Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Energy and Natural Resources Litigation Committee Newsletter

Vol. 2, No. 1 December 2013

MESSAGE FROM THE COMMITTEE CHAIR

David Johnson

In an effort to bring you cutting-edge legal news about energy and natural resources litigation issues, ENRL has gone social this year! Ok, we are not planning any big parties, but we hope that you have been enjoying our new bimonthly e-mail offerings, our posts to ENRL's webpage, and our new LinkedIn page, which can be found here: http://www.linkedin.com/groups?gid=5168736. Please join us there for discussions about the issues affecting your practice and how ENRL can benefit you.

Keep an eye out for the invitation for SEER's Annual Spring Conference to be held on March 20–22, 2014. This is the last spring conference to be held in Salt Lake City, so I would also suggest keeping a lookout for deals on skis, snowboards, or even paraskiing equipment. While in Salt Lake City, we hope to follow up on our ENRL dinner at the Fall Conference in Baltimore with an ENRL happy hour at the Spring Conference.

Finally, our next newsletter will be upon us soon, so keep an eye out for an e-mail in the next few months. If you already have an article and would like to discuss its inclusion in the newsletter, please contact Brittany Tofinchio at bktofinchio@aol.com.

WHAT YOU DIDN'T SAY: IMPLIED OBLIGATIONS AT THE CUTTING EDGE OF NATURAL GAS DEVELOPMENT

Barry C. Bartel

Domestic natural gas production is the key to energy independence, we are told with headlines like "Natural Gas Equals Energy Independence and Economic Rejuvenation." Robert Lenzner, *Natural Gas Equals Energy Independence and Economic Rejuvenation*, FORBES, July 20, 2012. Recent discoveries of natural gas in North Dakota, Texas, Wyoming, Colorado, and other states have significantly increased estimates of natural gas reserves. *Id.* As more reserves have been discovered, U.S. natural gas wellhead prices spiked and dipped more frequently and dramatically in the past decade than did stock market indexes. *See* U.S. Natural Gas Wellhead Price, http://www.eia.gov/dnav/ng/hist/n9190us3m.htm. With the importance of natural gas development, dramatic swings in prices, and significant expansion of reserves from new discoveries, courts have been asked to help determine who pays for what when natural gas is produced under an oil and gas lease. In some cases, obligations implied in leases lead to disputes over whether groups of royalty owners share common questions with common answers such that a class action is appropriate under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

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Brittany Tofinchio, Editor

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

January 24-26, 2014
Winter Council
Scottsdale, Arizona

Feb. 5-11, 2014
ABA Midyear Meeting
Chicago

Mar. 20-22, 2014
43rd Spring Conference
The Grand America Hotel
Salt Lake City

April 10-11, 2014
ABA Petroleum Marketing Attorneys' Meeting
The Ritz-Carlton Hotel
Washington, DC

May 2-4, 2014
Spring Council
Nashville, Tennessee

Jun. 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas

Aug. 7-12, 2014
ABA Annual Meeting
Sheraton Boston Hotel
Boston

Oct. 8-11, 2014
22nd Fall Conference
The Trump Doral Golf Resort & Spa
Miami

For full details, please visit www.ambar.org/EnvironCalendar

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1. How Does Production of Natural Gas Occur?

"Our nation's deference to private ownership of minerals is inherited from England, where the common law applied the Latin maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*: to whomsoever the soil belongs, he owns also to the sky and to the depths." James C. Smith, *Theories of Subsurface Ownership: An Overview*, 14 E. MIN. L. FOUND. § 4.01 (1993). "Of course, any portion of the space between the centre of the earth and the sky may be severed from the rest and be capable of a distinct ownership." WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 18 n.7 (1895).

Because they often lack the resources and/or the technical expertise to produce subsurface minerals, landowners can lease an interest in those minerals to others. When oil was discovered in Pennsylvania in the mid-1800s, the first oil lease was adopted almost word for word from early salt leases, and oil and gas leases developed with similarities. Robert J. Blake, *The Oil and Gas Lease*, 13 S. CAL. L. REV. 304, 309 (1939–40). The problem of securing capital for the risky venture of drilling the first oil well in Venango County, Pennsylvania, in 1859, was solved by the Seneca Oil Company, heralded more recently as "The Pennsylvania Start-up That Changed the World." Daniel Yergin, *The Pennsylvania Start-up That Changed the World*, FORBES, Sept. 3, 2009.

