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INDUSTRY UPDATES

Biden Administration Finalizes Waste Emission Charge Rule

By Edward "Skipp" L. Kropp and Armando F. Benincasa, Steptoe & Johnson PLLC

On November 12, 2024, less than one week after the most recent presidential election which will likely result in substantial changes to energy policy in the United States, the United States Environmental Protection Agency (USEPA) announced that it had finalized its rules implementing the Waste Emissions Charge (WEC) which was part of the Inflation Reduction Act (IRA) passed by Congress in 2022. Congress included this requirement in the IRA to encourage the oil and gas industry to better capture methane emissions from its operations. Smaller oil and gas operators who operate typically smaller, conventional production oil and gas wells fear the fee may impact the profitability of smaller, conventional oil and gas wells and plugging timing of such wells.

The IRA established the charge on emitters of methane if emissions exceed specific performance levels and directed USEPA to collect the charge and implement other features of the program, including providing appropriate exemptions for actions that reduce methane releases. USEPA will now collect WEC from entities "wasting" methane by flaring or venting it into the atmosphere rather than capturing it.

USEPA claims that these emission charges will prevent 1.2 million metric tons of methane from entering the atmosphere by the year 2035. The rule applies to oil and gas facilities emitting more than 25,000 metric tons of carbon dioxide per year, as self-reported to the Greenhouse Gas Reporting Program. However, distribution facilities are generally exempt.

In addition to creating the WEC, the IRA does provide funding to states and other groups to help monitor, measure, quantify, and reduce methane emissions from the oil and gas sector. Through the Methane Emissions Reduction Program, USEPA and the Department of Energy are expected to provide financial and technical assistance to promote the adoption of available and innovative technologies — including funds to mitigate emissions at low-producing conventional wells and other oil and gas infrastructure.

The WEC rule follows USEPA's issuance of final standards regarding methane emissions from new and existing oil and gas operations adopted in March 2024. The Supreme Court of the United States recently denied requests by industry groups and energy producing states to stay the new rule while substantive challenges move forward. The WEC rule details how the charge will be implemented, including the calculation of the charge and how exemptions from the charge will be applied. The WEC starts at $900 per metric tons of emissions above thresholds for calendar year 2024 and then increases to $1,200 per metric tons for excess emissions in calendar year 2025 and $1,500 per metric tons for excess emissions in calendar year 2026 and beyond. One significant change between the proposal and the final rule is that the payment deadline was delayed from March 31 until August 31. Given the Labor Day holiday in 2025, the first reporting and payment deadline is September 2, 2025.

The fate of the WEC is in question given the substantial changes which are coming to Congress and the White House in January 2025, but because the WEC is mandated by the IRA, Congress will be required to pass legislation in order to repeal or amend the requirement for USEPA to develop the rules implementing the charge. In a joint press release following the issuance of the final rule, United States Senator Shelly Moore Capito (R-WV), Senator John Hoeven (R-ND) and Congressman August Pfluger (R-TX) slammed the actions taken by USEPA. Senator Capito stated, "I look forward to working with my colleagues and President Trump to repeal this misguided tax early in the next Congress."

Midwest High Courts Uphold Carbon Pipelines' Authority to Survey Private Property

By Hannes D. Zetzsche, Baird Holm LLP

The Iowa Supreme Court issued an important decision on November 22, 2024, upholding carbon pipelines' statutory authority to survey private property. At issue in *Summit Carbon Sols., LLC, v. Kasischke*, No. 23-1186, __N.W.3d __ (Iowa 2024), was whether those surveys constitute a taking.

Both the North Dakota Supreme Court and South Dakota Supreme Court recently rejected similar takings claims over statutory survey access for carbon pipelines. *SCS Carbon Transp. LLC v. Malloy , Tr. of Harry L. Malloy Tr. No. 2 Dated May 25, 2008*, 7 N.W.3d 268 (N.D. 2024); *Betty Jean Strom Tr. v. SCS Carbon Transp., LLC*, 11 N.W.3d 71 (S.D. 2024). The Iowa Supreme Court likewise held Iowa's survey-access statute is not a taking.

Summit Carbon Solutions is one of three companies currently developing a major pipeline in the Midwest for carbon capture and storage. The others are Wolf Carbon Solutions and Tallgrass Energy. Navigator CO2 Ventures canceled a similar project last year.

