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INDUSTRY UPDATES

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INDUSTRY UPDATES

In-House Counsel Q&A with Eliot Cotton, Riverstone Holdings LLC, Credit and Decarbonization General Counsel

Interview by Parker Lee, McDermott Will & Emery LLP

PL: Please tell us a little bit about Riverstone and your role as General Counsel – Credit and Decarbonization at Riverstone.

EC: Riverstone is an energy and power-focused private investment firm founded in 2000 by David M. Leuschen and Pierre F. Lapeyre, Jr. with approximately $43 billion of capital raised. With offices in New York, London, Houston, Mexico City, Amsterdam and Menlo Park, we have committed to more than 200 investments in North America, Latin America, Europe, Africa, Asia, and Australia. As the investment landscapes within energy have evolved, we believe we're at the forefront of identifying and executing on opportunities to take advantage of the shifting paradigm. As climate change becomes increasingly important to governments, corporations, and consumers, we've positioned ourselves to take advantage, either by providing debt, equity, or some combination thereof, to help businesses grow and achieve their aims. As General Counsel, my goal is to support my deal teams in everything that they do. Whether it's fundraising, deal execution or coming up with creative solutions, I try to keep my finger on the pulse of where the industry is, where its headed and how we can stay two steps ahead.

PL: Riverstone has been a leader in the private equity space in going full speed toward investing in decarbonization businesses. Are there significant differences or unexpected similarities from a legal perspective in working with and investing in decarbonization businesses, as opposed to oil and gas?

EC: The biggest difference I've seen is in how our transaction structures have shifted. Instead of writing $400 - $500 million checks into an LLC, where we control the board and all primary governance decisions, because of the nascent nature of many decarbonization companies, we're taking minority positions, allocating smaller amounts, and introducing these companies and their technologies into our broader portfolio. The hard work, the need for extensive diligence, and the importance of surrounding ourselves with excellent external advisors is certainly the same, but the paper is different.

PL: Where do you see the energy market going in the next decade?

EC: Our primary obligation is being exceptional stewards of our investors' capital. That means finding and executing on opportunities that have the potential to deliver strong risk-adjusted returns. It also means listening to our investors and understanding where they want to allocate capital. In the energy space, that appears to be shifting towards decarbonization, clean energy and renewables. Every year, more governments, corporations, and financial institutions are making commitments to achieve net zero emissions by 2050 and that is presenting opportunities for the energy private equity space. While I think traditional energy projects will continue to hold a significant place in the investment conversation and landscape, I believe the next decade will see excellent opportunities for investments in people, technology and infrastructure designed to reduce carbon in the economy and mitigate the impact of climate change.

PL: One reason many lawyers give for wanting to move in-house is to get closer to the business side of things. Was that one of your motivations?

EC: Yes, absolutely. Wanting to be nearer to the investment decision making process and to better understand why we should or shouldn't take certain actions was the primary catalyst in accepting my current role. And Riverstone, without a doubt, has afforded me that opportunity. I am simply a member of the team – and where one person may have an expertise in sustainable bio-based fertilizers, I have an expertise in the law. Everyone on the team needs

to know and fully absorb the organization's broader goals, but lawyers working in-house also need to think ahead, manage risk, and constantly offer up creative solutions.

PL: How has working on the in-house side helped you grow your skill set as a lawyer and a professional in ways you never expected?

EC: At a law firm you are really valued as an expert in a specific area – in fact, you need to be an expert in a specific area. Once you're in-house, while always helpful to be an expert in something, you really need to approach every day with your business hat on first. You have to understand the business as well as every other member of the team and constantly work to make sure your practice is aligned with the broader goals of your organization. My current role forces me to think about the end rather than just the beginning. I have to anticipate several potential outcomes, prepare myself and the rest of the firm for those possibilities, and always focus on controlling the things we have control over, but more importantly, create retention walls to protect us from the unforeseen.

U.S. EPA Office of Land and Emergency Management Publishes Environmental Justice Action Plan

Samuel B. Boxerman and Nicole E. Noëlliste
Sidley Austin LLP

On September 30, 2022, the Office of Land and Emergency Management within the U.S. Environmental Protection Agency (EPA or the Agency) published an action plan, "EJ Action Plan: Building Up Environmental Justice in EPA's Land Protection and Cleanup Programs." EPA describes the EJ Action Plan as "a key component" of its implementation of President Joe Biden's Executive Orders 13985 and 14008 to promote environmental justice (EJ).

The EJ Action Plan outlines the following four main goals, as well as the projects, tools, and practices that it intends to use to achieve those goals and advance EJ in the Superfund, Brownfields, Emergency Response, Solid Waste Management, Resource Conservation and Recovery Act Corrective Action, and Underground Storage Tank programs across the Agency:

1. ***Strengthen compliance with cornerstone environmental statutes in communities overburdened by pollution.*** To accomplish this, EPA intends to focus on developing "good governance processes," enhancing accident prevention at facilities in or near communities with EJ concerns, reducing the frequency and severity of accidental releases, measuring compliance rates of facilities in EJ communities, and improving inspection rate of facilities.
2. ***Incorporate EJ considerations during the regulatory development process.*** EPA plans to use EJ mapping tools to identify potentially vulnerable communities and areas that would benefit from increased funding and support and to strengthen community protections and enhance public participation, especially for communities with EJ concerns. EPA also will issue guidance to its regional offices with recommendations for incorporating community input and EJ considerations as part of remedial and non-time-critical removal action decisions.
3. ***Improve community engagement in rulemakings, permitting decisions, and policies.*** As part of this effort, EPA intends to assess cumulative impacts of agency actions on communities as well as to identify communities with EJ concerns and provide those communities with more resources for effective engagement.
4. ***Implement the Justice40 Initiative.*** The Justice40 initiative seeks to drive investment to underserved communities. To help accomplish this goal, through this EJ Action Plan, EPA intends to provide direct and indirect benefits to underserved communities with direct grants as well as by elevating EJ focus and priorities into state grant agreements.

Fifth Circuit Affirms Remand of Louisiana Coastal Zone Lawsuits...Again

Kelly Ransom, Kelly Hart Pitre

On October 17, 2022, the U.S. Court of Appeals for the Fifth Circuit affirmed a Louisiana federal district court's order remanding the lead case among forty-two lawsuits filed on behalf of numerous Louisiana parishes asserting claims against various oil and gas companies under the Louisiana State and Local Coastal Resources Management Act of 1978 ("CZMA Cases").[1] The decision follows a jurisdictional battle that began in 2013 and has entailed two rounds of removals and remand orders and multiple Fifth Circuit opinions. While the procedural path to this most recent Fifth Circuit decision was full of twists and turns, the court ultimately concluded that there is no federal-officer removal jurisdiction, and the CZMA Cases belong in Louisiana state court.

A. 2013 to 2021: Removal, Remand, Repeat, and Appeal

Plaquemines Parish and Jefferson Parish filed the first twenty-eight of the CZMA Cases in state court in 2013. Other south Louisiana parishes soon followed suit by filing over a dozen additional CZMA lawsuits. Both the Louisiana Department of Natural Resources and the Louisiana Attorney General intervened in the individual lawsuits on behalf of the State of Louisiana. The defendants' first round of removals of the CZMA Cases was unsuccessful, and the cases were remanded in 2015.

Back in state court, the plaintiffs served an expert report in *Parish of Plaquemines v. Rozel Operating Co.* that addressed the defendants' operations and activities during World War II. That expert report, known as the *Rozel* report, included a certification that it represented the Louisiana Department of Natural Resources' position in all of the CZMA Cases. Based on the *Rozel* report, the defendants removed the CZMA Cases once again in May 2018 based on the federal-officer removal statute and federal question jurisdiction. According to defendants, the second removals were timely because they occurred within thirty days of receiving the *Rozel* report, which was an "other paper from which it may first be ascertained that the case is one which is or has become removable."[2]

The plaintiffs promptly moved to remand, arguing in part that the second removals were untimely. The federal district court agreed that removal was "simply too late" and rejected both the federal-officer and federal question grounds for removal.[3] The plaintiff's remand motion was therefore granted, and the defendants appealed to the U.S. Court of Appeals for the Fifth Circuit.

On August 10, 2020, the Fifth Circuit affirmed the district court's remand order finding the second removal untimely. The Court rejected the defendants' argument that it was not until the *Rozel* report was produced that it became apparent that the plaintiffs' claims were based in part on wartime activities:

> The *Rozel* Report simply repeated information from a 1980 Louisiana Coastal Resources Program Final Environmental Impact Statement (FEIS) that the Parishes filed with the court before the companies' *first* removal attempt in 2013. The FEIS discusses many of the specific wells involved in this litigation by referring to their unique serial numbers. And those serial numbers refer to wells the companies drilled before or during World War II. Accordingly, the *Rozel* Report is not a "paper from which it may *first* be ascertained that the case is one which is or has become removable."[4]

The defendants successfully petitioned the Fifth Circuit for reconsideration, and almost a year to the day after issuing the 2020 opinion, the court reversed its previous decision on the timeliness of removal.[5] This time, the court reasoned that, "in contrast to the petitions' vague citations to Louisiana regulations covering numerous aspects of oil production, the *Rozel* report identified, for the first time, specific conduct that the parishes alleged was unlawful."[6]

With respect to the jurisdictional issues, the Fifth Circuit affirmed its previous holding that there was no federal question jurisdiction but directed the federal district court to resolve the federal-officer jurisdiction issue under the four-part test set forth in *Latiolais v. Huntington Ingalls, Inc.*, a 2020 Fifth Circuit decision overruling an old federal-officer jurisdiction causal-nexus test.[7]

B. 2022: The Remaining Issue and Its Resolution...Maybe

By 2022, the only remaining remand issue in the CZMA Cases was whether removal based on federal-officer jurisdiction was proper. Under the new *Latiolais* test, a defendant must show that (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) it has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal

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1 *Par. of Plaquemines v. Chevron USA, Inc., et al.*, No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022).
2 28 U.S.C. §1446(b)(3).
3 *Parish of Plaquemines v. Riverwood Prod. Co., et al.*, No. 18-5217, 2019 WL 2271118 (E.D. La. May 28, 2019).
4 *Parish of Plaquemines v. Chevron USA, Inc., et al.*, 969 F.3d 502, 507 (5th Cir. 2020), opinion withdrawn and superseded on reh'g, 7 F.4th 362 (5th Cir. 2021) (quoting 28 U.S.C. § 1446(b)(3) (emphasis added in original)).
5 *Parish of Plaquemines v. Chevron USA, Inc., et al.*, 7 F.4th 362 (5th Cir. 2021).
6 *Id.* at 371.
7 *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020).

officer's directions.[8] The federal-officer jurisdiction issue in the CZMA Cases focused on whether the defendants' wartime exploration and production activities satisfied the third "acting under" prong and the fourth "associated or connected with" prong of the *Latiolais* test.