An oil and gas lease conveys a portion of the ownership "between the centre of the earth and the sky." The owner conveys the right to produce oil and gas, known as the working interest, and retains a royalty (a portion of the net revenue from the production, as defined by the lease). The working interest owner can further share the risk and capital investment of production with other working interest owners, and typically enters into a joint operating agreement to define the rights and obligations of the working interest owners. The working interest owners must generally produce the oil or gas with no cost to the lessor. Parties to leases may dispute what costs may be deducted from the net revenue paid to the landowner in the form of royalty, particularly if the parties' obligations are not express but are deemed implied in the lease.

2. Who Gets What When Natural Gas Is Produced?

The written oil and gas lease severs a part of the ownership and defines the rights and obligations of the parties. An early series of lectures observed that "from the very beginning of the industry the storm-center of litigation in the jurisprudence has been the degree of diligence which an oil and gas lessee should exercise in the development of the lands covered by his lease." James A. Veasey, *The Law of Oil and Gas*, 18 MICH. L. REV. 446, 454 (Apr. 1920). Veasey argues that a fundamental misconception that oil and gas can "wander at will" like wild animals led to two doctrines—that covenants dealing with time and extent of development be construed strictly against the lessee, and that certain implied covenants would be read into the lease in order to bring about prompt development. *Id.* at 453–54, 455.

Implied covenants developed to the point that Professor Merrill devoted entire treatises to them in 1926 and 1940, where he described implied obligations to begin drilling, to keep drilling, to operate diligently, and to protect the resource. MAURICE H. MERRILL, THE LAW RELATING TO IMPLIED COVENANTS IN OIL AND GAS LEASES 20 (1926), 23 (1940). Various authorities articulated four essential implied covenants: "(1) To begin a well within a reasonable time after execution and delivery of the lease; (2) To develop the land reasonably after discovery of oil or gas in paying quantities; (3) To operate the premises reasonably after wells are on production; and (4) To protect the premises from drainage by drilling offset wells." Robert J. Blake, *The Oil and Gas Lease, Part Two*, 13 S. CAL. L. REV. 393, 424 (1939–40).

From early on, the implied duty to operate wells diligently included the obligation to market the product. MERRILL at 148 (1926), 212 (1940). After all, production is meaningless and produces no royalty for the landowner unless production is sold. Merrill foreshadowed some of the issues currently in dispute when he suggested that "no part of the costs of marketing or of preparation for sale is chargeable to the lessor," MERRILL at 214–15 (1940), and recognized that "ordinarily, the product is marketed from the lease, and the lessee's duty is merely to arrange for sale there," *id.* at 219. He concluded that it is "impossible to conceive of any arguments" that lessor must account to lessee for sale at a distant market without allowance for transportation and that it seems preferable that lessee account for the price received for sale at a distant market less the reasonable cost of transportation from the leased property to the market. *Id.*

Kenneth M. Klemm provides a helpful survey entitled *Implied Covenants: Recent Developments in Failure-to-Develop Cases and Other Implied Obligations Under Mineral Leases*, 57 ROCKY MNT. MIN. L. INST. 20–21 (2011), demonstrating that courts in different jurisdictions approach implied covenants in different ways. *See also Stirman v. Exxon Corp.*, 280 F.2d 554, 564–65 (5th Cir. 2002). While Klemm addresses the duty to market production once production has begun, significant litigation in recent years has dealt with an extension of that covenant to an obligation to create a "marketable product" before costs can be deducted. *Id.* at 20–25. Only a few jurisdictions have imposed an obligation to obtain a marketable product before deductions can be taken, and each has stated the test differently. *See Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998) (test allows deductions after marketable product obtained); *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 891 (Colo. 2001) (test includes a location component); *Sternberger v. Marathon Oil Co.*, 894 P.2d 788, 791 (1995). Other jurisdictions have rejected the marketable product rule. *See Bice v. Petro-Hunt, L.L.C.*, 768 N.W.2d 496 (N.D. 2009) (declaring that ("[w]e join the majority of states adopting the 'at the well' rule and rejecting the first marketable product doctrine."); *Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225, 242 (5th Cir. 1984) (royalty calculated on value of gas "at the well"); *see also* PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS AND MEYERS, OIL AND GAS LAW, § 645.2 (LexisNexis Matthew Bender 2012).

3. Trends in Litigating over Natural Gas

Analyzing implied covenants related to drilling the initial well, how many further wells are necessary, and what is necessary to protect against drainage, require fact-specific inquiries. A breach of one of those obligations could lead to cancellation of the lease. *See, e.g.*, *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905) (a leading case discussing cancellation for breach of implied covenants).

