

Renewable, Alternative, and Distributed Energy Resources Committee Newsletter

*A joint newsletter of the Renewable, Alternative, and Distributed Energy Resources Committee
and the Energy and Environmental Markets and Finance Committee*

Vol. 1, No. 1

September 2012

CO-CHAIRS' INTRODUCTION

Kimberly E. Diamond

It is with great pleasure that we welcome you to this new ABA year. Roger Stark and I as Co-Chairs of the Renewable, Alternative, and Distributed Energy Resources (RADER) Committee, along with Chris Berendt and Joey Lee Miranda as Co-Chairs of the Energy and Environmental Markets and Finance (EEMF) Committee, are excited to work with you, participate in educational opportunities together, and broaden the scope of our knowledge and understanding of cutting-edge issues in the energy and renewable energy markets. Please feel free to reach out to any of us at any time with your thoughts, ideas, and inquiries.

This special edition newsletter marks several accomplishments. First, this publication is a joint issue of the RADER Committee and EEMF Committee Newsletter. Such collaborative effort marks the first of what we hope will be many such efforts between our two committees this year. Second, this publication constitutes the inaugural issue of the RADER Committee's Newsletter. We are pleased to have the opportunity to launch our new publication, and look forward to receiving your article contributions throughout the year. Third, this issue is solely dedicated to showcasing the articles from the winners and runners-up of The ABA SEER Energy Law Student Writing Competition (the Competition). The Competition was coordinated by 2011-2012 RADER Committee Public Service Vice Chair, Professor K.K. DuVivier of the University of Denver Sturm College of

Law, and by the 2011-2012 EEMF Committee Public Service Vice Chair, Jennifer M. Rohleder of Patton Boggs, LLP. We sincerely thank both K.K. and Jennifer for their efforts.

We hope you enjoy this issue, and look forward to a productive and successful year.

Kimberly E. Diamond, Co-Chair, RADER Committee
Roger Stark, Co-Chair, RADER Committee
Chris Berendt, Co-Chair, EEMF Committee
Joey Lee Miranda, Co-Chair, EEMF Committee

Like to write?

If you would like to contribute to a future issue of the Renewable, Alternative, and Distributed Energy Resources Committee Newsletter, please contact the RADER Committee's Vice Chairs of Publications, Audrey Lin (alin@goodwinprocter.com) or Darin Lowder (LowderD@ballardshpahr.com).



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Kimberly E. Diamond, Issue Editor

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AMERICAN BAR ASSOCIATION
**SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

October 10-13, 2012
20th Section Fall Meeting
Austin, TX

October 16, 2012
Innovations in Public-Private Sustainability Financing
Quick Teleconference

November 15, 2012
11th Annual Energy Litigation Conference
Primary Sponsor: Institute for Energy Law
Houston, TX

February 26, 2013
Key Environmental Issues in US EPA Region 4
Atlanta, GA

March 21-23, 2013
42nd Annual Conference on Environmental Law
Grand America Hotel
Salt Lake City, UT

April 11-12, 2013
ABA Petroleum Marketing Attorneys' Meeting
Ritz Carlton Hotel
Washington, DC

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INTRODUCTION: ENERGY LAW STUDENT WRITING COMPETITION

K. K. DuVivier and Jennifer Rohleder

There is more interest in law schools about energy, the environment, and the global economy than ever before. Law schools around the country are teaching more energy-related courses and hosting more conferences and symposia on energy law issues than they have in years past.

The ABA SEER Energy Law Student Writing Competition was created to help generate positive and constructive interaction between the SEER Energy Committees, law students, and the legal academic community. Students from across the country submitted entries for this year's topic: "Are past legal constructions for the development of other resources effective prologues, or should alternative energy deployment (including renewables) or climate change issues be addressed through *sui generis* rules?"

This special law student newsletter joint issue from the Energy and Environmental Markets and Finance (EEMF) and Renewable, Alternative, and Distributed Energy Resources (RADER) Committees celebrates this year's winners.

A panel of judges from academia, industry, and private practice chose the following winner and two runner-up awards:

2011–2012 Winner

- Robert Molinelli, *Renewable Energy Development: Surviving the Dormant Commerce Clause*
In this article, Mr. Molinelli argues that a California court misapplied the Dormant Commerce Clause of the U.S. Constitution in *Rocky Mountain Farmers Union v. Goldstene* and that this decision could derail state efforts to promote renewable energy if it is extended.

2011–2012 Runners-Up

- Benjamin Falber, *Transmission Lines: Generating a New Approach for FERC's Siting Authority*
In this article, Mr. Falber discusses § 216 of the Federal Power Act and makes a case for granting

the Federal Energy Regulatory Commission greater control of transmission siting to handle the challenges associated with the development of renewable energy resources and maintaining nationwide electricity reliability.

- Christopher Cooper, *Legal Heuristics: What Pornography Can Teach Us About Energy Law*
In this article, Mr. Cooper documents the Supreme Court's herculean efforts to define obscenity and points out that if energy law traditionalists and pioneers approach legal constructions in a similar way—less as strict canons and more as heuristic tools for the prudent development of energy resources—they might forge an evolving jurisprudence that tackles increasingly complex energy security and environmental challenges armed with the best of the past and the brightest of the future.

We congratulate these enterprising students and think the topics of their papers should be of substantive interest to committee members. In these articles, the membership may see the tangible, refreshing, thoughtful, and enthusiastic interest that law students (and hopefully future section members) have in substantive energy law and policy issues. The articles also provide law students with a meaningful and rewarding way to share their growing interest in energy law and policy issues with the wider energy law community.

We hope you enjoy reading what these students have to say.

