



THE Energy Dispatch

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

CONTENTS

INAUGURAL IEL LEADERSHIP CLASS KICKS OFF ..	2
A CONVERSATION ABOUT THE DEEPWATER HORIZON LITIGATION AND ADVICE FOR LITIGATORS	3
SEE EACH OTHER: WHAT I LEARNED DURING MY SECONDMENT	7
TIPS FOR YOUNG ENERGY PROFESSIONALS	8
DRAFTING ENFORCEABLE NON-COMPETES IN THE ENERGY INDUSTRY	8
CIRCUIT SPLIT POINTS TO POTENTIAL SUPREME COURT CASE ON DISCHARGES	10
THE RAPID PACE OF CHANGE IN ENVIRONMENTAL REGULATION CONTINUES IN COLORADO	10

Issue Editor

Tod Everage

Publications Co-Chairs

Ashley Hallene and Erin Potter Sullenger

Newsletter Subcommittee

Members

Miles Indest and Lucas Liben

Interested in writing for *The Energy Dispatch*? Young energy professionals may submit articles or ideas for our next issue to IEL's Associate Director, Vickie Adams (vadams@cailaw.org).

Upcoming IEL Events

[6th ITA-IEL-ICC Joint Conference on International Energy Arbitration](#)

January 24-25, 2019 in Houston, TX

[70th Annual Oil & Gas Law Conference](#)

February 21-22, 2019 in Houston, TX

[3rd National Young Energy Professionals' Law Conference](#)

April 10-12, San Antonio, TX

[6th Mergers & Acquisitions in Energy Conference](#)

May 21, 2019 in Houston, TX

Visit our [website](#) for our full calendar and a list of our online offerings!

Inaugural IEL Leadership Class Kicks Off

By: Jay E. Ray

The Institute for Energy Law (IEL) kicked off its inaugural Leadership Class on September 20th with a class retreat in Houston. As reported in the last issue of this publication, over sixty individuals applied for the thirty-five spots in the Leadership Class. IEL leaders chose an outstanding and diverse class with individuals from seven states and the District of Columbia. The class includes one person living in Africa, but also features current US residents from Africa, Australia, and Asia.

These thirty-five individuals came to Houston to begin building bonds with their classmates and to participate in outstanding programming designed to give them advice on becoming stronger leaders and attorneys.

After a networking luncheon, the retreat programming began with an interview of Randall Ebner, ExxonMobil's General Counsel, by legal titan Shannon Ratliff on having a successful career in energy law. Mr. Ebner stated that, in this day and age, "everything is a world issue." You have to think broadly and strategically about how a decision will affect the situation you are dealing with locally, but also how it will affect operations and situations around the world. He also stated that taking time for yourself and for your family should be of the highest importance and described his efforts to be available for dinners and other family activities. Misters Ebner and Ratliff stressed the importance of acting ethically because damage to your reputation is very difficult to repair.

Mr. Ebner also stated that you will be a better attorney if you are willing to listen to others, including in your team, and debate topics and solutions. Your team, including outside attorneys representing the company, has to feel comfortable in challenging your decision or thought process. The goal is not to get your way. Instead, it is to end up with the right answer. He also stressed that you have to let others shine. Mr. Ebner further reminded the class to focus on continuing to learn, both the law and the practice of law, stating that the process of learning to be a lawyer that starts in law school continues well after law school.

Following Mr. Ebner was AT&T General Counsel David McAtee, II, discussing lessons in leadership. Mr. McAtee focused on the changes he made within AT&T after taking over as General Counsel in 2015, including efforts to empower attorneys in the legal department to make decisions working as a team without everything having to be approved by the General Counsel. He stressed that a leader needs to be willing to change. Mr. McAtee quoted Winston Churchill, who stated, "To improve is to change; to be perfect is to change often." Mr. McAtee also stated that talking about change should not be viewed as levying an indictment against the past.

Mr. McAtee noted that although leadership is very personal, it is not about you. Instead, it is about who you lead. He stressed that although leaders historically might have kept information close to the vest because information is power; that is changing and should change. A leader should share information with his or her team, unless legitimate reasons prevent its sharing, because it empowers your team and facilitates the decentralization of decision making. Mr. McAtee stated that this is very important in a large legal department like AT&T's.

The retreat then featured a look on the state of law within the industry by Professor Gina Warren and a session on

developing an energy network by Jonathan Hunter of Jones Walker LLP and Patrick Morris of Shell Oil Company.

After the substantive programming, the class members engaged in speed networking with their peers, visiting with a number of their class for five minutes each. Following speed networking, the class members were able to continue their discussions at the reception for the 11th Young Energy Professionals' General Counsel Forum. This was followed by the GC Forum program, which featured seven general counsels or associate general counsels, and dinner with the panelists and attendees.

The second day of the retreat featured outstanding programming, including a session on the business of energy by Nick Wallace of Chevron, a session on communicating effectively by Stan Luckoski of Chevron Business Development, inclusion in the work force by Christine Lloyd of ConocoPhillips Company, and setting and obtaining career goals by Beth Walker of Newhouse + Noblin LLC.

In addition, PJ Dunn, a behavioral scientist, facilitated a session on strengths-based lawyering based upon results from the Strengthsfinder assessment taken by each class member. He stressed that it is important to focus on your strengths. Mr. Dunn said that he talks to and helps numerous individuals who are unhappy in their job or with the tasks they have to perform. He said they are often that way because they are in a job or performing tasks that do not match their strongest talents, which means they are unlikely to ever be happy in that job or performing the tasks.

