

UIC - 1

**MEMORANDUM
OF
AGREEMENT**

Chavez, Carl J, EMNRD

From: Brancard, Bill, EMNRD
Sent: Wednesday, December 12, 2018 1:32 PM
To: Gillespie, David; Dellinger, Philip; Pham, Lisa (Pham.Lisa@epa.gov)
Cc: Sanchez, Daniel J., EMNRD; Griswold, Jim, EMNRD; Chavez, Carl J, EMNRD; Knight, Andrew, NMENV
Subject: FW: New Mexico UIC Program Revision
Attachments: UIC Class I MOA Amend 12-18.pdf; WQCC UIC Program Description 12-18.pdf; WQCC UIC AG LT 12-18.pdf

David, Phil, Lisa,

Attached please find 3 documents to supplement the UIC Program Revision submitted by the State of New Mexico in September 2016:

- a) Amendment No. 1 to the Substitute Memorandum of Agreement between the State of New Mexico and U.S. EPA;
- b) Revisions to Program Description; and
- c) Revised Attorney General's Letter

The Amendment to the MOA includes the language agreed to by the State and EPA and has been signed by all three State agencies. The Program Description has been amended to include a reference to the MOA Amendment in Section VI at the bottom of page 4. The Attorney General's Letter has been revised to add the next to last paragraph which addresses a provision in section 20.6.2.3106 NMAC.

We really appreciate all the efforts at EPA to move this Program Revision forward. Please let us know if you have any other questions or concerns.

Sincerely,
Bill Brancard

General Counsel
NM Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
505.476.3210
Bill.brancard@state.nm.us

From: Brancard, Bill, EMNRD
Sent: Monday, September 12, 2016 4:08 PM
To: 'Pham, Lisa' <Pham.Lisa@epa.gov>; Dellinger, Philip <dellinger.philip@epa.gov>
Cc: Griswold, Jim, EMNRD <Jim.Griswold@state.nm.us>
Subject: RE: New Mexico UIC Program Revision

Lisa, Phil,

We have placed the documents on a CD, which will be mailed tomorrow. Attached is the cover letter, which will also be on the CD.

If EPA believes that a meeting to discuss the submittal would be useful, NM OCD is willing to meet.

Thank you for all your help on this matter,
Bill Brancard

General Counsel
NM Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
505.476.3210
Bill.brancard@state.nm.us

From: Pham, Lisa [<mailto:Pham.Lisa@epa.gov>]
Sent: Monday, September 12, 2016 12:03 PM
To: Brancard, Bill, EMNRD <bill.brancard@state.nm.us>
Cc: Dellinger, Philip <dellinger.philip@epa.gov>
Subject: FW: New Mexico UIC Program Revision

Good afternoon,

We would like to receive these on a CD so please mail them to the following address:

Philip Dellinger
Chief, Groundwater and UIC Section
U. S. EPA Region 6 (6WQ-SG)
1445 Ross Avenue
Dallas, Texas 75202

Thank you very much.

Lisa Pham
Environmental Engineer
214-665-8326

From: Brancard, Bill, EMNRD [<mailto:bill.brancard@state.nm.us>]
Sent: Monday, August 29, 2016 5:20 PM
To: Dellinger, Philip <dellinger.philip@epa.gov>
Cc: Griswold, Jim, EMNRD <Jim.Griswold@state.nm.us>
Subject: New Mexico UIC Program Revision

Phil,

We are ready to submit our Program Revision to EPA. The package is too large to be sent via e-mail, so our IT folks have two ideas. One, is if EPA has a link that we can upload to, we will do so. If not, our folks can create a link that EPA can download the documents from.

If all else fails, we can place the documents on a CD and mail them to you.

Let me know what you would like us to do.