Professor K. K. DuVivier, University of Denver Sturm College of Law and Communications/Outreach Vice Chair, RADER Committee

Jennifer M. Rohleder, Patton Boggs, LLP and Membership Vice Chair, EEMF Committee

WINNING ARTICLE:
**RENEWABLE ENERGY DEVELOPMENT:
SURVIVING THE DORMANT COMMERCE
CLAUSE**

Robert L. Molinelli

States are leading the charge in the development of renewable energy resources, spurred on by the desire to develop sustainable business and address climate concerns. To this end, states have used a number of different policy tools to encourage the development of renewable energy, including renewable portfolio standards and carbon life cycle analyses. These policies have been effective tools for the promotion of renewable energy and, if unhindered, will continue to encourage renewable development. Despite promising development of renewables, a recent ruling by the U.S. District Court for the Eastern District of California casts doubt on all state efforts to promote renewable energy. *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234-LJO-GSA (E.D. Cal. Dec. 29, 2011) (hereafter, *Rocky Mountain*). In granting an injunction against California's low carbon fuel standard, the court has misapplied the Dormant Commerce Clause of the Constitution, and if the logic of its holding is extended, it could derail state efforts to promote renewable energy development altogether. This paper will explain how the court erred in its analysis and how its errors could threaten renewable energy development. First, this paper will briefly examine California's Low Carbon Fuel Standard. Next, it will outline how the court in *Rocky Mountain* applied the Dormant Commerce Clause to California's Low Carbon Fuel Standard. Finally, this paper will examine how the court misconstrued the "extraterritorial regulation prong" of the Dormant Commerce Clause, and will argue that if adopted by other courts, this construction of the Dormant Commerce Clause will wreak havoc on state efforts to promote development of renewable resources.

I. California's Low Carbon Fuel Standard

After the passage of AB 32, the California Air Resources Board (CARB) promulgated a Low Carbon Fuel Standard (LCFS) that aims to reduce the carbon intensity of fuels used in California. *See*

California Global Warming Solutions Act of 2006, Cal. Health & Safety Code § 38500 (West 2007); Cal. Code Regs. tit. 17 § 95480 (2012) (West). CARB's regulations require fuel providers to calculate the carbon intensity of their fuel, based on a life-cycle analysis of the various components of the fuel from production through consumption. Cal. Code Regs. tit. 17 § 95486. CARB's regulations provide generic "pathways" for producers to calculate their carbon intensity, or allow producers to calculate their individual carbon intensity through another, more individualized process. *Id.* § 95486(b)(2)(B)–(D).

The LCFS uses the carbon life-cycle analyses in conjunction with an Average Carbon Intensity Requirement for Gasoline to create a system for trading credits and deficits between fuel distributors. *Id.* § 95482. The system essentially requires distributors to meet the average intensity requirements by purchasing ethanol that meets the carbon intensity requirements, or by purchasing credits from other distributors who have purchased "clean" ethanol in excess of the statutory mandate. *Id.* § 95485. If a distributor fails to comply, the state can levy fines or enjoin its operations. *Id.* § 95484(e). This system effectively modifies the California market for ethanol, by increasing the value of less carbon-intensive fuels.

The LCFS's success as a policy hinges on the use of a carbon life cycle analysis. A carbon life cycle analysis involves determining the total amount of carbon dioxide emitted from all of the processes that go into making a product. For ethanol, it involves calculating the total emissions of carbon dioxide from farming (fertilizer use and general farming practices) and electricity generation (depending on the electricity source used by an individual plant, ethanol production could be more or less carbon intensive). All of the aforementioned processes are theoretically within an individual ethanol plant's control. An ethanol producer can integrate a number of different alternatives to lower its greenhouse gas emissions.

II. *Rocky Mountain* and the Dormant Commerce Clause

Rocky Mountain is a challenge by midwestern ethanol producers of California's LCFS. *See Rocky Mountain*

Farmers Union v. Goldstene 2, No. 1:09-cv-02234-LJO-GSA (E.D. Cal. Dec. 29, 2011). The crux of the plaintiff’s lawsuit in this case centers on the pathways. The ethanol pathways for midwestern producers reflect higher carbon intensities than identical production processes based in California, and subsequently midwestern ethanol qualifies for fewer credits under the regulatory regime. *Id.* at 7. This differentiation between the origins of the fuel is what prompted a Dormant Commerce Clause challenge.

The Dormant Commerce Clause is an unwritten corollary to the Commerce Clause that prevents states from regulating interstate commerce. *See* Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 ENVTL. FORUM, July/Aug. 2008, vol. 25, no. 4, at 54. A statute that facially discriminates against interstate commerce or attempts to regulate commerce extraterritorially is subject to strict scrutiny, and will likely be declared unconstitutional. *Id.* Even statutes that are facially neutral and do not attempt to regulate conduct beyond their borders are still subject to a balancing test to determine their constitutionality. *Id.*; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The *Rocky Mountain* court found the California law failed both prongs of the strict scrutiny test because it both facially discriminated and regulated extraterritorially, and issued an injunction against the standard pending completion of the litigation. While the court’s ruling on both counts is suspect, this paper will focus on the court’s use of the “extraterritorial regulation” prong of the Dormant Commerce Clause to strike down this regulation. The court implicitly found that by influencing market participants to change their behavior, California impermissibly attempted to control conduct beyond its own boundaries. The court relied heavily on *Healy v. The Beer Institute* for its finding. 491 U.S. 324 (1989). In finding CARB’s regulation unconstitutional, the court noted,

[T]he “critical inquiry” is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state. *Healy*, 491 U.S. at 336. By using the life cycle analysis approach to reducing GHG emission, California is

attempting to account for—and reduce—emissions from the entire pathway. . . . Defendants cannot dispute the fact that the “practical effect” of the regulation would be to control this conduct—occurring wholly outside of California.

Rocky Mountain at 20. The court’s understanding of “control” was central to its holding, and it is incorrect.