Another very well received session was a management panel consisting of Kristi McCarty, General Counsel and Vice President, Land, Chevron North America Exploration & Production Company, Wendy Daboval, Former General Counsel and Vice President, Land, Chevron North America Exploration & Production Company, Hector A. Pineda, Head of Legal US, Associate General Counsel Downstream US, Central & South America, Shell Oil Company, and Mitchell Zuklie, Chairman, Orrick, Herrington & Sutcliffe LLP. This session tapped into decades of experience leading both small and extremely large teams of attorneys and offered insight into attorneys—"lawyers are smart overachievers who worry"—and advice on promoting, supporting and correcting team members. Mr. Zuklie stressed that you have to be a good team player to be a good leader. Ms. Daboval emphasized that it is your job as a leader to help the team to be successful, which includes finding what they need to be successful. Mr. Zuklie also focused on the importance of transparency. Mr. Pineda said that a leader should try not to always answer a question or set a directive immediately because it is important to give the team members an

opportunity to consider them and express their views. The panelists also discussed the importance of providing real time feedback on performance to employees rather than simply relying on yearly reviews.

Other themes that class members cited as being helpful were trusting your team members in order to be a great leader, leaders need to be humble and leave their ego behind, as well as diversity and reflecting the broader community in companies, firms and teams. In addition, leaders need to make it clear that they are receptive to ideas and to having their ideas challenged or pushed back on—and mean it—because it is important to avoid “group think.” Class members have reported that they were already following up with classmates, who they found to be a fascinating group, both personally and professionally.

The leadership class will continue with remote and live monthly programs, with another live event for all members at the 70th Annual Oil & Gas Law Conference in February and the 3rd National Young Energy Professionals' Law Conference in April.

Applications for next year's programs will be available in May 2019.

Institute for Energy Law Seeking Applications for Young Energy Professional Committee's Executive Council

The Institute for Energy Law's Young Energy Professionals' Committee is led by an Executive Council consisting of four officers (Chair, Vice Chair, Secretary and Immediate Past Chair) and ten council members. The Executive Council is composed of diverse individuals who are members of the IEL under 40 years of age and are seeking a more active leadership role within the Young Energy Professionals' Committee. They help to run the YEP Committee's subcommittees (Membership, Social, Publication/Communication, Programs, and Law Student Outreach) and work together to determine the actions the committee should take during the year.

The ten person council and the secretary are chosen through an application process. Applications for the 2019 Leadership Council are now available. If you would like to apply to be considered, please fill out the information at this [link](#).

The last day to apply for consideration is January 10, 2019. The term of the Leadership Council begins upon the conclusion of the 70th Annual Oil & Gas Law Conference on February 22, 2019.

A Conversation About The *Deepwater Horizon* Litigation and Advice For Litigators – Featuring Judge Carl J. Barbier, Magistrate Judge Sally Shushan (Ret.) and Law Clerk Ben Allums

By: Tod J. Everage, Kean Miller LLP

The legal battle arising out of the April 20, 2010 Deepwater Horizon disaster was one of the largest pieces of litigation in US history. The lawsuit was hard fought, well fought, and produced a catalog of legal opinions touching nearly every aspect of law familiar to energy and maritime litigators. The civil case was closely watched around the world and over eight years later is still not fully closed.

For those unfamiliar, the case was assigned by the Panel on Multidistrict Litigation to Judge Carl J. Barbier, of the U.S. District Court for the Eastern District of Louisiana. He was assisted by (now retired) Magistrate Judge Sally Shushan and his MDL law clerk, Ben Allums. Judge Barbier was confirmed in September 1998, and just recently celebrated his 20th anniversary on the federal bench. Magistrate Shushan retired in 2016 after serving as a Magistrate Judge on the same court since 1999, and is now in private practice as a mediator.

I was graciously granted an audience with Judge Barbier, Magistrate Judge Shushan and Allums to talk about the Deepwater Horizon litigation and what young energy litigators can take away from their experience. Our conversation covered many topics. Below are just a few of their comments on issues we discussed about the case and about litigation practice in general.

On whether they have taken a moment to reflect on the undertaking of the case...

CB: I think that I realized when I agreed to do it that it would be quite an undertaking. The best part about the experience, to me, turned out to be having great lawyers all the way around. And it made an almost impossible case feasible, because we did have great lawyers pretty much on all sides. The lawyers from the get-go acted professionally. I mean, we had some problems on the way but not in that aspect; really, not at all – at least not that came to my attention.

SS: I agree. If we hadn't had the attorneys that we had working on the case, it couldn't have gotten done. And they cooperated with each other to a large extent and they certainly cooperated with Ben and me, who were helping to organize it to get ready for trial, and then the presentation to Judge Barbier was excellent.

On the unique aspects of such a public case and handling the media...

CB: We had a lot of things we had to do differently because of the media attention to the case. I decided to give the media a lot of access that I had never done before. It turned out to be a good thing. For example, during the trial I allowed the reporters to tweet from the courtroom. And the way I looked at it is, it's just a modern version of a reporter sitting in a courtroom with a yellow pad taking notes and then running out to the phone, calling his editor to say what had just happened. Also, everybody in the courtroom was getting live feed from the real time court reporting. And then the other thing we did was to give the public access to everything. During the trial, I think we marshaled the exhibits at the end of every week, and anything that was admitted during the week was posted on a public website. All the trial exhibits, transcripts, everything was posted, so it was all publicly available.

BA: In the early days a skill I had to develop was handling calls from the media, as I did get a lot of questions. My typical response was "I can point you to an order or some other document in the record. But I will not interpret it for you." I got used to it very quickly, I guess. As for public access, I would add that during those first two years whenever we had a monthly status conference, we would set up a public dial in number – listen only – and I would get the report back and see 150 people called, including some from Europe and Asia, just to listen to this status conference.

On deciding to split the trial into 3 phases...

