Articles + Publications | June 24, 2025

Well, Well: Outlook for CCUS Projects in Texas Improves as EPA Proposes to Delegate Permitting Authority and the Texas Supreme Court Clarifies Pore Space Ownership

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On June 17, the Environmental Protection Agency (EPA) published a proposed rule to approve Texas's application for primary permitting and enforcement responsibility (primacy) for carbon dioxide (CO_2) sequestration wells pursuant to the Safe Drinking Water Act's (SDWA) Class VI Underground Injection Control (UIC) Program. Upon approval of the rule, the Railroad Commission of Texas (RRC) will have permitting and enforcement authority for the Class VI UIC program (with oversight from the EPA). This development is the culmination of lengthy negotiations between the state of Texas and the EPA, which we have previously discussed in more detail.

It is widely expected that EPA's delegation of the Class VI UIC program to the RRC will increase the speed and efficiency of permit issuance for carbon capture, utilization, and storage (CCUS) projects within the state. To date, CCUS projects have been bottlenecked by the slow pace of approvals at the EPA, with 62 projects currently under review and only 11 final permits having been issued. Permit applications in other states that have obtained primacy, such as North Dakota and Wyoming, have moved significantly faster than those subject to processing by EPA, and we expect the same result in Texas.

While primacy for the Class VI program has been anticipated for several years, another obstacle to CCUS projects in Texas has also been recently removed. On May 16, the Supreme Court of Texas issued a decision in *Myers-Woodward, LLC v. Underground Services Markham, LLC*,[1] holding that pore space below the surface belongs to the surface estate owner rather than the mineral estate owner. This decision provided much-needed clarity on a key legal issue relating to the underground storage of CO_2: who owns the interstitial space in which injected gas is actually stored? Prior to *Myers-Woodward*, pore space ownership had been decided largely in favor of surface owners, but a 1991 case, *Mapco, Inc. v. Carter*[2] raised questions as to whether the mineral interest owner had a right to the empty space left behind after mining salt. *Myers-Woodward* explicitly overrules *Mapco* on that point, stating that empty, or "pore," space belongs to the owner of the surface. As a result, prospective storers of carbon dioxide (and natural gas, for that matter) need only contract with the surface estate owner to secure rights to the pore spaces necessary to conduct storage operations.

With primacy imminent and pore space ownership clear, the remaining challenge for Texas carbon capture and storage projects is uncertainty surrounding transferability of the 45Q tax credit under the One Big Beautiful Bill Act (OBBB Act). CCUS projects 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. Currently, those credits may be transferred to unrelated taxpayers, but

the version of the OBBB Act that passed the House of Representatives proposes to remove that transferability[3] for any CCUS equipment which begins construction two or more years after enactment of the OBBB Act. If the OBBB Act passes in its current form, the repeal of transferability will limit the availability of financing for potential CCUS projects. This ticking timer on credit transferability makes Texas's imminent primacy even more important, as developers looking to retain the flexibility of the credit transfer may be racing against the clock to apply for and obtain their Class VI permits from the RRC in time to begin construction before the transferability deadline.

At Troutman Pepper Locke, we have extensive experience working with the Railroad Commission's UIC department, with significant permitting and compliance representation relating to underground natural gas and helium storage facilities. We have also assisted with the preparation and submission of a Class VI permit application, as well as the commercialization of carbon capture and sequestration facilities. Our team is well-equipped to assist clients in navigating the complexities of Class VI well permitting, compliance, tax credit, and commercial issues.

For more information on how these changes may impact your projects or to discuss potential opportunities, please do not hesitate to contact the Troutman Pepper Locke team.

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[1] — S.W.3d —, No. 22-0878, 2025 WL 1415892 (Tex. May 16, 2025).

[2] 808 S.W.2d 262, 274 (Tex. App.—Beaumont), rev'd in part on other grounds, 817 S.W.2d 686 (Tex. 1991).

[3] *See* section 112011 of the OBBB Act.

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