The defendants argued that they acted under the federal government's control during World War II and shared an "unusually close and special relationship with the government," and even a contractual relationship. They cited evidence of the government's creation of the Petroleum Administration for War ("PAW"), which exercised war powers to integrate oil companies into government war efforts. PAW directives and other government orders lifted antitrust law limitations on oil producers and refiners and imposed production quotas and other mandates aimed at ensuring fulfilment of government contracts for refined petroleum. Defendants claimed to be acting as government subcontractors during this time by supplying the product that refiners needed to fulfill their government contracts. And because plaintiffs' CZMA claims are based on alleged damage to wetlands and coastal erosion that they claim resulted from excessive production and operation, including those during World War II, the defendants' wartime production directed by the government is "connected to or associated with" the charged conduct in the CZMA Cases.

Plaintiffs responded that the defendants' evidence reflected only federal government directives to refiners, not operators or producers. Because those directives did not impose any mandate on producers, they did not show that the federal government exerted any control over the exploration and production side of the industry during World War II. At best, the evidence reflected that the defendants were simply subject to certain regulations, according to the plaintiffs, and this did not satisfy the third "acting under" prong of *Latiolais*.

In January 2022, U.S. District Court Judge for the Eastern District of Louisiana Martin Feldman once again granted the plaintiffs' motion to remand.[9] The district court concluded that "defendants have not demonstrated that they were doing any more than complying with regulation." The court rejected the defendants' argument that the government's contracts with refiners sufficed to create a contractual relationship with upstream producers. Likewise, Judge Feldman found that providing product to refiners did not make producers government subcontractors and noted that there was no document in the record evidencing any such subcontract. Though the district court acknowledged that it need not address the "connected or associated with" prong given its conclusion that defendants failed to satisfy the third prong of the test, it did so "for the same of completeness" and found that the "associated or connected with" prong of the *Latiolais* test was satisfied.

In a *per curiam* opinion, a three-judge panel of the Fifth Circuit agreed with Judge Feldman and affirmed the district court's remand order.[10] The court found that there is no federal-officer jurisdiction because the producers did not act under the federal government's direction during World War II. The Fifth Circuit rejected the defendants' argument that they had an unusually close and special relationship and explained "merely being subject to federal regulations is not enough" to be "acting under" a federal officer's or agency's direction. The court also rejected the defendants' positions that they shared a contractual relationship with the government and that they were federal subcontractors because they provided the essential product to refineries, which were contractually obligated to deliver to the government during wartime. Like the district court, the Fifth Circuit noted the absence of any document evidencing a subcontract to support the defendants' government subcontractor argument. Having found that the "acting under" prong was not satisfied, the court affirmed the district court's remand order without addressing the final prong of the *Latiolais* test.

Absent reversal of the Fifth Circuit's 2022 decision, the CZMA Cases will return to the state district courts in the South Louisiana parishes where originally filed. But days after the Fifth Circuit's decision, the defendants moved for a fourteen-day extension to petition the court for rehearing, signaling that the fight over federal-officer jurisdiction may not quite be finished yet.

8 *Id.* at 296.
9 *Parish of Plaquemines v. Riverwood Prod. Co., et al.*, No. 18-5217, 2022 WL 101401, at *8 (E.D. La. Jan. 11, 2022).
10 *Parish of Plaquemines v. Chevron USA, Inc., et al.*, No. 22-30055, 2022 WL 9914869, at *3 (5th Cir. Oct. 17, 2022).

Appellate Courts Provide Guidance on Jurisdiction for Climate Change Lawsuits

Brandon S. Winchester, Schiffer Hicks Johnson, PLLC

The U.S. Court of Appeals for the Tenth Circuit ruled in February 2022 that federal jurisdiction did not exist over a case brought by a group of Colorado municipalities accusing several energy companies of climate change-related harm.[1] Those municipalities allege in *Board of County Commissioners v. Suncor Energy (U.S.A.) Inc.* claims of public and private nuisance, trespass, unjust enrichment, civil conspiracy, and violations of the Colorado Consumer Protection Act and seek millions of dollars to adapt and repair infrastructure in addition to compensatory damages and attorneys' fees.[2]

The case was initially filed in Colorado state court and was later removed to federal court by the defendants, who cited a number of grounds for removal: original federal jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), the federal officer removal statute, that the municipalities' claims arose only under federal common law, and preemption under the Clean Air Act.[3]

The federal district court remanded upon motion by the plaintiffs and the matter wound its way through the Tenth Circuit and the U.S. Supreme Court until, ultimately, the Supreme Court remanded it to the Tenth Circuit in light of its recent holding in *BP, P.L.C. v. Mayor and City Council of Baltimore*.[4]

In *City of Baltimore*, the Supreme Court addressed federal officer removal jurisdiction and held that courts of appeal are permitted to review an entire remand order, not just the portion of the remand order addressing federal officer removal.[5] The Tenth Circuit, in its initial review in 2020, determined that appellate courts were only empowered to review removal and remand decisions as they relate to removal based on federal officer jurisdiction.[6]

The Tenth Circuit, now furnished with broad scope to review all of the defendants' grounds for removal, affirmed the district court's remand decision for a second time, holding that the case should be litigated in state court.[7] The Tenth Circuit found that federal officer removal was inapplicable as the defendants' compliance with federal leases was not enough to confer the requisite relationship for removal,[8] that the municipalities were exclusively relying on state law,[9] that there was not a substantial question of federal law in dispute,[10] that the Clean Air Act and other federal law did not completely preempt state law in this arena,[11] and that federal court jurisdiction under OCSLA was inappropriate.[12]

As noted above, another climate change lawsuit has wound its way through the federal courts. After the Supreme Court addressed removal jurisdiction, the Fourth Circuit has likewise remanded a climate change lawsuit back to state court in in *Mayor and City Council of Baltimore v. BP P.L.C., et al.*[13]