Thanks,
Bill Brancard

General Counsel
NM Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
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**UNDERGROUND INJECTION CONTROL PROGRAM
SUBSTITUTE MEMORANDUM OF AGREEMENT BETWEEN
THE STATE OF NEW MEXICO
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION VI

AMENDMENT NO. 1**

I. Substitute Agreement

The New Mexico Water Quality Control Commission (Commission), the New Mexico Environment Department (NMED), and the New Mexico Energy, Minerals, and Natural Resources Department (EMNRD), on behalf of the State of New Mexico (State), and the Regional Administrator, United States Environmental Protection Agency (EPA), Region VI (Regional Administrator) entered into a Substitute Memorandum of Agreement dated March 17, 2004 (Substitute Agreement) to establish responsibilities and procedures pursuant to 40 C.F.R. Parts 122, 144 and 145 and 146 for the State of New Mexico Underground Injection Control (UIC) Program for Class I, III, IV and V wells (State Program), as authorized by Part C of the Safe Drinking Water Act (P.L. 93-523, as amended). The State and EPA, pursuant to the authority in Section III ("Modification of Agreement") of the Substitute Agreement, wish to modify the Substitute Agreement as follows. Although New Mexico does not use variances in its UIC program, EPA is concerned about the potential availability of a variance as a result of 20.6.2.1210 NMAC. Therefore, EPA and New Mexico recommend the following amendment to the Substitute Agreement.

II. Amendment

Section XVIII ("Permit Review") of the Substitute Agreement is modified to add the following paragraph:

Should a variance petition be filed with the Commission pursuant to 20.6.2.1210 NMAC that pertains to any UIC well, NMED or EMNRD shall oppose any such petition. New Mexico and EPA acknowledge that any variance petition granted by New Mexico pursuant to 20.6.2.1210 NMAC shall not be used for the injection of any waste restricted from disposal into UIC Class I wells by 40 C.F.R. 148 unless an exemption from such restrictions has been granted by EPA in accordance with 40 C.F.R. 148.20. NMED and EMNRD agree to pursue an amendment to the Commission regulations at the next available opportunity to seek to remove the applicability of these variances to UIC wells. If any such petition is requested, NMED or EMNRD will provide a copy of the petition to EPA Region 6. Failure to respond by EPA to any such petition sent to EPA shall not be considered as evidence of EPA approval of such petition.

III. No Other Changes.

All other provisions in the Substitute Agreement remain in full force and effect.

Date: 12/14/18


Chair
Water Quality Control Commission

Date: 10/22/18


Secretary
New Mexico Environment Department

Date: 10/19/2018


Secretary
Energy, Minerals and Natural Resources Department

Date: _____

Regional Administrator
U.S. Environmental Protection Agency, Region VI

REVISIONS TO PROGRAM DESCRIPTION
NEW MEXICO UIC PROGRAM: CLASS I, III, IV AND V WELLS

I. Summary

The New Mexico Water Quality Control Commission (“WQCC” or “Commission”) has adopted amendments to the WQCC rules governing underground injection control to authorize the State of New Mexico to allow the approval of Class I hazardous waste injection wells but only for petroleum refineries disposing the waste generated at the refinery (the “Program Revision”). The Program Description, originally submitted for the approval of the New Mexico Class I, III, IV and V well program (40 CFR 147.1601), is hereby amended to incorporate this Program Revision.

The WQCC adopted amendments to existing rules and adopted new rule provisions, including federal rules adopted by reference. A list of the rule sections that were amended and added is provided in Appendix A. The full text of the codified rule with the revisions is provided in Appendix B. At a public meeting on July 14, 2015, the WQCC adopted the Program Revision after public notice and a public hearing (see “Public Participation”). The rule revisions were published in the New Mexico Register on August 14, 2015, and became effective on August 31, 2015. The rule revisions were codified in the New Mexico Administrative Code at 20.6.2.3000 through 20.6.2.5399 NMAC.

II. Authority

The U.S. Environmental Protection Agency (“EPA”) approved the UIC program for Class I, III, IV and V injection wells in New Mexico effective August 10, 1983. The program is administered by the New Mexico Water Quality Control Commission, the Environmental Improvement Division (now known as the New Mexico Environment Department or “NMED”), and the Oil Conservation Division (“OCD”) of the New Mexico Energy, Minerals and Natural Resources Department (“EMNRD”). 40 CFR 147.1601.

