

NO ORAL ARGUMENT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENT PETROLEUM)	
ASSOCIATION OF AMERICA, and)	
US OIL & GAS ASSOCIATION,)	
)	
)	
Petitioners,)	No. 10-1233
)	
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONERS’ OPPOSITION TO RESPONDENT’S
MOTION TO DISMISS**

This case concerns the decision of respondent U.S. Environmental Protection Agency (“EPA”) to regulate an oil and gas production technique known as hydraulic fracturing on a nationwide basis – for the first time ever – under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (“SDWA”). Hydraulic fracturing is a process in which fluids are pumped under high pressure through an

oil and gas production well into a subsurface formation containing oil or natural gas, creating fractures in the rock that facilitate the flow of the oil or gas to the wellbore, thus increasing the production of oil or gas through the well. The hydraulic fracturing process typically takes a matter of hours, while production from an oil or gas well can continue for years.

Despite its position that it does not regulate oil and gas production wells under the SDWA Underground Injection Control (“UIC”) program,¹ earlier this year EPA announced – following the lead of the U.S. Court of Appeals for the Eleventh Circuit – that oil and gas well operators undertaking certain types of hydraulic fracturing operations would be required to obtain UIC permits and that the wells in question would be regulated as Class II wells. EPA chose not to undertake a rulemaking to establish these requirements as mandated by the SDWA and the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* (“APA”); in fact, the Agency did not consult with or even notify any members of the regulated community that it was taking this very significant step, but instead quietly announced this determination on its website.

¹ For example, a graphic on an EPA webpage describing certain types of injection wells that are associated with oil and gas production categorized as Class II wells under the UIC program clearly states “Production wells are not regulated by the UIC program.” See <http://.epa.gov/type/groundwater/uic/classII/index.cfm> (last visited Nov. 7, 2010).

Petitioners the Independent Petroleum Association of America and the US Oil & Gas Association (collectively, “Petitioners”) have now filed a petition with this Court seeking review of this decision by EPA. The Agency has responded by filing a motion to dismiss the petition (“EPA Motion”), arguing that this Court lacks jurisdiction to review EPA’s decision because the website statements announcing this decision are merely a description of existing legal obligations under the SDWA and thus not final agency action. EPA Motion at 6-7.

Contrary to EPA’s assertions, EPA’s 2010 decision to adopt a 2001 ruling from the U.S. Court of Appeals for the Eleventh Circuit that was limited to Alabama’s UIC program and to enforce it nationwide on parties that did not participate in the original litigation is reviewable agency action. Moreover, EPA has disregarded the Eleventh Circuit’s decision for nearly a decade and its statements on the website, in fact, represented an abrupt change in what EPA has considered for years to be the legal obligations of oil and gas well operators under the SDWA. Consequently, EPA’s statements represent a new position established without any public involvement or notice and constitute final agency action that is reviewable by this Court, and EPA’s Motion should therefore be denied.

FACTUAL BACKGROUND

The SDWA was originally passed by Congress in 1974. *See* Safe Drinking Water Act, Pub. L. No. 93-523. The Act created the UIC program and instituted a

requirement that injection wells be authorized by permit. However, EPA did not propose a permitting program to implement the SDWA's UIC permitting requirements until 1976, *see* 41 Fed. Reg. 36,730 (Aug. 31, 1976), and did not begin to enforce those requirements until appropriate regulations were finally put in place in 1980, *see* 45 Fed. Reg. 42,500 (June 24, 1980), and UIC programs for specific states were approved beginning around 1984, *see* 49 Fed. Reg. 20,197 (May 11, 1984).

EPA has not historically considered hydraulic fracturing activities to require a permit under the SDWA and its UIC permitting program. *See Legal Envtl. Assistance Found. v. United States Envtl. Prot. Agency*, 118 F.3d 1467, 1471 (11th Cir. 1997) ("*LEAF I*"). For many years, the Agency's position was that oil and gas production wells being hydraulically fractured were not required to be regulated under the UIC program because the principal function of these wells was not to inject fluids (such as liquid wastes) into the subsurface but was instead to remove (*i.e.*, produce) valuable oil and gas from the subsurface.

