



# THE Energy Dispatch

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## CONTENTS

ENERGY LAW THEN & NOW: A MULTIGENERATIONAL DISCUSSION – PART I...	2
WHY YOU SHOULD APPLY FOR IEL'S 2020/2021 LEADERSHIP CLASS EVEN THOUGH THINGS ARE WEIRD RIGHT NOW.....	3
INTERVIEW WITH LAURA T.W. OLIVE, PH.D.....	4
YOUNG ENERGY PROFESSIONAL HIGHLIGHT .....	6
U.S. CLIMATE CHANGE LITIGATION: 2020 UPDATE .....	7
COLOMBIA: A PATH FORWARD FOR SHALE DEVELOPMENT? .....	9

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## Energy Law Then & Now: A Multigenerational Discussion – Part I

In **Patrick H. Martin's** storied career in oil and gas law, he has been a law professor, author and editor of essential legal publications, and the chief oil regulator in Louisiana. In this multi-part interview, Patrick is interviewed by his son **Drew Martin**, an oil and gas attorney in Louisiana and member of IEL's 2019-2020 Leadership Class.

Part I of this interview series covers Martin's entrée into oil and gas law, his time as in-house counsel, and predictions about the future of the industry in these volatile times.

**Drew:** Dad, first it might be useful for you to provide readers with some background on yourself. The *Dispatch* suggested a "then and now" format, and a good "then" may be your background and how you became involved in energy law in the first place.

**Pat:** I was born in Bastrop, Louisiana a few months before the end of World War II. After the war my father was an engineer with the paper mill, the major industry in Bastrop. He had grown up in a small city in Wisconsin where his father and grandfather had both been lawyers and judges. He had to drop out of college when his father died early in the Great Depression. To support his mother and sister, he went to Oklahoma where he found work in the oil fields of Oklahoma and New Mexico. Later, he went back for an engineering degree from the University of Wisconsin before serving in the Army in World War II. So, I guess the combination of law and oil in his background merged in my DNA and maybe I passed it on to you.

I was not an outstanding student in Bastrop High and my early college years were, let's just say, eclectic. Eventually I settled down and began making better grades, and the LSU History Department offered me a fellowship leading to a Ph.D. I wrote a dissertation on American relations with South Africa while I was enrolled at Duke for law school. I timed my efforts such that I was able to receive both my J.D. and Ph.D. in May 1974.

**Drew: Did you take mineral law while at Duke? Was it offered?**

I was interested in corporate practice after a summer clerkship with Scott Paper Company in Philadelphia. My interest in energy was stimulated in 1973 by events that year. An Arab-Israeli war had led to an oil embargo that resulted in gasoline shortages and rationing and price controls on oil. I can recall sitting in lines at filling stations to get a tank full. Back then all service stations (as they were called) had attendants who had to pump gas into your car. Self-service only started a few years later. Although Duke didn't offer an oil and gas class, I was the research assistant for a young professor named Joe Bell. With the creation of a new Federal Energy Office in 1973, he was offered a job with the new agency that permitted him to work for it while continuing to finish the academic year at Duke. I did work for him on oil and gas topics, and I did two independent study courses and wrote papers on both international oil and gas regulation, and on the interplay of state and federal natural gas regulation. The latter paper focused on an act of a special session of the Louisiana legislature that passed something called the Monster Bill to address energy issues arising with the energy crisis of 1973. In December of that year I accepted a job in the New Orleans law office of Gulf Oil Corporation to begin on graduation from Duke.

**Drew: You said your first job out of law school was at Gulf Oil. Many IEL members are in-house counsel at energy companies and are probably interested in knowing how that role has changed since the 1970s. Based on your own experience, and your discussions with current in-house lawyers, what are the biggest differences in the nature and demands of that role between then and now?**

In the 1960s and 1970s a number of the large oil companies recruited at law schools such that a young lawyer could begin a career directly with the oil company. Gulf Oil followed that model, with a goal of developing a dedicated staff of lawyers. Although I left to teach after a little over a year at Gulf, it was a wonderful experience. Because we didn't have to worry that our guidance to a client might not be well received, causing the client to take the company

business to another law firm, we were able to be fairly blunt in telling a client to change his or her plans.

The New Orleans law office of Gulf had jurisdiction over offshore operations in the Gulf of Mexico (state and federal waters) and onshore activities throughout Louisiana. The onshore activities included two refineries, one of which was a huge new one called the Belle Chasse Refinery south of New Orleans, large storage facilities in Plaquemines Parish, oil and gas production operations including pooling and unitization matters, and the service station activities of the marketing department. I was treated as a full-fledged lawyer from the first day in the office, though I had not yet even taken the bar.

