Funding the transfer of liability: the Alberta model

Nigel Bankes
Faculty of Law: University of Calgary
ndbankes@ucalgary.ca
The questions (assuming liability transferred)

- Normative\ descriptive
- What liabilities are transferred?
- What is the trigger to the transfer?
- How is the transfer of liability effected?
- What costs of assuming the transfer of liability are recovered from the operator in advance?
  - How? And how determined?
What liabilities are transferred?

• Transferred
  – Any statutory liabilities for re-abandonment downhole or surface reclamation etc
  – Third party tort liabilities
  – Any continuing MMV responsibilities

• Not transferred
  – Carbon accounting liability for avoided emissions for which credit received
  – RFA proposal
What is the trigger to the transfer?

• Issuance of a closure certificate
  – All wells abandoned
  – Surface reclamation completed
  – Plume is “behaving in a stable and predictable manner, with no significant risk of future leakage”
  – After a prescribed period
  – RFA, minimum of ten years + additional factors
How is the transfer effected?

• Statutory responsibilities
  – The Crown becomes the relevant person under the various statutes
    • E.g. well licensee; “person responsible”, “operator”

• Tort liabilities
  – Crown provides an indemnity
  – Assumes ownership of the injected CO2

• Monitoring
  – See statutory responsibilities
  – Not otherwise expressly transferred
  – PCSF monies can be used to pay for MMV
What liability costs are recovered?

- Legislation (MMA) provides for a Fund (PCSF)
- Fund may be used for
  - Any continuing MMV
  - The statutory liabilities assumed by the Crown
  - Suspension, abandonment, reclamation, remediation associated with an orphan facility
- Fund may not be used for
  - Any tort liability assumed by the Crown
  - Carbon accounting liabilities (but see RFA)
The orphan issue

• When does a facility become an orphan?
  – Only where the facility licensee and all WIPs have no remaining assets in the jurisdiction that can be used to satisfy any liability
  – No closure certificate issued

• Proposal to protect against orphaning (RFA)
  – Require licensee to post adequate security for abandonment, reclamation costs etc at outset
Fund issues

• Lessees must contribute to the Fund
• What is the contribution rate? How is it assessed?
  – Must be assessed on the basis of the Fund’s liability and not the Crown’s potential liability
    • Monitoring costs
    • Statutory re-abandonment etc liabilities
    • Orphan liabilities
    • Administration costs
Fund issues

• RFA
  – Fund contributions should be risk based and project specific
  – Level of contributions should be subject to regular review (but not retroactive)
  – Fund monies available to meet the prescribed liabilities of any project
    • i.e. rate is individual but monies pooled
Fund issues

• GoA working group on the PCSF
  – Retained DNV to advise
  – Work ongoing
  – The challenges?
    • Keep a focus on the Fund’s exposure and not the universe of liabilities
    • Accept the premise that a closure certificate has been issued; risk is accordingly very, very, very low
In sum

• There is a universe of potential liabilities
• The Crown accepts a transfer of a (large) subset of those liabilities
• The Fund is responsible for a subset of the Crown’s liabilities
• The Fund is financed by contributions from the industry
• The tort liability that the Crown assumes is unfunded