

## **COGCC Suggested Needs for companion legislation to SB 23-016**

Section 7 of SB23-016 is a well-drafted statutory provision which would grant COGCC authority to pursue Class VI regulatory primacy from the EPA. As directed by SB21-264, in 2021 COGCC issued a report evaluating the resources needed for the state of Colorado to regulate a safe and effective UIC Class VI program. At the direction of Governor Polis, COGCC followed up this report in 2022-23 with a detailed legislative proposal summarizing the legal changes necessary to achieve a comprehensive regulatory regime for carbon capture and storage (CCS) in Colorado. In our review of EPA's Class VI requirements, the legislative approaches of other states, and extensive stakeholder engagement while compiling the requested study and proposal, we identified additional legislative provisions which will provide legal clarity for property owners, the regulated community, and other stakeholders.

In COGCC's view, the recommendations described below are crucial additions to companion legislation to SB 23-016 to facilitate carbon sequestration opportunities in Colorado and enable safe and effective regulation of Class VI injection wells in a manner which protects public health, safety, welfare, and the environment, including wildlife resources. This memo is directed to the Legislative Drafting Team we are working with to provide the recommending additional CCS legislation that would accompany SB 23-016.

### **Must haves:**

#### **Public Interest Declaration**

We recommend that the companion legislation add a declaration that carbon sequestration is in the public interest. Doing so would be consistent with the existing public interest declarations regarding oil and gas that are currently in the Oil and Gas Conservation Act (C.R.S. 34-60-102) and the approach that other states have taken in their CCS legislation. Importantly, a public interest declaration would also provide a foundation for the required regulatory framework for Class VI, including COGCC's authority to aggregate pore space for sequestration. The public interest declaration should state that geologic sequestration of CO<sub>2</sub> is in the public interest for reasons including benefits to the state and global environment from reducing GHG emissions, ensuring the ongoing viability of the state's industries, and storage of a valuable commodity for potential later use.

Recommendation: We recommend creating a public interest declaration in companion legislation.

#### **Pore Space**

When CO<sub>2</sub> is injected, it occupies pore space (voids in the subsurface). Therefore, a key determination to enable a Class VI program in Colorado is who owns, and therefore controls access to, the pore space where CO<sub>2</sub> will be stored. This issue is not yet addressed in Colorado law, and ambiguity in this area has been identified as a significant barrier to large-scale CCS

development. A legislative determination on pore space ownership is thus important to enabling CCS in Colorado. To create certainty for property owners, project developers, and other stakeholders, legislation should address not only who owns pore space, but how those ownership rights interact with other property rights.

Recommendation: COGCC recommends that the companion legislation include the following provisions:

- Ownership of pore space is vested in the owner of the overlying surface estate, unless pore space has been expressly conveyed;
- Pore space is severable from the surface estate and may be transferred the same way as mineral interests;
- The mineral estate is dominant over pore space rights (meaning that a pore space owner cannot prohibit the owner of the mineral estate from accessing and developing their materials, as is already the case with respect to the relationship between surface and mineral rights);
- Access to the surface to develop pore space must be addressed. Due to ongoing discussions about the best approach, we should draft language for both of the following options:
  - Option 1: Operators must obtain the consent of the applicable surface owner, through a surface use agreement or other means, prior to conducting operations that will result in surface disturbance;
  - Option 2: The Reasonable Accommodation Doctrine extends to pore space, meaning that pore space owners have a right to access and use the surface to the extent that is reasonable and necessary to utilize the pore space, and in turn pore space owners will minimize damage and intrusion to the surface of the land (See 34-60-127);
- Disclaimers to ensure that the legislation will not be deemed an unconstitutional taking of private property, including that the legislation should not be construed to: (1) alter the common law as it relates to property ownership; or (2) effect prior conveyances of pore space; and
- A statement of purpose explaining that the pore space provisions of the legislation are intended to facilitate carbon sequestration, and not to create new rights in the subsurface related to enhanced oil recovery or other operations.

## **Aggregation**

When CO<sub>2</sub> is injected into the subsurface, it naturally spreads out to cover a large area—potentially tens to hundreds of square miles. Therefore, Class VI projects will typically span numerous parcels of land under different ownership. A mechanism to combine subsurface property interests is thus necessary to enable large-scale projects. Creation of such a mechanism was recommended by the CCUS Task Force and a wide variety of stakeholders with whom COGCC has consulted.

To facilitate large-scale sequestration projects in the State, the statutory mechanism for aggregating property rights should allow for inclusion of non-consenting owners. Given the large anticipated size of geologic storage reservoirs, a single sequestration project could require the use of pore space owned by hundreds or even thousands of individual landowners. It is therefore necessary to authorize the inclusion of non-consenting pore space owners to prevent a small number of holdouts from stopping a project from moving forward.

Recommendation: We recommend the companion legislation include the creation of a unitization process specifically designed to combine pore space rights for geologic sequestration of CO<sub>2</sub>. Based on stakeholder input, we find unitization to be the preferable approach over pooling because it provides greater opportunities for landowner involvement and ensures additional information regarding unit operations is provided to landowners and COGCC. Using statutory pooling for oil and gas development under C.R.S. 34-60-116 as an example, the pooling process typically requires operators to meet specified requirements, including providing each mineral owner a reasonable offer to lease. If the statutory and regulatory requirements are met, nonconsenting owners may be subject to payment terms set by statute. In contrast, unitization typically requires that operators obtain the consent of a certain percentage of the pore space owners to an agreement that establishes how the unit will be operated and how pore space owners will be paid for their subsurface rights, among other items. The requirement of a unitization agreement is thus the chief difference between unitization and pooling. Requiring such an agreement would provide pore space owners with additional information. Additionally, the unitization proposal would not set statutory terms for unit agreements, and therefore these terms would be subject to negotiation between pore space owners and operators. To provide strong protection for property rights, we recommend a high threshold consenting owners requirement of 80% (Note that only one other state, Wyoming, requires such a high threshold. Other states range between 51-75%). Requiring a high threshold of consenting owners will encourage operators to present appropriate terms and provide pore space owners with greater bargaining power.

