June 15, 2022

The Honorable Gary Gensler, Chair
U.S. Securities and Exchange Commission (the "***Commission***")
100 F Street NE
Washington, DC 20549-1090

RE: Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors, File No. S7-10-22

Dear Chair Gensler:

Western Midstream Partners, LP ("***WES***") is a publicly traded partnership with a market capitalization of over $11 billion, engaged in the business of gathering, compressing, treating, processing, and transporting natural gas and crude oil, and gathering and disposing of produced water. Our core assets provide services in the Delaware Basin in West Texas and New Mexico, and in the DJ basin in northeastern Colorado. We also operate facilities in South Texas, Utah, Wyoming, and Pennsylvania. WES appreciates the opportunity to provide comments in response to the Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors released on March 21, 2022 (the "***Proposed Rule***").

WES is committed to leading the midstream energy sector in safety, efficiency, and environmental stewardship through improvements in technology and innovation. Our industry-leading practices include, among other things, limiting our emissions footprint through the use of direct-to-producer pipeline connections, reducing leaks and fugitive emissions, and, where feasible, using zero-emission pneumatic devices, low-emission dehydration units, and electric-powered compressor stations and gas processing plants. WES issued its first Sustainability Report in 2020, and is focused on building an organization that delivers long-term value to our stakeholders by cultivating a strong culture of environmental, social, and governance ("***ESG***") responsibility. Our ESG Committee, comprising three non-management members of our Board of Directors, was created in 2021 to oversee these efforts.

WES is supportive of a regulatory framework that promotes consistency and accuracy in climate-change related disclosures. Nevertheless, we have serious concerns that the Proposed Rule would (i) require disclosures without regard to long-standing judicially accepted principles of materiality, (ii) force companies to make highly speculative disclosures and unfairly expose them to liability for the inevitable inconsistencies or errors in such information, and (iii) fail to adequately serve the Commission's mission to provide investors with "consistent, comparable, and reliable" climate-related information. WES therefore respectfully requests that the Commission consider the following comments.

I. General Comments on the Proposed Rule

A. The Commission should not depart from the traditional understanding of materiality by adopting specific, prescribed disclosure requirements.

The Proposed Rule mandates climate disclosure without regard to the concept of materiality that has traditionally been the core of the Commission's disclosure philosophy. The materiality standard provided by the U.S. Supreme Court in *TSC Industries v. Northway* provides that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or in making an investment decision.[1] The Proposed Rule deviates from this notion of materiality by, for example, requiring the aggregation of absolute values of numerous different and difficult-to-quantify climate events and activities relative to a 1% threshold on a financial-statement line-item basis. The financial statement impacts identified under such arbitrarily low thresholds will also drive numerous governance and risk-management disclosures. Similarly, requiring extensive discussion of governance and risk-management processes through the prism of climate change presumes the materiality, if not the primacy, of climate-change considerations in governance matters.

Corporate disclosures should focus on a company's material risks and opportunities that have sufficient potential to impact the company's operational and financial performance and shareholder value creation. Due to the fact-specific determination of what is "material" under the *TSC Industries* standard, each issuer is in the best position to determine what may or may not be material to its investors, and the materiality of various metrics will differ by industry. WES regularly engages with its investors to enable them to share concerns and provide feedback on WES's performance. While we recognize a growing interest in ESG matters, our experience would indicate that few of our investors are more concerned with our ESG-related metrics than they are with our financial performance. Even investors who are appreciative of climate-related disclosures are highly unlikely to elevate those concerns above financial return or tolerate the diversion of significant financial or managerial resources to improve climate-related disclosures without a corresponding improvement in financial performance.

