Background

On March 19, 2021, the Environmental Protection Agency (EPA) posted a notice of a direct final rule (86 FR 14846) with a parallel proposed rule (86 FR 14858) in the *Federal Register* to approve an application from the State of Michigan for primary permitting and enforcement responsibility or "primacy" for the Class II Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA). EPA requested public comment on the agency action for a 30-day period ending on April 19, 2021. EPA received adverse comment on the direct final rule during this period. As such, EPA withdrew the direct final rule (86 FR 32221; June 17, 2021) before its effective date and is proceeding with a full rulemaking process.

During the comment period, EPA received a total of 87 individual comments. Most comments were submitted by individual citizens opposed to granting Michigan primacy for the Class II UIC program. Many commenters asserted that the State of Michigan is not qualified to implement the Class II UIC program as required under SDWA and requested an additional public hearing be held by EPA to gather additional input on the agency action as well as the proposed Michigan UIC program. Several commenters expressed dissatisfaction with the EPA's UIC rulemaking process and raised legal considerations, among additional concerns. Each of the comments can be viewed in the docket (ID No. EPA-HQ-OW-2020-0595) as part of the final rulemaking.

After consideration of public comments, EPA is finalizing the proposed rule to approve the Michigan UIC Class II program primacy application and transfer authority to the state for the Class II program under Section 1425 of SDWA. EPA's response to comments (below) provides details on its regulations, guidance, processes, and actions relative to the concerns raised during the 30-day public comment period. However, comments that concerned items outside the scope of the Michigan Class II primacy rulemaking are not considered in EPA's responses.

Comments and Responses

1. ***Comment:* Underground injection is a generally unsafe practice and poses a significant threat to sources of drinking water.**

Response

EPA disagrees with the commenter's assertion that underground injection is generally unsafe. EPA regulates underground injection under the Safe Drinking Water Act (SDWA) and its implementing regulations, which include requirements to prevent the endangerment of underground sources of drinking water (USDWs). States seeking primacy approval under SDWA Section 1422 must demonstrate that their program requirements are at least as stringent as EPA's regulatory requirements (*Code of Federation Regulations* (CFR) at 40 CFR 145.11(b)(1)). The 1980 amendments to SDWA added a new Section 1425, which provides an alternative means for states to acquire primacy over underground injection related to the recovery and

production of oil and natural gas. States seeking primacy under Section 1425, as Michigan is here, must demonstrate that their Class II program is effective in preventing underground injection that endangers USDWs. EPA's Guidance 19 ("Guidance on State Submissions Under Section 1425 of the Safe Drinking Water Act") provides recommended factors that EPA may consider in assessing the effectiveness of a state's Class II program[1]. Michigan's proposed Class II UIC program has been reviewed by EPA and found to be effective in preventing the endangerment of USDWs from underground injection as mandated by SDWA.

2. ***Comment*: The Michigan State government is not qualified to receive primacy for the Class II UIC program for the following reasons:**
   a. **The state failed to protect consumers of a public water system serving Flint, Michigan;**
   b. **The Michigan Department of Environment, Great Lakes, and Energy's (MDEGLE) mission to support oil and gas development is in direct conflict with the UIC program mission to prevent ground water contamination; and**
   c. **The MDEGLE's compliance and enforcement oversight of the oil and gas industry in the state has been ineffective in the past and would be ineffective for the UIC program as demonstrated by cited news articles.**

   Response

   EPA disagrees with the comment. The MDEGLE application for Class II UIC primacy demonstrates that Michigan's Class II program is effective in preventing endangerment of USDWs as required under SDWA Section 1425. EPA performed a thorough review of all application elements and worked closely with MDEGLE prior to the state's application submittal to ensure that the state's program met the standard of effectiveness established under Section 1425. Based on the agency's review, the MDEGLE program is qualified to implement the Class II UIC program as the primary permitting and enforcement authority. The UIC program is a state-federal regulatory system that protects USDWs by ensuring that they are not endangered by the underground injection of fluids. When MDEGLE takes over as the primary permitting and enforcement authority for Class II wells within the State of Michigan, that are not in Indian country, EPA maintains an oversight and partnership role to help MDEGLE ensure the protection of USDWs as required by SDWA. The details of the state-federal partnership between EPA and MDEGLE are explicitly listed in the "Underground Injection Control Memorandum of Agreement between the State of Michigan and The United States Environmental Protection Agency Region 5," which is included in the rulemaking docket (EPA-HQ-OW-2020-0595). Among the topics included in the Memorandum are EPA's compliance monitoring, information sharing, enforcement, and oversight of the MDEGLE Class II UIC program. EPA will continue to work with the State of Michigan to implement the UIC Class II program in a manner that prevents the endangerment of

[1] Additional information about EPA's primacy process can be found at: https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program.

