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INDUSTRY UPDATES

Watch that Routine Venting and Flaring!

By Tim Sowecke, GableGotwals

On April 29, the New Mexico Environment Department (NMED) announced a $24.5 million settlement with Ameredev II, LLC for violations of state air regulations. This is the largest NMED settlement ever for a civil oil and gas violation.

NMED's Environmental Protection Division first issued a $40.3 million Administrative Compliance Order to Ameredev in June 2023 related to production at its facilities between October 2018 and April 2020 that did not transport the produced gas to downstream processors, instead flaring the gas. "This settlement holds the company accountable for failing to follow the terms of their permit and improperly releasing a substantial amount of natural gas into the environment," said NMED General Counsel, Zachary Ogaz.

NMED Secretary, James Kenney, made the following statement related to the penalty: "Let this serve as a wake-up call to the oil and gas industry -- the Environment Department is using remote sensing technology, on-the-ground inspections, and responding to citizen complaints."

In addition to the civil penalty, Ameredev also agreed to: perform an independent, third-party compliance audit of its New Mexico operations; submit monthly reports of actual emission rates from each emissions unit operating under a New Mexico General Construction Permit; develop a mitigation project to conduct weekly Optical Gas Imaging inspections for each facility operating under a General Construction Permit for two years or implement advanced leak and repair monitoring technology; and remove certain equipment from its operations.

This landmark settlement underscores NMED's use of flyover and remote sensing technologies for enforcement of air regulations in the Permian Basin, and serves as a reminder to operators to inventory facilities in anticipation of more aggressive Clean Air Act enforcement at federal and state levels.

Two Major SCOTUS Decisions Changing Federal Regulation Landscape

By Dallas F. Kratzer III, Devon Alt & Mattie F. Shuler, Steptoe & Johnson PLLC

In the final days of the term that just ended, the Supreme Court of the United States (SCOTUS) issued two major decisions changing the federal regulation landscape – *Loper Bright* and *Corner Post*.

First, in *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024) the Supreme Court ended *Chevron* deference. For 40 years, *Chevron* required courts to defer to an agency's reasonable interpretation of rules and regulations within its purview. *Chevron* handed interpretative power to the executive branch, so as a practical matter, interpretations could change from one administration to another. Writing for the majority, Chief Justice John Roberts explained that *Chevron* is inconsistent with the Administrative Procedure Act and, for that reason, overruled it. Going forward, courts — not agencies — will interpret rules and regulations. Courts may still look to agency interpretations for guidance, but they owe those interpretations no deference.

Second, in *Corner Post Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 22-1008, 2024 WL 3237691 (U.S. July 1, 2024) the Supreme Court clarified when the statute of limitations runs on an Administrative Procedure Act claim. Section 2401(a) provides a six-year statute of limitations for claims against the United States. And *Corner Post* called on the Supreme Court to decide whether that period runs from publication of a regulation or from the injury caused by agency action. Writing for the majority, Justice Amy Coney Barrett reasoned that the period runs from the injury because that is when the plaintiff has a "complete and present cause of action." As a result, long-standing regulations are not immunized by the passage of time, and a party may seek redress if they do so within six years of the injury.

Together, *Loper Bright* and *Corner Post* open new avenues in cases involving federal regulations. For one, courts are no longer restricted by agency interpretations, so parties have greater opportunities to advance regulation interpretations that do not align with the interpretation of an

administration. Nor is a party bound to accept an injurious administrative action based on a decades-old regulation; rather, they retain the ability to seek relief.

The post-*Chevron* landscape is quickly developing. The same day the Supreme Court announced *Loper Bright*, Alaska litigants challenged new oil development restrictions from the Bureau of Land Management. And in the few days since *Loper Bright*, federal courts in Texas, Kansas, Missouri, and New York have published decisions applying it. The decision is also likely to affect state regulations because several states, including West Virginia, Kentucky, and Ohio, adopted *Chevron* deference and, although free to continue using *Chevron*, may abandon it in favor of the *Loper Bright* approach.

The Supreme Court concluded that *Chevron* deference was inconsistent with § 706 of the Administrative Procedure Act, which empowers reviewing courts to decide all properly presented questions about agency action, considering the whole and taking into account the rule of prejudicial error. There are areas, however, where deference to agency interpretation of its own rules may survive after the *Loper Bright* decision, particularly in areas affecting the energy industry. For example, the Clean Air Act provides that § 706 doesn't apply in Clean Air Act cases. A reviewing court could, therefore, continue to defer to agency interpretations of Clean Air Act regulations. Additionally, since the Court also reiterated that clear delegation to an agency makes deference appropriate, deference may still be applicable where the Federal Power Act and the Natural Gas Act are involved. Both acts delegate to agencies authority over many matters.