Requiring the disclosure of information that is difficult to obtain, potentially misleading due to its inherently speculative nature, and expensive to gather and present – especially where an issuer has determined that the information is not material to its investors – is a waste of resources that is unlikely to benefit the investing public. **Accordingly, as a general matter, we believe the Commission should not impose a compulsory one-size-fits-all disclosure framework, but rather should maintain the traditional concept of materiality as a guiding principle and focus instead on ensuring the consistency of climate-related disclosure – and particularly emissions data – <u>if and when</u> it is determined to be required or is otherwise voluntarily disclosed**.[2]

B. The Commission should revise the scope of the expansive "value chain" concept when defining climate-related risks.

The Proposed Rules define "climate-related risks" to include the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole. By including actual or potential negative impacts on a registrant's value chains in this definition, the Proposed Rules will require us assess our climate exposure well beyond our own operations. Such

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[1] 426 U.S. 438, 229 (1976).

[2] We believe a framework analogous to that provided under Regulation G of the Securities Act of 1933, as amended (the "***Securities Act***") is advisable with regard to emissions reporting, in particular; i.e., <u>if</u> such data is reported or disclosed by a registrant, then certain guidelines should apply to ensure consistency in reporting between issuers.

an expansive concept departs from the Commission's long-established historical disclosure standards under Regulation S-K. "Value chain" includes the upstream and downstream activities related to a registrant's operations, including "supplier activities," transportation and distribution, and anything else in the value chain.

This expansive definition of climate-related risks including the impacts on our value chains will require us to expend significant resources to assess and measure potential exposure from an endless list of parties outside of our own operations over which we have no control. In order to make that determination, we would be forced to establish new and extensive processes and disclosure controls and procedures. This assessment will also require the use of assumptions and estimates likely requiring us to hire consulting firms and other experts that can assist with the process. The resulting disclosures, if any, may only elicit generic statements full of assumptions and caveats that would do more to confuse rather than inform investors. **For these reasons, we urge the Commission to revise the scope of climate-related risks to exclude the entire value chains and consider whether it is reasonable to require registrants to attempt to assess risks that are far outside their control and operations.**

C. If the Commission does adopt a prescriptive climate-related disclosure framework, it should allow climate-related disclosures to be furnished, rather than filed.

Given the subjective nature of many of the required disclosures (especially the identification of climate-related impacts in financial statements), the evolving GHG reporting standards and technology, and the difficulty of obtaining accurate and timely data from third parties, it would be manifestly inequitable to subject issuers to the heightened liability that may result from filing such information with the Commission.

Moreover, if climate information is subject to liability under Section 18 of the Securities Exchange Act and the strict liability provisions of Section 11 of the Securities Act, issuers are likely to disclose information in the most limited manner possible, and they may be unwilling to provide additional information that could give investors context. **For these reasons, until climate-related estimation, monitoring and measurement methodologies and processes are sufficiently mature to support the more rigorous liability standards, we believe it would be more appropriate to remove the private right of action under 10b-5 with respect to such disclosures, or allow registrants to furnish climate-related disclosures as part of a separate disclosure report, formally furnished to the SEC, or make such disclosures through existing sustainability reports**.

D. As proposed, we do not believe the rule will accomplish the Commission's stated mission to provide consistent, comparable, and reliable data to investors.

The Commission's stated goal with the Proposed Rule is to provide consistent, comparable, and reliable climate-related information to investors that is decision-useful. However, without modification and additional guidance, we strongly believe the proposal will fail to achieve this aim due to the speculative and subjective determinations necessary to make the required disclosures.

First, as discussed in more detail in section II. A. below, the proposed financial-statement and expenditure metrics will require companies to engage in pure speculation to identify climate-related physical and transition risks, and then endeavor to quantify the precise financial impact from such risks. Given the arbitrarily low reporting threshold and the dearth of guidance on these matters, companies will almost inevitably come to different conclusions using identical information.[3] With such variability in disclosures, it is unlikely that the rule would elicit consistent, comparable, and reliable information that would be useful to an investor. Accordingly,

[3] See Columbia Climate School Climate, Earth, and Society; Cho, Renee; https://news.climate.columbia.edu/2021/10/04/attribution-science-linking-climate-change-to-extreme-weather/

significant additional guidance from the Commission will be required to ensure consistent disclosure – whether or not the Commission adopts a prescriptive or principles-based reporting regime.