USDWs. The following provides additional information in response to the specific concerns raised in the above comment in the order they are listed:

a. EPA disagrees with the commenter's assertion that the State of Michigan's failure to protect drinking water in Flint should disqualify the state from primacy over its Class II UIC program. To receive primacy for the UIC program under Section 1425 of SDWA, a state must demonstrate that its Class II UIC program is effective in preventing endangerment to USDWs. EPA has concluded that Michigan's Class II UIC program meets this criteria for primacy under SDWA. MDEGLE has developed standards for Class II UIC well application, permitting, construction, injection, monitoring, reporting, well closure, inspection, and enforcement. In EPA's evaluation of these standards, the agency has determined that MDEGLE has procedures that are effective in preventing endangerment to USDWs. Under a separate SDWA program (the National Primary Drinking Water Regulations), Michigan implements the requirements for the Lead and Copper Rule. EPA will continue to coordinate and communicate with Michigan to ensure that the state is properly implementing and enforcing the requirements of that rule in order to protect against situations (like Flint), involving harmful levels of lead in drinking water.

b. Like many state agencies with primacy for the Class II UIC program, MDEGLE is also responsible for permitting and oversight of oil and gas development wells and other related activities. The Class II UIC program was created specifically to inject fluids associated with oil and gas development. EPA does not find a conflict of interest between MDEGLE's activities to safely develop oil and gas resources and MDEGLE's activities to safely inject fluids associated with oil and gas development.

c. To support the claim that MDEGLE is not qualified to receive primacy for the Class II UIC program, a commenter pointed to MDEGLE's response to specific cases of surface spills related to the oil and gas industry and brine spreading on roads. These documents can be found with the public comments included in the rulemaking docket (EPA-HQ-OW-2020-0595). The documents and incidents cited by the commenter are from 2012 and 2013. EPA disagrees that the commenter's asserted failure by the State of Michigan to address these specific cases involving surface spills should disqualify the state from UIC Class II primacy approval. MDEGLE has developed standards for Class II UIC well application, permitting, construction, monitoring, reporting, well closure, inspection, and enforcement. In EPA's evaluation of these standards, the agency has determined that MDEGLE has procedures that are effective in preventing endangerment to USDWs. Thus, the Michigan Class II UIC program is qualified to receive the primacy under the SDWA.

3. ***Comment*: The applicable regulations and legislation governing public participation actions under the Michigan Department of Environment, Great Lakes, and Energy (MDEGLE) Class II UIC program are insufficient to allow meaningful public input. Michigan Administrative Code (MAC) Part 615 Rule 324.803 limits the opportunity for public participation in the granting of a hearing. Additionally, the requirements under MDEGLE's public participation regulations conflict with state permitting law. MDEGLE is required to follow the public participation criteria set forth in Rule 324.803. However, the Sections 324.1301- 324.1317 of Part 13 (Permits) of the Michigan Natural Resources and Environmental Protection Act (NREPA), establishes a shorter permit processing period that could preclude public participation in the permit decision process, especially if an applicant seeks to enforce the statutory timeframe.**

Response

EPA disagrees with the comment that the applicable state regulations and legislation limit meaningful public participation in the MDEGLE UIC Class II program. EPA's review of Michigan's application for Class II program primacy included extensive evaluation of state regulations and legislation[2], including both MAC Part 615 Rule 324.803 and Sections 324.1301 – 324.1317 of Part 13 of the Michigan NREPA. EPA has determined that:

1. The public participation requirements under Rule 324.803 are sufficient to demonstrate an effective program under SDWA 1425; and
2. The requirements under Sections 324.1301 – 324.1317 of Part 13 of the NREPA do not limit the public participation requirements under Rule 324.803 so as to render the program ineffective

Rule 324.803 includes requirements and timeframes for permit decisions, public notice, responses to public comment, and public hearings. The rule requirements and timeframes for aspects of the MDEGLE UIC program regulations are in some cases different than those found under the federal UIC regulations[3]. However, these requirements and timeframes do not need to mirror each other because Michigan has applied for Class II UIC program primacy under Section 1425 of SDWA, which requires that states demonstrate "an effective program" for preventing endangerment to USDWs, not that their requirements are identical to those in EPA's UIC regulations.

