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Province of Alberta Issues a Request for Full Project Proposals For Carbon Sequestration Hubs

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Following an earlier announcement (Information Letter 2021-19) in May 2021 (commented on here) and then a call for Expressions of Interest (EOI) in September (commented on here, the link to the EOI is now broken and the EOI no longer seems to be available), the province has now moved to the next stage in developing its hub-based carbon capture and storage (CCS) policy with the issuance of a "Request for Full Project Proposals For Carbon Sequestration Hubs" (RFPP). This latest RFPP indicates that

> … the Province is interested in advancing a strategic hub concept through a competitive process (this (*sic*) "process") as described below. A carbon sequestration hub will be an area of pore space ("Location") overseen by a private company that can effectively plan, enable, and undertake carbon sequestration of captured carbon dioxide from various emissions sources as a service to industrial clients. (at 2)

The document refers to the company as an "industry steward" (at 2)!

The RFPP reports that the EOI call generated significant interest from a range of different actors with different backgrounds and project sizes and configurations. The RFPP, however, is not intended to be responsive to all of the EOIs received. Instead, the province has indicated that it seeks to focus, as a priority, on project proposals "from companies interested in building, owning, and operating a carbon sequestration hub that will primarily ensure sequestration services for emissions from Alberta's industrial heartland region …" (at 3). While this region is the "capture" focus of the RFPP at this time, sequestration may occur outside this region (at 3).

A successful proponent or proponents based on the call for proposals will be invited to enter into an evaluation permit with the government. Activities undertaken pursuant to the permit will "further define and establish the suitability and capacity of the Location as a carbon sequestration hub", and this "will ultimately facilitate the granting of a carbon sequestration agreement ("Agreement") to the successful proponent(s), establish the boundaries of the Location, and facilitate the hub manager role" (at 3). More than one proposal may be accepted for the Heartland region "in response to a demonstrated current or future demand, it can provide contingency sequestration options, and it can further enable competitive service rates" (at 5).

The RRFP contains detailed evaluation criteria organized under the following headings (at 7 – 10): (1) general overview, (2) business model, (3) project configuration and execution, (4) project location, (5) proponent's operational capacity, and (6) emissions policy.

I will leave it to others to explore the details of these evaluation criteria. What interests me most about the RRFP is its Appendix A which contains "additional details as to the intended Agreement" (at 13).

Appendix A: Additional details as to the intended Agreement

The "Agreement" that is referred to here is the proposed sequestration agreement that would follow on the successful execution of a work program under an evaluation permit. In my earlier note on the province's initial announcement in May, I had expressed some misgivings as to the lack of certainty with respect to some elements of Alberta's emerging hub policy, including the legal form of the instrument that would be offered (e.g. a standard form sequestration lease or an ad hoc Crown agreement), as well as with respect to the possible economic regulation of the services offered by a sequestration hub. Appendix A purports to address some of these issues, but other uncertainties remain.

The Appendix purports to clarify three things. First, the sequestration tenure will take the form of a Crown Agreement under s 9 of the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*] and not a sequestration lease under Part 9 of the *MMA*. Section 9 is a highly discretionary provision of the *MMA* which provides the Minister with extraordinary powers to do (so far as relevant here) the following:

> **9** *Notwithstanding anything in this Act or any regulation or agreement*, the Minister, on behalf of the Crown in right of Alberta, may
>
> (a) enter into a contract with any person or the government of Canada or of a province or territory respecting
>
> ….
>
> (iii) the storage or sequestration of substances in subsurface reservoirs;
>
> …
>
> (vi) any matter that the Minister considers to be necessarily incidental to, in relation to or in connection with any of the matters referred to in subclauses (i) to (v);
>
> (b) issue an agreement
>
> (i) containing a provision that is a variation of a provision of this Act or the regulations that would otherwise apply to the agreement, or
>
> (ii) making inapplicable a provision of this Act or the regulations that would otherwise apply to the agreement;

> (c) issue an agreement containing a provision providing for the waiver by the lessee of a benefit under this Act or any other Act under the administration of the Minister. (Emphasis added)

However, the Appendix then goes on to say that the resulting agreement will "reflect existing provisions within Part 9 of the *Mines and Minerals Act*, as well as aspects of the Carbon Sequestration Tenure Regulation" dealing with such matters as duration (15 years renewable on application), an obligation to pay into the Post-closure Stewardship Fund for all carbon dioxide injected, monitoring, and verification planning, and an initial and updated closure plan (at 13).

