

**DRAFT ONLY
NOT APPROVED FOR
INTRODUCTION**

HOUSE BILL NO. _____

Sequestration site unitization.

Sponsored by: Representative(s) Lubnau

A BILL

for

1 AN ACT relating to the unitization of carbon sequestration
2 sites; and providing for an effective date.

3

4 *Be It Enacted by the Legislature of the State of Wyoming:*

5

6 **Section 1.** W.S. 35-11-314 is created to read:

7

8 **35-11-314. Unitization of geologic sequestration**
9 **sites.**

10

11 **(a) The purpose of this section is declared by the**
12 **Wyoming legislature to be the protection of correlative**
13 **rights and the prevention of waste, as defined in this**
14 **section.**

1

2 (b) An agreement for the combined organization and use
3 of a geologic sequestration site into one **(1) or more parts**
4 is authorized and may be performed, and shall not be held
5 or construed to violate any of the statutes of this state
6 relating to trusts, monopolies, or contracts and
7 combinations in restraint of trade, and may be submitted to
8 the department for approval as being in the public
9 interest. Approval of such agreement by the department
10 shall constitute a complete defense to any suit charging
11 violation of any statute of this state relating to trusts,
12 monopolies and combinations in restraint of trade on
13 account of such agreement or on account of operations
14 conducted pursuant thereto. The failure to submit such an
15 agreement to the department for approval shall not for that
16 reason imply or constitute evidence that such agreement or
17 operations conducted pursuant thereto are in violation of
18 laws relating to trusts, monopolies and combinations in
19 restraint of trade.

20

21 (c) Except when context otherwise requires **or when**
22 **otherwise defined in this subsection**, the terms used or
23 defined in W.S. 35-11-103, shall have the same meaning when

1 used in this section. When used in this section, the
2 following terms shall mean:

3

4 (i) "Waste" means an inefficient and potentially
5 dangerous use of a geologic sequestration site without an
6 overriding plan of organization and utilization;

7

8 (ii) "Correlative rights" means the right of
9 owners of both pore space occupied by injected materials
10 and pore space which will be occupied in the future and
11 which is located within a geologic sequestration site to
12 share in the economic benefits generated by using the
13 geologic sequestration site for geologic sequestration.

14

15 (d) Any interested person may file an application with
16 the department requesting an order providing for the
17 operation and organization of a geologic sequestration site
18 as a unit of **one (1) or more parts** and for the pooling of
19 interests in pore space in the proposed unit area for the
20 purpose of conducting such unit operation. The application
21 shall contain:

22

1 (i) A copy of any permit issued by the department
2 allowing geologic sequestration or any application for such
3 permit;

4

5 (ii) A description of the pore space and surface
6 lands proposed to be so operated, termed the "unit area";

7

8 (iii) The names, as disclosed by the conveyance
9 records of the county or counties in which the proposed
10 unit area is situated, and the status records of the
11 district office of the bureau of land management: of (A)
12 All persons owning or having an interest in the surface
13 estate or pore space in such unit area including mortgages
14 and the owners of other liens or encumbrances, (B) All
15 owners of every tract of land or pore space not included
16 within but which immediately adjoins the proposed unit area
17 or a corner thereof, and (C) The addresses of all such
18 persons and owners, if known. If the name or address of any
19 such person or owner is unknown, the application shall so
20 indicate;

21

1 (iv) A statement of the type of operations
2 contemplated in order to effectuate the **purposes announced**
3 **in subsection (a) of this section;**

4
5 (v) A proposed plan of unitization applicable to
6 the proposed unit area which the applicant considers fair,
7 reasonable and equitable and which shall include provisions
8 for determining the pore space to be used within such area,
9 the appointment of a unit operator and the time when the
10 plan is to become effective;

11
12 (vi) A proposed plan for determining the amount
13 of pore space to be allocated to each separately owned
14 tract within the unit and the method by which such **pore**
15 **space** will be allocated the carbon credits or other
16 economic benefits generated by use of the pore space;

17
18 (vii) A proposed plan for the marketing and sale
19 of carbon credits or other economic benefits generated by
20 the use of pore space within the unit area;

21
22 (viii) A proposed operating plan providing the
23 manner in which the unit area will be supervised and

1 managed and, if applicable, costs allocated and paid,
2 unless all owners within the proposed unit area have joined
3 in executing an operating agreement or plan providing for
4 such supervision, management and allocation and, if
5 applicable, payment of costs;

6

7 (ix) Proof that the unit operator has sufficient
8 rights of access to the necessary surface estates to
9 operate the unit area.