However, where the implied obligation arises after gas is produced and deals with the marketing of the gas, courts have been asked to address claims for damages by large groups of royalty owners under the class action mechanism of Fed. R. Civ. P. 23 or similar state statutes. With the more recent implied covenant to obtain a marketable product announced by some courts, numerous class action cases have been filed in Oklahoma under *Mittelstaedt*, in Colorado under *Rogers*, and in Kansas under *Sternberger*.

States address these obligations in different ways, and these issues could lead to a variety of approaches to defining the rights and obligations under oil and gas leases.

<u>Litigation over the Existence and Scope of a Marketing Covenant:</u> In jurisdictions that have articulated a marketable condition rule, litigation interpreting and applying the rule will continue. In jurisdictions that have not addressed the question, courts will be asked to determine whether the implied covenant of marketability applies and whether there is a marketable condition component. Further, courts will be asked to determine whether

covenants dealing with marketability create common issues for class treatment.

Existing Lease Language: Implied covenants do not override express lease language. Litigation will continue to determine the meaning of language in existing leases and whether such leases give rise to an implied covenant dealing with marketing, particularly where they were entered into in different marketing environments. *Contrast Rogers*, 29 P.3d at 896 ("'at the well' language is silent with respect to allocation of costs") *with Piney Woods*, 726 F.2d at 240 ("'at the well' refers not only to the place of sale but also to the condition of the gas when sold").

New Leases: Bearing in mind that courts may interpret lease language differently, leases can be amended or new leases executed with language specifying more clearly how gas is to be marketed and how deductions are to be treated. Settlements of class actions have also clarified how leases are to be interpreted to avoid future disputes.

More Defined Classes: Particularly where courts have articulated the marketable condition rule in non-class cases, like *Mittelstaedt* in Oklahoma and *Rogers* in Colorado, litigation over whether the rule creates common issues for class treatment will continue. Federal district courts, applying state law on the marketable condition rule, have reached different conclusions with respect to class certification. The Tenth Circuit provided guidance on those issues in two recent rulings: *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 12-7047, 2013 WL 3388629 (10th Cir. July 9, 2013) (Oklahoma) and *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. July 9, 2013) (Kansas). Both cases vacated decisions certifying statewide classes for underpayment of royalty and remanded to consider lease language, marketability, and damages in the predominance inquiry.

Trial: To date, class actions applying the marketable condition rule have rarely been tried to verdict. In *Bridenstine v. Kaiser-Francis Oil Co.*, Case No. CJ-95-54 (Beaver County, Okla. Dist. Ct. 1997), the jury determined that gas was in marketable condition at the well. In *Mleynek et al. v. K.P. Kaufman Co., Inc.*, Case No. 07-CV-3268 (Denver, Colo. Dist. Ct. 2009), the jury returned a verdict for defendant where the class claimed that defendant breached the leases by paying royalties on gas before it was in marketable condition. Although the certification decision is a defining moment that can "sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle non-meritorious claims on the part of defendants," *Kalow & Springut, LLP v. Commence Corp.*, 272 F.R.D. 397, 401 (D.N.J. 2011), more cases may proceed to trial, particularly if classes are of more limited scope as discussed above.

Legislation: Some jurisdictions may also address issues of deductibility through legislation. *See, e.g.*, Wyo. Stat. Ann. § 30-5-304 (West) (defining "costs of production" in the Wyoming Royalty Payment Act without reference to "marketable condition," unless otherwise expressly provided in the written agreement, Wyo. Stat. Ann. § 30-5-305 (West)).

As natural gas plays a more important role in the domestic energy economy, and as newly discovered reserves are developed, issues involving the apportionment of costs between the working interest owner(s) and the royalty owner(s) will be dealt with in a variety of ways.

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"SUE AND SETTLE": RULEMAKING THROUGH LITIGATION BEHIND CLOSED DOORS

Bennett E. Resnik

On October 4, 2013, the *Wall Street Journal* published Stephen Moore's, "Using 'Sue and Settle' to Thwart Oil and Gas Drillers: The Endangered Species Act is being employed more than ever to block development." Stephen Moore, *Using 'Sue and Settle' to Thwart Oil and Gas Drillers*, Wall St. J., Oct. 4, 2013, http://online.wsj.com/news/articles/SB10001424052702304176904579115234181105684. Moore's article discusses the growing concerns over the 'sue and settle' tactic of environmental advocacy groups through use of the Endangered Species Act (ESA), including but not limited to, the Center for Biological Diversity, WildEarth Guardians, Sierra Club, and the Environmental Defense Fund.

