

MEMORANDUM

To: WCI, Inc. Board of Directors
From: Greg Tamblyn, Executive Director
Date: November 14, 2018
Re: Amendment #2 to Ontario Jurisdiction Agreement

Recommendation

Approve Amendment #2 to the Province of Ontario Jurisdiction Agreement in the form attached hereto as Exhibit A.

Background

The Province of Ontario (“**Ontario**”) entered into a funding agreement with WCI, Inc. dated January 1, 2016 (“**Original Agreement**”). WCI, Inc. and Ontario entered into an amendment to the Original Agreement dated January 1, 2018, extending the Original Agreement for an additional two years (“**Amendment #1**”).

Effective July 3, 2018, Ontario revoked its cap and trade regulation by Ontario Regulation 386/18, which prohibits all trading of emission allowances and credits under the Ontario Cap and Trade Program. WCI, Inc. received a letter from Ontario dated August 31, 2018, stating that as a result of Ontario Regulation 386/18 and pending Bill 4, Ontario wishes to amend the Original Agreement to reduce the level of services it receives from WCI, Inc. and provide for a new “Expiry Date” (as defined below) for the Original Agreement of November 30, 2018. The effect of this second amendment would be to terminate the Original Agreement effective November 30, 2018. On October 31, 2018, Ontario passed the Cap and Trade Cancellation Act, 2018 which formally ends the cap and trade program in Ontario. The Act will become law in Ontario following Royal Assent, which is expected to be received on November 14, 2018.

I have been negotiating the terms of the second amendment to the Original Agreement with Ontario staff with the support and advice of WCI, Inc.’s corporate counsel, Chris Delfino. The result of these negotiations is the amendment attached to this memo as Exhibit A (“**Amendment #2**”).

Discussion

Key Terms of Amendment #2:

- Under the terms of the Original Agreement, the “Expiry Date” is the date the agreement terminates. Under Amendment #1, this date was extended to December 31, 2019. Amendment #2 changes the “Expiry Date” to November 30, 2018.
- Language is added to Section 5.01 (OPS Confidential Information) to make it clear that WCI, Inc. can keep a copy of Ontario’s confidential information for use by WCI, Inc. and the other participating jurisdictions.

- Schedule A to the Original Agreement is the Description of Services WCI, Inc. provides to Ontario for the cap and trade programs. Attachment #1 to Amendment #2 amends and replaces the original Schedule A Description of Services to reflect the reduced level of services WCI, Inc. is to provide Ontario as Ontario's cap and trade program is being wrapped-up and closed down.
- Schedule B to the Original Agreement is the schedule of financial contributions Ontario is to make to WCI, Inc. for the services provided under the Agreement. Attachment #2 to Amendment #2 amends and replaces the original Schedule B Financial Contribution to reflect the change in payments for September 30, 2018, and November 30, 2018. The new amount set forth in November 2018 payments include the costs to WCI, Inc. in winding-down the services supporting Ontario's cap and trade program.
- A key term requested by WCI, Inc. but **NOT** included in Amendment #2 was for Ontario to indemnify WCI, Inc. for any losses or damages arising out of, or in connection with, the Ontario's ending and winding up of its cap and trade program or ending its participation in WCI, Inc. Ontario rejected this provision.

Key Terms of Original Agreement Surviving Termination

In the Original Agreement, certain terms survive and remain effective even after termination of the agreement. These terms were not amended by Amendment #1 or Amendment #2 and will remain in effect after the termination of the agreement on November 30, 2018 (assuming adoption of Amendment #2). The terms that survive termination are as follows:

- Section 2.04 of the Original Agreement requires WCI, Inc. to be responsible for its personnel and liable for any acts of its personnel. This section remains effective after termination so if any acts of WCI, Inc. occurring during the term of the Agreement cause damages to Ontario, WCI, Inc. would remain liable for such acts even after termination of the Agreement.
- Section 2.06 of the Original Agreement obligated WCI, Inc to avoid all conflicts of interest with Ontario in the performance of the services. This section shall also survive termination of the Agreement.
- Under Section 4.03 of the Original Agreement, WCI, Inc. is required to maintain certain records relating to its performance of the services for seven years from the Expiry Date and shall permit Ontario access to such records during these seven years.
- Section 5.01 of the Original Agreement requires WCI, Inc. to protect the confidential information of Ontario in its possession during and after the term of the agreement.

