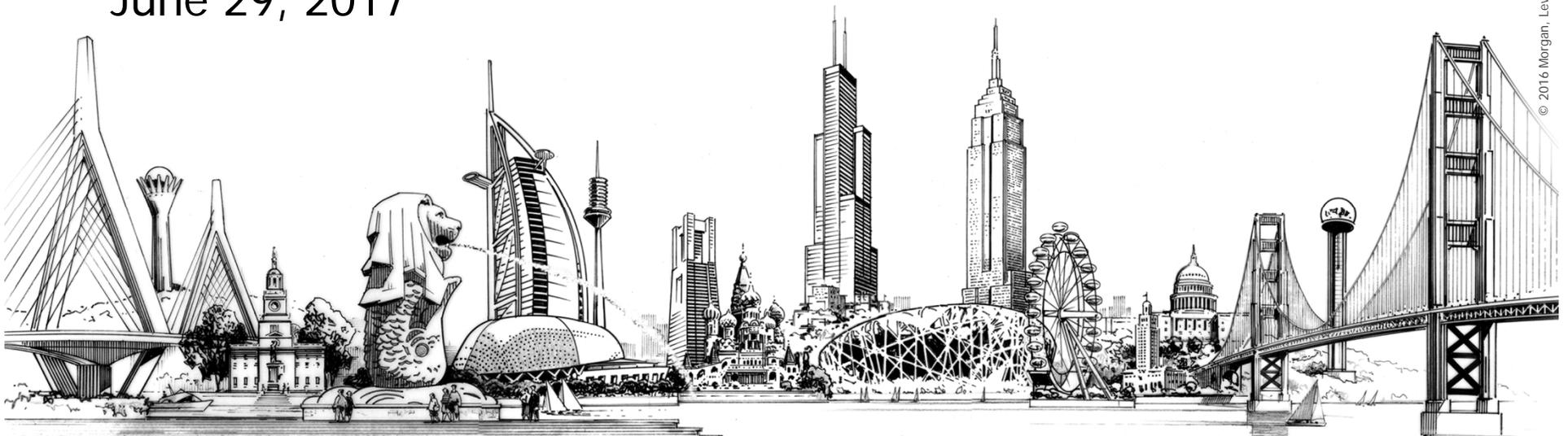


# Morgan Lewis

## **OIL AND GAS:** *REGULATORY ROUNDUP*

Levi McAllister and Pamela Wu  
June 29, 2017



# Restoring a Quorum at FERC

- Nominees
  - Neil Chatterjee
  - Robert Powelson
  - Possibly Richard Glick
- May 25 – Chatterjee and Powelson testified before the US Senate Committee on Energy and Natural Resources
- June 6 - Committee approved nominees Chatterjee and Powelson

# Restoring a Quorum at FERC (Cont'd)

- What's next?
  - May depend on when the White House announces a Democrat nominee
  - White House still intends to nominate Kevin McIntyre
- Note: Commissioner Honorable's term expires on June 30
  - May continue to serve at the Commission until a replacement is confirmed or until the end of the Congressional session

# Potential Limitations on FERC Disgorgement Authority

- Supreme Court held in *Kokesh v. SEC* that 5-year statute of limitations applies to disgorgement.
- Rationale:
  - Disgorgement operates as a penalty
  - Disgorgement is imposed to redress a wrong to the public (instead of to an individual)
  - Disgorgement is imposed for punitive purposes (and not compensatory purposes)
  - In many cases, disgorgement does not simply restore the status quo and leaves the defendant in a worse position

# Potential Limitations on FERC Disgorgement Authority (Cont'd)

- Potential Impact on FERC/CFTC Disgorgement Orders
  - FERC/CFTC staff may narrowly interpret *Kokesh* as limited to SEC matters
  - FERC/CFTC staff may explore ways to streamline investigation and discovery procedures
  - FERC/CFTC staff may request that subjects of investigations to enter into tolling agreements to give staff more time.
  - May require additional litigation to ensure limitations period is applied for FERC/CFTC enforcement actions
  - Disgorgement orders may try to provide a remedy to a particular party harmed by an action

# Senate Fails to Overturn DOI Methane Rule

- Senate sought to overturn the Department of Interior's Methane and Waste Prevention Rule under the Congressional Review Act (CRA)
- What is the CRA?
  - Law that empowers Congress to review new federal regulations issued by government agencies and overrule them

# Senate Fails to Overturn DOI Methane Rule (Cont'd)

- Department of Interior's Methane and Waste Prevention Rule
  - Purpose: reduce wasteful release of natural gas through venting, flaring, or leaks into the atmosphere from oil and gas production on public and Indian lands
  - Requires producers to:
    - Reduce accidental leaks of natural gas into the atmosphere on federal and tribal lands
    - Reduce intentionally flaring or venting gas during production operations on federal and tribal lands and use currently available technologies to help with this reduction
    - Periodically inspect operations for leaks
    - Replace outdated equipment that vents large quantities of gas into the air
    - Use best practices to limit gas losses when removing liquids from wells

# Senate Fails to Overturn DOI Methane Rule (Cont'd)

- Timeline of CRA Process:
  - February 2017 – House passed a measure to repeal the rule
  - May 2017 – Senate voted on resolution to nullify the rule, but came one vote shy
- Impact:
  - Compliance with the rule will impose costs on producers
  - DOI will need to act to change or revoke the rule

# Infrastructure Development Meets Enforcement

- Rover Pipeline
  - Project: Approx. 713-mile interstate natural gas pipeline system designed to transport 3.25 Bcf/d of Marcellus and Utica supplies through Pennsylvania, West Virginia, Ohio, and Michigan.
  - Estimated in-service date: early July 2017 for Phase 1, and November 2017 for Phase II.
  - In April, Rover notified OEP Staff of inadvertent release of drilling mud while completing the horizontal directional drilling of the Tuscarawas River, which resulted in approx. 2 million gallons of drilling fluid being spilled into state-designated wetlands.

