

Mr. David Post
Director of Research
Sustainability Accounting Standards Board
1045 Sansome Street, Suite 450
San Francisco, CA 94111

Dear Mr. Post:

The Sierra Club is pleased to submit its comments on SASB’s Sustainability Accounting Standard for Oil and Gas Midstream (SICS EM0102). These comments are based on a review of the October 2017 Proposed Changes to Provisional Standards (“Provisional Standard”), the SASB Conceptual Framework, SEC Concept Paper *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10364 and other materials referenced herein.

We have three principal suggestions for the Oil and Gas Midstream standards. First, indigenous rights and community engagement must be addressed in this sector. SASB proposes standards for addressing these topics for other sectors; similar attention is required here. Second, the standards must more thoroughly address the risks posed by pipeline construction, including risks of non-hydrocarbon spills such as drilling mud released during construction of water body crossings. Third, registrants must address indirect, “scope three” greenhouse gas emissions – emissions resulting from production and use of transported fuel – consistent with *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1363 (D.C. Cir. 2017).

GENERAL COMMENT

1. Distinction between facts and opinion, and the problem of generic disclosure. Under the Supreme Court’s definition of materiality used in the *Redline Draft*, information is material if there is “a substantial likelihood that the disclosure of the omitted *fact* would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” (emphasis provided). Many of the potential risks in the midstream oil and gas sector are susceptible to future market conditions and regulatory actions about which different evaluators may have different opinions. A company may opt to share its **opinion** about the likelihood of certain events occurring in the future, but such opinions should be separate from disclosure of the relevant **facts** that are known (or knowable) at the time of disclosure. In several instances the *Redline Draft* recommends that a registrant “discuss” certain relevant issues, such as changes in its GHG emissions over time and its calculation methodologies.¹ Such a discussion may indeed be helpful in placing the relevant facts in context, but the SASB should underscore that such explanations are in addition to, not in *lieu of*, providing the relevant facts.

A number of companies now routinely disclose that a number of broad topics, including climate change, government regulations, fuel prices, weather and other factors that may materially affect their financial condition or operating performance. Such generic disclosures do not provide the kind of information that would allow investors to understand the unique ways these risks could impact an individual company, or to make a peer-to-peer comparison of companies within a particular industry. We suggest that disclosures should include sufficient **facts** to allow a

¹ See, e.g., EM0201-01.

reasonable investor to understand the degree of potential risk and to conduct a peer-to-peer comparison of the company and its competitors. *The Sierra Club therefore recommends that the Guidelines be revised (1) to emphasize that the purpose of the disclosure is to provide **timely and relevant facts that may be useful to investors** and (2) to provide specific examples to assist investors in assessing sustainability topics.*

2. “Shall” versus “Should”. The *Redline Draft* offers the following distinction: “[t]he term “shall” is used throughout this document to indicate those elements that reflect requirements of the Standard. The terms “should” and “may” are used to indicate guidance, which, although not required, provides a recommended means of disclosure.”

A number of the recommendations in the *Redline Draft* – which is itself styled as “Guidance” – fall within the “should” category. The use of “guidance within guidance,” rather than simply setting out the requirements of the Guidance, is confusing at best, and may create unintended opportunities for “greenwashing” where a registrant meets only those items in the “shall” category and claims to have met SASB Guidelines.

TOPICS

1. Security, Human Rights, the Rights of Indigenous Peoples, and Community Relations

The proposed standards for oil and gas midstream activities should require disclosures pertinent to Security, Human Rights, and the Rights of Indigenous Peoples, as well as Community Relations. At a minimum, these standards should parallel the proposed standards for oil and gas exploration and production, proposed EM0101-12 through EM-0101-16. For example, SASB should include a standard for “(1) existing and (2) proposed miles of pipeline in or near indigenous land,” specifying the types of pipeline at issue (oil, natural gas, etc.). These disclosures should also address sensitive features crossed by proposed pipelines near indigenous land, particularly water bodies.

