

BILL ANALYSIS

C.S.H.B. 4557
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

To produce an environment that will attract businesses to invest in carbon capture, utilization, and storage (CCUS) in Texas, the creation of a legal, economic, and regulatory framework for the industry is critical. Liability issues in particular play a major role in the industry. Several states have other measures to prevent unwarranted litigation against companies engaged in capturing and storing carbon dioxide. If Texas is to compete, and ultimately lead in the CCUS industry, it needs to enact liability protections. C.S.H.B. 4557 seeks to provide the regulatory framework to businesses operating, and those who want to operate, CCUS facilities in Texas by providing liability protections for CCUS operators, facilities, and producers while also providing for damages for interference with water or mineral access.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 4557 amends the Civil Practice and Remedies Code to set out provisions relating to liability for capturing and storing carbon dioxide. The bill defines the following:

- "captured carbon dioxide" as carbon dioxide from any source that, through human effort or means, is seized for the purpose of sequestering the carbon dioxide with the intent of permanently preventing the carbon dioxide from being released into the atmosphere, including carbon dioxide that is captured from the atmosphere, stripped, segregated, or divided from a fluid stream, or captured from certain emissions sources;
- "carbon dioxide" as the chemical compound composed of one carbon and two oxygen atoms, including:
 - anthropogenic carbon dioxide;
 - naturally occurring carbon dioxide;
 - carbon dioxide captured from the atmosphere; and
 - phases, mixtures, and combinations of carbon dioxide that include:
 - a substance incidentally derived from the source materials for or process of capturing the carbon dioxide;
 - a substance added to the carbon dioxide stream to enable or improve storage of the carbon dioxide; and
 - a substance incidentally captured with carbon dioxide captured from the atmosphere;

- "claimant" as a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant, in an action under the bill's provisions and who is a land or mineral owner and party to a written agreement with the defendant related to the party's land or minerals or the defendant's activities regarding captured or stored carbon dioxide;
- "defendant" as a person against whom an action is brought under the bill's provisions and who is a producer of captured carbon dioxide or an owner or operator of a facility used to store carbon dioxide or a mechanism or instrumentality being used to transport captured carbon dioxide, including a pipeline or a tank or vessel carried by motor vehicle, watercraft, or rail;
- "geologic storage" as the underground storage of carbon dioxide in a reservoir;
- "geologic storage facility" as the underground reservoir, underground equipment, injection wells, and surface buildings and equipment used or to be used for the geologic storage of carbon dioxide and all surface and subsurface rights and appurtenances necessary to the operation of a facility for the geologic storage of carbon dioxide. The term includes any reasonable and necessary areal buffer and subsurface monitoring zones, pressure fronts, and other areas as may be necessary for this state to receive delegation of any federal underground injection control program relating to the storage of carbon dioxide;
- "legal requirement" as a statute, regulation, rule, order, judgment, or permit controlling or directing conduct or the design, construction, or use of a facility or equipment that was enacted, adopted, promulgated, or issued by the federal government, an agency of the federal government, a federal court, this state, an agency or court of this state, or a local government in this state;
- "reservoir," by reference, as a natural or artificially created subsurface sedimentary stratum, formation, aquifer, cavity, void, or coal seam; and
- "stored carbon dioxide" as captured carbon dioxide that is being transported or temporarily or permanently stored.

C.S.H.B. 4557 prohibits a claimant from bringing an action against an applicable defendant on the basis that captured carbon dioxide, stored carbon dioxide, or a process associated with capturing or storing carbon dioxide is a pollutant, constitutes a nuisance, including a public nuisance, under common law or state law, or has caused a nuisance-related injury.