The City of Baltimore, like the Colorado municipalities, brought claims against a number of multinational energy companies for public and private nuisance, design defect claims, failure to warn, trespass, and violations of the Maryland Consumer Protection Act.[14] The case was removed to federal court on similar removal grounds: federal common law, preemption under the Clean Air Act, the Outer Continental Shelf Lands Act (OCSLA), and the federal officer removal statute.[15]

Baltimore moved to remand and the District Court granted that remand, the defendants appealed to the Fourth Circuit who reasoned that it could only review the propriety of removal under the federal officer statute, and then the matter proceeded to the Supreme Court who addressed it as described above.[16]

The Fourth Circuit, armed with a broader scope of review, again affirmed the district court's remand decision for a second time in a fashion similar to the Tenth Circuit: federal common law is inapplicable as Baltimore's complaint alleges only state law claims,[17] there is not a substantial question of federal law in dispute,[18] the foreign-affairs doctrine does not preempt Baltimore's state law claims,[19] the Clean Air

1 *Board of County Commissioners v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1275 (10th Cir. 2022).
2 *Id.* at 1248.
3 *Id.* at 1248 – 49.
4 *Id.* at 1249; *see also Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners*, 141 S.Ct. 2667 (2021).
5 *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S.Ct. 1532, 1538, 1543 (2021).
6 *Board of County Commissioners*, 25 F.4th at 1249.
7 *Id.* at 1275.
8 *Id.* at 1253 – 54.
9 *Id.* at 1262.
10 *Id.* at 1267 – 71.
11 *Id.* at 1264 – 65.
12 *Id.* at 1275.
13 31 F.4th 178, 238 (4th Cir. 2022).
14 *Id.* at 194.
15 *Id.* at 196.
16 *Id.* at 196 – 97; *see also BP P.L.C.*, 141 S.Ct. at 1543.
17 *City of Baltimore*, 31 F.4th at 208.
18 *Id.* at 212.
19 *Id.* at 214.

Act did not preempt state law,[20] federal jurisdiction under OCSLA was inappropriate as Baltimore's alleged injuries would exist irrespective of activities on the outer continental shelf,[21] and federal officer removal was inapplicable as the defendants' compliance with federal leases and fuel supply agreements (with an agency of the federal government) was an insufficient relationship for removal.[22]

20 *Id.* at 217.
21 *Id.* at 221 – 22.
22 *Id.* at 231 – 34, 238.

CISA Seeks Public Input on Cyber Incident Reporting

Susan Lindberg, GableGotwals

Critical infrastructure, including energy infrastructure, is a prime target for cyberattacks. The Cybersecurity and Infrastructure Security Agency (CISA), an agency of the Department of Homeland Security, is tasked with leading the collection and sharing of cyber threat information between government and the private sector. CISA recently issued a Request for Information (RFI) seeking public input on cyber incident reporting requirements. The RFI marks an initial step by CISA in formulating regulations as required under the new Cybersecurity Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), enacted March 15, 2022. Comments must be submitted by November 14, 2022.

CISA will also hear comments from the public in listening sessions in 11 cities, beginning in September. Dates, times, and locations can be found in the Federal Register notice. Sessions will be four hours and presentations are limited to three minutes each, and capacity is limited, with priority given to attendees who pre-register.

The new legislation requires critical infrastructure companies to report cybersecurity incidents to CISA within 72 hours, and ransom payments within 24 hours. The requirements will become effective when CISA issues new regulations implementing the statute. CISA has until March 2024 to propose rules and another 18 months after that to finalize them. Affected companies will have the opportunity to comment during the CISA rulemaking process. More information on CIRCIA can be found here.

In the RFI, CISA lists the specific topics on which it seeks feedback, although the list is not exhaustive. The four key topics are:

1. definitions and terminology – for example, the meaning of "covered entity" subject to reporting requirements, and the meaning of "covered cyber incident";

2. report contents and submission procedures, including the specific information required to be included in the reports, what constitutes a "reasonable belief" that a covered cyber incident has occurred, clarification on the timing of reports and supplemental information submissions, and requirements for submission of reports by third parties;

3. existing incident reporting requirements and security vulnerability information sharing – for example, areas of overlap, duplication, or conflicts between existing requirements and CIRCIA requirements, and information on the cost of compliance;

4. additional policies, procedures, and requirements, including information on protections for reporting entities.

CISA encourages commenters to identify specific approaches for the agency to consider and to "provide information supporting why the approach would foster a cost-effective and balanced approach to cyber incident and ransom payment reporting requirements." Specific information, data, or recommendations are encouraged as opposed to "generic feedback."

Until fairly recently, reporting of cybersecurity incidents has been largely voluntary. Prescriptive requirements for disclosure to the government have been industry specific, or, in the case of government contractors, specified by contract. Successive administrations have attempted to encourage voluntary information sharing by private industry, with limited success. The Cybersecurity Information Sharing Act of 2015 required the Department of Homeland Security to establish a capability and process for sharing cyber threat indicators with both the federal government and private sector entities. The statute includes protections for private companies that share information with the government through DHS, including liability protections, privilege maintenance, protection of proprietary information, a safe harbor from disclosure in response to Freedom of Information Act requests, and other protections. These aspects are further detailed in guidance documents. In practice, the language of the statute creating these protections is not particularly clear, and relatively few companies have chosen to voluntarily share information.

CISA's RFI offers critical infrastructure owners the opportunity to shape the new information sharing requirements so that a company's information and infrastructure is sufficiently protected, and to create a reporting process that acknowledges the practical realities of responding to an incident.

