Articles + Publications | February 27, 2024

Locke Lord QuickStudy: CCS in Focus: Texas on Deck for Class ?VI Well Permitting Primacy

Locke Lord LLP

WRITTEN BY

M. Benjamin Cowan | John K. Arnold | Rachael Beavers

RELATED OFFICES

Houston

As interest and investment in carbon capture and sequestration (CCS) projects grows, spurred by the availability of tax credits and investor interest in the energy transition, the Environmental Protection Agency's (EPA's) permitting process has attracted significant scrutiny for its role as a bottleneck in the development process. With EPA recently approving Louisiana's application to take over permitting within the state, the eyes of Texas are upon the EPA and the Railroad Commission of Texas (RRC) in hopes that Texas will soon become the next state to obtain primacy. This QuickStudy will review the Louisiana approval process and assess what it may mean for Texas's pending primacy application.

Primacy Primer

EPA regulates all types of underground injection wells pursuant to its authority under the Safe Drinking Water Act's (SDWA) Underground Injection Control (UIC) program. Wells needed for CCS projects, designed specifically for the injection of carbon dioxide into deep rock formations for permanent geological sequestration, are designated as Class VI wells.[1] These wells can qualify for tax credits available under Section 45Q of the Internal Revenue Code for the sequestration or utilization of qualified carbon oxides – carbon dioxide or other carbon oxides captured from an industrial source or by direct air capture. Secure geologic storage of qualified carbon oxides generates a higher tax credit value than utilization in enhanced oil recovery operations or other beneficial uses.

Under Section 1422 of the SDWA, states may apply to EPA for primary program enforcement ("primacy") for specific well classes. The application must include a description of the state's proposed UIC program and demonstrate that the state's standards would meet or exceed the EPA's requirements for that well class. Until recently, only two states, North Dakota and Wyoming, had obtained primacy for Class VI permitting.

The primary benefit of obtaining primacy is a reduction in the time required to obtain a Class VI well permit in the state. As of October 2022, the EPA anticipated its review process to last approximately two years.[2] However, earlier Class VI permits took nearly six years to reach approval, and EPA's Class VI permit queue currently contains permits submitted in early 2021,[3] so two years is clearly a best-case scenario. By contrast, Class VI permit application approval in North Dakota has ranged in time from five to sixteen months,[4] and Wyoming issued its first three Class VI permits after ten months of review.[5]

Louisiana Becomes Third State to Obtain Primacy

Louisiana submitted an initial application on September 17, 2021 to add Class VI wells to the state's existing UIC program.[6] It revised its application on April 23, 2023 to incorporate measures to address environmental justice (EJ) concerns, including examining risks to minority and low-income populations, requiring applicants to evaluate projects using the EPA's EJ Screen, and implementing enhanced comment periods when EJ concerns and other risks are identified. The EPA proposed to approve Louisiana's application and opened the proposal for public comment on April 28, 2023. EPA issued its final rule granting Louisiana's request for primacy on December 28, 2023.

As a result of Louisiana's approval, applicants for Class VI well permits in Louisiana are no longer required to apply to EPA, but instead may apply to the Louisiana Department of Natural Resources (LDNR), which will now issue permits for and regulate these wells. Louisiana's approved Class VI program requires applicants to examine alternatives to proposed project locations and to propose mitigation measures to minimize adverse environmental effects.[7] It exceeds the federal standards in certain respects.[8] Specifically, under Louisiana law, the LDNR will not grant waivers to injection depth requirements, allow sequestration of carbon dioxide in salt caverns, or issue "area permits," or permits authorizing multiple wells within an area of review. Every well must be reviewed and permitted individually. Further, Louisiana imposes monitoring systems and operating requirements beyond the federal requirements for Class VI wells.

Implications for Texas's Primacy Application

RRC officials, who have worked closely with EPA's Region VI administrators, believe the approval of Louisiana's application may mean an accelerated timeline for Texas's application, with some expressing that it could happen "soon." The RRC submitted its primacy application on December 19, 2022, and submitted final rule amendments to the EPA for review in August 2023.[9] Additional changes to the RRC's regulations were enacted effective September 11, 2023, to further align the RRC's program with the EPA's Class VI regulations.

