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BILL ANALYSIS

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Senate Bill 775 (as introduced 8-27-09)
Sponsor: Senator Wayne Kuipers
Committee: Energy Policy and Public Utilities

Date Completed: 9-16-09

CONTENT

The bill would add Part 67 (Carbon Dioxide Storage) to the Natural Resources and Environmental Protection Act (NREPA) to do the following:

-- Require a person to obtain a permit from the Department of Environmental Quality (DEQ) in order to inject and store carbon dioxide in a storage facility.
-- Create the "Carbon Dioxide Storage Facility Trust Fund" and the "Carbon Dioxide Administrative Fund".
-- Establish a one-time fee and an annual fee that a storage operator would have to pay based on the amount of carbon dioxide stored in a storage facility, and require the fees to be deposited in the Trust Fund and the Administrative Fund, respectively.
-- Allow a storage operator to request from the DEQ a notice of completion for a storage facility.
-- Provide that 10 years after a notice of completion was issued, ownership and liability for the storage facility would transfer to the State.
-- Authorize a local unit of government to take private property by condemnation for use as a storage facility to be owned or operated by a governmental entity.
-- Authorize the DEQ and local units of government to enter into agreements with other governmental entities to regulate carbon dioxide storage.
-- Provide that Part 67 would preempt any conflicting local regulation.

In regard to certain "clean energy projects" initially funded by the State or Federal government for more than $80.0 million for research and demonstration purposes, the bill would do the following:

-- Transfer title to and liability for the stored carbon dioxide to the State.
-- Require a storage operator to pay the State the difference between the operator's costs and the value of a credit under Federal law.
-- Require the State to indemnify a storage operator for any liability related to stored carbon dioxide.
-- Provide that carbon dioxide storage would not constitute a nuisance or a trespass.

The bill is described below in further detail.

Carbon Dioxide Storage Permit

Under the bill, subject to certain exceptions, a person could not inject into and use a reservoir for the geologic storage of carbon dioxide unless the person was issued a permit under proposed Part 67. Upon application, the DEQ could issue a permit to drill and operate a well for the injection and storage of carbon dioxide in a storage facility.

("Carbon dioxide" would mean anthropogenically generated carbon dioxide and other chemical constituents of sufficient

purity and quality when injected into a reservoir so as not to compromise the safety, efficiency, and integrity of the reservoir. "Geologic storage" would mean permanent underground storage of carbon dioxide in a reservoir pursuant to a permit issued by the DEQ. "Reservoir" would mean any of the following that are suitable for or capable of being made suitable for the injection and storage of carbon dioxide:

-- A subsurface sedimentary stratum, formation, structure, aquifer, cavity, or void, whether natural or artificially created.
-- A saline formation.
-- A coal seam.

"Storage facility" would mean a reservoir, underground equipment, surface buildings, facilities, and equipment used in the storage of carbon dioxide pursuant to a permit, excluding pipelines used to transport the carbon dioxide from one or more capture facilities to the injection and storage site. The term would include any necessary and reasonable buffer and subsurface monitoring zones designated by the DEQ for the purpose of protecting against pollution or invasion, and the escape, release, or migration of carbon dioxide stored in the storage facility.)

The issuance of a permit would have to be in accordance with proposed Part 67 and any rules promulgated under it, applicable provisions of Part 615 (Supervisor of Wells), and applicable Federal law and regulation. A permit would have to be issued if the DEQ found all of the following:

-- The horizontal and vertical boundaries of the storage facility were appropriate.
-- The storage facility was suitable for the injection and storage of carbon dioxide.
-- The use of the facility would not contaminate other formations containing fresh water, oil, gas, coal, or other commercially valuable mineral deposits.
-- The proposed storage of carbon dioxide in the facility was in the public interest and would not endanger human health or the environment.

The DEQ also would have to find that the applicant, as the proposed storage operator, had made a good-faith effort to obtain the consent of a majority of the owners of the land or of rights or interests in the land comprising the storage facility and the applicant intended to acquire any remaining interests necessary for the purpose of drilling the injection well and operating the facility.

The DEQ could require a storage operator to provide adequate surety, security, or cash performance bonds as a condition of the issuance of a permit.

A carbon dioxide storage permit would not be required if the injection of carbon dioxide into a reservoir had been approved by the DEQ under Part 615 or 617 (Unitization) and if the approval remained in effect. This provision would not prohibit a person from seeking permits or approvals as provided for in proposed Part 67 or as provided for in Part 615 or 617.