III. The Correct Understanding of Extraterritorial Regulation

The *Rocky Mountain* court incorrectly equated control with influence. Its primary support, *Healy*, concerned a Connecticut statute that required alcohol wholesalers to affirm that their prices in Connecticut were no higher than prices in neighboring states. *Healy*, 491 U.S. 324 at 326. Critical for the *Healy* court was the statute’s de facto control over the prices of alcohol in neighboring states. The court found the statute unconstitutional because “by precluding the alteration of out-of-state prices after the moment of affirmation . . . [it] prevent[ed] brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions.” *Id.* at 338. Control, to the *Healy* court, meant one state effectively dictated a product’s price in the other states.

The Supreme Court affirmed this understanding of control in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). *Pharmaceutical Research* involved a Maine statute that prevented pharmaceutical companies from selling their products in the state unless they agreed to participate in a rebate program or their drugs were approved through a process known as a “prior authorization.” *Id.* at 654. The district court in *Pharmaceutical Research* (similar to the *Rocky Mountain* court) found the statute to violate the Dormant Commerce Clause because of the effects it would have on pharmaceutical companies’ market share in the state. *Id.* at 658. The Supreme Court distinguished the Maine statute from the statute at issue in *Healy* by noting that,

[U]nlike price control or price affirmation statutes, “the Maine Act does not regulate the price of any

out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.” . . . The rule that was applied in [. . .] *Healy* accordingly is not applicable in this case.

Id. at 669. After *Pharmaceutical Research*, it is clear that *Healy* was meant to apply to laws that dictated or effectively dictated prices of transactions in other states.

The policy at play in California has the practical effect of incentivizing different behavior, but it places no controls on extraterritorial sales. It merely offers advantages to producers that comply with certain production standards. In *Healy*, distributors had the choice of either selling at different prices out of state and withdrawing from the Connecticut market or completely conforming to the market conditions in Connecticut. This is not the case in California. California’s policy can best be described as a reordering of its own internal market conditions. Unlike the statute at play in *Healy*, California’s policy does not penalize or restrict companies’ activities in other interstate markets. A company can market and sell “dirty” ethanol in one state without facing any consequences in California, as long as the product it sells in California meets the new market standards. This is where the court’s interpretation of the Dormant Commerce Clause runs afoul. California’s policy will tend to influence behavior of out-of-state businesses that want to participate in California’s market, but California’s policy will not condition entry and participation in the California market on the processes used for products sold in other markets. California’s LCFS is therefore more similar to the prior authorization statute in *Pharmaceutical Research* than the price control statute in *Healy*.

IV. The Misapplication of the Extraterritorial Regulation Prong Will Undermine Renewable Energy Development

Rocky Mountain’s logic, if adopted by other states, would stymie state efforts to develop renewable energy. If influence becomes synonymous with control,

a multitude of state policies dealing with renewable energy would fail under the strict scrutiny standard of review. While this interpretation would certainly be fatal to policies that incorporate carbon life cycle analyses, it could also be fatal to procurement policies. Most importantly, the “influence as control” understanding would likely be fatal to renewable portfolio standards, one of the most common state policy tools to bring renewable energy online.

A renewable portfolio standard (RPS) establishes renewable energy procurement requirements for in-state utilities. Similar to policies that incorporate carbon life cycle analysis, RPSs ultimately influence businesses, both in-state and out-of-state, to build and develop renewable energy capacity. An RPS incentivizes energy holding companies and independent power producers (regardless of their location) to develop renewable capacity and to ship that power into states that have procurement standards. The practical effect of a large state adopting a RPS is that it will influence interstate commerce to adjust to new market conditions. In many ways, these policies are similar to the basic idea behind California’s LCFS. Producers of energy, whether they are ethanol producers or wind energy developers, tailor their operations to take advantage of the largest or most lucrative markets.

The problem then should be apparent. If courts find policies that influence interstate commerce to be policies that control commerce extraterritorially, they will rob states of some of the most important arrows in their quiver for renewable energy development. *Rocky Mountain*’s logic, if employed beyond the facts of the case, would be fatal to states’ largest and most successful attempts to promote renewable energy development and address climate change concerns. For example, California’s RPS requires that utilities provide 33 percent of their energy from renewable resources by 2030. This procurement standard has the practical effect of influencing businesses, both in-state and out-of-state, to invest in renewable energy. Because some of the best solar and wind resources in the United States are outside of California, the California policy will effectively be incentivizing energy development in other states. Energy companies that want to be more competitive in California will shape their business models and development plans in

response to this policy. Under the correct understanding of the extraterritorial prong of the Dormant Commerce Clause, this dynamic is acceptable. But under *Rocky Mountain's* interpretation, a policy that influences interstate commerce amounts to extraterritorial regulation that must survive strict scrutiny. Ultimately, *Rocky Mountain's* logic, if adopted by other courts, would be fatal to all renewable portfolio standards.

V. Conclusions

The development of renewable energy is threatened by a misapplication of the Dormant Commerce Clause. If uncorrected, policies that encourage investment in renewable resources and would otherwise survive a lower level of judicial scrutiny will be struck down. This misunderstanding of the “extra-territorial regulation” prong of the Dormant Commerce Clause must be addressed so that state policies that push for renewable energy development can continue to push ahead. If carbon life cycle analyses, renewable portfolio standards, and other market-related policies are to succeed bringing more renewables online, courts must reject the “influence equals control” understanding of the Dormant Commerce Clause and allow states to continue to experiment with and develop new renewable energy policies.

Robert Molinelli is a law student at Lewis & Clark Law School, where he serves as the 2012–2013 Symposium Editor for such school's Environmental Law, a law review dedicated solely to environmental issues. Mr. Molinelli plans to graduate from Lewis & Clark Law School in May 2013 with a Certificate in Environmental and Natural Resources Law.

20th Section Fall Meeting Oct. 10-13, 2012

Join your colleagues at the premier forum for CLE, networking, and idea exchange for environmental, energy, and resources lawyers. The conference theme is **Our Tangled Web of Energy Policies and Practices: Their Natural Resource and Environmental Consequences Examined.**

On Wednesday, October 10, we will begin our meeting with a public service project and a welcome reception. Thursday, October 11 and Friday, October 12 will offer CLE sessions on a wide range of topics. The dinner event on Thursday will be at the Bob Bullock Texas State History Museum, and our local flair reception and committee dining together events will be Friday evening. We will conclude with our Section business meetings on Saturday.

