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The Energy Dispatch, the IEL's Young Energy Professional newsletter, contains substantive articles on trending legal issues in the energy industry, interviews, and professional development.



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Interview with Andrew Busey, Senior Consultant, NERA Economic Consulting

Interview by Dr. Laura T.W. Olive, PhD, NERA Economic Consulting

Andrew Busey is a Senior Consultant in NERA Economic Consulting's Energy, Environment, Communications, and Infrastructure Practice. At NERA, he has worked on a wide range of projects involving economic analysis of energy and environmental matters, including cost-benefit analyses and economic impact assessments. Mr. Busey has extensive experience evaluating the social costs and benefits of Federal environmental regulations and regulatory compliance strategies including those related to the transportation and utilities sectors. He has also evaluated the economic benefits from potential non-compliance with environmental regulations, most notably the Clean Air Act and Clean Water Act. Mr. Busey has directed numerous evaluations of the economic costs and environmental externalities of proposed electricity resource plans on behalf of a Western utility.



LO: How did you become interested in economics and energy?

AB: Undergraduate economics courses gave me tremendous appreciation for the economic perspective of decision making, namely, how choices necessarily involve “opportunity

costs”—the trade-offs, some more tangible than others, that reflect what must be forgone by making one decision over an alternative. That mindset informed my graduate study, analyzing how the choices of individuals, organizations, and governments result in the spatial organization of economic activity. Those spatial considerations are especially fascinating in the energy sector, where, for example, history, nature, and culture shape a region's

energy supply, demand, and policy. At NERA—the oldest and largest firm of consulting economists—I work with the energy industry and policymakers to navigate these and other unique complications and challenges of the industry.

LO: Why do you find the type of work you do interesting?

AB: The more I worked in energy economics the more I realized that the industry presents interesting and impactful applications, not just of spatial economics, but of nearly every important economic concept. From industrial organization to political economy of institutional economics to externalities and social optimization, the energy sector turns every economic topic into a high-stakes, complicated challenge.

LO: What is the most important part of your job?

AB: In a word: communication. Energy investments, policies, and disputes bring together parties of varied priorities, backgrounds, and areas of expertise to discuss enormously complicated issues. To adapt explanations and questions to the audience at hand, be they an engineer, judge, epidemiologist, voter, or any other interested party, requires engaged and thoughtful communication at all times.

LO: What kinds of disputes arise in energy and how do you view them as an economist?

AB: Disputes in energy arise when a very complicated problem—matching energy supply with energy demand in real time and in the coming years and decades—becomes even more so with entanglement of competing priorities across numerous stakeholders and interest groups. For example, when a regulatory agency considers approval of a new power plant, the process often requires balancing multiple considerations: affordable and reliable electricity, macroeconomic impacts, environmental quality, etc. The rules for how regulators should weigh these factors may vary by jurisdiction, but inevitably the process will involve various parties with differing prioritizations and interests, each advocating for a different solution to the energy puzzle.

As an economist, I find it clarifying and vital to consider the relevant issues through the lens of opportunity costs, which requires an informed assessment of the likely alternatives in a world “but for” a particular judgement. As one example, the net effect on carbon dioxide emissions from increased spending on rooftop solar would depend on how else the funds could have been allocated—utility-scale renewable energy or investments in transportation decarbonization may well lead to more cost-effective emissions reductions in some settings.

LO: Can you give us some examples of how you apply economics, including opportunity costs, to issues in the energy industry?

AB: Yes, let me give you two types of recent cases that illustrate the relevance of opportunity cost.

The first involves work for a state agency that regulates gas distribution and must evaluate what regulatory actions it should take in accordance with the state's ambitious climate goals which include stringent emissions reductions targets in 2030, 2040, and 2050. A large policy question like this necessitates clear demarcation of the agency's power and then, within that scope, consideration of feasible alternatives and the trade-offs of each. I develop evaluations of the social costs and social benefits of viable policy actions—evaluations that adhere to economic principles required for such analyses and that make clear the opportunity costs of pursuing one policy pathway over another.