Summit sought access to survey land along its pipeline route. Iowa permits a pipeline company, after notifying the landowner, to "enter upon private property for the purpose of surveying and examining the land." Iowa Code § 479B.15. The pipeline company must pay "actual damages" from the survey. *Id.* If a landowner refuses, this pre-condemnation survey "may be aided by injunction." *Id.*

When a landowner in Hardin County, Iowa, refused Summit's survey, Summit sued for an injunction. The landowner counterclaimed, asserting that Iowa Code section 479B.15 was an unconstitutional taking of private property. U.S. Const. amend. V; Iowa Const. art. I, § 18. He also contended Summit had failed to satisfy pre-survey procedures.

The Iowa trial court entered judgment for Summit and enjoined the landowner from interfering with Summit's survey access.

On appeal, the Iowa Supreme Court affirmed. Like the courts in North and South Dakota, Iowa's high court held that survey access does not unconstitutionally take the landowner's private property. To the contrary, "section 479B.15 is a lawful pre-existing limitation on his title to the land." *Kasischke* at 10.

The court recognized survey access for a public purpose is a longstanding background restriction on private property. This restriction existed in early American law and remains throughout Iowa's statutes.

Survey access also is a narrow land restriction. It permits a single intrusion for a limited purpose. The court distinguished the survey statute from a California regulation that impermissibly gave union organizers up to 30 hours per year of private-property access in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). The California regulation was held to result in a physical appropriation of property, and thus, was a "per se taking" (*Id.* at 13); by contrast, the court held that statutory survey access does not "take away a property right" and thus does not constitute a taking (*Id.* at 10, 18).

Additionally, the court affirmed that Summit had satisfied pre-survey procedures. To conduct surveys under Iowa Code § 479B.15, a pipeline must transport "hazardous liquids," including "liquified carbon dioxide." § 479B.2. Summit's pipeline will transport carbon in both a liquid and supercritical phase. The court held both qualified. Record evidence showed "supercritical carbon dioxide is a fluid and flows as a fluid would." *Kasischke* at 19. The court also found that Summit had satisfied pre-survey notice requirements.

This decision is a victory for carbon-pipeline operators. Summit, for instance, plans to install some 2,500 miles of pipeline, though it reports having voluntary rights for much of that distance. Survey rights will help Summit and others to evaluate land suitability along their pipeline routes.

That said, other legal developments will also impact these carbon pipelines. Important cases are currently before the U.S. Court of Appeals for the Eighth Circuit, North Dakota Supreme Court and an Iowa trial court. Those courts will decide to what extent zoning authorities may regulate carbon pipelines, if pore-space amalgamation is lawful, and whether Summit properly obtained its Iowa siting permit. Like this decision, those will test and define carbon pipelines' regulatory authority and property rights.

Pennsylvania Joining the United States in Proposing a Bitcoin Strategic Reserve: Implications for the Energy Industry

By Braden L. Christopher, Steptoe & Johnson PLLC

On November 19, 2024, Pennsylvania Representative Mike Cabell (R) introduced legislation to form the Pennsylvania Bitcoin Strategic Reserve, aiming to diversify the state's financial holdings by allocating up to 10% of its treasury reserves into Bitcoin. *See* HB 2664. This state-level initiative parallels recent action taken on the federal level, where Senator Cynthia Lummis (R) from Wyoming introduced legislation on July 31, 2024 to create a national Bitcoin strategic reserve through the purchase of 1 million Bitcoins over five years. *See* Bitcoin Act of 2024. Further, President-elect Donald Trump is taking steps to form the first crypto advisory council to guide policymaking related to digital assets. As Bitcoin's total supply will never exceed 21 million, these recent steps taken by elected officials underscore Bitcoin's emerging role as a scarce strategic asset in public financial systems.

These developments may be particularly relevant for the energy industry. Bitcoin mining is inherently linked

with the energy sector and energy consumption. Mining operations require substantial electricity, increasing demand for both traditional energy sources, like natural gas and coal, and renewables, such as wind and solar. The Cambridge Bitcoin Electricity Consumption Index reported that global energy use associated with Bitcoin mining in 2023 ranged from 67 terawatt hours (TWh) to 240 TWh, with a point estimate of 120 TWh. *See* EIA Bitcoin Facts. In the United States, Bitcoin mining in 2023 consumed between 25 and 91 TWh — equivalent on the low end to the annual electricity consumption of states like West Virginia or Utah. *Id.*

Moreover, as the federal government and potentially more states establish Bitcoin reserves, the demand for innovative energy solutions in mining operations may increase. This could align with ongoing efforts to decarbonize the energy sector. For instance, the White House Office of Science and Technology Policy recently issued a report noting that "crypto-asset mining operations that capture vented methane to produce electricity can yield positive results for the climate, by converting the potent methane to CO_2 during combustion . . .; could potentially be more reliable and more efficient at converting methane to CO_2 [than flaring] . . . and . . . is more likely to help rather than hinder U.S. climate objectives."