CB: That was the result of a lot of discussion. I got assigned the case in August 2010 and I think sometime in October we had our first in court status conference which about 400 or 500 lawyers showed up for. I had to use the en banc courtroom plus three or four other courtrooms. And at first everybody was jockeying for position on the case. But after getting the committees appointed, I told the lawyers that I wanted them to meet and confer and make some suggestions as to how we should organize the case. The different parties came up with different ideas and we sifted through them and went back and forth and finally came up with the idea of – we called them "pleading bundles" to organize the pleadings in the case. And then I ordered the Plaintiffs' Steering Committee to file one master complaint as to each pleading bundle. Then I ordered the Defendants to file their Rule 12 motions to that master complaint. Every other complaint was just stayed, so we were dealing with maybe a dozen complaints and sets of motions as opposed to hundreds. And then once we got that organized, we had to decide how we were going to try the case, because the discovery depended

on that. We would organize and oversee the discovery that pertained to the next phase of the trial. And it was all going to be a bench trial, which made it somewhat easier. I don't know how we would have done that if it had been a jury trial.

On some of the difficult issues they grappled with...

BA: There were many. A couple that stand out for me. There were a host of issues that spun out of the economic and property damages settlement. There's some irony to that. Because when I hear the word settlement, I tend to think disputes have ended. Parties have come to an agreement...

CB: The disputes had just started!

BA: Yeah, it was pretty far from the truth. Arguably some of the most contentious moments in the MDL came out of fights over interpreting the settlement.

Another big one in my mind that came up fairly early was conflicts of law questions – which law will apply, preemption and displacement. Does OCSLA choice of law apply here? Does general maritime law apply? Does the Oil Pollution Act displace general maritime law? What about the various state laws, are any of those viable?

CB: Yeah. The choice-of-law issues early on were really important because like Ben referenced, we had the state law claims. For example, a lot of the local district attorneys in Louisiana – they are the persons that can bring or prosecute wildlife statutes which can penalize you if you intentionally kill birds or fish illegally. Alabama as I recall has an environmental statute that says if you release pollutants into their state waters, it's like one million dollars per day if it stays there, or something. So there were all of these kinds of statutes; and in a major ruling we eventually held that all of those state law claims were preempted by federal law. So it did make the case somewhat easier to handle since we were dealing with all federal laws.

On keeping the discovery and motion practice moving towards trial...

CB: That was where these master complaints and the Rule 12 motions targeted to the master complaints became very useful because they allowed us to resolve some of these overarching difficult legal issues. And they really were organized in an efficient way, I think. Because what we didn't want was hundreds of motions on the same or similar issues, and then hundreds of oppositions. So we would instruct the defendants, for example, to the extent they could – and usually they could – file a consolidated opposition, or combined motion on particular legal issues. There were a few occasions where they weren't aligned, but for the most part, they were.

BA: When I came in, I think, a lot of these [Rule 12] motions had been briefed. The motions, the oppositions, the reply briefs. And we started by addressing the 12(b)(6)'s on the B-1 master complaint. Once that was done, we'd move to the 12(b)(6)'s on the B-3 master complaint. Then the state governments' master complaint. Then the local governments' master complaint. And you could build off of each one; so, in some way it did get a little bit easier, or at least a little bit more efficient, because of that B-1 order from August 2011.

CB: That covered a lot of ground.

BA: It really did. And when the next set of motions came up, we were able to say: "okay, state law claims are preempted. See the B-1 Order for reasons why." That allowed us to focus on the issues that were unique to this master complaint, and so the case did kind of have a way of building on itself, at least for a while.

CB: Judge Shushan had weekly discovery conferences with the lawyers and I had monthly status conferences in my court to talk about whatever issues were going on, to talk about arguments on motions, anything that was going on just to keep the case moving.

On Judge Barbier's new paperless trial policy and the use of courtroom technology after *Deepwater Horizon*...

CB: [The courtroom technology] used to be optional at one point, but now I require for trials to be electronic; bench trials, jury trials, it doesn't matter. I don't know how you could have tried this case or handled this case. We would have had a courtroom or courthouse full of paper, or more.

And you think about the jury, nowadays the jurors are younger and almost all the jurors are very capable to work with electronic stuff. Now the jurors can use the electronic versions of exhibits in our jury room, which is relatively recent. And what we do when we send the jury out to deliberate, we get all the exhibits on a disk and we have an IT person in there with them who finds the most technologically-able person on the jury – which is not difficult to find – and he gives them about a 5 minute instruction how to operate everything, and they take it from there. Before, we used to have to bring the jury back into the courtroom to show them these electronic exhibits. And I will tell you one thing I have found is juries like all the electronic stuff; the high tech presentation material. It may be even more important for juries today. And I see occasionally an older lawyer fumbling around in front of the jury and sometimes they'll even, I think they think they can get some sympathy by saying "well, you know, I'm not too good at this electronic stuff," and they're fumbling around. And I think it just makes them look bad in front of the jury.

On presenting your arguments to the Court in an understandable way...

CB: I like to tell this story. When I was on the court about six months, I got invited to speak to an ABA committee on employment law here in New Orleans. It's plaintiff lawyers, defense lawyers, government lawyers, EEOC lawyers, and in-house lawyers. So I get invited to speak at one of their lunches and I didn't know anything about employment law. Had never done it; never handled an employment case. So I prepared to talk about something and I go there. I started off by saying: "I've been a judge for six months. I want all of you to know – full disclosure – I knew nothing about employment law when I got here. But obviously you all must think that when you get appointed to be a federal judge you get suddenly infused with all this knowledge from above. But, no, it doesn't work that way." So, my point was that when you become a judge on our court, we are generalists, you know? We deal with all kinds of issues. [The lawyers] have become more specialists in certain niches of the law and it's the lawyer's job to educate the judge on what the judge needs to know, whether it's technical knowledge, legal issues or whatever, the law that is relevant or relates to that particular case.