Supreme Court of Ohio Reviewing Challenge to Authorization of Wind Farm Project[1]

Dallas F. Kratzer III and Rebecca Schrote, Steptoe & Johnson PLLC

Renewable energy projects in Ohio may be stimulated or stifled depending on the outcome of *In re Application of Firelands Wind LLC* (Case No. 2022-0055). The appeal involves an ongoing challenge to the Ohio Power Siting Board's authorization of Firelands Wind LLC's proposed construction of a new Ohio wind farm called the Emerson Creek wind farm. The Board approved the project in June 2021 and again on rehearing in November 2021, but those decisions were appealed yet again to the Supreme Court of Ohio in January 2022.

The Ohio Chamber of Commerce, through counsel at Steptoe & Johnson PLLC, recently filed an amicus brief urging advancement of Firelands Wind's project. The brief emphasizes how the Emerson Creek project will serve the interest, convenience, and necessity of the people and businesses of Ohio. As the brief explains, supporting renewable energy projects in Ohio will fulfill rising business demand for renewable energy, yield broad economic benefits for Ohio citizens, and tap into the full potential of Ohio's wind power capacity.

Business Demand

Business demand for renewable energy is exploding in Ohio and beyond. Corporate purchases of renewable energy in the United States have increased by nearly 600% since 2016. Driving this growth in demand are some of the country's largest employers, including international technology companies, many of which conduct business in Ohio. But delays resulting from a lack of finality in Ohio's administrative process for approving renewable energy sites could deter companies from investing in Ohio.

Economic Benefits

Attracting businesses to Ohio by meeting their renewable energy needs will further generate numerous benefits for residents. With each renewable energy project comes the creation of jobs, provision of rental income to landowners, and increases in tax revenues to support schools, libraries, and other community services. For example, the Emerson Creek project is expected to provide $170.4 million in economic output to Ohio communities if allowed to go forward as approved by the Board.

Energy Opportunities

Ohio possesses remarkable renewable energy potential that has not yet been fully realized. This is especially true for Ohio's wind power capacity. While Ohio has at least as much wind energy capacity as neighboring states do, most of those states outperform Ohio in fulfilling their capacity. Establishing the finality of the administrative approval process for siting renewable energy projects could jump-start Ohio's renewable energy production.

With demands for renewable energy on the rise and related economic benefits and energy opportunities waiting to be realized, the Ohio Chamber of Commerce's amicus brief encourages the Supreme Court of Ohio to affirm the decisions of the Board and allow the Emerson Creek wind farm project to proceed.

1 *DISCLAIMER: These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.*

Louisiana Supreme Court Declares R.S. 30:16 Citizen Suits Imprescriptible

Jane A. Jackson, Kelly Hart Pitre

The Louisiana Supreme Court issued its first opinion interpreting citizen suit actions under La. Rev. Stat. § 30:16 ("R.S. 30:16"), and it held that R.S. 30:16 actions are not subject to liberative prescription. *State ex rel. Tureau v. BEPCO, L.P.*, No. 2021-0856, 2022 WL 12338524 (La. 10/21/22), --- So. 3d ---.

Several years ago, landowners began seeking remediation of alleged oil and gas contamination that exceeds regulatory standards by filing citizen suits under R.S. 30:16. That statute allows individuals to sue to restrain violations of conservation regulations if the Louisiana Department of Natural Resources, Commissioner of Conservation ("Commissioner") fails to do so. If the court finds that an injunction should be issued, the statute requires that the Commissioner be substituted as the plaintiff and that the injunction be issued in the Commissioner's name.[1]

1 La. Rev. Stat. § 30:16.

In *Tureau*, the trial court found that the landowner's R.S. 30:16 action was subject to a one-year prescriptive period, and it dismissed the suit because the landowner undisputedly knew about the alleged oil and gas operations, contamination, and regulatory violations by the time he had filed a traditional legacy lawsuit related to the same property at least four years earlier.[2] The Louisiana First Circuit Court of Appeal reversed the trial court's judgment and held that the one-year prescription did not apply. It did not, however, decide which prescriptive period, if any, applied to the action.[3] The Louisiana Supreme Court granted writs to make that determination.[4]

In holding that R.S. 30:16 actions are not subject to liberative prescription, the Louisiana Supreme Court highlighted the strict nature of prescription and the unique nature of a R.S. 30:16 claim.[5] The court found that the one-year prescription for delictual actions under Civil Code article 3492 did not apply because that article refers to "injury or damage" and is thus limited to claims seeking a "monetary award as compensation for damages allegedly sustained."[6] Citizen suits seeking to enforce environmental regulations, the court explained, are "fundamentally-different public law matters" unrelated to private tort claims.[7] The court further rejected the application of the default 10-year prescription for personal actions under Civil Code article 3499.[8] The court noted that R.S. 30:16 allows citizen to "essentially act[] for the Commissioner" while limiting the available relief to an injunction in the Commissioner's name, which serves the public's interest.[9] The court was persuaded by federal cases finding that the citizen suit provision under the Resource Conservation and Recovery Act ("RCRA") are not subject to any statute of limitations.[10]

In light of the legislature's failure to specify a prescriptive period for R.S. 30:16 along with "the unique qualities inherent in enforcement actions under [R.S. 30:16], the intent and purpose of Louisiana's conservation law, and the limited equitable relief available," the court held that citizen suits under R.S. 30:16 are not subject to liberative prescription.

