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INDUSTRY UPDATES

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