SS: And if you don't get that, you're in a world of trouble.

On the uniqueness of energy and oil and gas litigation...

CB: I think that area of the law is often more technical or complex, certainly than a case about an automobile accident. The average lay person and judge understands about driving cars and rules of the road and stuff like that, but when you come to oil and gas and offshore exploration and production, it is foreign for the most part. So I think it is more important than ever that you break it down in a way that is understandable, and use visuals.

On brief writing...

SS: To me the most important thing is to present the facts chronologically. Real simple stuff here. Am I exaggerating on the number of people who don't do that?

BA: And make sure to deal with the facts that are necessary for the court to understand and decide this motion.

CB: That's a good point because sometimes I will read a motion for summary judgment. I will read the brief in support, I read the opposition, I read the reply, and I still don't have a clear understanding of what the facts are in the case. And sometimes I'll have to wait until oral argument to ask questions about the facts so I can understand what the facts are. Now it sounds very basic, you know? But I do see that sometimes.

SS: I saw it all the time. Where they just jump right in and assume that you know the case as well as they know the case. Just factually, from point A to point Z, just tell me the important things that give me the context of your case.

CB: Yeah. And I understand that to some extent it might be a constraint that we put page limits on people and they might say, "well, I'd rather spend my pages arguing the law than arguing the facts", but sometimes the facts are important, you know? And I would devote more pages to the facts. Sometimes I see a lawyer has 25 pages and he'll spend 5 pages telling me what the law of summary judgment is. I don't know if you ever heard what Justice Scalia says about legislative history. He loves when people spend a lot of pages in their briefs on legislative history because he can just skip over those pages. I don't necessarily agree with that approach, but I have a similar point: If you spend several pages telling me what the law of summary judgment is, that's easy, I can just skip right over that.

SS: The judge and the judge's law clerk know that law, but they don't know the facts of the case. So spend the first two pages on the facts of the case and maybe just a paragraph on the summary judgment side.

CB: The other thing I notice is that some lawyers don't use the reply brief to actually address the other side's arguments in opposition. They will just repeat the arguments they made in their original motion. That is kind of a pet peeve of mine.

On oral argument...

CB: Well, one of the things I say that I see sometimes is lawyers don't listen – and I'm talking about oral argument now. Lawyers are not really listening to what the judge is saying and getting the clue. Usually if we ask a question, it's a clue to you as to what's important to us or what we're thinking. It's not that we are saying how we are going to decide the motion, but it's a hint or a clue. And I find sometimes lawyers just blow past it, just ignore it like they didn't hear or understand what I was trying to say.

Whether you're doing an oral argument or a brief, I would say to the extent you can, try to limit the number of issues or arguments you are going to raise. We do not get time to raise ten different issues. Always put what you think is your best argument first, whether orally or in writing.

On being appealed...

CB: [With a smile on his face] I tell my friends on the Circuit that just because they reverse me, it doesn't mean they were right and I was wrong, it just means they get to go last. Occasionally they are right, though. I have ended up agreeing with them.

SS: I didn't care if Judge Barbier reversed me. Honestly. I called the best shot as I saw it. If he disagreed with me, that's his prerogative.

YEP Member Highlight



Jennifer Mosley
Chevron, Senior Counsel, Major Transactions Law Group

Growing through Adventure and Travel

Jennifer's career is a story of adventure, unique opportunities, and learning from great mentors. Before she became the Chairman of the IEL's Young Energy Professionals Committee and Senior

Counsel for Chevron Upstream's Major Transactions Law Group, Jennifer earned her law degree in Texas, earned her LL.M in Florida, and practiced law in Scotland.

Jennifer began her career as a tax attorney, but she was passionate about learning from new challenges—even if that meant working around the world. Open to adventure, Jennifer left the U.S. and joined a law firm in Scotland, where she grew her expertise in the upstream energy sector. This leap of faith allowed her to create a successful oil and gas practice both internationally and domestically. After returning to practice in Houston, she was eventually led to her Senior Counsel position at Chevron, where she continues to embrace new challenges. Jennifer contributes much of her success to leaving her comfort zone and learning from great mentors and friends who supported her along the way.

Hobbies: Golfing; Rooting for the Aggies.

Notable Achievement: Jennifer is admitted to practice law in England & Wales.

Advice for other young lawyers: "Trust in yourself and try new things, even if it stretches beyond your comfort zone: This will make your career much more entertaining."

See Each Other: What I Learned During My Secondment

By: R. Chauvin Kean, Kean Miller LLP

Perspective is one of the most important elements of our jobs as counsel. Whether it's articulating an argument for a case or presenting information to internal stakeholders, perspective is one of the greatest skills we must develop as an attorney. Some might say that point-of-view isn't necessarily a skill, but I'd argue differently. Knowing the end goal and how material is to be used to achieve a purpose is essential and can only be understood through effective communication.

Recently, I completed an eleven-month secondment with an

international upstream oil and gas company, which required my perspective to completely change. Traditionally, I've worked at my firm as an oil and gas, maritime, and business and corporate associate, which, by all respects, has a very narrowed perspective – do good work and do a lot of it. During my secondment as an in-house attorney, my perspective adapted to conform to the corporate culture, mindset, and task at hand. My first challenge was simply understanding what corporate employees were saying: "stakeholder management"; "social license"; "strawman"; "after action look back" (just to name a few). My next challenge was understanding what I didn't know and what my colleagues didn't know so that we could better help one another on various projects and daily tasks. This also called for some perspective: what does outside counsel not know and what does in-house counsel not know? The answer is: a lot.