This information is plainly material. The risks of not obtaining community consent on large infrastructure projects are significant and quantifiable, as are the benefits to be realized through meaningful consultation.² Opposition from indigenous and community groups has had a major impact on new pipelines in recent years. For example, the Dakota Access Pipeline faced intense opposition from the Standing Rock and Cheyenne River Sioux Tribes, among others, resulting in years of delay and litigation that nearly succeeded in preventing the pipeline from being constructed and which has called the pipeline’s operation into question. One issue central to this opposition is the pipeline’s crossing of Lake Oahe. Although this lake is outside the formal boundaries of the tribal reservations, the oil pipeline crosses the lake only one mile upstream of water intakes used by the tribes, and the crossing is within land recognized as Sioux territory in the Treaties of Fort Laramie. Building the pipeline across the lake required a permit from the Army Corps of Engineers.

² Herz, et. al (2007). *Development Without Conflict: The Business Case for Community Consent*, available at http://pdf.wri.org/development_without_conflict_fpic.pdf

Sustained tribal and community opposition to the Dakota Access Pipeline garnered nationwide media attention.³ This opposition led the Obama Administration to announce, in September and December 2016, that it would not approve the water body crossing until additional environmental review was completed, delaying pipeline construction.⁴ And when the Trump administration reversed these decisions and approved the pipelines, the Tribes succeeded in challenging that approval in court, on the grounds that the government had failed to fully address the controversy surrounding the pipeline; the consequences a pipeline spill would have on the Tribes' fishing and hunting rights; and the broader environmental-justice impacts of the pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017). Even after the Dakota Access Pipeline was completed, litigation continued as to whether the pipeline could be allowed to actually transport oil, because of the failure to adequately analyze these issues. *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1769, 2017 WL 6001726 (D.D.C. Dec. 4, 2017).

The proposed Keystone XL oil pipeline similarly illustrates the materiality of impacts to tribal and community interests. Like the Dakota Access pipeline, the proposed route for Keystone XL crosses a water body upstream of the drinking water intake for a tribal community—there, the Fort Peck Reservation.⁵ Tribes whose water would be affected by a pipeline spill have vigorously opposed the project, and are currently litigating the approval.⁶ Keystone XL has also drawn broad opposition from indigenous groups all along the proposed route and throughout North America.⁷ Non-indigenous communities along the proposed route have also opposed the pipeline. In Nebraska, litigation over the pipeline route has proceeded to the state supreme court and has delayed condemnation proceedings;⁸ at present, the Nebraska Public Service Commission has only authorized construction along a route that significantly differs from the pipeline proponent's proposal.⁹ Of course, in addition to these tribal and community concerns, Keystone XL's impacts on climate and other issues have drawn further opposition and created additional risks, including causing the Obama administration to deny the permits needed for the pipeline in November of 2015.¹⁰ Although the Trump administration reversed that decision, Sierra Club and other groups are currently litigating this reversal.¹¹

³ E.g., <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

⁴ E.g. <https://www.theatlantic.com/science/archive/2016/09/the-obama-administration-temporarily-blocks-the-dakota-access-pipeline/499454/>, <https://www.politico.com/story/2016/12/us-army-corps-blocks-dakota-access-pipeline-232172>.

⁵ <https://www.rollingstone.com/politics/features/montana-tribes-fight-keystone-xl-pipeline-revived-by-trump-w477422>

⁶ *Indigenous Environmental Network et al. v U.S. Dep't of State*, Case 4:17-cv-00029-BMM, 2017 WL 5632435 (D. Mont. Nov. 22, 2017). This case is consolidated with a suit brought by Sierra Club. *See* <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/TAC.pdf>.

⁷ <http://thehill.com/policy/energy-environment/333685-us-canada-tribes-to-declare-keystone-opposition>

⁸ http://www.omaha.com/news/nebraska/timeline-keystone-xl-pipeline/article_f5827de2-e24d-11e6-bd42-6b28e1d7be97.html

⁹ <https://www.nytimes.com/2017/11/20/us/nebraska-pipeline-keystone-xl.html>

¹⁰ <https://obamawhitehouse.archives.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline>

¹¹ <https://www.sierraclub.org/press-releases/2018/01/federal-lawsuit-challenging-keystone-xl-approval-will-move-forward>

Thus, the risks posed by tribal and community opposition to proposed pipelines are plainly material. SASB recognizes similar risks with regard to oil and gas exploration and production. There is no reason to not account for similar risks in the oil and gas midstream sector. We recommend that SASB develop a more consistent approach to indigenous rights and community engagement. Rather than consider these issues sector by sector, SASB should review all the comments on these issues that it receives in high-risk sectors such as extractives, forestry, large-scale agriculture and infrastructure, and develop a common set of best practices. It can then tailor this baseline to the specific issues of each sector, as needed.