The court also rejected the defendants' argument that the landowner failed to state a cause of action because he alleged contamination resulting from historical oil and gas operations despite that R.S. 30:16 applies only to violations involving present, ongoing, or continuous conduct. The court quickly overruled the no cause of action exception based on the petition's allegations that the defendants are currently violating Louisiana's conservation regulations.[11] And it concluded that whether the failure to remediate contamination constitutes a violation of a conservation regulation is a matter of proof that goes to the merits.[12]

But the court did not end its discussion there. Rather, it continued by again considering federal cases analyzing RCRA and referencing a number of cases finding that the continued presence of illegally dumped hazardous wastes may be a current violation of a RCRA standard even where the operator's conduct occurred in the past.[13] The court further opined that certain language within R.S. 30:16 and its companion statute (La. Rev. Stat. 30:14, which establishes the Commissioner's obligation to sue to restrain violations) indicates that citizen suits are not strictly limited to violations committed on or after the date a suit is first filed.[14] Specifically, the court found that the venue provision (allowing a suit where a violation is alleged "to have occurred") and the express authority to seek mandatory injunctions, along with the absence of language limiting the type of violation addressed, supported its conclusion. Finally, the court dismissed any concerns that its reading would undermine the Commissioner's authority and discretion in enforcing Louisiana's conservation laws. According to the court, a citizen suit plaintiff "bears the risk and expense of proving that a harm to the public and/or the environment exists," and that burden of litigation is sufficient to avoid frivolous suits.[15]

Two justices dissented, with Justice Crain writing a dissenting opinion. According to Justice Crain, the landowner failed to state a cause of action because R.S. 30:16 applies only to "current, ongoing damage-causing operations," and not to present day damage from past oil and gas activities, as the landowner alleged.[16] Justice Crain noted the legislature's use of present-tense language allowing suit against a person who "is violating" as well as its remedy of "restraining that person from continuing

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2 *Tureau*, 2022 WL 12338524, at *4.
3 *Id.*
4 *Id.* at *6.
5 *Id.* at *7-*10.
6 *Id.* at *8.
7 *Id.*
8 *Id.* at *9.
9 *Id.* at *10-*11.
10 *Id.* at *12-*15. RCRA's citizen suit provision in 42 U.S.C. § 6972 allows persons to sue "any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health of the environment." *Tureau*, 2022 WL 12338525, at * 12 n.4.
11 *Id.* at *18.
12 *Id.* at *19.
13 *Id.* at *22.
14 *Id.* at *25.
15 *Id.* at *27.
16 *Id.* at *1 (Crain, J., dissenting).

the violation," and he contrasted that with the past-tense language used in other statutes creating rights to act based on past conduct.[17] The dissent also noted that the court has previously drawn a distinction between damages caused by continuous operating causes of injury and the lingering effects of past conduct.[18] Because R.S. 30:16 applies only to current conduct, Justice Crain explained, "the staleness meant to be prevented by laws on prescription ceases to be a concern," and whether the statute is imprescriptible is irrelevant.[19]

The court remanded the case to the trial court for further proceedings. With this decision, the Louisiana Supreme Court has both ensured that R.S. 30:16 citizen suits remain available to plaintiffs indefinitely and also set the stage for further developments of the case law on actions under the statute.

A separate writ application filed by other defendants in the *Tureau* case remains pending before the Louisiana Supreme Court. Those defendants are seeking review of the Louisiana First Circuit's reversal of the trial court's judgment in favor of the defendants regarding res judicata. The issue there is whether a landowner appears in the same capacity in a R.S. 30:16 action as in his original legacy lawsuit. While the court's opinion in *Tureau* touched on the notion that a citizen plaintiff under R.S. 30:16 is essentially acting for the Commissioner, it has neither resolved that issue nor determined whether it will review the First Circuit's res judicata ruling.

17 *Id.* at *3.
18 *Id.* at *5-*6.
19 *Id.* at *7.

U.S. FERC Issues Two Orders Clarifying the Scope of its Natural Gas Act Jurisdiction

Grace Dickson Gerbas and Emily P. Mallen, Sidley Austin LLP

On September 22, 2022, the U.S. Federal Energy Regulatory Commission (FERC) denied two separate complaints against natural gas pipelines located entirely within one state that turned on whether FERC had jurisdiction over the facilities under the Natural Gas Act (NGA). In the first, *Owen Stanley Parker v. Permian Highway Pipeline LLC, et al.*, FERC confirmed that NGA jurisdiction does not attach to a natural gas pipeline constructed to provide intrastate service if it later transports interstate gas under Natural Gas Policy Act (NGPA) Section 311. In other words, the complainant asked FERC to assert jurisdiction. In the second order, *Hummel Generation, LLC v. UGI Sunbury, LLC*, FERC affirmed its NGA jurisdiction over a pipeline that the complainant had asserted should be deemed subject to the "Hinshaw" pipeline exemption under NGA Section 1(c). Hence, the complaint sought the opposite outcome from Permian Highway, a disclaimer of jurisdiction already found.

Permian Highway considered whether a 430-mile-long natural gas pipeline located entirely within Texas and permitted by the Texas Railroad Commission was constructed without prior authorization from FERC in violation of NGA Section 7. The premise of the complaint was that the pipeline was supplied by other interstate natural gas pipelines, causing a commingling of interstate and intrastate gas, thereby transforming the pipeline's jurisdiction from an intrastate to an interstate facility. FERC explained that the NGPA shielded the pipeline from interstate jurisdiction because it neither received nor transported interstate gas when it began operations, removing it from the purview of NGA Section 7. FERC stated that commingling and interstate connections, therefore, do not factor into its analysis.