Too often I found that as an outside-counsel I was afraid to bother an in-house lawyer with questions pertaining to any random matter I was working on. Rather than ask the pertinent, but sometimes mundane, question, it would go unasked due to an unfounded fear that any communication to a client would damage my career. Having now seen the other side, nothing could be further from the truth. In fact, while working as an in-house counsel I appreciated when our outside counsel would call me with clarifying questions not only because it showed me their attention to detail, but it assisted me in refining my questions posed: often the initial questions asked to outside counsel were not the actual questions I needed answered by the time research was produced. This intermittent contact allowed for the opportunity to morph the requested advice to the ever-evolving situation at hand. Conversely, I found that as an in-house lawyer I (and others in the legal group) would hesitate to contact our outside attorneys for fear of being bothersome or causing my company undue costs (even though I should have known better).

My biggest take away from the secondment - after having seen the differing perspectives - is that communication is essential to both a working relationship and the production of good work. What you don't know may be known by someone else, but you'll never know until you ask. Modern lawyers tend to be guarded in their communications and prefer less personal contact such as email or text, when the pressing situation might be better suited for phone call or a meeting; regardless of the medium used, we must all actually communicate with one another to meet our stakeholders' goals. In-house lawyers: if you're too timid to contact the outside counsel partner, call her associate (because, honestly, the associate will often be the one with the most knowledge and most willing to provide the sought-after

information off-the-cuff rather than requesting formalities). Likewise, outside counsel: you shouldn't feel discouraged from contacting your clients in-house; explain the pitfalls and issues as they develop so that upon presentation of a final work product, it's a product your client can easily use to present to internal stakeholders.

Communication pitfalls can only be remedied if lawyers understand each other's perspective: how is my work going to affect you and your business? The only way the other is going to know this is if you tell them. Don't be afraid to ask questions. And, try to see each other's perspectives; because if you don't, your work product may have an inherent gap of information necessary to meet your company's end goal

Tips for Young Energy Professionals

Professionalism is important. It is the right way to conduct yourself in your work and dealings with others . . . and remember, someone who is an adverse party, adverse counsel, or your coworker today could become your client tomorrow.

-- Sharon O. Flanery, Chair, Energy & Natural Resources Dept., Steptoe & Johnson, PLLC

Actively manage relationships that may help you achieve your objectives and the objectives of your clients specifically by "making friends in peacetime." Don't wait for a problem to arise to connect with someone. Take time to reach out and share a coffee with someone whose path you might have to cross at a later date. When that difficult situation arises, you will already have a friendly foundation from which to address and fix the problems.

--Kimberly Phillips, Associate General Counsel, Global Litigation – Americas, Shell Oil Company

Your clients value you as a lawyer for your honesty and sound judgement, as much as for your legal knowledge and skill. Avoid being impulsive or flippant when giving legal advice.

--David Castro, Chair of IEL's Advisory Board, Former Associate General Counsel and Chief Litigation Counsel, Hess Corporation

Drafting Enforceable Non-Competes in the Energy Industry

By Meghaan Madriz, Yasser Madriz, and Miles Indest, McGuireWoods LLP

Employee turnover is a growing concern for the energy industry. Losing a high-ranking employee to a competitor is even more harmful if the employee had access to geophysical

data, financial data, and customer or vendor information.

One tool to limit the harm of employee turnover is a non-competition agreement, which restricts an ex-employee from competing for a specified time in a specified geography. Because the enforceability of these agreements vary by state, they can cause confusion for a company with employees across state lines. See *Bell v. Rimkus Consulting Grp., Inc. of La.*, 983 So.2d 927, 930 (La. App. 5th Cir. 2008) (applying Louisiana law to an employment agreement despite Texas choice of law provision). By comparing Texas and Louisiana non-compete law, this article shows that energy companies should routinely review the geography of their work force and the scope of their non-competition agreements to ensure their enforceability.

1. General: What interests are protected?

Louisiana requires "strict compliance" with *Louisiana Revised Statute Annotated* section 23:921 (the "Louisiana Non-Compete Statute"). The strict compliance rule supports Louisiana's historical public policy against restricting the right to work. Non-compete agreements that comply with the Louisiana Non-Compete Statute can protect investments in employees, trade secrets, financial expertise, and management techniques.

Texas takes a more flexible approach under *Texas Business and Commerce Code* sections 15.50–15.52 (the "Texas Non-Compete Act"). In contrast to Louisiana's strict compliance approach, Texas assesses the "reasonableness" of restrictions. Enforceable agreements in Texas can protect goodwill and "other business interests" of the employer, including special training invested in the employee.

2. Time: How long can an employer restrict competition post-employment?

Employers cannot restrict an employee's post-employment actions indefinitely: states have unique limits on how long non-compete covenants may last. For example, a Louisiana covenant must not restrict competition for longer than two years. This requirement is strictly enforced, and a violation of this term could void the entire agreement. See *Johnson Controls, Inc. v. Guidry*, 724 F. Supp. 2d 612, 621–22 (W.D. La. 2010) ("Louisiana courts have generally required mechanical adherence to the requirements listed in the law (especially the geographical and time limitations).").

Texas only requires a *reasonable* temporal restriction. The "reasonableness" will depend on several factors, such as the uniqueness and scope of the restricted work. While non-compete covenants for Texas employees generally range from one to two years, Texas courts have enforced longer restrictions based on the unique circumstances of the employer's business and the employee's employment. *Gallagher Healthcare Ins. Services v. Vogelsang*, 312 S.W.3d

640, 655 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (noting that “[t]wo to five years has . . . been held as a reasonable time in a noncompetition agreement”).

3. Geography: Where can an employee be restricted from competing?

Geographic restrictions generally must be limited to places where the employer had operations or where the employee actually worked. In Louisiana, the geographic restriction must state the *exact parishes, municipalities, or parts thereof*. Additionally, the employer must “carry on a like business therein.” If the agreement restricts competition in “any parish in Louisiana” or “in any part of the Haynesville Shale,” the agreement is likely void. Likewise, the agreement may be void if it restricts competition in Orleans Parish and the employer did not operate in that parish.