Storage Facility Trust Fund & Fee

The bill would create the Carbon Dioxide Storage Facility Trust Fund within the State Treasury. The State Treasurer could receive money or other assets from any source for deposit into the Trust Fund. The Treasurer would have to direct the Trust Fund's investment, and would have to credit to the Trust Fund interest and earnings. Money in the Trust Fund at the close of the fiscal year would remain in that Fund and would not lapse to the General Fund.

The DEQ would be the administrator of the Trust Fund for auditing purposes. The Department would have to use money in the Trust Fund, upon appropriation, for one or more of the following:

-- Long-term monitoring of storage facilities, including surface facilities, equipment, and wells.
-- Remediating mechanical problems associated with wells and surface infrastructure at storage facilities.
-- Repairing mechanical leaks at storage facilities.
-- Plugging and abandoning wells under the DEQ's jurisdiction for use as observation wells.
-- Paying claims associated with storage facilities.

The bill would establish a one-time fee of $1 for each ton of carbon dioxide injected into a storage facility. The DEQ would have to

collect the fees and forward them to the State Treasurer for deposit in the Trust Fund.

Administrative Fund & Fee

The bill would create the Carbon Dioxide Administrative Fund within the State Treasury. The State Treasurer could receive money or other assets from any source for deposit into the Fund. The Treasurer would have to direct the Fund's investment, and would have to credit to the Fund interest and earnings. Money in the Fund at the close of the fiscal year would remain in the Fund and would not lapse to the General Fund.

The DEQ would have to use money in the Administrative Fund to administer and enforce proposed Part 67 during the operational phase of a storage facility, including inspecting, testing, and monitoring it. The DEQ would be the Fund administrator for auditing purposes.

The bill would establish an annual charge of 15 cents per ton of carbon dioxide stored in a facility levied on each storage operator before a notice of completion was issued. The DEQ would have to collect the fees and forward them to the State Treasurer for deposit in the Administrative Fund.

Notice of Completion

Under the bill, a storage operator could submit to the DEQ a request for a notice of completion. The DEQ would have to issue a notice if it determined that a reservoir was reasonably expected to retain its mechanical integrity and contain the carbon dioxide stored in it. Ten years after a notice of completion was issued, the following would have to occur:

-- Ownership of the storage facility, including the stored carbon dioxide, would transfer by operation of law to the State.
-- The storage operator, all generators of any injected and stored carbon dioxide, and the owners of the land or of rights or interests in the land comprising the facility would be released by operation of law from civil, administrative, or criminal liability associated with the facility.
-- Any performance bonds posted by the storage operator would have to be released, and the continued monitoring of the facility, including remediation of any well leakage, would become the responsibility of the DEQ.

Clean Energy Projects

Under the bill, notwithstanding the provisions regarding transfer of ownership and liability to the State, for all clean energy projects funded initially, in whole or in part, by the State or the Federal government in excess of $80.0 million, for the purpose of conducting research and development and the demonstration of permanent carbon dioxide sequestration and storage, after carbon dioxide had been injected into the well and had passed into the reservoir, all right, title, and interest in and to, and any liabilities associated with, the stored carbon dioxide would transfer by operation of law to the State. At that time, the storage operator, all generators of any injected carbon dioxide, and the owners of the land or rights or interests in the land comprising the facility would be immune from any civil, administrative, and criminal liability arising out of, in connection with, or resulting from the storage, escape, release, or migration of the carbon dioxide injected by the storage operator. This provision would be in addition to and not in lieu of any immunity from or limitation of liability otherwise provided by statute or common law. This immunity would not extend to claims arising from activities occurring before carbon dioxide had been injected into a well and had passed into a reservoir.

("Clean energy project" would mean a steam-powered electric generation facility that produces between 30 and 100 megawatts of electric power through the use of fossil fuels and is designed and operated to capture, sequester, and store at least 90% of gross carbon dioxide emissions in a storage facility.)

Also, if State or Federal law created or confirmed the existence of a commercial market relating to credits or other economic value attributable to carbon dioxide that had been stored permanently, a storage operator that was operating under these provisions would be responsible for preparing, filing, and registering all applications and related documentation and fund transactions in connection with carbon dioxide stored permanently in a storage facility. Upon

receiving any funds, payments, credits, or other items of economic value attributable to the permanently stored carbon dioxide, the storage operator would have to pay the State an amount equal to the market value of the credits or other items of economic value issued less an amount sufficient to cover the storage operator's capital and operating costs for the same period for which the credits or other items were issued that were incurred due to the storage. The State would have to deposit these funds into the proposed Trust Fund. If State or Federal law created or provided for any bonus credit or credits for early adoption of a carbon storage program, the value of the bonus credit or credits would be the property of the storage operator.

("Credit" would mean the economic value attributed by Federal law or regulation to each 2,000 pounds of carbon dioxide stored permanently in a storage facility.)