In my view, this clarification is completely inadequate. The only incremental certainty that the clarification provides is that successful proponents know that they will *not* get a lease such as those sequestration leases issued to Shell for its Quest project (for details on the Quest project see earlier post). But they will know very little else for certain; and, crucially, they will *not* know one of the most important attributes that a sequestration lease provides, namely the potential for the transfer of liability (*MMA*, s 121) from the lessee to the Crown after closure if the Minister is satisfied that "the captured carbon dioxide is behaving in a stable and predictable manner, with no significant risk of future leakage" (*MMA*, s 120). And while the Minister may have large powers in granting a s 9 agreement, I am not sure that they extend as far as allowing the Minister to include a clause indemnifying a proponent or effecting a statutory novation of well licences etc., at least absent a further statutory amendment. As a result, a proponent under this scheme will have far less certainty than it has under the existing provisions of Part 9 of the *MMA* and the Regulation, and I don't think that a s 9 agreement will be able to offer similar comfort.

Second, Appendix A purports to clarify that an agreement holder will be obliged to offer open access "subject to fair and reasonable cost recovery" (at 13). But then the Appendix goes on to provide that the agreement holder must provide "access by a third party to sequestration pore space within the Location to undertake injection" (at 13). Once again, I think that this obfuscates rather than clarifies. It is one thing to say that an agreement holder must provide sequestration *services* on an open access (and presumably on a non-discriminatory basis), but to add an additional requirement (and it is clearly framed as an additional requirement) that such an agreement holder must actually provide *access by a third party* to pore space gives rise to a whole host of questions. Is this physical access? If so, how would that be mediated?

Third, the Appendix recognizes the risk that agreement holders/hub operators might have market power that the government (or a designated regulator) may need to curb. This is a good step forward, but a potential proponent is hardly likely to take much comfort from the following:

> An agreement holder will be subject to future regulatory structures and mechanisms as they evolve that will ensure affordable service rates and open access to the hub with a just and reasonable cost recovery. Objectives for economic regulation include:
> - Mitigating market power – Preventing agreement holder from controlling access exerting unreasonable conditions as a result of market position.
> - Public good – achieving efficient development of CCS infrastructure to reduce costs, support CCS development, reduce the environmental impact of the pipeline system,

> minimize safety risks and support development of EOR [enhanced oil recovery with CO_2 injection] markets. (at 13 – 14)

A potential proponent might also look askance at the warning that "[a]s carbon sequestration evolves and its value is better understood, an agreement holder will be subject to future regulatory structures that may require additional revenue to the Crown for the use of public pore space" (at 14). There are two caveats to this warning: first that any such "structures would account for the costs of CCUS [carbon capture, utilization, and storage] as well as a fair return on investment" (a utility type guarantee), and second that "[t]he Crown will not seek any additional revenue for use of public pore space for at least the next five years" (at 14). But one wonders why Crown royalty payees get a ten-year guarantee of current royalty rates (see *Royalty Guarantee Act*, SA 2019, c 9, (now s 34.1 of the *MMA*, and my comment on the *Guarantee Act* here) whereas the proponents of these much higher risk CCS hub projects get only five years.

These provisions fail to provide the regulatory certainty that any reasonable proponent would be seeking for developing what is still a relatively new technology and as such represent significant regulatory risk that is unhelpful to industry.

One final clarification on which the province has been consistent throughout is that this RRFP process will not apply to enhanced oil recovery or acid gas injection schemes.

> Current practices for enhanced oil recovery and injection of formation acid gas will remain in place. (at 2)

And,

> This process is only intended to provide access to subsurface formations (i.e., pore space) to undertake and enable carbon sequestration as defined in Part 9 of the Mines and Mineral Act and the Carbon Sequestration Tenure Regulation. Carbon sequestration in this document refers to the permanent disposal of carbon dioxide, deeper than 1,000 metres, *with no associated hydrocarbon recovery* (e.g., injection into a saline aquifer). (at 5) (emphasis added)

Conclusion

My overall assessment of the RRFP is that it is a further step forward in developing a hub policy for CCS in Alberta; but I still wonder why is it taking so long, and why some of the uncertainties referenced above have not been resolved since the issuance of the *Regulatory Framework Assessment* in 2013. Proponents are going to have a hard time wrapping their heads around what is still a moving target, let alone getting comfortable with the legal and regulatory risks for their proposed projects. They might reasonably have expected more clarity by this stage in the process after so much time has passed.

This post may be cited as: Nigel Bankes, "Province of Alberta Issues a Request for Full Project Proposals For Carbon Sequestration Hubs" (December 7, 2021), online: ABlawg,

http://ablawg.ca/wp-content/uploads/2021/12/Blog_NB_RFPP_Carbon_Sequestration.pdf

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