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Environmental Groups Challenge Louisiana's Primacy Over Class VI Wells

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The groups are seeking a total reversal of the EPA's decision to grant Louisiana primacy over Class VI wells. On June 12, 2024, three environmental activist groups—the Deep South Center for Environmental Justice, Healthy Gulf, and the Alliance for Affordable Energy—challenged the United States Environmental Protection Agency's (the "EPA") final rule granting Louisiana primary enforcement authority (also known as "primacy") over Class VI injection wells.[1] The groups filed a petition for review in the United States Court of Appeals for the Fifth Circuit, claiming that the EPA's final primacy rule was improper and violated the Safe Drinking Water Act (the "SDWA") and other federal statutes on a number of grounds. The groups are seeking a total reversal of the EPA's decision to grant Louisiana primacy over Class VI wells, and if the challenge is successful, Louisiana may be forced to resubmit portions of its Class VI primacy application, potentially stranding pending Class VI well permit applications that were transferred to the Louisiana Department of Energy and Natural Resources (the "LDENR") for review or shifting those applications back to the EPA to undergo its lengthy review process. **Louisiana's Path to Class VI Primacy** On September 17, 2021, Louisiana submitted an application to the EPA to expand Louisiana's primacy over underground injection wells to include Class VI injection wells under the state's existing Underground Injection Control (the "UIC") program under the SDWA.[2] To gain primacy for a Class VI injection well, a state must demonstrate that it (1) has jurisdiction over underground injection, (2) has implemented UIC laws and regulations that are at least as stringent as the applicable EPA requirements, and (3) has the necessary expertise and administrative, civil, and criminal enforcement mechanisms to enforce its UIC program.[3] After a year-long review process that included the consideration of over 40,000 public comments, the EPA determined that Louisiana's Class VI UIC program met all federal requirements, concluding that Louisiana had demonstrated that it has the requisite jurisdiction, stringent UIC provisions, enforcement procedures, and expertise in place to oversee a UIC program.[4] Consequently, on December 28, 2023, the EPA signed a final rule granting primacy over Class VI wells to Louisiana, which became effective on February 5, 2024.[5] We have previously covered Louisiana's primacy application in greater detail here. **Activist Groups Argue the EPA Violated the Safe Drinking Water Act and the Administrative Procedures Act.** The three activist groups, aided by their counsel at Earthjustice, challenged the EPA's decision to grant Louisiana primacy over Class VI wells by arguing that the EPA's decision violated both the SDWA and the Administrative Procedure Act (the "APA"). Two of these claims are described below:

Louisiana's Waiver of Liability after Site Closure

The activist groups' primary challenge to Louisiana's grant of primacy centers on a liability waiver provision in Louisiana's Class VI regulations governing post-injection site care and closure requirements. These groups argue in their challenge that, even though Louisiana's post-injection site care and closure regulations appear to meet or exceed the analogous regulations issued by the EPA, these regulations are effectively nullified by a liability release that is given to (1) Class VI storage site operators, (2) the emitters that generated the CO2 that was injected at the applicable site, (3) the owners of the CO2 stored at the applicable site, and (4) other parties.[6] Louisiana's liability release states:

Upon the issuance of the certificate of completion of injection operations, the

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> *storage operator, all generators of any injected carbon dioxide, all owners of carbon dioxide stored in the storage facility, and all owners otherwise having any interest in the storage facility shall be released from any and all future duties or obligations under this Chapter and any and all liability associated with or related to that storage facility which arises after the issuance of the certificate of completion of injection operations.*[7]

The activist groups argue that Louisiana's release of site operators and others from "future duties or obligations" and all liabilities related to the Class VI injection site arising after the site closure certificate is issued by the LDENR means that site operators are released from the state's post-injection site care and closure requirements and will have no liability if they do not meet such requirements. In addition, the groups point out that under Louisiana's UIC regulations, upon the state's issuance of a site closure certificate, the ownership of Class VI wells eventually automatically transfers to the state, but the related liabilities do not. This, they claim, may orphan the responsibility and liability associated with post-injection site care and closure requirements.[8] Consequently, the activist groups argue, "Louisiana's liability waiver renders the state's program less stringent [than the EPA's program] on its face" because the EPA's Class VI regulations do not include similar liability waiver provisions.[9] Thus, the groups claim in their challenge that Louisiana's primacy application did not satisfy the necessary requirements and the EPA did not have the authority to grant primacy based on the application. The EPA appears to have already addressed the arguments made by the activist groups. In its final rule granting Louisiana primacy, the EPA stated that "[t]he EPA disagrees that long term liability provisions are always incompatible with the SDWA and the EPA's UIC regulatory requirements".[10] The EPA also pointed out that in its Class VI Rule of 2010 "the EPA did not conclude that states that authorize liability transfer after site closure cannot receive UIC Class VI primacy" and a state may receive primacy if "such state liability transfer provisions [are] appropriately crafted so that the state's Class VI program meets UIC regulatory requirements", concluding that Louisiana's provisions were appropriately crafted and met all federal requirements. [11] North Dakota and Wyoming, the two other states to have been granted Class VI primacy from the EPA, provide for a possible liability transfer to the state after a Class VI well is closed, after 10 years and 20 years, respectively.[12] Additionally, several other states that are in the process of applying for Class VI primacy have adopted similar liability transfer provisions regarding Class VI wells. Of all these states' liability transfer provisions, Louisiana's are the strictest, with a 50-year minimum wait before liability transfer can occur.[13]