The potential strategic reserves also highlight Bitcoin's potential role as a hedge against inflation. Pennsylvania's HB 2664 states that "[i]nflation has eroded the purchasing power of the assets held in State funds managed by the State Treasurer as well as State retirement funds. . . . Bitcoin is a digital asset that can serve as a hedge against inflation by a sovereign nation or an investment advisor." The Bitcoin Act of 2024 notes in its findings that "[t]he acquisition and long-term storage of substantial quantities of Bitcoin by the United States can strengthen the financial condition of the United States, providing a hedge against economic uncertainty and monetary instability." By holding Bitcoin, energy firms and governments alike may find a financial tool to mitigate risks associated with economic volatility.

MicroStrategy, a prominent business intelligence firm whose stock has risen over 500% in 2024, has pioneered this approach by making substantial investments in Bitcoin. By holding a substantial Bitcoin reserve of 331,220 Bitcoins with an estimated value of nearly $30 billion as of November and a highly publicized strategy to purchase an addition $42 billion in Bitcoin over the next three years, the company aims to preserve value.

As the energy future takes shape, Bitcoin's dual role as a financial asset and a driver of energy innovation will likely continue to influence discussions within the energy industry. Further, Pennsylvania's proposal, along with similar federal initiatives, could position the United States as a leader in both financial and energy innovation.

San Diego County Weighs Potential Restrictions on Lithium-Ion Battery Storage Facilities

By Brian Jackson, Andrew Gann, Mitch Diles and Christina Bassick, McGuireWoods LLP

The San Diego County Board of Supervisors passed a measure on September 11, 2024 for the county fire department, in coordination with a battery storage consultant, to complete a technical study examining potential safety standards for battery energy storage facilities. The study – which was expected to take about a month to complete – will be used to develop a uniform safety standard for battery storage projects. The standard is scheduled to come before the San Diego County Board of Supervisors on December 11, 2024.

California has more battery energy storage system capacity than any other state. San Diego County alone is home to more than 50 battery energy storage system sites and has 10 energy storage projects in the pipeline. These battery storage facilities are integral to the state's plan to achieve its climate goal of net zero carbon emissions by 2045.

However, in the past year, San Diego County experienced three fires at battery storage facilities. In light of the recent fires, one member of the Board of Supervisors stated that ordering the completion of the study is not enough and called for an immediate moratorium prohibiting battery storage operations in facilities that do not have isolated containers. The four other members on the Board of Supervisors disagreed, recognizing the energy and environmental benefits of the battery storage facilities, and stating that no standards should be adopted until the study is complete. Waiting until the study is released ensures the Board of Supervisors has the requisite information to adopt safety standards without unduly burdening and limiting the development of clean energy.

Attendees at the meeting on September 11 expressed particular concern about a 23-acre battery storage site proposed by AES that could be built near residential neighborhoods in the Eden Valley area of Escondido. The facility, known as the Seguro Energy Storage project, would power nearly 240,000 homes with clean energy. The site was chosen for its proximity to existing industrial uses and an Escondido energy substation, which will make transmission of the stored energy easier and more efficient.

In response to public feedback, AES adjusted the project's design and downsized the proposed battery storage system by 20%. It also increased the project's setbacks so that it is located no less than 70 feet from the nearest structure and no less than 130 feet from the nearest home. Moreover, AES added fire-resistant landscaping and fire hydrants, implemented stormwater capture solutions, and developed a county trail along portions of the site. AES also committed to meeting or exceeding all required safety standards, including

implementing a four-step fire mitigation plan that includes a battery management system for electrical diagnoses and system isolation; gas detection, smoke and sensor-triggered fire suppression systems; and fire suppression and containment systems within the battery containers — all of which will reduce the potential for and scope of a thermal runaway event.