METRICS

1. GHGs – Disclose All Emissions and Identify State or Territory Where Emissions Occur

As proposed, the oil and gas midstream standards require disclosure of (1) total GHG emissions, and (2) the subset of those emissions covered under an existing regulatory program, such as the California Cap-and-Trade program. TA04-11-01.01 and .06. We agree that both metrics are material, because emissions subject to an existing regulatory programs present additional risks, duties, and compliance options. However, it is likely that in coming years, additional states or regions will adopt regulatory programs, or that existing programs will expand. The proposed standards do not provide investors with information sufficient to evaluate the extent to which such regulatory expansion will impact company’s emissions. To account for this, emissions should be disclosed at the state or territory level in addition to the disclosures presently required. This level of geographic specificity will not be unduly burdensome, but will allow investors to come to informed opinions about the extent to which disclosed emissions are likely to be subject to additional pertinent regulation in the future.

2. GHGs – Account for Entire Life Cycle

In addition to requiring disclosure of scope 1 emissions, oil and gas midstream companies must disclose emissions associated with the entire life cycle of fossil fuels transported or processed by midstream infrastructure (scope 3 emissions). This information is plainly material: Sierra Club recently prevailed in a lawsuit challenging the approval of the Southeast Market Pipelines Project,¹² in which the D.C. Circuit held that the Federal Energy Regulatory Commission had improperly approved the project by failing to consider and disclose the greenhouse gases that would be emitted by use of the natural gas delivered by the pipeline. *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1363 (D.C. Cir. 2017). The court affirmed FERC’s ability to deny a permit on the grounds that these emissions would be contrary to the public interest. In light of FERC’s failure to do this analysis, the court called for vacatur of the order authorizing pipeline operation. *Id.* at 1373, 1379.

Other aspects of the proposed standards recognize the importance of emissions beyond “scope 1.” For example, proposed metric EM0101-23 calls for “Estimated carbon dioxide emissions embedded in proved hydrocarbon reserves,” which are emissions not directly emitted by oil and gas production and thus outside scope 1. The D.C. Circuit’s decision in *Sierra Club v. FERC*,

¹² <https://content.sierraclub.org/press-releases/2017/08/court-rules-ferc-failed-adequately-review-environmental-impacts-sabal-trail>

and other similar decisions, demonstrates that scope 3 emissions are material for the oil and gas midstream sector as well, and similar disclosure therefore must be required.

3. Air Quality – Impact on Air Quality

The proposed standard calls for disclosure of four categories of non-greenhouse gas pollutants: oxides of nitrogen, oxides of sulfur, non-methane volatile organic compounds, and particulate matter. These pollutants are the primary “criteria” pollutants, for purposes of the U.S. Clean Air Act, emitted by the oil and gas midstream sector.

Understanding the consequences of these pollutants, and the risks posed by their emission, requires knowing the impact on ambient air quality, which is generally a function of the amount and timing of emissions, characteristics of the source, and the background air quality in the places where the emissions occur. One simple way to shine light on this broader context is to require disclosure of the amount of emissions occurring in places where air quality is already impaired for the pollutant at issue, such as whether the region is in non-attainment.

In addition, disclosures should address the role of oxides of nitrogen and volatile organic compounds in ozone formation. Thus, companies must disclose emissions of these pollutants in areas with impaired ozone quality, in addition to addressing areas where levels of these ozone precursors are themselves in violation of existing standards.

In addition, if any modeling of impacts on ambient air quality has been performed, this modeling and the results thereof must be disclosed.

4. Ecological Impacts and Operational Safety – Impacts of Pipeline Construction

The proposed standards for ecological impacts and operational safety focus on pipeline operation, ignoring the significant risks posed by pipeline construction. Pipeline construction poses significant risks to both the environment and the public, such as the risk of waterway contamination during construction of water body crossings. SASB must ensure that standards account for risks posed by pipeline construction.