A storage operator that was operating under these provisions could elect irrevocably to disclaim the applicability of these requirements and to be subject to the provisions regarding the notice of completion, effective as of the date the storage operator designated in a written statement filed with the DEQ.

Notwithstanding any law to the contrary, including the governmental immunity law, after the transfer of title to carbon dioxide to the State, the State would have sole civil, administrative, and criminal liability in connection with, arising out of, or resulting from the storage, escape, release, or migration of the carbon dioxide.

Notwithstanding any law to the contrary, the State would have to indemnify, hold harmless, defend, and release the storage operator from and against any liability, whether civil, administrative, or criminal, asserted against it in connection with stored carbon dioxide, including payment to the storage operator of reasonable attorney fees and all other costs of litigation it incurred. The State's obligation to indemnify the storage operator, however, would not extend to any liability arising out of or relating to any of the following:

-- The storage operator's intentional or willful misconduct in its operation of the storage facility.
-- The storage operator's failure to comply with State or Federal law.
-- The preinjection operation of the storage facility.

Under these provisions, the operation of a storage facility or the injection or storage of carbon dioxide in a facility by the storage operator would not constitute a public or private nuisance or a trespass. A court of this State would not have jurisdiction to enjoin or restrain the operation of a storage facility or the injection or storage of carbon dioxide in a facility under any other law. Rules of any State department or agency, to the extent that they conflicted with proposed Part 67, would not apply to the operation of a storage facility or the injection or storage of carbon dioxide in a storage facility.

Condemnation

The bill would allow a local unit of government to take private property situated within or outside of its corporate limits under Public Act 149 of 1911 (which governs acquisition of property by State agencies and public corporations) for use as a storage facility, to be owned or operated, in whole or in part, by that local unit, another local unit, or the State.

Rights or interests in a storage facility held by a party who had obtained a carbon dioxide storage permit would not be subject to condemnation otherwise authorized by these provisions.

The exercise of the right of condemnation authorized by the bill would not preclude the right of the owner of the land or of rights or interests in the land to drill through the storage facility reservoir, if the drilling complied with NREPA and the rules promulgated under it. The authorized right of condemnation would not prejudice, impair, or diminish the rights of the owner of the land or of rights or interests in the land to the enjoyment of all other uses not acquired for the storage facility.

Other Provisions

The bill provides that the DEQ would have continuing jurisdiction and authority over all people and property necessary to administer and enforce proposed Part 67. The Department's jurisdiction would include all

periods after the storage operator ceased operations.

The DEQ and local units of government could enter into agreements with each other and with the Federal government or other states for the purpose of regulating carbon dioxide storage projects or owning or operating storage facilities.

Part 67 would preempt any conflicting resolution, ordinance, charter, zoning, land use, or other provision adopted by a local unit of government.

The bill would authorize the DEQ to promulgate rules to implement Part 67.

Proposed MCL 324.6701-324.6710

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill outlines the procedure for the licensure of carbon dioxide storage facilities (CDSFs) by the Department of Environmental Quality. This process would involve the time of DEQ employees, so some indeterminate costs would be incurred.

The bill would establish the Carbon Dioxide Storage Facility Trust Fund. The Fund would be funded by a $1 per ton one-time fee levied upon operators of CDSFs, although the bill specifies that funds could come from any source. Additionally, the bill specifies that money in the Fund at the close of the fiscal year would remain in the Fund, rather than lapsing to the General Fund.

The bill also would establish the Carbon Dioxide Administrative Fund. This Fund would be funded by a 15-cent per ton annual fee levied upon operators of CDSFs during the time before a notice of completion was issued. As provided for the Trust Fund, funds could come from any source, and at the conclusion of a fiscal year, money left in the Administrative Fund would remain there.

The bill would provide for the transfer of ownership of CDSFs to the State 10 years after a notice of completion was issued. The notice of completion would indicate that no additional carbon dioxide would be stored in the facility and that the facility was in reasonable mechanical shape and should continue to function. Once this transfer was complete, the State would assume all liability for the CDSF. Continued maintenance and monitoring of the CDSF would be funded by the Carbon Dioxide Storage Facility Trust Fund. During the period of operation before a notice of completion was issued, inspections, testing, and monitoring of the facility by the DEQ would be funded by the Carbon Dioxide Administrative Fund.

For clean energy projects fully or partially funded by the State or the Federal government for more than $80.0 million, any money received in the form of "carbon credits" would be ceded to the State. The operator could keep a portion of the credit for the operator's capital and operating costs, with the remainder going to the Carbon Dioxide Storage Facility Trust Fund.

The bill would have a minimal fiscal impact on local governments.

Fiscal Analyst: Josh Sefton