If you are going to attend the Section Fall Meeting and would like to sign-up to attend the RADER Committee or EEMF Committee dinner during the “Dining Together” event, then please contact Kim Diamond (RADER Committee; kdiamond@lowenstein.com) or Joey Lee Miranda (EEMF Committee; jmiranda@RC.com) to confirm your attendance.

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RUNNER UP:

TRANSMISSION LINES: GENERATING A NEW APPROACH FOR FERC'S SITING AUTHORITY

Benjamin Falber

I. Introduction

States have traditionally held the sole jurisdictional authority for permitting the siting and construction of new electricity transmission lines. *See* Miriam Sowinski, *Practical, Legal, and Economic Barriers to Optimization in Energy Transmission and Distribution*, 26 J. LAND USE & ENVTL. L. 503, 514 (Spring 2011). This authority has been exercised under local land use regulations, the use of eminent domain, and state energy authorities. There is no comprehensive nationwide coordination of transmission line siting or single agency to plan investments in national transmission. *See* Letha Tawney, Ruth Greenspan Bell, & Micah S. Ziegler, *High Wire Act: Electricity Transmission Infrastructure and Its Impact on the Renewable Energy Market* 26, World Resources Institute, 2011, available at <http://www.wri.org/publication/high-wire-act> (hereafter, *High Wire Act*). This has resulted in a patchwork of state-permitted facilities. *Piedmont Envtl. Counsel v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 310 (4th Cir. 2009).

Transmission lines are becoming increasingly important with the development of renewable energy sources that are dependent on a grid that can carry electricity from remote locations of renewable energy generation to population centers. *See* Tawney et al., *High Wire Act*, at 6. The Federal Energy Regulatory Commission (FERC) has made efforts to increase its role in the siting of new transmission lines through the two channels available to federal administrative agencies: by flexing its adjudicatory and rulemaking authority, and by broadening its interpretation of the power delegated to it by Congress. FERC, *Major Orders and Regulations*, <http://www.ferc.gov/legal/maj-ord-reg.asp>; *see also* *Piedmont*, 558 F.3d 304.

This paper will focus on the power delegated to FERC by Congress, particularly via § 216 of the Federal

Power Act (FPA), which was meant to respond to FERC's inability to site transmission lines in wholesale markets on non-federal lands. *See* Debbie Swanstrom & Meredith M. Jolivet, *DOE Transmission Corridor Designations and FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?* 30 ENERGY L.J. 415, 422 (2009) (hereafter, *DOE Transmission*). The addition of § 216 to the FPA made important strides with the potential creation of National Interest Electricity Transmission Corridors (NIETCs) and FERC's backstop authority. 16 U.S.C.S. § 824p(a)(2) (2012); *id.* at 824p(b)(1)(C)(i). However, FERC should be granted greater control of transmission siting in order to handle the magnitude of challenges associated with the development of renewable energy resources and maintaining nationwide electricity efficiency and reliability.

II. Problems with Decentralized Control of Transmission Siting

Transmission lines are the high voltage lines that carry electricity from generators to distribution facilities. *See* Fred Bosselman, Joel B. Eisen, Jim Rossi, David B. Spence & Jacqueline Lang Weaver, ENERGY ECONOMICS AND THE ENVIRONMENT 581 (3d ed. 2010) (hereafter, ENERGY ECONOMICS). Often, wind farms and solar thermal fields are distant from large customer centers. *Id.* at 930. States have generally allowed for the siting of new lines where there is a localized public interest. *See* Tawney et al., *High Wire Act*, at 26. Furthermore, where new transmission lines need to be built, states frequently must exercise their power of eminent domain, thus leaving projects subject to approval only under certain state-imposed conditions. *See* Bosselman et al., ENERGY ECONOMICS, at 931; *see e.g.*, New York Transportation Corporations Law (TCL) § 11(3-a). These factors have all influenced the patchwork development of new transmission in the United States, consequently leading to issues with electricity reliability and the use of renewable energy. Bosselman et al., ENERGY ECONOMICS, at 931.

There are two interrelated issues associated with the regulatory regime governing the siting of new

transmission lines. First, there has been increased pressure for federal control of transmission planning in order to ensure electricity reliability in wholesale markets. *Id.* Strategically built transmission lines can be a substitute for generation expansion. *Id.* at 581. For example, the Cross Sound Cable Company laid a high voltage transmission line under the Long Island Sound in 2002 in order to supply Long island with less expensive New England power, especially during the peak summer months. See Elisa Gootman, *New Setback for Power Cable Between Connecticut and L.I.*, N.Y. TIMES, Jan. 9, 2003, at B5. Although this transmission line eventually became a welcome benefit for the region and allowed Long Island to avoid building more local power, competing state agendas delayed the project for years, costing the developers millions of dollars. See Bruce Lambert, *New York and Connecticut Agree to End Cable Dispute*, N.Y. TIMES, June 25, 2004, at B6.

Second, renewable energy sources meant to bolster U.S. energy production, like wind farms in the Rocky Mountains, highlight the need for the growth of new transmission lines from geographically isolated and rural areas. See Jeremy Fugleberg, *Rocky Mountain Power Scales Back Power Line Project in Wyoming*, Feb. 10, 2012, http://trib.com/news/state-and-regional/rocky-mountain-power-scales-back-power-line-project-in-wyoming/article_4d813f44-8477-534a-a821-4b5431c788e4.html. The network of transmission lines that could capture the wind potential of the Rocky Mountains would extend over multiple states.

