
Infrastructure Risks and Opportunities

FEBRUARY 14, 2019

This is the third issue of WilmerHale's 10-in-10 Hot Topics in Energy Series. Over the next 10 weeks, our attorneys will share insights on current and emerging issues affecting the US energy sector. Attorneys from across various practice groups at the firm will offer their take on issues ranging from congressional investigations, to the impact of key regulatory reforms, to emerging trends in domestic litigation and international arbitration. [Read our other recent publications.](#)

Early signs point to a renewed focus on infrastructure in 2019. In last week's State of the Union, President Trump appealed to both parties "to unite for a great rebuilding of America's crumbling infrastructure." Both Speaker Nancy Pelosi and Senate Majority Leader Mitch McConnell have identified infrastructure as one of the few potential areas of bipartisan compromise in the 116th Congress. However, this is not the first time President Trump has called for infrastructure investment, and details of any legislation are yet to be seen.

Whether or not Congress passes a major infrastructure bill, it is clear that infrastructure-based risks raise critical legal issues for energy and utility companies. In this week's alert, we look at two of those issues: the unique risks to the natural gas industry posed by aging infrastructure, and the increasing risks faced by energy companies from wildfires caused by transmission lines or other infrastructure.

Regulatory/Legislative Updates

Infrastructure has long been a policy priority for President Trump. As a candidate, he proposed \$1.5 trillion in infrastructure spending over 10 years. In his first two years in office, he has taken executive actions to promote major infrastructure projects through streamlined permitting and reductions in other regulatory requirements, including expedited environmental review and approval. See Executive Order 13766 (Jan. 24, 2017); Executive Order 13807 (Aug. 25, 2017). In 2018, he [proposed \\$200 billion in federal funding](#) designed to stimulate an additional \$1.3 trillion in infrastructure spending from states, local governments and the private sector. That proposal failed to gain traction, and the tangible effects of the Trump Administration's efforts so far have been limited.

With evidence of a renewed focus coming from President Trump and leaders in both parties, 2019

could be the year an infrastructure bill passes. That said, the contours of any such legislation are unclear, and a workable compromise is far from certain. One sticking point will be the source and amount of federal funding for any infrastructure package. Options include increasing the federal gas tax for the first time in 25 years and implementing a “vehicle-miles-traveled” fee (to account for the increase in electric vehicles). We can expect that any bill will include incentives for public-private partnerships, and investments at the state and local levels.

Because infrastructure is a broad term, another hurdle will be agreeing on the types of projects that should be included and prioritized. For President Trump and many Republicans in Congress, the focus is largely on expediting the development of pipelines and other infrastructure to promote transmission and export of oil and natural gas as part of America’s “energy dominance” agenda. To gain majority support in the Democratic-controlled House, by contrast, any bill would likely need to include measures addressing climate change, including by supporting infrastructure necessary to facilitate a transition to clean and renewable energy sources. Indeed, the recently proposed “Green New Deal”—which has already garnered widespread support among Democratic presidential candidates—expressly requires that “any infrastructure bill considered by Congress addresses climate change.” Such provisions, of course, are unlikely to find broad support among Senate Republicans.

Even if bipartisan legislation stalls, there are a number of unilateral actions available to President Trump. Prior to the partial government shutdown earlier this year, there were reports that the President was considering executive actions to facilitate pipeline development, boost liquefied natural gas exports and limit states’ ability to block permits using Section 401 of the Clean Water Act—which requires that an applicant for a federal license or permit certify that its operations will meet state water quality standards.

As with many of the President’s other executive actions, these would likely trigger immediate legal challenges. States, environmental groups, Native American tribes and other stakeholders are already actively challenging a number of high-profile pipelines and transmission projects. And, as discussed in a [prior alert in this series](#), House Democrats are planning to use their oversight authority to investigate the Trump Administration’s actions in this space, including its promotion of oil and gas drilling on public lands, attempts to streamline permitting, and perceived watering down of environmental reviews.

Aging Pipeline Infrastructure

Regardless of whether Congress passes infrastructure legislation, risks associated with existing infrastructure will continue to make headlines. Natural gas infrastructure in the United States includes more than 2.5 million miles of transmission, distribution and service pipelines. For much of the 20th century, cast iron was a popular material for natural gas pipelines. Now more than 60 years old in many places, cast-iron pipes pose safety and emissions risks due to corrosion and leakage. The risk of aging cast-iron pipes is well documented: although only 2% of all distribution mains are cast iron, between 2005 and 2017, such mains accounted for 10.6% of reportable “incidents”—i.e., leaks causing an injury or fatality, property damage in excess of \$50,000, or the unintentional release of a certain amount of gas.¹

The natural gas industry and regulators have long recognized these risks and have made strides in recent years to modernize the system. From 2005 to 2017, the mileage of cast-iron distribution mains and service lines decreased by nearly 38% and 77%, respectively.² According to the Pipeline Hazardous Materials Safety Administration (PHMSA), by the end of 2017 approximately 97% of natural gas distribution pipelines in the United States were made of plastic or steel.³

Despite modernization efforts, thousands of miles of old pipe remain in the system. Several recent events have highlighted the risks associated both with aging natural gas infrastructure itself and with efforts to upgrade it. Gas companies and utilities have faced high-profile legal challenges resulting from these incidents.

As gas companies and utilities operate, maintain and modernize their pipeline infrastructure, they must navigate a complex overlay of federal and state requirements. Pursuant to the National Gas Pipeline Safety Act (NGPSA), 49 U.S.C. § 60101 *et seq.*, every state other than Alaska and Hawaii has assumed safety authority over *intrastate* gas pipelines through a certification process with PHMSA. State requirements may—and often do—exceed the federal minimums.

According to one industry survey, more than 1,300 safety requirements imposed by states exceed federal standards, and state utility commissions most often govern the day-to-day operations and maintenance of pipelines.⁴ Moreover, penalty provisions may differ significantly by jurisdiction. Some states have adopted the NGPSA's \$2 million cap on civil penalties for a related series of violations, while other states have not. For example, because California state law imposes penalties far greater than the NGPSA cap, the California PUC was able to impose \$1.6 billion in penalties on Pacific Gas & Electric Company (PG&E) in connection with the pipeline incident in San Bruno, California. Gas companies and utilities must therefore be aware not only of federal requirements, but also of the varying requirements of the states in which they operate.

Wildfire Liability

Wildfires pose an increasing risk to energy companies and utilities across the country. One such risk is suits by private parties and state and federal agencies for damages caused by wildfires. For fires in which utility equipment was involved, utilities may be required to pay for the damage caused by the fire. In California, which has the most stringent liability regime for wildfires, property owners can seek compensation for property damage through inverse condemnation when it is determined that the utility's equipment was the cause of ignition, regardless of whether the utility was negligent or at fault. This strict liability regime has been the main factor in PG&E's recent bankruptcy filing, as the company faces billions of dollars in damages resulting from the 2017 and 2018 California wildfires.

Moreover, if a fire burns national forest land, the federal government can bring common-law claims for negligence and trespass and, in some states, for fire-suppression costs under provisions of state law. For example, the United States has invoked a California statute that provides that any person who negligently or illegally starts a fire is liable for suppression costs, and permits emergency or rescue services to recover fire-related costs. See Cal. Health & Safety Code § 13009; *see, e.g., United States v. Al-Shawaf*, 2018 WL 4501108 (C.D. Cal. Sept. 19, 2018). In addition to

recovery of suppression costs, the United States has successfully recovered the market value of lost timber and restoration costs, including compensation for the diminution in value of federal lands due to scenic, recreational and wildlife impacts. See, e.g., *United States v. Union Pac. R.R. Co.*, 565 F. Supp. 2d 1136 (E.D. Cal. 2008).

In response, energy companies and utilities are implementing best management practices and other tools to prevent such fires, including:

- Modernizing vegetation and forest management practices for fire prevention, including an increased focus on removing vegetation near power lines;
- Ensuring utility and public infrastructure is designed, constructed and operated to maximize resiliency, including installing of more fireproof equipment;
- Increasing weather and fire monitoring activities by installing weather stations to monitor wind and humidity and by mounting cameras to watch for flames;
- Responding to wind and weather events through de-energizing power lines;
- Using specialized insurance products in high wildfire areas to mitigate risks;
- Working with state legislatures to limit liability for utility companies in light of increased climate-related risks.

At the federal level, Congress has reduced procedural requirements for agency approval of certain wildfire-prevention efforts on federal lands, including some hazardous-fuel reduction and vegetation-restoration projects. Under the Healthy Forest Restoration Act (HFRA), 16 U.S.C. § 6501 *et seq.*, wildfire-prevention projects on federal lands that meet certain criteria are eligible for streamlined environmental review under the National Environmental Policy Act (NEPA) and expedited review of NEPA documents and proposed projects within the approving agency. In practice, this allows utilities and energy companies to more quickly receive approvals from federal agencies to conduct critical wildfire-prevention projects.

Even with support voiced by both parties, it remains to be seen whether Congress and the White House can pass infrastructure legislation in 2019. Many obstacles must be overcome before such legislation becomes reality. With or without congressional action, though, energy companies and utilities will continue to face the risks—including legal challenges, financial impacts and reputational damage—associated with aging infrastructure and the increasing threat of infrastructure-caused wildfires.

-
1. “Cast and Wrought Iron Inventory,” *PHMSA Pipeline Replacement Updates*.
 2. *Id.*
 3. “Background,” *PHMSA Pipeline Replacement Updates*.
 4. *Providing Increased Public Safety Levels—Executive Summary*, National Association of Pipeline Safety Representatives.