EPA approved Louisiana's application for primacy more than two years after its submittal. In theory, Texas's application should take less time, as the RRC has coordinated with North Dakota, Wyoming, and Louisiana to pattern Texas's application after those states' primacy applications. But the timing of EPA's review can be difficult to predict.

Additionally, Texas's application is likely to require further revision to address EJ concerns like those incorporated into the Louisiana approval. In December 2022, EPA Administrator Michael Regan authored a letter to state governors regarding EJ in Class VI primacy applications ("Letter to Governors"),[10] laying out EJ approaches that the EPA "will be looking for" in Class VI primacy applications. The Letter to Governors advised, "it is important for environmental justice and equity considerations to be fully integrated into the UIC Class VI program, including in permitting."

Neither the Letter to Governors, nor EPA's subsequent August 2023 Environmental Justice Guidance for UIC Class VI Permitting and Primacy ("EJ Guidance")[11] reiterating and expanding on the principles detailed in the Letter to Governors, constitute formal rulemaking by EPA; as such, these documents do not impose legally binding requirements on states seeking primacy. However, Louisiana's Program Description and Memorandum of

Agreement were revised to incorporate principles listed in the Letter to Governors. In EPA's proposal to approve Louisiana's application, EPA stated that it compared Louisiana's EJ approach to the elements described in the Letter to Governors.[12]

Texas's rules already include limited EJ considerations, but additional revisions to the primacy application or the rules may be required by the EPA. For example, the RRC's rules require "enhanced public outreach activities"[13] if the application's area of review contains an EJ or Limited English Speaking Household community according to the "the most recent U.S. Census Bureau American Community Survey data." While this requirement may address certain public involvement measures detailed in the in the EJ Guidance, Texas's rules are silent regarding other considerations found in the Guidance, such as using EJScreen assessments and implementing mitigation measures. Commenters on the RRC's most recent CCS rulemaking recommended revision of the rules to incorporate EJ language consistent with Louisiana's Class VI Program Description and its Memorandum of Agreement with the EPA. The RRC did not adopt these suggestions, stating that the comments will be considered in the development of the RRC's Memorandum of Agreement with EPA. Thus, it is reasonable to expect that further EJ considerations may be incorporated into Texas's primacy application, which, when incorporated to EPA's satisfaction, could produce a more rapid approval for Texas's application, possibly even in 2024.

Conclusion

Primacy over Class VI wells in Louisiana will expedite the growth of the carbon capture and sequestration industry in the state by alleviating bottlenecks in well application approvals. The timing of Texas's application becomes all the more important as companies looking to take advantage of the 45Q tax credit begin selecting project sites. While the lessons learned from Louisiana's application should facilitate a smoother application for Texas, the timing of Texas's primacy application appears to be dependent on how quickly Texas can resolve any lingering concerns from the EPA, most particularly any concerns related to the ability to address the EPA's EJ concerns in its rules or its Memorandum of Agreement.

For further information regarding the Louisiana Class VI well program or Texas's primacy application please contact the authors. Locke Lord's extensive Texas energy regulatory and commercial practice includes significant experience with the Underground Injection Control staff of the RRC, as well as with the regulation and oversight of carbon dioxide pipelines.

—

[1] Louisiana Summary of Action; 89 Fed. Reg. 703 (Jan. 5, 2024).

[2] EPA, Class VI Permitting Report to Congress at 13 (Oct. 28, 2022)

[3] Current Class VI Projects under Review at EPA

[4] Class VI – Geologic Sequestration Wells

[5] Wyoming grants its first three Class VI permits

[6] Primary Enforcement Authority Underground Injection Control Program – Louisiana

[7] 89 Fed. Reg. 703, 705-06 (Jan. 5, 2024).

[8] EPA Grants Louisiana Office of Conservation State Authority Over CO2 Injection and Sequestration

[9] Geologic Storage of Carbon Dioxide (CO2)

[10] Underground Injection Control Class VI Wells Memorandum

[11] EPA, Environmental Justice Guidance for UIC Class VI Permitting and Primacy (Aug. 17, 2023),

[12] 89 Fed. Reg. 703 (Jan. 5, 2024).

[13] 16 Tex. Admin. Code § 5.204(a)(6).

RELATED INDUSTRIES + PRACTICES

- Energy