EPA's position was challenged when a group petitioned EPA in 1994 to withdraw its approval of the Alabama UIC program because that program did not regulate hydraulic fracturing as underground injection. *Id.* EPA denied the petition and the group sought review before the Eleventh Circuit. The Eleventh Circuit rejected EPA's argument that hydraulic fracturing activities were not

“underground injection” under the SDWA, relying on what it viewed as the plain language of the statute and ignoring Congressional intent. *See LEAF I*, 118 F.3d at 1478.

Consistent with the court’s decision, EPA subsequently initiated proceedings to withdraw approval of Alabama’s Class II UIC program. *See* 64 Fed. Reg. 27,744 (May 21, 1999). The Alabama Oil & Gas Board went through a rulemaking process and proposed new regulations addressing hydraulic fracturing operations, which EPA approved. *See* 65 Fed. Reg. 2,889 (Jan. 19, 2000). In doing so, EPA noted that hydraulic fracturing is a one-time activity (often taking only a couple of hours) and that it did not seem entirely appropriate to categorize a well being hydraulically fractured as a Class II well for its entire operational life – which could encompass many years – because of a temporary activity. *Id.* at 2,892. EPA agreed that Alabama’s program could treat hydraulic fracturing as a “Class II-like” activity adhering to some, but not all of EPA’s regulatory requirements for Class II wells. *Id.* EPA took no other action in response to the Eleventh Circuit’s ruling in *LEAF I*; the Agency certainly did not take any steps to require any other state to modify its UIC program to regulate hydraulic fracturing as underground injection.

EPA’s approval of Alabama’s revised program was again challenged and reviewed by the Eleventh Circuit. *See Legal Envtl. Assistance Found., Inc. v.*

United States Env'tl. Prot. Agency, 276 F.3d 1253 (11th Cir. 2001) (“*LEAF II*”). The *LEAF II* court concluded that EPA’s UIC regulatory scheme was of such a nature that all injection wells fall into one of five categories; under this scheme, Class II wells are those wells that are used for injection of fluids for specified purposes related to oil and gas operations while Class V is a catch-all category. *Id.* at 1263. Because EPA did not argue that hydraulic fracturing should be considered a Class V well and apparently was not willing to revise its existing regulatory structure, the *LEAF II* court believed it had no option but to find that Alabama’s program must classify wells being hydraulically fractured as Class II UIC wells. *Id.* at 1263-64. The court remanded to EPA to determine whether Alabama’s revised program for the regulation of hydraulic fracturing met the requirements for Class II wells.

EPA published a notice in the Federal Register in July 2004 setting forth its response to the Court’s remand. *See* 69 Fed. Reg. 42,341 (July 15, 2004). In its notice, the Agency stated that it still had not promulgated any “national regulations expressly and specifically designed to establish minimum requirements for state programs that regulate hydraulic fracturing of coal beds to enhance methane production.” *Id.* at 42,342. EPA expressed concern about “accord[ing] ‘full’ Class II status” to oil and gas wells being hydraulically fractured to increase production because the production of natural gas in Alabama could be impeded as a result of

the imposition of certain regulatory requirements applicable to Class II wells, contrary to the mandate of Congress.² *Id.* at 42,343. The Agency reiterated that “EPA’s Class II regulations were not designed to, and do not specifically address the unique technical and temporal attributes of hydraulic fracturing.” *Id.* EPA ultimately determined that the Alabama program was not required to comply with all of the specific regulations promulgated by EPA for Class II UIC wells because of the flexibility provided by Section 1425 of the SDWA, 42 U.S.C. § 300h-4, for state UIC programs related to oil and gas production wells.

At the same time, EPA did not withdraw approval for any other of the 32 states that operate under state-administered, EPA-approved UIC programs even though none of these states had modified its UIC program to regulate hydraulic fracturing.³ EPA also did not require oil and gas well operators using hydraulic fracturing to obtain Class II UIC permits in those states in which the UIC program is directly administered by EPA, such as New York and Pennsylvania.

At around the same time as its decision on remand, EPA affirmed that its position was that national UIC regulations governing hydraulic fracturing were unnecessary. In light of EPA’s then just-issued study concerning the potential

² The SDWA specifies that UIC regulations relating to the types of injection wells covered under Class II may not interfere with or impede these oil and gas production-related activities unless such regulations are essential to protecting underground sources of drinking water (“USDWs”). *See* 42 U.S.C. § 300h-1(c).