Specifically, we recommend that the companion legislation:

- Create a unitization mechanism, applicable only to geologic storage, for aggregating property rights, including nonconsenting owners;
- Establish a requirement that at least 80% of the pore space owners in the unit must approve of the unitization agreement; and
- Require that all pore space owners be equitably compensated.

### **Programmatic Funding**

Carrying out the permitting and regulatory authority created by SB23-016 and the companion legislation will require additional COGCC staffing and resources. Accordingly, the companion legislation should authorize COGCC to collect permitting and regulatory fees from geologic storage operators in order to offset these costs.

Recommendation: Authorize COGCC to collect permitting and regulatory fees associated with Class VI operations.

## **Definitions**

For the sake of clarity within the statute and during rulemaking, we recommend including within the companion legislation the following definitions:

- Carbon Dioxide (CO<sub>2</sub>): Naturally occurring, geologically sourced, or anthropogenically sourced carbon dioxide including its derivatives and all mixtures, combinations, and phases, whether liquid, gaseous, solid, stripped, segregated, or divided from any other fluid stream thereof.
- Geologic Storage: The injection and underground storage of Carbon Dioxide or other substances in subsurface geologic formations pursuant to a valid UIC Class VI permit.
- Geologic Storage Operations: Any work performed by a Storage Operator for the purposes of engaging in Geologic Storage, including, but not limited to, conducting seismic operations and the drilling of test bores; siting, drilling, deepening, recompleting, reworking, or abandoning a well for Geologic Storage and/or monitoring; all operations related to any such well, including installing flowlines, but excluding any work, equipment, or disturbances associated with Carbon Dioxide pipelines; injecting Carbon Dioxide for the purposes of Geologic Storage; and any constructing, site preparing, or reclaiming activities associated with such operations.
- Pore Space: A cavity or void, whether natural or artificially created, in a subsurface stratum, which can be used as storage space for Carbon Dioxide or other substances.
- Reservoir: A subsurface geologic formation, aquifer, cavity, or void, whether natural or artificially created, suitable for or capable of Geologic Storage.
- Storage Facility: That part of the specific Reservoir which is utilized for Geologic Storage, together with all surface equipment and disturbances associated with Geologic Storage Operations.
- Storage Operator: Any person or entity who exercises the right to control the conduct of Geologic Storage Operations in the state of Colorado pursuant to a valid UIC Class VI permit.

## **Convenient to have:**

The following provisions, while not as critical to a comprehensive regulatory framework as the items listed above, would provide further legal clarity on important aspects of Colorado's CCS framework.

## **CO<sub>2</sub> Ownership**

It is possible that multiple entities will be involved in the entire CCS process. For example, one entity may capture the CO<sub>2</sub>, another entity may transport the CO<sub>2</sub> to the final injection site, and another entity may inject the CO<sub>2</sub> and monitor its migration post-injection. A declaration of who

owns the CO<sub>2</sub> once sequestered will provide clarity in the event of disputes over liability and/or regulatory responsibility.

Recommendation: We recommend that the companion legislation specify that title to the stored CO<sub>2</sub> and storage facilities remains with the Storage Operator who injected the CO<sub>2</sub> or the party to whom said Storage Operator specifically transferred title.

### **Direct Air Capture Siting**

We recommend granting COGCC authority to site Direct Air Capture (“DAC”) facilities. While SB23-016 grants COGCC authority to pursue Class VI regulatory primacy, there are industries related to CCS over which COGCC currently has no authority. For example, DAC involves the removal of CO<sub>2</sub> directly from the atmosphere. Generally, DAC facilities utilize large fans that direct air through a capture media that removes CO<sub>2</sub> and other pollutants. DAC facilities will necessitate siting evaluations. COGCC has experience siting facilities in a manner which protects public health, safety, welfare, and the environment, including wildlife resources. Granting COGCC authority to regulate siting of DAC facilities will allow COGCC to take a more comprehensive approach to rulemaking and provide clear regulatory oversight of this possibly emerging component of CCS.

Recommendation: We recommend that the companion legislation authorize COGCC to regulate siting of DAC facilities.

### **Misrepresentations at site closure**

The current draft of SB23-016 includes a provision for site closure—a process by which operators can apply to be relieved of post-injection regulatory responsibilities and have their financial assurance returned. While we find this provision of SB23-016 prudent, we recommend granting COGCC authority to reimpose post-injection regulatory responsibility and financial assurance obligations if an operator makes a material misrepresentation in its application for site closure. While the prospect of relief from regulatory responsibility may create an incentive to misrepresent a site’s eligibility for closure, the prospect of having regulatory responsibility and financial assurance obligations reimposed should create a disincentive for such misrepresentations.

Recommendation: Specify that, should the Storage Operator make any misrepresentations in its application for site closure, COGCC may reimpose all regulatory responsibility and financial assurance obligations upon the Storage Operator for the Storage Facility at issue. In such a case, the Storage Operator’s regulatory responsibility and financial assurance obligations should revert to the situation as it existed before COGCC approved the site closure.