

LEGISLATIVE BILL 650

Approved by the Governor May 24, 2021

Introduced by Flood, 19; Lowe, 37.

A BILL FOR AN ACT relating to carbon dioxide; to adopt the Nebraska Geologic Storage of Carbon Dioxide Act; to create funds; to provide penalties; and to provide severability.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 24 of this act shall be known and may be cited as the Nebraska Geologic Storage of Carbon Dioxide Act.

Sec. 2. The Legislature finds, recognizes, and declares that it is in the public interest to promote the geologic storage of carbon dioxide. Doing so will benefit the state and the global environment by reducing greenhouse gas emissions and will help ensure the viability of the state's energy and power industries, to the economic benefit of Nebraska and its citizens. Further, geologic storage of carbon dioxide, a potentially valuable commodity, may allow for its ready availability if needed for commercial, industrial, or other uses. Geologic storage, however, to be practical and effective, requires cooperative use of surface and subsurface property interests and the collaboration of property owners. Obtaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources. Use of any subsurface stratum and any materials and fluids contained therein for geologic storage of carbon dioxide is a reasonable and beneficial use.

Sec. 3. For purposes of the Nebraska Geologic Storage of Carbon Dioxide Act:

(1) Applicable underground injection control program for each class of storage facility injection well means the program, or most recent amendment thereof, for that class of well in Nebraska as provided by federal law;

(2) Carbon dioxide stream means carbon dioxide from anthropogenic sources, plus incidental associated substances derived from the source materials and the production or capture process, and any substances added to the stream to enable or improve the injection process if such substances will not compromise the safety of geologic storage and will not compromise those properties of a storage reservoir which allow the reservoir to effectively enclose and contain the stored carbon dioxide stream;

(3) Commission means the Nebraska Oil and Gas Conservation Commission;

(4) Geologic storage means the permanent or short-term underground storage of carbon dioxide streams in a storage reservoir;

(5) Permit means a permit issued by the commission under the Nebraska Geologic Storage of Carbon Dioxide Act allowing a person to operate a storage facility;

(6) Reservoir means a subsurface stratum, formation, cavity, or void, whether natural or artificially created, suitable for or capable of receiving through a well and geologically storing a carbon dioxide stream;

(7) Reservoir estate means ownership of any portion of a storage reservoir;

(8) Storage facility means the storage reservoir, underground equipment, and surface facilities and equipment used or proposed to be used in a geologic storage operation. The term includes the injection well and equipment used to connect the surface facility and equipment to the storage reservoir and underground equipment. The term does not include pipelines used to transport carbon dioxide to the storage facility;

(9) Storage operator means a person holding or applying for a permit under the act; and

(10) Storage reservoir means the reservoir proposed, authorized, or used for storing one or more carbon dioxide streams pursuant to a permit. The term does not include reservoirs used for purposes other than storage of carbon dioxide streams.

Sec. 4. (1) Title to any reservoir estate underlying the surface of lands and waters is vested in the owner of the overlying surface estate unless it has been severed and separately conveyed.

(2) A conveyance of the surface ownership of real property shall be a conveyance of the reservoir estate ownership in all strata below the surface of such real property unless the ownership interest in such reservoir estate previously has been severed from the surface ownership or is explicitly excluded in the conveyance. The ownership of reservoir estates may be conveyed in the manner provided by law for the transfer of mineral interests in real property. No agreement or instrument conveying mineral or other interests underlying the surface shall act to convey ownership of any reservoir estate unless the agreement explicitly conveys that ownership interest.

(3) No provision of law, including a lawfully adopted rule or regulation, requiring notice to be given to a surface owner, to an owner of a mineral interest, or to both, shall be construed to require notice to persons holding ownership interest in any underlying reservoir estate unless the law specifies notice to such persons is required.

(4) Nothing in this section shall be construed to change or alter the common law existing as of the effective date of this act as it relates to the rights belonging to, or the dominance of, the mineral estate. For the purpose of determining the priority of subsurface uses between a severed mineral estate and reservoir estate as described in this section, the severed mineral estate is dominant regardless of whether ownership of the reservoir estate is vested in the several owners of the surface or is owned separately from the surface.

(5) All instruments which transfer the rights to reservoir estates under this section shall describe the scope of any right of the owner of the reservoir estate to use the surface estate. The owner of any reservoir estate right shall have no right to use the surface estate beyond that set out in a properly recorded instrument.

