

Fifth Annual Conference on Carbon Capture & Sequestration

Steps Toward Deployment

Regulatory Analysis

A Model CCS Code: Establishing the Regulatory Framework and Incentives to Enable Technology Deployment

Kipp Coddington, Partner, Alston & Bird; Executive Director, Coalition for
Commodity CO₂

May 8-11, 2006 • Hilton Alexandria Mark Center • Alexandria, Virginia

Overview

- Goals of federal CCS regulation
- Key elements of regulation
- Suggested approach: “Federal Carbon Storage Insurance Act of 2006”
- How the Act would work
- Benefits of the Act’s approach
- How “not” to regulate

Goals of Federal CCS Regulation

- Impose necessary legal framework to address business & public sector needs
 - *Must be “just right”:* over- and under-regulation will cripple the industry
- Encourage commercial technology deployment today, not a decade or more from now
 - *R&D (e.g., FutureGen) is critical for technical reasons but may not be the model for future commercial regulation*
 - *The need for clarity exists today*
- Be cognizant of where CO₂ injection is occurring today and which regulatory bodies have the expertise
 - *CO₂-EOR is not a niche, it’s a key component and the building block*
 - *Federal versus State; EPA versus natural resource commissions*

Key Elements of Regulation

- The legal status of CO₂, when injected and stored, is critical
 - *The CCS industry will never get off the ground if carbon is injected & stored as something other than a commodity*
- The federal role should be minimized
 - *The States are the primary regulators of CO₂ injection today*
 - *The States may regulate the same conduct differently*
- The federal role should be focused on the primary legal gap
 - *Insurance issues associated with the long-term storage of carbon dioxide*
 - *Other risks – capture and transportation, for example – are either manageable or not a matter of additional federal concern at this time*

Federal Insurance Analogues

- Price-Anderson Act
 - *Provides no-fault insurance for public in event of certain nuclear accidents*
- Agricultural programs
 - *Numerous federal programs provide outlays to farmers in case of disaster (drought, etc.)*
- Countless others
 - *S&L, banking, flood, etc.*

Suggested Approach for a Model Federal CCS Code

- Federal government insures long-term carbon storage if States regulate in a manner to spur the commercial roll-out of CCS
 - *Modeled after the National Flood Insurance Program*
 - ✓ *“Plan”-based approach under which the Federal government incentivizes desirable State conduct*
 - ✓ *Focused on private insurance markets*
- What risks are insurable under the federal program?
 - *Climate change-related*
 - *Orphaned sites*

Elements of an Insurable State Plan

- CO₂ is a commodity
 - *Any other status would subject the CCS industry and governments to speculative, but potentially crippling, liability*
- State regulation based upon natural resource/oil & gas commissions
 - *State oil & gas commissions have the vast bulk of the experience with CO₂ injection*
 - *Oil & gas codes and related case law address issues such as trespass, property rights, protection of environmental & mineral resources, etc.*
- **States must address a variety of technical and policy issues**
 - *Siting, MMV*
 - *Notice and comment rulemaking*
 - *Must meet minimum federal storage criteria*

How the New Law Would Work

- Entirely voluntary
 - *States may regulate differently*
- Secretary of the Treasury implements the insurance program through regulations
 - *Two options: federal program or federally supported private program*
- Interested States prepare and submit carbon storage insurance plans
- Federal government reviews the plans
 - *Projects in States with federally approved plans are eligible for insurance*
 - *Judicial review*

Benefits of the Federal Carbon Storage Insurance Approach

- Fosters commercial development and investment today
- Builds upon those State agencies with the most expertise – i.e., oil & gas
- Builds upon the only industry doing CCS today: CO₂-EOR
- Puts the States in the lead, while ensuring minimum federal standards are met
- Addresses public acceptance through notice-and-comment rulemaking, judicial review, etc.
- Enables R&D to continue while commercial activity proceeds

How “Not” To Regulate

- Classify CO₂ as a waste
- Fail to acknowledge the decades of experience that State oil & gas agencies have with CO₂ injection
- Regulate CCS without considering mineral rights and related issues
- Create a new federal program with substantive criteria that trumps the States
- View CO₂-EOR as a side show instead of the main event
- Fail to recognize the non-commercial path that immediate deep saline injection may represent (though CO₂ stored therein could be used later as a commodity)
- Turn CCS into a perpetual R&D line item in the federal budget instead of the real commercial opportunity that it represents
- Envision a world in which there is a Class I well in everybody’s back yard (which appears to be the current thinking) and build your laws around that model
- “Over think” the issue or let the pursuit of perfection defeat progress that could lift all boats, from investors to environmentalists

For more information

Kipp Coddington

Alston & Bird, LLP

202-756-3408

Kipp.coddington@alston.com