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HOUSE BILL 790

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Karen E. Giannini

AN ACT

RELATING TO OIL AND GAS; ENACTING THE CARBON DIOXIDE SEQUESTRATION ENABLING ACT; IDENTIFYING OWNERSHIP RIGHTS OF PORE SPACE AS DISTINCT FROM OTHER PROPERTY RIGHTS; PROVIDING FOR FEES; PROVIDING FOR PERMITS; PROVIDING PENALTIES; MAKING APPROPRIATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. ~~[NEW MATERIAL]~~ SHORT TITLE.--Sections 1 through 12 of this act may be cited as the "Carbon Dioxide Sequestration Enabling Act".

Section 2. ~~[NEW MATERIAL]~~ DEFINITIONS.--As used in the Carbon Dioxide Sequestration Enabling Act:

A. "carbon dioxide" means any anthropogenic carbon dioxide, including any gas mixture containing significant quantities of carbon dioxide that the division determines is

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1 suitable for storage and sequestration pursuant to the Carbon
2 Dioxide Sequestration Enabling Act that has been:

3 (1) captured from an industrial source and
4 would otherwise have been released to the atmosphere;

5 (2) captured from combustion of fuels; or

6 (3) stripped, segregated or divided from any
7 other fluid stream;

8 B. "buffer zone" means that part of a reservoir in
9 proximity to but not included in the permitted confinement zone
10 that the division designates as a protective zone for detection
11 and prevention of excursion;

12 C. "commission" means the oil conservation
13 commission created pursuant to Section 70-2-4 NMSA 1978;

14 D. "division" means the oil conservation division
15 of the energy, minerals and natural resources department;

16 E. "excursion" means underground movement of carbon
17 dioxide that has been injected into a storage facility to a
18 subsurface location outside the horizontal or vertical limits
19 of the permitted confinement zone;

20 F. "geologic sequestration" means the underground
21 storage of carbon dioxide in a permitted confinement zone
22 suitable to provide permanent confinement of the carbon
23 dioxide; provided that the division may authorize the
24 withdrawal of sequestered carbon dioxide for use pursuant to
25 the Carbon Dioxide Sequestration Enabling Act;

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1 G. "injection phase" means that period of time
2 during which a storage operator is injecting or re-injecting
3 carbon dioxide into a storage facility;

4 H. "permitted confinement zone" means the portion
5 of a reservoir, defined by horizontal and vertical limits in
6 the order permitting a storage facility, that the injected
7 carbon dioxide is expected to physically occupy;

8 I. "pore space" means all underground space,
9 whether in caverns, fissures, pores, on the surface of
10 formation rocks or otherwise, that is suitable, or can be made
11 suitable, for injection, transport or storage of fluids;

12 J. "reservoir" means any subsurface stratum,
13 formation, aquifer, cavity or void, whether natural or
14 artificially created, including any oil or gas reservoir,
15 saline aquifer or coal seam suitable for or capable of being
16 made suitable for the injection and storage of carbon dioxide,
17 but does not include any aquifer or part of any aquifer that is
18 an underground source of drinking water;

19 K. "storage facility" means a permitted confinement
20 zone or zones, associated buffer zones and all underground
21 equipment and surface facilities and equipment utilized in the
22 storage operation, excluding pipelines used to transport carbon
23 dioxide to the facility;

24 L. "storage operator" means any person that the
25 division authorizes to operate a storage facility;

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1 M. "storage rights" means, with respect to a tract
2 of land, as a minimum, an estate or interest in land that:

3 (1) confers upon the owner the permanent right
4 to use of the pore space in the permitted confinement zone for
5 geologic sequestration of carbon dioxide;

6 (2) unitizes all interests in production of
7 oil and gas from the reservoir during the injection phase of
8 storage facility operation; and

9 (3) relinquishes by all owners of the mineral
10 estate in the tract, including owners of any leasehold
11 interest, owners of the mineral fee estate and owners of any
12 royalty interest or other right to production therefrom, all
13 residual rights to explore for or produce oil, gas or other
14 minerals from the permitted confinement zone and associated
15 buffer zone, except for production of oil and gas during the
16 injection phase of storage facility operation. In the case of
17 lands where the mineral fee estate is owned by the United
18 States, the state of New Mexico or any tribal government, the
19 consent of the governmental entity to inclusion of the lands in
20 a storage project shall be deemed equivalent to the
21 relinquishment of residual mineral rights for purposes of this
22 definition;

23 N. "surface rights" means rights of access to the
24 surface of lands overlying a reservoir that the division
25 determines are reasonably necessary for the operation,

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1 maintenance, monitoring, closure and post-closure monitoring of
2 a storage facility and for any remediation operation required
3 pursuant to the Carbon Dioxide Sequestration Enabling Act,
4 including well sites for injection and monitoring wells that
5 the division permits or requires and permanent rights for
6 pipelines and access to those well sites; and

7 0. "underground source of drinking water" means an
8 underground source of drinking water as now or hereafter
9 defined by the United States environmental protection agency
10 pursuant to the federal Safe Drinking Water Act.