There are major roadblocks to getting that electricity out of places like Wyoming and into Oregon, Nevada, and California. For example, Rocky Mountain Power encountered a great deal of backlash while attempting to site transmission lines from planned wind farms in southeastern Wyoming. This was due to local groups being deeply averse to hosting transmission lines in their communities, citing the major impact that transmission siting would have on the completion of a large housing development project. See Ken Otterbourg, *The Power Struggle for Wyoming's Wind*, Sept. 14, 2011, <http://tech.fortune.cnn.com/2011/09/14/the-power-struggle-for-wyomings-wind/>.

As of September 2011, only a tenth of Wyoming's wind energy potential was being utilized at 1400 megawatts of power. *Id.* The rest remains untapped for several reasons, one in particular being nonexistent interstate power lines that can only be built after fulfilling burdensome permitting processes over multiple jurisdictions. *Id.* Furthermore, there is a strong interest in preserving Wyoming's open space and protecting it from a web of new power lines.

An additional challenge particular to Rocky Mountain Power is that it is a regulated utility. *Id.* Thus, although it has a guaranteed customer base, it is constricted in its ability to build transmission lines beyond the needs of its service area and pass on those costs to its customers. Bosselman et al., *ENERGY ECONOMICS*, at 583. These challenges have made it difficult for Rocky Mountain Power to find development partners.

Essentially, there is a national interest to develop wind energy. However, this interest is butting directly up against the types of local land use interests discussed above. Furthermore, states are often precluded from bearing in mind out-of-state end users when considering the local public interest in permitting a transmission siting. Therefore, efforts to expand the use of renewable energy would be greatly helped by federal regulations that increased FERC's role in transmission siting in wholesale markets where it could balance national, multistate interests.

III. § 216 of FPA: The Fate of FERC, DOE, and NIETCs

In the Energy Policy Act of 2005, Congress added § 216 to the FPA in order to mitigate some of the concerns associated with FERC's inability to regulate transmission siting. See Swanstrom & Jolivet, *DOE Transmission*, at 420–21. This legislative action was taken partially in response to a rash of nationwide brownouts and blackouts. *Id.* at 423. It has two categorical elements, both of which have been challenged in federal court. First, it requires the Secretary of Energy to consult with Affected States while conducting a Transmission Congestion Study within one year of the statute's enactment. 16 U.S.C.S. § 824p(a)(1). Based on that study, the Secretary is

authorized, but not required to, designate any area with “electric transmission capacity constraints or congestion that adversely affects consumers as a [NIETC].” *Id.* at § 824p(a)(2).

The statute then has a second element that gives FERC some permitting authority, known as its backstop authority, exclusively in NIETCs. It provides that FERC may issue a permit for a transmission line where a state commission is unable to or does not have the authority to approve siting transmission facilities, or if it cannot take interstate benefits into account. *Id.* at § 824p(b)(1)(A)(i); *id.* at § 824p(b)(1)(A)(ii). FERC can also approve siting where the applicant does not qualify for a permit in a state because it does not serve end users in that state, or where the state commission has “. . . withheld approval for more than 1 year after the filing of an application.” *Id.* at § 824p (b)(1)(B); *id.* at § 824p(b)(1)(C)(i). Finally, FERC may step in where the state commission has required project-killing conditions in an approval. *Id.* at § 824p(b)(1)(C)(ii).

Subsequent to the addition of § 216 to the FPA, the Department of Energy (DOE) designated two NIETCs, the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor. The Ninth Circuit, in *California Wilderness Coalition v. Department of Energy*, vacated DOE’s NIETC designations on February 1, 2011, due to DOE’s failure to comply with the FPA’s and the National Environmental Protection Act’s (NEPA) statutory requirements. 631 F.3d 1072 (2011). It was held that DOE failed to consult with affected states in compliance with § 824p(a)(1) of the FPA and did not consider the environmental consequences of its decision as required by NEPA. 42 U.S.C. § 4332 (2012).

In *California Wilderness Coalition*, on the first count, the court held that DOE had interpreted the term “consult” as no more than notice-and-comment. 631 F.3d at 1087 (2011). The crux of the issue was that Congress had not explicitly defined what it meant by “consult,” and thus the court was left to decide its meaning with a Chevron analysis. *Id.* at 1084, *citing Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Based on the

plain meaning of the term “consult,” case law, and the construction of the statute, the court found that DOE had essentially conflated the notice-and-comment requirement for NIETC designations, with the more active consultation requirement for the Transmission Congestion Study. *Id.* at 1088. DOE’s interpretation of “consult,” and the subsequent failure to actively include the Affected States, particularly by not disclosing its congestion modeling data, was not a harmless error, it was in contradiction with Congress’s intent, and thus in violation of the law. *Id.* at 1089–91.

On the second count, DOE failed to complete an Environmental Assessment (EA) on the potential impacts of designating NIETCs and the possible need for a programmatic Environmental Impact Statement (EIS). *Id.* at 1096. The NIETCs were major federal actions that usurp traditional state rights, create new federal authority over 100 million acres, and potentially raise significant environmental impacts. *Id.* at 1099–1101. According to the Ninth Circuit, DOE failed to investigate any of the programmatic impacts of NIETCs, failed to take a “hard look,” and thus did not fulfill its mandate under NEPA. *Id.* at 1106.

The second element of § 216, which broadened FERC’s backstop authority within NIETCs, was challenged in the Fourth Circuit on February 18, 2009 in *Piedmont Environmental Counsel v. Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Cir. 2009). Public utilities and community interest organizations challenged FERC’s rule making authority in connection with its implementation of § 216. *Id.* at 309. According to the Fourth Circuit, FERC had incorrectly determined that its backstop authority could be triggered if a state commission denied a permit for a transmission siting. FERC argued that the denial of a permit was equivalent to where a state has “withheld approval for more than 1 year.” *Id.* at 312.