'Sue and settle' occurs when an agency deliberately discards its congressional and constitutional discretion by agreeing to lawsuits from outside groups that effectually dictate the main concerns and responsibilities of the agency through "legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public." U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors. http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf May 2013 (last visited on Oct. 21, 2013).

The first and foremost concern stemming from the 'sue and settle' tactic is the sidestepping of the Administrative Procedures Act (APA). APA section 553, commonly known as "notice-and-comment," statutorily structures the basic rulemaking process for the promulgation of an agency rule. Section 553 of the APA states:

> (b) General notice of proposed rulemaking shall be published in the Federal Register . . . (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553.

Though the APA does not require any specific time limits for agency actions, it leaves most deadlines to be determined in the individual agency's enabling statute. The APA states that, "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Additionally, the APA states that "the reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed. . . ." *Id.* at § 706. As such, environmental groups suing for allegedly failing to meet deadlines, or for delay of action, pressures the agency to elevate special interests and cooperate to make rules without proper public participation.

Stakeholders, individuals, or groups with an interest or concern in the matter, typically have a voice in these procedures, and at times, a seat at the table. Without agency notice and invitation to submit comments to the rule, these stakeholders' rights are being abandoned. Only after 'sue and settle' are stakeholders being told what will happen—creating political and structural tensions. Creating access to one set of stakeholders and not others is an affront to the democratic process. Circumventing the APA in the issuance of new and costly regulations burden regulated industries, adversely impact the economy, and must be prohibited. Moore at 1. In addition, the valid concern, that the "central functions . . . have been obfuscated by ideology," was espoused by Senator David Vitter in referring to the Environmental Protection Agency (EPA), but it should also be considered applicable to many other agencies. Nomination Hearing for Ms. Gina McCarthy to lead U.S. Environmental Protection Agency before the S. Comm. on Env't and Pub. Works, 113th Cong. (2013) (statement of Sen. David

Vitter, Ranking Member of S. Comm. on Env't and Pub. Works).

In his article, Moore provides an example dating back to the 1980s when "environmentalists successfully used a listing of the Northern Spotted Owl as threatened to cripple the timber industry. . . ." Moore at 1. The ESA is not the only act being used, nor are the burdens exclusive to the timber industry. The economic implications of 'sue and settle' are evident in several economic impact reports. Over 100 of EPA's new rules and regulations were consequences of 'sue and settle' agreements, creating tens of billions of dollars in new costs. William L. Kovacs et al., Sue and Settle 14 (Daren Bakst et al. project team, 2013). These regulations have been enforced on regulated industry with a lasting and substantial impact. For example, the oil and gas maximum achievable control technology (MACT) rule costs up to $738 million annually and the utility MACT rule up to $9.6 billion annually. *Id.* at 15 (citing 77 Fed. Reg. 9304 (Feb. 16, 2012)). This highly suspect policy-making procedure has not abated and has become a common tactic of environmental groups that target EPA for agency actions behind closed doors.

Regulation of greenhouse gas (GHG) emissions from the coal and natural gas industry has also been a focus for environmental groups using 'sue and settle' tactics; proving unfavorable to coal and natural gas business and development activities. EPA agreed to propose the first-ever motor vehicle GHG emission standards, now at center-stage since the Supreme Court granted review of several cases, including review of *Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006), consolidated with eight others. This profusion of litigation comes from the aftershock of *Massachusetts v. EPA*, 549 U.S. 497 (2007), where the Supreme Court held that the "Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change . . . and [that the] EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Mass. v. EPA*, 549 U.S. 497.

Included in the consolidated cases in front of the Supreme Court is *Southeastern Legal Foundation v. EPA* (Dkt. No. 12-1268), which brought forth the following question at issue to the court:

> May EPA exert authority over GHG emissions under the Clean Air Act where (1) EPA acknowledged that its interpretation of the Act is fundamentally inconsistent with both the express terms of the Act and the manifest intent of Congress and would lead to results that are "absurd" and "impossible" to administer, (2) there exist reasonable alternative interpretations of the Act that do not create such conflicts and absurd results, and (3) EPA's action was based on an irrational claim of scientific certainty in the face of ample contradictory and equivocal evidence in the rulemaking record?

Se. Legal Found., Inc. v. EPA, No. 12-1268 (U.S. Oct. 15, 2013).

The cases have been consolidated with the following question at issue: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." *Id.*

Rising use of the 'sue and settle' tactic to issue new regulations is imposing "tens of billions of dollars of costs on industry and land owners." Moore at 2. This costly trend is bending the APA and related regulatory rule promulgation procedures. These costs are not merely financial but have overarching implications geo-politically. For example, 'Sue and settle' tactics could be one of several barriers to the United States' energy independence, as a result of horizontal drilling and hydraulic fracturing. It is possible that this process will continue, federal administrators working with pro-environmentalist groups, which has the potential to remain as a thorn in the side of the regulated community.

Larger concerns permeate the issue surrounding 'sue and settle' tactics; specifically, affording due process. Oklahoma Attorney General Scott Pruitt stated, "The EPA is picking winners and losers, exhibiting favoritism, at the expense of due process and transparency." Oklahoma Office of the Attorney General, Attorney General Pruitt Leads Multi-State Lawsuit Demanding Transparency in EPA's Sweetheart Settlements with Environmental Groups, available at http://www.oag.state.ok.us/oagweb.nsf/0/4483F57934B29C1F86257BAA00635C21!OpenDocument. "Regulation-through-litigation" is a dangerous path to walk down; one would hope future litigation and rule making are properly addressed and not amalgamated in the guise of effective agency rule promulgation. *Id.*

This trend is being addressed in Congress by Sen. Charles Grassley (R. Iowa) and Representative Doug Collins (R. Ga.) through the proposed Sunshine for Regulatory Decrees and Settlements Act of 2013. H.R. 1493, 113th Cong. (2013). This legislation would address the political and structural tensions produced by the 'sue and settle' tactic by providing for increased transparency, requiring courts approving of consent decrees and settlements to account for public comments in accordance with the APA and provide that consent decrees and settlement agreements cases may be filed only after stakeholders have had the opportunity to intervene in the litigation, providing comments or entering a pending lawsuit. *Id.*

We find the APA on bended knee, hoping to become a necessity for rulemaking and promulgation compliance rather than a passive statute from the use of 'sue and settle'. Federal agencies should inform the public through the *Federal Register* for notice-and-comment at the beginning of 'sue and settle' negotiations, providing stakeholders the opportunity to intervene or allow for public comments. Additional concerns will be quelled if and when Congress passes the Sunshine for Regulatory Decrees and Settlements Act of 2013, returning the safeties of APA to the public and stakeholders.

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NEW LAWS PROMOTE DEVELOPMENT OF SMALL HYDROPOWER PROJECTS

Debbie A. Swanstrom and
Andrea I. Sarmentero Garzón

Hydropower supplies about seven percent of the U.S. electricity demand and is currently the nation's largest source of renewable carbon-free energy. The operational flexibility that pumped storage hydropower projects provide to the grid, by responding rapidly to supply and demand imbalances and maintaining power system stability, is particularly beneficial. Yet, reportedly only three percent of the dams in the United States currently generate hydropower. Congress therefore decided to change existing laws to promote more expeditious development of small hydropower projects.

On August 9, 2013, President Obama signed into law two new acts passed by Congress: (1) the Hydropower Regulatory Efficiency Act, Pub. L. No. 113-23, 127 Stat. 493 (2013) (Hydropower Efficiency Act); and (2) the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act, Pub. L. No. 113-24, 127 Stat. 498 (2013) (Reclamation Act). Both Acts streamline and expedite the regulatory approval process to facilitate development of small hydropower projects.

The Hydropower Efficiency Act

The Hydropower Efficiency Act (1) expands the Federal Energy Regulatory Commission (FERC) exemptions for small hydropower projects and conduits; (2) establishes a general exemption from Federal Power Act (FPA) license requirements for certain hydropower projects; (3) allows the term of preliminary permits to extend beyond three years; (4) directs FERC to investigate the feasibility of an expedited two-year licensing process for certain hydropower projects; and (5) directs the Secretary of the Department of Energy (DOE) to conduct certain studies.

1. Expansion of Existing Exemptions

This new law expands the small project exemption, provided in the Public Utility Regulatory Policies Act and codified in 16 U.S.C. § 2705(d), by increasing the capacity of projects eligible for this exemption from 5 megawatts (MW) to 10 MW. The new law also expands the existing conduit exemption, provided in the FPA and codified in 16 U.S.C. § 823a, by increasing the capacity of non-municipal projects eligible for this exemption from 15 MW to 40 MW. Municipal hydropower projects keep their prior 40 MW eligibility threshold for conduit exemptions. The new law maintains the FPA definition of "conduit" as any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

2. General Exemption from License Requirements

The new law exempts from the FPA's license requirements small hydropower projects that meet the following criteria: (1) use for electric power generation only the hydroelectric potential of a non-federally owned conduit, (2) have a maximum installed capacity of 5 MW, and (3) are not currently licensed or exempted from license requirements.

The Hydropower Efficiency Act requires any person, state, or municipality proposing to construct a qualifying conduit hydropower facility to file with FERC a notice of intent. FERC recently posted a template of this notice of intent on its Web site.

The Act also requires FERC to make an initial determination as to whether the facility meets the qualifying criteria within fifteen days after receiving such a notice of intent. If the initial determination finds that the hydropower project meets the criteria for exemption, FERC must publish public notice of the notice of intent. If an entity contests whether the hydropower project meets the criteria for an exemption, FERC must issue a final determination within forty-five days after the date of publication of the public notice. If no entity contests whether the hydropower project meets the criteria for an exemption, then the project will be deemed to meet the criteria for waiver within forty-five days after the date of publication of the public notice without further FERC action.

3. Extension of Preliminary Permits

FERC is now authorized to extend the preliminary permit term for up to two additional years beyond the three years currently allowed if FERC finds that the permittee has implemented activities under the permit in good faith and with reasonable diligence. In the prior regime, there was no extension of time for expired preliminary permits. The permittee was and still is allowed to file another preliminary permit application for the same location but it is not guaranteed to keep its licensing priority because the second preliminary permit application, like the initial permit application, is open to potential competing applications by other entities.

4. Expedited Licensing Process

Currently, licensing processes for hydropower projects may take up to five years. To expedite the licensing of low-impact hydropower projects, the new law directs FERC to investigate the feasibility of issuing a license for hydropower projects at non-powered dams and closed-loop pumped storage projects in a two-year period. Significantly, the new law states that this two-year period shall include any FERC pre-licensing process.

FERC must hold a series of workshops to solicit public comment on how to implement the expedited licensing process and develop the applicable qualification criteria. On October 22, 2013, FERC held its first workshop under Docket No. AD13-9-000. By February 2014, FERC must implement pilot projects to test the two-year licensing process. By February 2017, FERC must hold a final workshop to solicit public comment on the effectiveness of the tested two-year licensing process.

5. DOE Studies

The Hydropower Efficiency Act directs DOE to study (1) the technical flexibility that existing pumped storage facilities can provide to support intermittent renewable electric energy generation, including the potential for such facilities to be upgraded or retrofitted with advanced commercially available technology; and (2) the technical potential of existing pumped storage facilities and new advanced pumped storage facilities to provide grid reliability benefits.

The Reclamation Act

The Reclamation Act (1) provides that the Bureau of Reclamation (Reclamation) Power Resources Office is the lead office of small conduit hydropower processes; (2) defines “small conduit hydropower” as a facility capable of producing 5 MW or less of electric capacity; (3) excludes small conduit hydropower projects from requirements under the National Environmental Policy Act of 1969 (NEPA); and (4) establishes a right of first refusal for the lease of power privilege to irrigation districts or water users associations.

1. Lead Office

The new Reclamation Act amends the Reclamation Project Act of 1939 to authorize the Secretary of the Interior (acting through Reclamation) to contract for the development of small conduit hydropower projects. Reclamation’s Power Resources Office is established as the lead office of small conduit hydropower policy and procedure-setting activities. According to the Congressional Research Service’s summary of the enacted bill, H.R. 678, 113th Congress, 2013–2015 (2013), this “lead office” role is intended to exclude such activities from FERC’s jurisdiction.

2. NEPA Categorical Exclusion

The new law requires the Bureau to apply its categorical exclusion process under NEPA to qualifying small conduit hydropower projects. This exclusion does not include the siting of associated transmission facilities on federal lands. The application of this categorical exclusion under NEPA means that these small conduit hydropower projects in Reclamation’s conduits could be allowed to proceed without preparing NEPA environmental documents, such as an environmental impact statement.

3. Right of First Refusal

The new law requires that a lease of power privilege be offered first to an irrigation district or water users association operating or receiving water from transferred or reserved conduits. The law defines (1) "reserved conduit" as any conduit included in project works whose care, operation, and maintenance have been reserved by Reclamation; and (2) "transferred conduit" as any conduit included in project works whose care, operation, and maintenance have been transferred to a legally organized water users association or irrigation district.

If the irrigation district or water users association elects not to accept a lease of power privilege offer, Reclamation must offer the lease of power privilege to other parties.

Litigation Issues

The use of a categorical NEPA exclusion under the Reclamation Act and the expedited licensing process combined with the new exemption from license requirements under the Hydropower Efficiency Act are expected to reduce costs incurred by small hydropower project developers, including costs associated with long processes and protracted litigation.

These new streamlined processes and reduced bureaucratic and litigation costs should help induce construction of small hydropower projects. However, it remains possible that some environmental groups or third parties attempting to halt construction of specific hydropower projects will challenge the implementation of these processes.

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OFFSHORE WIND UPDATE

Maggie Palmer

There is some exciting news for offshore wind advocates. In September 2013, the federal government solicited indications of interest for the first offshore wind lease on the West Coast of the United States. Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Oregon, Request for Interest, 78 Fed. Reg. 59,968–72 (Sept. 30, 2013).

In May 2013, Principle Power precipitated the government action when it submitted a request for a commercial wind lease 16 nautical miles off the coast of Oregon's Coos Bay. *Id*. at 59,969; Elizabeth Harball, *Renewable Energy: Will Ore. Test Project Bring Offshore Wind to the West Coast?*, ENVIRONMENT & ENERGY PUBLISHING (Oct. 9, 2013), http://www.eenews.net/stories/1059988558. The Bureau of Ocean Energy Management (BOEM) then published the solicitation of interest in the *Federal Register* pursuant to subsection 8(p)(3) of the OCS Lands Act, which requires that renewable energy leases be issued on a competitive basis unless there is no competitive interest. 43 U.S.C. § 1337(p)(3). Indications of interest were due October 30, 2013. *Id*. at 59,969. The government has not yet released a list of the parties that submitted interest.

Principle Power's proposed "Windfloat Pacific Project" would have a capacity of 30 MW which would be generated by five floating turbines. Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Oregon, Request for Interest, 78 Fed. Reg. at 59,969. It would be located 15 miles off the coast of Coos Bay in water that is approximately 1,400 feet deep. *Id*. at 59,969–70.

Other Offshore Projects

There is news from the East Coast as well. Here are some updates on current projects:

- Maine: The United States's very first offshore wind turbine is up and running off the coast of Maine. Dave Levitan, *Is US Offshore Wind Power Finally Ready to Take Off?*, The Guardian, Sept. 23, 2013, http://www.theguardian.com/environment/2013/sep/23/us-offshore-wind-power-take-off. Situated in Castine Harbor, Maine, and rising only 60 feet in the air, the turbine has a 20-kilowatt capacity that should provide enough power to provide electricity for a few homes. *Id*. The turbine is part of a pilot project by researchers at the University of Maine. *Id*. If successful, the project could be scaled up to 6 MW and deployed near Monhegan Island. Mitch Esguerra, *Maine Launches First US Offshore Wind Turbine*, The Daily Energy Report (June 3, 2013), http://www.dailyenergyreport.com/maine-lunches-first-us-offshore-wind-turbine/. Unfortunately, Maine's offshore wind energy sector has suffered a recent setback. In June of 2013, the Maine legislature, under the influence of Governor Paul LePage, passed a law forcing the Maine Public Utilities Commission to delay contract negotiations with the Norwegian energy company Statoil. Whit Richardson, *Statoil to Quit Work on $120 Million Offshore Wind Project in Maine*, Bangor Daily News (Oct. 15, 2013), http://bangordailynews.com/2013/10/15/business/statoil-to-quit-work-on-offshore-wind-project-in-maine/. Statoil, which planned to build a $120 million floating offshore wind farm off of Boothbay Harbor, pulled out of the project in October 2013. Tux Turkel, *Statoil Leaving Maine for More Certain Climate*, Maine Sunday Telegram (Oct.15, 2013), http://www.pressherald.com/news/Statoil_pulling_out_of_Maine_.html?pagenum=2. The company cited "changes in the framework conditions in the state, uncertainty around the commercial framework, and the schedule implications of project delays," which made the project "too uncertain to proceed." *Id*.

- Virginia: After worries surfaced that the government shutdown would delay the lease finalization for 113,000 acres off the coast of Virginia, BOEM accepted the lease, the lease payment, and the surety bond from Dominion Virginia Power during the shutdown. Peter Bacque, *Federal Shutdown Holds Up Offshore Wind Energy Lease*, Richmond Times-Dispatch (Oct. 11, 2013), http://www.timesdispatch.com/business/economy/federal-shutdown-holds-up-offshore-wind-energy-lease/article_47337075-faae-5e27-a9da-2d372002f215.html; Peter Bacque, *Dominion Virginia Power Signs Offshore Wind Lease*, Richmond Times-Dispatch (Oct. 13, 2013), http://www.timesdispatch.com/business/economy/dominion-virginia-power-signs-offshore-wind-lease/article_9e683a8a-2557-5d9b-890e-27790ab49215.html. Dominion Virginia Power bid $1.6 million on the offshore lease and the right to develop the first wind energy farm off the coast of Virginia. *Id*. Once it is fully developed, Dominion expects the offshore wind farm to power about 500,000 homes. *Id*. The first wind turbine should be installed in about 10 years if all goes well with federal and state permitting. *Id*.

- Rhode Island/Massachusetts: Deepwater Wind, a Boston-based developer, won the first offshore wind auction held by BOEM with a $3.8 million bid for a parcel of 165,000 acres located off the coasts of Rhode Island and Massachusetts. Dave Levitan, *Is US Offshore Wind Power Finally Ready to Take Off?*, The Guardian (Sept. 23, 2013), http://www.theguardian.com/environment/2013/sep/23/us-offshore-wind-power-take-off. The project is moving forward quickly: National Grid has agreed to a 20-year power purchase agreement, environmental studies have been completed, and final state and federal permit applications have been submitted. Navigant Consulting, *Offshore*

Wind Market and Economic Analysis (2013), http://www1.eere.energy.gov/wind/pdfs/offshore_wind_market_and_economic_analysis_10_2013.pdf. Deepwater Wind is also moving forward with the 30 MW Block Island wind farm, situated three miles off the coast of Block Island, Rhode Island. *Deepwater Wind Wins Auction to Develop Offshore Wind Energy Sites in Federal Waters*, Deepwater Wind (July 31, 2013), http://www.dwwind.com/news.

Litigation Update

There are relatively fewer challenges to offshore wind than in the past. After weathering 13 lawsuits, Cape Wind has just two appeals standing between it and production. Ehren Goossens and Christopher Martin, *Cape Wind Offshore Wind Farm Sees Lawsuits Cleared by Year-End*, Bloomberg (Oct. 22, 2013), http://www.bloomberg.com/news/2013-10-22/cape-wind-offshore-farm-sees-lawsuits-cleared-by-year-end.html. Jim Gordon, president of Energy Management, Inc., the company behind Cape Wind, hopes that the remaining decisions will be issued prior to the end of the year so that the project can qualify for the investment tax credit, which is a 30 percent tax credit for renewable energy projects that expires at the end of this year. *Id*. So far, no challenges have been filed against Oregon's project. Deepwater Wind, the Conservation Law Foundation, the National Resources Defense Council, the National Wildlife Foundation, Energy Management, Inc. (Cape Wind's developer), and NRG Bluewater Wind have likely staved off a number of lawsuits by reaching an agreement to modify construction timelines to protect the migration of endangered North Atlantic right whales. *Deepwater Wind, Conservation Law Foundation Reach Agreement to Protect Right Whales During Block Island Wind Farm Construction*, Deepwater Wind (Feb. 4, 2013), http://www.dwwind.com/news/deepwater-wind-conservation-law-foundation-reach-agreement-to-protect-right-whales-during-block-island-wind-farm-construction.com.

All in all, 2013 has been an exciting year for offshore wind advocates. From the installation of the nation's first offshore wind turbine to the beginnings of offshore wind on the West Coast, the overall trend is toward more offshore wind, not less.

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2014 Call for Nominations
The Section invites nominations for the following awards:

Environment, Energy, and Resources Dedication to Diversity and Justice Award

The Environment, Energy, and Resources Dedication to Diversity and Justice Award will recognize people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial, and ethnic diversity in the environment, energy, and natural resources legal area. Accomplishments in promoting access to environment/energy/resources rule of law and to justice can also be recognized via this award.

ABA Award for Distinguished Achievement in Environmental Law and Policy

This award recognizes individuals and organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Environment, Energy, and Resources Government Attorney of the Year Award

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year [consideration may be given to allowing projects that occurred in the 2012-2013 or 2013-2014 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2013 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 5, 2014.
These Awards will be presented at the ABA Annual Meeting in Boston in August 2014.

For further details about these awards, please visit the Section Web site at **www.ambar.org/EnvironAwards**

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