

III. If EPA is going to act, it should define "diesel fuels" by reference to existing regulation and provide a de minimis threshold

EPA has asked for comment on how to define "diesel fuel" as Congress' passing reference to diesel fuels in the 2005 Energy Act provides no specific statutory definition. 42 U.S.C. § 300h(d)(1)(B)(ii). If EPA is inclined to define diesel fuel by way of guidance, then EPA should clarify the diesel fuel definition by reference to EPA's existing fuel additive regulations. Specifically, EPA has already defined "diesel fuel" as follows:

"Diesel fuel means any fuel sold in any State or Territory of the United States and suitable for use in diesel engines, and that is (1) A distillate fuel commonly or commercially known or sold as No. 1 diesel fuel or No. 2 diesel fuel; (2) A non-distillate fuel other than residual fuel with comparable physical and chemical properties (e.g., biodiesel fuel); or (3) A mixture of fuels meeting the criteria of paragraphs (1) and (2) of this definition."

40 C.F.R. § 80.2(x). If guidance is provided, then EPA should use this pre-existing definition that has already been subject to notice and comment rulemaking. This existing standard eliminates any need for EPA to create an entirely new definition by way of informal guidance.

The existing regulatory definition could be amplified with the details included in the Chemical Abstract Service (CAS) registry numbers. EPA could identify the registry numbers that correspond to diesel fuels to provide more certainty to the scope of the definition. Accordingly, API suggests the three existing CAS registry numbers for diesel fuel – 68476-34-6; 68476-30-2; 68334-30-5 – could be used to inform the definition.

EPA should, however, reject any apparent suggestion to more broadly define diesel fuels as "all hydrocarbon-based components," and without the specificity outlined in the existing fuels definition and CAS registry numbers. See EPA's Approach to Developing Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels, Public Webinar, slide 42 (June 15, 2011). Congress specifically only addressed "diesel fuels" in the narrow exclusion from the broad exemption provided hydraulic fracturing from the UIC requirements under the statute. Had Congress intended to encompass "all hydrocarbon based components" within the narrow exclusion, it would have so stated. Any guidance that went beyond that to encompass "all hydrocarbon based components" would be flatly inconsistent with Congress' clear direction.

In addition, API also strongly recommends EPA set a de minimis threshold below which fluids would not be considered "diesel fuel" for purposes of the Act. It is common for EPA to set de minimis levels for a constituent before the substance would trigger additional regulatory requirements. Otherwise, trace levels of a substance would trigger requirements that could both overwhelm regulatory authorities and impose additional burdens without even any potential risk of any kind whatsoever. In this instance, API would propose a de minimis threshold of 1% of total injected fluid by volume. This threshold would set a reasonable materiality level for the use of diesel fuels, before any additional regulatory burdens are imposed.