Here, in an analysis similar to *California Wilderness Coalition*’s examination of the term “consult,” the court was required to apply the Chevron analysis to “withheld.” *Id.* at 313–14. The Fourth Circuit determined that based on the definition of “withheld” the specific context of the term, and the broader context of the statute, the intent of Congress was clear

on FERC's backstop authority. *Id.* at 312–13. First, the court found that “withhold” does not broadly include denial in its definition. *Id.* at 314. Second, according to the court, the denial of a permit within one year ends the permitting process, and when a permit is denied it is not just being continually withheld. *Id.* Finally, the court reasoned that if FERC had the authority to permit the siting of a transmission line whenever a state commission denied a permit, then the rest of the statute would not make sense and be superfluous. *Id.* at 315. In other words, there would be no reason to include all the circumstances listed above where FERC could step in.

It was clear to the Fourth Circuit that Congress did not intend to have FERC supplant state commissions in their authority to deny applications when appropriate. *Id.* Thus, FERC has permitting authority if the circumstances are limited to siting transmission lines in NIETCs when the state commission: (a) cannot or is unable to act; (b) includes project-killing conditions in its permit; or (c) does not make a decision on a permit within a year.

IV. Conclusion and Recommendation

The regulatory authority for transmission siting is still primarily vested in the states. The Energy Policy Act of 2005 added § 216 to the FPA in response to a rash of nationwide brownouts and blackouts. Swanstrom & Jolivert, DOE Transmission, at 423. In spite of § 216, the Department of Energy's NIETC designations have been vacated and FERC's backstop authority has been curtailed. DOE recently closed the comment period for its third attempt at designating NIETCs on March 30, 2012. Office of Electricity Delivery & Energy Reliability, 2012 National Electric Transmission Congestion Study, <http://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/2012-national>. Thus, the issue of new transmission siting on non-federal lands, which had a sense of urgency in 2005, disappointingly, has gained little momentum. Peter Behr, DOE Tries a “Fundamentally Different” Approach to Modernize the Nation's Power Grid, CLIMATE WIRE, E&E Publishing, LLC, Jan. 17, 2012, <http://www.eenews.net/public/climatewire/2012/01/17/1>.

In addition to Congressional efforts, there is some potential for multistate regional compacts and Regional Transmission Operators (RTOs) to coordinate transmission line siting. See Tawney et al., High Wire Act, at 27. However, these are technically voluntary efforts and RTOs must balance a wide variety of stakeholder interests. *Id.* Furthermore, many areas in the West with massive renewable energy capacity remain outside of RTOs and are thus governed by local utilities focused on point-to-point infrastructure and not wholesale markets. *Id.*

Any efforts to build renewable generation capacity will be inhibited by transmission bottlenecks and local land use laws butting up against national interests. For FERC to be most effective in this area, Congress should grant it greater authority over wholesale transmission siting on non-federal lands.

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RUNNER UP:
**LEGAL HEURISTICS: WHAT PORNOGRAPHY
CAN TEACH US ABOUT ENERGY LAW**

Christopher Cooper

“I shall not attempt further to define the kinds of material I understand to be [obscene] . . . but I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

In the 1960s, the U.S. Supreme Court struggled to define obscenity. Despite its collective brainpower, the Court found itself stymied. Watergate reporter Bob Woodward documented their herculean efforts, which included “movie days” when the justices and their clerks viewed (with popcorn!) the pornographic films that were the subject of many First Amendment cases awaiting their decision. B. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

Despite such thorough review of the materials in question, the justices could not agree on which images were protected under the First Amendment and which were so obscene they lacked constitutional protection. For Justice White, protected speech could not depict intercourse, sodomy of any kind, or anything erect. Justice Brennan applied a simpler, bright-line test that his clerks jokingly referred to as the “Limp Dick Test” (no erections). Justice Stewart used a different approach, what he called the “Casablanca Test.” As a World War II Navy lieutenant stationed in Casablanca, Stewart had seen the locally-produced hardcore pornography that his men brought back to the ship and knew how it differed from the pornographic material the Court watched on movie days. His difficulty articulating this difference, however, made his test an easy target of ridicule, especially by the snarkier clerks who would shout during the most lascivious scenes: “That’s it, that’s it, I know it when I see it!” Judith A. Silver, *Movie Day at the Supreme Court or “I Know It When I See It”: A History of the Definition of Obscenity*, FINDLAW.COM, <http://library.findlaw.com/2003/May/15/132747.html> (last visited on Mar. 1, 2012).

Today, energy lawyers face a dilemma as daunting (if less scintillating) as what the Warren Court faced in the 1960s: whether to apply traditional legal constructions to emerging energy and environmental challenges, or whether to approach these issues, like Justice Stewart did, with entirely new legal rules. For some, energy law’s focus remains on energy security, defined almost entirely as securing the supply of a specific fuel source or the entire primary fuel supply of the nation. Gal Luft & Anne Korin, *Energy Security: In the Eye of the Beholder*, in *ENERGY SECURITY CHALLENGES FOR THE 21ST CENTURY: A REFERENCE HANDBOOK* 1–17 (G. Luft ed., 2009); D.R. Bohi & M.A. Toman, *THE ECONOMICS OF ENERGY SECURITY* (1996). For these traditionalists, existing jurisprudence provides sufficient bedrock for developing new resources that achieve enduring energy security goals. Others see energy systems as more than the sum of supply-side components. More jurists, for example, are analyzing the social, environmental, and political elements of energy systems and how they affect national energy security. Marilyn A. Brown & Michael Dworkin, *The Environmental Dimension of Energy Security*, in *THE ROUTLEDGE HANDBOOK OF ENERGY SECURITY* 176–217 (Benjamin K. Sovacool ed., 2011). For these pioneers, past legal constructions are insufficient prologues for deploying new resources to meet evolving energy security challenges.

The lesson drawn from the Court’s epic battle over pornography is that the best approach may not require a forced choice between past legal constructions and *sui generis* rules. Often the more prudent solution requires employing the most useful parts of both approaches. Social psychologists, for example, are finding that human beings often rely on gut instinct when confronting complex problems. These heuristic “rules of thumb” enable people faced with overwhelmingly complex situations to apply limited information to make decisions that generally lead to the desired outcome, if not the optimal solution. G. Gigerenzer & P. Todd, *SIMPLE HEURISTICS THAT MAKE US SMART* (1999).

