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MICHIGAN OIL AND GAS UPDATE

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I. REGULATORY DEVELOPMENT

The Michigan Department of Environment, Great Lakes, and Energy (“EGLE”), formerly the Michigan Department of Environmental Quality,² is in the process of seeking primary enforcement responsibility from the United States Environmental

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2. Exec. Order No. 2019-6, *reprinted in* MICH. COMP. LAWS SERV. §324.99923

Protection Agency (“EPA”) for its Underground Injection Control (“UIC”) program for Class II wells pursuant to Part C of the Safe Drinking Water Act (“SDWA”).³

The primary purpose of the SDWA is to protect the quality of underground sources of drinking water.⁴ The SDWA accomplishes this purpose by prohibiting the injection of fluids underground without a permit.⁵ The EPA regulates the injection of fluid underground through UIC programs for various types of injection wells.⁶ Class II wells are injection wells used exclusively for the injection of fluids associated with oil and natural gas production (whether for disposal, storage or enhanced recovery).⁷ The EPA administers the UIC program for Class II wells, unless a state agency has applied for and received EPA approval for primary enforcement authority. The delegation of the EPA’s primary enforcement authority is generally referred to as “primacy.”⁸

There are two methods for a state to obtain primacy over Class II wells. A state can demonstrate that its UIC Program meets the EPA’s minimum requirements for construction, operation, monitoring, testing, reporting, and closure under Section 1422 of the SDWA.⁹ Alternatively, a state can demonstrate that its existing program is equally effective in preventing endangerment of underground sources of drinking water and has adequate permitting, inspection, monitoring, record-keeping and reporting requirements under Section 1425 of the SDWA.¹⁰ EGLE is applying for primacy over Class II injection wells pursuant to Section 1425 of the SDWA.¹¹

3. Protection of Underground Sources of Drinking Water, 42 U.S.C. §§ 300h to 300h-8 (2012).

4. See *Summary of the Safe Drinking Water Act*, EPA <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last visited Jan. 8, 2020), [<https://perma.cc/QV3R-M8D2>].

5. § 300h(b)(1)(a).

6. §§ 300h–300h-8.

7. See 40 C.F.R. § 144.6(b) (2011).

8. See *Primary Enforcement Authority for the Underground Injection Control Program*, EPA <https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program> (last visited Jan. 8, 2020), [<https://perma.cc/RL5C-YVHU>].

9. § 300h(b)(1).

10. § 300h-4(b).

11. *Primary Enforcement Authority for the Underground Injection Control Program*, EPA <https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program> (last visited Jan. 8, 2020), [<https://perma.cc/RL5C-YVHU>].

During the ongoing Completeness Review of EGLE's primacy application,¹² a determination was made that certain regulatory changes would be necessary to demonstrate to the EPA that the State's program is equally effective at protecting underground sources of drinking water.¹³ In particular, Michigan's Oil and Gas Operations rules in effect at the time of initial primacy application limited certain regulatory requirements to "mineral water," which was undefined, and "fresh water," which was more narrowly defined than an "underground source of drinking water" in the EPA rules promulgated pursuant to the SDWA.¹⁴ In addition, the definition of "waste" in the Michigan Oil and Gas Operations rules contained an ambiguity, which could have been construed to imply that EGLE's authority to prevent waste did not arise until after an underground source of drinking water became contaminated.¹⁵

In response to the EPA's expressed concerns about whether the EGLE's Oil and Gas Operations rules would be equally effective at protecting underground sources of drinking water as the EPA administered UIC program for Class II wells, EGLE proposed Oil and Gas Operations rule revisions to re-define "fresh water" and "waste" and add a new definition for "mineral water."¹⁶ EGLE's proposed rule set was the first rule to be presented to and approved by the new Environmental Rules Committee, which was established in 2018 as an independent body to oversee the rule-making function of EGLE pursuant to Michigan Public Act No. 652 of 2018.¹⁷

12. *Id.*

13. See MICH. DEP'T OF ENV'T, GREAT LAKES, & ENERGY, AGENCY REPORT TO THE JOINT COMMITTEE ON ADMINISTRATIVE RULES (2019) https://dtmb.state.mi.us/ORRDocs/JCAR/1889_2019-001EG_jcar.pdf.

14. Compare MICH. ADMIN. CODE r. 324.102(s) (current version at MICH. ADMIN. CODE r. 324.102(s), amended effective October 18, 2019), which defined "fresh water" as "water that is free of contamination in concentrations that may cause disease or harmful physiological effects and is safe for human consumption, with 40 C.F.R. 144.3(a)(2), which, in relevant part, defines an "underground source of drinking water" as containing "fewer than 10,000 mg/l total dissolved solids."

15. MICH. ADMIN. CODE r. 324.801(v) (2019) (defining "waste" as "includ[ing] unreasonable damage to an underground source of drinking water").

16. See MICH. DEP'T OF ENV'T, GREAT LAKES, & ENERGY, *supra* note 12.

17. S.B. 652, 99th Leg., Reg. Sess. (Mich. 2018). More details on the establishment, make-up and function of the *Environmental Rules Committee* can be found in *Michigan Legislative Developments*, 5 TEX A&M PROP. L. 39 (2019) available at <https://law.tamu.edu/docs/default-source/jpl/mi-2019-tamu-jpl-oil-gas-survey->

The new Oil and Gas Operations rules became effective October 18, 2019. Under the new Oil and Gas Operations rules, “fresh water” is now redefined as water containing less than 1,000 milligrams per liter of total dissolved solids¹⁸ and “mineral water” is defined as water containing 1,000 milligrams per liter or more of total dissolved solids.¹⁹ “Waste” is now redefined as including “endangerment to an underground source of drinking water.”²⁰

EGLE intends these new rules to demonstrate to the EPA that the EGLE Oil and Gas Operations rules unequivocally protect underground sources of drinking water from endangerment and are equally effective as the EPA administered UIC program for Class II wells.²¹ Should the EPA concur, approval of EGLE’s application for Michigan primacy over Class II wells is in the reasonably foreseeable future.

18. MICH. ADMIN. CODE r. 324.102(s) (2019).

19. MICH. ADMIN. CODE r. 324.102(z) (2019).

20. MICH. ADMIN. CODE r. 324.801(v) (2019).

21. See MICH. DEP’T OF ENV’T, GREAT LAKES, & ENERGY, *supra* note 12.