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Newly Proposed PHMSA Rulemaking Targets Natural Gas Distribution Systems

By Kurt L. Krieger and Kevin W. Hivick, Jr., Steptoe & Johnson PLLC

On August 24, 2023, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") announced a Notice of Proposed Rulemaking ("NPRM") aimed at enhancing safety requirements for gas distribution pipelines. The changes contained therein are primarily focused on distribution pipeline integrity management plans, emergency response plans, and distribution facility designs. The NPRM implements provisions of the Leonel Rondon Pipeline Safety Act and a National Transportation Safety Board ("NTSB") recommendation aimed at preventing "catastrophic incidents resulting from overpressurization of low-pressure gas distribution systems."

Key components of the NPRM include (i) improvements to construction procedures aimed at reducing the risk of over-pressurization incidents; (ii) updates to distribution integrity management programs ("DIMP") to include and prepare for over-pressurization incidents; (iii) requirements for new regulator stations designed to include secondary pressure relief valves and remote gas monitoring, in order to better prepare gas distribution systems to avoid over-pressurizations and limit damage during such incidents; and (iv) improvements to emergency response plans, including requirements for operators to contact local emergency responders and keep customers and the public informed of what to do in the event of an emergency.

While PHMSA's primary goal in promulgating the NPRM is reducing safety risks, PHMSA also states the NPRM "builds on other national and international actions advanced by Congress and the Biden-Harris Administration to reduce methane emissions." In total, PHMSA Deputy Administrator Tristan Brown hopes the NPRM "will protect communities and the environment, as well as lower energy costs for consumers."

As the regulatory rulemaking process moves forward, it will be important for distribution pipeline operators and other stakeholders to continue to monitor this proposal. For those interested in taking an active role in the rulemaking, comments are due 60 days from the date the notice is published in the Federal Register.

California's Comprehensive Climate Accountability Regime: Setting an Aggressive New National Standard

By William J. Stellmach, Adam Aderton, A. Kristina Littman, Elizabeth P. Gray, Archie Fallon, William L. Thomas, Paul J. Pantano Jr., and Maria Chrysanthem, Willkie Farr & Gallagher LLP

On October 7, 2023, California adopted a new set of far-reaching climate laws in the form of SB 253, the Climate Corporate Data Accountability Act ("CCDAA"), and SB 261, the Climate-Related Financial Risk Act ("CRFRA") (collectively, the "California Climate Accountability Regime"). Richard Vanderford, *New California Climate Law Pulls In Private Companies*, THE WALL ST. J. (Sept. 26, 2023). Because of the sheer size of the California market—the world's fifth largest economy—the new legislation effectively will re-shape the Environmental, Social and Governance ("ESG") and climate transparency debate far beyond the state's borders.

Under the CCDAA, companies operating within California with annual revenues exceeding $1 billion must begin publicly reporting their greenhouse gas ("GHG") emissions, including indirect emissions impacts resulting from their activity, starting in 2026. Under the CRFRA, companies operating in California with annual revenues exceeding $500 million must publish biennial climate-related financial risk reports disclosing both climate-related financial risk and measures taken to reduce and adapt to such risk by January 1, 2026. Covered companies under both bills must pay an annual fee, the amount of which is to be determined.

California has now outpaced the U.S. Securities and Exchange Commission, which back in March 2022 proposed a climate rule that would require public company registrants to disclose certain climate-related information in their annual reports and registration statements. And California sweeps in a potentially broader swath of companies because the California Climate Accountability Regime applies to both public and private companies that exceed certain revenue thresholds. In light of the size of the California market, these new state rules may effectively set a new national standard.

A. CCDAA

The CCDAA requires public and private companies "doing business" in California, with total annual revenues exceeding $1 billion in the prior fiscal year, to publicly report their direct and indirect GHG emissions. The bill does not define "doing business," but it seems likely it will be interpreted broadly by stakeholders. For example, the California Tax Code defines "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit," and regulators seem primed to apply an equally capacious definition here. Cal. Code Regs. Tit. 18, § 23101.

The CCDAA categorizes GHG emissions by scope, requiring companies to publicly disclose Scope 1 and 2 emissions starting in 2026, and Scope 3 emissions starting in 2027. Scope 1 emissions are those that stem from sources that the company owns or directly controls, regardless of location, including, but not limited to, fuel combustion activities. Scope 2 emissions are indirect GHG emissions from consumed electricity, steam, heating, or cooling purchased or acquired by a company, regardless of location. Scope 3 emissions are indirect upstream and downstream GHG emissions, other than Scope 2 emissions, from sources that the company does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commutes, and processing and use of sold products. Scope 3 emissions essentially include everything up and down a company's value chain—a broad category where there is variance of opinion and practice in the nuance.

Measuring and reporting of GHG emissions must conform with the Greenhouse Gas Protocol ("GHG Protocol") standards, informed by guidance developed by the World Resources Institute and the World Business Council for Sustainable Development. GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/ (last visited Oct. 4, 2023). Covered companies must also obtain independent, third-party assurance of their public disclosure. Scope 1 and 2 emissions must be verified with "limited assurance" beginning in 2026, and with "reasonable assurance" beginning in 2030. Assurance for Scope 3 emissions will be verified with limited assurance starting in 2030. On or before January 1, 2025, the California State Air Resources Board will develop and adopt regulations overseeing the CCDAA's disclosure requirements.

