

Implementing Cooperative Federalism in the UIC Program

Bob Van Voorhees
Robert F Van Voorhees PLLC
GWPC UIC Meeting
Tulsa, Oklahoma
February 12, 2018



Current Regulatory Development and Review

- President Trump has signaled a theme of reassessing regulatory approaches at the federal level specifically calling for regulatory reform and improving the way that federal agencies interact with state agencies through cooperative federalism.
- The President has issued a series of executive orders that explain the approach and provide directives and procedures for federal agencies to follow.



Opportunities for Cooperative Federalism Improvements

- GWPC and a number of other organizations responded to these initiatives by identifying specific issues and activities to be addressed.
- This presentation will focus on 2 opportunities
 - UIC program updates to revise 40 CFR Part 147
 - Transferring UIC Class I administration to the Alaska Oil and Gas Conservation Commission

Addressing 40 CFR Part 147 UIC Program Updates

GWPC Comments May 15, 2017:

- EPA should consider removing the requirement on state primacy programs to submit updates to their primacy programs in a comprehensive manner to meet the provisions of 40 CFR Part 147.
- Any modifications to state programs should be managed using a step by step approach, rather than through a full program revision submission.
- This is an unnecessary and huge resource drain for States with delegated programs and could discourage innovation at the state level due to the effort required to go through a comprehensive review.

Case Study:

Texas UIC 1422 Program Update

- As required in the Federal UIC regulations, substantial State UIC program revisions must be approved and codified in the CFR by a rule signed by the EPA Administrator.
- The intended effect of this action is to approve, update and codify the revisions to the authorized Texas UIC Program and to incorporate by reference the relevant portions of the revisions in the Code of Federal Regulations.

69 Fed. Reg. 8565 (Feb. 25, 2004).



Background

- After EPA's initial approval of the UIC program in 1982, TCEQ predecessors revised the program several times.
- The revisions included regulation changes, for which Texas was required by § 145.32 to obtain approval from EPA, and three agency name changes.
- Process initiated in 1996 was completed in 2004.



Update Initiated by a Challenge

- On June 17, 1996, the Environmental Defense Fund (EDF) and the Paper, Allied Industrial, Chemical and Energy Workers Union (PACE) petitioned EPA to withdraw primacy approval.
- All issues were satisfactorily resolved through negotiations with Petitioners.
- The proposed revisions to implement the regulatory changes called for in the agreement were published in the August 8, 1997, edition of the Texas Register and finalized in the Texas Register on November 21, 1997, effective December 1, 1997.
- On August 14, 1998, TCEQ submitted a complete UIC program revision application package.
- Specific details on the Petitioners' issues and their resolution can be found in the Federal Register proposal dated November 8, 2001 (66 FR 56496— 56503).
- Final rule approval was published on February 26, 2004.

How UIC Primacy Works Under the SDWA and 40 CFR Part 145

- To obtain primacy, a State must adopt an underground injection control program which meets the minimum requirements for effective programs to prevent underground injection which endangers drinking water sources.
- If the Administrator approves the State's UIC program, the State shall have primacy until the Administrator determines, by rule, that the State no longer meets the minimum requirements.
- If the Administrator determines that a State no longer meets the minimum requirements, the Administrator shall prescribe a UIC program applicable to such State.
- Such program shall apply in such State to the extent that a program adopted by such State which the Administrator determines meets such requirements is not in effect.



Required Program Updates

- Within 270 days of *any EPA amendment* of its minimum standard regulations, each State shall submit revised regulations that meet the revised or added requirements.
- Within 90 days after the State's application and reasonable opportunity for presentation of views, the Administrator shall by rule either approve, disapprove, or approve in part and disapprove in part, the State's UIC program.
- If the Administrator approves the State program, the State has primacy until the Administrator determines, by rule, that the State no longer meets the minimum requirements.



Applicable State UIC Program

- The “applicable underground injection control program” for any State is the program (or most recent amendment thereof)
 1. which has been adopted by the State and approved by the Administrator, or
 2. which has been prescribed by the Administrator.

