
Tremors in the Cooperative Environmental Federalism Arena: What Happens When a State Wants to Assume Only Portions of a Primacy Program or Return a Primacy Program? — The Underground Injection Control Program under the Safe Drinking Water Act as a Case Study

Markus G. Puder* and Michel J. Paque**

I. INTRODUCTION***

When crafting the major media and waste statutes in the 1970s Congress adopted a new approach to environmental law and policy—cooperative federalism,¹ a balancing formula that envelops the federal government, the states, the tribal authorities, and the citizens.² Cooperative federalism bridges the federal and state

* Markus G. Puder is a researcher and attorney in the Environmental Assessment Division of Argonne National Laboratory's Washington DC Office. He is also an adjunct professor of law at the Georgetown University Law Center where he teaches Introduction to U.S. Legal Methods and European Union Law. First and Second Legal State Examinations (Ludwig-Maximilians University, Munich, Germany), LL.M. (Georgetown University Law Center), and Ph.D. in Law (Ludwig-Maximilians University). Member of the New York State Bar and the U.S. Supreme Court Bar.

** Michel J. Paque has been the Executive Director of the Ground Water Protection Council (GWPC) since it was founded in 1984. GWPC, a national organization of concerned citizens, state and federal ground water and oil and gas agencies, and industry representatives, pursues the objective of promoting and ensuring the use of best management practices and effective laws and regulations for comprehensive ground water protection and supply. Mr. Paque previously served as Associate Director of the Interstate Oil and Gas Compact Commission, Principal Planner for Oklahoma City, and Environmental Planning Analyst for the Wisconsin Department of Transportation. His experience in environmental policy matters includes testifying to Congress, sponsoring national conferences, and funding research on ground water issues. He is frequently called upon to brief senior managers at the U.S. Environmental Protection Agency (EPA), the U.S. Department of Energy (DOE), and Congressional staffers relative to ground water protection and underground injection matters. M.S., Political Science, University of Wisconsin.

*** The views offered in this article are strictly those of the authors. The article expands on presentations made at the Ground Water Protection Council Annual Forum in Niagara Falls (NY) (Sept. 16, 2003) and at the Ground Water Protection Council Underground Injection Control Meeting in Houston (TX) (Jan. 21, 2004). These presentations were graciously supported by the Ground Water Protection Council, under interagency agreement, through U.S. Department of Energy contract W-31-109-Eng-38. We wish to thank the federal and state officials who communicated with us for their time and help.

¹ See, e.g., CLIFFORD RECHTSCHAFFEN & DAVID MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT 3, 13-58 (2003); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1173-74 (1995).

² Markus G. Puder & John A. Veil, *Overfiling in the Cooperative Federalism Balance—A Search*

spaces. The U.S. Environmental Protection Agency (“EPA” or “Agency”) is entrusted with articulating the federal blueprint of minimum environmental protection standards.³ However, the states and tribes are enabled to gain the lead responsibility or primacy for day-to-day program implementation and enforcement⁴ through a transfer process known as delegation, authorization, and approval.⁵ The states have made ample use of the offer, and 75 percent of the major federal environmental programs are now administered by the states.⁶

Much has been written about the carrots and sticks that continue to be available to the EPA even after a state has gained program primacy and seeks to defend the delegated chunks of the pie.⁷ As the federal-state relationship continues to mature, novel issues are moving into center stage. States, finding themselves increasingly challenged by evolving federal requirements and widening funding shortfalls, may attempt to “pick and choose” and merely assume singular chunks or sub-elements from a program devised and offered as one whole in the EPA’s federal blueprint. Also, more dramatically, states may elect to “cut and run” by returning entire programs or parts of them to the EPA.

This article ventures into largely uncharted territory, using the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA) as a case study.⁸ After reviewing the basic mechanics for gaining, revising, and terminating UIC program primacy, the following questions are explored. Can a state obtain primacy for only a small circumscribed portion of a program offered by the federal blueprint? Can a state return to the EPA all or part of its program primacy? What does the law say? Do the EPA/state primacy agreements contain hints? What are the pertinent procedures? Are precedents available?

Forever Incomplete and Incompletable, 29 COLUM. J. ENVTL. L. 119, 120 (2004).

³ For a concise summary of EPA’s present authorities and responsibilities relative to a dozen major environmental statutes, see Martin Lee, *Summaries of Environmental Laws Administered by the EPA*, Congressional Research Service Report RL30022, available at <http://www.ncseonline.org/nle/crsreports/briefingbooks/laws/b.cfm> (last visited Feb. 11, 2004).

⁴ Puder & Veil, *supra* note 2, at 102; Denise Scheberle, *Partners in Policymaking: Forging Effective Federal-State Relations*, ENVIRONMENT, Dec. 1998, at 2, available at http://www.findarticles.com/cf_0/m1076/10_40/53520538/p1/article.jhtml (last visited Feb. 11, 2004).

⁵ For an example using all three terms, see U.S. Env’tl. Protection Agency, *Response To Petition To Withdraw Approval, Delegation, and Authorization to Administer Federal Environmental Programs*, Ohio, Notice of Final Action, 68 Fed. Reg. 8591 (Feb. 24, 2003); see also RECHTSCHAFFEN & MARKELL, *supra* note 1, at 93 (offering the following definitional distinctions with respect to the sometimes confusing terminology often used interchangeably: “authorization means that the EPA is empowering a state to be the primary regulator in the state through the state’s implementation of its version of a federal law, while delegation means that the state is empowered to implement the federal law itself”).

⁶ RECHTSCHAFFEN & MARKELL, *supra* note 1, at 3; Joel A. Mintz, *Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS*, 30 ENVTL. L. REP. 10,639, 10,640 (2000).

⁷ See RECHTSCHAFFEN & MARKELL, *supra* note 1 (providing a wealth of information and references).

⁸ For a dramatic topical quote, see Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”*: *Devolution, Revolution, or Reform*, 81 MINN. L. REV. 97, 184 (1996) (“No contemporary environmental program cuts to the quick of public anxiety more than the safety of our drinking water, and no problem better illustrates the implications of the current breakdown in relations between the . . . levels of government”).

II. LEGAL AND REGULATORY FRAMEWORK GOVERNING UNDERGROUND INJECTION OPERATIONS

A. Origins

In the early 1970s, the EPA tried to use the authorities under the Federal Water Pollution Control Act (FWPCA) for controlling underground injection.⁹ However, according to a court decision of 1973, the FWPCA did not cover the regulation of underground injection.¹⁰ Through the SDWA of 1974 (Part C, Sections 1421 through 1426) Congress gave the EPA the express authority for UIC regulation.¹¹

B. Technical Criteria and Standards

Part C of the SDWA establishes the criteria for a UIC program. It must at a minimum (1) prohibit any underground injection not authorized by permit or rule; (2) require that permitted injections not endanger drinking water sources; (3) include inspection, monitoring, record-keeping, and reporting requirements; and (4) apply to injections by federal agencies.¹² Acting on SDWA authority the EPA has published final regulations for the UIC program.¹³ Underground injection involves the

⁹ The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251 - 1387 (2003), which governs pollution of the Nation's waterways, was enacted in 1948. Major amendments were undertaken in 1956, 1961, 1965, 1966, 1970, 1972, 1977, 1981, and 1987. See Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948); Water Pollution Control Act of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956); Federal Water Pollution Control Act Amendments Pub. L. No. 87-88, 75 Stat. 204 (1961); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Clean Water Restoration Act, Pub. L. No. 89-753, 80 Stat. 1246 (1966); Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970); Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 894 (1972); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Municipal Wastewater Treatment Construction Grants Amendments, Pub. L. No. 97-117, 95 Stat. 1623 (1981); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987). Under the FWPCA, the EPA required operators of injection wells (later Class I) at facilities with National Pollutant Discharge Elimination System (NPDES) permits for various surface discharges to also obtain appropriate state or federal NPDES permits for the injection well(s). See also Interview by Markus G. Puder with William R. Bryson, The University of Kansas (July 27, 2004).

¹⁰ U.S. EPA, UNDERGROUND INJECTION CONTROL PROGRAM, WHAT IS THE UIC PROGRAM? SUMMARY OF THE HISTORY OF THE UIC PROGRAM, available at <http://www.epa.gov/safewater/uic/history.html> (last visited Feb. 11, 2004) [hereinafter HISTORY OF THE UIC].