11 Section 3. [NEW MATERIAL] DECLARATION OF PUBLIC
12 POLICY.--The legislature declares that geologic sequestration
13 of anthropogenic carbon dioxide is in the public interest. The
14 Carbon Dioxide Sequestration Enabling Act shall be liberally
15 construed to facilitate the establishment and operation of
16 storage facilities.

17 Section 4. [NEW MATERIAL] OWNERSHIP OF PORE SPACE,
18 CONVEYANCES AND SURFACE RIGHTS--SUBSURFACE TRESPASS--OWNERSHIP
19 OF INJECTED CARBON DIOXIDE.--

20 A. The legislature declares that any grant or
21 reservation of the minerals in any lands in New Mexico does
22 not, unless otherwise specifically provided in the instrument
23 of conveyance, vest in the party to whom the mineral estate or
24 part thereof is granted or reserved ownership of the pore space
25 underlying such lands, except for the right to use the pore

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1 space as may be reasonably necessary to explore for or produce
2 the minerals pursuant to the common law of this state.

3 B. Title to pore space may be severed from the
4 surface estate by grant, conveyance or otherwise, but no title
5 instrument shall be construed as effecting such a severance
6 unless it expressly so provides. The owner of a severed right
7 or title to pore space shall have no right to enter upon, or
8 otherwise use, the surface of the land unless the instrument of
9 severance expressly so provides. This section shall govern the
10 construction of all instruments affecting title to pore space
11 executed on or after the effective date of the Carbon Dioxide
12 Sequestration Enabling Act and shall guide the construction of
13 all such instruments executed prior to the effective date of
14 that act, except to the extent that a court determines that
15 construction of any preexisting instrument pursuant to this
16 subsection would deprive any person of vested property rights
17 existing on the effective date of that act.

18 C. Any public body and any personal representative,
19 guardian, receiver, trustee or other fiduciary shall be
20 authorized to grant to any storage operator rights for
21 underground sequestration of anthropogenic carbon dioxide in
22 lands the public body or fiduciary controls in the same manner
23 as provided by law for sale by the public body or fiduciary of
24 interests in land, or if the public body or fiduciary is not
25 authorized to sell the lands, then in the same manner as

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1 authorized by law for entering into agreements to grant an
2 easement or license for the use of the lands.

3 D. The provisions of this section are not intended
4 to change the law of the state with respect to the rights of
5 the owners of any mineral estate, nor with respect to
6 underground waters.

7 E. No owner of any interest in land shall have any
8 claim or cause of action for subsurface trespass by reason of
9 the injection of carbon dioxide pursuant to the Carbon Dioxide
10 Sequestration Enabling Act unless the carbon dioxide physically
11 invades pore space within the horizontal and vertical limits of
12 the owner's land.

13 F. Carbon dioxide injected pursuant to the Carbon
14 Dioxide Sequestration Enabling Act shall remain the property
15 and responsibility of the storage operator, unless and until
16 transferred to and accepted by another person.

17 Section 5. [NEW MATERIAL] PERMIT REQUIRED.--

18 A. No person shall construct or operate a storage
19 facility for the geologic sequestration of carbon dioxide
20 except pursuant to a permit issued by the division or the
21 commission, which shall specify the horizontal and vertical
22 limits of the reservoir, the horizontal and vertical limits of
23 the permitted confinement zone and appropriate buffer zones and
24 the location of surface facilities, including injection wells,
25 monitoring wells and testing sites.

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1 B. Prior to issuing any permit for construction or
2 operation of a storage facility, the division or commission
3 shall find:

4 (1) that the reservoir is suitable for
5 injection and permanent storage of carbon dioxide;

6 (2) that construction and operation of the
7 storage facility as provided in the permit is feasible;

8 (3) that the construction and operation of
9 the storage facility will not endanger human health, surface
10 water, underground sources of drinking water, other natural
11 resources or the environment;

12 (4) that the construction and operation of
13 the storage facility will not endanger any commercial deposit
14 of oil, gas or other mineral outside the horizontal and
15 vertical limits of the permitted confinement zone and buffer
16 zones; and

17 (5) that the storage operator has acquired or
18 can acquire the storage rights necessary for the operation of
19 the facility, subject to such exceptions as the division or
20 commission may authorize.

21 C. Carbon dioxide injected pursuant to the Carbon
22 Dioxide Sequestration Enabling Act into a storage facility
23 shall not be withdrawn, except for withdrawal and re-injection
24 at the storage facility in connection with oil and gas
25 production, unless specifically authorized by the division or

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1 commission or in event of an emergency as defined by division
2 or commission rules.