Over a century ago, Russian novelist Fyodor Dostoevsky observed that humanity’s “unfettered desire”—its inherent humanness—“constantly smashed

to smithereens” all grand systems and theories designed to describe and understand it. F. Dostoevsky, NOTES FROM UNDERGROUND 16 (1864). More recently, Professor Morell E. Mullins has argued that legal grand theories in particular invite disaster by imposing upon courts “the worst kind of artificial, rule-bound jurisprudence.” Morell E. Mullins Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 31 (2003) (hereafter, *Tools, Not Rules*). Mullins referred to an exercise that legal realist Karl Llewellyn employed in 1950. *Id.* at 65. Categorizing tools of statutory interpretation into 56 “canons,” Llewellyn then placed them into two columns, with 28 in each column. For each cannon in the first column, he identified one in the second column that directly conflicted with it. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). Llewellyn’s exercise, though hardly definitive, helped reveal that, no matter how revered traditional legal constructions are, judicial reasoning is “inextricably linked to the mental processes operative in judicial decisions.” Dan Simon, *A Psychological Model of Decision Making*, 30 RUTGERS L.J. 1, 18 (1998). Thus, to truly decide how courts should make decisions using either traditional legal constructs or more heuristic approaches, one must investigate the cognitive operations at work.

Scientists are just beginning to unravel the complex processes involved in human decision-making, ironically employing precise methods to decipher the imprecision in human cognition. Recent research has revealed, for example, that humans faced with a dizzying amount of data tend to become overly focused during the decision-making process and routinely overlook important information. Lee Merkhofer Consulting, *Bounded Awareness and Decision-Making*, PICKING THE WRONG PORTFOLIO OF PROJECTS, <http://www.prioritysystem.com/reasons1c.html> (last visited Mar. 1, 2012). They concentrate their mental faculties within the conceptual frameworks most familiar to them. Unfortunately, this keen focus also tends to limit awareness, with results that are often catastrophic. M. Bazerman & D. Chugh, *Decisions Without Blinders*, 1 HARV. BUS. REV. 88–97 (2006).

On the day of the Challenger shuttle tragedy, for example, decision makers argued whether the frigid weather would affect the shuttle’s O-rings. M. Bazerman & D. Chugh, *Bounded Awareness: What You Fail to See Can Hurt You*, Harvard Business School Working Paper No. 05-037, revised 25 Aug., <http://www.people.hbs.edu/mbazerman/Papers/05-037.pdf> (last visited Mar. 1, 2012) (2005). NASA scientists examined seven prior launches in which they observed some sort of O-ring problem. But they found no pattern linking temperature to O-ring failure and allowed the launch to proceed. After that decision led to the deaths of seven crew members, NASA broadened the investigation and analyzed data from all of the Challenger’s 24 previous launches. The expanded data set revealed that the shuttle had more than a 99 percent chance of malfunctioning on the day of its catastrophic launch. *Id.* The scientists’ fixation on temperature allowed them to overlook crucial indications that the O-rings were likely to fail not just from the weather, but from a combination of factors particular to the fatal launch.

Strict adherence to traditional conceptual frameworks can elicit this same “bounded awareness” and undermine the development of energy law. In Colorado, for example, regulators unintentionally created a “catch-22” situation for renewable energy developers by inserting a “safety valve” into the state’s renewable portfolio standard (RPS). Intending to limit the rate impact of financial incentives for renewable energy development, lawyers for the Colorado Public Utilities Commission looked to existing statutory approaches found in the federal Public Utilities Regulatory Policies Act (PURPA). Christopher Cooper & Benjamin K. Sovacool, *Renewing America: The Case for Federal Leadership on a National Renewable Portfolio Standard*, 1-7, NETWORK FOR NEW ENERGY CHOICES 145 (2007). Employing an approach similar to PURPA’s “avoided cost” requirements, drafters of Colorado’s RPS created a cap at which renewable energy costs could impact electricity rates and pegged it to the avoided cost of natural gas generation. The original RPS statute stipulated:

For each qualifying utility, the commission shall establish a maximum retail rate impact for this section of one percent of the total electric bill annually for each customer. The retail rate impact shall be determined net of new nonrenewable alternative sources of electricity supply reasonably available at the time of the determination.

COL. REV. STAT. ANN. § 40-2-124(1)(g)(1). Put simply, the regulations limited the difference in the cost of renewable electricity relative to the cost of the same amount of electricity if it had been generated using the most likely source of new nonrenewable generation (natural gas). The problem is that deployment of renewable energy resources directly affects natural gas prices by decreasing demand. C. Chen, R. Wiser & M. Bolinger, *Weighing the Costs and Benefits of Renewable Portfolio Standards: A Comparative Analysis of State-Level Policy Impact Projections*, LAWRENCE BERKELEY NATIONAL LABORATORIES, LBNL-61580 (2007). Because some renewable units generate electricity during periods of peak demand, they can offset electricity otherwise derived from natural gas-fired “peaking” units. Researchers at Resources for the Future calculated that, given the historical volatility of the market, every 1 percent reduction in natural gas demand could reduce the price of natural gas by up to 2.5 percent. Carolyn Fisher, *How Can Renewable Portfolio Standards Lower Electricity Prices?*, Resources for the Future Discussion Paper (2006). Thus, the more renewable resources deployed, the more likely they will depress natural gas prices.

By pegging the rate cap of renewable technologies to the cost of natural gas, Colorado’s regulators created a vicious cycle where renewable technologies may never reach sufficient levels: the more they effectively lower natural gas prices, the less profit they are allowed to recover. Richard Mignogna, *Implementing Colorado’s Renewable Portfolio Standard*, Presentation to the 3rd Annual Renewable Portfolio Standards Conference, Denver, Colorado (2007). Relying on traditional legal constructions created a type of bounded awareness that may have caused Colorado’s regulators inadvertently to undermine the fundamental purpose of the state’s RPS.

