ARTICLES >>

**Colombia: Towards the Energy Grid Diversification**
By: Ricardo Seligmann

Colombia’s energy landscape is starting to change with the implementation of recent regulation aiming at the integration of clean energies to the grid. Clean energy generation projects are starting to flourish countrywide, even if there are still regulatory tasks pending government action.

**Three Timely Congressional Research Reports for Environmental Response & Recovery**
By: Anthony Mark DeStefano

The Congressional Research Service recently published three excellent reports concerning federal environmental laws governing emergency response and recovery. The timing of these articles could not have been better considering the recent need for government response to a slew of environmental hazards stemming from recent major disasters, e.g., Hurricanes Harvey, Irma, and Maria. These articles condense complicated laws for public interest attorneys, both inexperienced and seasoned alike.

**Climate Change and International Relationships: U.S. and Mexico Reach Deal over Colorado River Conservation Program**
By: Matthew Walker

In a time of contentious international relationships, overcoming political differences is necessary to avert the changing environmental landscape from climate change. A look at the recent deal between the U.S. and Mexico over water rights shows where our priorities should be placed.

**Shedding the Light on Mediation as the Preferred Method to Conflict Resolution**
By Armita Azad.

Discussing the advantages of mediation in comparison to arbitration or litigation.
NEWS AND ANNOUNCEMENTS >>

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ARTICLES

COLOMBIA: TOWARDS THE ENERGY GRID DIVERSIFICATION
By: Ricardo Seligmann

Colombia has historically been a clean energy generating country, due to the fact that approximately 70% of the grid comes from hydro power. This characteristic kept the country away from developing –and therefore regulating– the generation and integration of other types of clean energies, such as wind, solar or thermal.

However, several factors such as climate change (which has intensified climate variability phenomena such as “El Niño” and “La Niña”, which repeatedly affect Colombia) and the international environmental commitments entered into by the Colombian state, have forced Congress and the Government to enact Law 1715 of 2014, as a means of fostering the use of clean technologies to produce renewable energy.

Law 1715, long expected by environmental movements, investors and part of the civil society, sets forth the general guidelines for the development of clean energies. However, this Law is so general and abstract in its provisions, that it requires specific regulation from government agencies, in terms of step-by-step procedures, deadlines and other limits and requirements, in order for it to be fully applicable. It has taken almost four years since the enactment of the Law to start seeing real signs of political will on the part of the government agencies in charge of issuing the proper regulation (by means of decrees, resolutions, etc.). There are still some pending tasks, but the path is already set.

With a substantial amount of specific regulation in place, this 46-articles Law brings to the table three main features worth highlighting: (i) tax benefits for investments in clean technologies, (ii) creation of a public fund to invest in renewable energy projects, and (iii) the possibility of selling energy to the grid from self-generators.

The list of tax benefits introduced by this law include (i) income tax deductions for 5 years (Article 11), (ii) VAT exemptions in the purchase of machinery and equipment (Article 12), (iii) tariffs exemptions when importing machinery and equipment for renewable energy projects in Colombia (Article 13), and (iv) accelerated depreciation of purchased machinery and equipment.
(Article 14). These tax incentives are the most evident invitation for investors to turn their eyes into the Colombian renewable energy market.

In second place, the Fund for Non-Conventional Energies and Efficient Energy Management ("FENOGE") is a state managed fund which will handle resources from international cooperation programs and private and public funds, aimed at sponsoring and subsidizing a broad spectrum of renewable energy initiatives for industrial, commercial, transport and residential sectors. The extent and scope of this Fund is one of the pending tasks but at least there is a decree for its regulation which is already in place.

Last but certainly not least, the Law introduces the concept of “self-generation”, a possibility already in place and regulated in many jurisdictions around the world but not in Colombia until the enactment of this Law. According to the text of the Law, a self-generator is any individual or legal entity capable of generating energy mainly for its own needs, with the possibility of exporting the energy surplus to the grid. Self-generators, according to Law 1715, are classified as "low scale" or "high scale" depending on their power generation capacity. This possibility has the potential to be a break-through in the generation landscape in Colombia, to the extent that virtually anyone can be a self-generator if having the technology and fulfilling the requirements which are still to be established.