Failure to comply with the law's requirements may result in an administrative penalty of up to $500,000 per reporting year.

B. CRFRA

The CRFRA requires public and private companies "doing business" in California with annual revenues exceeding $500 million to prepare a biennial climate-related financial risk report. The report must disclose the company's (1) climate-related financial risk, and (2) measures adopted to reduce and adapt to climate-related financial risk. "Climate-related financial risk" is defined in the bill as material risk of harm to immediate and long-term financial outcomes due to physical and transition risks. This includes risk to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, https://www.fsb-tcfd.org/publications/ (last visited Oct. 4, 2023).

On or before January 1, 2026, covered companies must publish their report to the company's website. Failure to include the required disclosures in the report may lead to an administrative penalty of up to $50,000.

C. Compliance: Interplay with the SEC Proposed Climate Rule and EU Corporate Sustainability Reporting Directive ("CSRD")

While the California bills are similar to the SEC proposed rule on climate-related disclosures, there are material distinctions.

First, the California Climate Accountability Regime applies to both public and private companies, while the SEC's proposed rule applies only to public companies reporting to the SEC.

Second, the CCDAA requires disclosures for Scope 1, 2, and 3 GHG emissions, whereas the SEC proposed rule—perhaps recognizing the difficulty in quantifying Scope 3 emissions—only mandates Scope 3 disclosure from upstream and downstream activities if (1) the GHG emissions are "material" or (2) if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. The California law essentially compels covered companies to request GHG emissions data from *non-covered companies* (i.e., non-California companies or those with less than $1 billion in revenue) in their supply chain, making the reach of the CCDAA considerably more expansive than first meets the eye.

Companies required to comply with the EU-adopted CSRD will not find that the California Climate Accountability Regime imposes material new burdens. The CSRD likewise applies to any companies doing business in Europe above a certain revenue threshold (public or private, even if non-EU) and dictates comparable disclosure requirements.

The reach of California's new legislation cannot be understated. If a company seeks to do any business in California, it must collect and report its national or even international climate data. And the new standards are immune to changes at the federal level: regardless of what the SEC ultimately does with respect to its climate disclosure rulemaking or who is elected president in 2024, California's disclosure standards will be unaffected. Companies therefore would be well-advised to review these new standards and lay the groundwork for compliance with their obligations in this new framework.

Oklahoma Requires Affidavit to be Filed with Recorded Deed

By Jacob Wall, Kelly Hart Hallman

Oklahoma has long restricted ownership of Oklahoma realty to United States citizens and bona fide Oklahoma residents. Effective November 1, 2023, however, the Oklahoma Legislature enacted Senate Bill 121 to enforce these restrictions further, requiring every "deed" filed with an Oklahoma county clerk to include an affidavit executed by the grantee stating that the grantee is qualified to hold title to Oklahoma realty, including oil and gas interests, under Oklahoma law:

> any deed recorded with a county clerk shall include as an exhibit to the deed an affidavit executed by the person or entity coming into title attesting that the person, business entity, or trust is obtaining the land in compliance with the requirements of this section and that no funding source is being used in the sale or transfer in violation of this section or any other state or federal law.

O.S. tit. 60, § 121(B). The Oklahoma Attorney General has created affidavit forms for (1) individuals, (2) non-exempt entities, and (3) exempt entities (i.e., those engaged in federally regulated interstate commerce).

The Oklahoma Attorney General has also provided several "Additional Resources" on its website, including a list of frequently asked questions and answers prepared by the Oklahoma Real Estate Commission, as well as frequently asked questions and answers prepared by the Oklahoma Land Title Association Government Affairs Committee.

A number of questions remain unanswered, such as how stipulations, disclaimers, and other title curative documents, will be handled. Will the affidavit be required for these instruments, too? The Oklahoma Attorney General may very well answer some of the remaining questions soon, given that the Oklahoma Land Title Association has noted that it expects the Oklahoma Attorney General to promulgate Emergency Administrative Rules "in the coming months."

For now, practitioners should keep an eye out for further guidance—and prior to closing of any Oklahoma realty transaction, make the parties aware of these requirements.

Fifth Circuit Vacates Spent Nuclear Fuel Storage License

By Julian Sharp and D.J. Beaty, Haynes Boone, LLP

In *Texas v. Nuclear Regulatory Commission*, the Fifth Circuit Court of Appeals held that "the Atomic Energy Act doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel." 78 F.4th 827, 844 (5th Cir. 2023). Thereby creating a circuit split on the hotly contested issue of the NRC's power to regulate the storage of spent nuclear fuel.

Spent nuclear fuel refers to nuclear fuel that can no longer produce energy after being used in a reactor. *Id.* at 832. It is "intensely radioactive" and "must be carefully stored." *Id.* (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 195 (1983)). No permanent method of storage has been successfully proposed.