While an imprudent reliance on past legal constructions risks repeating some of the most disastrous policy decisions, abandoning them altogether may be impossible as well as impolitic. Administrative law guru Cass Sunstein warned that the beliefs and orientations of jurists are the product of antecedent beliefs and orientations, many of which confound logical cost-benefit analysis. Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 770 (2003). Moreover, “Once several people start to take an example as probative,” he observed, “many people may come to be influenced by their opinion, giving rise to cascade effects.” *Id.* at 759. Thus, when pundits and prognosticators started declaring nuclear power a “carbon-free” source of electricity, both 2008 presidential candidates (from diametrically opposed political parties) embraced nuclear as an essential component of their national energy policies. Benjamin K. Sovacool & Christopher Cooper, *Nuclear Nonsense: Why Nuclear Power Is No Answer to Climate Change and the World’s Post-Kyoto Energy Challenges*, 33 WILLIAM & MARY ENVTL. L. & POL’Y REV. 1, 2 (2008).

The well-intended exuberance to embrace nuclear energy as a solution to a confounding environmental crisis, however, provides a good example of how purely heuristic approaches can still go awry. For two weeks in August 2007, Alabama found itself in the grip of a record-breaking heat wave. B. Johnson, *Record-Breaking Heat Wave Maintains Grip on Alabama*, USA TODAY, Aug. 15, 2007. Near the Tennessee border, where the Tennessee Valley Authority (TVA) operates three reactors at the Browns Ferry Nuclear Plant, water from the Tennessee River (used to cool the reactors) reached 90 degrees. Operators began to shut down one reactor and decreased output from the other two by over 25 percent. The incident forewarned a looming problem for nuclear energy as a viable solution to climate change. Because nuclear reactors require vast quantities of cooling water, rising average global temperatures present a potential engineering pitfall. Nuclear plants generate electricity when steam passes through turbines with enough pressure to spin the enormous blades. However, from the second steam enters the turbine, it loses energy. Fortunately, as the nuclear-heated steam cools and condenses, reduced

pressure creates a vacuum that pulls the steam through the blades. This condensation-assisted vacuum is essential to the turbine's electrical output. As river temperatures rise, it becomes far more difficult to cool the steam to the point of condensation. The force of the vacuum diminishes, so the reactor requires more energy to force steam through the turbines. Thus, as the ambient temperature of coolant water increases, electrical output from nuclear power plants decreases (ironically, just as demand for electricity to power air conditioning skyrockets). E. Fleishauer, *Heat Wave Shutdown at Browns Ferry Stirs Nuclear Debate*, ASSOCIATED PRESS, Sept. 7, 2007. At some point, existing cooling systems will be overwhelmed by the electrical demand of nuclear plants and policymakers will be forced to make hard choices about how best to use dwindling water resources. B. Sovacool & K. Sovacool, *Identifying Future Electricity-Water Tradeoffs in the United States*, 37 ENERGY POL'Y 7, 2763–73 (2009). Rather than nuclear power providing a solution to the climate crisis, one former Brown's Ferry engineer warned, "We're going to have to solve the climate-change problem if we're going to have nuclear power, not the other way around." *Nuclear Power Can't Take the Heat*, ECOLOGIST, May 21, 2007.

Hard facts may stubbornly undermine the most revolutionary the legal constructions. Often, new problems may require falling back upon traditional legal approaches that are coldly calculating and gallingly inflexible. But legal constructions are not doctrine in the black-letter sense. They cannot and should not be reduced to algorithmic "if-then" rules having a force

and effect that demands obedience. If jurists understand them, rather, as legal tools then they are no more in conflict than a hammer is in conflict with a wrench. Mullins, *Tools, Not Rules*, at 66. Both are useful in different contexts and both may be employed toward the same endeavor.

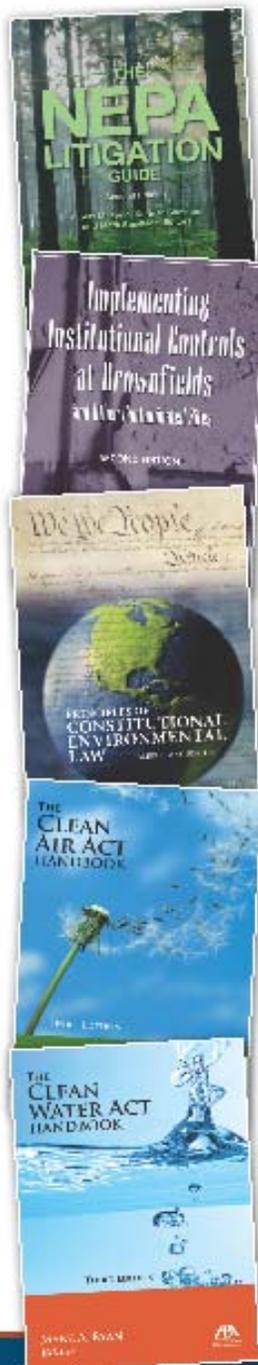
When Justice Stewart composed his amorphous definition of obscenity, he was employing legal construction as a heuristic tool to reach a practical end. Relying on his own experience with hardcore pornography, he developed subjective criteria for identifying obscenity that, while not as easily articulated (as demonstrated by his famous quote above), arguably were more useful—and more just—than the phallogocentric bright-line tests employed by Justices White and Brennan. Stewart could not define obscenity, but his experience in Casablanca provided sufficient information that he knew it when he saw it. While his approach may not fit neatly into determinative canons of legal analysis, in most circumstances it would produce the most reasonable results. Similarly, if energy law traditionalists and pioneers approach legal constructions less as strict canons and more as heuristic tools for the prudent development of energy resources, they might forge an evolving jurisprudence, an alliance that tackles increasingly complex energy security and environmental challenges armed with the best of the past and brightest of the future.

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