For now, Law 1715 and its regulation, together with the optimal conditions for the generation of wind and solar energy, have spawned the development of projects to build solar and wind farms for the generation of energy (specially in the northern region of La Guajira, where solar conditions are similar to the Sonora Desert in Mexico or the Atacama Desert in Chile).

There is still plenty of work ahead, but finally Colombia is moving in the right direction, as well as its neighbors and other many countries around the world.

THREE TIMELY CONGRESSIONAL RESEARCH REPORTS FOR ENVIRONMENTAL RESPONSE & RECOVERY
By Anthony M. DeStefano

The Congressional Research Service recently published three excellent reports concerning federal environmental laws governing emergency response and recovery. The timing of these articles could not have been better considering the recent need for government response to a slew of environmental hazards stemming from recent major disasters, e.g., Hurricanes Harvey, Irma, and Maria. These articles condense complicated laws for public interest attorneys, both inexperienced and seasoned alike.

The first is *Oil and Chemical Spills: Federal Emergency Response Framework*, R43251 (2017) by David Bearden and Jonathan Ramseur. This report explains the legal authorities, executive orders, and bureaucratic constructs in funding mechanisms for federal environmental response. What is particular useful about this report is that it succinctly describes the National Oil and Hazardous Substances Pollution Contingency Plan\(^2\) – normally referred to as the National

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\(^1\) The author is an active duty Lieutenant Commander in the U.S. Coast Guard. This article should not be construed as the position of the Department of Homeland Security or the U.S. Coast Guard.

\(^2\) Codified at 40 C.F.R. Part 300 (National Oil and Hazardous Substances Pollution Contingency Plan). © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
Contingency Plan (NCP) – and distinguishes it from the National Response Framework (NRF) which is a framework for coordinating a wide variety of federal response and assistance mechanisms pursuant to the Stafford Act. Many commentators have noted that these two different constructs are frequently confused during an emergency response. For instance, Admiral Thad Allen of the U.S. Coast Guard, the National Incident Commander for the Deepwater Horizon spill of April 2013, noted lack of understanding of environmental response authorities at “all levels of government.” He also noted that others tend to conflate the federal government’s plenary power for environmental response with the federal government’s assistance authority under the Stafford Act. Such confusion may be due to the vast number of varying acronyms and terms of art. The Congressional Research Service report makes clear how the NCP is a step-by-step process for responding to specific hazards pursuant to CERLCA in the Clean Water Act in federal regulation. In contrast, the NRF is an administrative framework for coordinating an array of Federal response plans generally by the Federal Emergency Management Agency (“FEMA”). The report also explains the theoretical ability of the federal government to apply the NCP through the NRF in the event in of a major disaster or emergency; however, it clarifies that the Federal government has responded to major discharges of pollutants under the NCP alone even during the Exxon Valdez and Deepwater Horizon oil spill. This comparison helps to clear up the confusion between NCP and Stafford Act response. The result is a good resource for new or seasoned attorneys who may have to work through these distinctions themselves or similarly educate their clients or the public at large.

The second article is Oil Spill: Background and Governance, RL33705 (2017) by Jonathan Ramseur. This report provides useful historical information concerning oil spills as well as the regulatory framework for preventing and responding to spills. The usefulness of this information and analysis will hopefully prove useful as Congress wrestles with the idea of reducing the concentration of oil and chemical refineries in vulnerable coastal zones.