(6) Transfers of reservoir estate rights made after the effective date of this act are null and void at the option of the owner of the surface estate if the transfer instrument does not contain a specific description of the location of the reservoir estate being transferred. The description may include but is not limited to a subsurface geologic or seismic survey or a metes and bounds description of the surface lying over the transferred reservoir estate. In the event a description of the surface is used, the transfer shall be deemed to include the reservoir estate at all depths underlying the described surface area unless specifically excluded. The validity of reservoir estate rights under this subsection shall not affect the respective liabilities of any party, and such liabilities shall operate in the same manner as if the reservoir estate transfer were valid.

(7) Nothing in this section shall alter, amend, diminish, or invalidate rights to the use of subsurface reservoir estates that were acquired by contract or lease prior to the effective date of this act.

Sec. 5. The commission has authority:

(1) Over all persons and property necessary to administer and enforce the Nebraska Geologic Storage of Carbon Dioxide Act and its objectives;

(2) To regulate activities relating to a storage facility, including construction, operation, and closure;

(3) To enter, at a reasonable time and in a reasonable manner, a storage facility to inspect equipment and facilities, to observe, monitor, and investigate operations, and to inspect records required to be maintained at the facility;

(4) To require that storage operators provide assurance, including bonds, that money is available to fulfill the storage operator's duties;

(5) To exercise continuing jurisdiction over storage operators and storage facilities, including the authority, after notice and hearing, to amend provisions in a permit and to revoke a permit; and

(6) To grant, for good cause, exceptions to the act's requirements and the requirements of any implementing rules and regulations.

Sec. 6. Geologic storage is allowed if a permit has been obtained from both the commission and the Underground Injection Control program permitting authority. A permit may be transferred if the commission and the Underground Injection Control program permitting authority consent.

Sec. 7. (1) A person applying for a permit shall:

(a) Comply with application requirements set by the commission;

(b) Pay a fee in an amount set by the commission. The amount of the fee shall be set by rule and regulation and shall be based on the commission's anticipated cost of processing the application. The fee shall be deposited in the Carbon Dioxide Storage Facility Administrative Fund; and

(c) Pay to the commission the costs the commission incurs in publishing notices for hearings and holding hearings on permit applications.

(2) In processing permit applications, the commission shall give priority to storage operators who intend to store carbon dioxide produced in Nebraska.

Sec. 8. (1) The commission shall hold a public hearing before issuing a permit.

(2) Notice of the hearing shall be provided in accordance with section 57-911 and commission rules and regulations adopted and promulgated thereunder.

(3) Notice of the hearing shall be given to each mineral lessee, mineral owner, and reservoir estate owner within the storage reservoir and within one-half mile of the storage reservoir's boundaries.

(4) Notice of the hearing shall be given to each surface owner of land overlying the storage reservoir and within one-half mile of the storage reservoir's boundaries.

(5) Notice of the hearing shall be given to any additional persons that the commission requires.

(6) Hearing notices required by this section shall comply with deadlines set by the commission and shall contain the information the commission requires.

Sec. 9. Before issuing a permit, the commission shall consult with the Department of Environment and Energy and the Underground Injection Control program permitting authority.

Sec. 10. Before issuing a permit, the commission shall find:

(1) That the storage operator has complied with all requirements set by the commission;

(2) That the storage facility is suitable and feasible for carbon dioxide injection and storage;

(3) That the carbon dioxide to be stored is of a quality that allows it to be safely and efficiently stored in the storage reservoir;

(4) That the proposed storage facility will not endanger surface waters or

underground sources of drinking water;

(5) That carbon dioxide will not escape into the atmosphere or surface waters from the storage reservoir;

(6) That the storage facility will not endanger human health or unduly endanger the environment;

(7) That the horizontal and vertical boundaries of the storage reservoir are defined;

(8) That the storage operator will establish a testing and monitoring plan to assess the location and migration of carbon dioxide injected for storage and to ensure compliance with all permit, statutory, and administrative requirements;

(9) That the storage operator has satisfied all of the requirements in subdivisions (2) through (8) of this section if the storage operator has obtained all permits required by the applicable underground injection control program permitting authority for each storage facility injection well;

(10) That the storage facility is in the public interest;

(11) In accordance with the United States Environmental Protection Agency Underground Injection Control Program, that the storage operator has completed a comprehensive geologic study which includes a seismic risk assessment;

(12) That the storage operator has made a good-faith effort to obtain the consent of all persons who own reservoir estates within the storage reservoir;

(13) That the storage operator has obtained the consent of persons who own reservoir estates comprising at least sixty percent of the physical volume contained within the defined storage reservoir;

(14) Whether the storage reservoir contains commercially valuable minerals. If it does, a permit may be issued only if the commission is satisfied that the interests of the mineral owners or mineral lessees will not be adversely affected or have been addressed in an arrangement entered into by the mineral owners or mineral lessees and the storage operator; and

(15) That all nonconsenting reservoir estate owners are or will be equitably compensated.