Nor will the proposed greenhouse gas ("***GHG***") emissions reporting rules achieve the Commission's stated goal of providing consistent, comparable, and reliable information to investors. Due to the breadth of the proposed GHG reporting requirements, companies will need to rely on third parties to provide Scope 1 emissions data from non-operated joint ventures, as well as most Scope 2 and Scope 3 emissions. These third parties may lack processes and controls needed to report such information on an accurate and timely basis. Additionally, discrepancies between similarly situated companies will exist depending upon whether direct GHG measurement or estimated measurement techniques are employed. Finally, year-to-year comparisons will be impacted if, as happens from time to time, environmental agencies revise applicable estimation factors.

For these and other reasons, as more specifically detailed below, we would urge the Commission to re-evaluate the likely efficacy and impact of its Proposed Rule and consider certain changes.

II. Specific Comments Regarding Financial Statement Disclosures

A. The Commission's existing disclosure rules already require sufficient disclosure of climate or transition impacts.

The disclosure of contingences and management's assessment of long-lived asset impairments are already critical accounting estimates for many companies requiring significant judgment and disclosure in the financial statements. Impairment assessments would already include consideration of climate-related risks, and incorporate cash flow estimates based on management's expectations for the continued use of the asset. Further, contingency guidance would account for fines, penalties etc. from enhanced regulatory and permitting standards. If impacts from climate or transition activities were material to the financial statements presented in a quarterly or annual report, companies should already be disclosing them, as WES and many other issuers did with respect to the impacts of Winter Storm Uri in February 2021.

B. As proposed, companies will have difficulty complying with disclosures regarding climate-related financial statement and expenditure metrics, including the basis of calculation requirements, which will limit the information's usefulness to investors.

The Proposed Rule requires climate-related disclosures in the annual financial statements, including extensive disclosure of financial statement and expenditure metrics, at a low bright-line threshold. As drafted, these rules are subject to interpretation, and management will be required to make subjective determinations based on numerous assumptions to identify "severe weather events" and "extreme temperatures" and estimate the financial statement impact from such physical risks to its financial statements. For example, if an increase in storms or temperatures are considered physical risks of climate change, management would ostensibly need to identify a baseline of storms or temperatures that might be considered "normal". Companies are ill-suited to make such determinations, and without additional guidance, it is more likely than not that such baselines would differ significantly from company to company. And even if a climate-related event can be identified accurately, we believe it will be very difficult for a company to accurately tabulate the impact of such event on its financial statement line-items to the exacting precision required by the proposal.

Similarly, attempting to assess the financial impact of energy transition risk will require companies to translate predictions about the actions of regulatory bodies, new technologies, changes in market behavior, and a host of other variables, into financial consequences, which, due to the fact that there is no standardized method for making such determinations, means that consistent, comparable, and reliable disclosure is unlikely to be achieved. For example, as a midstream service provider, our business is impacted by activity levels of our producer-customers based on supply and demand for, and resulting prices of, oil, gas and other hydrocarbon products. Identifying and quantifying this indirect impact on our business, however, may be impossible, because our producer-customers often weigh numerous considerations when deciding to increase, decrease, or maintain production that are not related to the current prices of oil or gas. Even if commodity price impacts on our business were identifiable, it would be pure speculation to attempt to segregate such price changes between those driven by climate change and those related to other broader global economic impacts, like actions by OPEC, or the outbreak or end of a global pandemic or military conflict.

Such speculative and imprecise disclosures are inappropriate within the audited financial statements, and ill-suited to the development and application of internal controls over financial reporting that would be required for information included in the footnotes thereto. The 1% threshold is also significantly below the "initial step"/rule of thumb of 5% used by some registrants/auditors in assessing materiality.[4] While the SEC Staff openly acknowledges that a purely quantitative threshold is not conclusive, setting the threshold at 1% is very low by any normative standard and by the SEC's own logic in Staff Accounting Bulletin: No. 99 ("***SAB No. 99***"), and not dispositive for purposes of a registrant's materiality determination.[5] Such disclosures are also likely to be inconsistent across registrants, rendering comparability difficult or impossible. **For these reasons, WES believes that a traditional materiality standard should be applied to identifying climate-related impacts, rather than the arbitrary 1% threshold. Further, as discussed above, if such disclosures are ultimately required, WES believes they should be presented outside of the financial statements, under a regime that would permit the information to be furnished, rather than filed**.

