

## Carbon Dioxide Storage Facility Act

The Alabama House and the Senate have both passed House Bill 327 which was signed into law by Governor Ivey on May 9, 2024. This Act could be of serious consequence to landowners, timber operations, oil, gas and mineral holders, property developers; (including subdivisions), title insurers and perhaps others.

As you may know, in trying to deal with climate change, regulations are being issued by the Federal Government in certain states to decrease the amount of Carbon Dioxide (CO<sup>2</sup>) emissions into the atmosphere. One of the technologies supposedly being employed and authorized is the sequestration of CO<sup>2</sup> below the surface of the earth. The new Alabama Act makes it considerably easier for CO<sup>2</sup> sequestration operators to obtain the rights to store CO<sup>2</sup> but does not address the pipelines that will need to traverse long distances to get to the sequestration facilities.

### Highlights of the Act

The key highlights are as follows:

1. **Pore Space**. The Legislature has identified a sub-surface area called "Pore Space" which is basically any sub-surface area that the State Oil & Gas Board ("Board") will authorize for CO<sup>2</sup> sequestration. In other words, Pore Space is anything below surface that the Board determines is an appropriate location in which to pump and store CO<sup>2</sup>. That may not necessarily require that Pore Space include salt domes and similar sub-surface geologic features that have some type of geologic containment features, but rather could simply be some sub-surface area where the Board authorizes CO<sup>2</sup> storage.
2. **Ownership of Pore Space**. The Act provides that the ownership of Pore Space is vested in the owners of the surface rights unless the ownership interest in the Pore Space has previously been severed from the surface ownership and is expressly excluded or reserved in a conveyance (which is unlikely for prior conveyances since there has been no definition of Pore Space by law before this Act).
3. **Transfers of Pore Space**. In order to transfer Pore Space, it would be conveyed in the same manner as required for transfer of surface interests, such as by Deed or Lease.
4. **Pre-existing OG&M Rights**. The Act specifically provides that any instrument that has previously conveyed oil, gas and other mineral interests ("OG&M") shall not convey or reserve ownership in any Pore Space unless the Pore Space is expressly conveyed or reserved for the storage of CO<sup>2</sup>.
5. **Future OG&M Rights**. Any agreement that conveys the right to utilize Pore Space or the surface for CO<sup>2</sup> storage shall not include any OG&M rights in the same agreement. If so, those other OG&M rights are void. This does not apply to agreements executed before October 1, 2024.
6. **Surface Owners Rights**. The Act provides that the owner of the Pore Space does not have any right to use the surface estate beyond those rights which are set out in an executed agreement with the surface owner or if it will adversely affect any "existing Easement" whether public or private.

Real Estate

# Alert

*This alert was prepared by Hand Arendall Harrison Sale's Real Estate Team. For further information or assistance, please contact the author or the attorney with whom you normally work.*

**Author**

T. Bruce McGowin

251-694-6342

[bmcgowin@handfirm.com](mailto:bmcgowin@handfirm.com)

**Practice Group Members:**

E. Shane Black

Anne G. Burrows

Kelly Thrasher Fox

Christopher M. Gill

Wesley J. Hunter

Neil C. Johnston (Sr.)

J. Fred Kingren

Brooks P. Milling

Yanya O'Hara

Chase Pritchard

John E. Rollins

Jennifer L. Roselius

Edward T. Rowe

Sabrina Ruffin

Jack P. Russell

David A. Ryan

Matthew C. Vaughn

Christopher S. Williams

7. **OG&M Approval Board Considerations.** A permit from the Board is required to store CO<sup>2</sup> in Pore Space. Among the considerations to be made by the Board in approving a Sequestration Permit, the Board is to consider competing rights in the hands of third parties such as the surface owner, easement holders or OG&M holders.
8. **Pooling.** As with OG&M interests, the Act provides for the pooling of Pore Space for the storage of CO<sup>2</sup>. In order to avail itself of that the storage operator has to obtain the consent of at least 66 2/3% of the owners of the Pore Space desired. For those non-consenting owners who do not want to convey their Pore Space, the Board would hold a public hearing and then, as to the non-consenting owners, provide for pooling of their interests upon terms that are “just and reasonable as determined by the Board”, with such non-consenting owners to be “fairly and equitably compensated”.
9. **Surface use by the CO<sup>2</sup> Operator.** The Act provides that the storage operator has to “limit the adverse surface use impact upon the lands of the non-consenting owners”. That implies a right of the storage operator to use the surface to some extent as imposed by the Board.
10. **Carveouts for Coal.** The Act expressly has carveouts for coal mines and coal seams in Jefferson, Tuscaloosa and Walker counties or within a ten (10) mile radius of any coal mining operation.
11. **Trust Funds.** The Act establishes an Administrative Fund and a Closure Fund which are paid out of fees assessed by the Board on the storage operator to use in administering the requirements of the Act and in closing out a facility. As noted below, once a facility is closed out, the responsibility for any cost associated with the release of CO<sup>2</sup> is payable from the Closure Trust Fund.
12. **Liabilities.** While the storage operator is actively operating the facility, the Act provides that the storage operator remains liable for damages attributed to its operation as long as it holds title to the injected CO<sup>2</sup>. The Act provides that once the facility is deemed to be stable and given a Closure Certificate by the Board, then title to all the equipment and facilities and all responsibilities and liabilities associated with such passes to the State. Further, in addition to imposing this liability on the State, the Act provides for an express release of the CO<sup>2</sup> storage operator from any post-closure regulatory requirements and any bonds or other security that may have been posted. Monitoring and managing the storage facility after closure expressly becomes the responsibility of the State, administered by the Board, unless the federal government assumes responsibility. Lastly, the Act does not address liability if the holder of any OG&M rights drills into or through the Pore Space and causes a leak or other damage.
13. **State Lands.** The Act provides that the Commissioner of the Alabama Department of Conservation and Natural Resources can lease Pore Space for any lands under its jurisdiction for carbon sequestration.
14. **Effective Date.** The Act is effective on October 1, 2024.

## Conclusion

The Act and CO<sub>2</sub> sequestration present a host of real property issues, health issues and other potential issues and we would be happy to discuss any or all of those issues with you.