Under the New Mexico Water Quality Act, the WQCC is mandated to adopt regulations “to prevent or abate water pollution in the state”. NMSA 1978, §74-6-4(E). The WQCC may adopt regulations to require persons to obtain from a constituent agency designated by the WQCC a permit for the discharge of any water contaminant. NMSA 1978, §74-6-5(A). The WQCC adopted the regulations that are incorporated by reference into the approved UIC program under the federal rules. 40 CFR 147.1601(a). The WQCC regulations, as recodified and amended, are found in the New Mexico Administrative Code (“NMAC”) at 20.6.2 NMAC. (<http://www.nmcpr.state.nm.us/nmac/>)

Under the Water Quality Act, the WQCC must assign responsibility for the administration of its regulations to its “constituent agencies”. NMSA 1978, §§74-6-4(F) and 74-6-2(K) (list of constituent agencies). In general, the WQCC has delegated the administration of its regulations to only two constituent agencies: to the OCD for oil and natural gas facilities and

to the NMED for all other facilities. For this Program Revision, the WQCC explicitly delegated to the OCD the authority to regulate certain Class I hazardous waste injection wells in New Mexico. 20.6.2.5300(C) NMAC (see Section V: Agency).

III. Program Revision

The WQCC has amended its rules governing underground injection control to authorize the State of New Mexico to allow the approval of Class I hazardous waste injection wells but only for petroleum refineries disposing the waste generated at the refinery. The requirements adopted by New Mexico are at least as stringent, and in some cases more stringent, than the corresponding federal requirements for Class I hazardous waste wells.

The specific rule changes, as filed with the New Mexico State Records Administrator, are provided in Appendix C. Appendix D provides a summary of the rule changes for each section. Appendix E is a cross reference table that links the federal regulations governing hazardous waste UIC wells to the state regulation that is either the equivalent regulation or incorporates the federal regulation by reference.

The rule changes adopted by the WQCC are based on the federal requirements for Class I hazardous waste injection wells found in 40 C.F.R. Parts 144 and 146. As shown in Appendix F, the WQCC rule changes incorporate the federal requirements in two ways and, as a result, are at least as stringent as—and in some cases more stringent than—the federal regulations. First, in many cases, entire Code of Federal Regulation provisions have been adopted by reference. Second, other CFR provisions were incorporated verbatim with minor conforming changes. These minor adjustments were made to reflect the fact that (1) the regulations would be administered by OCD rather than by EPA and (2) the regulations will become a part of the New Mexico Administrative Code.

Appendix F provides a comparison between the federal rules governing Class I hazardous waste injection wells with the new rules adopted by the WQCC for Class I hazardous waste injection wells. The changes and additions to the federal rules are indicated by redlining. This document is also annotated to explain the differences.

Finally, the Program Revision does not involve any significant changes to the existing New Mexico UIC regulations. The WQCC did amend several existing sections of its regulations to clarify that Class I hazardous waste injection wells are no longer prohibited entirely under New Mexico law and to recognize that new sections had been added to the Code. These changes are described in the Summary of Program Revision Rule Changes (Appendix D).

IV. Public participation

The process for the adoption of the Program Revision by the WQCC followed the public participation requirements of New Mexico law, including the Water Quality Act and the State Rules Act. In addition, while the federal regulations on program revisions do not specify any public participation requirements for a program revision (40 CFR 145.32), the process for this Program Revision also addressed the criteria for public notice for the initial approval of a State

UIC program. 40 CFR 145.31(a). Appendix G provides the documents for the administrative record before the WQCC.

The Program Revision process began with the submittal of a written Petition by Navajo Refining Company LLC (“Navajo”) to the WQCC to amend the WQCC rules. NMSA 1978, §74-6-6(B). The WQCC, at a public meeting held within 90 days of the submittal of the Petition, determined to hold a public hearing on Navajo’s petition. *Id.* The WQCC appointed a hearing officer for the public hearing.

The WQCC published a public notice of the proposed rulemaking and the public hearing in the New Mexico Register and in 15 newspapers across New Mexico including in areas that are substantially affected by the proposed rule changes. The notice was also mailed to persons on the WQCC mailing lists. NMSA 1978, §74-6-6(C); 40 CFR 145.31(a)(1).