¹¹ 42 U.S.C. §§ 300h to 300h-8 (2003). The SDWA, which is designed to protect and ensure the safety of public water supplies, was enacted in 1974, and amended in 1976, 1977, 1979, 1980, 1984, 1986, 1988, 1994, 1995, and 1996. See Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974); Public Health Service Act of 1976, Pub. L. No. 94-317, 90 Stat. 695 (1976); Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243 (1977); Safe Drinking Water Act Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393 (1977); Authorization, Appropriations — Safe Drinking Water Act, Pub. L. No. 96-63, 93 Stat. 411 (1979); Safe Drinking Water Act Amendments of 1980, Pub. L. No. 96-502, 94 Stat. 2737 (1980); Safe Drinking Water Act Amendments of 1986, Pub. L. 99-339, 100 Stat. 642 (1986); Lead Contamination Control Act of 1988, Pub. L. No. 100-572, 102 Stat. 2884 (1988); Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996). See also Interview with Bryson, *supra* note 9 (adding that even after SDWA was passed in 1974, the “NPDES” injection points” were retained until final promulgation of the UIC regulation under 1422 occurred).

¹² See 42 U.S.C. § 300h(b)(1) (2003).

¹³ The EPA's May 19, 1980 administrative and permitting regulations are codified in 40 C.F.R. §§ 144, 146 (1995); see 45 Fed. Reg. 33,290 (1980). The Agency's June 24, 1980, technical requirements are codified in 40 C.F.R. § 146 (1995); see 45 Fed. Reg. 42,472 (1980). The regulations were subsequently

subsurface placing of fluids in porous formations of rocks or soils, through wells or other similar conveyance systems. The regulations define an injection well as any bored, drilled or a driven shaft or a dug hole, where the depth is greater than the largest surface dimension that is used to discharge fluids underground.¹⁴ The mantra of the EPA's regulatory program revolves around protecting underground sources of drinking water (USDWs). The three-prong regulatory definition of an underground source of drinking water (USDW) combines quantitative and qualitative elements that cover actual or potential supply scenarios.¹⁵ A USDW is an aquifer or portion of an aquifer that supplies any public water systems or contains sufficient quantity of groundwater to supply a public water system.¹⁶ Moreover, a USDW currently supplies drinking water for human consumption or contains fewer than 10,000 milligrams/liter total dissolved solids.¹⁷ Finally, any aquifer exempted from UIC regulations cannot be a USDW.¹⁸

The EPA's regulatory controls are designed to prevent contamination by keeping injected fluids within the well and the intended injection zone.¹⁹ In the case of injection of fluids directly or indirectly into a USDW the injectate must not cause a public water system to violate drinking water standards or otherwise adversely affect public health.²⁰ All injection wells require authorization under general rules or specific permits.²¹ The EPA's technical criteria and standards generally speak to the siting, construction, operation, maintenance, monitoring, testing, and closure of injection wells.²²

C. Well Classes

The UIC program governs underground injection of waste through grouping

amended; *see* 46 Fed. Reg. 43,156 (1981); 47 Fed. Reg. 4,992 (1982); 48 Fed. Reg. 2,938 (1983); 48 Fed. Reg. 14,146 (1983); 53 Fed. Reg. 28,118 (1988); 58 Fed. Reg. 63,890 (1993); 59 Fed. Reg. 64,339 (1994); 60 Fed. Reg. 33,926 (1995). The EPA's regulations on state underground injection control programs requirements are codified in 40 C.F.R. § 145 (2003). *See* 48 Fed. Reg. 14,153 (1983), amended at 59 Fed. Reg. 64,343 (1994). In 1999, EPA developed regulations and other management measures for certain types of shallow wells that inject non-hazardous waste; *see* 64 Fed. Reg. 68,545 (1999). In 2002, the EPA announced a final determination for all sub-classes of injection wells not included in a 1999 rulemaking; *see* 67 Fed. Reg. 39,583 (2002).

¹⁴ 40 C.F.R. §§ 144.3, 146.3 (2003).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* For aquifer exemptions, *see* 40 C.F.R. §§ 144.7, 146.4 (2003); *see also* Interview with Bryson, *supra* note 9 (explaining that originally, a state could petition an area out of the UIC program where the ground water supply would not support a public supply, however, the EPA discouraged states from seeking exemptions for aquifers based on "lack of supply").

¹⁹ U.S. EPA, UNDERGROUND INJECTION CONTROL PROGRAM, WHAT IS THE UIC PROGRAM? HOW DOES THE UIC PROGRAM PREVENT CONTAMINATION OF OUR WATER SUPPLY?, *available at* <http://www.epa.gov/safewater/uic/whatis.html> (last visited Feb. 11, 2004) [hereinafter PREVENT CONTAMINATION].

²⁰ *Id.*

²¹ 40 C.F.R. § 144.11 (2003).

²² 40 C.F.R. Part 146 (2003); *see also* Interview with Bryson (noting that siting criteria and standards are not applicable to all wells, in particular wells which inject fluids for the enhanced recovery of oil or natural gas).

operations into five classes of injection wells.²³ Class I wells are used for emplacing industrial hazardous, industrial nonhazardous, and municipal (non-hazardous) waste into isolated formations beneath the lowermost USDW.²⁴ Class I operations are the most strictly regulated by the SDWA.²⁵ Class II wells inject brines, produced waters, and other fluids associated with oil and gas production.²⁶ Class III wells are used for fluids associated with solution mining of minerals.²⁷ Class IV wells, which involve the injection of hazardous or radioactive wastes into or above a USDW,²⁸ are banned unless authorized under other statutes for ground water remediation.²⁹ Class V wells — those not captured in Classes I through IV — most commonly inject nonhazardous fluids into or above a USDW.³⁰ They typically include shallow, onsite disposal systems, such as floor and sink drains discharging directly or indirectly to ground water, dry wells, leach fields, and similar types of drainage wells.³¹

D. Primacy

The EPA has established minimum program implementation and administration standards that states must meet prior to receiving primacy for the UIC program under Section 1422 of the SDWA.³² In the wake of a Congressional amendment in 1980, Section 1425 of the SDWA relieves oil and gas-related injection well programs in the states from having to meet the technical requirements in the UIC regulations.³³ Instead, the demonstration can be made that the state already has an effective program (including adequate oversight, record-keeping and reporting) in place to prevent the endangerment of USDWs by underground injection operations.³⁴ Section 1425 of the SDWA reinforces the instruction given in Section 1421(b)(2) of the SDWA that the EPA not interfere with the production of oil and gas unless the

²³ U.S. EPA, Office of Water, Technical Program Overview: Underground Injection Control Regulations, at 7-11 (2002).

²⁴ See 40 C.F.R. §§ 144.6(a), 146.5(a) (2003).

²⁵ For criteria and standards applicable to Class I nonhazardous injection waste injection wells, see 40 C.F.R. § 146.11-15 (2003). For criteria and standards applicable to Class I hazardous waste injection wells, see 40 C.F.R. §§ 146.61-73 (2003).

²⁶ See 40 C.F.R. §§ 144.6(b), 146.5(b) (2003); Class II-D wells dispose of fluids which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection; Class II-EOR wells are employed for enhanced recovery of oil or natural gas; Class II-H wells are used for storage of hydrocarbons which are liquid at standard temperature and pressure; For criteria and standards applicable to Class II wells, see 40 C.F.R. §§ 146.21-25 (2003).

²⁷ See 40 C.F.R. §§ 144.6(c), 146.5(c) (2003). For criteria and standards applicable to Class III wells, see 40 C.F.R. §§ 146.31-34 (2003).

²⁸ See 40 C.F.R. §§ 144.6(d), 146.5(d) (2003).

²⁹ See 40 C.F.R. § 144.13 (2003).

³⁰ 40 C.F.R. §§ 144.6(e), 146.5(e) (2003). For criteria and standards applicable to Class V injection wells, see 40 C.F.R. § 146.51 (2003).

³¹ OFFICE OF GROUND WATER AND DRINKING WATER, U.S. EPA, PROTECTING DRINKING WATER THROUGH INJECTION CONTROL, 18 (2002).

³² 42 U.S.C. § 300h (2003).

³³ 42 U.S.C. § 300h-4 (2003).

³⁴ *Id.*

requirements are essential for the protection of USDWs.³⁵ Most states with UIC program primacy for Class II wells have chosen the approval route under Section 1425 because it offers greater flexibility.³⁶ Native American tribes may also assume primacy.³⁷ They must be considered a “Federally Recognized Tribe” and must have been designated for “Treatment Similar to a State.”³⁸

The EPA can approve delegation of the UIC program to the states in several ways, including for (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); and/or (3) all but oil and gas injection wells under Section 1422 of the SDWA (All-But-One Section 1422 Program).³⁹ A state could have full delegation of the UIC program — one portion for oil and gas injection wells approved under Section 1425 and another for the remainder of the well classes under Section 1422 of the SDWA.⁴⁰ In many instances, the primacy state’s oil and gas agency takes on the 1425 Program, while the environmental agency assumes responsibility for the All-But-One Section 1422 Program.⁴¹

The EPA has approved program primacy for all well classes in 33 States.⁴² It shares responsibility in seven States.⁴³ The Agency directly implements the program for all well classes in 10 States (and in all Native American lands, three territories, and four jurisdictions).⁴⁴ The Agency provides grant funds to all delegated programs to help pay for program costs.⁴⁵ As originally authorized, the federal government portion of the program was 75%. States must provide a 25% match.⁴⁶ National UIC budgets have not increased for more than a decade, nor have the grant funds sent to the states.⁴⁷ Inflation and increased workloads have diminished the federal share to

³⁵ 42 U.S.C. § 300h(b)(2) (2003).