Texas allows a more flexible approach. Non-compete covenants are held to the standard of *reasonableness*, and the geographic restrictions do not need to specify each county or municipality.



Although a covenant may conceivably bar competition “in the entire state of Texas,” courts are more likely to enforce non-compete covenants that are limited to areas where the employee worked for the employer or about which the employer received confidential information.

4. Drafting: How to define the employer’s business?

In Louisiana, non-compete agreements must “specify the employer’s business” and should define the prohibited conduct. A general definition of the prohibited conduct, such as “selling frozen drinks for consumption by the general public” is likely void. *Daiquiri’s III on Bourbon, Ltd. v. Wandfluh*, 608 So.2d 222, 224–25 (La. Ct. App. 1992). This clause is overly restrictive because an employee “would be precluded from employment at countless different businesses, stores, and stands which sell all forms of ‘frozen drinks,’ such as yogurt, ice cream, malts, or other products not related to Daiquiris.” *Id.* Thus, it would likely be improper in Louisiana to restrict the “selling of any oil and gas equipment” if the employer only sells tubing.

In contrast, Texas does not have an express requirement to “specify the employer’s business.” But as a practical matter, defining the employer’s business and the scope of activities restrained may help satisfy Texas’ *reasonableness* requirement and clarify for the employee what actions are prohibited.

5. Consideration: What constitutes valid consideration?

Energy companies often require management and sales employees to sign a non-competition agreement at the beginning of employment, acknowledging the special training or confidential information that the employee will receive during the course of employment. In Texas, an enforceable non-compete must be “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.” Consideration must be: (i) reasonably related to the employer’s interest in (ii) protecting a legitimate interest, such as good will, trade secrets, and other confidential or proprietary information. *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 780 (Tex. 2011) (upholding stock options as sufficient consideration to support non-solicitation of customers restriction). In Texas, consideration is a present exchange bargained for in return for a promise. Past consideration, such as trade secrets disclosed prior to the agreement or continued at-will employment, generally does not support a subsequent non-competition agreement.

Louisiana, as a civil law jurisdiction, does not formally recognize the concept of “consideration.” However, Louisiana courts will ask whether the exchange of trade secrets, confidential information, or compensation “justifies” the agreement or “brings it within” the Louisiana Non-Compete Statute. Louisiana courts may consider: (i) the amount invested in the alleged trade secret, training, or other protectable interest; and (ii) the time elapsed since the expenditure. If the employee worked for many years, the employer may have received “the full benefit from its investment,” rendering the agreement unenforceable.

6. Practical Considerations

Because non-competition law varies dramatically by state, energy companies that utilize non-compete agreements should consider the following points to maximize the enforceability of their agreements and protect their investments in employees:

- “One size fits all” non-compete agreements may not be enforceable in all jurisdictions; therefore, employers should consider tailoring their non-compete agreements to the various states in which they operate.
- Before an employee signs a non-compete agreement, employers should evaluate where the employee will perform work to determine which state law will apply and ensure the agreement complies with the applicable state law.
- Employers should be mindful of the employee’s position and the scope of the employee’s work in drafting the non-compete agreement. Courts will consider these factors in assessing the enforceability of the time and geographic restrictions.
- Employers should ensure the employee will receive

valid consideration for the non-compete agreement, being mindful of the consideration requirements of different state non-compete laws.

Energy companies with operations in multiple states should avoid assuming their standard non-competition agreement is enforceable in all jurisdictions and for all employees. The state-specific nature of non-compete law may jeopardize an energy company's enforcement of a non-compete agreement that was assumed to be enforceable. Energy companies can mitigate against enforceability issues by analyzing their non-compete agreements on the front end, before employees sign them, to ensure their compliance with relevant state law

Circuit Split Points to Potential Supreme Court Case on Discharges

By Forrest Smith, Reed Smith, LLP

It has been a busy year for challenges to the Clean Water Act's coverage of groundwater contamination and discharge cases. On September 24, the U.S. Court of Appeals for the Sixth Circuit decided two cases in an increasingly contentious circuit split. In *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. Sep. 24, 2018) and *Ky. Waterways Alliance v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. Sep. 24, 2018), the Sixth Circuit held that groundwater contamination from coal ash impoundments were not point source discharges. These decisions are the most recent from Circuit Courts to address the ongoing disagreement between federal circuits on how to apply the Clean Water Act (CWA) to alleged pollution from groundwater into navigable waters.

The CWA is intended to prevent and reduce pollution through regulation of "point-source discharges." The CWA defines a "point-source" as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). Recently, there has been much debate among the federal circuits as to what constitutes a "point source" and the role of groundwater in bringing a CWA claim.

9th Circuit: *Hawai'i Wildlife Fund v. Cty. of Maui*

This Ninth Circuit case demonstrates the importance of developing a technical analysis of how pollution moves from a source to navigable water, because the presentation of those facts may impact a Court's understanding and decision of CWA applicability. In *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. Feb. 1, 2018), the Ninth Circuit held that the county had violated the CWA where it discharged wastewater into wells that migrated through groundwater and eventually reached the Pacific Ocean. A tracer dye study was done that demonstrated effluent from at least some of the wells reached the Pacific Ocean. Because of this factual posture, the Ninth Circuit concluded that the wells were "point-sources" and acted as the conveyance to the

Pacific Ocean—the groundwater was merely another medium through which the effluent traveled. The Ninth Circuit also hinted at its underlying perspective with the first line of its conclusion: "At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly."