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***** STAFF COMMENT *****

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W.S. 34-1-152(f), passed last legislative session, establishes that surface access rights must be defined in the agreement transferring pore space rights and that pore space owners/users have no superior / automatic right to use the surface, as would be the case with oil and gas production. Consequently, a unit operator likely will have to acquire its rights to surface access outside the unitization process.

(e) Upon filing of such application, the department shall promptly set the matter for hearing, and in addition to any notice otherwise required by law or the department's rules, shall cause notice of such hearing, specifying the time and place of hearing, and describing briefly its purpose and the land and pore space affected, to be mailed by certified mail at least fifteen (15) days prior to the

1 hearing to all persons whose names and addresses are
2 required to be listed in the application.

3

4 (f) After considering the application and hearing the
5 evidence offered in connection therewith, the department
6 shall enter an order setting forth the following findings
7 and approving the proposed plan of unitization and proposed
8 operating plan, if any, if the department finds that:

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***** STAFF COMMENT *****

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(i) The material allegations of the application
23 are substantially true;

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[delete "actual"] share of the pore space to be used in the
sequestration activity;

1 ***** STAFF COMMENT *****

2 Pursuant to Craig Newman's suggestion, the word
3 "actual" is deleted in the paragraph above.
4 However, consider leaving the word. The purpose
5 of this provision is to require a confirmation
6 that the unit plan as closely as possible
7 allocates carbon credits according to the actual
8 amount of pore space in each tract.
9

10 (iii) The method by which each unit of pore space
11 is allocated the carbon credits or other economic benefits
12 generated by use of that pore space is fair and reasonable.
13 For this purpose, there shall be a rebuttable presumption
14 that a fair and equitable allocation will provide (**strike**
15 **"the owner of"**) each separately owned tract within the unit
16 twelve and one-half percent (12.5%) of the [**strike "total"**]
17 carbon credit acquired by using that (**strike "owner's"**)
18 **tract's** allocation of pore space;

19 ***** STAFF COMMENT *****

20 The 12.5% used in this paragraph is meant as a
21 placeholder only. Of course, this presumptive
22 amount does not address a situation where "other
23 economic benefits," other than carbon credits, are
24 used.
25
26

27 (iv) The method of marketing the carbon credits or
28 other economic benefits generated by using the unit's pore
29 space is fair and equitable and is reasonably designed to
30 maximize the value of such benefits;

31 ***** STAFF COMMENT *****
32

1 These last two provisions allow flexibility in the
2 way in which carbon credits are valued. It would
3 be difficult to define the actual market price (or
4 even the market) which will determine the value.
5 The carbon market is just emerging and the United
6 States has not ratified the Kyoto Protocol or
7 otherwise adopted a carbon cap and trade system
8 which will require the development of a carbon
9 market. Despite this fact, currently, there are
10 at least six exchanges trading in carbon
11 allowances. The problem is that different types of
12 carbon credits are available and are certified
13 using different methods. Consequently, there is
14 not a single "market" for carbon credits.

15
16 The approach taken in these provisions avoids
17 allowing unit operators to take pore space for
18 their use and then compensate the pore space
19 owner. Such a regulatory scheme likely would
20 raise concerns about unconstitutional takings.
21 Instead, these provisions track the
22 constitutionally valid approach taken in the oil
23 and gas unitization / forced pooling statutes.