C.S.H.B. 4557 prohibits a claimant from recovering noneconomic damages in a civil action against an applicable defendant for damages for injury to a person or property, including for interference with a possessory interest or an ownership right or an injury to crops or an animal, resulting from any of the following:

- the transmission or injection of captured carbon dioxide into a geologic storage facility, including an action for damages caused by seismic activity;
- subsurface migration of stored carbon dioxide, including a claim for trespass or conversion arising from the subsurface migration of stored carbon dioxide into a pore space, geologic formation, cavity, void, reservoir, aquifer, mineral deposit, or other geologic formation; or
- captured or stored carbon dioxide being inadvertently released, including an action alleging environmental damage caused by the inadvertent release of captured or stored carbon dioxide into the air or surface water.

However, the bill authorizes the claimant to recover noneconomic damages only if the claimant establishes, in addition to other requirements of law, actual damages and one of the following:

- that, with respect to information relevant to a permitting authority's decision to grant the defendant a permit to transport, capture, or store carbon dioxide or conduct the process or operate the equipment or facility being used to transport, capture, or store carbon dioxide:
 - the defendant concealed, withheld, or misrepresented the information;
 - the information relates to the safety or propriety of injecting carbon dioxide into the geologic storage facility or is relevant to determining whether the stored

- carbon dioxide could migrate or escape in the manner in which it migrated or escaped;
- the permitting authority, in granting the defendant's permit reasonably relied on the information and did not receive the relevant accurate information from another source before granting the defendant's permit;
- the information is of sufficient importance that a reasonable person with the permitting authority's knowledge and experience would consider the information material to the permitting authority's decision to grant the permit; and
- the permit was granted not more than five years before the date the carbon dioxide was injected, migrated, or escaped;
- that:
 - at the time of the event that caused the damage that is the basis of the action, the defendant was not in compliance with a legal requirement that governs an aspect of the defendant's conduct, including conduct regarding the defendant's equipment or facility, relevant to the event;
 - the legal requirement is intended to protect a person or property from the kind of damage that occurred in the event; and
 - if the defendant had been in compliance with the legal requirement, the event would not have occurred; or
- that, if the aspect of the defendant's conduct, including conduct regarding the defendant's equipment or facility, was not subject to an applicable permitting process or applicable legal requirement:
 - the defendant's actions or omissions were contrary to a standard industry practice for the conduct relevant to the damage-causing event;
 - the defendant chose not to comply with such industry practice solely for an economic reason; and
 - if the defendant had acted in accordance with such industry practice, the damage-causing event would not have occurred.

C.S.H.B. 4557 prohibits an applicable claimant from recovering noneconomic damages in a civil action for a claim that an applicable defendant prevented or impeded access to, or interfered with the production of, underground minerals or water due to the storage of captured carbon dioxide in a geologic storage facility. The bill authorizes the claimant to recover noneconomic damages only if the claimant establishes, in addition to other requirements under the law, actual damages and establishes the following regarding information relevant to the authority determining if storage of captured carbon dioxide in the geologic storage facility would prevent or impede the claimant's access to underground minerals or water or interfere with the claimant's production of the minerals or water:

- the defendant withheld from or misrepresented the information to the permitting authority;
- the permitting authority, in granting the defendant's permit, reasonably relied on the information provided by the defendant and did not receive the relevant accurate information from another source before granting the defendant's permit;
- the claimant did not know or receive notification of the proceeding in which the defendant obtained a permit to establish the geologic storage facility; and
- the information is of sufficient importance that a reasonable person with the permitting authority's knowledge and experience would consider the information material to the permitting authority's decision to grant the permit.

C.S.H.B. 4557 establishes that a claimant who receives compensation, including through a lease payment, a royalty payment, or the purchase of an easement, in consideration of the possibility that a geologic storage facility may prevent or impede access to or interfere with the production of the claimant's underground minerals or water, is not entitled to recover damages from the owner or operator of the facility if the facility prevents or impedes access to or interferes with the production of the claimant's minerals or water.