³ *See* <http://water.epa.gov/type/groundwater/uic/primacy.cfm#who> (last visited November 3, 2010).

impacts of hydraulic fracturing of coalbed methane wells on USDWs and its conclusion that “hydraulic fracturing did not present a significant public health risk,” the Agency told members of Congress that “we see no reason at this time to pursue a national hydraulic fracturing regulation to protect USDWs or the public health.” EPA Motion, Ex. 2, 2004 Grumbles Letter at S7279. When asked whether EPA would require states to monitor diesel fuel use as part of the states’ UIC programs, EPA replied that it would not – the “[c]urrent federal UIC regulations do not expressly address or prohibit the use of diesel fuel in fracturing fluids, but the SDWA and UIC regulations allow States to be more stringent than the federal UIC program.” *Id.* at S7278.

EPA also was asked specifically by members of Congress if it planned to establish standards for determining whether state Class II programs for the regulation of hydraulic fracturing were in compliance with the requirements of the SDWA. *Id.* at S7279. EPA explained that it would not do so because “[c]onsidering and developing national regulations for hydraulic fracturing would involve discussions with numerous stakeholders, the states, and the public and it would require an intensive effort to arrive at regulatory language that could be applied nationwide.” *Id.*

Congress largely overturned the *LEAF I* and *LEAF II* decisions with the passage of the Energy Policy Act of 2005, Pub. L. No. 109-58 § 322 (“2005 Act”),

by expressly excluding hydraulic fracturing activities from the definition of “underground injection” and therefore regulation under the SDWA. 42 U.S.C. § 300h(d)(1)(B)(ii). The 2005 Act’s exclusion did not extend to hydraulic fracturing operations involving diesel fuels, thereby providing EPA with the authority to regulate hydraulic fracturing activities involving diesel fuel under the SDWA. 42 U.S.C. § 300h(d)(1)(B)(ii). However, Congress did not expressly require the regulation of diesel-related activities or otherwise dictate how EPA must address such operations. As late as 2008, EPA had done nothing with regard to nationwide regulation of hydraulic fracturing operations utilizing diesel fuels and continued to stand by its 2004 study finding that hydraulic fracturing poses little or no threat to USDWs. EPA Motion, Ex. 3, 2008 Grumbles Letter at pp. 3-5. To the best of Petitioners’ knowledge, EPA had taken no other relevant action to regulate hydraulic fracturing operations that utilize diesel fuels up until this year.

Notwithstanding this lengthy history of effective non-acquiescence in the *LEAF I* and *LEAF II* decisions and without any other intervening action by Congress or any court, EPA earlier this year announced via its website that “[a]ny service company that performs hydraulic fracturing using diesel fuel must receive prior authorization from the UIC program. Injection wells receiving diesel fuel as a hydraulic fracturing additive will be considered Class II wells by the UIC program.” EPA Motion, Ex. 1 (emphasis in the original). This was the first

announcement of this position by the Agency; it came 13 years after the *LEAF I* decision, nine years after *LEAF II* and five years after the 2005 Act. The statements appeared without any opportunity for comment by members of the regulated community or even any notice.

In light of the irregular nature of EPA's decision-making process and the significance of its economic consequences, among other things, the Petitioners filed an action seeking review of EPA's decision.

LEGAL BACKGROUND

The U.S. Supreme Court has established a two-part test to determine when an agency action is reviewable as "final." First, the action under review "must mark the 'consummation' of the agency's decision making process – it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 431, 437 (1948)). Second, the action must "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

ARGUMENT

EPA's statements on its website have serious legal and economic consequences and constitute reviewable final agency action. Significantly, EPA

does not dispute that its website statements satisfy the first prong of the *Bennett* analysis – *i.e.*, the statements represent the “consummation” of the Agency’s decision-making process. EPA Motion at 6-7. For the purposes of this action, EPA’s position is set. EPA does, however, challenge whether its website statements satisfy the second prong of the *Bennett* analysis.