C. The phase-in period is inadequate, and companies will likely be unable to comply with the requirement that the proposed metrics must be included on a historical basis.

The Proposed Rule requires compliance as early as 2023, and comparative disclosures are required for all periods presented, meaning data from 2021 and 2022 would be required as well. Issuers, however, will need additional time to develop systems, processes, and internal controls to capture the data necessary to report the information required by the Proposed Rule. It is not reasonable to expect companies to be able to produce data at an auditable level on the timeline proposed. Further, we expect that many, if not most, issuers would need to avail themselves of the provisions of Rule 409 or Rule 12(b)-21 to exclude historical metrics for years in which the required data was unavailable without undue effort or expense; however, this may be a high hurdle to overcome. **WES requests that the Commission consider (i) requiring any new disclosures only prospectively, and (ii) extending the timeline for compliance.**

III. Specific Comments Regarding Greenhouse Gas Emission Disclosures

A. The Commission should consider adopting the EPA's GHG reporting standards and processes, which would streamline the reporting of GHGs and make such figures more consistent and comparable.

The Commission asserts in the Proposed Rule that the standards set forth by the TCFD are "widely endorsed" by U.S. registrants. This is simply not the case. While WES has adopted some of the TCFD's disclosure

[4] *See* Securities and Exchange Commission, SEC Staff Accounting Bulletin: No. 99 – Materiality, Release No. SAB 99 (Aug. 12, 1999), available at https://www.sec.gov/interps/account/sab99.htm.
[5] *See id*.

standards, it does not, and it is our understanding that our peer companies do not, comply with the entirety of the TCFD standards. The Commission's assumption that companies are already gathering the data necessary for calculating *all* Scope 1 and Scope 2 emissions is simply incorrect. Rather, as discussed below, our focus has traditionally been on EPA reporting standards. WES reports GHG emissions data to the EPA in accordance with EPA emissions reporting standards, and voluntarily reports such data to its investors in its annual Sustainability Report. Under the current EPA requirements, companies are required to report emissions data for facilities that produce more than 25,000 metric tons of CO2e per year. Approximately 8,000 facilities are required to report their annual emissions, covering approximately 85-90% of total U.S. greenhouse gas emissions.[6] The Proposed Rule, however, would require companies to report *all* emissions, without regard to any sort of minimum threshold. WES expects to spend a significant amount of time and incur significant costs gathering additional information required for emissions data associated with facilities generating emissions below the EPA thresholds. Furthermore, the Proposed Rule would duplicate efforts because the EPA will continue to require reporting under its regulatory program – forcing us to maintain two separate categories of emissions results for reporting purposes.

WES also believes it is important to provide an independent timeline for reporting GHG emissions data not tethered to the traditional Form 10-K reporting deadline. The EPA's GHG reporting program allows several months to review and finalize the data that is ultimately published as final in the fall of each year. This EPA process does not align with typical reporting schedules under Regulations S-X and S-K. The Commission should work with the EPA to develop a practical and feasible timeline for the preparation and reporting of GHG information sought by the Commission. **To better align with the EPA process and timing, WES recommends allowing companies to submit a furnished GHG emissions report to the Commission in the December timeframe. Also, for the reasons stated above, WES respectfully requests that the Commission consider adopting the GHG reporting standards and processes employed by the primary regulator of such emissions—the EPA.**

B. The consolidated financial statement basis for reporting GHG emissions would require the disclosure of emissions data from equity method investments for which data may be unavailable or unreliable.