24
25 This legislation contemplates unitization as an
26 exercise of the state's police powers, designed to
27 protect all pore space owners. It is not an
28 effort to authorize the taking of pore space and
29 to set a method for providing just compensation.
30 This legislation addresses the complex issue of
31 how CO2 will spread within a geologic
32 sequestration site. If a geologic sequestration
33 site is capable of holding 1 million tons of CO2,
34 but in the first 3 years only 500,000 tons are
35 injected, how is such injection (or the carbon
36 credits realized by injecting 500,000 tons)
37 allocated among the unit's pore space owners?
38 Should the credits only go to those whose pore
39 space is actually filled during those 3 years? If
40 so, what if, after the initial injection of
41 500,000 tons, no further injection takes place?
42 Under this scenario, uncompensated pore space
43 owners may eventually see the migration of CO2
44 into their pore space. Allowing unit operators to
45 pay some, but not all, unit members seems to
46 ignore testimony that the flow of CO2 into a

1 sequestration site eventually affects all unit
2 members (even if only on a long time scale). Just
3 as oil is considered to be drawn from all corners
4 of an oil and gas unit, so might the injection of
5 CO2 be considered to flow to all corners of a
6 geologic sequestration site. In the oil and gas
7 context, all unit members are compensated from the
8 first barrel that is pumped from the ground. To
9 protect all pore space owners, and assuming no
10 geologic characteristics that would make the
11 payment of all pore space owners inequitable, it
12 seems necessary to simply require that carbon
13 credits created by CO2 injection be spread across
14 all pore space owners in proportion to the amount
15 of pore space they own in the unit. Of course,
16 this approach will avoid requiring unit operators
17 to make potentially impossible guesses about the
18 migration of CO2 and who should be paid and when.

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21 (v) Where the unit area embraces less than the
22 whole of a geologic sequestration site, that the portion
23 thereof to be included within the unit area is of such size
24 and shape as may be reasonably required for the successful
25 and efficient conduct of the unitized method or methods of
26 operation for which the unit is created and that the
27 conduct thereon will have no material adverse effect upon
28 the remainder of such **geologic sequestration site**;

29
30 ***** STAFF COMMENT *****
31 **This provision would allow a unit operator to deal**
32 **with a situation in which the geological**
33 **sequestration site was of such a character as to**
34 **make the proportional sharing of all carbon**
35 **credits among all pore space owners in a geologic**
36 **sequestration site inequitable. The sponsor may**
37 **want to consider, however, the best means for**
38 **defining the circumstances under which a**

1 **gerrymandering of unit boundaries is allowed. The**
2 **current language "[where] the conduct thereof will**
3 **have no material adverse affect upon the remainder**
4 **of such pool" may be too ambiguous. Because of the**
5 **complexity of the issue and the uncertain variety**
6 **of geological realities that might justify**
7 **excluding part of a sequestration site from the**
8 **sequestration unit, perhaps it is better to insert**
9 **language that would leave this matter within the**
10 **discretion of the Department.**

11
12
13 (vi) In the event that there are pore space
14 owners in the unit area who have not executed an operating
15 agreement or agreed to the proposed operating plan, that
16 such proposed operating plan:

17
18 (A) Provides that each owner shall have a
19 vote in the supervision and conduct of unit operations
20 related to the allocation and sale of carbon credits and
21 the allocation, if any, of the costs of unit operations
22 chargeable against the interests of such owner;

23
24 (B) Provides for fair and equitable terms
25 and conditions for removal of a unit operator and for
26 appointment of a successor unit operator;

27
28 (C) Makes a fair and equitable adjustment
29 among unit members for their respective investments, if

1 any, in any improvement which will contribute to unit
2 operations;

3

4 (D) If the plan provides for an allocation
5 of the cost of unit operations, including capital
6 investment, provides a fair and equitable method for
7 determining such costs and allocating such costs to the
8 separately owned tracts and for the payment of such costs
9 by the persons owning such tracts.

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***** STAFF COMMENT *****

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**With regard to (C) and (D), it seems possible that
13 pore space owners will not share in the costs of
14 operating the unit. If that is the case, it may
15 be better to omit the two provisions, above.**

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(g) No order of the department authorizing the
19 commencement of unit operations shall become effective
20 until the plan of unitization has been signed or in writing
21 ratified or approved by those persons who **have been**
22 **allocated** at least eighty percent (80%) of the pore space
23 within the unit area. If such consent has not been
24 obtained at the time the department order is made, the
25 department shall, upon application, hold such supplemental
26 hearings and make such findings as may be required to
27 determine when and if such consent will be obtained. Notice