Specifically, EPA argues in its Motion that the statements on its website that the use of diesel fuel in hydraulic fracturing operations must be regulated as Class II UIC wells under the SDWA are simply a restatement of the existing law and therefore do not satisfy *Bennett’s* second prong, which requires action from which legal consequences will flow. EPA Motion at 6. EPA does not argue that its position is not binding, and with good reason. The statements on its website are in no way tentative or equivocal and otherwise bear the hallmarks of finality. *Cf. Croplife America v. United States Env’tl. Prot. Agency*, 329 F.3d 876, 883 (D.C. Cir. 2003) (an EPA press release stating that the Agency would not give credence to certain kinds of studies was a final agency position subject to judicial review). Nor does EPA attempt to argue, as it has in other cases, that its website statement is mere “guidance” without legal consequences. *See Appalachian Power Co. v. United States Env’tl. Prot. Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (an EPA guidance document had “legal consequences” because the agency “has given the States their ‘marching orders’ ”). Instead, EPA argues that no legal consequences

flow from the Agency's statements because they simply reflect the existing law pertaining to hydraulic fracturing operations utilizing diesel fuels. *Id.* at 7.

There are two potential sources of this "existing law" cited by EPA. The first is the 2005 Act. However, that statute gave EPA the authority to regulate hydraulic fracturing operations involving diesel fuel but did not require the Agency to take any particular action and certainly said nothing about regulating wells being hydraulically fractured as Class II wells.⁴

The other potential source of "existing law" cited in EPA's Motion – but nowhere on its webpage – is the *LEAF* decisions from the Eleventh Circuit. However, the case law is clear that EPA was not legally obligated to give the Eleventh Circuit's *LEAF* decisions nationwide application nearly a decade after *LEAF II* was published, and EPA had never acted as if it had any such obligation. EPA's statements on its website represent an act of discretion and not a recitation of law already in effect throughout the country. Furthermore, EPA's statements cannot plausibly be characterized as simply reflecting the state of existing law because they are a dramatic departure from the approach that EPA had adopted for more than ten years.

⁴ In practice, when EPA has asserted UIC permitting authority over new activities, it has done so through rulemaking establishing appropriate permit requirements. *See, e.g.*, 45 Fed. Reg. 42,500.

Moreover, EPA's action will have serious consequences not only for the regulated community but for states as well. Operators of oil and gas wells – who already obtain permits from state regulatory authorities for their production wells – will now have to obtain separate UIC permits for those wells if their hydraulic fracturing activities will involve the use of diesel fuel. The U.S. Department of Energy has determined that the costs associated with these permitting requirements could be quite significant.⁵ In addition, states that have obtained approval from EPA to administer the UIC program for Class II wells will have to modify their programs and demonstrate to the Agency that their programs meet any requirements related to hydraulic fracturing in order to maintain the authority to administer the Class II program. In the meantime, because EPA has imposed these requirements without any notice or opportunity for input by affected parties, its website statements have created considerable confusion about the scope and impact of these new requirements. As a result, EPA's statements have significant legal and practical consequences and the second prong of *Bennett* is easily satisfied.

⁵ Advance Resources International, *Potential Economic and Energy Supply Impacts of Proposals to Modify Federal Environmental Laws Applicable to the U.S. Oil and Gas Exploration and Production Industry*, p. 26 (Jan. 2009) (prepared for the U.S. Department of Energy Office of Fossil Energy), available at http://fossil.energy.gov/programs/oilgas/publications/environment_otherpubs/Impacts_of_Modify_Fed_Environmental_Law.html (last visited November 3, 2010) (costs of UIC permitting could be more than \$100,000 per well).

I. EPA'S DECISION TO ADOPT THE ELEVENTH CIRCUIT'S *LEAF II* RULING AND APPLY IT NATIONALLY IS FINAL AGENCY ACTION

Contrary to EPA's assertions, the Agency's determination to apply the *LEAF II* ruling nationally is not simply a reflection of existing legal obligations or an inevitable result of the Eleventh Circuit's decision; rather, the statements on EPA's website represent an exercise of the Agency's discretion that will have legal consequences throughout the country for both states and the regulated community and therefore constitute final agency action. This Court should reject EPA's argument as it and the Seventh Circuit have done under analogous circumstances in prior decisions.