The third article is Implementing the National Environmental Policy Act (NEPA) for Disaster Response, Recovery, and Mitigation Projects, RL34650 (2017) by Linda Luther. The report discusses how the law excludes NEPA’s environmental review requirements for federal actions undertaken in response to emergencies in major disasters, but and how other environmental laws may apply (such as the Endangered Species Act). Nevertheless, NEPA may apply to

3 The full name for the Stafford Act is the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206.
5 Numerous acronyms mean wildly various things despite sounding somewhat similar. For example the NCP which creates the NRS which in turn creates the NRT, RTT, and ACP. Then, there is the NRF which creates ESFs and other acronyms.
6 See e.g., U.S. Coast Guard, supra at 4 (2010) (noting the public did not understand that the “Responsible Party” was in fact subject to orders and directions of the federal government).
8 See e.g. Federick Kenny & Melissa Hamann, The Flow of Authority to Stop the Flow of Oil: Clean Water Act Section 311(c) Removal Authority, 36 Tul. L. J. 359, 389-390 (noting apparent confusion between the “top-down” regime of the NCP and the “bottom up” regime of the Stafford Act.”).

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projects for federal funding of recovery grants requested by state or tribal entities. The report explains how the NEPA process helps mitigate the likelihood of damage, loss, and pollution due to a future disaster in the same locale. The report also provides a NEPA practice aid for prospective applicants for federal grants.

These reports should be a go-to-guide for new attorneys practicing in environmental and emergency response as well as seasoned attorneys looking to explain nuanced laws to either their clients or the public-at-large. They are written objectively and succinctly in contrast to law review articles or commercial practice aids which tend to be geared towards scholars or a narrow group of academics.

**CLIMATE CHANGE AND INTERNATIONAL RELATIONSHIPS: U.S. AND MEXICO REACH DEAL OVER COLORADO RIVER CONSERVATION PROGRAM**

By: Matthew Walker

In an international agreement formalized on September 27, 2017, the United States and Mexico agreed on a plan to preserve the Colorado River and the efficient use of its resources in an era of changing conditions. The deal directs millions of dollars to conservation and restoration projects on the River, as well as calls for the nations to develop contingency plans to in the event of drought brought upon by the potential effects of climate change. It comes at a time where the effects of drought and wildfires are prevalent in the western states and the political relationship between the two nations has become increasingly more volatile over issues of immigration and border security.

The nine year agreement is actually the latest phase in a long history of treaties and agreements concerning the utilization of border waters. The U.S. and Mexico originally entered into the Mexican Water Treaty of 1944, establishing the International Boundary and Water Commission and governing how the U.S. and Mexico manage and allocate use of the river, which flows through both nations. This recent agreement further expands upon a 2012 amendment that is set to expire at the end of this year. The treaties and agreements guarantee a specific quantity and quality of water is available to Mexico, where it is important for agricultural uses in an area without other water resources.

Sustainable use of downstream water from the Colorado River in Mexico provides managers of water use in river basin States with more adaptability over the appropriation of water resources. Because the Colorado River crosses international and state borders, it is managed and operated under numerous compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines, collectively known as the "Law of the River." Further, western states within the river basin generally prescribe to a regime known as "prior appropriation," whereby water users that are "first in time" are given priority over the continued access and use of water resources so long as they are applied to a "beneficial use"—agricultural, industrial or household.

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The system can often strain water managers in apportioning water rights and put water interest holders in dispute in times of water scarcity. Eliminating waste and ensuring a sustainable flow can remove considerable stress from an already complex system.

Under the deal, Mexico is committed to doing more to conserve water from the Colorado River. The U.S. agrees to invest $31.5 million in those conservation efforts in Mexico to reduce the country’s usage, particularly in agriculture. This includes lining irrigation ditches to reduce loss and providing more efficient irrigation equipment. Further, Mexico is allowed to store some of its share of the river water in Lake Mead in the United States if it is not needed for use at the time. Mexico is then able to withdraw the water at a later time, unless Lake Mead’s water supply is also deficient, tying Mexico in during periods of water scarcity. The surplus water saved as a result of the conservation efforts is to be divided between the U.S. and Mexico, as well as applied to environmental projects.

This deal is particularly interesting given the tenuous relationship between the two nations over discussions of border security and immigration. It does, however, symbolize the powerful impetus of climate change and global environmental issues in international cooperation as nations work to prepare for the potential effects of a climate altered landscape. The deal is to be one of many international arrangements recognizing the importance of shared resources over political discourse, particularly in areas where such resources are absolutely vital to the economic general survival of the population. It provides a basis for discussion among other nations that may need to overcome their political differences in order to ensure the viability of their populations and future generations.

**SHEADING THE LIGHT ON MEDIATION AS THE PREFERRED METHOD TO CONFLICT RESOLUTION**

By Armita Azad.

The “Quiet Revolution” has transformed the American conflict resolution in the twentieth century between the courts and government agencies for a more effective dispute resolution procedure. Mediation and arbitration both play a role in resolving disputes outside the court. These methods of conflict resolution both assist parties into resolving disputes according to the party’s needs, and take in account personal or business priorities and interests which no court judgement is able of addressing. Both approaches are tailored to the trend of judicial relief. So why is it that during the recent years the parties tend to lean more towards mediation, instead of arbitration or litigation? It is commonly known that binding arbitration is often perceived as a preferred method of going to court, it is always more formal, time consuming and expensive in comparison to mediation, which hands over the final decision-making authority to a third party.

More recently so, arbitration has become more adversarial in which the parties are obliged to proceed with their lawyers and a third-party decision makers that will impose the judgement. For those reasons business lawyers often persuade parties to only enter into arbitration after either negotiation or mediation has failed, instead of having a judge and jury to decide the case based on the law and facts, which often leads to one sided results. Instead, the whole idea in mediation is to use a neutral third party to facilitate a deal amongst the parties. Mediation has

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the advantage of reorienting parties towards each other, not by imposing rules on them. Instead, it assists them with achieving a new shared perception of their relationship with an innovative view that will redirect their attitudes towards each other. When parties mediate, their relationships can be restored; however, not all relationships will survive when the conflict escalates into a legal dispute and not all should. In this scenario, the attitudes of the mediators are also significant for the parties and council, as they can start a “pre-dispute facilitation” method of communication by understanding and collaborating the hardened and adversarial attitudes that arise from active disputes.

In arbitration, a judge and jury decides the merits of the case based on the law and facts, which leads to one sided results. On the other hand, the whole idea of mediation is to use a neutral third party to facilitate a deal with mutual interests amongst the parties. For these reasons, mediation is a favored ADR technique as the focus is to move the parties toward settlement through compromise and negotiation. This only works if the parties to the mediation process are not firmly entrenched in their position, and have a strong stance based on principle, or hold the idea that litigation is the only way they will succeed to reach their goals. To sum, mediation is one of the preferred methods of dispute resolution but only if the parties are ready to compromise in the interest of transactional cost avoidance and quantification of a palatable loss or gain.

NEWS AND ANNOUNCEMENTS

Call for the Vice-Chairs!

The committee is soliciting volunteers to serve as committee Vice Chairs. Applications should be sent to the Chair, Anthony DeStefano, at antonmd83@gmail.com, with final approval to come from the YLD Director.

Vice Chairs would help execute the Committee’s plan such as committee resolutions, quarterly publications, and managing social media sites.

A copy of the resolution and accompany report can be found here

Monthly Committee Calls

YLD EER committee will generally hold a monthly call the third Wednesday of each month at 12:30pm Eastern Standard Time. The calls will provide updates on the committee’s plans for upcoming meetings, programming, publications, and other activities.


To join the call, please use the following information: (712) 775-7031; code: 310148. We look forward to hearing from you.

Interested in writing for the Committee?

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Please reach out to Michael Walker, Vice Chair and Content Editor, at MWalker@atg.state.il.us, or Anthony M. DeStefano, antonmd83@gmail.com.

Publication submissions for the Fall Quarter are due to the Content Editor on October 1, 2017. EER has two types of publications. The first is for the Quarterly Newsletter which provides developments and updates in the law; each article is roughly 200-300 words. The second is the 101 Practice Series which are short practice aids to educate practitioners; each article is roughly 500-600 words. Further guidance on the 101 Practice Series is here: https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series.html.