³⁶ U.S. EPA, *supra* note 23, at 26 (speaking of a statutory showing of equivalency).

³⁷ U.S. EPA, Underground Injection Control Program, State UIC Programs, *available at* <http://www.epa.gov/safewater/uic/primacy.html> (last visited Feb. 10, 2004). The EPA will be entertaining applications for Class II-only primacy from the tribes via Section 1425, which allows the tribes to demonstrate that they have regulations that are effective; *see also* Interview by Markus G. Puder with Bruce Kobelski (U.S. EPA (Aug. 14, 2004)) (adding that the Regions were advised by Headquarters to alert the tribes to the benefits of coming in for all well classes under Section 1422 because they could receive grant funding for all well classes).

³⁸ *Id.*

³⁹ U.S. EPA, *supra* note 10; *see also* personal communication with Bryson, *supra* note 9 (noting that in the early 1980s, a state seeking primacy under Section 1422 had to write up a program description for classes of UIC wells not represented nor inventoried in order to receive a grant share; for example, South Carolina had primacy for Classes I-V under Section 1422, but had no wells except non-inventoried Class V wells).

⁴⁰ For a list of the primacy status of states, *see* U.S. Env’tl. Protection Agency, Underground Injection Control Program, Responsibility for the UIC Program, Delegation Status, *available at* <http://www.epa.gov/safewater/uic/primacy2.html> (visited Feb. 12, 2004).

⁴¹ For a listing of state agency contacts, *see* U.S. EPA, Underground Injection Control Program, State Contacts, *available at* <http://www.epa.gov/safewater/uic/states.html> (last visited Mar. 1, 2005).

⁴² U.S. EPA, *supra* note 23, at 25.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See* 42 U.S.C. § 300j-2(b) (2003).

⁴⁶ U.S. EPA, Underground Injection Control Program, State UIC Programs, *available at* <http://www.epa.gov/safewater/uic/primacy.html> (last visited Mar. 1, 2005).

⁴⁷ For the proposition that some responsibility for the draining effect lies with Congress, *see* Interview

the point where some states are seriously questioning the system and contemplating to exit the current cooperative federalism equation.

II. OVERVIEW OF STATE UIC PROGRAM PRIMACY APPROVAL, REVISION AND TERMINATION

The EPA's codified State UIC Program Requirements⁴⁸ specify the criteria, procedures, and time lines that the Agency will follow when approving, revising, and withdrawing Section 1422 Programs. However, express procedures for the approval, revision, and termination of Section 1425 Programs are not offered. The EPA has issued guidance relative to approving Section 1425 Programs.⁴⁹ Withdrawal proceedings for these programs generally trace the regulatory path for the Section 1422 Program.⁵⁰

A. UIC Program Primacy Approval⁵¹

The major elements of a state's package requesting program approval by the EPA⁵² include a showing of public participation activities prior to the submission, a letter from the Governor, a description of the envisaged program,⁵³ a statement of legal authority by the state Attorney General certifying that the state law and regulations provide program authority and coverage,⁵⁴ a Memorandum of Agreement with the EPA Regional Administrator that includes provisions for the transfer of pending permit applications, permit classes and categories, reporting, compliance monitoring and enforcement.⁵⁵ In substance, the envisaged state program must include requirements for permitting,⁵⁶ compliance evaluation,⁵⁷ enforcement,⁵⁸

with Bryson, *supra* note 9 (offering that Congress (1) presumed, once states received program primacy, the workload for states would actually decrease, which would allow the state to use the grant as program costs associated with EPA administrative needs, and, over a period of 5-10 years, integrate the various programs (UIC, NPDES, and others) into an ongoing budgeted routine; (2) did not count on EPA continually raising the regulatory and performance bar for primacy states, particularly in the area of administrative oversight of state primacy programs; and (3) continued to create new requirements in the course of reauthorizations or newer statutes, which has caused EPA to bend back its ears and concentrate in a new direction).

⁴⁸ 40 C.F.R. § 145 (2003).

⁴⁹ U.S. EPA, Ground Water Program Guidance #19, Guidance for State Submissions under Section 1425 of the Safe Drinking Water Act (undated).

⁵⁰ See, e.g., 64 Fed. Reg. 27,744 (1999) (explaining that (1) "the [withdrawal] procedures were promulgated for the withdrawal of a "Section 1422 Program;" and (2) "in lieu of different express regulatory provisions for the withdrawal of Section 1425 Programs..., EPA is following the procedures at 40 CFR 145.34(b) in proposing to withdraw Alabama's Section 1425 Program."). See also Interview with Bryson, *supra* note 9 (recalling a tacit understanding among many Class II primacy states that the withdrawal proceedings under Section 1422 would probably apply to an EPA-generated withdrawal under Section 1425).

⁵¹ 40 C.F.R §§ 145.21, 145.31 (2003).

⁵² *Id.*, at § 145.22.

⁵³ *Id.*, at § 145.23.

⁵⁴ *Id.*, at § 145.24.

⁵⁵ *Id.*, at § 145.25.

⁵⁶ *Id.*, at § 145.11.

⁵⁷ *Id.*, at § 145.12.

⁵⁸ *Id.*, at § 145.13.

public participation, and sharing of information.⁵⁹

The multi-stage approval process plays back and forth between the candidate state and the EPA.⁶⁰ It is initiated with the state's public notice of its intent to adopt a UIC program and seek approval from the EPA,⁶¹ followed by the actual request for approval of the proposed program.⁶² Within 30 days maximum of receipt of the program submission, the EPA will notify the state whether the package is complete.⁶³ This determination may require follow-up activities by the state. Once the EPA deems the submission complete, the Agency issues a public notice of the program submission received from the candidate state in the Federal Register, announcing a public hearing (no earlier than 30 days after a hearing notice) and a public comment period of 30 days.⁶⁴ The EPA's completeness determination triggers the clock for the statutory review period. The Agency has 90 days to fully approve, disapprove, or approve in part by rule.⁶⁵ In practice, the back-and-forth between the candidate state and the federal reviewers in a particular primacy petition is generally much more drawn out than a mere summation of the regulatory timelines would suggest.

B. UIC Program Primacy Revision⁶⁶

Program revision may be initiated by either the EPA or any approved state.⁶⁷ The need for revision could stem from changes in controlling federal or state statutory or regulatory authority.⁶⁸ Elements of a state program revision package include a modified program description, a statement by the Attorney General, a Memorandum of Agreement, or other documents deemed necessary by the EPA.⁶⁹ In the case of substantial amendments the Agency publishes public notice in the Federal Register and statewide newspapers, and facilitates public involvement through a comment period of at least 30 days and the opportunity to request a public hearing.⁷⁰ The EPA then approves or disapproves program revisions.⁷¹ They become effective with the approval. Notice of approval of substantial amendments is published in the Federal Register, while notice of approval of non-substantial program revisions may be provided through a letter from the EPA to the State Governor or designee.⁷² Whenever states with approved programs propose to transfer all or part of any

⁵⁹ *Id.*, at § 145.15.

⁶⁰ *Id.*, at § 145.31.

⁶¹ *Id.*, at § 145.31(a).

⁶² *Id.*, at § 145.31(b).

⁶³ Memorandum for the U.S. EPA, to the Water Division Directors Regions I-X #34, at 8 & Figure 1 (undated), available at <http://www.epa.gov/safewater/uic/guidances/guid34.pdf>.

⁶⁴ 40 C.F.R. § 145.31(c) (2003).

⁶⁵ *Id.*, at § 145.31(e).

⁶⁶ *Id.*, at § 145.32.

⁶⁷ *Id.*, at § 145.32(a).

⁶⁸ *Id.*

⁶⁹ *Id.*, at § 145.32(b)(1).

⁷⁰ *Id.*, at § 145.32(b)(2).

⁷¹ 40 C.F.R. § 145.32(b)(3) (2004).

⁷² *Id.*, at § 145.32(b)(4).

program from the approved state agency to any other state agency, they must notify the EPA, identifying any new division of responsibilities among the agencies involved.⁷³ This type of agency reshuffling or reorganization is not effective until the approval by the EPA is secured.⁷⁴

C. UIC Program Primacy Termination

Program termination scenarios include contested or provoked withdrawal conducted by the EPA and voluntary return initiated by the approved state. Both scenarios are contemplated by codified regulations. The Agency has not issued additional guidance, and the Memoranda of Agreement — the terms of the program primacy contract — are regularly silent on this point.