The public notice identified the New Mexico UIC program and described the changes to the program being proposed by the rule changes. 40 CFR 145.31(a)(6). The notice identified where copies of the proposed rule changes could be reviewed, both in person and online, and how persons could obtain of the proposed rule changes and at what cost, and identified a person who could be contacted for further information. NMSA 1978, §74-6-6(C); 40 CFR 145.31(a)(2), (3) and (7).

The public notice stated that a public hearing on the proposed changes would be held on July 14, 2015, at the Artesia City Hall Chambers in Artesia, New Mexico, and that written comments on the proposed rule changes could also be submitted until July 14, 2015. NMSA 1978, §74-6-6(C); 40 CFR 145.31(a)(5). All the publications of the public notice occurred at least thirty days prior to the hearing date and the end of the public comment period. NMSA 1978, §74-6-6(C); 40 CFR 145.31(a)(4) and (5).

The public hearing was held on July 14, 2015, before both a WQCC hearing officer and the full Commission. Prior to the hearing, five technical witnesses from Navajo and one from OCD pre-filed written testimony. At the hearing, each of the technical witnesses summarized their testimony and was subject to questioning from the Commissioners and the public. In addition to the technical witnesses, several members of the public, including local elected officials, provided written or oral testimony in favor of the proposed rule changes. There was no testimony, written or oral, in opposition to the proposal.

After the hearing concluded, the full Commission reconvened their regular meeting and voted to approve the rule changes with some technical amendments. On July 31, 2015, the Commission entered its Statement of Reasons and Final Order which summarizes the proposed rule changes and responds to the comments and testimony provided. 40 CFR 145.31(b). A copy of the Statement of Reasons and Final Order was mailed to each person and entity that provided comments or testimony. On July 31, 2015, the rule changes were filed with the State Records and Archives Center as required by the State Rules Act and the Water Quality Act. NMSA 1978, §§ 14-4-5 and 74-6-6(E). The rule changes were published in the New Mexico Register on August 14, 2015, and became effective on August 31, 2015. NMSA 1978, §§ 14-4-5 (no rule

effective until after filing and publication in the New Mexico Register) and 74-6-6 (no rule under the Water Quality Act becomes effective until at least 30 days after filing).

Any rule adopted by the WQCC may be appealed to the New Mexico Court of Appeals within thirty days after the rule is filed under the State Rules Act. NMSA 1978, §74-6-7(A). No appeal of the rule changes was taken.

V. Agency

The Program Revision does not alter the approved New Mexico UIC program for Class I, III, IV and V wells which is administered by the WQCC, NMED and OCD. 40 CFR 147.1601. The regulations for the Program Revision were adopted by the WQCC pursuant to the New Mexico Water Quality Act, NMSA 1978, Section 74-6-1 et seq. Under the Water Quality Act, the WQCC has the duty to assign responsibility for administering its regulations to “constituent agencies”. NMSA 1978, §74-6-4(F). For the Program Revision, the WQCC has assigned the administration of the Class I hazardous waste well program to the OCD. 20.6.2.5300 NMAC.

The OCD currently administers the UIC program for Class II wells, 40 CFR 147.1600, as well as Class I, III and V wells that are used at oil and gas facilities, including refineries. Currently, all approved Class I wells in New Mexico are administered by the OCD. Since the Program Revision is limited to Class I hazardous waste wells at petroleum refineries, it is appropriate that the OCD will administer the wells under the Program Revision.

The OCD currently administers over 4000 Class I, II, III and V wells in New Mexico. OCD has the procedures and personnel currently in place to review, permit, inspect and enforce compliance for UIC wells including the wells authorized under the Program Revision. OCD currently regulates water quality issues at petroleum refineries, including the permitting of Class I non-hazardous wells, and is therefore familiar with operations of petroleum refineries.

The Program Revision is limited to a small potential class of wells, and therefore will not require an expansion of OCD’s UIC program. The Program Revision does include significant permit fees, both for applications and renewals and for annual administration. 20.6.2.5302 NMAC. These fees will provide the OCD with the resources to hire additional temporary employees or contract for specialized assistance as needed in the review of permits.