In *Hummel Generation*, FERC considered whether it erred in authorizing a 34.4-mile-long natural gas pipeline in Pennsylvania under NGA Section 7 because the pipeline met the NGA's Hinshaw exemption. Specifically, the NGA exempts from jurisdiction a pipeline whose facilities are located entirely within one state, that receives all of its gas at or within the boundaries of that state, with all of its gas supplies consumed therein, and is regulated by the relevant state commission. The complainant argued that it was unnecessary for the state commission to actively regulate the pipeline for the Hinshaw exemption to apply. However, there was no proclamation by the Pennsylvania Public Utility Commission as to its jurisdiction over the pipeline, and FERC declined to interpret Pennsylvania law to determine whether the pipeline is "subject to" state regulation.

Neither order addressed the damages sought by the complainants had they prevailed before FERC. In *Permian Highway*, the complainant asked FERC for $1 billion and an injunction to prevent the pipeline from continuing with any condemnation actions or proceedings. In *Hummel Generation*, the pipeline had suggested to FERC that the complaint was motivated by the complainant's interest in renegotiating its transportation service agreements. Regardless of whether FERC had authority to grant the relief requested, these proceedings illustrate the importance of jurisdiction to underlying business transactions and whether a disclaimer or assertion of FERC jurisdiction can support or frustrate a business purpose.

Whose Party is it Anyway? Re-evaluating Workplace Events from a Lens of Inclusivity

Nneka Obiokoye

When my son was just four weeks old, I had to attend a series of social events organized by my then current employer. I wasn't expressly told that these events were mandatory, but I was given a strong impression that attending was crucial "if I wanted a shot at staying around." To make matters worse, these events were held after work hours and lasted till well after 9 pm. The firm spent a lot of money on the events, and they were supposed to be a lot of fun, but I only remember feeling anxious, stressed, physically uncomfortable (from being unable to nurse or pump), and isolated.

On one of those days, I remember crying in the bathroom because I was all dressed up and the babysitter did not show. My husband had already left for his night shift, and I was stranded at home with no visible options, struggling with feelings of inadequacy and riddled with guilt that this was even an issue. I mean, who cries because they have to stay home with their infant, instead of attending a party? Still, that was my predicament. Worse, I'm pretty sure my experience is not unique.

When polled on social media regarding what would make their lives easier, a recurring theme among Associates and young Partners in private law practice is the desire to avoid or reduce forced social interaction.

Forced social interaction loosely refers to the idea of being required to attend social events as a means of enforcing culture or bonding with a person's peers and superiors. These events may take the form of lunches, happy hours, dinners, retreats, or holiday parties. What they have in common is compulsion: attendees feel that their careers or status at the workplace will be injured in some way if they do not attend.

For working parents, especially women, these events often mean incurring additional costs to secure childcare for the event and the stress associated with cancelations, delays, or inability to obtain care, as well as time away from young children.

For individuals from underrepresented minorities, these events often mean awkward conversations with people you have nothing in common with, on topics that are often more applicable to the experiences of your white counterparts, and the stress of needing to code switch - modifying your tone, language, and mannerisms to fit into a predominantly white environment.

For introverts and neurodiverse individuals, these events may cause heightened levels of stress, exacerbated by the absence of autonomy in choosing when and how to engage socially with other people.

When intersectionality among the above groups is added to the equation, these events start to look like a very bad idea.

So how can leaders reduce or minimize forced social interactions, without entirely sacrificing opportunities for employees to engage with their colleagues in more considerate ways?

Here are some considerations that might be helpful:

1. Take some time to develop measurable data points for evaluating what type of events will actually foster positive social interactions, and what frequency (and duration) will achieve that purpose. For instance, would a 15–20-minute group check-in yield the same results as a weekly lunch?

2. Before you plan the next expensive event that no one wants to attend, why not take some time to ask your employees what they want to do, instead of leaving all the decisions to a handful of people in a committee. Use polls or written feedback mechanisms, so that introverts and other people that are less likely to speak up in a formal meeting can contribute.

3. What messaging are you providing regarding those who choose not to attend? Are you being clear about what is mandatory and what is not?

4. For mandatory events, can you offer alternatives up front that allow for time to plan ahead? Can you provide billable credit or some other productivity value for time spent? If employees perceive this as something they need to do over and above their productivity requirements, then it is in fact uncompensated work, not a social event.

5. Organize social events around business hours, so that parents and caregivers don't feel like they must choose between family and work. If such events must be held outside business hours, provide (or cover the cost of) childcare and elder care, and ensure that nursing/pumping facilities are available for those who need it, so that caregivers are not disproportionately burdened by such events. I find that engaging in the process of sourcing for group childcare and evaluating the cumulative cost of procuring such care, is a very effective way for leaders to understand the true tax of such events on parents and other caregivers, which may ultimately serve as a data point for an argument in favor of moderating the nature and frequency of such events.

Having a positive work culture is important but ensuring that the culture you seek to cultivate actually encourages a healthy and invested workforce is even more important. People thrive when they believe that they are

seen and appreciated; that they are valued both for their humanity and their productivity.

With the end of the year looming around the corner, with its attendant parties and social events, there's no better time to re-evaluate office events through a lens of empathy and inclusivity. This may be one of those few instances where a little consideration can go very far.

DIVERSITY, EQUITY & INCLUSION HIGHLIGHT

Shell USA, Inc. General Counsel Kimberly Phillips Honored as First Recipient of the Institute for Energy Law's Excellence in Diversity, Equity, and Inclusion Award

The Institute for Energy Law honored Kimberly Phillips, General Counsel, Global Litigation at Shell USA, Inc, as the first recipient of its inaugural Excellence in Diversity, Equity and Inclusion Award. The award presentation and following fireside chat were held at the Buffalo Soldiers National Museum in Houston on Thursday, September 22. Demetra Liggins, McGuireWoods LLP, introduced and interviewed Ms. Phillips for the fireside chat.