*1. Withdrawal of State Program by the EPA for Not Being in Compliance with the Law and Implementing Regulations*⁷⁵

At the outset of a withdrawal proceeding, the EPA determines whether it has “cause to believe” that the approved state is not administering or enforcing its program in full compliance with the SDWA and the implementing regulations.⁷⁶ Withdrawal criteria include a state’s failure to comply with the applicable regulatory requirements with respect to state legal authorities, program operation and enforcement, and terms of the Memorandum of Agreement.⁷⁷ The major process components incumbent upon the EPA include an initial warning to the state, public involvement activities, and compliance evaluations.⁷⁸

Upon finding a cause in this sense, the Agency, by registered mail, raises with the state the specific areas of alleged noncompliance.⁷⁹ Unless the state makes a compliance demonstration to the Agency’s satisfaction within 30 days of the notification, the EPA informs the state and schedules a public hearing to discuss the withdrawal process.⁸⁰ This hearing is convened not less than 60 days nor more than 75 days following the publication of the notice of the hearing.⁸¹ If, after conclusion of the public hearing, the EPA finds that the state is in noncompliance, the Agency notifies the state of the specific deficiencies and the necessary remedial actions.⁸²

⁷³ *Id.*, at §145.32(c).

⁷⁴ *See id.* For an example involving the State of Kansas, where in 1986, the legislature transferred most of the oil and gas regulatory program from the Kansas Department of Health and Environment (KDHE) to the Kansas Corporation Commission (KCC); *see* Interview with Bryson, *supra* note 9 (In 1984, KCC had applied and received primacy for the Kansas Class II UIC program under 1425)(KDHE had separately applied for and received primacy for Classes I, III, IV, and V under 1422)(By interagency agreement KDHE received all of the grants, including those allocated to Class II because they maintained the district offices for both agencies.)(When the split occurred, KCC was required to resubmit a program package for approval by the EPA, which ran an evaluation of KCC as a “qualified” environmental protection agency).

⁷⁵ 40 C.F.R. §§ 145.33, 145.34(b) (2003).

⁷⁶ *Id.*, at § 145.34(b)(1).

⁷⁷ *Id.*, at § 145.33.

⁷⁸ *Id.*, at § 145.34(b).

⁷⁹ *Id.*, at § 145.34(b)(1).

⁸⁰ 40 C.F.R. § 145.34(b)(2) (2003).

⁸¹ *Id.*

⁸² *Id.*, at § 145.34(b)(3).

The state is given 90 days to carry out the appropriate steps for returning to full compliance.⁸³

If the state continues to default, the EPA withdraws the program approval⁸⁴ and then initiates direct implementation. At any juncture of this multi-step process, the EPA may find that the state is in compliance with the SDWA and the implementing regulations. The Agency then notifies the state by registered mail and terminates the withdrawal proceedings.⁸⁵

2. *Voluntary Transfer of State Program back to the EPA*⁸⁶

Any approved state may voluntarily transfer back program responsibilities required by federal law to the EPA. The return process either follows the codified regulatory path or a case-specific agreement between the state and the EPA. The regulations provide for a three-stage process based on initial notification by the state, evaluation by the EPA, and announcement to stakeholders.

The state shall give the EPA 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant and necessary program information not in the physical possession of the EPA (such as permits, permit files, compliance files, reports, permit applications).⁸⁷ Within 60 days of receiving the state's notice and transfer plan, the EPA evaluates the plan for potential deficiencies and identifies any additional information needed by the EPA for program administration.⁸⁸ This language does not resolve with finality the scenario when a state does not have, or does not want to hand over, the information requested by the EPA. The test question then will in all likelihood boil down to the type of the additional information requested and its significance with respect to the administration of the program envisioned for return.

At least 30 days before the scheduled transfer the EPA publishes notice of the transfer in the Federal Register and the newspapers with statewide coverage.⁸⁹ Moreover, notice must be mailed to all permit holders, permit applicants, other regulated parties and interested persons.⁹⁰

III. DISCUSSION THEME 1: "PICK AND CHOOSE" — STATE AUTHORITY FOR PROGRAM PORTIONS

A. Issue Formulation

Petitions for state primacy over program portions conceptually fall into horizontal and vertical scenarios. A horizontal request from an interested state agency involves a program currently run by a fellow state agency and triggers the EPA's program

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*, at §§ 145.34(b)(1), (2) & (3).

⁸⁶ *Id.*, at § 145.34(a).

⁸⁷ 40 C.F.R. § 145.34(a)(1) (2003).

⁸⁸ 40 C.F.R. § 145.34(a)(2) (2003).

⁸⁹ 40 C.F.R. § 145.34(a)(3) (2003).

⁹⁰ *Id.*

revision procedures which require an interagency agreement between the agencies concerned and approval by the EPA of the reshuffling.⁹¹ A vertical primacy application for a program still managed by the EPA in direct implementation will be governed by the EPA's primacy approval procedures.⁹²

When it comes to approving state primacy over UIC programs the EPA adheres to an all-or-none approach. Other than the historical carve-out for Section 1425 Programs and the positive demonstration by a state that within its jurisdiction certain types of injection activities for one or more well classes do not in fact and cannot legally occur,⁹³ the Agency does not give partial approval for singular UIC well classes or subcategories within a given UIC well class.⁹⁴ In this light, for example, the EPA will not accede to the request by a state environmental agency for primacy over Class I only.⁹⁵ A state environmental agency interested in Class I primacy would have to seek the whole suite of well classes (except for Class II).⁹⁶ Similarly, approval will not be given by the EPA when a state oil and gas agency with UIC Class II primacy seeks partial authority for a typical UIC Class V subcategory.⁹⁷ A conceivable example involves Montana's coal bed methane disposal wells.⁹⁸ In this scenario the Montana Board of Oil and Gas Conservation contemplates primacy from the EPA only over aquifer recharge wells for the injection of produced water back into the coal seams.⁹⁹ In Montana, the Montana Board of Oil and Gas Conservation has received primacy for UIC Class II wells only.¹⁰⁰ Since the Montana Department of Environmental Quality has not sought primacy for the other well classes, the remainder of the UIC program is directly implemented by the EPA.¹⁰¹

⁹¹ 40 C.F.R. § 145.32(c) (2003).

⁹² 40 C.F.R §§ 145.21, 145.31 (2003).

⁹³ U.S. E.P.A., *supra* note 23, at 26-27 (citing to the EPA's regulations). *See also*, 40 C.F.R § 145.21(e) (2003).

⁹⁴ *See, e.g.*, Interview by Markus G. Puder with Bruce Kobelski, U.S. Env'tl. Protection Agency (Sept. 12, 2003); Interview by Markus G. Puder with Mario Salazar, U.S. Env'tl. Protection Agency, Headquarters (Aug. 20, 2003); Interview by Markus G. Puder with John Taylor, U.S. Env'tl. Protection Agency, Region 5 (Aug. 13, 2003); Interview by Markus G. Puder with Steve Platt, U.S. Env'tl. Protection Agency, Region 3 (Aug. 12, 2003).

⁹⁵ Interview by Markus G. Puder with Jim Regg, Alaska Oil and Gas Conservation Commission (Nov. 13, 2003).

⁹⁶ *Id.* (State agencies may be reluctant to take over the immense universe associated with Class V wells.).

⁹⁷ Interview by Markus G. Puder with Tom Richmond, Mont. Bd. of Oil & Gas Conservation (Sept. 9, 2003). *See also* Interview with Bryson, *supra* note 9 (stating that Class V bromine wells in Arkansas are under the Arkansas Oil and Gas Commission (AOGC) by agreement with the Arkansas Department of Environmental Quality (ADEQ)). This provides for an example of the proposition that a state may allow two agencies within the state to transfer administration of a sub-class to another agency under the EPA's approval. In Arkansas, AOGC has Class II primacy and ADEQ has Class I, III, IV and V. *Id.*

⁹⁸ Interview with Richmond, *supra* note 97.

⁹⁹ *Id.* (noting some decreased interest in the process because of the physics involved).

¹⁰⁰ Mont. Bd. of Oil & Gas Conservation; Underground Injection Control (UIC) Program; Primacy Program Approval, 61 Fed. Reg. 58,933 (Nov. 19, 1996) (codified at 40 C.F.R. pt 147).

¹⁰¹ Interview by Markus G. Puder with George Hudak, Mont. Bd. of Oil & Gas Conservation (July 28, 2003).

B. Law and Policy Considerations

Language in the EPA's state program regulations leaves room for several interpretations. The approval regulations state that "...a *partial program* (emphasis added) may be approved."¹⁰² At the end of the approval process for a complete state submission "...the Administrator shall by rule either fully approve, disapprove, or approve *in part* (emphasis added)...."¹⁰³ In the revision regulations the EPA provides that "[s]tates shall notify EPA whenever they propose to transfer *all or part of* (emphasis added) any program from the approved State agency to any other State agency..."¹⁰⁴ The return regulations do not use the explicit terms "part" and "partial" but offer a generic plural that avoids the sweep of the definite article, indicating that "[a] State...may transfer program *responsibilities* (emphasis added)..."¹⁰⁵ Advocates of partial primacy for a state beyond the EPA's current policy argue that a literal reading of the regulations supports the proposition of the Agency's unfettered discretion and creativity to slice and dice.

However, the EPA has consistently pursued and articulated its posture of "all or none"¹⁰⁶ and "no parsing." Agency officials emphasize that only Congressional amendments to the SDWA giving oil and gas programs the statutory equivalency route forced the EPA to cleave program approval into three groups.¹⁰⁷ Within this general trifurcation, if a state can demonstrate that underground injection operations for one or more classes do not exist and that such activities cannot legally occur until the state has developed a program, the state need not submit a program to regulate these injections.¹⁰⁸ For example, Wisconsin's program basically consists of a prohibition of all injection wells except Class V heat pump return flow injection wells.¹⁰⁹ Florida has banned those Class I wells that inject hazardous waste except for one exempted by the Florida legislature.¹¹⁰ However, the EPA emphasizes and documents in the federal codification of state-administered programs that primacy states still take on the applicable suite of well classes and then internally circumscribe injection operations through implementing state bans on wells that they either cannot site or, by policy, do not allow.¹¹¹ The Agency has time and again indicated that in consonance with language crafted for the approval, revision, and return regulations it is not willing to further split up well classes.¹¹² The EPA defends its posture with administrative discretion and pragmatic considerations.¹¹³

¹⁰² 40 C.F.R. § 145.21(e) (2003).

¹⁰³ 40 C.F.R. § 145.31(e) (2003).

¹⁰⁴ 40 C.F.R. § 145.32(c) (2003).

¹⁰⁵ 40 C.F.R. § 145.34(a) (2003).

¹⁰⁶ Interview by Markus G. Puder with Dave Watkins, W. Va. Dep't of Env'tl. Protection (Aug. 7, 2003).

¹⁰⁷ Interview with Salazar, *supra* note 94.

¹⁰⁸ 40 C.F.R. § 145.21(e) (2003).

¹⁰⁹ 40 C.F.R. § 147.2500 (2003) (Wis.). *See also* Interview by Markus G. Puder with Bruce Kobelski, U.S. Env'tl. Protection Agency (Feb. 26, 2004).

¹¹⁰ The Environmental and Land Use Law of The Florida Bar, *Underground Injection Control, Classification of Underground Injection Wells*, available at http://www.eluls.org/under_inject.html (last visited Mar. 2, 2004).

¹¹¹ Interview by Markus G. Puder with Bruce Kobelski, U.S. Env'tl. Protection Agency (Mar. 02, 2004).

¹¹² Interview with Taylor, *supra* note 94.

¹¹³ Interview with Kobelski, *supra* note 94.

According to the Agency, it is doubtful that Congress foresaw and desired a piecemeal approach.¹¹⁴ Officials add that further parsing and slicing would immensely complicate the federal-state interface, for example, when it comes to grant allocation machinations.¹¹⁵

C. Precedents?

The Division of Oil, Gas, and Geothermal Resources (Division) in the California Department of Conservation received primacy over Class II wells in 1983, but did not seek Class V primacy because of the EPA's "all or none" policy.¹¹⁶ Yet, the Division's Geothermal Section regulates geothermal injection wells pursuant to a tailored Memorandum of Agreement (MOA) between the EPA and the Division "until procedures for formal program delegation of subclasses of Class V injection wells are developed or when the State of California receives primary enforcement authority for all classes of injection wells."¹¹⁷ The MOA has allowed the state to administer a circumscribed program of 180 wells that technically constitute a Class V subclass without assuming the full primacy over the entire Class V program, which is estimated to include thousands of wells.¹¹⁸

Federal and state regulators refer to the uniqueness of situation. California — the world's largest generator of electricity from geothermal energy — has accumulated substantial experience with respect to geothermal well regulation.¹¹⁹ At the time when the MOA was signed in 1991, no Class V well regulations existed as such,¹²⁰ since the EPA did not finalize its Class V rule until 1999.¹²¹ Similar considerations have been advanced in the case of Hawaii, a direct implementation state where local municipalities and a state agency regulate geothermal wells.¹²²

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Interview by Markus G. Puder with Michael Stettner, Cal. Dep't of Conservation, Div. of Oil, Gas, & Geothermal Res. (Sept. 9, 2003).

¹¹⁷ Memorandum of Agreement between the U.S. Env'tl. Protection Agency and Cal. Div. of Oil & Gas, signed by M.G. Mefferd, Supervisor, Cal. Div. of Oil & Gas, Cal. Dep't of Conservation (July 30, 1991) and Harry Seraydarian, Dir., Water Mgmt. Div., U.S. Env'tl. Protection Agency, Region IX (July 29, 1991) (on file with the authors) [hereinafter MOA].

¹¹⁸ Interview with Stettner, *supra* note 116. *See also* Interview by Markus G. Puder with Michael Stettner, Cal. Dep't of Conservation, Div. of Oil, Gas, & Geothermal Res. (Aug. 13, 2004) (noting that geothermal UIC is solely the financial responsibility of the Division).

¹¹⁹ Interview with Michael Stettner, *supra* note 116.

¹²⁰ Interview with Salazar, *supra* note 94. *See also* MOA, *supra* note 117, at 1 (describing as its intent to give the Division program responsibility "until procedures for formal delegation of subclasses of Class V injection wells are developed or when the State of California receives primary enforcement authority for all injection wells.").

¹²¹ Revisions to the Underground Injection Control Regulations for Class V Injection Wells, 64 Fed. Reg. 68,546 (Dec. 7, 1999) (to be codified at 40 C.F.R. pt. 9, 144-46). The Agency's final determination of 2002 for all subclasses of Class V injection wells not included in the previous rulemaking (Underground Injection Control Program, Notice of Final Determination for Class V Wells, 67 Fed. Reg. 39,585 (June 7, 2002) (to be codified at 40 C.F.R. pt. 144)) added no additional requirements beyond the general endangerment clause (Underground Injection Control Program, 40 C.F.R. §144.12 (2003)) designed to protect primary national drinking water standards and the health of persons.

¹²² Interview with Kobelski, *supra* note 94.

For other programs and laws, the slicing and dicing of the federal-state interface may look different from state to state. Since the National Pollutant Discharge Elimination System (NPDES) Program under the CWA consists of various components (including NPDES base program for municipal and industrial facilities, federal facilities, general permitting, pretreatment program, and biosolids), a given state may receive authorization for one or more program components.¹²³ For example, in New York, the Department of Environmental Conservation is authorized to run the direct point source discharge base program in lieu of the federal permit program, whereas the pretreatment program is implemented by the EPA through Region 2.¹²⁴

D. Summary Observations

When a framework statute does not speak with clarity and candor to a particular issue, but leaves the implementing agency a margin of discretion, the control standards are permissibility and reasonableness.¹²⁵ When preferring a policy of “all or none” in the context of the UIC program the EPA does not override clear statutory language to the contrary. The Agency cannot be said to abuse the leeway provided by the law. After all, the UIC program is federal in origin coupled with an offer to the states. The EPA has emphasized that cases such as California and Hawaii do not constitute full-fledged precedents that could give rise to a binding internal practice by the Agency.

However, Executive Order No. 13132 *Federalism*, issued in 1999 by President Clinton, directs that federal agencies “grant the States the maximum administrative discretion possible” in implementing federal programs.¹²⁶ Moreover, workload considerations offsetting the additional effort involved with grant allocation arithmetics may alter the thinking in the EPA and encourage creative policy shifts. For example, in Montana the Agency had to expend much effort relative to a small number of permits.¹²⁷

IV. DISCUSSION THEME 2: “CUT AND RUN” — PRIMACY TERMINATION

A. Issue Formulation

Discussions over scenarios of state primacy termination have flared up again in light of budgetary shortfalls in the states, historic failure by the EPA to increase its

¹²³ U.S. Env'tl. Protection Agency, National Pollutant Discharge Elimination System, State and Tribal Program Authorization Status, *available at* <http://cfpub.epa.gov/npdes/statestribes/astatus.cfm> (last visited Feb. 12, 2004) (explaining that, if a state had received primacy over the base program but not over federal facilities, EPA would continue to issue permits to federal facilities (such as military bases, national parks, and federal lands)).

¹²⁴ RECHTSCHAFFEN & MARKELL, *supra* note 1, at 93-94.

¹²⁵ *See* Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984). *Chevron* established a two-pronged approach governing judicial control of an administrative agency entrusted with implementing a statute: (1) if Congress has directly spoken to the matter at hand, then the statutory disposition comes to bear and no further analysis is required; (2) however, absent such unambiguous language, the analysis proceeds and the court defers to the agency interpretation if permissible and reasonable.

¹²⁶ Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

¹²⁷ Interview with Richmond, *supra* note 97.

UIC state grants budgets, looming federal spending cuts, evolving federal requirements and rising performance bars, and increasing devolution of other significant federal programs.¹²⁸ The states emphasize that they were never able to secure an inflation adjuster or some other prioritization mechanism to maintain a steady share of federal aid in the context of primacy programs.¹²⁹ Thus, the relative burden shouldered by the authorized states has steadily been rising over the years. In the late 1980s, the EPA supported more than 40% of the effort in the Indiana Department of Environmental Management.¹³⁰ However, in the mid-1990s that figure sank to less than 20%.¹³¹ The State of Nebraska is said to have incurred a funding loss of 10% to 15% due to parameter changes, such as changing demographics, and corresponding adjustments under the EPA's disbursement formula.¹³² While it may take at least 50 million dollars in the first three years to run a solid program, the EPA annually makes available 10.5 million dollars spread across the entire nation for all UIC program classifications.¹³³ For a single state agency like the Nebraska Department of Environmental Quality that translates to one full-time employee.¹³⁴ Measures to change this trend have thus far not been made by the EPA. For example, in the spring of 2003, the Environmental Council of States (ECOS) and the EPA abandoned their bid to use federal enforcement staff in the context of primacy programs.¹³⁵ Such an agreement could have meant significant relief for the states since at present state agencies carry out about 80 percent of the enforcement actions under the federal environmental laws.¹³⁶

The ECOS has therefore called on the EPA to advocate and ensure that future federal budgets provide adequate funding to the states. In light of the funding challenges faced by many primacy programs, the states have urged the EPA to refrain from adding new layers of federal program requirements into primacy programs without a corresponding fair share of federal resources. Examples of costly new federal requirements in the context of the UIC program include performance measure activities, new categories of Class V well inventories, and electronic reporting and recordkeeping requirements under the Cross-Media Electronic Reporting and Recordkeeping Rule (CROMERRR).¹³⁷

¹²⁸ *States Urge EPA to Push White House for Sufficient Funds in FY05*, INSIDE EPA, at 1, 6-7 (Aug. 15, 2003).

¹²⁹ *Id.* at 6.

¹³⁰ Kathy Prosser, *From Paternalism to Partnership: Changing the State-Federal Relationship*, 1 (2) ECOS – THE ENVIRONMENTAL COMMUNIQUÉ OF THE STATES, at 2 (Nov./Dec. 1993) (on file with the authors).

¹³¹ *Id.*

¹³² Interview by Markus G. Puder with Marty Link, Neb. Dep't of Env'tl. Quality (Sept. 12, 2003).

¹³³ Interview with Taylor, *supra* note 94.

¹³⁴ Interview with Link, *supra* note 132.

¹³⁵ *ECOS, EPA Abandon States' Bid to Use Federal Enforcement Staff*, INSIDE EPA, at 4-5 (May 12, 2003).

¹³⁶ RECHTSCHAFFEN & MARKELL, *supra* note 1, at 3. See also Interview with Bryson, *supra* note 9 (noting that even if the state invites the Agency to join, the EPA has to notify the state to correct the problem in a specified period, and, in the absence of a correction, can take over the lead in the enforcement action). This provides for a deterrent to joint EPA-state enforcement actions.

¹³⁷ Interview by Markus G. Puder with Stan Belieu, Neb. Oil & Gas Conservation Comm'n (Aug. 5, 2003).

B. Law and Policy Considerations

In addition to program withdrawal, the EPA's UIC regulations do recognize the possibility of a program return. The ability of a primacy state to transfer back to the federal government a program that is federal in origin expresses the exit option for the states in the cooperative federalism equation.¹³⁸ The federal government is barred from "commandeering" the states to continue enacting and enforcing a federal program.¹³⁹

However, resource constraints limit the EPA's disposition to welcoming back programs after primacy has been granted to willing and able states.¹⁴⁰ Summarizing this predicament, Congressional testimony by former EPA Administrator Browner in 1993 offered that "[t]here are some States that have seriously considered returning primacy to the Federal government. I will be very honest with you, we don't have the resources to manage even one major State if primacy were returned."¹⁴¹

C. Precedents?

When it comes to primacy termination, a state, unable or unwilling to retain a delegated program, could "provoke" and wait for the EPA to initiate withdrawal proceedings or, on its own initiative, request a voluntary transfer back to the EPA. Few case studies involving program termination scenarios exist. While examples in the SDWA's UIC program involve aborted cases, the picture is different in recent instances involving the delegated prevention of significant deterioration (PSD) programs under the new source review (NSR) rules of the Clean Air Act (CAA).¹⁴² Most NSR rules require large industrial plants to install new pollution control equipment when modifications increase emissions.¹⁴³ PSD permits are required in areas that have attained federal air quality standards to ensure new sources do not catapult the area out of attainment.¹⁴⁴ In the winter of 2002/03 the EPA made revisions¹⁴⁵ that are said to have relaxed standards.¹⁴⁶ The revisions were scheduled

¹³⁸ See RECHTSCHAFFEN & MARKELL, *supra* note 1, at 41-42 (discussing Tenth Amendments limits on the power of the federal government to require state action).

¹³⁹ *Id.* at 42.

¹⁴⁰ *Id.* at 20. See, e.g., Steinzor, *supra* note 8, at 223-24 (arguing that the EPA would be overtaxed by a "takeover of even a few state regulatory programs" because the major federal statutes provide for "citizens' suits against the EPA when the EPA misses the deadlines for fulfilling its regulatory quotas, federal regulators have no choice but to continue to commit resources to writing new regulations even as their ability to implement existing requirements all but collapses"). Some estimate that compared to a state, the federal government would have to expend between twice and five times of the costs. See Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2391 (1996) (offering that "a federally-run . . . program might result in greater compliance").

¹⁴¹ See RECHTSCHAFFEN & MARKELL, *supra* note 1, at 20 n.51 (quoting Rena I. Steinzor & William F. Piermattei, *Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?*, 28 ELR 10563 n.105 (Oct. 1998)).

¹⁴² See 42 U.S.C. §§ 7475-7479 (2003). In 1978, the EPA published final regulations at 40 C.F.R. § 52.21 (1978) implementing the PSD program. See 43 Fed. Reg. 26,403 (June 19, 1978) (final rule).

¹⁴³ See Steve Cook, *Publication of New Source Review Changes Opens Period for Comments, Lawsuit Filing*, 250 DAILY ENVT. REP. A-4 (Dec. 31, 2002).

¹⁴⁴ For an overview, see STEVEN FERRY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 170-72 (2d ed. 2001).

¹⁴⁵ See 67 Fed. Reg. 80,186 (Dec. 31, 2002) (final rule).

to be effective on March 3, 2003.¹⁴⁷

I. Withdrawal

The EPA has generally been reluctant to proceed down the path of program withdrawal.¹⁴⁸ In light of the high thresholds for withdrawal and the significant resources and costs involved with direct implementation, the Agency usually resorts to “golden reign” sanctions,¹⁴⁹ negotiations of new deadlines, or overfilings,¹⁵⁰ rather than revocation of a state program.¹⁵¹

In the realm of UIC program withdrawal scenarios, two examples have garnered national attention. In the mid-1980s, the EPA was on the verge of withdrawing the Section 1425 Class II Program from the (former) Illinois Department of Mines and Minerals (now the Department of Natural Resources) because of “poor performance and dereliction of duty.”¹⁵² After the EPA’s Headquarters and Region 5 had hammered home the seriousness of the case and the Agency’s withdrawal threats were delivered as far as the Governor’s Office, the state restored program integrity and pulled back from the brink.¹⁵³ A veritable UIC saga arose in Alabama in the 1990s over hydraulic fracturing of coal bed methane wells in the wake of a decision by an appeals court that the practice fell within the definition of underground injection and required UIC regulation.¹⁵⁴ Implementing a judicial order (*writ of mandamus*),¹⁵⁵ the EPA initiated proceedings to withdraw Alabama’s Section 1425 Program.¹⁵⁶ In the absence of codified rules governing the withdrawal of programs

¹⁴⁶ See Cook, *supra* note 143, at A-4 to A-5 (referring to a charge by attorneys general of nine Eastern states and environmental groups).

¹⁴⁷ *Id.*

¹⁴⁸ For a historic reference, see Steinzor, *supra* note 8, at 223 (recounting that in 1994, nine states were threatened by the EPA with the withdrawal hammer: California, Colorado, Hawaii, Indiana, Kansas, Maryland, Pennsylvania, South Dakota, and Virginia).

¹⁴⁹ The palette includes mere cajoling, denial of federal aid or permits, or conditional spending. See, e.g., RECHTSCHAFFEN & MARKELL, *supra* note 1, at 106-07; see also, e.g., Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 381-82 (2000); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918-20 (1995).

¹⁵⁰ See generally Puder & Veil, *supra* note 2.