4th Circuit: *Upstate Forever v. Kinder Morgan Energy Partners, L.P. and Sierra Club v. Va. Elec. & Power Co.*

In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. Apr. 12, 2018), the Fourth Circuit held that two conservation groups could proceed on their CWA claim because they could plausibly prove a direct hydrological connection from a ruptured pipeline, through groundwater, to navigable water. However, in *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. Sep. 12, 2018), the Fourth Circuit held that the CWA did not apply where coal combustion residual ponds did not constitute a point-source. It is the Fourth Circuit's decision in *Upstate Forever* that the Sixth Circuit expressly disagreed with in *Ky. Waterways Alliance*. The Fourth Circuit cases illustrate that decisions on CWA applicability may, in many ways, turn on the nature of the source of the pollution, rather than the fact that contaminants reached navigable water.

6th Circuit: *Tenn. Clean Water Network and Ky. Waterways Alliance*

In this pair of cases, the Sixth Circuit provided insight into its interpretation of CWA applicability to cases where pollutants flow through groundwater to navigable water. In *Ky. Waterways Alliance* the Sixth Circuit concluded that, "The CWA does not extend liability to pollution that reaches surface waters via groundwater." In doing so, the Circuit Court rejected the theories that groundwater itself is a point source, and that the coal ash ponds were a point source with groundwater as the "hydrological connection" to the requisite navigable water. The Circuit Court's decision in *Tenn. Clean Water Network* reaffirms its conclusions from *Ky. Waterways Alliance*, and explores how the CWA interacts with other laws on point, in that case the Resource Conservation and Recovery Act. Based on its analyses, the Sixth Circuit expressly split from the recent rulings out of the Fourth and Ninth Circuits.

The Supreme Court

This contentious circuit split has set up an opportunity for the U.S. Supreme Court to resolve these issues and hand down a decision on the applicability of the CWA to discharges that flow through diffuse groundwater before reaching navigable water. This could turn on the interpretation of a "point source" or the existence of a "hydrologic connection." Until there is clarity and uniformity, parties must continue to look to the specific facts of their case, and to controlling federal circuit, to determine what liabilities may exist.

The Rapid Pace of Change in Environmental Regulation Continues in Colorado

By Cynthia Teel, Lathrop Gage LLP

Environmental regulation of the energy industry continues to evolve in Colorado. Despite the recent defeat of a high-profile proposition that would have amended statutory setbacks, significant new and amended agency regulations and guidance have already impacted both day-to-day operations as well as long-term planning in the State, and ongoing stakeholder and rulemaking processes indicate that the rapid pace of regulatory change will continue. Several significant environmental regulatory developments at the Colorado Oil and Gas Conservation Commission are listed below, and two of the most impactful issues being addressed by the Colorado Department of Health and Environment—ozone nonattainment and technologically enhanced naturally occurring radioactive material—are then discussed in more detail.

Colorado Oil and Gas Conservation Commission

The Colorado Oil and Gas Conservation Commission (“COGCC”) recently updated guidance on various topics that affect operators, such as [bradenhead testing](#), [flowlines](#), and the [mill levy](#). COGCC is also in the process of changing the [pooling statute](#) as required by Colorado [Senate Bill 18-230](#), with the release of [final proposed rules](#) by the staff. [School setback rulemaking](#) recently resumed as well, with a hearing scheduled and [draft proposed rules](#) released by the staff. Finally, COGCC is implementing a July 2018 [Executive Order](#) that aims to “expand existing efforts to plug, remediate, and reclaim existing orphaned oil and gas wells and sites, and to prevent additional wells and sites from being orphaned in the future.” See COGCC’s Orphaned Well Program FY 2018 Report [here](#).

Colorado Department of Health and Environment

The Colorado Department of Health and Environment (“CDPHE”) recently promulgated new regulations, and has various rulemaking and stakeholder processes underway which impact the energy industry in the State. Among the most impactful of these regulatory schemes are those that relate to ozone nonattainment, and to the disposal of technologically enhanced naturally occurring radioactive material.

Clean Air Act – Ozone Nonattainment

One of the most significant ongoing environmental issues in Colorado relates to the Clean Air Act and ozone nonattainment. The U.S. Environmental Protection Agency (“EPA”) designated the nine-county Denver Metro/North Front Range area as a “Marginal” nonattainment area (“NAA”)

for ozone in 2012, downgrading it to “Moderate” in 2016 because the applicable ozone standard had still not been met. See CDPHE “Ozone planning information for industry” [webpage](#). If attainment is not reached going forward, the NAA could again be downgraded to “Serious,” which would have major implications for industry in the NAA by triggering stricter reporting, permitting limits, permitting public comment thresholds, and control technology requirements. See *id.*; see also Regional Air Quality Counsel Ozone Values Table [webpage](#) (Oct. 2, 2018) (“The 2015 8-Hour Ozone Standard is 70 parts per billion (ppb) and is calculated using a rolling three-year average of the fourth (4th) highest daily 8-hour ozone concentration.”). Data is currently being analyzed to determine the date by when attainment must be met. There are other areas in Colorado that are also close to exceeding the national standard for ozone.