Energy Transfer Partners’ Rover Pipeline illustrates the materiality of these risks. Construction of the Rover Pipeline has been beset with numerous accidents and violations of applicable environmental protection standards. In April of 2017, Rover reported spills of drilling fluid to the Ohio Environmental Protection Agency and Federal Energy Regulatory Commission. Ohio EPA issued multiple notices of violation.¹³ Shortly thereafter, FERC issued an order halting new drilling for waterbody crossing, limiting completion of pipeline construction.¹⁴ Problems with pipeline construction persisted: in July the director of Ohio EPA found that construction of Rover Pipeline had, to that date, resulted in at least nine “inadvertent returns” of drilling fluid, at least seventeen violations of stormwater protection requirements, and numerous other

¹³ Ohio EPA, Notice of Violation 1704-70-0756 (Apr. 14, 2017), 1704-76-0751 (April 13, 2017), both available at <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/20170418-5244%2832112195%29%20%281%29%20%281%29.pdf>,

¹⁴ FERC Docket CP15-93, Accession No. 20170510-3009, <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14586249>.

violations.¹⁵ FERC lifted its moratorium on drilling on October 10, 2017.¹⁶ Mere days later, the Michigan Department of Environmental Quality issued a notice of violation stating that the Rover Pipeline had spilled gasoline into a wetland in Michigan.¹⁷ Similarly, Ohio EPA has issued at least five notices of violation for the Rover pipeline subsequent to FERC's order allowing drilling to resume.¹⁸ On November 3, 2017, Ohio filed a lawsuit against the pipeline alleging numerous violations and seeking \$2.3 million in civil penalties and injunctive relief to prevent further violations.¹⁹ Most recently, on January 24, 2018, FERC again ordered a halt to pipeline construction-related drilling on the basis of release of drilling fluid.²⁰

The Rover pipeline shows that non-hydrocarbon spills during pipeline construction can result in construction delays and potential civil penalties, such that these spills are plainly material. Proposed standard EM0102-07.38, addresses only hydrocarbon spills; proposed standard EM012-09 is also, per its description, focused on "unintended releases of hydrocarbons" and on "operations" rather than construction. One or both of these standards must be revised to include *any* spills that meet the standards for reporting to applicable regulators, including drilling mud or other non-hydrocarbons and spills resulting from construction activity; at a minimum, the standard should require disclosure any spills which resulted in an issuance of notice of violation or similar response.

Proposed Standard EM0102-08.46 should be revised to encompass state as well as federal regulations, and the list of examples should broadened to include fines resulting from environmental noncompliance, in addition to merely anti-competitive behavior. And the list of disclosed or reportable orders must extend beyond merely monetary penalties, to encompass stop-work orders or other non-monetary actions imposed by regulators, such as the May 10, 2017 letter order FERC issued regarding the Rover pipeline.

Conclusion

The Sierra Club appreciates the opportunity to provide comment on the SASB's Sustainability Accounting Standards. We believe this is an important project that can, if properly implemented, provide critical information to investors who are increasingly considering sustainability issues in their decision making. Please feel free to contact Mr. Steven Herz at steve.herz@sierraclub.org if you have any questions or wish to discuss any of the matters we recommend.

Sincerely,

¹⁵ <http://epa.ohio.gov/Portals/35/enforcement/Rover.pdf>

¹⁶ FERC Docket CP15-93, Accession No. 20171011-3011, <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14707799>

¹⁷ See, e.g. <https://www.sierraclub.org/press-releases/2017/10/rover-pipeline-spills-gasoline-michigan-wetlands>

¹⁸ Ohio EPA, *Rover Pipeline Spills Contaminants in Ohio Streams* (Nov. 24, 2017),

<http://epa.ohio.gov/News/OnlineNewsRoom/NewsReleases/tabid/6596/articleid/1242/rover-pipeline-spills-contaminants-in-ohio-stream.aspx>.

¹⁹ <http://wksu.org/post/ohio-sues-rover-pipeline-collect-23-million-environmental-damage#stream/0>, <http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Environmental-Enforcement/2017-11-03-Rover-Complaint-Signed-for-Filing.aspx>, Stark County, Ohio, Court of Common Pleas Case 2017cv02216

²⁰ FERC Docket CP15-93, Accession No. 20180124-3036, <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14805298>.

Steven Herz