Second are cases supporting applications of utilities' integrated resource plans. Such applications may require detailed evaluations of the economic costs and environmental externalities of proposed plans—analyses that quantify and monetize the trade-offs across alternatives. One plan may include earlier retirement of a fossil unit, for example, but alternatives could differ in how the utility would replace that capacity and energy—whether through imports, new fossil units, or new renewables—some options leading to higher rates but lower emissions or vice versa.

Young Energy Professional Highlight – Bailey A. Bridges, BakerHostetler

Interview By Ryan Pittman, BakerHostetler

RP: What was your path to becoming a lawyer?



BB: I took an interesting route to becoming a lawyer and started nowhere near the energy sector. I started my professional life as a publicist in Nashville, Tennessee for country music artists. It was an incredible opportunity to learn. It was with a boutique PR Firm

(only 6 or so of us), so I got my feet wet very fast. One day I realized: "Advocating for your client? Tailoring writing to a particular audience? Communicating concisely and persuasively? I can transfer these skills to litigation." I'm so happy I did. I love my job. When I moved to Houston, Texas, I focused more on energy and never looked back.

RP: How would you describe your legal practice?

BB: My law practice is a bit of a mixed bag. I would say my primary practice is mineral title examination. However, my practice has branched out quite a bit from title examination and includes experience in renewables (primarily solar and carbon capture and sequestration), environmental litigation, and mineral leasing disputes.

RP: What do you find most gratifying about your legal practice?

BB: Learning new things. The incredible thing about being a lawyer, and especially a litigator, is you are constantly learning. Almost every week I learn more about different sectors of the energy industry, how states and the federal government work together to regulate certain energy related practices, and how different companies run their facilities. It keeps things fresh, and it's something I relish about this job. I would go crazy if I dealt with the same matter my whole career!

RP: How has your experience been as part of IEL's Young Energy Professionals Committee?

BB: It's been wonderful. After attending some of IEL's programming, I wanted to get more involved. When I joined the YEP Committee, and then eventually the Public Service and Outreach subcommittee, I could really get to know some of the young members on a more personal basis. We met outside of the big conferences, and it made a very large organization feel smaller.

RP: What advice do you have for young lawyers practicing in the energy sector?

BB: Never stop asking your colleagues and industry friends what they are working on. Energy is such a vast area of law, and there is always something new to learn.

RP: What are your interests outside of the office?

BB: I'm pretty boring. My dogs live better than I do, so I enjoy spending time with them at parks. I also am an amateur baker, so I try my recipes out on the weekend. I live in Houston, so I eat out way too much, too. I'm usually hunting down the next best Vietnamese restaurant. We have the best food in the country, I'm convinced.

PFAS Prognostication? Recent SCOTUS Decision Leaves Climate Change Case Analysis Open to Lower Courts

Lauren Brogdon, Morgan Haenchen, and Holton Farnum, Haynes and Boone, LLP

Considerable uncertainty abounds as to how climate change cases will be resolved, particularly given the U.S. Supreme Court's recent refusal to hear appeals from energy companies and industry groups facing such claims. But a recent decision by the Sixth Circuit may prove to be a bellwether for how some lower courts will address questions of traceability and standing in climate change and other large scale environmental cases.

In *Hardwick v. 3M Co.*, 87 F.4th 315 (6th Cir. 2023), the Sixth Circuit de-certified a statewide class of PFAS litigants bringing claims against 3M, DuPont, and other manufacturing companies. PFAS, or “per- and polyfluoroalkyl substances,” are a family of ubiquitous chemical compounds that have been used in countless consumer products since the 1950s. *Id.* at 318. Named plaintiff Kevin Hardwick was a longtime firefighter who used firefighting foams on the job that contained PFAS. *Id.* at 319. Despite blood samples indicating the presence of several PFAS compounds in Hardwick's blood, it is unknown which, if any, of the defendants manufactured the firefighting foams that Hardwick used. *Id.*

Nevertheless, Hardwick filed suit in 2018, alleging that 3M and other defendants caused PFAS contamination in his blood. At the time of filing suit, Hardwick had suffered no sickness or symptoms from the alleged PFAS contamination. *Id.* at 318. Hardwick later sought to certify a class including every person within the United States “with 0.05 parts per trillion (ppt) or more of PFOA [which is a particular type of PFAS] and at least 0.05 ppt or more of any other PFAS in their blood serum.” *Id.* The parties agreed that these trace amounts “are present in the blood of every person residing in the United States.” *Id.* The U.S. District Court for the Southern District of Ohio granted Hardwick's motion to certify the class in part, certifying a FRCP Rule 23(b)(2) class including “every person subject to the laws of Ohio” who has 0.05 ppt of PFOA and at least 0.05 ppt of PFAS in their blood. *Id.* The defendants sought interlocutory review of that class certification, and the Sixth Circuit obliged.

