

ENVIRONMENTAL LAW

The fading luster of carbon capture

Carbon dioxide is used to carbonate beverages, enhance plant growth and for decades, in enhanced oil recovery, where it's injected into O&G formations to aid extraction.

Many say that CO₂ causes or contributes to climate change. In 2009, EPA issued its "endangerment finding" in which EPA determined that current and projected concentrations of CO₂ and other GHGs in the atmosphere threaten the public health and welfare.

The idea of capturing CO₂ before it enters the atmosphere and using it or injecting it for perpetual storage, or sequestration, came about to mitigate the anticipated impacts of climate change. To facilitate CCUS, Congress created the 45Q tax credit. The Biden administration and Louisiana's prior governor also endorsed CCUS as a key climate strategy.

EPA is reviewing the endangerment findings and is expected to rescind them. That action would undermine the legal basis for a host of regulations designed to reduce emissions of GHG and would also seem to negate the stated need for CCUS. Louisiana,

though, seems to have already moved on from CCUS. Not only has the current Governor dropped climate change as a rallying cry, but the Louisiana Legislature has also enacted multiple provisions over the last two to three years that create roadblocks for a successful CCUS project.



Originally, the legislature believed that "geologic storage of carbon dioxide will benefit the [state] by reducing greenhouse gas emissions." This year, however, that language was stripped from the statute.

Multiple requirements have been added over the last two years. For example, an applicant for a CO₂ injection permit must submit an environmental analysis to address whether the potential and real adverse

environmental effects of the proposed permit activity have been avoided to the maximum extent possible and to perform a cost-benefit analysis weighing the environmental impact costs versus the social and economic benefits of the proposed activities. Additionally, a storage operator must conduct groundwater monitoring above the confining zone.

The power to exercise eminent domain has also been made a bit more burdensome. For example, the right to use eminent domain for "the expropriation of reservoir storage rights for geologic storage" was recently removed. As to pipelines, eminent domain was available after receiving a certificate of public convenience and necessity. Previously, the Secretary of the Department of Conservation and Energy "shall" issue the certificate if the required showing is made. Now, the Secretary "may" issue the certificate.

Additionally, the requirements for obtaining the certificate were revised. Now, in addition to showing that the certification is or will be in the present or future public interest, the Secretary must also find that either the use

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of expropriation is required solely because absentee owners cannot be located after a reasonable attempt or the applicant is or intends to operate as a common carrier.

The common carrier requirement is new. When a complaint or application concerning the classification of a pipeline as a common carrier is filed with the Public Service Commission (PSC), the commission may request a 'secretarial review' with the Secretary. In that administrative process, the Secretary must consider such matters as connectivity, necessity and alternative routes and then issue findings to the PSC. This will certainly slow down pipeline approvals.

Applicants for CO₂ injection-related permits face ever-increasing regulatory hurdles. While 45Q credits may still exist and potentially be available, getting to the point where those credits can be obtained seems increasingly difficult with each legislative session.

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