- In addition to Section 5.01, Article 5 of the Original Agreement also include the requirement for WCI, Inc.'s compliance with Ontario's Freedom of Information and Protection of Privacy Act ("FIPPA"). WCI, Inc.'s obligations to comply with FIPPA under Article 5 continue indefinitely after termination of the agreement.
- Section 6.01 of the Original Agreement provides for very broad indemnity by WCI, Inc. to Ontario. WCI, Inc.'s obligations with respect to providing indemnity to Ontario contained in Section 6.01 continue indefinitely after termination of the agreement.
- Section 6.05 of the Original Agreement sets forth conditions on the required participation of the parties should a dispute or other proceeding occur. These conditions remain effective even if a dispute or proceeding occurs after termination.
- Section 7.03 of the Original Agreement allows Ontario to terminate the agreement upon notice to WCI, Inc. and Ontario would remain responsible for any expenses incurred by WCI, Inc. prior to the date WCI, Inc. received the termination notice. Ontario's obligation to WCI, Inc. for these expenses would continue even after termination of the agreement.
- Section 7.06 of the Original Agreement requires WCI, Inc. to provide the following to Ontario at termination of the agreement: (a) provide a final report to Ontario detailing (i) the current state of the provision of services, and (ii) any other information requested by Ontario pertaining to the services and performance of the agreement; (b) execute such documentation as required by Ontario to give effect to the termination; and (c) comply with other instruction regarding transfer of services to another person. The obligations in Section 7.06 survive termination of the agreement.

Appendix E – Amending Agreement No. 2

Amending Agreement No. 2

This Amending Agreement (“**Amendment No. 2**”), made in duplicate, to support the operations of the Western Climate Initiative, Inc. is effective as of October 15, 2018 (“**Amending Agreement No. 2 Effective Date**”),

Between:

Her Majesty the Queen in Right of Ontario
as represented by the Minister of the Environment, Conservation and Parks
(formerly the Ministry of the Environment and Climate Change)

(referred to as the “**Ministry**”)

And:

Western Climate Initiative, Inc.
a body corporate constituted under the General Corporation Law
(Delaware Code, Title 8, Chapter 1) of the State of Delaware

(referred to as “**WCI, Inc.**”)

WHEREAS the Ministry and WCI, Inc. entered into an agreement with the effective date of January 1, 2016 (the “**Original Agreement**”);

AND WHEREAS the Ministry conducted a number of Ontario-only auctions for emission allowances in 2017;

AND WHEREAS the Ministry entered into a linking agreement with the California Air Resources Board and the Gouvernement du Québec, with an effective date of January 1, 2018, which allowed for Ontario’s Cap and Trade Program to be linked with the joint program of Quebec and California, and as a result, the parties amended the Original Agreement to extend the Expiry Date and set out the costs for related services to be provided to Ontario, effective January 1, 2018 (“**Amending Agreement No. 1**”);

AND WHEREAS the Original Agreement as amended by Amending Agreement No. 1 is hereby referred to collectively as the “**Agreement**”;

AND WHEREAS effective July 3, 2018, the Province of Ontario revoked its cap and trade regulation by Ontario Regulation 386/18, which prohibits all trading of emission allowances and credits under the Ontario Cap and Trade Program (O. Reg. 386/18);

AND WHEREAS on July 25, 2018, the Province of Ontario introduced Bill 4: the *Cap and Trade Cancellation Act, 2018* which will, if passed, formally end the Cap and Trade Program in Ontario;

AND WHEREAS the Ministry is required to take steps to wind down its Cap and Trade Program, including ending Ontario's participation in WCI, Inc. as a Participating Jurisdiction;

AND WHEREAS the Ministry and WCI, Inc. wish to amend the Agreement on the following terms and conditions;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Capitalized terms used but not defined in this amending agreement ("**Amending Agreement No. 2**") have the meanings ascribed to them in the Agreement.
2. As of the Amending Agreement No. 2 Effective Date, "Environment and Climate Change" is hereby deleted and replaced with "Environment, Conservation and Parks" on the first page of the Agreement, and in the definition of "Ministry Address" and "Ministry Representative" in Section 1.01 of the Agreement.
3. The definition of "Expiry Date" in Section 1.01 of the Agreement is hereby replaced in its entirety with the following:

"Expiry Date" means November 30, 2018.

4. Section 5.01 (OPS Confidential Information) of the Agreement is hereby amended by adding the following sentence to the end of Section 5.01, "In addition to and notwithstanding any other term or condition of this Section 5.01, WCI, Inc. may keep a copy of the OPS Confidential Information for the use by WCI, Inc. and the other participating jurisdictions only if such use is consistent with the use of such OPS Confidential Information by such entities during the Term."
5. Schedule A of the Agreement is hereby replaced in its entirety with Attachment 1 to this Amending Agreement No. 2.
6. Schedule B of the Agreement is hereby replaced in its entirety with Attachment 2 to this Amending Agreement No. 2.
7. Amending Agreement No. 2 shall be effective as of the Amending Agreement No. 2 Effective Date.