C.S.H.B. 4557 limits the economic damages available for interference with access to underground minerals and water due to the storage of captured carbon dioxide to a claimant not otherwise barred from recovering damages by the bill to the following:

- if the defendant's geologic storage facility prevents or impedes access to the claimant's underground minerals or water, the increased cost to access the minerals or water that results from penetrating or circumventing the geologic storage facility;
- if the defendant's geologic storage facility interferes with the production of the claimant's underground minerals or water, the increased cost to produce the minerals or water and present value of the minerals or water that the claimant cannot with reasonable probability produce because of the interference; or
- if the defendant's geologic storage facility prevents access to and the production of the claimant's underground minerals or water, the present value of the minerals or water that the claimant cannot with reasonable probability produce because of the facility.

C.S.H.B. 4557 prohibits a claimant in an applicable civil action from recovering exemplary damages unless the claimant proves the information required by the bill, as applicable, and meets the statutory requirements for recovery of exemplary damages.

C.S.H.B. 4557 establishes that its provisions may not be construed to impair, amend, alter, negate, or otherwise affect any right, obligation, or other term of an agreement but authorizes the voluntary waiver of the bill's provisions by an agreement. The bill's provisions relating to liability for capturing and storing carbon dioxide are an exercise of authority under the Texas Constitution and take effect only if the bill receives a vote of three-fifths of all the members elected to each house, as provided by the constitution.

C.S.H.B. 4557 establishes that its provisions may not be construed to impair a party's right or obligation under a contract entered into before the bill's effective date. The bill applies only to a cause of action that accrues on or after the bill's effective date.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 4557 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute revises the definition of "claimant" that appeared in the introduced by including the condition that the claimant must be a land or mineral owner and party to a written agreement with the defendant related to the party's land or minerals or the defendant's activities regarding captured or stored carbon dioxide. Whereas the introduced included as a "defendant" a person against whom an action described by the bill's provisions is brought and who is an owner or operator of a mechanism or instrumentality used to transport captured carbon dioxide, the substitute includes a specification absent from the introduced that the person is an owner or operator of a mechanism or instrumentality being used for such transportation.

The substitute omits the provision from the introduced that established that stored carbon dioxide is not a pollutant or a nuisance, including a public nuisance, under common law or state law. The substitute revises the prohibition in the introduced against a person bringing a nuisance action or similar cause of action on the basis that captured carbon dioxide, stored carbon dioxide, or a process associated with capturing or storing carbon dioxide constitutes a nuisance as follows:

- by changing the person who may not bring the action from any person to a claimant;

- by specifying the basis on which the action may not be brought is that the carbon dioxide or related process constitutes a nuisance under common law or state law, including a public nuisance; and
- by including as a basis on which an action may not be brought that the carbon dioxide or related process is a pollutant or has caused a nuisance-related injury.

While both the introduced and substitute authorize a claimant to recover noneconomic damages in a civil action for damages for injury to a person or property resulting from certain injection, migration, or release of captured carbon dioxide only if the claimant establishes actual damages and certain facts, the substitute includes the condition that the claimant must establish those damages and facts in addition to other requirements of law.

Both the introduced and substitute limit the damages that a claimant may recover in a civil action against a geologic storage facility that prevents access to and production of the claimant's minerals or water to the present value of the minerals or water that the claimant cannot with reasonable probability produce because of the facility. However, the substitute omits the requirement from the introduced for such a claimant to convey the claimant's ownership interest in the underground minerals or water that are the subject of the action to the defendant on receipt of payment of the damages.

The substitute omits the provision from the introduced that established that any person who owned or operated a carbon dioxide repository for offshore geologic storage of carbon dioxide before the date the permanent school fund acquires the right, title, and interest in carbon dioxide is relieved of liability for any act or omission regarding the carbon dioxide in the repository.

The substitute includes provisions absent from the introduced that do the following:

- establish that the bill's provisions may not be construed to impair, amend, alter, negate, or otherwise affect any right, obligation, or other term of an agreement;
- authorize the bill's provisions to be voluntarily waived by an agreement; and
- establish that the bill's provisions may not be construed to impair a party's right or obligation under a contract entered into before the bill's effective date.