The Proposed Rule requires a registrant to set the organizational boundaries for its GHG emissions disclosure using the same set of principles applicable to its GAAP consolidation analysis. This standard is inconsistent with the alternatives permitted by the Greenhouse Gas Protocol (the "***GHG Protocol***"), which permits a company to set its organizational boundaries considering financial control, operational control, or equity share. Most importantly, the one-size-fits all organizational boundary rule would require issuers to report emissions resulting from assets owned by joint ventures in which they hold minority non-operating interests. Under these joint venture arrangements, which are common in our industry, we would have limited ability or influence to obtain and validate emissions information from third party owner-operators. These joint operating arrangements are generally governed by model forms, which come with a set of standard terms, are not typically subject to extensive negotiation and do not allow for a unilateral right to amend the agreement. Requiring companies to file information that they cannot independently verify subjects registrants to an unreasonable level of compliance risk. We are unable to quantify the amount of time or costs that would be required to acquire, assess, and report such information in a manner that rises to the level of certainty required for information filed with the Commission – if such information were available at all. **For this reason, WES suggests that the Commission consider**

[6] United States Environmental Protections Agency, Greenhouse Gas Reporting Program and the U.S. Inventory of Greenhouse Gas Emissions and Sinks, (2022), available at https://www.epa.gov/ghgreporting/greenhouse-gas-reporting-program-and-us-inventory-greenhouse-gas-emissions-and-sinks#:~:text=Some%20entire%20sectors%2C%20such%20as,total%20U.S.%20greenhouse%20gas%20emissions.

allowing companies to set their organizational boundaries in a manner consistent with the methodologies permitted under the GHG Protocol.

C. Reporting of Scope 3 emissions disclosures should be furnished rather than filed, and protected by a stronger safe harbor.

We believe that Scope 3 information may be important in assessing a company's emissions profile, given that Scope 1 and Scope 2 data – whether disclosed voluntarily or as part of a prescriptive disclosure framework – presents only a partial picture. However, we are concerned that such reporting will be primarily dependent upon third-party sources, the consistency and credibility of which we may not be able to verify. The Proposed Rule provides a safe harbor for Scope 3 emissions disclosure that provides protection for disclosures made on a reasonable basis in good faith. While such a safe harbor may seem reasonable on its face, Scope 3 emissions data is inherently speculative and obtained almost entirely from third-party sources. For example, if a registrant receives third-party Scope 3 emissions data that is significantly inconsistent with expectations, it may be unable to reconcile such inconsistencies for any number of reasons – including a lack of cooperation from such third parties – prior to the reporting deadline. Under such circumstances, it is not clear how a registrant could even develop a good faith belief that the data provided is correct. We urge the Commission to consider a more robust safe harbor that precludes all implied private rights of action alleging defects in Scope 3 disclosures. The Commission's authority to disimply the Rule 10b-5 private right of action is supported both by prominent legal scholars and the Supreme Court.[7] **WES respectfully requests that the Commission consider providing stronger safe-harbor protections that recognize the inherent limitations on a company's ability to gather and evaluate the accuracy of Scope 3 emissions, in addition to, as noted at the beginning of this letter, allowing such data to be furnished, rather than filed, or removing the Rule 10b-5 private right of action.**

IV. Specific Comments Regarding Corporate Governance Disclosures

A. The Proposed Rule's required disclosures are likely to disincentivize the very behavior that the Commission wants to encourage.

Innovation and change involve trial and error and refining processes over time. The detailed disclosure requirements in the Proposed Rule that spring into existence without regard to materiality, if a company has developed a transition plan, internal carbon price, climate-related targets and goals, or process for environmental scenario analysis, disincentivize the very climate-related innovation that the Commission seemingly would like to encourage.

Companies are likely to avoid taking steps to assess and plan for climate change-related scenarios if doing so would require them to file disclosures they feel are not ready for the high standard imposed on information filed with the Commission. As previously discussed herein, even companies—like WES–that are trying to improve environmental performance and adapt in the midst of a transitioning market for energy, are doing so in an evolving space where targets, regulations and investor demands are constantly moving, and technology is steadily improving. For example, companies inclined to improve their environmental performance may want to experiment with setting certain emissions-reduction targets, developing an internal carbon price, or performing climate-related scenario analysis. However, the Proposed Rule will have a chilling effect on such activities if well-intentioned issuers must disclose, under a heightened liability standard, detailed and sensitive information

[7] *See* Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harvard Law Review 961-1024 (1994); *see also*, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., et al.*, 552 U.S. 148 (2008).

developed on assumptions that may ultimately prove to be incomplete or even incorrect due to the evolving nature of climate-related practices.