VI. Program Documents.

Statement of Legal Authority. With this amendment to the Program Description, New Mexico submits an Attorney General’s Statement regarding the authority of New Mexico to carry out this Program Revision (see Appendix H).

Memorandum of Agreement. Based upon discussions with the EPA, New Mexico submits Amendment No. 1 to the Substitute Memorandum of Agreement, dated March 17, 2004, among EPA Region VI, WQCC, NMED and EMNRD (see Appendix I). Amendment No. 1 has been signed by WQCC, NMED and EMNRD.

VII. Timeline

- Nov. 5, 2014: Navajo Refining Company, L.L.C. (“Navajo”) files a Petition to Amend 20.6.2.5000 NMAC and Request for Hearing with the New Mexico Water Quality Control Commission (“WQCC”) (WQCC Docket No. 14-15 (R))
- Nov. 12, 2014: Navajo files a First Amended Petition to Amend 20.6.2.5000 NMAC and Request for Hearing with the WQCC.
- Nov. 18, 2014: WQCC, at a public meeting, sets the hearing date of May 12, 2015, and delegates the appointment of a Hearing Officer to the Chairman.
- Dec. 23, 2014: WQCC Chairman designates Morris Chavez as Hearing Officer for WQCC 14-15(R).
- Dec. 29, 2014: Hearing Officer reschedules the hearing for July 14, 2015.
- April 30, 2015: Navajo files a Second Amended Petition to Amend 20.6.2.3000 NMAC and 20.6.2.5000 NMAC and Request for Hearing (“Petition”) with the WQCC.
- May 14, 2015: Public notice of rulemaking hearing published in the New Mexico Register
- May 15, 2015: Hearing Officer issues a Procedural Order.
- May 15, 2015: Public notice published in Clovis News Journal
- May 16, 2015: Public notice published in Hobbs News-Sun, the Gallup Independent, Roswell Daily Record, the Santa Fe New Mexican, the Silver City Daily Press and Independent, the Farmington Daily Times
- May 17, 2015: Public notice published in The Albuquerque Journal, the Artesia Daily Press, and Carlsbad Current-Argus
- May 19, 2015: Public notice published in The Cibola Beacon
- May 20, 2015: Public notice published in the Truth or Consequences Herald
- May 21, 2015: Public notice published in The Taos News
- May 29, 2015: Amended public notice of rulemaking hearing published in the New Mexico Register
- June 12, 2015: Public notice published in Las Cruces Bulletin and Las Cruces Sun-News
- July 14, 2015: WQCC conducts a public hearing on the Petition in Artesia, New Mexico. At the conclusion of the hearing, the WQCC deliberates on the rulemaking proposal and adopts the rule changes.
- July 31, 2015: WQCC files the rule changes with the New Mexico State Records Center and Archives.

Aug. 14, 2015: Publication of rule changes in New Mexico Register

Aug. 31, 2015: The rule changes become effective.

Appendices

- A. List of Rule Sections that Were Amended and Added
- B. 20.6.2 NMAC with Final Rule Changes
- C. Rule Changes Filed with the New Mexico State Records Administrator on July 31, 2015
- D. Summary of Program Revision Rule Changes
- E. Cross Reference Table: Class I Hazardous Waste UIC Program Requirements: Federal Rules and New Mexico New Rule Sections
- F. Annotated Redline Comparing New Sections of New Mexico Rules (20.6.2.5300 to 20.6.2.5399 NMAC) With Federal Rules
- G. Water Quality Control Commission Administrative Record
- H. Attorney General's Statement
- I. Amendment No. 1 to the Substitute Memorandum of Agreement, dated March 17, 2004, among EPA Region VI, WQCC, NMED and EMNRD

State of New Mexico
Energy, Minerals and Natural Resources Department

Susana Martinez
Governor

Ken McQueen
Cabinet Secretary

Matthias Sayer
Deputy Cabinet Secretary

Bill Brancard, General Counsel
Office of General Counsel



December 12, 2018

Anne Idsall
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202

Attorney General's Statement for Program Revision of New Mexico UIC Program

Dear Administrator Idsall:

Pursuant to 40 CFR 145.24 and 40 CFR 145.32(b)(1), Special Assistant Attorney General Bill Brancard submits the following Attorney General's statement in support of the revision to the New Mexico Underground Injection Control ("UIC") Program for Class I, III, IV and V wells ("Program Revision").