# Infrastructure Development Meets Enforcement (Cont'd)

- OEP Staff issued an order on May 10 directing Rover to:
  - Cease new horizontal drilling
  - Obtain a third-party consultant who will work under Staff's direction to evaluate the incident, determine the cause, and develop a plan detailing measures that Rover must undertake to prevent such an event from happening again
- OEP Staff issued another letter stating:
  - Ohio Environmental Protection Agency provided test results to FERC that indicated presence of diesel fuel in samples of the drilling mud associated with the Tuscarawas River HDD
  - OEP Staff referred the matter to the Office of Enforcement for further investigation

# Infrastructure Development Meets Enforcement (Cont'd)

- Takeaways:
  - Certificate holders are obligated to satisfy the requirements in the certificate orders.
  - Developers must abide by their commitments to ensure environmental impacts are minimized.
  - Enforcement can get involved in certificate proceedings to ensure the terms of the certificate are followed.

# Liquidity and Transparency in Physical Markets Technical Conference

- Staff Technical Conference on Developments in Natural Gas Index Liquidity and Transparency – **TODAY!**
  - (1) What is the current state of natural gas index liquidity and voluntary reporting to index developers?
  - (2) How have natural gas indices been used over time?
  - (3) What are possible actions that the industry and/or the Commission could take to increase transparency and support greater robustness in natural gas price formation?

# Liquidity and Transparency in Physical Markets Technical Conference (Cont'd)

- This morning's panel explored:
  - The robustness and liquidity of natural gas indices
  - The degree of industry reliance on index-based contracts rather than fixed-price contracts
  - The decline in fixed-price reporting to index developers
  - Whether natural gas indices accurately reflect market conditions
  - Whether there is a need for additional transparency

# Pipeline Certificates and the CWA

- DC Circuit ruling in *Delaware Riverkeeper Network v. FERC* addressed the intersection between the Natural Gas Act and Clean Water Act (CWA)
  - CWA prohibits federal agencies from authorizing any activity that may result in discharge into navigable waters before the state issues a CWA section 401 certification.
  - Can FERC issue a certificate to a pipeline before the pipeline receives the CWA certification?

# Pipeline Certificates and the CWA (Cont'd)

- FERC can issue conditional certificates to natural gas pipelines under section 7 of the NGA before pipeline receives Clean Water Act 401 certification
- Court's Rationale:
  - Conditional approval is the pipeline's first step towards obtaining construction approval
  - Certificate at issue conditioned the approval of the pipeline obtaining CWA 401 certification (so, certificate did not grant authority to proceed with activity that could result in discharge or violate the CWA)
- Court left unresolved whether letter orders authorizing pre-construction activities that could result in discharge into navigable waters before pipeline receives CWA 401 certification can withstand such challenge.

# CFTC Whistleblower Protections

- The CFTC recently adopted amendments that strengthen anti-retaliation protections for whistleblowers by expanding the CFTC's enforcement authority to include the ability to take enforcement action against employers who retaliate against whistleblowers.
  - The CFTC's revised whistleblower protection and newly created anti-retaliation authority applies to persons and employers that are engaged in transactions subject to CFTC regulation under the Commodity Exchange Act (CEA).
- In the Final Rule, the CFTC adopted its proposed amendments and reinterpretation of its anti-retaliation authority, explaining that nothing in the CEA precludes or limits the CFTC from exercising its general enforcement authority in cases of retaliation or suggests that the private cause of action is exclusive.

# CFTC Whistleblower Protections (Cont'd)

- The CFTC's Final Rule raises several questions for employers engaged in CFTC-regulated derivative markets. Notably, the amendments expand the commission's enforcement authority into a new area in which its staff may have limited to no experience.
- In light of the CFTC's Final Rule, employers should review their compliance programs and related policies to confirm that they are robust and consistent with best practices, including:
  - Encouraging employees to bring any compliance concerns to management's attention;
  - Establishing an independent office or program to evaluate the concerns, including retaliation concerns;
  - Addressing concerns in a timely manner commensurate with their significance; and
  - Giving employees timely feedback regarding how their concerns are being addressed.

# Challenges to PHMSA Underground Gas Storage Rule

- Three petitions for review of PHMSA's Interim Final Rule adopting federal safety regulations and reporting requirements for underground natural gas storage facilities.
  - One pending before 5th Circuit
  - Two pending before DC Circuit
- Interim Final Rule imposed new requirements for downhole facilities, incorporated American Petroleum Institute (API) Recommended Practices (RP), and added reporting requirements.

# Challenges to PHMSA Underground Gas Storage Rule (Cont'd)

- Challenges to Interim Final Rule
  - Takes away states' authority over underground natural gas facilities
  - Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law
  - Incorporates API Recommended Practices in a way that significantly alters the Recommended Practices
  - Imposes impracticable compliance timeframes and unreasonable obligations

# Questions?



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