This Court has held that an agency's decision to implement a ruling from another circuit court nationally is subject to judicial review. *See Holland v. National Mining Ass'n*, 309 F.3d 808, 810 (D.C. Cir. 2002). In that case, the Commissioner of the Social Security Administration had his interpretation of part of the Coal Act, 26 U.S.C. § 9701 *et seq.*, rejected by the Eleventh Circuit. *Id.* at 812. Shortly thereafter, the Commissioner sought to apply the Eleventh Circuit's interpretation of the Coal Act nationally without the benefits of a rulemaking, and parties brought suit alleging that the Commissioner was violating the APA. *Id.* The *Holland* court noted that the Eleventh Circuit ruling technically extended only to the parties to the litigation. *Id.* at 815. Because the Supreme Court has rejected

the application of non-mutual collateral estoppel against the government, this Court reasoned that the Commissioner was not bound by the Eleventh Circuit's ruling and review by this Court for compliance with the APA was proper. *Id.*

Similarly, EPA cannot argue that its decision to implement nationally the *LEAF II* decision was merely a statement of existing law because *LEAF II* was plainly limited to Alabama's UIC program and had never been applied by EPA elsewhere until the Agency issued its statements on its website in 2010. EPA's decision to require oil and gas well operators to obtain Class II UIC permits for hydraulic fracturing activities involving the use of diesel fuel – and to require states with delegated Class II UIC programs to process such permit applications – was not compelled by *LEAF II* but instead was agency action subject to review under the APA.

In reaching its decision, the *Holland* court relied in part upon the Seventh Circuit's rejection of an analogous argument on the grounds that an agency's national application of a circuit court ruling is final agency action. *See* 309 F.3d at 818 (citing *Atchison, Topeka and Santa Fe Railway Company, et al., v. Pena*, 44 F.3d 437 (7th Cir. 1994) ("*Atchison*"). In *Atchison*, the Federal Railroad Administration's long-standing interpretation of a statute was rejected by the Ninth Circuit, and the agency opted to apply the Ninth Circuit's holding nationally so the rule would be uniform throughout the country. *Id.* at 440. The Seventh Circuit

observed that “the only possible issue with respect to our jurisdiction is whether the FRA’s conduct constitutes a final agency action within the meaning of the statute.” *Id.* at 441. The court reasoned that “the agency completed its decisionmaking process (or at least the Ninth Circuit completed the FRA’s decisionmaking for it) and the result directly affected the railroads. The FRA’s communication of its change in interpretation of [the statute] constitutes final agency action within the context of 28 U.S.C. § 2342(7).” *Id.*⁶ Thus, EPA’s argument that its adoption of the *LEAF II* ruling represents the application of existing law and is not reviewable final agency action is simply incorrect – an agency’s decision to implement a ruling from another circuit court nationwide is reviewable final agency action.

II. EPA’S DECISION TO START REGULATING HYDRAULIC FRACTURING OPERATIONS THAT UTILIZE DIESEL IS NOT A STATEMENT OF ESTABLISHED LAW

EPA’s decision to regulate wells being hydraulically fractured as Class II UIC wells is reviewable final agency action because EPA’s website statements are an abrupt change of position and not a statement of established law. EPA cannot convincingly argue now that its decision announced on its website in 2010 may escape judicial review because it is consistent with any “existing legal obligations

⁶ The *Atchison* court had already concluded that “final agency action” under 28 U.S.C. § 2342(7) has the same meaning as it does under 5 U.S.C. § 704. *See* 44 F.3d at 441.

under the statute,” EPA Motion at 7, when the Agency has taken the opposite position from the time of the *LEAF I* decision in 1997 up until as recently as this year.

As explained above, EPA’s position was that hydraulic fracturing operations throughout the country were not covered by the SDWA until the *LEAF I* court ruled otherwise in 1997. Even then, EPA took action only with respect to Alabama’s UIC program, effectively non-acquiescing in the decision and limiting its impact to the Eleventh Circuit. Indeed, as of the time of this filing, EPA has not instituted proceedings to withdraw approval for any state UIC programs other than Alabama’s. Moreover, the Agency continued to stress the problems inherent in categorizing wells being hydraulically fractured Class II wells even after the *LEAF II* court ruled in 2001 that such wells in Alabama were to be considered Class II wells. *See* 69 Fed. Reg. at 42,343. Therefore, EPA cannot plausibly argue it believes that *LEAF I* and *LEAF II* simply represent “existing statutory obligations” because EPA has never acted as if this was the case until recently.