The Nuclear Waste Policy Act sought, in part, to "devise a permanent solution to the problems of civilian radioactive waste disposal." 42 U.S.C. § 10131(a)(3). The Act tasked the Department of Energy with establishing "a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact." *Texas*, 78 F.4th at 832–33 (quoting *Nat'l Ass'n of Regul. Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 821 (D.C. Cir. 2012)). In 1987, over strong opposition, Nevada's Yucca Mountain became the designated location for this repository. *Id.* at 833. After decades of delay and controversy, the Obama Administration halted work on the Yucca Mountain repository, shifting to a "consent-based" approach that would "find[] sites where all affected units of government . . . are willing to . . . accept a facility." *Id.* at 833; BLUE RIBBON COMMISSION ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY vii (Jan. 2012) https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf. Then-Governor Rick Perry of Texas expressed willingness for Texas to host a site. *Texas*, 78 F.4th at 833. A change in gubernatorial administrations saw that willingness dissipate, giving rise to this dispute and highlighting the difficulties of finding a solution to spent nuclear waste.

The NRC has taken the position that the Atomic Energy Act grants it the authority to license and regulate the storage of spent nuclear fuel. *Priv. Fuel Storage L.L.C.*, 56

N.R.C. 390, 395–407 (2002). It granted such license to Interim Storage Partners, LLC, to operate in Andrews County, Texas—a sparsely populated county near the geographic center of the Permian Basin. Texas, along with others with interests in the Permian Basin, petitioned the Fifth Circuit that the issuance of the license exceeded the NRC's statutory authority under the Atomic Energy Act and the Nuclear Waste Policy Act. *Texas*, 78 F.4th at 839–40. The Fifth Circuit agreed, addressing each Act in turn.

First, the Atomic Energy Act authorizes the NRC to issue licenses for the possession of "constituent materials of spent nuclear fuel." *Id.* at 840. However, the Act authorizes these licenses "for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel." *Id.*

Second, the Nuclear Waste Policy Act "creates a comprehensive statutory scheme for addressing spent nuclear fuel accumulation," which "prioritizes construction of [a] permanent repository and limits temporary storage to private at-the-reactor storage or at federal sites." Id. at 844. "It plainly contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility." *Id.*

In rejecting the statutory bases for the NRC's authority under these Acts, the Fifth Circuit created a circuit split. The D.C. and Tenth Circuits reached the opposite conclusion about NRC authority under the Acts nearly two decades ago. *See Bullcreek v. Nuclear Reg. Comm.*, 359 F.3d 536 (D.C. Cir. 2004); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004). The Fifth Circuit held *Bullcreek* "provided no textual basis for its assumption that the statute authorized the Commission to issue" the licenses and cited irrelevant caselaw about "preemption and the role of states in this scheme." *Id.* at 842. And Skull Valley also "assume[d] the Commission's authority without analyzing the statute," the Fifth Circuit wrote. *Id.*

The NRC has petitioned the Fifth Circuit for en banc review, which will likely be granted or denied sometime in the first half of 2024. If the Fifth Circuit denies review, scrutiny by the U.S. Supreme Court may loom given the circuit split over important federal issues.

First-Ever Gulf of Mexico Wind Auction Results in Only 1 Wind Lease Offshore Louisiana. What Happens Next?

By Jana Grauberger, Kathleen L. Doody and Valkyrie "Kyrie" Buffa, Liskow

The U.S. Bureau of Ocean Energy Management ("BOEM") held its long-anticipated offshore wind lease sale for the federal Outer Continental Shelf ("OCS") in the Gulf of Mexico ("GOM") on Tuesday, August 29, 2023. Three GOM leases were offered for sale, with one located offshore Lake Charles, Louisiana, covering 102,480 acres (OCS-G 37334), and two located offshore Galveston, Texas, covering 102,480 acres (OCS-G 37335) and 96,786 acres (OCS- G 37336). Disappointingly, the sale resulted in a single $5.6 million winning bid for the lease area offshore Louisiana, submitted by the provisional winner, RWE Offshore US Gulf, LLC ("RWE"). According to results posted online by BOEM, the other two lease areas offshore Texas received no bids.

RWE, as the provisional winner, earned two bidding credits from this auction. First, a credit equal to 20% of the cash bid if it successfully commits to supporting workforce training programs and developing a domestic supply chain for the offshore wind energy industry. Second, a credit equal to 10% of the cash bid if it successfully contributes to, or establishes and contributes to, a fisheries compensatory mitigation fund to reduce potential negative impacts to commercial and for-hire recreational fisheries caused by wind development in the GOM. RWE's bidding credits will result in more than $860,000 in investments for workforce training and a domestic supply chain, and over $430,000 for fisheries compensatory mitigation.

BOEM also included two stipulations in the lease requiring a lessee to: (1) make every reasonable effort to enter into a project labor agreement (PLA) covering the construction stage of the project; and (2) establish a Statement of Goals describing its "plans for contributing to the creation of a robust and resilient U.S.-based offshore wind industry supply chain that would facilitate this or other renewable energy projects permitted by BOEM." The lease stipulations mandate that a lessee provide regular progress updates on the achievement of those goals, and BOEM will make those updates publicly available.

This was BOEM's first offshore wind lease sale this year — and the second of its kind for floating wind. According to BOEM, this lease has the potential to power 435,400 homes based on 1.24 GW per year of production. Although the results fell short of expectations, the GOM lease sale is a significant step forward in bringing offshore wind to Louisiana and Texas electricity markets.