“Seldom is so ambitious a case filed on so slight a basis,” the Sixth Circuit's opinion portentously began. *Id.* at 318. Anchoring its analysis in the traceability element of legal standing, the Sixth Circuit held that Hardwick had failed to allege sufficient facts to show that each defendant had likely caused PFAS to end up in his blood. *Id.* at 320.

Hardwick's first failure of proof stemmed from treating all defendants as a “collective.” *Id.* The Sixth Circuit noted that the U.S. Supreme Court has “made it clear that ‘standing is not dispensed in gross.’” *Id.* (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). To adequately prove traceability, a defendant must link their injury to each individual defendant. *Hardwick*, 87 F.4th at 320. Hardwick's second pleading deficiency was that he had failed to allege that any of the defendants had even manufactured the PFAS compounds found in his blood. *Id.* at 321. Lacking sufficient facts alleged to support traceability—and therefore standing—the Sixth Circuit remanded the case with instructions to dismiss for lack of jurisdiction. *Id.*

Although it occupies a different substantive domain than the climate change cases recently before the U.S. Supreme Court, *Hardwick* may provide a framework for lower courts to analyze plaintiffs' claims in these cases. Like *Hardwick*, climate change plaintiffs will need to allege sufficient evidence of traceability linking individual defendants to carbon emission related injuries. This is no small task given the pervasiveness of carbon emissions from entities, industries, and individuals worldwide.

Definitive rulings are likely years away given that most climate change lawsuits are just beginning to work their way through lower courts. However, questions of injury traceability will likely factor into courts' analyses of these types of claims. If lower courts follow the Sixth Circuit's *Hardwick* precedent, it may be challenging for plaintiffs to prevail on their climate change claims.

U.S. CSB Announces Elimination of Its Investigation Backlog

Andrew F. Gann, Jr., Adam Sowatzka, Shannon M. Kasley, Kristen L. Mynes, and Ryan J. Frankel, McGuireWoods LLP

On December 27, 2023, the U.S. Chemical Safety and Hazard Investigation Board (“CSB”) announced that it had eliminated its long-standing backlog of investigations. Seventeen investigation reports were released in the seventeen months between July 2022 and December 2023—the most reports the agency ever issued in such a short period. Eleven of those reports were issued in 2023.

In July 2022, Steve Owens became the CSB's interim executive after the former chairperson resigned. At that time, the CSB was “faced with an unacceptable backlog of 17 open investigations and uncompleted reports” that dated as far back as 2016, Owens said. Owens and the other CSB Board Members sought to conclude the investigations and issue the reports as quickly as possible, and stated a commitment to ensure such a serious backlog never happens again. One of the reasons that there may be a larger number of “open” CSB matters is the reporting

requirements promulgated by the CSB in February 2020, which increased the number of matters that the CSB responded to since 2020 ([85 Fed. Reg 10094](#)). In short, those reporting requirements now require the “owner or operator of a stationary source [to report] . . . any accidental release resulting in a fatality, serious injury, or substantial property damage.” *Id.*

The CSB believes the empty backlog better positions the agency to address chemical safety challenges in a timely manner. One CSB Board Member stated that the agency eliminated the backlog through “dedication, diligence, and expertise” which it will bring to future investigations. Another CSB Board Member said “[n]ow that these legacy reports are out, we are better positioned to deploy to chemical incidents across the country and complete future reports more efficiently.”

