

INSIGHTS

EPA's Proposal to Grant Class VI Primacy to Louisiana – Availability of Application Documents

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On May 4, 2023, the US Environmental Protection Agency (EPA) published its proposal to approve revision of Louisiana's Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) program to add Class VI injection well primary enforcement responsibility (primacy) for Class VI injection wells. 88 *Federal Register* 28,450 (May 4, 2023). The proposed rule would allow the Louisiana Department of Natural Resources (LDNR) to issue UIC permits for geologic carbon sequestration facilities as Class VI wells located in the state, except for Class VI wells proposed to be located on Indian Lands. Primacy for any Class VI wells proposed to be located on Indian Lands would remain with the EPA.

The EPA has provided a 60-day comment period on the proposed rule, with comments due on July 3, 2023. A public hearing will be held on June 15, 2023, at the offices of LDNR in Baton Rouge, Louisiana. The EPA requests that members of the public who have questions or who would like to speak at the public hearing contact Lisa Pham at (214) 665-8326 or pham.lisa@epa.gov.

Now that the proposed rule is published in the *Federal Register*, the final application package and associated documents are available for review at <https://www.regulations.gov/search?filter=EPA-HQ-OW-2023-0073>. Importantly, the application package includes the Memorandum of Agreement (MOA) between the State of Louisiana and EPA Region 6 that describes the responsibilities of LDNR, as the lead agency, and the EPA relating to permitting, permitting compliance and enforcement of Class VI UIC permits. Another important background document is the State of Louisiana Class VI UIC Program 1422 Description (Program Description).

Entities with Class VI applications pending at EPA Region 6 for projects in Louisiana have been anticipating the opportunity to review the final MOA. Unfortunately, it does not provide the anticipated reassurance that the EPA will move quickly on long-pending applications rather than waiting until Louisiana has primacy and turning the permit applications over to the LDNR. The MOA merely states (in Section II.D) that the EPA will transfer to LDNR any pending permits, applications, and any other information relevant to Class VI UIC program operation not already

in the possession of the state Director upon assumption of primacy. Thus, applicants are left to continue hoping EPA Region 6 will move forward with permits prior to transfer of primacy.

The Program Description provides interesting information about LDNR's expectations with regard to Class VI permits, noting (in Section 6) that it anticipates that up to 14 Class VI applications may be submitted during the first two years after it gains Class VI Primacy with nine permit applications likely to be submitted in year 1 and five in year 2. Perhaps more importantly, the Program Description states that LDNR expects to process Class VI permits much more expeditiously. According to the Program Description, once LDNR determines that a Class VI application is "complete" (i.e., it contains all required information), it will normally take nine to twelve months to issue the permit (assuming full cooperation from the applicant and the LDNR staffing levels that have been proposed).

Another document in the rulemaking docket is the December 9, 2022 letter from EPA Administrator Michael Regan to governors setting out the EPA's priorities (including environmental justice) for state applications for Class VI primacy. As expected, the MOA includes comprehensive discussions of the issues set out in the letter. Because Louisiana's primacy application is the first reviewed and approved by the EPA that addresses these priority issues, it is anticipated that Louisiana's application package will be instructive to other states that are working on applications for Class VI primacy.

Finally, the EPA includes in the rulemaking docket a memorandum filed on March 2, 2023, by the Environmental Defense Fund (EDF) and Gupta Wessler PLLC (GW). In the memorandum, they assert that Louisiana's liability release statute for owners or operators of Class VI UIC wells does not comply with the EPA's regulations at 40 CFR Section 145.13(a). According to EDF and GW, the Louisiana statute fails to adequately address an owner's or operator's liability for regulatory noncompliance after well closure and does not provide the state with adequate emergency powers to order remediation by owners or operators. The inclusion of this memorandum in the docket suggests that these issues will likely be the subject of public comment and a possible legal challenge when the EPA issues a final rule to grant Class VI Primacy to Louisiana.