Congress of the United States
Washington, DC 20515

August 8, 2011

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

Dear Administrator Jackson:

We are writing in regard to the definition of "diesel fuel" that EPA will use in its upcoming guidance on permitting for oil and gas hydraulic fracturing activities.

The 2005 Energy Policy Act exempted hydraulic fracturing from the Safe Drinking Water Act unless the fluid injected contains diesel fuel. For that reason, the way in which EPA defines this term has far-reaching consequences. We encourage you to adopt a definition of "diesel fuel" that is broad enough to protect human health and to address the specific reason why Congress singled out diesel fuel in the law—because it often contains benzene, toluene, ethylbenzene and xylenes (the BTEX compounds).

In a 2004 report, EPA stated that the "use of diesel fuel in fracturing fluids poses the greatest threat" to underground sources of drinking water.[1] EPA called diesel fuel "the additive of greatest concern because it introduces BTEX compounds" into the geologic formation, from which the chemicals could then migrate into sources of drinking water.[2] The Department of Health and Human Services, the International Agency for Research on Cancer, and the EPA have all determined that benzene is a human carcinogen. Long term exposure to the chemicals toluene, ethylbenzene, or xylenes also have significant health impacts as they can damage the central nervous system, liver, and kidneys.

These concerns about diesel and the BTEX compounds contained in diesel led EPA to negotiate a memorandum of agreement with the three largest hydraulic fracturing providers to voluntarily stop using diesel fuel when performing hydraulic fracturing in underground sources of drinking water.[3] Congress also specified in the Energy Policy

---

[1] U.S. Environmental Protection Agency, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coal bed Methane Reservoirs (June 2004) (EPA816-R-04-003) at 4-11.
[2] *Id.* at ES-12.
[3] Memorandum of Agreement between the U.S. Environmental Protection Agency and BJ Services Company, Halliburton Energy Services, Inc., and Schlumberger Technology Corporation (Dec. 12, 2003).

PRINTED ON RECYCLED PAPER

Act of 2005 that the requirements of the Safe Drinking Water Act underground injection control program still apply to the use of diesel fuel in hydraulic fracturing fluids.[4]

We understand that some stakeholders have suggested that EPA limit its definition of diesel fuel to fuels sold in the United States for use in a diesel engine. Others have suggested limiting the definition to a small number of diesel formulations with specific Chemical Abstracts Service (CAS) identifying numbers, citing as justification a report the Energy and Commerce Committee Democrats sent you on January 31, 2011.[5] In that report, Democratic Committee staff calculated the volume of hydraulic fracturing products containing diesel fuel with three specific CAS numbers. The report focused on those three types of diesel fuel because of data limitations, not because the permitting requirement in the Energy Policy Act applies only to these three specific diesel types. The goal of the report was to reveal to policy-makers and the public that oil and gas companies have continued to use diesel fuel in hydraulic fracturing fluids without a permit, not to define what constitutes a diesel fuel.

When EPA raised concerns about the use of diesel fuel in hydraulic fracturing fluids and Congress acted on those concerns, there was no intent to restrict scrutiny to diesel fuels with a particular CAS number or with a certain sulfur content. Instead, diesel fuel was singled out for regulation because of the BTEX components contained in the diesel formulations. Limiting the definition of diesel fuel to only a slim set of CAS numbers or only to diesel fuels legally sold in the United States for use in a diesel engine would not be consistent with Congress's intent. It could result in a scenario in which hydraulic fracturing companies could use many forms of diesel fuel without obtaining a permit—even if the fuel contained BTEX compounds—because the diesel formulation fell outside the scope of a narrow definition.[6]

How "diesel fuel" is defined is a vital issue as the agency crafts guidance for permitting diesel fuel use for hydraulic fracturing. Since federal law contains no public disclosure requirements for hydraulic fracturing fluids, this guidance offers an opportunity to clarify permitting requirements and increase consistency and transparency of program implementation in a way that serves to protect public health and drinking water supplies. We urge you to craft a definition that provides consistency to industry while serving to protect public health and the environment.

---

[4] 42 U.S.C. § 300h(d)

[5] Letter from Henry A. Waxman, Edward J. Markey, and Diana DeGette to EPA Administrator Lisa Jackson (Jan. 31, 2011) (online at http://democrats.energycommerce.house.gov/sites/default/files/documents/Jackson.EPADieselFracking.2011.1.31.pdf).

[6] For example, if EPA limited the definition of diesel to the three CAS categories examined in the Energy and Commerce Committee study, that could have the unintended consequence of excluding other diesel fuel formulations from appropriate permit requirements. For instance, fuel oil #4 is used in some diesel engines. The Committee did not obtain any evidence that oil and gas companies currently use fuel oil #4 in hydraulic fracturing; however, excluding it from permitting requirements would not be appropriate given its chemical composition.

Sincerely,

Henry A. Waxman
Ranking Member
Committee on Energy and Commerce

Edward J. Markey
Ranking Member
Committee on Natural Resources

Diana DeGette
Ranking Member
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce

Rush Holt
Ranking Member
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources