

Slow EPA Approvals Impair State Carbon Storage Plans

By **Anna Wildeman and Dave Ross** (October 6, 2022)

The Biden administration has enormous climate and carbon management goals — which rightfully include the geologic sequestration of carbon dioxide as a core part of its climate adaptation strategy.

The administration, to its credit, has worked with Congress to provide tax credits and billions of dollars of new funding for programs targeting the transportation and sequestration of carbon. But without equal commitment to the regulatory side of the issue, the administration's ambitious goals are at risk.

The U.S. Environmental Protection Agency has direct regulatory authority over carbon sequestration projects, through its administration and oversight of the Underground Injection Control program. The UIC program was created by Congress through the Safe Drinking Water Act, or SDWA, to prevent injection wells from contaminating underground drinking water sources.

The EPA has established, by federal rule, the minimum requirements for six classes of UIC wells that the agency administers, unless states, tribes or territories obtain primary enforcement authority, known as primacy. The agency's website helpfully explains that the UIC program requirements "are designed to be adopted by states, territories, and tribes."

The EPA established the Class VI program for carbon dioxide geologic sequestration wells in 2010. At that time, the agency was anticipating that several states would seek primacy for the new Class VI program right away, and delayed the effective date of the new federal regulation to provide states time to apply and obtain authorization before the EPA became the permitting authority for the new program.

The agency delayed the effective date by 270 days to provide states "a reasonable amount of time to develop and submit their application to EPA for approval."^[1] In the final rule, the EPA committed to help states obtain primacy within that 270-day window by developing implementation materials, providing training, assisting states with developing regulations that meet the federal minimum requirements, and using "an expedited process for approving primacy."^[2]

Under the 2010 rule, states were authorized to seek primacy for only the Class VI well program, which marked a shift in the EPA's approach for the UIC program. As the rule preamble explains:

EPA believes that this shift in its longstanding policy of discouraging "partial" or "independent" primacy is warranted to encourage States to seek primacy for Class VI wells and allow States to address the unique challenges that would otherwise be barriers to comprehensive and seamless management of [geologic sequestration] projects.^[3]

The agency noted that "[a]llowing States to apply only for Class VI primacy will also shorten



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the primacy approval process."^[4]

On June 21, 2013, North Dakota became the first state to seek Class VI primacy. It took less than three months for the EPA to determine that the state's package was complete, but it then took nearly four years for the agency to publish a proposal in the Federal Register to approve North Dakota's primacy. It was another 11 months before the EPA published a final rule approving North Dakota's Class VI UIC primacy.

All in, this EPA review and approval process took nearly 1,800 days — more than six and a half times as long as the EPA stated would be reasonable for a state to develop a Class VI primacy application and obtain EPA approval. This incredible delay occurred despite the agency's recognition that carbon capture would be critical to the success of its climate priorities.

Less than two years later, Wyoming submitted its Class VI primacy package for EPA approval. Again, it took the agency less than three months to determine that the state's package was complete — but that was where the processes diverged.

It took the EPA only six months after proposal to publish a final rule approving Wyoming's Class VI UIC primacy. This approval process took about 250 days, which is in line with the agency's original 270-day estimate for how long it thought the process should take for states to apply for and obtain Class VI primacy.

A third state, Louisiana, is now in the process of seeking Class VI primacy. It has already been approximately 500 days since Louisiana submitted its application to the EPA, and the agency has yet to publish a completeness determination or a proposal for decision.

At this rate, the Louisiana process is looking much more like North Dakota's than Wyoming's. Several other states preparing their primacy applications are surely taking note.^[5]

The SDWA and the EPA's federal UIC program regulations provide the agency with mandatory timelines to act on state primacy applications. Specifically, Title 40 of the Code of Federal Regulations, Section 145.22, provides that: "Within 30 days of receipt by EPA of a state program submission, EPA will notify the state whether its submission is complete."

Additionally, "[a]fter determining that a State's submission for UIC program approval is complete the administrator shall issue public notice of the submission in the Federal Register."^[6] The EPA's determination of completeness then triggers the SDWA statutory timeline for the agency to conduct a formal review of the primacy application.

Accordingly, the EPA's regulations provide: "Within 90 days of the receipt of a complete submission ... the Administrator shall by rule either fully approve, disapprove, or approve in part the State's UIC program taking into account any comments submitted."^[7] These timelines for agency action are reiterated in Appendix A of the EPA's UIC Program Class VI Primacy Manual for State Directors.

The "completeness determination" process is the Achilles' heel in federal and state permitting programs. Despite careful thought and planning in the legislative and rulemaking process to encourage — and indeed, mandate — efficient government decision making, when to start the clock is an age-old problem, and is frequently used to buy time in an otherwise abbreviated permitting time frame.

Asking for additional information or clarifying questions, while reasonable in certain circumstances, leads to significant delays and permitting or regulatory decision-making backlogs. The Louisiana Class VI program application process — like North Dakota's a decade ago — seems caught in this decision-making quagmire, and raises questions for other states to consider as they plan their appropriations, staffing and other key program implementation strategies that necessarily depend on a predictable federal decision-making process.

The EPA would be wise to consider process improvements that help accelerate its state program delegation process, as its limited program staff faces growing demand on their time and resources. With the exception of projects in North Dakota and Wyoming, every carbon sequestration project must obtain UIC approval from the agency.

To date, it has issued only two Class VI UIC approvals, both for projects in Illinois. There are currently 28 Class VI applications pending before the agency, 15 of which are for projects in Louisiana.

The number of Class VI applications pending before the EPA has doubled since May of this year — and with significant federal incentives, and the Biden administration's climate goals, the number of applications is certain to increase in the very near future.

The sooner the EPA approves Louisiana's primacy — and shifts to assisting Texas, West Virginia and Arizona with obtaining primacy in a timely manner — the sooner it will realize the climate adaptation and carbon capture potential of the Class VI program.

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[1] 75 Fed. Reg. 77230, 77242 (Dec. 10, 2010).

[2] Id.

[3] Id.

[4] Id.

[5] Texas, West Virginia and Arizona are working toward submitting Class VI primacy packages, but they are still in the pre-application process.

[6] 40 C.F.R. § 145.31(b).

[7] Id. § 145.31(e).