SDWA §1422, 42 USC §300h-1(d).



State UIC Program Revision

- Either EPA or the approved State may initiate program revision.
- The state shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. 40 CFR 145.32(a)



Revision of a State program

- The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, *or such other documents as EPA determines to be necessary* under the circumstances.
- Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment
- The Administrator shall approve or disapprove program revisions based on SDWA and Part 145 requirements.
- A program revision shall become effective upon the approval of the Administrator.

40 CFR 145.32(b)



Alternative Update Approach

- For UIC program updates, EPA has historically required that each element of the original primacy application be included.
- Neither the SDWA nor Part 145 mandate this approach.
- Both allow narrow focus on what has changed
- EPA should focus on determining whether program revisions still meet “minimum requirements for effective programs to prevent underground injection which endangers drinking water sources”
- Revisions that do should not be treated as substantial
- EPA should use direct final rule procedures, publishing a direct final rule and a proposed rule simultaneously



Partial Primacy for Alaska

- The Alaska Oil and Gas Conservation Commission (AOGCC) has indicated a desire to administer the Class I well program in Alaska
- AOGCC has primacy for the Class II program
- The only Class I wells in Alaska are associated with oil field operations
- AOGCC already regulates the Alaska Class I wells
- Yet EPA has indicated that AOGCC must take primacy for all Class I, III, IV and V programs to administer the program for Class I wells in oil fields



Unwritten EPA Primacy Policy

EPA has been willing to approve delegation of the UIC program to the states in only 4 ways:

1. all well classes under Section 1422 of the SDWA (Full Section 1422 Program);
2. only oil and gas injection wells under Section 1425 of the SDWA (Section 1425 Program);
3. all but oil and gas injection wells under Section 1422 of the SDWA;
4. Combination of 2 and 3.



Section 1422 Primacy

According to EPA, under Section 1422, applicants may submit primacy applications for:

- All well classes
- Classes I, III, IV and V
- Class VI

However, this approach is not spelled out in the UIC regulations, and the regulatory language indicates otherwise.



Primacy Approval

- Within 90 days of the receipt of a complete submission . . . or material amendment thereto, the Administrator shall by rule either fully approve, disapprove, **or approve in part** the State's UIC program taking into account any comments submitted. 40 CFR 145.31(e)
- If the Administrator determines not to approve the State program **or to approve it only in part**, the notice shall include a concise statement of the reasons for this determination. 40 CFR 145.31(e)
- EPA retains primary enforcement responsibility whenever the State program is disapproved in whole or in part. States which have partially approved programs have authority to enforce any violation of the approved portion of their program. 40 CFR 145.21(f)



EPA Can Approve Class I Primacy

- Absent statutory or regulatory language that precludes granting AOGCC primacy for Class I wells alone, EPA can approve Class I primacy
- Doing so would eliminate duplication of efforts on Class I wells by AOGCC and EPA Region 10
- Eliminating that duplication and moving the Class I regulation to the state is the very essence of cooperative federalism
- There is even an alternative approach that would be fully consistent even with unwritten EPA policy



California Partial Primacy Example

- The California Division of Oil, Gas, and Geothermal Resources (DOGGR) regulates geothermal wells (a Class V subclass)
- California and DOGGR have primacy only for Class II wells, but DOGGR still regulates these wells
- DOGGR does so under the authority of a MOA between EPA and DOGGR



Partial Primacy Through MOA

- Under the MOA EPA Region 9 has assigned to DOGGR “the responsibility for administering the geothermal energy injection well program until” either
 - procedures for formal program delegation of subclasses of Class V injection wells are developed or
 - when the California receives primacy for all well classes.
- The MOA is limited to the geothermal energy injection wells under the jurisdiction of DOGGR and excludes wells on Federally owned lands or Indian lands.
- DOGGR takes responsibility for issuing permits, compliance activities, and enforcement actions for all other geothermal energy injection wells in California.

Questions - Discussion