

## **EPA Confirms Its Position that Hydraulic Fracturing with Diesel Requires an Underground Injection Control Permit**

**November 2, 2010**

On October 29, the U.S. Environmental Protection Agency (EPA) filed a motion to dismiss a lawsuit brought by the Independent Petroleum Association of America and the U.S. Oil & Gas Association (the Associations) under the Safe Drinking Water Act (SDWA). The Associations allege that the EPA has taken new action to regulate the use of diesel fuel in the hydraulic fracturing (or “fracking”) of natural gas embedded in shale. The EPA’s response makes clear its view that using diesel fuel for such activities requires an Underground Injection Control (UIC) permit. Both producers and fracturing service providers should consider the EPA’s position in deciding whether to use diesel fuel in fracturing processes and, if so, whether to seek a UIC permit.

On August 12, 2010, the Associations petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to review statements the EPA recently posted on its website claiming, in part, that “[a]ny service company that performs hydraulic fracturing using diesel fuel must receive prior authorization from the UIC program.” The EPA cited as authority for its position Section 1421(d) of the SWDA, which defines an “underground injection” as meaning “the subsurface emplacement of fluids by well injection; [excluding] . . . 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.” In its statements, the EPA explained that while Section 1421(d) “specifically excludes” hydraulic fracturing, diesel fuel use in the hydraulic fracture process is nevertheless regulated by the UIC program, which requires prior UIC authorization.

The Associations claimed that the language on the EPA website constituted a “final agency action” reviewable under SDWA Section 1448(a)(2). In its petition, the Associations seek to have the D.C. Circuit review the following four issues:

1. Whether the EPA complied with procedural requirements before posting the diesel fuel regulation on its website, including whether the regulation constituted a rule that must be made in accordance with the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA).
2. Whether, for those states that have delegated UIC programs, the EPA failed to follow the specific SDWA rulemaking procedures.
3. Whether the EPA diesel permitting requirement is arbitrary and capricious given the EPA practice of not requiring operators to obtain UIC well permits under regulations adopted through traditional APA rulemaking.

4. Whether the EPA decision to label hydraulically fractured wells using diesel fuel as Class II UIC wells is arbitrary and capricious since the EPA has stated that the current Class II regulations cannot be applied to hydraulic fracturing processes.

In response, the EPA filed its motion to dismiss, arguing that its website statements are “only a description of existing legal obligations under the statute, not the source of new requirements.” The EPA also stated in its motion that “Congress made clear that [hydraulic fracturing] operations using diesel fuels as an additive remain subject to regulation under the UIC programs pursuant to the SDWA.” Thus, according to the EPA, its website statements are not final agency action and therefore are not reviewable by the court.

The D.C. Circuit will have the motion to dismiss under advisement but no timeline for its decision is known.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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