Sec. 11. The commission may include in a permit or order all things necessary to carry out the objectives of the Nebraska Geologic Storage of Carbon Dioxide Act and to protect and adjust the respective rights and obligations of persons affected by geologic storage.

Sec. 12. If a storage operator does not obtain the consent of all persons who own a reservoir estate within the storage reservoir, the commission may require that any reservoir estates owned by nonconsenting owners be included in a storage facility and subject to geologic storage.

Sec. 13. When the commission issues a permit, it shall also issue a certificate stating that the permit has been issued, describing the area covered, and containing other information the commission deems appropriate. The commission shall file a copy of the certificate with the register of deeds in the county or counties where the storage facility is located.

Sec. 14. (1) The commission shall take action to ensure that a storage facility does not cause pollution or create a nuisance. For the purposes of this provision and in applying other laws, carbon dioxide streams stored, and which remain in storage under a commission permit, are not a pollutant and do not constitute a nuisance.

(2) The commission's authority in subsection (1) of this section does not limit the jurisdiction held by the Department of Environment and Energy. Nothing else in the Nebraska Geologic Storage of Carbon Dioxide Act limits the jurisdiction held by the Department of Environment and Energy.

(3) The commission shall take action to ensure that substances that compromise the objectives of the act or the integrity of a storage reservoir do not enter a storage reservoir.

(4) The commission shall take action to ensure that carbon dioxide does not escape from a storage facility.

Sec. 15. The Nebraska Geologic Storage of Carbon Dioxide Act and any issuance of a permit under the act shall not be construed to:

(1) Prejudice the rights of property owners within a storage facility to exercise rights that have not been committed to a storage facility;

(2) Prevent a mineral owner or mineral lessee from drilling through or near a storage reservoir to explore for and develop minerals if the drilling, production, and related activities comply with commission requirements that preserve the storage facility's integrity and protect the objectives of the act; or

(3) Amend or alter any statute, rule, or regulation in effect on the effective date of this act which relates to the commission's authority to regulate operations to increase ultimate recovery from a pool as defined in section 57-903, including, but not limited to, the introduction of carbon dioxide into a pool.

Sec. 16. (1) Storage operators shall pay the commission a fee on each ton of carbon dioxide injected for storage. The fee shall be in an amount set by the commission in rules and regulations adopted and promulgated by the commission. The amount shall be based on the commission's anticipated expenses in regulating storage facilities during their construction, operational, and preclosure phases.

(2) Any fees collected pursuant to this section shall be remitted to the State Treasurer for credit to the Carbon Dioxide Storage Facility Administrative Fund, which is hereby created. The fund shall be administered by the commission and shall be used only for defraying the commission's expenses in processing permit applications, regulating storage facilities during their

construction, operational, and preclosure phases, and making storage amount determinations under section 24 of this act. The commission, however, through a cooperative or interlocal cooperation agreement with another state agency, may use the fund to compensate the cooperating agency for expenses the cooperating agency incurs in carrying out regulatory responsibilities such agency may have over a storage facility. Interest earned by the fund shall be deposited in the fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. Transfers from the fund are not permitted.

Sec. 17. (1) In addition to the fee required under section 16 of this act, storage operators shall pay the commission a fee on each ton of carbon dioxide injected for storage. The fee shall be in an amount set by the commission in rules and regulations adopted and promulgated by the commission. The amount shall be based on the commission's anticipated expenses associated with long-term monitoring and management of the storage facility following issuance of the certificate of project completion under section 19 of this act.

(2) Any fees collected pursuant to this section shall be remitted to the State Treasurer for credit to the Carbon Dioxide Storage Facility Trust Fund, which is hereby created. The fund shall be administered by the commission and shall be used only for defraying expenses the commission incurs in long-term monitoring and management of a closed storage facility. The commission, however, through a cooperative or interlocal cooperation agreement with another state agency, may use the fund to compensate the cooperating agency for expenses the cooperating agency incurs in carrying out regulatory responsibilities such agency may have over a storage facility. Interest earned by the fund shall be deposited in the fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. Transfers from the fund are not permitted.