Alternatively, *Loper Bright* may bring with it significant changes to the energy industry in the absence of *Chevron* deference. Notably, one recent case pending in the Fifth Circuit is challenging a Department of Labor rule elevating considerations of environmental, social, and governance (ESG) factors. ESG considerations have become increasingly prevalent in the energy industry over the past few years. The DOL rule was previously upheld under *Chevron*, so this more recent case challenging the rule will provide a view into the new post-*Chevron* landscape. Moreover, the role of FERC may be subject to change, as Republican attorneys general raise objections to a recent rule on transmission, known as new Order 1920. Looking ahead, more so than ever, we will likely see agencies and industry advocates going to court to convince judges that their interpretation of a statute is correct.

Energy Sector: Mexican New Administration 2024-2030

By Adrián Ortiz de Elguea Leiva, Holland & Knight LLP (Mexico)

In the presidential elections held in Mexico on June 2, 2024, Claudia Sheinbaum Pardo emerged victorious. Sheinbaum, representing the 2018-2024 actual presidential party, clinched a substantial win, solidifying her position as the nation's new leader. The election witnessed remarkable voter turnout, underscoring a watershed moment in Mexican political history.

The new Mexican President has become the first woman elected to occupy the Presidency in the country's history. During her electoral campaign, Sheinbaum proposed various aspects within her future National Plan which would receive greater attention to drive development, including: (i) Energy; (ii) Environment; (iii) Infrastructure; (iv) Mobility; (v) Telecommunications; (vi) Taxes and Economy; (vii) Public Administration; (viii) Health; (ix) Poverty and Equality; (x) Security and Justice; (xi) Labor; (xii) Education; (xiii) Innovation in Science and Technology; and (xiv) Political-Electoral Aspects.

Within the energy sector, the main proposals focus on promoting and supporting renewable energies and energy efficiency, the use of green hydrogen, geothermal energy, solar panels, petrochemicals and fertilizers, national production of natural gas, and strengthening and providing financial support to PEMEX and CFE in order to continue to bolster themselves as strategic public companies for the benefit of the national interest and consumers. Also, efforts would be made to control prices of fuels, electricity, and gas, as well as to reinforce the transmission and distribution capacity of electricity.

Similarly, Sheinbaum proposed that the new administration would endeavor to consolidate the Sonora Plan, a USD $7 billion plan for the construction of new industries and renewable energy projects, and promote electromobility by supporting the entire country in developing electric transport systems to benefit the environment.

In the same vein, the Mexican President would be committed to an energy transition that promotes the development of renewable energies, primarily solar and wind power. Her plan includes the installation of around 80 GW of clean energy, requiring an investment of USD $13.6 billion, some of which would go toward the rehabilitation of hydroelectric plants.

According to a document issued by Sheinbaum, titled "*100 Steps for Transformation*," efforts would be made to ensure timely and effective intervention in price and tariff setting, establish the right to electricity as a human right, replace fossil fuels with renewable energies, and strengthen

distributed generation in the country, clean and low-carbon footprint transportation, as well as research, technological development, human resources training, and innovation.

In conclusion, the energy sector under Mexico's new administration from 2024 to 2030 is poised for significant transformation. With President Claudia Sheinbaum Pardo at the helm, the nation is embarking on an ambitious journey towards sustainable development and clean energy adoption. Her new administration is committed to achieving environmental goals outlined in international agreements like the Paris Agreement, while also prioritizing social welfare and economic growth. Through a combination of policy interventions, technological advancements, and public-private partnerships, Mexico may be well positioned to emerge as a leader in the global transition towards a cleaner and more sustainable energy future.

Nuclear Energy – Growth and Transactional Opportunities

By Eric Pogue, S. Kris Agarwal, Norman C. Bay, John R. Thomas, Archie Fallon, Dale Smith, Niko Letsos, and Jacob Bell, Willkie, Farr & Gallagher LLP

Nuclear energy generation is enduring and expanding on several fronts, which has raised the likelihood of Another Nuclear Renaissance. Over the last few years, and picking up steam in 2024, nuclear energy is having a moment. This moment is being driven by the need for baseload resources, high-load growth, efforts to decarbonize the grid, government policies that support nuclear energy, and bipartisan political support. While challenges remain and there are no guarantees that this renaissance will fare better than the last, below we discuss some of the leading technologies and ancillary areas of the nuclear power market, both new and old, that underlie many of the opportunities in this sector