Alleged Lack of Expertise at the LDNER

The activist groups further claim that the EPA's decision to grant Class VI primacy to Louisiana was "arbitrary and capricious" and thus in violation of the APA because, the groups allege, Louisiana failed to demonstrate that the LDENR has the proper staff and expertise necessary to implement its UIC Program.[14] The SWDA and the EPA's guidelines for making primacy determinations require applicant states to provide a description of the state agency staff that will carry out the UIC program and to demonstrate the technical expertise required to evaluate Class VI projects. The groups argue that Louisiana "conceded" that the LDENR does not have the requisite expertise because the LDENR plans to utilize third-party contractors to review Class VI well permit applications for factors like site characterization, modeling, risk, and environmental justice analysis.[15] They note that, while the "EPA allows use of contractor support" and states may demonstrate in their primacy applications that "they have in-house staff or access to contractor support" for all requisite areas of expertise,[16] Louisiana's primacy application did not identify specific contractors or provide details regarding LDENR's access to contractors. They further argue that access to contractors could prove to be difficult in the future due to either a limited number of contractors or to conflicts of interest.[17] As a result, the groups conclude that the EPA does not have support for the assertion that the LDENR has access to the required expertise, either through in-house staff or through third party contractors. The activist groups further claim that Louisiana lacks the requisite expertise "in light of the state's past failures regulating less complicated wells" [18],

alleging that performance audits on the state's oil and gas wells from 2014 through 2020 show a failure to monitor and enforce violations.[19] The groups also allege two instances in which a Class II and Class III well, respectively, caused water contamination in the state, even though Louisiana has primacy over Class II and III wells.[20] The groups claim that, given the state's alleged lack of expertise and oversight, the EPA failed to reasonably explain why it granted Louisiana Class VI primacy, making the decision to do so arbitrary and capricious.[21] In its published final rule, the EPA responded to public comments that had expressed similar concerns that Louisiana lacked the requisite staff and expertise to be granted Class VI primacy. The EPA concluded that the LDENR did have the requisite staff and technical expertise to oversee all aspects of its UIC program in accordance with federal standards.[22] The EPA also stated that the previous environmental incidents either were unrelated to UIC program implementation or they did not involve LDENR and thus could not have any bearing on LDENR's expertise.[23] **Other Claims and Future Developments** The activist groups also challenged Louisiana's primacy on other grounds, including that (1) the EPA's adoption of Louisiana's liability waiver violated federal law by releasing Class VI project participants from liability under the Clean Water Act, CERCLA, and RCRA,[24] and (2) the EPA violated the APA by failing to evaluate certain differences between the EPA's regulations and Louisiana's regulations to determine if Louisiana's regulations are less stringent.[25] It is not clear if the challenges raised by the activist groups will be successful. The EPA's responses to public comments appear to show that it was aware of, and not concerned by, these challenges when it issued its final rule granting Louisiana primacy over Class VI wells. While these challenges might delay the development of the carbon capture industry in the United States if successful, the interest in carbon capture projects (and the tax credits that these projects generate) will likely lead to market solutions for any delays that result. Gibson Dunn will continue to monitor this case and other potential challenges to carbon capture projects throughout the United States. [1] Class VI wells are used by the carbon capture and sequestration industry to permanently sequester captured carbon in underground geological formations. [2] https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program-0. [3] 89 Fed. Reg. 703, 704 (Jan. 5, 2024); 40 CFR parts 124, 144, 145, and 146. [4] 89 Fed. Reg. at 706-10. [5] 89 Fed. Reg. at 703. [6] Petitioners' Brief at 11. [7] La. Rev. Stat. Section 30:1109(A)(3). [8] Petitioners' Brief at 12. [9] Petitioners' Brief at 17. [10] 89 Fed. Reg. at 707. [11] *Id.* At 706-07. [12] N.D. Cent. Code Section 38-22-17; W.S. Section 35-11-319. [13] La. Rev. Stat. Section 30:1109(A)(1). [14] Petitioners' Brief at 1; 49. [15] Petitioners' Brief at 46. [16] Petitioners' Brief at 46-47. [17] Petitioners' Brief at 47. [18] Petitioners' Brief at 1. [19] Petitioners' Brief at 47-48. [20] Petitioners' Brief at 48. [21] Petitioners' Brief at 49. [22] 89 Fed. Reg. at 706-07. [23] 89 Fed. Reg. at 708-09. [24] Petitioners' Brief at 13. [25] Petitioners' Brief at 16.

The following Gibson Dunn attorneys prepared this update: Michael P. Darden, Rahul D. Vashi, Zain Hassan, Mariana Lozano, and Graham Valenta.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have about these developments. To learn more, please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's Oil and Gas, Tax, or Environmental Litigation and Mass Tort practice groups, or the authors: **Oil and Gas**: Michael P. Darden – Houston (+1 346.718.6789, mpdarden@gibsondunn.com) Rahul D. Vashi – Houston (+1 346.718.6659, rvashi@gibsondunn.com) Graham Valenta – Houston (+1 346.718.6646, gvalenta@gibsondunn.com) Zain Hassan – Houston (+1 346.718.6640, zhassan@gibsondunn.com) Mariana Lozano – Houston (+1 346.718.6711, mlozano@gibsondunn.com) **Tax**: Michael Q. Cannon – Dallas (+1 214.698.3232, mcannon@gibsondunn.com) Matt Donnelly – Washington, D.C. (+1 202.887.3567, mjdonnelly@gibsondunn.com) Josiah Bethards – Dallas (+1 214.698.3354, jbethards@gibsondunn.com) **Environmental Litigation and Mass Tort**: Stacie B. Fletcher – Washington, D.C. (+1 202.887.3627, sfletcher@gibsondunn.com) David Fotouhi – Washington, D.C. (+1 202.955.8502, dfotouhi@gibsondunn.com) Rachel Levick – Washington, D.C. (+1 202.887.3574, rlevick@gibsondunn.com)

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