3 Section 6. [NEW MATERIAL] POWERS OF THE DIVISION AND
4 COMMISSION.--

5 A. The division or commission may:

6 (1) adopt rules to regulate the injection,
7 geologic sequestration, storage and removal from storage of
8 carbon dioxide, including administering the federal Safe
9 Drinking Water Act, as may be authorized by any program adopted
10 by the United States environmental protection agency regarding
11 geologic carbon sequestration;

12 (2) after public notice and hearing, issue
13 permits for the construction and operation of storage
14 facilities and determine, and from time to time re-determine,
15 the vertical and horizontal boundaries of the permitted
16 confinement zone or zones and appropriate buffer zones;

17 (3) adopt rules and orders necessary or
18 proper to administer and enforce the provisions of the Carbon
19 Dioxide Sequestration Enabling Act;

20 (4) impose such terms and conditions upon any
21 permit issued pursuant to the Carbon Dioxide Sequestration
22 Enabling Act as may be necessary to protect human health and
23 safety, surface water, underground sources of drinking water,
24 other natural resources and oil, gas and mineral deposits
25 outside the permitted confinement zone and buffer zones and the

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1 environment;

2 (5) authorize withdrawal of carbon dioxide
3 from a storage facility permitted pursuant to the Carbon
4 Dioxide Sequestration Enabling Act for use, upon such terms and
5 conditions as the division or commission shall prescribe;

6 (6) after public notice and hearing,
7 establish fees for the permitting and re-permitting of storage
8 facilities that do not exceed the reasonable cost of
9 administering the Carbon Dioxide Sequestration Enabling Act;

10 (7) require storage operators to furnish
11 financial assurance sufficient to secure the storage operator's
12 compliance with statutory and regulatory requirements for
13 proper maintenance, closure and post-closure monitoring of any
14 storage facility and prescribe the forms and amounts of such
15 financial assurance;

16 (8) after notice and opportunity for a
17 hearing, assess civil penalties for any violation of the Carbon
18 Dioxide Sequestration Enabling Act or of any rule or order
19 adopted or permit issued by the division or commission pursuant
20 to the Carbon Dioxide Sequestration Enabling Act, not to exceed
21 ten thousand dollars (\$10,000) for each violation or for each
22 day of a continuing violation;

23 (9) issue orders requiring the unitization of
24 oil and gas interests in the permitted confinement zone and
25 associated buffer zones; and

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1 (10) exercise jurisdiction over all persons,
2 facilities, properties and matters and do all things necessary
3 or proper to administer and enforce the provisions of the
4 Carbon Dioxide Sequestration Enabling Act.

5 B. Section 70-2-13 NMSA 1978 and rules adopted
6 pursuant thereto shall apply to all hearings required or
7 authorized under the Carbon Dioxide Sequestration Enabling Act.

8 Section 7. [NEW MATERIAL] CONDITIONS PRECEDENT TO
9 INJECTION--EXCURSION.--

10 A. No storage operator shall commence injection of
11 carbon dioxide pursuant to this act until the storage operator
12 has:

13 (1) complied with all conditions precedent to
14 commencement of injection provided in applicable rules and in
15 its permit;

16 (2) acquired the storage rights and surface
17 rights necessary for operation of the storage facility; and

18 (3) filed a certified copy of the commission
19 or division order defining the permitted confinement zone or
20 zones and buffer zones in the office of the county clerk of
21 each county in which any part of any permitted confinement zone
22 or associated buffer zone is located.

23 B. If the division or commission at any time
24 determines that excursion has occurred, the division or
25 commission shall, as it determines to be appropriate to

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1 accomplish the purposes of the Carbon Dioxide Sequestration
2 Enabling Act:

3 (1) expand the boundaries of the permitted
4 confinement zone as necessary to encompass the area of
5 excursion and of any necessary buffer zones, in which event the
6 storage operator shall make a good faith effort, as
7 expeditiously as possible, to acquire storage rights and
8 surface rights in the expanded area as the division or
9 commission shall order; or

10 (2) if the division or commission determines
11 that the area of excursion is not suitable for confinement and
12 storage of the anthropogenic carbon dioxide, require the
13 storage operator to undertake such remedial measures as may be
14 necessary and proper to prevent further excursion and to remedy
15 any damage caused by the excursion, including abatement of any
16 resulting water contamination.

17 C. The division or commission may by rule require
18 any person who encounters carbon dioxide in a well to report
19 such discovery to the division or commission and, if the
20 division or commission determines that the carbon dioxide is
21 present in the well due to excursion from a storage facility,
22 to take necessary or appropriate actions to prevent the escape
23 of sequestered carbon dioxide into or through the well.