1 of such supplemental hearing shall be given by regular mail
2 at least fifteen (15) days prior to such hearing to each
3 person owning interests in the pore space in the proposed
4 unit area whose name and address was required by subsection
5 (d) (iii) of this section to be listed in the application
6 for such unit operations. If the required percentages of
7 consent have not been obtained within a period of six (6)
8 months from and after the date on which the order of
9 approval is made, such order shall be ineffective and
10 revoked by the department, unless, for good cause shown,
11 the department extends that time. Any interested person may
12 file an application with the department requesting an order
13 applicable only to the proposed unit area described in the
14 application which shall provide for the percentage of
15 approval or ratification to be reduced from eighty percent
16 (80%) to seventy-five percent (75%). The application shall
17 contain the information required by subsection (d) of this
18 section and any order of the department entered pursuant to
19 the application must comply with subsection (f) of this
20 section. Notice of the hearing on the application shall be
21 given in the same manner and to the same persons as
22 required by subsection (e) of this section. If the
23 department finds that negotiations were being conducted

1 **since** the effective date of this act or have been conducted
2 for a period of at least nine (9) months prior to the
3 filing of the application, that the applicant has
4 participated in the negotiations diligently and in good
5 faith, and that the percentage of approval or ratification
6 required by this subsection cannot be obtained, the
7 department may reduce any percentage of approval or
8 ratification required by this section from eighty percent
9 (80%) to seventy-five percent (75%). Such an order shall
10 affect only the unit area described in the application and
11 shall operate only to approve the proposed plan of
12 unitization and proposed operating plan and to reduce the
13 required percentage of approval or ratification thereof and
14 shall not change any other requirement contained in this
15 section.

16

17 (h) From and after the effective date of an order of
18 the department entered under the provisions of this
19 section, the operation of the unit area defined in the
20 order by persons other than the unit operator or persons
21 acting under the unit operator's authority, or except in
22 the manner and to the extent provided in the plan of

1 unitization approved by the order, shall be unlawful and is
2 hereby prohibited.

3

4 (j) Unless otherwise provided in this section, an
5 order entered by the department under this section may be
6 amended in the same manner and subject to the same
7 conditions as an original order or previous agreement:
8 provided, no amendatory order shall change the allocation
9 of pore space as established by the original order or
10 previous agreement, except with the written consent of
11 those persons who **have been allocated** at least eighty
12 percent (80%) of the pore space in the unit, nor change any
13 allocation of costs as established by the original order or
14 previous agreement, except with the written consent of
15 those persons who **have been allocated** at least eighty
16 percent (80%) of the unit pore space. If such consent has
17 not been obtained at the time the department order is made,
18 the department shall, upon application, hold such
19 supplemental hearings and make such findings as may be
20 required to determine when and if such consent will be
21 obtained. Notice of such supplemental hearing shall be
22 given by regular mail at least fifteen (15) days prior to
23 such hearing to each person owning interests in the unit

1 area whose name and address was required by the provisions
2 of paragraph (d)(iii) of this section to be listed in the
3 application for such unit operations. If the required
4 percentages of consent have not been obtained within a
5 period of six (6) months from and after the date on which
6 the order of approval is made, such order shall be
7 ineffective and revoked by the department, unless, for good
8 cause shown, the department extends that time. Any
9 interested person may file an application with the
10 department requesting an order applicable only to the unit
11 area described in the application which shall provide for
12 the percentage of approval or ratification to be reduced
13 from eighty percent (80%) to seventy-five percent (75%).
14 The application shall contain the information required by
15 subsection (d) of this section and any order of the
16 department entered pursuant to the application must comply
17 with subsection (f) of this section. Notice of the hearing
18 on the application shall be given in the same manner and to
19 the same persons as required by subsection (e) of this
20 section. If the department finds that negotiations were
21 being conducted **since** the effective date of this act or
22 have been conducted for a period of at least nine (9)
23 months prior to the filing of the application, that the

1 applicant has participated in the negotiations diligently
2 and in good faith, and that the percentage of approval or
3 ratification required by this subsection cannot be
4 obtained, the department may reduce any percentage of
5 approval or ratification required by this section from
6 eighty percent (80%) to seventy-five percent (75%). Such an
7 order shall affect only the unit area described in the
8 application **and operate only to reduce the required**
9 **percentage of approval or ratification necessary for**
10 **amending the allocation of pore space or allocation of**
11 **costs** and shall not change any other requirement contained
12 in this section.