That first day was memorable, for the other five lawyers in the office had left for a funeral. Around mid-morning a distressed person from the marketing office came into the law department and talked to the only lawyer around. At least I was the only guy in a coat and tie, so I had some of the trappings of an attorney. There was an emergency, a crisis: one of the Gulf stations in the city was being decommissioned – the machines were now breaking up the concrete. The blows were shaking the adjacent buildings and disturbing a certain member of the City Council who had his office next door. He had called, threatening to cancel all business between Gulf and the City if the demolition didn't cease. What should they do? I pondered the facts for a few minutes and used my years of training in the principles of contract, property, administrative law, and constitutional law to come to a judgment and a course of action. With as much authority as I could muster and not revealing to the client I was as yet unadmitted to the bar, I counseled: "Stop the machines." And lo, the machines stopped. The client was grateful that he had been relieved of the onus of responsibility, and the project was deferred for a day or two. I looked around and thought – 'Hey this could be cool. I can stop the machines. No one will know I'm improvising.'

***Drew: You've seen lots of swings in the industry over the years: moves by OPEC that have impacted domestic prices and exploration, the giddy shale frenzy of the mid-late 2000s and subsequent price hangover, the development of LNG technology, and now the double-whammy of the Covid-19 pandemic and the Saudi/Russian price war. Do these more recent developments strike you as any different than what's occurred in the past, insofar as it concerns the possibility of a "new normal" of lower prices and a more consolidated industry? Or is it going to remain similarly-cyclical going forward?***

The oil and gas business has always been international in nature and it has always been volatile. Oil and gas have

long been an instrument or weapon of national policy. I've never been uncomfortable about making sweeping predictions so long as they are broad generalizations. As someone once said of me, "Martin may not always be right, but he's never in doubt."

**The Oil and Gas Industry Past:** Small companies took risks, innovated, grew large; many failed. For example, Edwin Drake and the Seneca Oil Company. In 1859 he used piping to prevent borehole collapse, giving well technology the basis for drilling wells ever since then. He died broke. Back then, prices were volatile.

**The Oil and Gas Industry Future:** Small companies will take risks, innovate, and grow large; many will fail after spectacular successes. Dare I say, there will be other Enrons? Bankruptcy law will always have a role in oil and gas. Prices will be volatile.

In the distant past, wells were closely spaced, and that was wasteful. Now wells are closely spaced, and that is efficient. In the distant past, oil was exported from the U. S. For example, the ship Elizabeth Watts departed the Philadelphia docks on November 19, 1861. On January 9, 1862 (45 days) she sailed down the Thames River to London's Victoria Dock. It took twelve days to unload the 1,329 barrels of American oil. In the future, oil will be exported from the U. S. On December 18, 2015 a long time ban on oil exports ended and export has resumed. We will be exporting LNG and NGLs for years to come despite interruptions such as the Russians and Saudis are causing at the moment.

***Be sure to check out Part II in the next issue!***

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## **Why You Should Apply for IEL's 2020/2021 Leadership Class Even Though Things are Weird Right Now**

Laura Springer Brown, Liskow & Lewis

While being honored at a 2013 Equality Now event, the writer and director Joss Whedon gave a speech describing his aversion to the word "feminist." Whedon, the creator of early 2000s feminist icons like "Buffy the Vampire Slayer," explained that his dislike was phonetic—he especially hated the last syllable of the word: "...'ist.' Hate it. I hate it. Fail on 'ist.' It's just, a little dark, black little, must be hissed. Hissed. It's Germanic but not in the romantic way." To Whedon, the thing was essential, but the word was terrible.

For most of my life, network has been a word like that to me. Phonetically, it's not melodious; mechanically, it doesn't roll off the tongue. But my main dislike came from the components and what they connoted: net (a device to trap, to ensnare); work (self-explanatory).

Over the past few weeks, we have all been, and will continue to be affected in some manner by the COVID-19 pandemic. Early on, large conferences began to drop, including the IEL's National Young Energy Professionals Conference in Austin, Texas—and all its stellar social offerings. (Sixth Street! Corndog Shrimp!) My hometown of New Orleans rapidly became an epicenter of the outbreak, and now Louisiana is one of a growing number of states that have issued “stay at home” orders.

In this present reality, I've come to see the word differently: net (something to catch you, keep you safe); work (something I am lucky to be able to do). Things are uncertain right now, but life will return to normal, and we'll get those opportunities to connect with each other in person again. One unmissable opportunity in that vein is the IEL's Leadership Class.

What is it? I'll borrow from IEL's website: it's a program where 35-40 “participants will have the opportunity to meet distinguished leaders within and outside the energy industry, learn more about the energy industry, leadership, communication, diversity, and careers in energy.

Members will also discover and analyze their strengths and weaknesses, the traits of good leaders, and opportunities for success as energy professionals. In addition, participants will build bonds with other class members and energy leaders, including IEL leaders.”