Industry and regulators are pursuing various avenues to work toward attainment. In November 2017, the Colorado Air Quality Control Commission (“Commission”) revised its Regulation No. 7 to apply stricter control measures and inspection requirements to oil and gas emissions. See Commission 2017 Revisions to Regulation Number 7 – Oil and Gas Emissions [Fact Sheet](#) (Dec. 20, 2017). The rulemaking applies within the NAA to sources addressed in EPA’s Control Techniques Guidelines for the Oil and Natural Gas Industry—namely compressors, pneumatic controllers/pumps, and certain equipment leaks and fugitive emissions. See *id.* The changes require these sources to implement reasonably available control technology to their emissions. See *id.*

The Commission determined that existing storage tank requirements in the regulation were sufficient, but added inspection requirements for natural gas-driven pneumatic controllers at well production facilities and natural gas compressor stations within the NAA. See *id.*

One of the significant new requirements imposed by the revised Regulation No. 7 is a more stringent leak detection and repair (“LDAR”) program for the NAA. The LDAR program imposes heightened inspection requirements for some natural gas compressor stations and well production facility components (e.g., valves, flanges, connectors, etc.). See *id.* It also expands existing leak repair thresholds, and repair, recordkeeping, and reporting requirements. See *id.*

The changes to Regulation No. 7 require CDPHE’s Air Pollution Control Division to conduct a stakeholder process to identify and recommend strategies for reducing hydrocarbon emissions from the oil and natural gas industry, with a report of its findings and recommended proposals due to the Commission by January 2020. CDPHE “Oil and gas hydrocarbon emissions” [webpage](#). The recommendations will apply statewide, not just to the Denver Metro/North Front Range NAA. Air Pollution Control Div. Presentation,

[“Statewide Oil and Gas Hydrocarbon Emissions Reductions Initiative”](#) (April 17, 2018). The ongoing stakeholder process aims to consider cost-effective strategies for both the near- and long-term, and for both regulatory and non-regulatory measures. *Id.*

Meanwhile, the oil and gas industry has worked to voluntarily curb emissions, which has “nearly halved its emissions of... VOCs ... all while oil production quadrupled statewide.” Colorado Oil & Gas Association (“COGA”) Press Release [“COGA members working to reduce summertime ozone through voluntary initiative”](#) (June 4, 2018). These efforts include voluntary and coordinated field-based emission reduction measures on peak-ozone summer days, such as: “Alternate vehicle fueling times; [r]educed vehicle traffic and miles traveled; [m]anaged drilling and completions on high ozone days to reduce emissions; [l]ower emitting tank load outs; [d]elayed operational activities (e.g., pigging, well unloading) on high ozone days; [and a]dditional aerial surveys to detect and fix leaks.” COGA Fact Sheet, [Ozone](#) (Sept. 19, 2018). COGA members are also “plug[ging] and reclaim[ing] an estimated 4,000 oil and natural gas wells” throughout 2017–2018. *Id.*

However, there remains a real possibility that attainment will not be reached, and the industry will be facing significant emissions reductions requirements and other limitations. See [Regional Air Quality Counsel Ozone Values Table](#) (Oct. 2, 2018) (showing the most recent 8-Hour Ozone Summary and three-year averages).

[Solid Waste – Technologically Enhanced Naturally Occurring Radioactive Material](#)

Technologically enhanced naturally occurring radioactive material (“TENORM”) results when naturally occurring radioactivity in rocks, soil, or water, becomes concentrated by human activity—commonly, during oil and gas or drinking water treatment activities. CDPHE was statutorily prevented from directly regulating the disposal of TENORM until the Colorado legislature passed Senate Bill 245 during the 2017–2018 session. SB 245 now requires CDPHE to promulgate regulations governing the disposal of TENORM. CDPHE must:

- “Convene a stakeholder group to discuss the development of rules and the impacts the rules might have on various industries.
- Review TENORM residual management and regulatory limits from other states.
- Prepare a report that considers background radiation levels in the state, waste stream identification and quantification, use and disposal practices, current engineering practices, appropriate test methods, economic impacts and data gaps.

- Develop a proposed residuals management rule based on the report.
- The report must be provided to the state legislature by December 31, 2019, and [CDPHE] cannot file a notice of proposed rulemaking until the report is presented to the legislature. The rules must be adopted by December 31, 2020.”

CDPHE TENORM overview [webpage](#).

CDPHE engaged a consultant to research and draft the report, which is expected to be completed in March 2019. *Id.* While the stakeholder process began in July 2018, it was put on hold after stakeholder groups requested that it take place after the draft report is completed and available for review. *Id.* Public comment will also take place after the draft report is completed. *Id.*

Currently, as required by SB 245, existing guidance remains in effect. These include CDPHE’s “Interim Policy and Guidance Pending Rulemaking for Control and Disposition of [TENORM] in Colorado” (February 2007) and the oil and gas waste production guidance letters dated November 7 and November 14, 2017, both available [here](#).

For exploration and production waste, the guidance was updated to state that “E&P waste streams with the potential for high concentrations of TENORM are prohibited from disposal in all solid waste facilities in Colorado not specifically approved and designated to take them unless and until each waste is sampled and tested on a per shipment basis... and found to contain TENORM at levels less than the administrative release levels found in the Interim Policy...” CDPHE Guidance, [“Management and Disposal of TENORM Wastes Generated by Oil and Gas Exploration and Production”](#) (Nov. 14, 2017).

Only three facilities in Colorado are currently approved and designated to accept waste with levels above that in the Interim Guidance, though additional disposal facilities may become approved and designated in the future (both state and local approval is needed). See *id.* Exporting waste to out-of-state facilities in states other than Nevada or New Mexico implicates and must be authorized by the Rocky Mountain Low-Level Radioactive Waste Board. See *id.*; see also Rocky Mountain Low-Level Radioactive Waste Board “Waste Export” [webpage](#).

The pending TENORM regulations have the potential to greatly impact the cost, logistics, and timing of disposal of exploration and production wastes. Together with potentially increased compliance costs in the NAA and other new and ongoing regulatory changes at COGCC and CDPHE, the creation of TENORM regulation in Colorado demonstrates the evolving regulatory climate facing operators in Colorado today.



Institute for
ENERGY LAW

The Energy Dispatch
Institute for Energy Law
The Center for American and International Law
5201 Democracy Drive
Plano, TX USA 75024



IEL is an Institute of

**THE CENTER FOR AMERICAN
AND INTERNATIONAL LAW**



THE Energy Dispatch

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE