LFC Requester:	Helen Gaussoin

AGENCY BILL ANALYSIS
2024 REGULAR SESSION

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original x **Amendment** ____
Correction ___ **Substitute** ____

Date 01/30/2024
Bill No: SB 215

Sponsor: Sen. William Sharer, Sen. Leo Jaramillo, Rep. Meredith A. Dixon, Rep. Jack Chatfield

Agency Name and Code Number: State Land Office - 539

Short Title: GEOLOGIC CARBON DIOXIDE SEQUESTRATION ACT

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	**FY25**		
None	None		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	**FY25**	**FY26**		
None	Unknown	Unknown	Recurring	Land Maintenance Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	None	Negative but unknown	Negative but unknown		Recurring	Land Maintenance Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SB 215 explicitly permits, and regulates, the "geologic sequestration of carbon dioxide" – that is, injection of CO2 deep underground into "a geological stratum, formation, aquifer, cavity or void … including deep saline aquifers, oil and gas reservoirs and unminable coal seams, such that carbon dioxide does not escape to the atmosphere." The bill would confer regulatory jurisdiction over CO2 sequestration to the Oil Conservation Division (OCD) of the Department of Energy, Minerals and Natural Resources; OCD may "grant to an operator rights for geologic sequestration in lands subject to its jurisdiction or control in the same manner as provided for entering into oil and gas leases."

The bill creates a regulatory scheme for carbon sequestration that is superficially similar to OCD's existing regulation with regard to the extraction of oil and gas. For instance, an operator may apply to unitize or force-pool acreage for the purpose of establishing a carbon sequestration facility, and upon meeting criteria established by the bill, is entitled to a unitization/pooling order from OCD.

The bill provides that CO2 is the property of operators conducting sequestration activities, until the sequestration unit agreement ceases to be in effect, at which point ownership of the injected CO2 – and associated liabilities – gets transferred to the State. The bill does not require operators of carbon sequestration facilities to provide emergency response plans, address leaks, or submit financial assurance for their injection activities.

Finally, the bill goes beyond the specific subject area of carbon sequestration to generally define "pore space" rights for general purposes as subsurface space belonging to the surface estate, as opposed to mineral estate.

A substantially similar version of the bill was introduced in the 2022 session (HB 205) but not heard in any committee.

A 2019 bill (SB 586) provided, as SB 215 does, that pore space rights generally vest to the surface owner.

FISCAL IMPLICATIONS

The intended purpose of the legislation appears to be to create a framework for large-scale carbon sequestration projects. The State Land Office does not currently have leasing instruments, financial assurances or other required instruments to perform this type of leasing activity (large-scale CO2 sequestration projects). Creation of, and management of, these types of projects may require additional personnel and resources.

With regard to revenue, there could be a positive revenue impact from any new pore space leasing activities that occur that would have not otherwise happened without the legislation. There may also be a negative revenue impact to the extent that the utilization of pore space for CO2 sequestration competes with or interferes with other subsurface activities, such as salt-water injection wells or oil and gas development.

SB 215 could also have significant but undetermined fiscal implications for the "state" after the completion of CO2 injection operations. Once completed, the State incurs, and the operator is released of, all responsibilities related to the sequestration facility, and any monitoring, repair and remediation required. OCD is charged with overseeing such actions unless the federal government assumes this responsibility. *See* Section 9(B)(4). The legislation does not indicate which specific agency or other entity is to bear the financial costs of long-term legacy issues. To the extent that the State Land Office would be forced to carry any costs on behalf of the "state," revenue from state land trust beneficiaries (public schools, universities, hospitals and other public institutions) would be impaired.

SIGNIFICANT ISSUES

Under the direction of the Commissioner of Public Lands, the New Mexico State Land Office (NMSLO) manages about nine million acres of surface estate and 13 million acres of minerals. SB 215 would specify that, in the absence of specific language to the contrary, the surface estate "includes the pore space, and the ownership of all pore space in all strata below the surface lands and waters of this state is declared to be vested in the several owners of the surface above the strata or formations." The scope of this provision in SB 215 is not limited to the use of pore space for purposes of CO2 sequestration. The bill thus has implications for over four million acres of state trust mineral estate severed from the surface estate and goes beyond CO2 sequestration to include other uses of the pore space.

The statutory NMSLO oil and gas lease includes the right to produce CO2, *see* NMSA 1978, § 19-10-2, and operators under NMSLO oil and gas leases frequently use CO2 for enhanced oil and gas recovery. The statutes pertaining to state trust lands include the State Carbon Dioxide Act, which provides for certain kinds of disposition of CO2 produced under an NMSLO oil and gas lease. SB 215 would provide that nothing in the new act (i) prevents a mineral owner or lessee from drilling through a CO2 sequestration unit or near a sequestration facility so long as it uses reasonable measures to protect the facility against the escape of the CO2 being stored and the drilling operations are conducted in accordance with all applicable drilling and casing rules; or (i) affects or limits enhanced oil or gas recovery permitted by the OCD. While the bill addressed "escape" of CO2 as a result of exploration for or production of oil and gas, the bill seems unclear on whether a lessee or operator under an oil and gas lease may purposely extract sequestered CO2.

The NMSLO has not yet issued leases for CO2 sequestration but does already have the authority

to do so. The bill (Section 4) would specifically authorize the Commissioner of Public Lands and other state agencies to lease lands under their jurisdiction for CO2 sequestration. Specifically, Section 4(C) provides that NMSLO may grant an operator rights for carbon sequestration on state trust lands based on "fair market value of the rights," but does not define fair market value. Other than statutory oil and gas leases and a handful of other forms of mining leases, the Commissioner generally has authority to enter into leases at her discretion (on terms consistent with the Enabling Act) that she finds beneficial to the public schools and other beneficiaries on whose behalf she acts. For this reason, the Legislature should consider amending the bill to simply require an operator to negotiate or obtain an agreement with the appropriate government agency. With respect to state trust lands, the legislation should provide that the Commissioner may approve CO2 sequestration on terms and conditions, including compensation, that the Commissioner deems appropriate, consistent with the requirements of the Enabling Act. The Enabling Act, federal law consented to by the State of New Mexico as a condition of statehood, controls the use of state trust lands and includes specific requirements conditioning their use, such as public auctions for leases with terms over a period of five years.

The bill (Section 5) provides that an operator may apply to OCD for compulsory pooling or unitization of "a geologic formation or formations for geologic sequestration of carbon dioxide to be included within [a] proposed sequestration unit." The bill (Sections 5-7) should be amended to prevent unleased state lands from being force-pooled, similar to current law and practice with respect to compulsory pooling for oil and gas. Similarly, oil and gas operators must obtain approval from the NMSLO prior to OCD issuing a unit order; a similar process should follow here. The forced pooling of state trust lands runs contrary to NMSLO's/Commissioner of Public Lands' constitutional and statutory obligation to obtain the highest and best use of state trust land under the Enabling Act.

Notably, Section 6 of the bill only requires 60% of landowners to agree to participate in a sequestration unit. In forming an oil and gas unit, parcels of land may be excluded from a unit where landowners do not agree to participate in a unit. Ratification of a unit always requires 75% agreement, but, in general, 100% of owners agree to participate in a unit, absent certain exceptions (e.g., acreage would be stranded). An amendment to a higher threshold of participation is more in line with current oil and gas unit practices and demonstrated reasons for a lower threshold is consistent with current unit practices.

The bill (Section 8) deems the sequestered carbon dioxide to be owned by the operator "so long as the sequestration unit agreement remains in force and effect." The bill appears to confer on private operators the economic benefits of CO2 disposal, while shifting long-term costs onto the state. In addition, a unit may terminate and then the state is left with the long-term liability for the carbon dioxide. The bill lacks clarity regarding which entity or agency could be held financially responsible for legacy issues, simply stating that the "state" is responsible. If taxpayers are going to assume these long-term costs for permanent sequestration after operators complete injections, there should be clarity regarding how the state's financial costs will be dealt with and a clear understanding of the extent of the costs that could be incurred over many decades.

The bill does not require operators of carbon sequestration facilities to provide emergency response plans, mitigate leaks, or submit financial assurance for their commercial activities. (The bill makes a reference in Section 9 to any bonds on file being released, but nowhere else refers to bonds or explicitly requires any financial assurance for CO2 injection). In the absence of appropriate environmental and financial protections, New Mexicans may be left to absorb the

cost and other consequences of leaks, accidents, water contamination, increased seismicity, and other adverse events that might arise out of carbon sequestration activities. A requirement for emergency planning is important given past and recent CO2 pipeline accidents such as one that hospitalized 45 people in Mississippi in 2020, leaving some people with serious long-term injuries and disability, and forced the evacuation of 200 others.[1]

The bill explicitly (Section 9(B)) shifts liability to the state based largely on an operator's statement that injection operations are complete, including responsibility for long-term monitoring and remediation (Section 9(B)(4)). There is no exception for operators' negligence, and under the bill the State would be required to assume duties pursuant to contracts between operators and other private parties which the state did not have an opportunity to negotiate or even review. For these reasons this provision of the bill may violate the Anti-Donation Clause of the New Mexico Constitution, Art. IX, Sec. 14.

The bill has no safeguards (such as a testing or reporting regime) to ensure that CO2 injected into carbon sequestration facilities is not contaminated with VOCs (volatile organic compounds) or other impurities often commingled with captured CO2.

The bill imposes significant additional duties on OCD, which has a nearly 15% vacancy rate at a time of record-breaking oil and gas activity in New Mexico. The Legislature should consider additional appropriations for OCD tied to the creation and implementation of new oversight over CO2 sequestration.

EPA regulates class VI injection wells for carbon sequestration. New Mexico could gain primacy to regulate these wells but has not yet done so. It is unclear how the bill's provisions giving OCD authority over CO2 sequestration units and other approvals does or does not fit into the pre-existing EPA regulatory structure.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

Section 2(H) – The definition of "sequestration unit" does not include oil and gas units where carbon dioxide is injected for purposes of enhancing oil and gas production.

Section 5(B)(8) – It is unclear if the bill would require all surface owners to be paid the same amount per acre. NMSLO may have rates that differ from BLM or other surface owners.

Section 7(C) – While the bill allows for a unit expansion or contraction, it is silent as to the effective date of the compensation paid to owners and whether owners already in the unit must reallocate their previous *pro rata* share of the distributions. Making it clear that all payments made are on a go forward basis would prevent confusion and ambiguity and that owners are not subject to reallocation of previously distributed compensation. Further, as compensation would

[1] https://www.npr.org/2023/05/21/1172679786/carbon-capture-carbon-dioxide-pipeline

only apply to private landowners, assuming government agencies have a separate agreement with the operator, the provision would apply just to private landowners.

Section 9(D)(4) – References to CO2 being "stable" are vague. An appropriate scientific standard should be included in lieu of this undefined term that is open to multiple interpretations.

Section 13(B) – States "to the extent the dominant mineral estate is *reasonably* utilizing the surface estate for the production of minerals located…" This is ambiguous and seems to imply a paying quantities analysis, at minimum. It is unclear what volumes of production are needed and if a mere surface location for a backbuild with a well bore on an adjacent site would qualify. Further, it is unclear what happens if oil and gas production occurs after a parcel is unitized for CO2 sequestration. Finally, as the provision only excludes formations with surface activity, horizontal wells traversing formations with no surface activity would be subject to the Act.

OTHER SUBSTANTIVE ISSUES

The bill (Section 5(B)(8)) provides for public disclosure of the "amount per acre that the operator proposes to pay to compensate the surface owners or … the owners of the formation or formations within the buffer and monitoring zone." No similar requirement currently applies to operators seeking to acquire various approvals from OCD (such as permits to drill, compulsory pooling orders, etc.).

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS

As noted in greater detail above ("Significant Issues" and "Technical Issues"):

Section 4(C) should be amended to remove reference to "fair market value" at least with respect to state trust land and instead provide that the Commissioner may approve sequestration on terms, conditions, and pricing consistent with the Enabling Act.

Section 6 should be amended to prohibit the force-pooling of state trust land acreage.

Section 6(B) (10) should be amended to increase the minimum voluntary unitization requirement to 85% and allow a lower requirement of 75% if the operator demonstrates a sound reason, to be defined in rule, to allow a lower requirement.

Section 7(C) – the bill should clarify that all compensation paid to private landowners, after any sequestration unit expansion or contraction, shall be from the effective date of the expansion or contraction, with any compensation already paid not serving as a credit or debit for future compensation towards the landowner.

Section 9(D)(4) – "stable" should be defined by reference to appropriate scientific standards.

The bill should require operators to submit emergency response plans and adequate financial assurance in connection with their CO2 injection activities.

The bill should not transfer liability for private operators' commercial actions (and possible negligence) to the State of New Mexico.