EPA also suggests that the 2005 Act establishes that hydraulic fracturing operations utilizing diesel fuel require Class II permits. EPA Motion at 9. EPA ignores both the language of the 2005 Act and EPA’s own interpretation of its regulations at the time. The 2005 Act does not require that hydraulic fracturing operations be regulated and certainly provides no hint that they must be regulated

specifically under the Class II UIC well program (as opposed to the Class V program or an entirely new program). The 2005 Act simply provides that hydraulic fracturing operations involving the use of diesel are not excluded from regulation. *See* 42 U.S.C. § 300h(d)(1)(B)(ii).

Indeed, EPA's position in 2004 before this legislation was enacted was that the "[c]urrent federal UIC regulations do not expressly address or prohibit the use of diesel fuel in fracturing fluids, but the SDWA and UIC regulations allow States to be more stringent than the federal UIC program." EPA Motion, Ex. 2, 2004 Grumbles Letter at S7278. In that same letter, EPA stated that it would require an "intensive effort to arrive at regulatory language that could be applied nationwide." *Id.* Thus, EPA's established position around the time Congress enacted the 2005 Act was that EPA's regulations did not apply to hydraulic fracturing operations of any sort and that it would take a significant investment of resources to craft regulations that would appropriately apply to hydraulic fracturing operations given the "unique technical and temporal attributes" of these operations.

Congress clearly left the door open in the 2005 Act for EPA to regulate hydraulic fracturing operations involving the use of diesel in the future. However, Congress did not establish that such operations must be regulated or how they should be regulated and EPA cannot use the 2005 Act as a post hoc rationalization for its recent website statements.

In this respect, the current case is far different from *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), in which the Agency letter under review “neither announced a new interpretation of the regulations nor effected a change in the regulations themselves. *Id.* at 427. Indeed, this Court noted that the Agency letter being challenged in that case represented a restatement “for the umpteenth time” of EPA’s longstanding interpretation. In stark contrast, the Agency in this case has not pointed to a single articulation of its position prior to this year, and Petitioners are not aware of any such statements. In fact, EPA’s current position as articulated on its website in 2010 is a new interpretation and an abrupt reversal of EPA’s position years after *LEAF I* and *LEAF II* were published in 1997 and 2001, respectively, and the Energy Policy Act was enacted in 2005.

Although Petitioners believe that EPA’s Motion should be denied based upon the foregoing alone, this Court’s decision in *Reckitt Benckiser Inc. v. United States Envtl. Prot. Agency*, 613 F.3d 1131 (D.C. Cir. 2010) (“*Reckitt*”), is noteworthy because EPA argued to this Court that its interpretation of its authority was not final agency action, and this Court rejected that argument for largely the same reasons advanced by Petitioners here. As in *Reckitt*, EPA’s website statements here are unambiguous and definitive and give no indication that they are subject to further Agency consideration or possible modification. *Id.* at 1138. Likewise, EPA cannot point to a single instance outside the Eleventh Circuit in

which it had previously enforced these UIC Class II permitting requirements prior to posting the statements on its website. *See id.* at 1140. The website statements give every indication of being “an authoritative interpretation of [EPA’s] authority that has practical and significant legal effects.” *Id.* at 1138. Consequently, this Court should reject EPA’s attempt to escape judicial review just as it did in *Reckitt*.

CONCLUSION

An agency cannot evade judicial review by characterizing its action as reflecting existing law when that law comes in the form of decade-old decisions of limited application that the Agency has long avoided applying nationally and statutes that do not require any action by the Agency. EPA’s decision to change its position and require nationwide that operators of oil and gas wells undertaking hydraulic fracturing operations utilizing diesel fuel obtain a Class II UIC permit is definitive final agency action, and this Court has jurisdiction to review that decision. As a result, EPA’s Motion to Dismiss should be denied.

Dated: November 8, 2010

Respectfully submitted,

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PROTECTION AGENCY,)

Respondent.)

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that on this 8th day of November, 2010, I filed a copy of the Independent Petroleum Association of America's, and the US Oil & Gas Association's Opposition to the United States' Motion to Dismiss and thereby caused it to be served electronically to:

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/s/
Thomas C. Jackson