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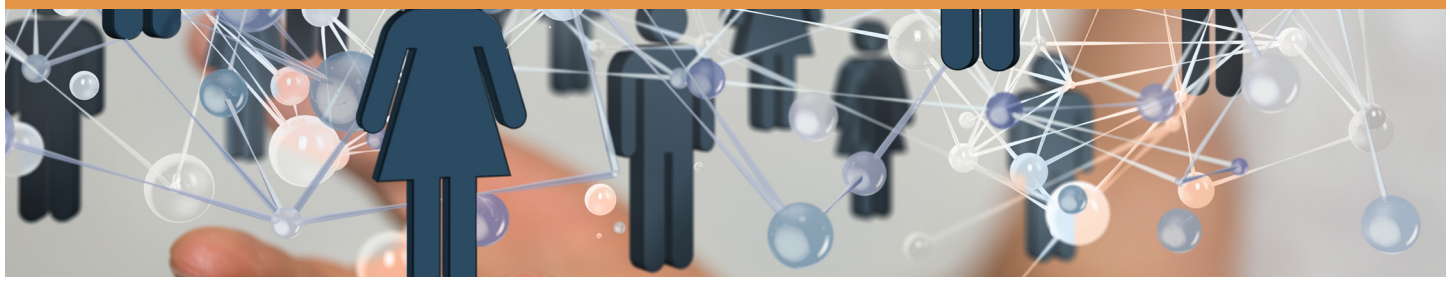
Photo: IEL Advisory Board Chair, Michael P. Lennon, Jr. presented Kimberly Phillips, Shell USA, Inc., with the inaugural Excellence in Diversity, Equity and Inclusion Award on September 22.

MEMBERS IN THE NEWS



IEL Advisory Board Member Jared Nelson Receives the 2022 Frank L. Maraist Award

The Louisiana Association of Defense Counsel has announced Jared Nelson of Liskow & Lewis as this year's recipient of the 2022 Frank L. Maraist Award.

The Frank L. Maraist Award recognizes a young lawyer who has made outstanding achievement in his practice and exemplary contributions to the legal profession, to the defense bar and to his community.

Left to Right: Charles Matthews (left) with IEL Chair Michael P. Lennon, Jr. (right) with IEL's 2022 Lifetime Achievement Award in Energy Litigation trophy.

Charles Matthews Honored as the IEL's 2022 Lifetime Achievement Award in Energy Litigation Recipient

The Center for American and International Law's ("CAIL") Institute for Energy Law ("IEL") honored Charles Matthews as the 2022 recipient of its Lifetime Achievement Award in Energy Litigation during the institute's 21stAnnual Energy Litigation Conference in Houston.

The award, presented to Matthews by IEL Chair Michael P. Lennon, Jr. (Mayer Brown LLP), is presented each November to a litigator whose achievements throughout their career or during a particular piece or series of litigation have won the admiration of their peers.

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!

LAW SCHOOL MEMBER

- Cleveland-Marshall College of Law, Cleveland, OH with Heidi Gorovitz Robertson as the Advisory Board Member

ACADEMIC/GOVERNMENT/NON-PROFIT MEMBER

- The Hon. William Guy Arnot, III, Arnot Law Firm, Houston, TX

ASSOCIATE MEMBERS

- Marcella Burke, Burke Law Group, Houston, TX
- Ryan Cowgill, Pillar Oil and Gas, LLC, Dallas, TX
- Barclay R. Nicholson, Sheppard, Mullin, Richter & Hampton LLP, Houston, TX
- Allison Stewart, Greenberg Traurig, LLP, Dallas, TX
- Marc Tabolsky, Schiffer Hicks Johnson PLLC, Houston, TX

YOUNG ENERGY PROFESSIONAL MEMBERS

- Alec N. Andrade, Liskow & Lewis, New Orleans, LA
- Rachael Beavers, Locke Lord LLP, Houston, TX
- Travis Denton Steele Cox, Copeland & Rice LLP, Houston, TX
- J. Hunter Curtis, Liskow & Lewis, New Orleans, LA
- Brandon Duke, Winston & Strawn LLP, Houston, TX
- Siobhan Galbraith, Schlumberger Oilfield Services, Sugar Land, TX
- David Joshua Gutierrez, Yetter Coleman LLP, Houston, TX
- William "Joe" Heaton, Liskow & Lewis, Lafayette, LA
- Hammons Hepner, Sharp Law LLP, Prairie Village, KS
- Michael H. Ishee, Liskow & Lewis, Lafayette, LA
- Gus E. Laggner, Liskow & Lewis, Lafayette, LA
- Hailey Maldonado, Liskow & Lewis, New Orleans, LA

New Members, cont.

YOUNG ENERGY PROFESSIONAL MEMBERS, CONT.

- Motahareh H. Nickel, GableGotwals, Oklahoma City, OK
- Ryne Pritchard, Evolution Well Services, LLC, The Woodlands, TX
- Kelicia Davis Rayas, Kean Miller LLP, New Orleans, LA
- Patricia L. Schouker, Energy Bridge Global, Alexandria, VA
- Cristian Soler, Liskow & Lewis, New Orleans, LA
- R. David Vinson, Pearson Adair & Co., Frisco, TX

FULL-TIME LAW STUDENT

- Jonathan Franks, South Texas College of Law, Manvel, TX
- Missy Kroninger, Syracuse University College of Law, Santa Ana, CA
- Coates Roberts, St. Mary's University School of Law, San Antonio, TX

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