A. What's Next

The Department of Justice now has 30 days from the announcement of RWE as the provisional winner to conduct an antitrust review of the results of the sale. Once all post-auction reviews are complete to BOEM's satisfaction, it will issue three unsigned copies of the lease to RWE. RWE will then have 10 business days from receipt of the lease copies to (i) sign and return them to BOEM, (ii) post financial assurance, and (iii) pay any outstanding balance of its bonus bid. The first year's rent is due 45 calendar days after RWE receives the lease copies for execution. BOEM will then verify that all required obligations have been satisfied and execute the lease.

Execution of an offshore wind lease does not, in and of itself, allow a lessee to develop offshore wind energy projects. Instead, it allows the lessee the opportunity to conduct activities and submit for BOEM approval project-specific plans to develop offshore wind energy. The lease provides for a preliminary term of 12 months for the lessee to submit a site assessment plan ("SAP"). Approval of the SAP initiates a five-year site assessment term. If a lessee intends to continue to develop a commercial wind project, then it must submit a construction and operations plan ("COP") before the end of the five-year site assessment term, which must be approved by BOEM before construction of the project can begin. The twenty five-year operations term commences from COP approval.

B. BOEM's 2023 Renewable Energy Modernization Rule

BOEM's 2023 Renewable Energy Modernization Rule (Proposed Rule) proposes to update and modernize existing regulations governing offshore wind energy development, including those pertaining to existing wind lease terms. For example, the Proposed Rule, among other things, proposes to: (i) merge the existing preliminary and site assessment terms into a single five-year preliminary period commencing at the lease effective date, which may be extended upon approval of a suspension request; (ii) add new COP review and design/construction periods of varying length depending on the duration of the COP review and the design and construction process; (iii) convert the twenty-five operations term to a thirty-year operations period commencing at the commercial operations date; and (iv) clarifying that lessees may modify the default schedule and propose an alternative for phased development (i.e., deferring developing portions of a lease). The Proposed Rule also makes clear that BOEM can extend any lease period for good cause shown. Notably, unlike federal offshore oil and gas leases, BOEM in its sole discretion can refuse to approve a wind lease assignment.

C. Path Forward

GOM lessees, like RWE, face significant challenges in developing their wind projects, including new floating wind technologies, development of transmission infrastructure, interconnection with the grid, engagement with stakeholders and sovereigns (i.e., Tribes, states, and local governments), and navigating the federal permitting process which will likely include addressing potential conflicts among multiple uses of the GOM OCS.

BOEM's Offshore Wind Leasing Path Forward for 2021–2025 anticipates additional auctions for federal offshore wind leases in the Central Atlantic, Oregon, and Gulf of Maine, in that order. Hopefully, these future auctions will produce more interest and higher bids, similar to the New York Bight and Carolina Long Bay auctions, but only time will tell.

OPA 90 or CERCLA? The U.S. Fifth Circuit Settles Which Applies to Mixed Oil Spills

By David Judd and Tod Everage, Kean Miller LLP

The Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") are two federal environmental laws with significant effects on businesses and individuals across the nation. OPA 90 provides a remedial scheme that apportions the liability and costs of oil spills among responsible parties. CERCLA does the same but for spills of "hazardous substances," a term of art that is defined in the statute.

But what if there is a spill that is a mix of oil and hazardous substances? Which law governs, OPA 90 or CERCLA? That is the question answered recently by the U.S. Fifth Circuit in the case of *Munoz v. Intercontinental Terminals Co.*, 85 F.4th 343 (5th Cir. 2023). The court's answer: CERCLA.

The case arose out of a fire that broke out at Intercontinental Terminals Company's chemical-storage facility at Deer Park, Texas. There was an allegation that during the ensuing battle to control the fire, various tank products, fire water, and firefighting foam accumulated behind ITC's containment wall. Later, damage to this wall caused it to collapse, allegedly releasing various contaminants into the Houston Ship Channel.

Crucially, subsequent testing by the Texas Commission on Environmental Quality revealed that the spill was *oil mixed with hazardous substances*. About a year later, various plaintiffs sued ITC under OPA 90, seeking to recover economic losses due to interruptions of their business caused by closures of the Houston Ship Channel.

OPA 90, unlike CERCLA, allows for recovery of purely economic losses. For that reason, the plaintiffs brought OPA 90 claims, arguing that OPA's definition of "oil" includes mixtures of oil and hazardous substances. ITC disagreed and moved for summary judgment on the issue of OPA 90's applicability.

The district court granted ITC's motion, and the plaintiffs appealed, teeing up the issue for the Fifth Circuit. As with all legitimate statutory interpretation, the court started with the text of the law. CERCLA, which was passed before OPA 90, expressly excludes "petroleum, including crude oil" from its definition of "hazardous substance." But it does not exclude *mixtures* of oil and hazardous substances. In fact, before OPA 90 was passed, courts interpreted CERCLA's definition of "hazardous substance" to include such mixtures.

Because OPA 90 was passed against this backdrop, the court could reasonably assume that Congress was aware of the accepted interpretation of CERCLA when drafting OPA 90. And OPA 90's definition of "oil" expressly excludes any "hazardous substance" under CERCLA. The statute provides, '"oil' means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under [CERCLA]." 33 U.S.C. § 2701(23). The plaintiffs, however, argued that a mixture of oil and hazardous substances was not "specifically listed" under CERCLA, so OPA 90's hazardous-substance exclusion did not include ITC's mixed spill.

The court rejected this clever argument. It reasoned that the Ninth Circuit, the Fifth Circuit, and the EPA had interpreted CERCLA's definition of "hazardous substance" to include mixtures of oil and hazardous substances. Therefore, when Congress later excluded hazardous substances from OPA 90's purview, it did so knowing that exemption included commingled spills. Further, OPA 90's legislative history revealed that Congress intended for OPA 90 and CERCLA to be mutually exclusive.

The plaintiffs also argued that the court's interpretation of OPA 90 incentivizes the intentional or reckless commingling of oil with hazardous substances so that the responsible party can avoid liability for economic losses under OPA 90. The Fifth Circuit explained that while this might amount to a questionable policy decision under the law, it is not so absurd as to overcome the plain language of OPA 90, interpreted in light of the backdrop of CERCLA and its accepted meaning.

The *Munoz* case creates a disparity in potential liabilities for different parties. A party responsible for an unmixed spill of oil may be liable for pure economic losses under OPA 90, while a party responsible for a mixed spill may be liable under CERCLA, which does not include pure economic losses.

Avoid PSA PTSD: When Defining Terms Such as "Net Royalty Acres," Make Sure There is a Meeting of the Minds

By Brad Gibbs, Oliva Gibbs LLP

In *Foundation Minerals, LLC v. Montgomery*, the New Mexico Court of Appeals considered whether a Mineral Estate Purchase Agreement ("PSA") was enforceable. 2023 N.M. App. LEXIS 78 (2023). The dispute centered around the meaning of "Net Royalty Acres," which was the formula used to determine the final Purchase Price. Montgomery ("Seller") argued that the term Net Royalty Acres was ambiguous enough to void the contract completely.

The trial court agreed with the Seller and held that the PSA was unenforceable because the parties never reached a mutual assent or "meeting of the minds" about the Purchase Price. In applying Texas law in accordance with the PSA, the New Mexico Court of Appeals noted that one element of an enforceable contract is a meeting of the minds on all essential terms—such as the purchase price. You cannot infer a meeting of the minds without "sufficiently definite" contract terms.

A. Background and the PSA

Under the PSA, Foundation Minerals, LLC ("Buyer") contracted with the Seller for the sale of 257.48 Net Royalty Acres ("NRAs") at $15,535.19 per NRA under twenty-five tracts of land. The total Purchase Price was thus *estimated* to be $4,000,000.00. The PSA defined an NRA as "the equivalent of 1 Net Mineral Acre ("NMA") being leased at a 1/8 royalty. For Example: 1 NMA leased at a [25% royalty] is equal to 2 NRAs." In other words, for every NMA that was leased at a 25% royalty, the Buyer would purchase 2 NRAs for a total of $31,070.38. Exhibit "A" to the PSA listed a total of 128.74 NMAs, and assumed that each NMA was leased at 25%, totaling said 257.48 NRAs. However, the final amount of NRAs and thus the total Purchase Price were to be determined by title examination prior to closing.

Disagreements subsequently arose between the Buyer and Seller as to the treatment of nonparticipating royalty interests ("NPRIs") and unleased mineral interests ("UMIs"). The PSA addressed NPRIs to a degree, stating that "adjustments to the price will only be made if the NRAs increase or decrease based on title examination which shall include confirmation of the assumed 25% lease royalty on all leases." Per the Buyer, this meant that NPRIs were intended to be valued "in the same manner as a royalty interest." It appears that the PSA was silent on UMIs, but the Seller testified that UMIs are commonly sold at an *assumed* 25% royalty, "because more value is placed on [UMIs] since the purchaser [is] then able to negotiate and enter into its own lease at a [25%] royalty, [and] negotiate and receive lease bonuses."

B. The Seller's Argument

The Seller was apparently unhappy with certain title defects that were asserted by the Buyer prior to closing and the corresponding reductions to the Purchase Price. The Seller thus attacked the enforceability of the PSA, stating that there was no mutual assent as to price because the Seller "intended to sell [its] mineral estate for $4,000,000.00, and nothing less." As part of its argument, the Seller argued that the NRA formula, as outlined in the PSA, could not be applied to UMIs (which clearly have no lease) or NPRIs (which represent only the right to receive a payment under a lease and not to participate in the lease itself). Because the PSA did not separately identify a different Purchase Price for either, the Seller argued that there could not have been a meeting of the minds. The trial court agreed and negated the PSA on summary judgment, and the Buyer appealed.

C. Decision on Appeal

The New Mexico Court of Appeals first held that for a PSA to be enforceable it must set forth a Purchase Price with a "reasonable degree of certainty." The court then held that the PSA was reasonably certain because it allowed the Buyer to pay an adjusted Purchase Price after a title examination had been conducted to confirm the 257.48 Net Royalty Acres. The PSA expressly included a mechanism to adjust the final valuation and reflected a "strong presumption that the parties intended a reasonable price." The parties' course of dealing during the due diligence period further supported this reasoning. For example, the Seller had attempted to cure title issues and had even entered into new leases covering some of the UMIs.

The court then addressed the Seller's argument that the PSA should be canceled because it failed to adequately define a Purchase Price for UMIs and NPRIs. It agreed with the Buyer that based on common trade usage and the course of dealing between the parties, an *assumed* 25% royalty rate could be implied in the purchase and sale of these interests. Further, the PSA itself stated that NPRIs would be purchased assuming a 25% royalty on all leases—subject to confirmation by title examination.

For these reasons, the court held that the Purchase Price in the PSA was sufficiently definite, even if the final total was left open. The PSA in no way supported the Seller's claim of a "flat" $4,000,000 regardless of the results of title examination in the due diligence period. The PSA thus did not guarantee the Seller a particular dollar amount, instead setting forth that: "(1) a decipherable calculation would yield the total purchase price after title examination verified Seller's mineral and royalty interests; and (2) should Seller fail to correct any title issues, Buyer could grant Seller more time, negotiate a reduction in price acceptable to all parties, waive the title issue, or refuse to accept title to the Mineral Estate and cancel the agreement." Therefore, the Seller could not repudiate the PSA based on an indefinite Purchase Price.

D. Takeaway

Although commonly employed in purchase and sale agreements and the oil and gas industry at large, terms such as Net Royalty Acres, Net Royalty Interest Acres, Overriding Royalty Acres, and Net Revenue Acres are not legal terms of art. This means that these monikers have no universally accepted legal definition.

Royalty acres were originally conceptualized based on the standard 1/8 royalty, with eight Net Royalty Acres contained in one Net Mineral Acre. Thus, a 1/8 lease would entitle you to one of the eight royalty acres. In other words, a 1/8 lease would grant you 1 NRA, a 3/16 lease would grant you 1.5 NRA and a 1/4 lease would grant you 2 NRA (as in the *Foundation* PSA). Over time, the idea of a Net Royalty Acre has become disconnected from the actual lease royalty and a single Net Royalty Acre has come to generically mean a 1/8 royalty on the full mineral interest in one acre of land. An oft-cited legal treatise argues that a "royalty acre" should continue to reflect a full lease royalty. In other words, if a landowner is subject to a 1/4 royalty on 1 acre of land and sells 1 royalty acre, then such a grant would include the full lessor's royalty interest. Conversely, if 1 mineral acre equals 8 royalty acres, a 1/4 lessor's royalty on a 1-acre tract would yield 2 royalty acres and the sale of 1 royalty acre would only transfer 1/2 of the grantor's royalty. *See* 1 PATRICK H. MARTIN AND BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW, § 320.3 (LexisNexis 2022).

Further complications may arise when a PSA does not address how to treat unleased mineral interests and/or nonparticipating royalty interests. It benefits both parties and assures a "meeting of the minds" if terms such as Net Royalty Acre, and the treatment of NPRIs and UMIs, are carefully defined in the PSA. This also prevents the possibility of a court later imposing its own definitions, leading to unpredictable results.

Understanding the nuances of "dirt law" is crucial when negotiating a PSA for mineral, nonexecutive, and leasehold interests. These nuances can have a tremendous impact on your defects and price adjustments at closing and may even negate the deal completely (as the *Foundation* Seller attempted to do here). Therefore, it is advisable to have a trusted oil and gas attorney, licensed in the state where the assets are located, and look over the definitions, defect mechanisms, and due diligence provisions in your PSA before signing.

ESG Deception or Overreach: Understanding the Landscape of Greenwashing Litigation

By Molly Pela and Andrew Good, Oliva Gibbs LLP

In addition to the risk of regulatory enforcement actions and penalties, the court system continues to be used as a battleground for climate issues through litigation against oil and gas ("O&G") companies. According to the United Nations Environment Programme, there were 2,180 climate-related cases filed in 65 jurisdictions, including international and regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, such as Special Procedures at the United Nations and arbitration tribunals, as of December 2022. These lawsuits have been brought by state and local governments, environmental groups, indigenous people, climate change protestors, citizen groups, and others that seek to hold energy companies liable for climate-related damages. Some, however, view these as political tactics that intend to harm domestic energy production and use, thereby increasing energy costs. Kirk Herbertson, "Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs," EarthRights, March 21, 2018.

The first legal strategy relating to climate change was brought forth by the Global Warming Legal Action Project ("GWLAP") in 2001, which included four goals: (1) develop and apply a tort law approach to global warming that will require greenhouse gas emitters and fossil fuel companies to internalize the costs of their contributions to global warming; (2) serve as a forum for sharing strategy and ideas with attorneys nationwide and worldwide who are seeking to use legal action to promote progress on reducing global warming; (3) educate members of the bar and the public regarding the industry's potential liability for global warming injuries by participating in legal symposia, publication of articles and similar activities; and (4) understand additional legal work that will further the Civil Society Institute's mission of combating global warming and promoting clean energy solutions. Thereafter, the GWLAP joined attorney generals from multiple states to file an initial tort case against American Electric Power, which ultimately was appealed to the U.S. Supreme Court. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). The Court, in an 8-0 decision, held that corporations cannot be sued for greenhouse gas emissions ("GHGs") under federal common law, primarily because the Clean Air Act delegates the management of carbon dioxide and other GHG emissions to the Environmental Protection Agency ("EPA").

Since such time, there has been a massive uptick in climate-related litigation as a result of environmental, social, and governance (collectively "ESG") issues having become a major focal point for a large number of politicians, public and private corporations, and citizens in general. These cases attempt to force liability through alignment to current laws and regulations, climate attribution science, public mobilization efforts, and broad allegations relating to alleged ESG deception efforts, which include "greencrowding," "greenlighting," "greenshifting," "greenlabeling," "greenrinsing," or "greenhushing." As such, there are more stringent and sophisticated ESG-related policies and regulations, along with an increased concentration on ESG practices and disclosures of information. With a wider pool of litigants, and more avenues for those litigants to pursue, O&G companies need to make sure they have consistent and compliant ESG-related knowledge and corresponding capabilities to defend against such claims, which can carry significant reputational, regulatory, and/or financial consequences.

One type of claim that has been gaining momentum involves allegations of "greenwashing," which is a term associated with the act of making false or misleading statements about products or ESG practices to appeal to consumer interest through (claimed) eco-friendly products and/or sustainable practices. The causes of action vary by state, but can include claims of public nuisance, private nuisance, trespass, negligence, strict liability, civil conspiracy, unjust enrichment, unfair and deceptive practices, and shareholder litigation. These causes of action typically involve, amongst others, challenges against O&G companies' alleged misleading, misrepresented, and/or omitted disclosures about: (1) governmental or corporate commitments; (2) climate investments, financial risks, and corresponding harms; (3) efforts to downplay the effect of fossil fuel usage on climate change; (4) the effects of fossil fuel products to consumers; and/or (5) the level of investment in cleaner energy sources.

While oil and gas companies have strategically attempted to either dismiss pending lawsuits in their early stages or sought to remove them to federal courts, plaintiffs have successfully discovered how to bring greenwashing lawsuits against O&G companies in their preferred forum (i.e. state courts) and survive dismissal. Additionally, the Federal Trade Commission has pursued greenwashing litigation against companies for purportedly deceptive environmental claims. *See U.S. v. Walmart, Inc.*, No. 22-cv-965, Dkt. No. 3 (D.D.C. Apr. 8, 2022). Similarly, the Securities and Exchange Commission launched its Enforcement Task Force focused on Climate and ESG issues in 2021, with the goal of developing initiatives to identify ESG-related misconduct and focusing initially on greenwashing actions or omissions. Thus, it is apparent that companies need to be increasingly prepared to face litigation and implement strategies to avoid or mitigate significant regulatory, reputational, and financial harms.

So, how can companies in the petrochemicals sector prepare for and/or mitigate risk against greenwashing claims or lawsuits? By taking a proactive approach and focusing on its principles, practices, governance, and disclosures concerning the eco-sustainability of its activities, products, and transactions. For example, O&G companies should:

- Fully understand that greenwashing is about false or misleading practices concerning ESG credentials, products, or practices, which carries significant regulatory, reputational, and financial risks;
- Stay up-to-date on ESG-related developments, including greenwashing, to ensure they can adapt to and comply with governmental policies, rules, and regulations;
- Evaluate their compliance with the most current FTC Green Guides;
- Have internal policies and procedures that provide guidance on potential risks and mitigation associated with greenwashing, while accounting for current (and potentially future) legislation, rules, and regulations;
- Confirm that company practices, statements, and corporate documents match environmental claims/disclosures;
- Use accurate, logical, and verifiable representations or disclosures, including the explanation of evidence-based information and terms that are related to ESG issues or practices;
- Analyze whether their use of words, images, colors, or other descriptors can be considered an environmental claim;
- Examine external claims about company practices and products to confirm they are not misleading, but are justifiable and evidence based;
- Measure what ESG-related commitments and claims are achievable through timely planning and execution;
- Identify and cure any discrepancies between what is disclosed versus what is done in any ESG claim or disclosure;
- Use third parties to verify any ESG-related claims or disclosures, including having legal counsel review disclosures or ESG-related claims;
- Manage and retain all data necessary to defend against environmental claims;
- Use disclaimers, qualifications, or other explanations to mitigate the risk of inaccurate or misleading claims; and
- Analyze and evaluate ESG-related compliance and due diligence obligations as required by law.

It is a good idea for all companies that are concerned about the possibility of greenwashing lawsuits to take a comprehensive look at their principles, practices, governance, and disclosures in comparison to the continuously developing statutes, regulations, and case law so that they can confirm there is evidentiary support for company ESG activities and statements. Remember, the best defenses to greenwashing claims will be found in a company's principles, practices, due diligence, and disclosures, along with the ESG-profile for its product, activity, or transaction.

EPA Issues Draft Revision of Technical Guidance for Assessing Environmental Justice in Regulatory Analysis

By Emily von Qualen, Amy Tomlinson, and Clare M. Bienvenu, Liskow

The Environmental Protection Agency recently issued draft guidance updating how agencies are to evaluate environmental justice ("EJ") concerns when undertaking regulatory actions, entitled "Technical Guidance for Assessing Environmental Justice in Regulatory Analysis" ("Guidance"). This 130-page document outlines analytic expectations and technical approaches that can be used by agency analysts in such an evaluation.

The draft revision updates and expands on EPA's original guidance issued in 2016. The draft guidance addresses scientific advancements, peer-reviewed Agency guidance, and the Biden administration's new priorities, policies, and direction on EJ by incorporating Executive Order 14096. The draft guidance highlights early integration of EJ in the rulemaking process and provides approaches for using analytics to ensure EJ concerns are addressed as regulatory actions are developed.

The main updates that EPA has included in the draft Guidance include updating several key definitions and concepts so that they align with the terms used in Executive Order 14096.

A. "EJ Concerns"

In its 2016 guidance, EPA defined "EJ concern" as "the actual or potential lack of fair treatment or meaningful involvement of minority populations, low-income populations, tribes, and indigenous peoples in the development, implementation." The EPA updated the definition used in the draft Guidance to mirror the EJ groups identified in EO 14096, including by adding national origin, color, and disability status. That definition now states that "[a]n EJ concern is the actual or potential lack of just treatment or meaningful involvement on the basis of income, race, color, national origin, Tribal affiliation, or disability status in the development, implementation and enforcement of environmental laws, regulations and policies."

The draft Guidance also updates how to identify and define these populations groups of concern, noting that agency analysts should be most concerned with identifying groups with increased vulnerability based on economic and social factors. This may include additional considerations, such as linguistic isolation, gender, age, and employment status.

B. “Meaningful Involvement”

Additionally, based on how the term is defined in EO 14096, EPA proposes updating “meaningful involvement” to focus on active and early engagement with EJ communities. EPA suggests that to meaningfully involve or engage EJ communities, it must go beyond the minimum requirements of standard notice and comment periods, and the agency should actively work to engage EJ communities early in the process well before a proposed rule is published.

C. Cumulative Impacts and Climate Change

As directed in the Executive Order, EPA places a higher priority on cumulative impacts and climate change in the proposed Guidance. Under the proposal, EPA analysts should consider a community’s vulnerability, including cumulative impacts and climate change. While these were considerations in the 2016 guidance, the proposed Guidance puts cumulative impacts and climate change front and center, including more information and tools on how to incorporate these considerations.

In addition to the changes based on Executive Order 14096, EPA also proposes:

- Incorporating an analysis of compliance and enforcement history in determining whether policy options that encourage better compliance (such as publicly available real-time monitoring data or enhanced reporting requirements) can reduce exposure to EJ communities; and
- Evaluating the underlying heterogeneity (i.e., diversity or differences) of the regulated industry in question, the populations at risk, and the risks themselves when determining the correct analytical approach. For example, with respect to selecting a geospatial unit for analysis, EPA explains that it is important to weigh any potential tradeoffs between fully capturing the populations at risk and the heterogeneity in risk which may mask information about those most at risk by including populations that are much less affected.

While focused on technical metrics in this Guidance, EPA is clear that it is not proposing a bright line test to determine whether an EJ concern results in disproportionate and adverse health and environmental effects. That determination is “ultimately a policy judgment.” Nor does the proposed Guidance require EPA analysts to conduct a specific type of technical review for EJ concerns. Rather, it includes key considerations that should be taken into account when completing an EJ review, and it encourages analysts to provide transparent justification for their choices.

While the Guidance is not directly applicable to non-government actors, it provides insight into methods EPA considers appropriate for analyzing EJ concerns that private actors should bear in mind when conducting their own EJ analysis for use in seeking federal approval for proposed activities. Comments on the proposed Guidance are due by January 15, 2024.

A Message from IEL

Join us in person in Houston or online from your office or home, February 22-23, 2024, for the 75th Annual Energy Law Conference. The IEL 75th Anniversary and Distinguished Leadership in Energy Award Reception and Dinner honoring Gretchen Watkins, President of Shell USA, Inc., will be held at the River Oaks Country Club on Thursday, February 22 at 6:15 p.m. IEL Advisory Board Members attend the conference for free. If you haven't renewed your membership for 2024, you may do so here.

Once again, we would like to thank our IEL publications liaisons – this issue has been a great success and we appreciate your support!

If you are interested in being your firm or company's publication liaison to IEL, please contact Kelly Ransom (kelly.ransom@kellyhart.com) and Emma Espey (eespey@cailaw.org).

MEMBERS IN THE NEWS

Kelly Hart & Hallman attorney Kelly Ransom received a 2023 New Orleans CityBusiness Leadership in Law Award for outstanding achievements in her legal career and community contributions. As a three-time Leadership in Law award recipient, she was also honored this year for earning a place among the esteemed "Hall of Fame Honorees."

IEL Advisory Board member and Founder and Managing Partner at CONEXIG, LLC, Felipe André Isoré Gutierrez, announces the opening of an office in Houston. CONEXIG provides expert witness services and maintains offices in the United States (Miami and San Diego), Mexico, Colombia, Ecuador, Peru, Chile, Brazil, Argentina, France, Portugal, Spain, Angola, South Africa, and Australia.

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We are honored and excited to add the following companies and individuals to IEL's membership roster. Please join us in welcoming them to our organization!

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