production, to inject fluids for enhanced oil recovery, or for the storage of liquid hydrocarbons. Hydraulic fracturing is a process of well completion that does not intend for fluids to be permanently stored in a geological formation.

Our concerns are heightened by a recent presentation that is posted on EPA's website, which includes the question, "What should be considered as diesel fuels?" The first option listed is the ASTM D975-91 standard, which is a version of the ASTM standard developed in 1991. Not only has this standard been redesigned 47 times since the 1991 version; it was also developed specifically to determine whether a product can be defined as diesel fuel in the context of being an appropriate fuel *for a diesel engine*. The other options listed in the presentation are plain English alternatives, which leave much open to interpretation.

If EPA does not proceed carefully, there could be unintended consequences. For example, it appears EPA could define "diesel fuel" as any product that contains similar carbon chain characteristics. Diesel fuel has a relatively long carbon chain and is similar, on a molecular level, to mineral and vegetable oils. Mineral oil is increasingly being used in fracking fluids, and according to the FDA, is safe enough for human consumption. Treating and regulating it the same as diesel fuel therefore appears to make little sense.

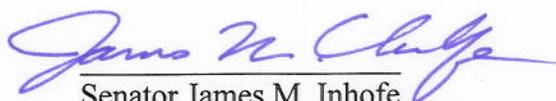
Clearly, EPA's definition of "diesel fuel" will be the linchpin of its regulatory action. Some are urging EPA to broadly define the term to include a wide range of hydrocarbons and petroleum distillates. Whether EPA pursues guidance or regulation, we believe that a vague definition would overreach EPA authority, open the door for increased litigation and create a significant burden on the 40 states that will be responsible for implementing and enforcing any regulations under the SDWA.

As EPA itself has acknowledged, one of the critical questions that it will face as it proceeds will be: "how can [EPA] establish that diesel has or has not been used?" We believe that EPA should follow the precedent that it has established on its own Integrated Risk Information System (IRIS) and use Chemical Abstract Service (CAS) numbers to define "diesel fuel." EPA must work with the states to ensure that states can effectively and efficiently address any proposed guidance. This will provide maximum clarity to all stakeholders and ensure maximum compliance, while allowing a path forward for responsible energy development.

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We know that states feel strongly that it is in their best interest to ensure proper and practical water and environmental protections without cutting off access to critical resources. We therefore believe EPA must proceed very carefully, in an open and transparent manner, as it contemplates greater federal regulation of diesel fuel used in hydraulic fracturing. We also request that EPA thoroughly consider input from all stakeholders, including the concerns that we have raised in this letter, in a timely fashion, to ensure that its regulations do not unnecessarily harm our nation's energy producers.

Sincerely,



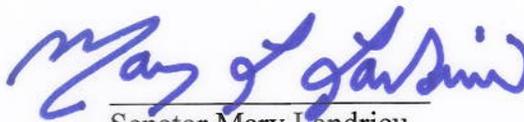
Senator James M. Inhofe
Ranking Member
Senate Committee on Environment
and Public Works



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



Senator John Hoeven



Senator Mary Landrieu