California's push for cleaner energy has led to an increased need for battery storage systems. Regulations specifying isolation measures or that restrict build locations could have significant impacts on the feasibility of future battery energy storage projects and negatively impact the growth of clean energy infrastructure. With respect to this new and expanding battery storage technology, the greatest success and safety will likely be achieved in communities where there is open collaboration between state and local officials and battery storage facilities.

Colorado's Construction Agreements' Anti-Indemnity Statute

By Brent D. Chicken and Deva A. Solomon, Steptoe & Johnson PLLC

In 2007, the Colorado Legislature adopted C.R.S. § 13-21-111.5(6) ("Anti-Indemnity Statute"), mandating that "construction agreements" containing language indemnifying a party against damages arising from that party's own negligence, or the negligence of a person under the control or supervision of that party, are unenforceable and void as against Colorado public policy. This means that one of the typical types of indemnification agreements in the oil and gas industry (that Company A can indemnify (or be responsible to) Company B for Company B's own negligent conduct) would not be enforceable if it is determined to be a "construction agreement" under the Anti-Indemnity Statute. This law was enacted primarily to prevent Colorado contractors from being unable to secure reasonably priced insurance due to a high volume of claims in the construction industry.

The Anti-Indemnity Statute applies to all "construction agreements" tending to affect "improvements to real property within the State of Colorado," meaning that the Anti-Indemnity Statute cannot generally be avoided contractually via choice of law provisions. The Anti-Indemnity Statute defines a "construction agreement" as follows:

> a contract, subcontract, or agreement for materials or labor for the construction, alteration, renovation, repair, maintenance, design, planning, supervision, inspection, testing, or observation of any building, building site, structure, highway, street, roadway bridge, viaduct, water or sewer system, gas or other distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction.

C.R.S. § 13-21-111.5(6)(e)(I).

Until recently, *Williams v. Inflection Energy, LLC*, 2016 WL 4429998 (M.D. Pa. Aug. 22, 2016), was seen as the leading case with respect to the application of the Anti-Indemnity Statute to contracts associated with oil and gas development. In *Williams*, the court found that the same did not apply to prevent application of an indemnity provision in a master service agreement, because the parties in *Williams* "entered into a contract for the operation of a drill site . . . not a construction agreement as defined by the [Anti-Indemnity Statute]." *Williams*, 2016, WL at 15.

However, a more recent Colorado federal court case, which is subject to a request to vacate at the time of this writing — *BKV Barnett, LLC v. Electric Drilling Technologies, LLC*, Civil Action No. 23-cv-00139-PAB-SBP (D. Colo. Sept. 26, 2024) — has now interpreted the Anti-Indemnity Statute in the context of a contract for the provision of electrical service and related infrastructure associated with an oil and gas wellsite.

Factual and procedural background

BKV Barnett LLC was the operator of an oil and gas wellsite in Texas and entered into a master service agreement ("Agreement") with Electric Drilling Technologies LLC ("EDT") for the provision of electrical service infrastructure to BKV's wellsite, including power poles, power lines, and other associated electrical service equipment.

The Agreement provided that BKV may request, from time to time, that EDT "perform certain work or furnish certain services to [BKV] as specified in verbal requests or written work orders." *BKV*, at p. 1. The Agreement also contained a lengthy defense and indemnification provision, in relevant part obligating EDT to indemnify, defend, and release BKV from all claims, causes of action, and damages arising out of EDT's performance of the Agreement, regardless of "the sole, concurrent, or partial negligence (of whatever nature or character), fault, or strict liability of [BKV]." *BKV*, at p. 3. Importantly, the Agreement also contained a Colorado choice of law clause.

Subsequent to the execution of the Agreement by BKV and EDT, a lightning strike damaged electrical facilities at BKV's wellsite, resulting in a loss of power. EDT notified BKV of the incident, and EDT agreed to dispatch a crew to resolve the issue. EDT hired Turn Key Utility Construction Inc. to perform the required repairs and restore power to BKV's wellsite. Specifically, EDT: (i) installed a utility pole and overhead wires/

aboveground cable; (ii) set pad-mounted switches; and (iii) repaired overhead cable. During the conduct of such repairs, an employee of EDT, Matthew Lara, was subjected to an arc flash and sustained burns and other physical injuries.