¹⁵¹ See Zahren, *supra* note 149, at 415 (“[A] large number of minor violations still do not warrant the ‘hydrogen bomb response’ of the revocation of a state’s program authorization.”); Stephen C. Robertson, Note, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 593, 606 (1999) (“Given that the states perform the vast majority of site inspections, the practical reality of the EPA’s taking over an entire state’s inspection program is ‘more theoretical than real.’”).

¹⁵² Interview with Salazar, *supra* note 94; Interview with Taylor, *supra* note 94; Interview with Bruce Kobelski, *supra* note 109. At the time the Class II program was basically a one-person operation. Some alleged that pre-written permits were issued without proper technical review.

¹⁵³ Interview with Salazar, *supra* note 94; Interview with Taylor, *supra* note 94; Interview with Bruce Kobelski, *supra* note 109.

¹⁵⁴ Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467 (11th Cir. 1997) (LEAF I). For background, see Markus G. Puder, *Did the Eleventh Circuit Crack “Frac?” Hydraulic Fracturing After the Court’s Landmark LEAF Decision*, 18 VA. ENVTL. L.J. 507 (1999).

¹⁵⁵ See *In re* Legal Envtl. Assist. Found., Inc., Order Granting Petitioner’s Petition of Writ of Mandamus to the EPA, No. 98-06929 (11th Cir. Feb. 18, 1999) (copy on file with the authors).

¹⁵⁶ See 64 Fed. Reg. 27,744 (May 21, 1999) (proposed rule).

approved under the equivalency route, the Agency applied the regulations promulgated for Section 1422 Programs.¹⁵⁷ However, after Alabama had made changes to its UIC program,¹⁵⁸ the EPA considered the state's changes sufficient to return into compliance and approved the revised program.¹⁵⁹ At the time two rather interesting questions were discussed. The first related to the type of program that EPA would have been required to implement in the post-withdrawal era.¹⁶⁰ The EPA was prepared to impose and codify in its direct implementation regulations for Alabama the basic federal Class II requirements, possibly augmented or modified by coal bed methane hydraulic fracturing rules.¹⁶¹ The other issue was embodied in the

¹⁵⁷ See *id.* (explaining that the codified withdrawal regulations were promulgated for the withdrawal of a Section 1422 Program; and “[i]n lieu of different express regulatory provisions for the withdrawal of Section 1425 Programs . . . , EPA is following the procedures at 40 CFR 145.34(b) in proposing to withdraw Alabama’s Section 1425 Program”).

¹⁵⁸ See State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama’s Class II UIC Program Revision, 64 Fed. Reg. 56,986 (proposed October 22, 1999)(to be codified at 40 C.F.R. pt. 147).

¹⁵⁹ See State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama’s Class II UIC Program Revision, 65 Fed. Reg. 2889 (Jan. 19, 2000)(to be codified at 40 C.F.R. pt. 147). The EPA’s approval was relitigated. See *Legal Envtl. Assistance Found. v. EPA*, 276 F.3d 1253 (11th Cir. 2001) *LEAF II*, *cert. denied*, 537 U.S. 989 (2002) (holding that (1) the EPA’s decision to use the approval route under Section 1425 was based on a permissible construction of the statute; (2) the EPA’s decision to classify hydraulic fracturing of coal beds to produce methane as a “Class II-like underground injection activity” was inconsistent with the EPA’s well classification scheme; and (3) Alabama’s UIC program regulating hydraulic fracturing of coalbeds complied with the requirements of the SDWA). The court remanded the case “to EPA to determine whether Alabama’s revised UIC program complies with the requirements for Class II wells.” In the latest installment of the drama, LEAF filed a petition for a writ of mandamus directing the EPA to “immediately ‘determine whether Alabama’s revised [UIC] program complies with the requirements for Class II wells.’” *Petition for Writ of Mandamus to United States Environmental Protection Agency* (2004) (copy on file with the authors). The EPA responded that the petition should be denied because a writ of mandamus was governed by high thresholds and not warranted in light of the Agency’s reasonable progress and schedule towards reaching a final determination. See *In re: Legal Envtl. Assistance Found.*, No. 04-10473 (2004) (copy on file with the authors). In June 2004, the EPA published the final version of its own study of hydraulic fracturing. U.S. Envtl. Protection Agency, Office of Water, Office of Ground Water and Drinking Water, Drinking Water Protection Division, Prevention Branch, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, EPA 816-R-04-003 (June 2004). In the course of its study, the EPA reviewed over 200 peer-reviewed publications, interviewed approximately 50 employees from state or local government agencies, and communicated with approximately 40 citizens who were concerned that coalbed methane production affected their drinking water wells. The EPA also searched for confirmed incidents of drinking water well damage. Based on the information collected and reviewed, the EPA concluded that the injection of hydraulic fracturing fluids into coalbed methane wells poses little or no threat to USDWs, and does not justify additional study at this time. On July 15, 2004, the EPA published a notice in the Federal Register announcing its final determination “that the hydraulic fracturing portion of Alabama’s UIC program relating to coal bed methane production, which was approved under [S]ection 1425 of the SDWA, complies with the requirements for Class II wells within the context of [S]ection 1425’s approval criteria. 69 Fed. Reg. 42,341 (2004) (containing the EPA’s response to court remand and public comments). Some have offered that the administrative record assembled by the EPA may effectively end the LEAF litigation saga. See Matt Spangler, *Group Drops Hydraulic-Fracturing Fight after EPA Finds Little Threat to Water*, *INSIDE ENERGY* 13 (June 28, 2004) (quoting David Ludder, LEAF president and general counsel); Interview by Markus G. Puder with Dennis Lathem (Coalbed Methane Association of Alabama (June 30, 2004)) (noting that LEAF will focus their attention on other issues).

¹⁶⁰ Interview by Markus G. Puder with Robert F. Van Voorhees, Partner, Bryan Cave LLP (Jan. 21, 2004).

¹⁶¹ Interview with Bruce Kobelski, *supra* note 109 (noting that a requirement to obtain federal Class II permits could have caused problems for the Class II well operators in Alabama). The EPA would have

argument that once withdrawn, a program originally approved pursuant to the optional program equivalency demonstration offered by Section 1425 of the SDWA could not be re-approved under that avenue.¹⁶² Re-approval in the wake of withdrawal, it was argued, would require a showing that the EPA's more stringent minimum technical criteria and standards promulgated under Section 1422 of the SDWA were met.¹⁶³

In a relatively recent example involving the CAA PSD program, the EPA rescinded delegation of permitting authority from several California and Nevada air districts having expressed their inability to implement the recent federal program revisions.¹⁶⁴ Some have argued that the EPA decision was driven by political considerations, since the states did not want to make changes mirroring the federal reforms, while the EPA did not want to make an equivalency determination, implying that their new program was less stringent than the previous status quo.¹⁶⁵

2. *Voluntary Return*

In the realm of voluntary program transfer, the first round of rumblings dates back to the 1990s.¹⁶⁶ In the UIC arena, the Illinois Environmental Protection Agency (Illinois EPA) prepared a package requesting the transfer of Section 1422 Program primacy back to the EPA.¹⁶⁷ The state agency argued that, due to the overall lack of funds and resources, it was not in a position to effectively run the program, especially the Class V portion.¹⁶⁸ While they had been given full primacy over Class I, III, IV, and V wells, the Illinois EPA spent most of its resources on the Class I program.¹⁶⁹ When pressured to take measures to regulate Class V wells, the state agency expressed the desire to return primacy to the EPA.¹⁷⁰ The EPA's Region 5 prepared the documentation, including a draft Federal Register notice, to take back the program.¹⁷¹ However, the EPA Headquarters, Office of Water, negotiated a last-

codified the direct implementation rules for Alabama as an EPA-administered program in Subpart B (Alabama) of 40 C.F.R. Part 147. For the current status, see 40 C.F.R. §147.52 ("The UIC program for hydraulic fracturing of coal beds in the State of Alabama, except those on Indian lands, is the program administered by the State Oil and Gas Board of Alabama, approved by EPA pursuant to Section 1425 of the SDWA on December 22, 1999 and effective on January 19, 2000").

¹⁶² For a reference to this proposition, see Puder, *supra* note 154, at 538 n.210.

¹⁶³ *See id.*

¹⁶⁴ The rescission was effective March 3, 2003 (the effective date of the EPA's revisions to the PSD program). The corresponding withdrawal notice was published by the EPA on April 21, 2003. *See* 68 Fed. Reg. 19,371 (Apr. 21, 2003) (to be codified at 40 C.F.R. pt. 51).

¹⁶⁵ *Shelving State Equivalency Plans, EPA Assumes Authority for Clean Air PSD Programs in Several Areas*, INSIDE EPA, at 3 (Apr. 25, 2003).

¹⁶⁶ For a past primacy crises brewing in the early 1990s, *see* Steinzor, *supra* note 8, at 223 n.409 (referencing "a 1992 press account of a meeting between then-EPA Administrator William Reilly and several state governors who had requested an opportunity to surrender control of their drinking water programs, a senior EPA official, James R. Elder, described the situation as a "crisis" and warned that the program could fall "flat on its face" unless the government took effective action").

¹⁶⁷ Interview by Markus G. Puder with Bur Filson, Ill. Env'tl Protection Agency (Sept. 12, 2003).

¹⁶⁸ Interview with Taylor, *supra* note 94.

¹⁶⁹ Interview with Kobelski, *supra* note 109.

¹⁷⁰ *Id.*

¹⁷¹ Interview with Salazar, *supra* note 94.

minute deal with the Illinois EPA to abort the return process.¹⁷² Some have characterized the arrangement, which was reached without Regional Office involvement, as a minimalist preservation of the status quo.¹⁷³ Others have argued that Illinois was effectively not in a position to return program primacy in light of state law precluding the return of federal funding if offered.¹⁷⁴ In follow-up, Illinois and the EPA's Region 5 entered into an Innovative Approach partnership agreement enabling the state to carry out their Class V mission, with assistance from the Regional Office.¹⁷⁵ In consequence, the state kept the program. Similarly, at the same time when the Illinois story unfolded, Indiana articulated, but never implemented, intentions to return its approved wastewater and hazardous waste permitting programs to the federal government.¹⁷⁶

A case example of a full voluntary program return again involves the EPA's recent revisions to the PSD program and the Commonwealth of Massachusetts, which had assumed through delegation the administration of the EPA's PSD rules instead of adopting its own rules.¹⁷⁷ Massachusetts followed the procedure outlined in the original delegation approval letter of June 30, 1982, signed by the Acting Director of the Air Management Division of EPA Region 1: "[u]nless EPA receives a written notice of objection within 30 days of notification of [amendments to the federal regulations governing the delegated program], the Commonwealth will be deemed to have accepted authority for implementing the amended regulation."¹⁷⁸ The EPA's program amendment had been sent to the Commonwealth of Massachusetts by letter of January 30, 2003, from the Regional Administrator of the EPA's Region 1 to the Commissioner of the Massachusetts Department of Environmental Protection (MADEP).¹⁷⁹ The corresponding objection had been forwarded through letter of February 27, 2003, from the Acting Commissioner of MADEP to the Regional Administrator, serving notice that Massachusetts would no longer accept authority for the implementation of the federal PSD program as of March 3, 2003 (the effective date of the EPA's revisions to the PSD program).¹⁸⁰ In consequence, the program authority reverted to the EPA on that date and the Agency

¹⁷² Interview with Taylor, *supra* note 94. The chief counterparts at the time were the EPA's Assistant Administrator for the Office of Water, Robert Perciasepe, and Illinois EPA Director Mary A. Gade. See interview with Bruce Kobelski, *supra* note 109.

¹⁷³ *Id.* (referring to unspecified sources).

¹⁷⁴ Interview with Van Voorhees, *supra* note 160; Interview with Kobelski, *supra* note 109.

¹⁷⁵ See Interview with Bruce Kobelski, *supra* note 109 (noting that the Innovative Approach process was championed by the ECOS).

¹⁷⁶ Prosser, *supra* note 130, at 1-2.

¹⁷⁷ See David Safford, *EPA Accepts Massachusetts Decision to Return Permit Program to Federal Agency*, DAILY ENVT. REP., June 23, 2003, at A5; Interview by Markus G. Puder with Brendan McCahill, U.S. Env'tl. Protection Agency, Region 1 (Sept. 12, 2003).

¹⁷⁸ Letter from Harley F. Laing, Acting Director, U.S. Env'tl. Protection Agency, Region 1, Air Management Division, to Kenneth A. Haag, Director, Massachusetts Department of Environmental Quality Engineering, Division of Air Quality Control (June 30, 1982).

¹⁷⁹ Letter from Robert W. Varney, Regional Administrator, U.S. Environmental Protection Agency, Region 1, to Lauren Liss, Commissioner, Massachusetts Department of Environmental Protection (Jan. 30, 2003).

¹⁸⁰ Letter from Edward P. Kunce, Acting Commissioner, Massachusetts Department of Environmental Protection, to Robert W. Varney, Regional Administrator, U.S. Environmental Protection Agency, Region 1 (Feb. 27, 2003).

published a corresponding information notice in the Federal Register on June 17, 2003.¹⁸¹

D. Summary Observations

While codified in the EPA's UIC regulations, a voluntary program return from a primacy state back to the federal government has thus far never been completed. Procedural requirements in the context of returning UIC programs have therefore not been tested in reality. Since primacy approval is requested by a letter from the Governor, the *actus contrarius* of initiating primacy return would in all likelihood be subject to the same requirement.¹⁸²

In light of the emerging contours and potentially daunting and resource-laden requirements associated with running the very large, but relatively young Class V program, the historic paper tiger of program return has now become a real and viable possibility. A counter-balancing consideration relates to the overall responsibility of the states to protect public health and the environment. The EPA therefore strongly discourages states from returning primacy programs.¹⁸³ If the states fail, so the thinking goes, then the Agency fails.¹⁸⁴

In addition, other considerations may enter the decision process within a state relative to retaining or returning a UIC primacy program. Industry stakeholders may exercise pressure because they prefer to continue working the familiar state agency. Also, in view of the EPA's likely posture of not re-approving a lost Section 1425 Program under that route, program return may prejudice a future decision to re-apply for primacy under more burdensome conditions.

V. CONCLUSIONS AND PERSPECTIVES

The two issues discussed in this article — state authority for program portions and return of primacy programs — reflect the tensions and challenges involved with securing and maintaining state implementation of federal laws and policies.¹⁸⁵ Yet, the picture is not bleak. States and tribes continue to be interested in obtaining UIC program primacy under the auspices of the EPA's present regulatory and policy framework.¹⁸⁶ In the case of Florida and Arizona the primacy approval process has stalled. Florida failed to respond to program deficiency review findings by the EPA's Region 4 with respect to the state's Class II program primacy petition.¹⁸⁷ Arizona was unsuccessful in securing Class V primacy since the state's proffered implementation, through the existing aquifer protection program, was deemed insufficient by the EPA.¹⁸⁸ In contrast, the tribal program approval requests are

¹⁸¹ Information Notice, 68 Fed. Reg. 35,881 (June 17, 2003).

¹⁸² Interview with Salazar, *supra* note 94.

¹⁸³ Interview by Markus G. Puder with Roy Simon, U.S. Env'tl. Protection Agency (Sept. 15, 2003).

¹⁸⁴ RECHTSCHAFFEN & MARKELL, *supra* note 1, at 21 (referencing a report prepared by the EPA).

¹⁸⁵ See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

¹⁸⁶ Interview with Kobelski, *supra* note 94.

¹⁸⁷ Interview by Markus G. Puder with Bruce Kobelski, U.S. Env'tl. Protection Agency (June 30, 2004).

¹⁸⁸ Interview with Kobelski, *supra* note 94 (the program was deemed insufficient in terms of command and control features).

moving forward. The Fort Peck Tribe has officially applied for Class II primacy and the EPA's Region 8 is in the process of re-noticing all review milestones.¹⁸⁹ The Navajo Nation has also officially applied for Class II UIC primacy, and their approval request is still undergoing review by the EPA's Region 6.¹⁹⁰ EPA approval of the petitions by the Fort Peck Tribe or the Navajo Nation would mark a milestone and grant, for the first time in the UIC program history, primacy to Native American tribes.¹⁹¹

The EPA's approach to primacy approval, revision, and termination reflects the cooperative federalism structure entrusting the EPA with ultimate responsibility for program delivery, while giving the states the option of entering and exiting the picture. The idea is to enlist and deputize willing and able states as "environmental protection agencies across the nation."¹⁹² Over the decades states have made significant investments in their capacity to administer environmental programs.¹⁹³ However, the steep increase in the number of programs now administered under primacy agreements coupled with the decrease of federal financial leverage has led to strains in the federal-state relationship.¹⁹⁴

Those interested in averting a revolution¹⁹⁵ argue that rather than embarking on a collision course, the EPA and the states should harness the elasticity of the cooperative federalism formula to promote their mutual interest in program success. If the states do well, the EPA succeeds — and if the EPA does well, the states theoretically should also succeed. This will undoubtedly require some give and take on both sides.

¹⁸⁹ Interview with Kobelski, *supra* note 94.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See RECHTSCHAFFEN & MARKELL, *supra* note 1, at 19 (quoting a staffer of ECOS).

¹⁹³ See *id.* (offering that, according to ECOS, state spending in the aggregate now exceeds that of the federal government).

¹⁹⁴ Steinzor, *supra* note 8, at 223 ("[M]any [states] are clearly getting to the point where the loss of primacy would come as a relief to state officials.").

¹⁹⁵ *Id.* at 223-24.