8. Except for the amendments provided for in Amending Agreement No. 2, all provisions in the Agreement shall remain in full force and effect.
9. Amending Agreement No. 2 may be executed in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Amending Agreement No. 2 may be validly executed and delivered by means of transmission of signed facsimile or by email transmission of an electronically scanned original signature (such as PDF file format).

IN WITNESS WHEREOF the parties hereto have executed the Agreement effective as of the date first above written.

**Her Majesty the Queen in Right of Ontario as
represented by the Minister of the Environment,
Conservation and Parks**

Signature: _____

Name:

Title:

Western Climate Initiative, Inc.

Signature: _____

Name:

Title:

I have authority to bind WCI, Inc.

Attachment 1

Schedule A Description of the Services

A. Background

Ministry of the Environment, Conservation and Parks (formerly the Ministry of the Environment and Climate Change)

The Ministry is responsible for protecting Ontario's air, land and water to ensure healthy communities, ecological protection and sustainable development for present and future generations of Ontarians.

Western Climate, Initiative Inc. (WCI, Inc.)

WCI, Inc. was incorporated in 2011 as a non-profit corporation to provide technical and scientific advisory services to States of the United States and Provinces and Territories of Canada in the collaborative implementation of their respective greenhouse gas emissions trading programs.

WCI, Inc. provides coordinated administrative and technical support to member state and provincial governments implementing emission trading programs to reduce GHG emissions. By coordinating support across jurisdictions, WCI, Inc. enables cap and trade programs to be administered at a lower cost than would be possible with independent administration by each jurisdiction. Coordinated administrative support ensures that all programs maintain the highest level of security, enhances market oversight, reduces the potential for fraud and malfeasance, allows for linking of programs, and provides a framework that can be expanded as more jurisdictions implement their respective programs.

Ontario's Cap and Trade Program

On June 15, 2018, the incoming government signaled its intention to withdraw from WCI, Inc. as well as the September 2017 joint agreement with California and Québec.

On July 3, 2018, the Province of Ontario revoked its cap and trade regulation by Ontario Regulation 386/18, which prohibits all trading of emission allowances and credits under the Ontario Cap and Trade Program.

On July 25, the Province of Ontario introduced [Bill 4: the Cap and Trade Cancellation Act, 2018](#), which will, if passed, formally end the Cap and Trade Program in Ontario.

B. Description of the Services

WCI, Inc. agrees to provide Ontario, as a member jurisdiction, with participation in WCI, Inc. with access to administrative systems being developed and administered to support the implementation of state and provincial greenhouse gas trading programs (stand-alone or linked). Ontario will be provided access to administrative systems including development and administration of the Cap-and-Trade Compliance Instrument Tracking System Service (CITSS) at the level of access that was previously provided to Ontario prior to linking to California and Quebec. Other than what is described in Schedule A, WCI, Inc. shall not undertake or allow WCI, Inc. service providers to undertake any further activities which would result in any additional costs to the Ministry without prior written consent from the appropriate Ministry Representative.

The parties to this Contract acknowledge and agree that in addition to the aforementioned Services, WCI, Inc. also undertakes such activities necessary for the administration and operation of WCI, Inc. ("**Administrative Services**"). The Administrative Services also may include other services requested by any participating jurisdiction and approved by the WCI, Inc. Board of Directors. These Administrative Services are to the benefit of all WCI, Inc. participating jurisdictions, including Ontario. The Ministry further acknowledges and agrees that the Payment Amounts set forth in Schedule B of this Contract will be used, in part, to cover these Administrative Services and that WCI, Inc. does not and will not separately itemize or report to the Ministry the Payment Amounts attributable to any Administrative Services (whether individually or jointly). Ontario shall not be responsible for any additional costs for Administrative Services over and above what is included in the Payment Amounts set forth in Schedule B to this Contract without the prior written consent of the Ministry Representative.

Attachment 2

Schedule B Financial Contribution

The Ministry will provide a financial contribution to WCI, Inc. according to the following schedule:

Payment Dates	Payment Amount (USD)
March 31, 2016	\$387,110
June 30, 2016	\$300,000
September 30, 2016	\$300,000
December 31, 2016	\$300,000
March 31, 2017	\$398,745
June 30, 2017	\$350,000
September 30, 2017	\$350,000
December 31, 2017	\$350,000
March 31, 2018	\$311,055.40
June 30, 2018	\$311,055.40
November 30, 2018	\$316,084