

Locke Lord QuickStudy: Seeking Primacy – the Railroad Commission of Texas Seeks Primary Authority Over the Class VI Carbon Sequestration Program

Locke Lord LLP

WRITTEN BY

[John K. Arnold](#) | [Rachael Beavers](#)

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The Railroad Commission of Texas (“RRC” or “Commission”) recently took a critical first step in the process of applying for permitting and enforcement authority, known as “primacy,” over the Safe Drinking Water Act’s Class VI Underground Injection Control Well (“Class VI”) program. Obtaining primacy would make the Commission the primary authority for anthropological carbon sequestration wells in Texas. The Class VI program is currently administered by the U.S. Environmental Protection Agency (“EPA”) in every state except North Dakota and Wyoming, which have successfully applied for and obtained primacy.

If the Commission’s primacy application is approved, Texas projects seeking credits or incentives for permanent anthropological carbon sequestration, such as the federal 45Q Tax Credit, will be required to submit only one application for authorization to the RRC. The primacy application implements House Bill 1284, in which the Texas legislature designated the RRC as the primary Texas agency with jurisdiction over permanent carbon dioxide sequestration wells. Before the passage of H.B. 1284, the Texas Commission on Environmental Quality and the RRC shared such jurisdiction.

The Primacy Process

The four phases of the primacy process are: (1) pre-application; (2) completeness review and determination; (3) application evaluation; and (4) final rulemaking and codification.

The pre-application phase began in May 2022 when the RRC proposed revisions to its Chapter 5 rules governing CO₂ rules to meet the minimum standards set by the EPA’s Class VI rules. The Commission also began to prepare its application to the EPA, which consists of the revised rules, the Texas statutes granting the RRC jurisdiction, a regulatory “crosswalk” identifying the provisions of the RRC’s rules that fulfill the federal requirements set by the EPA, the program description, a memorandum of understanding between the EPA and the RRC, and the public participation documentation. The RRC has been coordinating closely with EPA during this process, with the EPA reviewing proposed application materials during the pre-application phase. Before submitting a formal application, the RRC will submit a summary of how the revised rules meet the federal

requirements of the Class VI program to the Texas Attorney General's Office ("AG"). Once the revisions are certified by the AG, the RRC will request a letter from the Governor that asks the EPA to grant primacy.

Thereafter, the RRC will submit its formal application along with the certification from the AG's office and the letter from the Governor. The application then enters the "completeness review and determination" phase, during which the EPA will determine whether the application is administratively complete. The EPA may require further revisions before it conducts a full evaluation of the application.

During the application evaluation phase, the EPA will publish a proposed rule in the Federal Register indicating the EPA's intent to approve or disapprove Texas's application. The proposed rule will be subject to a public comment period during which the public may request a public hearing. The EPA will review public comments and, if necessary, review the application and request further changes to the application.

The final phase is the EPA's rulemaking and codification of its final rule that will either approve or disapprove the Commission's primacy application in the Federal Register.

Timing

The timing of the primacy approval process is difficult to predict. Only North Dakota and Wyoming have completed the process. North Dakota's primacy application took five years to obtain approval, while Wyoming's formal application process took only one year (though it was preceded by many years of dialogue). Louisiana initiated the process in May 2021, but no final decision has been reached. The RRC has communicated with the implementing agencies in North Dakota, Wyoming, and Louisiana to determine how best to proceed with its own application. We anticipate that the "lessons learned," along with the current administration's commitment to climate change technologies, might lead to a smoother primacy application process for the RRC.

What Now?

Until the RRC obtains primacy over the Class VI permitting process, projects that intend to permanently sequester carbon in Texas for incentives such as 45Q tax credits must seek authorization under both the RRC's Chapter 5 rules and under the EPA's Class VI program. In anticipation of primacy, the RRC has coordinated with the EPA to share data from the EPA's electronic permitting tool, the Geological Sequestration Data Tool ("GSDT"), to ensure that the application review for both agencies is performed in parallel. This coordination streamlines the process for applicants and will facilitate the transfer to RRC primacy. As such, carbon sequestration project developers should not delay the often-lengthy process of permitting in anticipation of the primacy approval, as the process and required data will not change significantly upon approval.

Locke Lord's Energy Transition team will continue to rely on its extensive permitting experience and ?close working relationship with the Railroad Commission staff to ensure it has the most accurate and ?up-to-date information on the primacy process.? If you have any questions, please reach out to John Arnold or Rachael Beavers.

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