1. Small Modular Reactors

Small Modular Reactors (SMRs) have the potential to play a key role in the development of the next generation of nuclear power. SMRs are generally defined as reactors with a power output of 300 megawatts or less – compared to the typical 1,000-megawatt output of traditional reactors. Given SMRs' ability to have small physical footprints, reduced capital costs, and relative ease of siting, SMRs may provide a near-term path forward for resource-intensive industries with carbon-free, 24/7 power needs. *See* *https://www.energy.gov/ne/advanced-small-modular-reactors-smrs*. Light water-cooled SMRs, which can take the form of pressurized water reactors or boiling water reactors, may see deployment as early as the late 2020s. *See* *https://www.iaea.org/topics/water-cooled-reactors*. Other, nontraditional coolant SMRs, such as those that deploy liquid metals, salts, and gases are also in development with anticipated future deployment. With the capability to provide baseload generation without having the footprint of a full-scale nuclear plant, SMRs have been supported by a suite of programs at the U.S. Department of Energy (DOE), such as the Advanced Reactor Demonstration Project, which has a history of bipartisan legislative support.

2. Existing Reactors in the United States

There are currently 94 nuclear reactors in 54 nuclear power plants in 28 states. In 2023, nuclear plants provided 18.6% of the nation's electricity, nearly equal to wind (10.2%), hydro (5.7%), and solar (3.9%) combined. *See* *https://www.eia.gov/tools/faqs/faq.php?id=427&t=3*. On April 29, 2024, Waynesboro, Georgia saw the latest reactor begin commercial operation. *See* *https://www.georgiapower.com/company/news-hub/press-releases/vogtle-unit-4-enters-commercial-operation.html*. However, this recent commercialization is the exception to the rule. Over 90% of American plants in operation are over 30 years old.

Because of the critical role these plants play in addressing increasing load and constrained supply options, many of these plants are scheduled to continue operation for decades more. An initial license and renewal allow an operator to use a reactor for up to 60 years. Since it began operations to January 2022, the Nuclear Regulatory Commission (NRC) has renewed the licenses of 94 commercial nuclear reactors, including many that have since ceased operations. *See* *https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-reactor-license-renewal.html*. Beginning in 2022, the NRC began offering "subsequent license renewals" that can extend operation from 60 to 80 years. *See* *https://www.nrc.gov/reactors/operating/licensing/renewal/subsequent-license-renewal.html*. It can be more cost-effective to extend the life of existing plants rather than to build new ones. Nonetheless, the costs of extending a one-gigawatt reactor's life by 10 years could cost anywhere between $0.5 - $1 billion. *See* *https://www.iea.org/reports/nuclear-power-in-a-clean-energy-system*. There are many governmental programs to support the existing nuclear reactor fleet, including a new production tax credit pursuant to the Inflation Reduction Act.

3. Converting Coal Plants to Nuclear Plants

Converting coal plants to nuclear plants may be one of the next frontiers for nuclear energy. Coal plants – either decommissioned projects or projects near closure – offer existing interconnection capacity, site control, and other advantages that make these sites appealing for developers of other types of resources, including nuclear power. The DOE recently concluded that choosing to develop a nuclear plant at a retired coal plant could save 35% of construction costs. *See* *https://www.energy.gov/ne/articles/8-things-know-about-converting-coal-plants-nuclear-power*. Construction is often

the most unpredictable and greatest expense in developing a new nuclear plant. Considering that shuttering coal plants has significant economic impact on the surrounding community, stakeholders are interested in the coal-to-nuclear conversation.

4. Repowering Nuclear Plants

Shut-down nuclear plants offer even more savings to operators looking to provide nuclear energy compared to other options. Palisades Nuclear Plant in Covert, Michigan ceased operations in May 2022. On March 27, 2024, the DOE announced a conditional commitment of up to $1.52 billion for a loan guarantee to restore Palisades Nuclear Plant and have it resume operation until at least 2051, subject to NRC licensing. *See* https://www.energy.gov/lpo/articles/lpo-announces-conditional-commitment-holtec-palisades-finance-restoration-and. Palisades is on the path to becoming the first restarted nuclear power plant in American history. With repowering would come thousands of high-paying jobs, zero-emission energy, other regional benefits, and a model for repowering other decommissioned plants around the country. This could be a potential growth area for the nuclear industry.

5. Traditional "Full-Scale" Projects

In addition to SMRs, advances have been made in traditional reactor designs that have a typical output capacity of one gigawatt. Westinghouse Electric Company's AP1000 is the leading example, with the NRC approving the original design in 2005. The AP1000 aims to improve passive safety features in a pressurized water reactor with lower capital costs overall. America's newest reactor in Georgia, mentioned in Section 2 above, is an AP1000. Sanmen Nuclear Power Station in Zhejiang, China became the first plant to achieve criticality with an AP1000 design in June 2018. *See* https://www.world-nuclear-news.org/NN-Chinese-AP1000s-pass-commissioning-milestones-2206184.htm. Poland is moving forward with its first nuclear power plant utilizing AP1000 reactors, scheduled to enter commercial operations in 2033. *See* https://www.world-nuclear-news.org/Articles/Connection-to-grid-requested-for-Poland-s-first-pl.

6. Nuclear Fusion

Nuclear fusion has the potential to unlock unprecedented amounts of energy generation with few negative externalities, offering virtually limitless, clean power with no long-lasting radioactive waste. For the last 30 years, a common refrain has been that fusion is "a decade away," and the question now is whether advances in fusion technology will make commercial applications a reality. The Fusion Industry Association tabulates $6 billion in investment through the middle of 2023 and 25 companies that are aiming to deliver fusion-generated power before 2035. *See* https://www.fusionindustryassociation.org/wp-content/uploads/2023/07/FIA%E2%80%932023-final.pdf. Moreover, U.S. nuclear fusion company Helion Energy recently entered into an agreement with Microsoft to provide approximately 50 megawatts or more via nuclear fusion, with the project slated to come online and begin ramping up by 2028. *See* https://www.reuters.com/technology/microsoft-buy-power-nuclear-fusion-company-helion-2023-05-10/.

7. Complementary Infrastructure

The expansion of nuclear energy infrastructure will be a necessary component beyond reactors, encompassing a comprehensive ecosystem of support services and transmission needs. Thus, prospective investors should consider the entire life cycle of nuclear fuel when deciding to invest. This life cycle involves sophisticated production processes, secure storage solutions, and advanced technologies to manage and possibly even reprocess spent fuel. Additionally, the market for ancillary services, such as maintenance, safety inspections, and waste management, is well positioned to grow with the expansion of nuclear power.

Anticipating the Impacts of Spiking Demand from AI

By Robyn Parkinson and Ben Barnes, Dowd Bennett LLP

Artificial Intelligence (AI) has dominated the news cycle during the past few months. Setting aside its extraordinary potential for innovation, the growth of AI is already putting significant strain on the U.S. electricity infrastructure. This impact will be felt more strongly in Texas, specifically within the Electric Reliability Council of Texas (ERCOT), than in any other part of the country.

Developing new AI technologies requires an enormous amount of electricity. It reportedly took over 1,200 MWh of energy to train version 3 of ChatGPT according to The Brussels Times, and version 4 required an estimated 50 GWh per Forbes. Even after AI products are operational, they demand more energy than their non-AI counterparts. AI servers can use more than ten times the energy of traditional servers, *Id.*, and posing a question to ChatGPT consumes 25 times more energy than a traditional Google search. The Brussels Times.

The AI industry, with its enormous computational power requirements, will only continue on this path of exponential growth. Currently, data centers account for approximately 2.5% of the nation's energy demand. This number could reach 20% by 2030, with AI being the major contributor. Motley Fool. North Texas is second only to Virginia in the data center marketplace, and it is growing rapidly. Government Technology. Texas is an attractive location for data centers, for

both established tech giants and aspiring startups. Power is relatively cheap and generally less volatile. Texas' geographic centrality (with ease of access from both New York and Silicon Valley) and its infrastructure support rapid growth in data center demand. *Subcontractors USA*. The state also has sufficient land to support the industry, and its solar resources allow eco-conscious corporations to boast about low carbon footprints. *Industrial Sun*.

ERCOT is already preparing for the influx of demand and the unique challenges it will impose on existing infrastructure. Data centers and other facilities with aggregate peak demand greater than 75 megawatt are defined as "Large Loads" by ERCOT. *ERCOT Monthly*. ERCOT projects that the number of Large Load projects will grow by a factor of 10 over the next four years. *Id.* Large Loads can react unpredictably during times of volatility or scarcity, making them more difficult for regulators to account for during planning. *ERCOT Large Load Overview*. Moreover, unplanned disconnections in Large Loads can have an outsized impact on the grid. *Id.*

The unprecedented demand from AI, combined with Texas' ongoing population growth, could increase pricing volatility within ERCOT. The anticipated surge in electricity consumption might also lead to sustained periods of high pricing with greater frequency than seen in the past. Litigation is likely as infrastructure development catches up with demand. Although we are unlikely to face another crisis matching the severity of February 2021's Winter Storm Uri, we can apply lessons learned from that event to mitigate future risks from high pricing events.

Winter Storm Uri led to a broad spectrum of litigation, some of which was unavoidable. But some commercial disputes could have been avoided or simplified if the parties had implemented clearer dispute resolution procedures in their power purchase agreements. Many parties defaulted upon receiving extraordinarily high electricity invoices, seizing on any contractual ambiguity to justify delay or nonpayment. The old adage that "possession is nine-tenths of the law" became a reality for many commercial partners in the months following the storm.