24 Section 8. [NEW MATERIAL] ACQUISITION OF STORAGE RIGHTS
25 AND SURFACE RIGHTS.--Acquisition of storage rights by a storage

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1 operator shall, unless otherwise agreed between the parties,
2 preserve to the owners from whom the rights are acquired and
3 their heirs, successors and assigns:

4 A. the right to drill through the reservoir in such
5 manner as shall comply with applicable rules and orders of the
6 division or commission; and

7 B. all other rights or interests of such owners in
8 the surface or the subsurface that can be exercised without
9 interference with the operation of the storage facility or
10 compromising the integrity thereof.

11 Section 9. [NEW MATERIAL] UNITIZATION OF OIL AND GAS
12 PRODUCTION.--

13 A. If the reservoir for any storage project
14 contains oil or gas deposits that can be commercially produced
15 during the injection phase of storage facility operation, the
16 storage operator may, in lieu of acquiring all interests in the
17 oil and gas in the permitted confinement zone and buffer zones
18 that can be so produced, apply to the division or commission
19 for compulsory unitization of such interests.

20 B. The division or commission may order the
21 compulsory unitization of oil and gas interests described in
22 Subsection A of this section if the division or commission
23 finds that:

24 (1) the storage operator has obtained a permit
25 to construct a storage facility;

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1 (2) the storage operator has acquired by
2 voluntary conveyance or unitization at least twenty-five
3 percent of the expense-bearing oil and gas interest in the
4 reservoir and at least twenty-five percent of the revenue
5 interest in the oil and gas in the permitted confinement zone
6 and buffer zones;

7 (3) the storage operator has made a good faith
8 effort to obtain voluntary unitization upon terms that would
9 allow use of the reservoir for geologic sequestration as
10 provided in the Carbon Dioxide Sequestration Enabling Act; and

11 (4) the terms of the unit agreement and unit
12 operating agreement that the storage operator proposes, or as
13 modified in the division's or commission's order, are fair and
14 reasonable to the non-joining owners.

15 C. Compulsory unitization of the rights to oil and
16 gas production as provided in this section does not relieve the
17 storage operator of the requirement of the Carbon Dioxide
18 Sequestration Enabling Act to obtain all other storage rights
19 and surface rights necessary for the operation of the storage
20 project, including rights of surface access and rights to
21 operate injection and monitoring wells following the
22 termination of applicable oil and gas leases, or of oil and gas
23 production, and rights to produce other minerals, the
24 production of which is precluded by the construction and
25 operation of the storage facility.

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1 Section 10. ~~[NEW MATERIAL]~~ ENHANCED RECOVERY
2 OPERATIONS.--

3 A. The Carbon Dioxide Sequestration Enabling Act
4 does not apply to any enhanced oil recovery project or enhanced
5 gas recovery project now or hereafter permitted by the division
6 or commission under the Oil and Gas Act where the sole purpose
7 of injection is enhanced recovery of oil or gas, nor does it
8 prohibit the use of anthropogenic carbon dioxide in such
9 projects. The Carbon Dioxide Sequestration Enabling Act also
10 does not apply to the disposal of oil field waste by injection
11 pursuant to division or commission rules adopted pursuant to
12 the Oil and Gas Act.

13 B. The division or commission may adopt rules
14 pursuant to the Carbon Dioxide Sequestration Act to authorize
15 the conversion of enhanced oil recovery projects or enhanced
16 gas recovery projects into storage facilities. Upon approval
17 of conversion, the Carbon Dioxide Sequestration Enabling Act
18 shall apply to the converted storage facility.

19 Section 11. ~~[NEW MATERIAL]~~ COOPERATIVE AGREEMENTS.--The
20 division and commission are authorized to enter into
21 cooperative agreements with other state, federal or tribal
22 agencies, including agencies of other states, for the purpose
23 of implementing the provisions of the Carbon Dioxide
24 Sequestration Enabling Act.

25 Section 12. ~~[NEW MATERIAL]~~ CARBON SEQUESTRATION

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1 FACILITIES FUND.--The "carbon sequestration facilities fund" is
2 created in the state treasury to be administered by the energy,
3 minerals and natural resources department. The fund is
4 composed of all fees collected pursuant to the rules adopted
5 under the Carbon Dioxide Sequestration Enabling Act. Money in
6 the fund is appropriated to the energy, minerals and natural
7 resources department for the purpose of administering the
8 Carbon Dioxide Sequestration Enabling Act and the rules adopted
9 pursuant to that act, and shall not revert at the end of a
10 fiscal year. Disbursements from the fund shall be made upon
11 warrants drawn by the secretary of finance and administration
12 pursuant to vouchers signed by the secretary of energy,
13 minerals and natural resources.