13

14 (k) The department, upon its own motion or upon
15 application, and with notice and hearing, may modify
16 its order regarding the operation, size or other
17 characteristic of the **(delete "geologic sequestration")**
18 unit **area** in order to prevent or assist in preventing
19 the violation of any **(delete "element") fact or**
20 **circumstances** upon which the order granting approval
21 was originally based or to correct a substantial
22 inequity resulting from operation of the unit.

23

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***** STAFF COMMENT *****

1 **This provision is taken from W.S. 30-5-109(d). It**
2 **somewhat over-laps the first phrase of Paragraph**
3 **(h) and the sponsor may wish to simply replace the**
4 **first phrase of (h) with this provision.**
5
6

7 (m) Any owner of pore space within a geologic
8 sequestration site who has not been included within a
9 unitization application or order authorizing a unit under
10 this section, may petition for inclusion in the unit area.
11 The petition shall be filed with the department and shall
12 describe the petitioner's legal entitlement to the pore
13 space, the location of the pore space and the bases for
14 inclusion in the unit area. Such petition must be
15 accompanied by a deposit of money sufficient to pay all
16 costs of the inclusion proceedings. The department shall
17 cause a notice of filing of such petition to be published
18 which notice shall state the filing of such petition, the
19 name of the petitioner, the location of the pore space, and
20 the prayer of the petitioner. The notice shall notify all
21 interested persons to appear at a specified time and place
22 and to show cause, in writing, if any they have, why said
23 petition should not be granted. The department at the time
24 and place mentioned in the notice shall proceed to hear the
25 petition and all objections thereto and shall thereafter
26 grant or deny the petition. The filing of such petition

1 shall be deemed and taken as an assent by each and all
2 petitioners to the inclusion in the unit of the pore space
3 mentioned in the petition or any part thereof. If the
4 petition is granted, the petitioner shall be considered to
5 have been a member of the unit since its inception and,
6 upon the payment of any costs paid by unit members, shall
7 be entitled to all carbon credits or other economic
8 benefits received by unit members since the inception of
9 the unit.

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***** STAFF COMMENT *****

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This paragraph is an adaptation of W.S. 22-29-307, concerning petitions to change the boundaries of special districts. The sponsor should consider whether paragraph (h), above, is applicable to this provision. If a petition to expand the unit is approved, should it then be necessary to obtain 80% approval of the unit members since it would necessarily involve a reallocation of pore space percentages?

(n) All operations, including, but not limited to, the commencement, drilling, or operation of a well upon any portion of the unit area for all purposes shall be deemed to be the conduct of such operations upon each separately owned tract in the unit area by the owner or owners thereof. The portion of the unit's storage capacity, carbon credits, other economic benefits or costs allocated to separately owned tracts in the unit area shall be

1 deemed, for all purposes, to have been actually generated
2 or incurred on such tracts by a well drilled thereon.
3 Operations conducted pursuant to an order of the department
4 providing for unit operations shall constitute a
5 fulfillment of all the express or implied obligations of
6 each lease or contract covering lands in the unit area to
7 the extent that compliance with such obligations cannot be
8 had because of the orders of the department. Whenever the
9 department enters an order providing for a unit operation,
10 any lease, other than a state or federal lease, which
11 covers lands that are in part within the unit area embraced
12 in any such plan of unitization and that are in part
13 outside of such unit area shall be vertically segregated
14 into separate leases, one (1) covering all formations
15 underlying the lands within such unit area and the other
16 covering all formations underlying the lands outside each
17 unit area, such segregation to be effective as of the
18 anniversary date of such lease next ensuing after the
19 expiration of ninety (90) days from the effective date of
20 unitization; provided, however, that any such segregated
21 lease as to the outside lands shall continue in force and
22 effect for the primary term thereof, but not for less than
23 two (2) years from the date of such segregation and so long

1 thereafter as operations are conducted under the provisions
2 of the lease. If any such lease provides for a lump-sum
3 rental and if rentals become payable under any segregated
4 lease covering the outside land, such lump-sum rental shall
5 be prorated between such segregated leases on an acreage
6 basis.