EPA disagrees with the comment that Rule 324.803(2) unduly limits public participation in the granting of a public hearing. EPA's Guidance 19 provides that "state programs should provide opportunity for a public hearing if the Director finds, based upon requests, a significant degree of public interest." Michigan's rule requirements are consistent with this recommendation. Under the Michigan rule, the state takes public comment on a permit application for 30 days,

[2]"EPA-Approved State of Michigan Safe Drinking Water Act § 1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II Wells" (November 24, 2020"), Docket EPA-HQ-OW-2020-0595.
[3] 40 CFR Part 124, Procedures for Decision-making.

allowing the state to assess the degree of public interest. If the state receives a comment or objection that it finds to be "relevant to the issues of waste, public health or safety, or is of substance," and the commenter has requested a public hearing, the state will hold a public hearing. EPA disagrees with the comment that this criterion "places an extremely difficult and unreasonable burden on the public." Requiring comments to be "of substance" or meet a broad standard of relevance to waste, public health or safety is a reasonable threshold for finding the level of public interest to be "significant" and thus warranting a public hearing as recommended under Guidance 19.

EPA also disagrees with the comments asserting that the state program fails to provide sufficient notice of a permit application or how the public may request a public hearing. Requirements established under Rule 324.803 provide sufficient notice to the public of Class II well permit applications and demonstrate a clear process through which a public hearing can be requested.

Section one of Rule 324.803 requires public notice be provided by the state within 10 days of receipt of a Class II well permit application, specifying that the state must:

> *…mail notice to each surface owner of record and well permittee of each oil, gas, and injection well within 1,320 feet of the proposed injection well, to the township supervisor or municipal manager where the well is located, and shall post the notice on the department website concurrently with the weekly permit list publishing which is posted on the department website and available by email list server.*

With respect to public notice of a well application, Guidance 19 provides that "[t]he method of giving notice should be adequate to bring the matter to the attention of interested parties and, in particular, the public in the area of the proposed injection." Although the commenter asserts that notification to surface owners within 1,320 feet is not sufficient to provide notification, EPA notes that Michigan's rule also requires notification to the township supervisor or municipal manager, as well as requiring posting on the department website. Contrary to the commenter's suggestion that publication in a local newspaper is required for sufficient notice, EPA notes that Guidance 19 specifically lists "posting" as a method of publication that EPA may consider to be "adequate," as well as "any other effective method that achieves the objective." Accordingly, given the multiple methods of notification provided under Michigan's rule, EPA concluded that such notification is "adequate" to provide sufficient notice to interested parties, including the public in the area of the proposed injection

The comment correctly points out that MDEGLE's regulatory requirements for public participation (Rule 324.803) are different than those listed in state permitting statute (Part 13) and that if followed, Michigan's statutory permit processing would be inconsistent with Michigan's rule procedures and time frame for public participation on Class II UIC applications. The differences between state statute and state regulation and the potential for their impact on public participation in the MDEGLE Class II program was highlighted and resolved in a memorandum from Region 5 Administrator to the EPA Administrator recommending approval of

the Michigan Class II UIC primacy application found in the rulemaking docket (EPA-HQ-OW-2020-0595). The memorandum states,

> *…in the Program Description section of the application,* [MD]*EGLE assures EPA that (1) it will follow the permit processing time frame and public participation procedures in its administrative rules and incur any consequences under Part 13, including returning permit fees and accounting for missed processing periods to the Michigan legislature, and (2) it will seek a change to the statute at its earliest opportunity. Therefore, as reviewed by Region 5, and including* [MD]*EGLE's assurances regarding rule implementation described above, the program described in* [MD]*EGLE's application meets the requirements of SDWA § 1425.*

As discussed in the memorandum, EPA's finding that Michigan's Class II UIC program provides for sufficient public participation is supported by MDEGLE's commitment to follow their public participation requirements found at Rule 324.803, despite the conflicting provisions in Part 13. This commitment is reflected on page 8 of the Program Description included in Michigan's primacy application and provided again in a February 7, 2020 letter from the MDEGLE Oil, Gas, and Mineral Division (OGMD) that provides clarifying responses to EPA's inquiry regarding the impact of state permitting law Part 13 on the MDEGLE Class II UIC program. Both the primacy application and the OGMD letter can be found in the rulemaking docket (EPA-HQ-OW-2020-0595). As noted on page 2 in the OGMD letter,

> *…the* [MDEGLE] *OGMD intends to adhere to Part 615, Supervisor of Wells, of the NREPA, including administrative rule Michigan Administrative Code (MAC) R 324.803, which may require a longer processing period when public hearings are held. The OGMD is not concerned that Part 13 processing period time frames will supersede the Supervisor of Wells authority to have required public comment and hearing pursuant to MAC R 324.803 but does intend to have Part 13 updated at the earliest opportunity.*

4. ***Comment:* The Michigan Department of Environment, Great Lakes, and Energy (MDEGLE) application for Class II primacy under Section 1425 of the Safe Drinking Water Act (SDWA) is deficient because:**
    a. **The UIC Program Description submitted by MDEGLE does not provide a summary of past UIC program performance to fulfill the criteria listed under Section 3.3 (f)(4) of Ground Water Program Guidance 19, *Guidance for State Submissions Under Section 1425 of the Safe Drinking Water Act*;**
    b. **The requisite letter from the Governor requesting program approval, which is mandatory in 40 CFR Section 145.22(a)(1) and Section 3.2 of Ground Water Program Guidance 19, is deficient because it was signed by Governor Rick Snyder instead of Governor Gretchen Whitmer, the sitting Governor of Michigan at the time of the submission of the final application for Class II UIC primacy; and**

c. **The Statement of Legal Authority submitted by MDEGLE to fulfill Section 3.4 of Ground Water Program Guidance 19 is deficient because:**
    i. **It does not cite the State's settlement on oil and gas brine spreading on the roads statewide, the "In the Matter of Supervisor of Wells Order 1-85" case; and**
    ii. **The Michigan Attorney General provides the opinion that the MDEGLE Class II UIC program has been carried out in a manner that effectively protects underground sources of drinking water without providing evidence or review of MDEGLE's past performance in compliance and enforcement.**

Response

EPA disagrees with the comment that the application submitted by Michigan to obtain primacy under Section 1425 of SDWA is deficient. Prior to submittal, EPA worked closely with MDEGLE for multiple years to help develop a program that is effective in preventing the endangerment of underground sources of drinking water (USDWs) from Class II injection activities. EPA provided direct input on many aspects of the final application included in the rulemaking docket, including but not limited to Michigan Rules, the program description, the memorandum of agreement, and the statement of legal authority. The following provides specific responses to the assertions raised in the above comment in the order they are listed:

a. The program description submitted as part of MDEGLE's application to receive primacy for the Class II UIC program is consistent with the recommended criteria for consideration listed in Ground Water Program Guidance 19, *Guidance for State Submissions Under Section 1425 of the Safe Drinking Water Act* (or "Guidance 19"). It should be noted that, unlike the federal regulations applicable to Class II primacy under SDWA section 1422, Guidance 19 establishes neither a set process for states, tribes, and territories to apply for primacy under SDWA 1425, nor a set of required criteria for EPA's review of such applications. As stated in Section 1 of Guidance 19: "A State may choose to apply in a different form and make demonstrations different from those suggested in this document. EPA will consider such applications" (page 1).

   Section 3.3(f)(4)) of Guidance 19 provides that the program description should provide certain summary data regarding the state's enforcement program if the state is seeking approval for an existing program. This portion of the guidance is to be considered for states, tribes, and territories that had an active equivalent of a Class II program prior to the passing of SDWA in 1974 and amendments of 1980. This portion of the guidance is no longer relevant as all of these pre-existing programs obtained primacy during this period or EPA became the UIC permitting authority. Michigan does not have an existing equivalent of a Class II UIC program and thus the recommended criteria in Section 3.3(f)(4) is not relevant with respect to Michigan's application or for EPA's review thereof.

b. The requirement to submit a "letter from the Governor of the State requesting program approval" under 40 CFR Part 145.22(a)(1) does not apply with respect to primacy applications under SDWA Section 1425. Regulations at 40 CFR 145.1(a)(1) specify that the Part 145 regulations apply only to primacy applications under SDWA Section 1422. In any case, neither 145.22(a)(1) nor Guidance 19 specify that the "letter from the Governor" must be signed by the person who is governor at the time of program approval, rather than the person who is governor at the time of the State's application for primacy. Accordingly, it was appropriate and reasonable for the letter to be signed by the governor at the time of primacy application—and there is nothing in the regulations or guidance that requires this letter to be supplanted by one signed by a new governor if the position changes hands during the pendency of the primacy approval process.

c. EPA has found that the Statement of Legal Authority submitted by MDEGLE meets the recommended criteria in Section 3.4 of Guidance 19 as well as the standard of review for Class II UIC primacy applications under Section 1425 of SDWA. Section 3.4 states,

> *The statement may, at the option of the State, consist of a full analysis of the legal basis for the State program, including case law as appropriate. Or the statement may consist of a simple certification by the legal representative that the State has adequate authority to carry out the described program. If the State chooses to submit a certification, the program description should detail the legal authority on which the various elements of the State's program rest.*

The statement provided by the State of Michigan Department of Attorney General certifies that the State has adequate authority to carry out the described program. As provided in the Guidance, this statement does not need to include a full analysis of the legal basis for the State program, which can be provided in the program description. The program description details the legal authority for the state's Class II program. Contrary to the commenter's suggestion, there is no requirement that the description of legal authority include discussion of particular cases, such as the specific case that the commenter points to ("In the Matter of Supervisor of Wells Order 1-85"). Moreover, as indicated in Response to Comment 2c. above, this case involves spreading of brine on roads, an activity that is not subject to regulation under the UIC program or SDWA, and thus not relevant to EPA's approval of Michigan's Class II UIC program. The certification provided by the Michigan Department of Attorney General can be reviewed in full in the rulemaking docket (EPA-HQ-OW-2020-0595).

5. ***Comment*: EPA did not correctly follow its public notification requirements under 40 CFR part 25 when it published notice and requested comment on a complete application from the State**

of Michigan to obtain primacy for the Class II UIC program under Section 1425 of the Safe Drinking Water Act (SDWA). Since EPA failed to provide direct mailing notice of the action, it should hold an additional public hearing to obtain input on the rulemaking action.

Response

EPA disagrees with the assertion that it failed to provide sufficient notice of these actions under 40 CFR Part 25, for the reasons discussed as follows:

First, with respect to the commenter's assertion that EPA failed to provide notice that it was seeking comment on Michigan's Class II primacy application, EPA in fact provided such notice in the *Federal Register* (85 FR 20909), on the agency's website, and in three state newspapers[4]. The state also provided such notice on its website. Such notification is sufficient to meet the requirements of Part 25, which specifies only that each agency "notify interested and affected parties…in advance of times at which major decisions not covered by notice requirements for public meetings or public hearings are being conducted." 40 CFR Part 25.4(c). Despite the commenter's suggestion, Part 25 does not require direct mailing to interested parties regarding such decisions; and publication in the *Federal Register*, in three state newspapers, and on the website was sufficient to meet the requirement to "notify" such parties under Part 25.4(c), that Michigan had submitted a primacy application and that EPA was seeking public comment on such application.

With respect to the public hearing, EPA provided public notice of such hearing in the same manner used to inform the public about Michigan's Class II primacy application (*Federal Register,* three state newspapers, EPA and state websites). There is no requirement under Part 25 to provide direct notification via mail or email to interested parties of public hearings about Class II primacy applications. The Part 25.5 requirements with respect to public hearings apply only if public hearings are otherwise required under applicable regulations. See 40 CFR 25.1(b) ("This part does not mandate the use of these public participation mechanisms. It does, however, set requirements for which those responsible for implementing the mechanisms must follow if the mechanisms are required elsewhere in this chapter") (emphasis added). Here, because Michigan is seeking primacy under SDWA Section 1425, there are no applicable regulations requiring a public hearing. See 40 CFR 145.1(a) (specifying that the regulations apply only to primacy applications under SDWA Section 1422). Accordingly, the Part 25.5 requirements with respect to public hearings are not applicable here, and EPA provided ample notification regarding the public hearing in the manner described above.

Finally, with respect to the proposed and direct final rules approving Michigan's primacy application, EPA published both notices in the *Federal Register*. EPA disagrees with the

[4] Traverse City Record-Eagle; Grand Rapids Press; and Detroit Free Press (see Docket: EPA-HQ-OW-2020-0595).

commenter's characterization of such publication as "non-notification," that "violated federal regulations." Part 25.10, which applies to proposed and final rules, specifies that notification of such actions shall be distributed in accordance with 25.4(c), which, as discussed above, requires that each agency "notify interested and affected parties" in advance of the decision – but does not require direct mailing to such parties. Moreover, even if 25.10 were read to require some form of notification beyond publication in the *Federal Register*, any failure of the EPA to do so would constitute harmless error at most, given that the commenter had actual notice of the proposed and direct final rule, as reflected by their comments.