All of that is true. In more personal terms, my being part of the 2019-2020 Leadership Class has meant having peers to seek out and talk to at IEL conferences. It means expanding my base of contacts across the United States who can tell me the best places to eat and what to see in their city (whenever I'm able to do that again, of course). The Class has deepened my involvement in a worthy organization—for instance, I wouldn't be writing this article without it. It has indeed been a learning experience, substantively and professionally. In particular, I've learned more about evaluating my strengths and parlaying that into making my peer-to-peer interactions more meaningful. As a “connector” who thrives on learning interesting facts about people, I appreciate that the class experience lets me meet people on a more personal level. I may not remember exactly what you're working on, but I'll remember if you were the largest baby born in Houston.

Finally, I'd be remiss if I didn't add that it's fun. I've very much enjoyed the Leadership Class for quality socializing with a professional slant. I can't change the lexicon, so “professionizing” isn't going to take off and replace “networking” anytime soon. Recognizing that, I'll just agree that the Leadership Class provides exceptional networking. Applications for the 2020-2021 Class open in May, and I encourage you to apply, re-apply, or encourage others

to apply. In trying times, leadership matters. The next Leadership Class will be uniquely positioned to engage with new challenges, and, I imagine, be especially ready to have some fun.

## Interview with Laura T.W. Olive, Ph.D.

Associate Director, NERA Economic Consulting  
Boston

### Vickie Adams (VA): How did you become interested in economics and energy?

LO: I have always been interested in history, law, economics,



and politics and how they work together. Those interests led me to study economics as an undergraduate and next to pursue a Ph.D. In my studies, I learned neoclassical economics—where demand and supply interact, prices reach competitive levels, and equilibrium results. I also learned how firms organize themselves, including the

reasons for vertical integration, joint ventures, long-term contracts, and regulation. Energy is a field that is constantly changing, yet has a long history tied to economics, law, and politics. At NERA—the oldest and largest firm of consulting economists—I work with the energy industry to navigate questions that arise from its unique characteristics and face new challenges.

### VA: Why do you find the type of work you do interesting?

LO: As a student, I learned industrial organization and regulation from a neoclassical perspective (what Alfred Kahn, one of NERA's founders, writes about in Volume I of his treatise, *The Economics of Regulation*). But what I learned on the job was that institutional economics provides a more useful foundation for dealing effectively with energy disputes (Volume II of Dr. Kahn's treatise) by recognizing the transactions costs associated with the energy business. Energy law is closely tied with the economics of the industry and requires a deep understanding of relationships, history, context, and the institutions that drive decision-making.

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

LO: Disputes in energy arise from a normal set of issues, but energy assets and contracts can be very idiosyncratic (e.g.

refineries, oil/gas supply contracts, LNG terminals, pipelines). For example, disputes can occur between buyers and sellers due to incomplete contracts involving energy infrastructure that is useful for one particular purpose. Neoclassical economics abstracts from the organization of firms and is primarily concerned with prices and output in markets. Institutional economics, however, examines how firms contract with each other to maintain economic businesses and relationships given investment costs and uncertainties in markets. The institutional perspective is highly effective for approaching disputes in energy (characterized by long-lived, highly capital-intensive investments tied to competitive commodity markets).

**VA: What is the most important part of your job?**

LO: In one word: context. Understanding a dispute, a transaction, or a market requires reviewing how and why the infrastructure was built or the market developed, what normal industry practices exist, how the law influences business decisions, and how companies approach markets. To evaluate issues and develop reasonable conclusions, context is everything.

**VA: Can you give us some examples of how you apply institutional economics to issues in the energy industry?**

LO: Yes, let me give you three examples of publications related to my work.

First, the case of polar vortexes in New England—where periods of extreme cold result in high gas and electricity prices—is one example of where neoclassical economics, looking only at market dynamics, does not have a useful solution. An institutional economics perspective, considering the regulatory structure of each industry, recognizes that the solution lies not in the market, but rather in how the legislation that created New England’s unbundled electricity market bars electric distributors from signing long-term contracts for gas pipeline capacity to serve competitive electric generators (see “Polar Vortexes in New England: Missing Money, Missing Markets, or Missing Regulation?” in *Economics of Energy & Environmental Policy*, 2019).

Second, regulation of pipelines in the United States dates back more than 100 years and the laws passed in 1906 (oil) and 1938 (gas) drive how each industry developed over time. One key difference is that oil pipelines—whose regulation stems from railroad regulation—are common carriers, while gas pipelines—who benefited from an additional 30 years of regulatory experience—are contract carriers. Therefore, oil pipelines must serve any firm that wishes to ship oil in a given month, while the capacity on gas pipelines is fully subscribed

before it is built. