

Energy Sector Alert Series: Hot Topics in California

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In this eight-week alert series, we are providing a broad look at current and emerging issues facing the energy sector. Attorneys from across the firm will discuss issues ranging from environmental disclosures and risk management in business transactions to insolvency, compliance programs and intellectual property. Please [click here](#) to read all of our recent publications.

Important energy issues continue to arise at the intersection of law and policy in California. Here are eight hot topics that require the attention of entities with interests in California's energy sector.

1. Fallout From Spills and Leaks

The past year brought two high-profile incidents in the energy sector: (1) the May 2015 rupture of the Plains All American Pipeline, which discharged approximately 3,000 barrels of crude oil along the California coast; and (2) the October 2015 discovery of a leak from the Aliso Canyon storage facility, which emitted 100,000 tons of methane into the air near Los Angeles. Legal and policy responses to these incidents continue to emerge at the state and federal levels. For example:

- — on October 8, 2015, Governor Jerry Brown approved AB 864, which requires certain oil pipelines to use leak detection systems and other technologies to reduce potential environmental impacts;
- — on February 5, 2016, the California Department of Conservation's Division of Oil, Gas, and Geothermal Resources issued emergency rules requiring daily inspections of wells and other testing at underground natural gas storage facilities;
- — on February 5, 2016, the US Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an advisory bulletin calling for operators of underground storage facilities used for the storage of natural gas to undertake specific practices to prevent and mitigate the breach of integrity, leaks, or failures; to ensure the safety of workers and the public; and to protect the environment; and
- — on February 17, 2016, PHMSA issued a report citing corrosion as the cause of the pipeline failure, prompting calls for federal requirements for pipeline technology.

These incidents illustrate the need for energy companies (many of which may be struggling to meet

daily demands and budgetary pressures) to kept abreast of recent regulatory changes, review and update their compliance programs as needed, and be ready to deploy strategic responses in the event an incident occurs. A “multi-branch” approach is critical to successfully addressing the legal, policy, and media dimensions of high-profile incidents, when they occur.

2. Expanding Mandate for Renewables

In October 2015, Governor Brown approved SB 350, the Clean Energy and Pollution Reduction Act of 2015. SB 350 increased the state's renewables portfolio standard (RPS) to 50% by 2030. (Previously, the state's RPS was set at 33% by 2020.)

New initiatives are underway to achieve SB 350's goals. For example:

- — the California Air Resources Board (ARB) has proposed a regulation to create a penalty mechanism to support enforcement of the RPS;
- — the California Energy Commission (CEC) has opened a new proceeding to address amendments to the RPS guidelines needed to implement SB 350; and
- — the CEC is working with the California Public Utilities Commission (CPUC) and California Independent System Operator (CAISO) to launch Renewable Energy Transmission Initiative (RETI) 2.0 to establish the relative potential associated with various renewable locations in California.

As these agencies modify their regulations and programs to address the expanded RPS mandate, interested entities should ensure that their views are well represented, and identify new obligations and potential business opportunities that may result.

3. Streamlined Permitting

The CEC, Bureau of Land Management, US Fish and Wildlife Service, and California Department of Fish and Wildlife have collaborated to create the Desert Renewable Energy Conservation Plan (DRECP) to streamline renewable energy and transmission permitting while advancing conservation goals. The DRECP covers 22.5 million acres in seven California counties. It has been split into two phases: Phase I (for federal lands) and Phase II (for non-federal lands).

In November 2015, in compliance with the National Environmental Policy Act (NEPA), the Final Environmental Impact Statement was released for Phase I, which triggered a 30-day “protest” period. The collaborating agencies are now analyzing the protests, but it is not anticipated that any resulting changes to the DRECP will be significant enough to warrant further NEPA analysis. Interested parties should prepare for the release of the Record of Decision, after which implementation of Phase I will begin immediately. Meanwhile, Inyo and Imperial counties have issued plans of their own as part of Phase II, and the other counties' plans are forthcoming.

4. Energy Storage Needs

SB 350's mandate for more renewable energy, much of which is produced intermittently, is likely to trigger further interest in energy storage. This may focus attention on [AB 33](#), a bill that would require the CPUC to determine what role large-scale energy storage could play as part of the state's overall

strategy to diversify energy resource portfolios. And energy storage will become a hotter topic as the CPUC develops a framework for making residential electricity rates based on “time of use.”² Interested entities should seek opportunities to engage in the legislative and regulatory processes.

5. Energy Efficiency Targets

SB 350 requires the CEC, CPUC, and local utilities to establish annual targets for statewide energy efficiency savings and demand reduction that will achieve a cumulative doubling of statewide energy efficiency savings in retail electricity and natural gas usage by January 1, 2030. SB 350 sets a deadline of November 1, 2017 to establish these targets, and requires a public process that allows input from stakeholders. Owners of existing building stock, significant consumers of electricity or natural gas, and others with affected interests should evaluate the impact these targets may have on their current operations, and consider participating in the stakeholder process as appropriate.

6. The Energy-Water Nexus

California's historic drought is intensifying the competition for water between the energy sector and others. The State Water Board has begun to issue curtailment notices with greater frequency, calling for water rights holders to limit or stop diverting water. On February 18, 2016, the Department of Water Resources (DWR) released draft [regulations](#) for groundwater management. The regulations must be finalized by June 1, 2016, and DWR is currently soliciting public input. As a major water users, the energy sector should consider commenting on DWR's draft regulations, and more generally also needs to plan ahead, protect water rights, and engage in advocacy as agencies formulate processes to address sustainability.

In addition, the energy sector should monitor and participate in water rate-setting procedures, as water suppliers seek to regain revenues lost from water conservation measures that have been put in place due to the drought.

7. Revisions to Greenhouse Gas Regulations

Through the Global Warming Solutions Act, AB 32, California was well on its way to complying with the greenhouse gas (GHG) emissions reductions set by the US Environmental Protection Agency's Clean Power Plan (CPP). On February 9, 2016, the US Supreme Court stayed implementation of the CPP pending judicial review in the DC Circuit. But California is leading a coalition of states in support of the CPP, and continues to work toward CPP compliance despite the stay. On February 16, 2016, Governor Brown was among a group of 17 governors that signed the [Governors' Accord for a New Energy Future](#), which includes commitments to expand clean energy sources, encourage clean transportation options, and other policy changes. And the ARB recently proposed changes to the state's mandatory GHG emissions reporting and cap-and-trade regulations to address CPP compliance. Generators, refineries, fuel suppliers, and other energy industry members should review the ARB's [proposal](#) and consider providing feedback if their interests so merit.

8. Impacts of Proposed Projects' GHG Emissions

California is plowing new ground in efforts to incorporate climate change into environmental impact reviews. The Supreme Court of California recently held that an individual project could have a significant impact on the environment based on its GHG emissions, under the California Environmental Quality Act (CEQA), the state analogue of NEPA.³ That contrasts with federal GHG guidance, which states that, for any given project, significant impacts would not be expected “based on cumulative impacts of GHG emissions alone.”⁴ While the Court suggested a few “potential pathways” to evaluate the cumulative significance of a proposed project’s GHG emissions, it conceded that none of those approaches would guarantee CEQA compliance. Energy project proponents need to be prepared to deal with this uncertainty, and are advised to help develop the evaluation and compliance standards that may be required to fulfill this CEQA requirement.

Conclusion

Success in California’s energy sector will require strategic thinking and advocacy. Energy companies should be prepared to work quickly and with all three branches of government—on the state level and federal level—as incidents occur and legal frameworks take shape. There are coalitions to be built and governmental interactions to navigate. Beyond merely watching legal and policy developments, California’s energy industry should be actively participating.

WilmerHale’s Presence in California

Established in 2007 and 2005, respectively, our [Los Angeles](#) and [Palo Alto](#) offices are built upon the firm’s guiding principles of a dedication to excellence in our legal work and our client service, a collaborative and collegial environment, diversity, and a commitment to public service. Our California-based attorneys advise clients on a range of regulatory, transactional, intellectual property, securities and litigation/controversy issues. WilmerHale’s [Strategic Response Group](#) assists clients in navigating multifaceted challenges at the intersection of law, policy, and business. Our recent experience on energy matters in California has included assisting independent power producers with obtaining and defending regulatory approvals for energy project development, advising a utility company in its effort to develop and implement a best-in-class compliance system, advising a wholesale electricity supplier regarding proposed transmission projects, and defending a client against allegations of energy market manipulation in an enforcement action brought by the Federal Energy Regulatory Commission in the Federal District Court for the Eastern District of California.

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² CPUC, [Order Instituting Rulemaking to Assess Peak Electricity Usage Patterns and Consider Appropriate Time Periods for Future Time-of-Use Rates and Energy Resource Contract Payments](#) (Dec. 28, 2015) (“[time-of-use] rates can provide an incentive for customers to store solar energy during the early afternoon hours for use during the later afternoon and early evening peak hours”).

³ *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal. 4th 204 (2015).

⁴ Council on Environmental Quality, [Revised Draft Guidance on the Consideration of Greenhouse](#)

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