The U.S. Environmental Protection Agency approved the UIC program for Class I, III, IV and V injection wells in New Mexico effective August 10, 1983. 40 CFR 147.1601. The program is administered by the New Mexico Water Quality Control Commission ("WQCC"), the Environmental Improvement Division (now known as the New Mexico Environment Department or "NMED"), and the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department ("OCD"). Id.

The Program Revision amends the approved UIC Program to authorize the State of New Mexico to allow the approval of Class I hazardous waste injection wells but only for petroleum refineries disposing the waste generated at the refinery. The Program Revision was implemented through a rule change adopted by the WQCC and filed with the State Records and Archives Center and published in the New Mexico Register. The rule change became effective on August 31, 2015. In the rule change, the WQCC delegated the administration of the Class I hazardous waste well program to the OCD. 20.6.2.5300 NMAC.

The State of New Mexico, and specifically the OCD, has the authority to carry out the Program Revision. The New Mexico UIC Program, and the Program Revision, is authorized under the New Mexico Water Quality Act and its regulations. NMSA 1978, §74-6-1 to -17 (1967, as amended through 2013); 20.6.2 NMAC (1/4/1968, as amended through 8/31/2015). The Program Revision is specifically authorized and described under the regulations: 20.6.2.5300 to 20.6.2.5363 NMAC.

The WQCC is authorized under the Water Quality Act to adopt regulations implementing the Act. NMSA 1978, §74-6-4. The WQCC followed the procedures in the Act for the adoption of regulations, including providing public notice and conducting a public hearing. NMSA 1978, §74-6-6. As required by the Water Quality Act and the State Rules Act, the rule changes were filed with the State Records and Archives Center and published in the New Mexico Register. NMSA 1978, §§ 14-4-5 and 74-6-6(E). The rule changes became effective on August 31, 2015. NMSA 1978, §§ 14-4-5 (no rule effective until after filing and publication in the New Mexico Register) and 74-6-6 (no rule under the Water Quality Act becomes effective until at least 30 days after filing).

Under the Water Quality Act, the WQCC has the duty to assign responsibility for administering its regulations to "constituent agencies". NMSA 1978, §74-6-4(F). For the Program Revision, the WQCC has assigned the administration of the Class I hazardous waste well program to the OCD. 20.6.2.5300 NMAC. The OCD is one of the constituent agencies under the Water Quality Act, NMSA 1978, §74-6-2(K), and has the authority to administer the Program Revision.

Class I hazardous waste wells are subject to the requirements for UIC wells under 20.6.2.5000 through 20.6.2.5299 NMAC along with the more specific requirements for hazardous waste wells in 20.6.2.5300 through 20.6.2.5399 NMAC. 20.6.2.5300(A) NMAC. These rules require a discharge permit for the operation of a UIC well. 20.6.2.5101(B) ("Operation of a Class I well or Class III well must be pursuant to a discharge permit"). In addition, for a Class I hazardous waste well, no injection can occur until a permittee has notified the agency director that the well has completed construction and the agency has inspected or waived inspection of the well. 20.6.2.5341(N) NMAC. These specific rules control for UIC wells, and particularly for Class I hazardous waste wells, over a general provision in the ground water protection rules which could allow a discharge without a permit for a period up to 120 days. 20.6.2.3106(B) NMAC. Therefore, such waiver could not apply to a UIC well.

As required by 40 CFR 145.24, where State agencies have independent legal counsel, the Attorney General's Statement may be provided by an agency attorney who has full authority to represent the State agency in court on all matters pertaining to the State UIC program. Pursuant to a Commission dated August 18, 2015, I have been appointed by New Mexico Attorney General Hector H. Balderas as a Special Assistant Attorney General with full authority to independently represent the New Mexico Energy, Minerals and Natural Resources Department and the Oil Conservation Division on all matters related to the UIC program.

Sincerely,



Bill Brancard
Special Assistant Attorney General
General Counsel
Energy, Minerals and Natural Resources Department