Sec. 18. The storage operator has title to the carbon dioxide injected into and stored in a storage reservoir and holds title until the commission issues a certificate of project completion under section 19 of this act. While the storage operator holds title, the operator is liable for any damage the carbon dioxide may cause, including damage caused by carbon dioxide that escapes from the storage facility.

Sec. 19. (1) After carbon dioxide injections into a reservoir end and upon application by the storage operator, the commission shall consider issuing a certificate of project completion.

(2) The certificate may only be issued after public notice and hearing. The commission shall establish notice requirements for such hearing.

(3) The certificate may only be issued after the commission has consulted with the Department of Environment and Energy and the Underground Injection Control program permitting authority.

(4) The certificate may only be issued if the storage operator:

(a) Is in full compliance with all laws governing the storage facility;

(b) Shows that it has addressed all pending claims regarding the storage facility's operation;

(c) Shows that it has received an authorization of site closure from the applicable underground injection control program permitting authority for each storage facility injection well; and

(d) Shows that any wells, equipment, and facilities to be used in the post-closure period are in good condition and retain mechanical integrity.

(5) Once a certificate is issued:

(a) Title to the storage facility and to the stored carbon dioxide transfers, without payment of any compensation, to the State of Nebraska;

(b) Title acquired by the state includes all rights and interests in, and all responsibilities associated with, the stored carbon dioxide;

(c) The storage operator and all persons who generated any injected carbon dioxide streams are released from all regulatory requirements associated with the storage facility;

(d) Any financial assurance provided by the storage operator shall be released; and

(e) Monitoring and managing the storage facility is the state's responsibility to be overseen by the commission.

Sec. 20. (1) Any person who violates any provision of the Nebraska Geologic Storage of Carbon Dioxide Act or any rule, regulation, or order of the commission under the act shall be guilty of a Class II misdemeanor. Each day that such violation continues shall constitute a separate offense.

(2) If any person, for the purpose of evading the provisions of the act or any rule, regulation, or order of the commission under the act, makes or causes to be made any false entry or statement in a report required by the act or by any such rule, regulation, or order, makes or causes to be made any false entry in any record, account, or memorandum required by the act or by any such rule, regulation, or order, or removes from this state or destroys, mutilates, alters, or falsifies any such record, account, or memorandum, such person shall be guilty of a Class II misdemeanor.

(3) Any person who knowingly aids or abets any other person in the violation of any provision of the act or any rule, regulation, or order of the commission under the act shall be subject to the same penalty as that prescribed by the act for the violation by such other person.

(4) The penalties provided in this section shall be recoverable by suit filed by the Attorney General in the name and on behalf of the commission, in the district court of the county in which the defendant resides, or in which

any defendant resides if there be more than one defendant, or in the district court of any county in which the violation occurred. The payment of any such penalty shall not operate to relieve a person on whom the penalty is imposed from liability to any other person for damages arising out of such violation.

(5) In determining the amount of the penalty, the court shall consider:

(a) The nature of the violation, including its circumstances and gravity, and the hazard or potential hazard to the public's or a private person's health, safety, and economic welfare;

(b) The economic or environmental harm caused by the violation;

(c) The economic value or other advantage gained by the person committing the violation;

(d) The history of previous violations;

(e) The amount necessary to deter future violations;

(f) Efforts to correct the violation; and

(g) Other matters justice requires.

Sec. 21. (1) The commission may enter into agreements with other government entities and state agencies for the purpose of carrying out the objectives of the Nebraska Geologic Storage of Carbon Dioxide Act, including agreements under the Interlocal Cooperation Act when applicable.

(2) The commission may enter into contracts with private persons to assist it in carrying out the objectives of the act.

Sec. 22. Cooperative operation of a storage facility under a permit issued by the commission does not violate Nebraska statutes relating to trusts, monopolies, or restraint of trade.

Sec. 23. State agencies and political subdivisions are authorized to consent to and participate in a geologic storage project.

Sec. 24. (1) The commission, under procedures and criteria it may adopt, shall determine the amount of injected carbon dioxide stored in a storage reservoir.

(2) The purpose for determining storage amounts is to facilitate using the stored carbon dioxide for such matters as carbon credits, allowances, trading, emissions allocations, and offsets, and for other similar purposes.

(3) The commission may charge a reasonable fee to the person requesting a storage determination. Any such fee shall be set by the commission in rules and regulations adopted and promulgated by the commission.

(4) Any fees received by the commission under this section for storage determinations shall be remitted to the State Treasurer for credit to the Carbon Dioxide Storage Facility Administrative Fund.

Sec. 25. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.