This demonstrates a trend that the CSB may more aggressively investigate and resolve more quickly investigations into significant incidents going forward. What that means for clients is the need to properly manage internal (privileged) investigations to reduce the impact of CSB involvement in significant matters. Importantly, clients should note the statutory prohibition in the amendments to the Clean Air Act which limit the use of potentially significant portions of CSB reports in follow-on litigation, pursuant to 42 U.S.C. § 7412(r)(6)(G). That section provides that “[n]o part of the conclusions, findings, or recommendations of the [CSB] Board relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages arising out of any matter mentioned in such report.”

The CSB is an independent federal agency responsible for investigating industrial chemical accidents. Its authority derives from the Clean Air Act Amendments of 1990, with the principal role of investigating accidents to determine the conditions and circumstances which led to the event and identifying the cause so that similar events might be prevented. As an independent federal agency, the CSB is unique insofar as Congress provided in law that no other agency or executive branch official may direct the activities of the CSB. Its investigative function is completely independent of the rulemaking, inspection, and enforcement authorities of the Environmental Protection Agency and Occupational Safety and Health Administration. Board members are appointed by the President and confirmed by the Senate. Since its inception in 1998, the CSB has deployed to over 170 chemical incidents and issued nearly 900 recommendations to companies, industry organizations, labor groups, and regulatory agencies.

Even when the initial on-site investigation is completed, the CSB reports and the official closing of files can take

years. In terms of how the CSB conducts an investigation, at the outset, a CSB team arrives onsite, conducts detailed interviews of witnesses, inspects company safety records, inventories, and operating procedures, and other information in order to understand the circumstances of the incident. Over the course of several months, investigators (including chemical and mechanical engineers, industrial safety experts, and other specialists) review the collected evidence, consult with Board members, and review regulations and industry practices before drafting key findings, root causes, and recommendations. We note that CSB does not have enforcement authority, but views its mission as educating industry and other stakeholders on lessons learned from industrial incidents.

Professional Development Insight: Reviewing Your Professional Game Tape

Laura Meherg and Tara Weintritt, Wicker Park Group

Superbowl Sunday is top of mind with record breaking crowds tuning in to watch the two teams compete. Most of us know the game well, but we can all learn something from the practices, habits and behaviors of the nation's best sports teams. While both teams spent hours preparing and practicing on the field for the big day, they also spent as many additional hours rewatching tape of previous games. They watch to see what they want to repeat, what they want to change/adjust and what they can learn about their competitors. Rewatching game tape is a standard practice for high functioning teams and is something we don't do enough when it comes to our professional lives.

Far too often we do the same things over and over, expecting different results. Or we do the same things without evaluating what went well, what we could have changed or what we want to adjust for the future.

It's still the first quarter of 2024. How do you feel about your progress towards your personal and professional success? Take some time to review what you have been doing to advance your goals and build the practice you want. What have you done that's worked well? What didn't work so well? What minor adjustments does it take to make a difference in your efforts?

Here are a few suggestions to get you started reviewing your professional game tape to identify where you should double down, what you might need to give up and where a small pivot could make a big difference:

- **Review your calendar from last year.**
 - What clients and projects did you love? Invest in the relationships you want to keep and grow. Reach out to those clients, contacts and colleagues to make sure they know how much

you value the work and relationship and make sure you understand their goals and priorities going forward.

- What events and conferences were time well spent and which ones didn't result in networking or education that met your expectations?
- What did you learn from your business and professional development time and efforts? What would you change after reviewing how you spent (or did not spend) that time?
- **What can you learn from your competitors?**
 - Who, within the organization and outside of the organization, has the practice, type of work and contacts you aspire to have and represent? What have they done and what are they doing to attract that kind of work?
 - Very few law firm rainmakers or business leaders are "all things to all people." They are known for less than a handful of key areas of focus, strength or expertise. They may do more behind the scenes, but they are careful about their public image. What does your biography, LinkedIn profile and activity and other public information say to your network?
- **How are you maintaining excellent health and wellness?**
 - The greatest competitors prioritize their health, fitness and mental wellbeing to be at their best. Did you prioritize your health and well-being last year? If so, stick with it. If not, what small steps can you take to allocate time each day for moving, resting or caring for your body?
- **What does the Superbowl of your professional life look like?**
 - The winners have plans, plays and teams to reach their goals. Far too often, we expect business development and career success without a plan. Dedicate time to creating a game plan for your own success.



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