However, where parties had adequately specified the consequences of default and negotiated appropriate assurances for commercial obligations, disputes upon default were mitigated or avoided altogether. For example, the Edison Electric Institute (EEI) form Master Power Purchase Agreement includes detailed dispute resolution procedures. *See EEI Master Contract*. Beyond defining what constitutes an event of default, the EEI form includes additional detailed procedural terms that provide practical clarity to parties facing default. Specifically, the form provisions: (i) prescribe how and when the non-defaulting party can terminate the agreement; (ii) allow the non-defaulting party to net out settlement amounts; (iii) explain how the parties should calculate the value of the contract being terminated; and (iv) provide procedures for resolving a disputed termination payment. Relatedly, the EEI form agreement also contemplates that the parties should negotiate an appropriate form of collateral in a suitable amount to protect their respective interests under the agreement. Post-Uri, parties with robust power purchase agreements supported by adequate collateral had fewer issues collecting on their counterparties' obligations.

Too often, dispute resolution terms are deprioritized or ignored in commercial negotiations. With the anticipated uptick in demand in ERCOT and associated pricing volatility, parties are wise to carefully consider how their commercial relationships could end during negotiations. This is particularly true when negotiating with nontraditional and startup businesses within the AI sector, which could be less financially stable than traditional energy businesses that have dominated the space in the past. By negotiating for greater certainty in the event of a default, electricity market participants can minimize the downside risks of market volatility as AI-driven demand continues to increase.

Gale Force Winds: A National Push for Wind Energy in the Gulf Coast

By Victor Gregoire, Louis Grossman, Lily Pavy, and Michael Levatino, Kean Miller LLP

In the last decade, the United States has seen a societal and regulatory movement towards alternative energy including biofuels, natural gas, nuclear power, and solar power. As concerns over greenhouse gas emissions (GHG), particularly CO_2 emissions, increase, regulators, industry, and consumers are searching for the next generation of energy to replace and/or supplement fossil fuels. Each of the above referenced alternative energy sources received extensive investments and large-scale developments in the last decade; however, regulators are advocating for further reductions in GHG emissions by 2030. *Biden's Climate Act to Cut US Emissions by 2030 by 35-43%, Government Report Says*, Reuters (Sept. 2023); *see also CEQ Announces New Net-Zero Government Initiative Countries Joining U.S. to Cut Climate Emissions from Government Operations*, The White House, (Dec. 2023). Thus, a new form of energy is required to meet the ambitious task of reducing GHG emissions produced by the nation's power sources. This begs the question: what is the next hot ticket alternative fuel source? The answer – offshore wind energy.

Offshore wind is not new for the rest of the world, but the U.S. has only recently developed offshore wind with varying degrees of success. In the last five years, only two projects have been completed while one other project remains in development. Allegra Dawes and Joseph Majkut, *Tailwinds and Headwinds: The U.S. Offshore Wind Market*, Center for

Strategic & International Studies (Jan. 2023). Many of the proposed projects have stalled in the permitting process and are far from development. *Id.* Moreover, recent projects have faced significant issues with increasing development costs, low returns, project delays, lack of marine services and equipment, and project cancellations.

To combat these challenges, the federal government, through the Inflation Reduction Act, has implemented tax credits and other benefits to developers of offshore wind to reduce costs and burdens imposed by inflation, Covid-19, and project delays. With multiple benefits in place for the development of offshore wind, the states and federal government are now turning to the Gulf Coast for the development of offshore wind farms.

Louisiana is positioned to be a leader of offshore wind, not only in developments off the coast of the state, but in its ability to fill the national supply chain demands. Louisiana industry has long been prepared to tackle large-scale offshore developments due to its extensive knowledge of oil and gas operations, offshore services, and vessel construction. In fact, many of the vessels and equipment currently used in the building of wind turbines are manufactured in Louisiana and shipped around the world. Additionally, with Louisiana's lofty goal to drastically reduce Louisiana's GHG/CO_2 emissions by 2050, offshore wind may be the necessary step to meet the State's goals. Louisiana Priority Climate Action Plan (Jan. 2024).

As discussed in this article, developers and manufacturers face a long road to the successful development of offshore wind that comes at no small cost. Nonetheless, the continued commitment to offshore wind from government agencies, developers, and industry will help curtail the current downsides associated with the leasing, permitting, and development of offshore wind.

1. **Offshore Wind Energy in the United States – Behind the Curve with a Lot to Learn.**

In relation to the rest of the world, the United States falls far behind in the global market of development of offshore wind farms. Denmark installed the first offshore wind farm in 1991. *Offshore Renewable Energy*, European Union (Accessed May 2024). However, the U.S. did not complete its first commercial offshore windfarm until 2016, when the Block Island Wind Farm was completed with five offshore turbines. It was not until 2024 that the South Fork Wind farm was installed off the coast of Montauk Point, New York consisting of twelve turbines – double the size of Block Island. Jennifer McDermott, *The United States has its First Large Offshore Wind Farm, with More to Come*, Associated Press (March 2024).

In addition to the Block Island and South Fork Wind Farms, developers are building another offshore wind farm known as Vineyard Wind off the coast of Massachusetts with a total of 62 turbines. *Id.* Even though two projects will be operational by the end of 2024, developments have faced significant hardships resulting in two project cancellations in the last year.

The slow development of offshore wind in the U.S. is likely tied to the extensive predevelopment costs and permitting requirements which can take years to complete. Obtaining a commercial lease for development is only a small step in a much larger process to developing an offshore wind farm. *Permitting and Approvals*, New York State (Accessed April 2024). Developers must submit and obtain approvals for the site assessment plan, the construction and operation plan, the facility and design report, and the fabrication and installation report. Developers must also consult with and obtain approval from multiple federal agencies (such as NOAA Fisheries, Environmental Protection Agency, United States Army Corps of Engineers, and Advisory Council of Historic Preservation) under various federal acts (*e.g.*, Magnuson-Stevens Fisher Conservation and Management Act, Marine Mammal Protection Act, National Historic Preservation Act, and Endangered Species Act), including approvals under the Clean Air and Clean Water Acts. *Id.* Moreover, this arduous process does not account for the permitting and approval processes that may be imposed by individual states.

The Bureau of Ocean Energy Management developed a timeline that shows the process to develop a wind farm prior to even breaking ground on the project:

Jen McCann, *What is the Permitting Process for Large Wind Farms*, University of Rhode Island (July 2020). As shown in this timeline, developing a wind farm can take up to five years of preliminary planning before even installing the first turbine. This process can place a substantial financial burden on developers.

In fact, the Danish developer Orsted abandoned its two developments off the coast of New Jersey citing problems

with supply chains, higher interest rates, and failure to obtain the necessary tax credits to keep the projects afloat. Jennifer McDermott, Matthew Daly, Michael Hill and Mike Catalini, *Offshore Wind Projects Face Economic Storm. Cancellations Jeopardize Biden Clean Energy Goals*, Associated Press (Nov. 2023). The project cancelations alone will cost Orsted approximately $4.4 billion. Catherine Clifford, *Orsted Cancels Two New Jersey Offshore Wind Projects, Takes $4 Billion Writedown*, CNBC (Nov. 2023).

Nonetheless, the long permitting period, increased costs, high interest rates, and lost tax credits have not deterred developers and the federal government from pursuing and encouraging offshore wind. Orsted's CEO recognized that "maybe we were too optimistic. . . but at the time the industry was booming." Benajmin Storrow, *Maybe We Were Too Optimistic: Orsted Executive Talks About Offshore Wind Struggles*, E&E News (Nov. 2023). Orsted's CEO continued by stating, "we've got a whole bunch of lease area that positions us well for the future of offshore wind, and we just need to make sure the macro conditions and off-take conditions are suitable for us to continue to make investments." *Id.*

The challenges faced by industry and ongoing concerns with meeting federal and state goals of net zero carbon emissions have prompted the Federal Government to take measures to encourage and incentivize offshore wind developments at reduced costs.

2. United States Government is Implementing Tax Credits and Other Benefits to Ease the Cost of Developing Offshore Wind Farms.

The Inflation Reduction Act (IRA), which became law on August 16, 2022, established an energy community bonus structure to help revitalize areas impacted by industrial pollution and the fossil fuel industry. The IRA aimed to do this by building facilities that emit less carbon-intensive energy. And to boost development of renewable energy technologies, the IRA extends and increases tax credits for wind energy projects that begin construction prior to January 1, 2025. See U.S. Dep't. Of Energy, Off. of Energy Efficiency & Renewable Energy, DOE/GO-102022-5822: *Advancing the Growth of U.S. Wind Industry: Federal Incentives, Funding, and Partnership Opportunities* (2023), at 1.

Beginning in 2025, the IRA will convert energy tax credits to emissions-based, technology-neutral tax credits. *Id.* These tax credits will be available to all types of power facilities with zero or net-negative carbon emissions. Projects that began construction on or after January 29, 2023 must satisfy apprenticeship and prevailing wage requirements to benefit from the increased credit amount, subject to certain exceptions outlined in the rule. DOE/GO-102022-5822, at 1. Larger projects that do not meet the wage and apprenticeship requirements are capped at 20% of the full credit amount. *Id.* Under the rule, projects can also receive stackable bonus credits based on domestic manufacturing thresholds, location of the project, and investment in low-income communities. *Brownfield Overview and Definition*, EPA (Accessed May 8, 2024).

One tax credit available under the IRA is the Renewable Electricity Production Tax Credit (PTC). The PTC allows owners and developers of wind energy facilities, both land and offshore-based, to claim a federal income tax credit on every kilowatt-hour (k-Wh) of electricity supplied to the power grid annually for 10 years after a facility is placed in service. *Id.* at 2. The IRA extended the PTC through 2024, which previously expired for wind at the end of 2021. This means that wind projects placed into service after 2024 will now be eligible for a technology-neutral clean energy PTC of the same value. *Id.*

Additionally, under newly released guidance from the Internal Revenue Service (IRS), more offshore wind facilities will be able to qualify for bonus production and investment tax credits. This provides an incentive for companies to build clean energy projects in "energy communities." Kat Lucero, *IRS Opens Bonus Energy Credits to More Offshore Wind Sites*, Law 360 (Mar. 22, 2024). Specifically, the offshore wind project's Supervisory Control and Data Acquisition (SCADA) system – the "nerve center for an offshore wind project" – must be in an energy community to gain tax credit. *Id.* Energy communities, as defined by the IRS, include facilities that house control operations for offshore wind energy systems and can be located in ports. *Id.*

Energy communities may also include brownfield sites or areas where the economy once relied on the fossil fuel industry. These areas have significant employment or local tax revenue from fossil fields and a higher-than-average unemployment rate is the area most relevant to offshore wind projects. *Id.* Projects, facilities, and technologies developed in energy communities are now eligible to get a bonus of 10% points on top of the investment tax credit under Internal Revenue Code Section 48 or a 10% increase for those claiming a production tax credit under Internal Revenue Code Section 45. *Id.* New guidance by the IRS will likely spur the growth of offshore wind companies in historically disadvantaged communities. *Id.*

3. Developers Have Their Eyes on Louisiana's Coasts.

With increased tax benefits, offshore wind energy is taking root in Louisiana. In December 2023, Louisiana signed two agreements with foreign companies to build offshore wind farms within state waters. Tristan Baurick, *Louisiana Signs Agreements to Build First Offshore Wind Farms in State Winds*, Nola.com (Dec. 13, 2023). Danish company Vestas, operating as Cajun Wind, was granted almost 60,000 acres off the coast of Cameron Parish. *Louisiana Signs Agreements to Build First Offshore Wind Farms in State Waters*, American

Journal of Transportation (Dec. 18, 2023).

Mitsubishi, through its subsidiary company Diamond Offshore Wind, was approved for a 6,162-acre area off the coast of Terrebonne and Lafourche parishes. *Id.* Diamond and Entergy Louisiana signed a memorandum of understanding in 2022 to evaluate the potential offshore wind sites in Louisiana, which extend three miles from the coast. *Id.* Additionally, a Norwegian company, Kontiki Winds, has been negotiating an offshore wind agreement with the Louisiana Department of Natural Resources. *Id.*

It is unlikely that these projects will be large wind farms that power millions of homes; however, they have several advantages, including lower transmission costs and operation on a scale that permits testing of new technologies. *Id.* These major investments in Louisiana (if the projects come to fruition) will greatly benefit the local economies and build new industry within the state.

Louisiana's two offshore wind agreements come only four months after the first-ever wind lease auction in the Gulf's federally managed waters. In August 2023, a German energy firm, RWE, won the right to develop a wind project 40 miles south of Lake Charles on 120,000 acres. *Id.* Notably, federal lease areas off of the coast of Texas did not receive any bids. *Id.* Although Texas' coast offers stronger wind speeds, the draw toward Louisiana's coast is likely due to its political support for offshore wind development. *Id.*

Former Louisiana Governor Jon Bel Edwards submitted the Louisiana Climate Action Plan, which set a goal of net zero carbon emissions by 2050, and has pushed Louisiana to achieve a minimum of 5 gigawatts of power from offshore wind by 2035. *Id.* RWE referenced Edwards' support of offshore wind before bidding on the Lake Charles lease area. Edwards previously stated that wind energy products are a "natural fit" for Louisiana because it already has expertise and infrastructure from offshore oil and gas operations that could be transitioned to support offshore wind energy. *Id.*

4. Local Industry is at the Forefront of Offshore Wind Development, Technology, and Vessel Building.

As a known major U.S. energy producer, Louisiana continues to be pivotal in growing the offshore wind industry. Zach Bartscherer & Courtney Durham Shane, *Louisiana Businesses Bet Big on Offshore Wind*, Governing (Feb. 16, 2024). Louisiana recently held the first-ever Wind Energy Week, which focused on the potential of the offshore wind industry. Wind Energy Week spotlighted companies in Louisiana with expertise and capabilities to supply services needed for offshore wind. *Id.* Notably, eight Louisiana-based companies have been at the forefront of wind energy development. For example, Louisiana-based businesses Aries Marine Corps and Falcon Global helped develop Block Island, the United States' first commercial offshore wind farm. Greater New Orleans Inc., Regional Economic Development: *The GNO Wind Alliance – Power & Jobs for the Future* (2022), at 5.

Even Louisiana universities are offering education and training, in collaboration with developers, to create a job pipeline for the offshore wind energy industry. Bartscherer & Shane, *supra*. And with over 100 fabrication and manufacturing assets capable of producing components for offshore wind projects, Louisiana's manufacturing sector has significant potential to support offshore wind development. *Harnessing the Gulf: Louisiana's Future in Offshore Wind Energy*, Environment + Energy Leader, (Apr. 15, 2024). For example, shipbuilding is a vital area of expertise, with opportunities to supply vessels and fabricate structures like jacket foundations and electrical service platforms. *Id.*

Additionally, more than 175 Louisiana-based companies have expertise in planning, installation, operations, and decommissioning for offshore oil and gas. *Id.* Louisiana's workforce can easily be transferred from its traditional energy spheres to accommodate the growing wind energy market. Workers in marine transportation, offshore oil and gas, and advanced manufacturing sectors possess valuable experience and technical skills that can benefit offshore wind development. In addition to the many companies with specified expertise in oil and gas, over 450 Louisiana companies have the potential to provide products or services to the offshore wind industry. One report highlighted companies with strong specialist expertise in technologies as relevant to the offshore wind sector, including vessel design and build services, as well as experience in marine logistics. *Id.* This demonstrates that Louisiana's supply chain has strong potential to meet the needs of the offshore wind industry and contribute to its growth. *Id.* With Louisiana's port infrastructure, maritime construction, and traditional energy production, it is well-positioned to create new opportunities through renewable energy. This gives Louisiana an opportunity to emerge as a leader in the offshore wind industry.

5. Industry Finds Itself in the Perfect Position for Offshore Wind Developments Off the Coast of Louisiana.

Louisiana and its booming industrial sector are perfectly positioned to take advantage of the growing interest in offshore wind. Although many projects will not be without specific challenges (increasing costs, potential delays, and environmental concerns, to name a few), federal tax incentives and industry's ongoing commitment to the energy field sends a positive message – offshore wind will be developed off the coast of multiple states including Louisiana. The real question remains: who will take advantage of this rapidly developing industry?

Offshore wind has national appeal and industry interest with potential long-term returns. As more projects are completed, interest rates decline, and developers learn from

their mistakes, projects will become more feasible. However, infeasibility has not stopped developers and federal/local governments from encouraging offshore leases to spur development. While many of the proposed projects are still in the permitting phase, the next few years will spawn the initial development and investment into offshore wind projects.

Moreover, with proposed projects in Louisiana state waters and a recently awarded federal lease, Louisiana is poised to see significant investment into offshore wind. Not only is Louisiana government setting offshore wind as a primary goal under its "PCAP" plan, but local industry has heavily invested into the development of wind turbine manufacturing and Jones Act compliant vessels that will be central to many of the proposed projects across the country. Offshore wind is an essential part of the future of Louisiana's energy sector and will likely provide significant opportunities to all parts of Louisiana's economy.

A Message from IEL

The Institute for Energy Law is pleased to announce its 7th Leadership Class. Forty-six accomplished professionals were selected to take part in the 2024-2025 class. The class consists of energy professionals from seven states and the District of Columbia. Their experience in the field ranges from two to thirteen years. Several class members work in oil and gas litigation and transactions while others have experience in energy transition, land, CCUS, natural gas, hydrogen, oilfield services, and more.

The 2024-25 class dedicates time to their communities, their pro bono work, and volunteerism in diversity, refugee advocacy, mentorship, and other areas. The class includes veterans, U.S. immigrants, pianists, fitness enthusiasts, first-generation professionals, polyglots, and a former competitive skater. You can find the full list of 2024-25 IEL Leadership Class members here.

Upcoming IEL Programs

Registration is open for several Fall 2024 programs: 15th Appalachia Energy Law Conference, September 5th in Pittsburgh, PA (early bird pricing available until August 16th); IEL Upstream Lifecycle Conference, October 17th in Houston, TX (early bird registration pricing available until September 25th); and the 23rd Annual Energy Litigation Conference, November 12th in Houston, TX (early bird registration pricing available until October 22nd).

MEMBERS IN THE NEWS

IEL Advisory Board Member, The Hon. Michael Massengale (Former), FCIArb, was recently selected for the College of Commercial Arbitrators' 2024 Fellows Class.

Megan E. Griffith, member of IEL's 6th Leadership Class, recently authored a piece published by the American Bar Association Litigation Section. Read Megan's article here: "Steer Clear of Excessive Deposition Objections."

NEW MEMBERS

We are honored and excited to add the following companies and individuals to IEL's membership roster. Please join us in welcoming them to our organization!

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