

## **Appendix D**

### **Roadmap Recommendations for a Liability Regime**

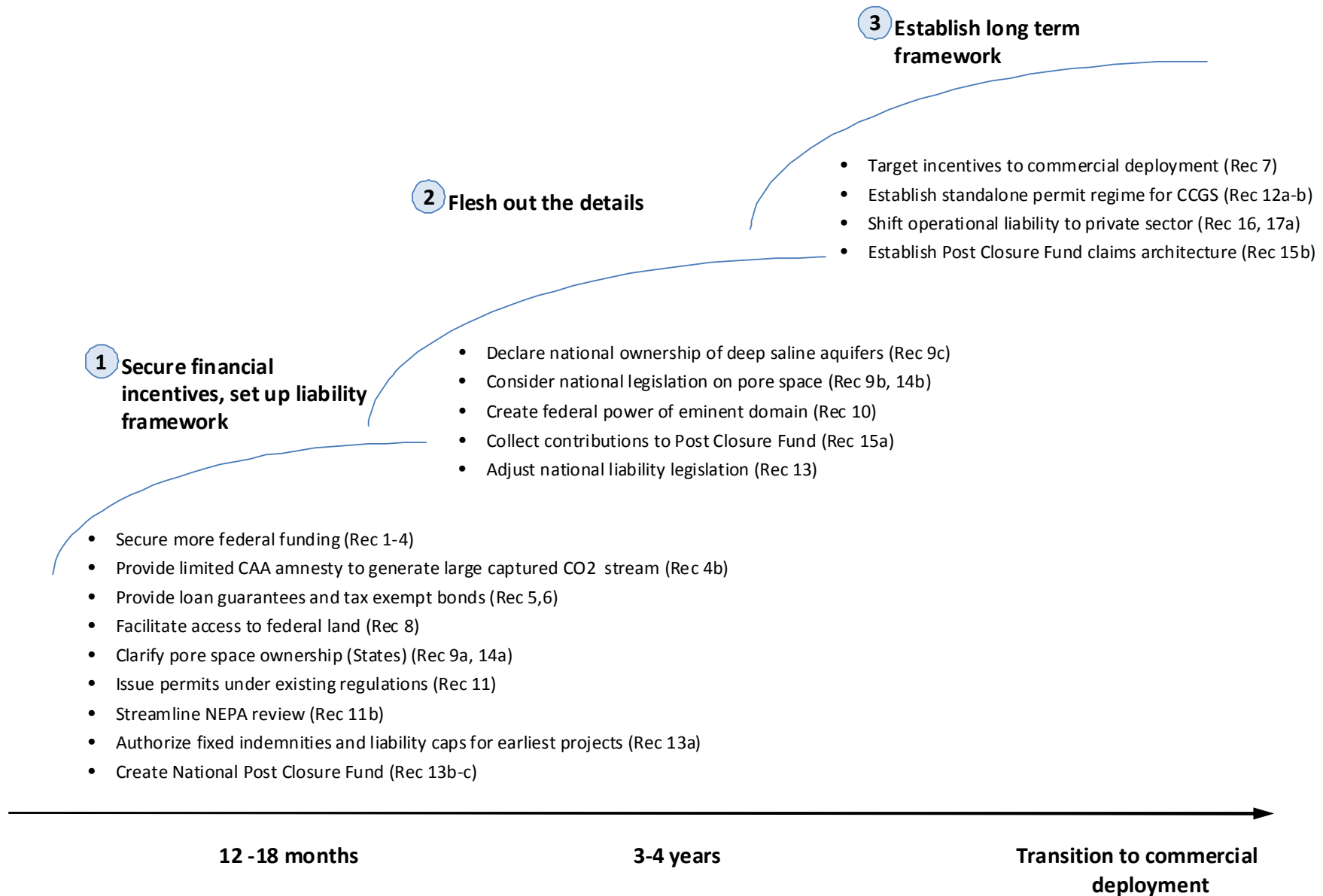
In an earlier paper (the “Roadmap”<sup>1</sup>), Harvard Law School’s Emmett Environmental Law & Policy Clinic outlined legal and financial incentives necessary for the rapid demonstration of geological sequestration and proposed a statutory and regulatory framework.

The figure on the next page depicts the Roadmap’s recommendations for achieving commercial viability for CCS. The box that follows these recommendations outlines the Roadmap’s specific recommendations regarding liability.

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<sup>1</sup> Jacobs, Wendy B., Leah Cohen, Lara Kostakidis-Lianos and Sara Rundell, “Proposed Roadmap For Overcoming Legal and Financial Obstacles to Carbon Capture and Sequestration” Discussion paper 2009-04, Cambridge, Mass.: Belfer Center for Science and International Affairs, March 2009.

# Roadmap to commercial viability of CCGS



Excerpt from HLS Environmental Law & Policy Clinic's Proposed Roadmap for Overcoming Legal and Financial Obstacles to CCS (3/30/09).

## **Liability recommendations from the Roadmap**

### **Pass federal legislation to create an operational and long-term liability framework.**

- *Authorize DOE and DOI to set caps on operational liability and provide indemnities for a limited number of geologically diverse, large-scale demonstration projects.* A cap on operational liability is a simple cost-sharing mechanism, provides certainty to operators, and preserves incentives for responsible project management.
- *Transfer responsibility of sequestration sites to the federal government post-certification.* This will provide certainty for operators and reassurance to the public that sequestration sites will be monitored over the long-term. Operators should remain liable for their gross negligence and intentional misconduct.
- *Establish a national Post Closure Fund financed by fees paid by industry.* Recovery for remediation and damages under the Fund would be capped as described below, and the Fund would be available on a strict liability basis without time limitations.

### **Pass legislation to limit trespass and ejectment actions.**

- Concerns about potential liability for trespass or ejectment may deter or delay demonstration projects. We recommend either preventing trespass or ejectment actions in the case of CCS, or limiting them to cases where there is actual damage.
- We recommend that states take action in the first instance, with the federal government taking action if necessary in light of state inaction.

### **Establish rules for Post Closure Fund contributions and claims.**

- *Set contribution fees for the Post Closure Fund.* We recommend a two-tiered approach, including (i) regular fees from CO<sub>2</sub> generators, transporters, geological sequestration operators, and a broader range of industries that benefit from CCS, and (ii) balloon payments by operators at post-closure certification, based on operator performance and particular site risks. For instance, where a saline aquifer has been used for sequestration, the cost of future treatment of the water to render it potable and/or safe for agricultural purposes should be calculated and paid into the Fund.
- *Establish rules for Post Closure Fund claims.* EPA should lead the development of the Post Closure Fund claims architecture through notice and comment rulemaking to ensure appropriate public input on the types of claims recoverable, caps on claims, and the claims process. Federal legislation will be needed to either completely pre-empt state law claims or else set caps on recovery under those claims.

### **Shift financial responsibility for operational liability to the private sector as CCS becomes commercially viable.**

- Beyond the first five large-scale demonstration projects, liability caps and indemnities during the operational phase should no longer be available. If operators are unable to access sufficient financial assurance on commercially feasible terms, a risk-pooling model may be required. We suggest that a secondary insurance model, along the lines employed by the nuclear industry in the Price Anderson Act, may be *appropriate*. A cap on individual claims may be necessary if an industry-wide risk pooling mechanism is employed in order to limit the exposure of operators who are not at fault. This would require explicit federal legislation to preempt state law claims and cap damages for individual state law claims.