7

8 (o) That portion of pore space allocated to any tract,
9 and the proceeds from the sale of carbon credits or other
10 economic benefit generated from that pore space, shall be
11 the property and income of the several persons to whom, or
12 to whose credit, the same are allocated or payable under
13 the order providing for unit operations.

14

15 (p) No department order or other contract relating to
16 a separately owned tract within the unit **area** shall be
17 terminated by the order providing for unit operations, but
18 shall remain in force and apply to that tract, its
19 benefits, burdens and obligations, until terminated in
20 accordance with the provisions thereof.

21

22 (q) Except to the extent that the parties affected so
23 agree, no order providing for unit operations shall be

1 construed to result in a transfer of all or any part of the
2 title or right of use to pore space or other rights in any
3 tract in the unit area.

4
5 (r) Subject to the limitations set forth in this
6 section, and to such further limitations as may be set
7 forth in the plan of unitization and operating plan, the
8 operator of the unit shall have a first and prior lien for
9 costs incurred pursuant to the plan of unitization and
10 operating plan upon each owner's pore space and his share
11 of carbon credits or other economic benefit to secure the
12 payment of such owner's proportionate part of the costs of
13 developing and operating the unit area. The lien may be
14 established and enforced in the same manner as provided by
15 W.S. 29-3-101 through 29-3-111. For such purposes any
16 nonconsenting owner shall be deemed to have contracted with
17 the unit operator for his proportionate part of the cost of
18 developing and operating the unit area. A transfer or
19 conversion of any owner's interest or any portion thereof
20 however accomplished after the effective date of the order
21 creating the unit, shall not relieve the transferred
22 interest of said operator's lien on said interest for the
23 cost and expense of unit operations.

1 ***** STAFF COMMENT *****

2 The term "owner" as used in this subsection is
3 important since the operator is given a lien on
4 the interest of the "owner." This language is
5 borrowed from the oil and gas statutes. In the
6 oil and gas context, the owner does not include
7 royalty or other cost-free interests in the oil
8 and gas lease. This draft bill does not define
9 "owner" and this provision arguably gives the
10 operator a lien against the owner of pore space,
11 even if that owner has leased his right to
12 another. The sponsor needs to consider the
13 breadth of the desired lien and, more generally,
14 the part owners and lessees should play in this
15 legislation. In contemplating the definition of
16 an "owner," the sponsor should be mindful that
17 provisions such as subsection (g) (requiring 80%
18 consent before a unit is formed) may need to
19 include title holders and lessees, while
20 provisions such as this one may need to apply only
21 to those interest holders directly involved in the
22 sequestration project (e.g. only the lessee where
23 the owner has leased his pore space rights to the
24 lessee and takes no active part in the
25 sequestration activities).

26

27 (s) Notwithstanding any other provision in this
28 section to the contrary, any person who owns an interest in
29 pore space within the unit area which is not subject to a
30 pore space lease or similar contract, shall, with respect
31 to twelve and one-half percent (12.5%) of the interest, be
32 deemed to be an owner obligated to pay all costs of unit
33 operations attributable to the interest and shall be deemed
34 to be a royalty owner to the extent of one-eighth of the
35 interest free from the costs.

36

1 ***** STAFF COMMENT *****
2 **This provision is borrowed from the oil and gas**
3 **statutes at the sponsors request. It treats an**
4 **unleased interested in pore space as if it is**
5 **leased with a one-eighth royalty, so that the**
6 **owner's interest is treated as if leased and cost-**
7 **bearing as to 7/8ths and cost-free as to 1/8th.**
8 **Please advise on the sponsor's preferred method of**
9 **applying this paragraph to the pore space /**
10 **sequestration context.**

11
12
13 (t) [Omitted provision regarding inapplicability of
14 this section to unitization agreements prior to the act's
15 effective date.]

16
17 (u) A certified copy of any order of the department
18 entered under the provisions of this section shall be
19 entitled to be recorded in the land records of the County
20 Clerk for the counties where all or any portion of the unit
21 area is located, and such recordation shall constitute
22 notice thereof to all persons.

23
24 **Section 2.** This act is effective July 1, 2009.

25

26

(END)