Lara subsequently filed a lawsuit in Texas state court against BKV, EDT, the local electrical service provider, CoServ Electric, and other parties. CoServ demanded in writing that BKV indemnify and defend it against Lara's claims. BKV forwarded CoServ's notice, and its own demand to indemnify and defend BKV against Lara's claims, to EDT. When EDT refused the indemnification and defense requests, BKV filed suit in the U.S. District Court for the District of Colorado, alleging claims for: (i) a declaratory judgment, finding that the Agreement required EDT to indemnify and defend BKV from all of Lara's claims against BKV and EDT; (ii) breach of contract, due to EDT's refusal to indemnify and defend BKV; and (iii) the recovery of BKV's attorney's fees and costs.

Federal court order

Following an unsuccessful motion-to-dismiss effort by EDT and the conduct of discovery, BKV moved for summary judgment against EDT on BKV's declaratory judgment and breach of contract claims.

With respect to BKV's summary judgment claim, BKV argued that the Agreement was valid and enforceable, and expressly provided that EDT was required to indemnify and defend BKV against the claims asserted by Lara and CoServ. Concerning its breach of contract claim, BKV argued that it was entitled to summary judgment because: (i) the Agreement was valid and enforceable; (ii) BKV performed its obligations under the Agreement by demanding indemnification and defense from EDT; (iii) EDT breached the Agreement by refusing to provide the same; and (iv) BKV suffered damages stemming from such refusal.

In response to BKV's claims, EDT argued that the Anti-Indemnity Statute applied to render the indemnification and defense provisions of the Agreement — at least insofar as the same required EDT to indemnify and defend BKV for BKV's own negligence — invalid and unenforceable. Specifically, EDT took the position that the work performed by EDT under the Agreement, which gave rise to Lara's injury claims, involved the repair of a structure, which the Anti-Indemnity Statute expressly defines as a "construction agreement." Conversely, BKV cited *Williams* and argued that the Agreement was not a "construction agreement" within the purview of the Anti-Indemnity Statute because the Agreement contracted for EDT to provide electrical service to BKV's wellsite, including any repairs required to maintain such electrical service.

The court began its analysis by finding that EDT did not agree to the performance of any specific work, or type of work, pursuant to the Agreement, supporting such position by also noting that neither BKV nor EDT had explained whether the agreement to repair the electrical service at BKV's wellsite was via a verbal agreement or under a written work order. However, the court also explained that the specific work performed by EDT (through Turn Key Utility Construction Inc.) at the wellsite — utility pole, overhead wire, and aboveground cable installation and repair — was also undisputed.

Accordingly, the *BKV* court held that: (i) a utility pole constitutes "materials," and once installed constitutes a "structure" under the Anti-Indemnity Statute; (ii) EDT's repair of overhead cables constitutes "repair" of a "structure" pursuant to the Anti-Indemnity Statute; and (iii) consequently, the Agreement was indeed a "construction agreement" within the meaning of the Anti-Indemnity Statute. *BKV*, at p. 14. As such, the court further held that the provisions of the Agreement requiring EDT to indemnify and defend BKV were void and unenforceable as against Colorado's public policy. *BKV*, at p. 14. Accordingly, the court denied BKV's summary judgment motion, and on September 26, 2024, ordered BKV to show cause on or before October 24, 2024 as to why judgment should not be entered in favor of EDT. It appears that further guidance (at least in this case) may not be forthcoming, as BKV and EDT instead filed a notice of settlement and a request to vacate the court's order.

While this case does not necessarily carry precedential value, the decision in *BKV* raises a potential concern that indemnity provisions in operations-related agreements may not be enforceable under Colorado's Anti-Indemnity Statute if those contracts are determined to be "construction agreements." Accordingly, operators may want to consider the provisions of their operations-related agreements in light of both the court's analysis above and the specific, operations-related work that is required to be performed by the contractor.

A Message from IEL

Registration is open for the 13th ITA-IEL-ICC Joint Conference on International Energy Arbitration, January 16-17 in Houston, TX; and IEL's 76th Annual Energy Law Conference, February 13-14 in Houston, TX– IEL Advisory Board Members can attend the Annual Conference for FREE! At the Conference Dinner (February 13 at Houston Racquet Club), the IEL Distinguished Leadership in Energy Award will be presented to Thomas E. Jordan (Chairman, Chief Executive Officer and President, Coterra).

Mark Your Calendars for the 8th National Young Energy Professionals Conference, April 2-3 in Las Vegas, NV; and IEL's new Lower Carbon Conference: Headwinds, Tailwinds, or Both?, May 8 in Houston, TX!

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