Arbitrarily mandating disclosure of a transition plan, internal carbon price, or scenario analysis without regard to materiality will almost certainly be counterproductive and discourage proactive climate-related innovation.

B. The requirement that companies disclose board member expertise in climate-related risks is inappropriate and should be eliminated.

Skills like climate-change expertise—if material to the selection of a candidate for a director position—are already implicated by the Commission's disclosure regime under S-K 401, which requires disclosure of the relevant "specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director." While we recognize that climate change may present challenges for many companies, climate risks vary among companies both in type and degree. Elevating particular facets of candidate experience above others, by compelling specific disclosure on those topics, creates a value-laden one-size-fits-all disclosure framework that ignores these important differences between companies and their board needs. Over the long term, this will likely impede the ability of boards and their nominating/governance committees to exercise appropriate judgment in candidate selection based on what they view as the most critical attributes needed for their particular businesses (versus feeling compelled to check certain boxes specified by the Commission).

We are not aware of precedent for this approach outside of the recent Cybersecurity proposal, and the Audit Committee Financial Expert ("***ACFE***") disclosure requirement that was part of the Sarbanes Oxley Act. But in adopting the ACFE disclosure requirement, the Commission was directed by congress to craft a definition of ACFE and promulgate an associated disclosure requirement (and obviously that disclosure requirement dovetailed with a substantive congressional directive requiring listed companies to maintain independent audit committees…which one would certainly hope included such expertise). It is notable that the Commission has never specifically required disclosure regarding board level expertise around, for example, executive compensation, despite the intense focus on that issue over the past decade both in Commission rulemakings and proxy advisory firm voting guidelines and the fact most listed companies have been required to have independent compensation committees for the quite some time. To single out something like climate change expertise for specific disclosure, accordingly, feels like an aberration and we would therefore suggest eliminating this requirement.

Finally, there is little incentive for an individual to join a board of directors as a designated expert if there is potential for increased liability, including liability under Section 11 of the Securities Act. While we would urge the Commission to delete this disclosure requirement, if nonetheless adopted, the Proposed Rule should provide a safe harbor clarifying that such an expert designation would not impose any duties, obligations, or liability that is greater than the duties, obligations, and liability imposed on such person as a member of the board of directors in the absence of such designation or identification**, similar to the safe harbor proposed in the Commission's cybersecurity proposal**.

C. Mandating the disclosure of asset locations by zip-code presents a security issue for companies operating energy infrastructure in remote locations.

The Proposed Rule would require "physical risk" descriptions to include ZIP codes for the location of its assets. In addition to posing potential security and competitive concerns, pipeline and other midstream energy companies with operations that cover large geographic areas may find compliance to be burdensome, and without a corresponding benefit to investors. In fact, requiring ZIP-code level disclosure does not benefit the investors that are the purported target audience of this information, but rather is intended to provide non-investor "stakeholders" data with which to perform financial modeling. **To address these concerns, the Commission should permit companies to use regional descriptions (for example, "West Texas" or "Denver-area") to convey information for an investor to determine the material impact of its operational locations**.

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In conclusion, we ask that the Commission carefully consider our concerns and recommendations when determining how to proceed with respect to the Proposed Rule and the potential adoption of related regulation. We would be happy to discuss our comments or any other matters that you believe would be helpful. Please contact me at [redacted] and [redacted] if you have any questions or wish to discuss our comments.

Sincerely,

WESTERN MIDSTREAM PARTNERS, LP
By: Western Midstream Holdings, LLC,
its general partner

Christopher B. Dial
Senior Vice President,
General Counsel, and Secretary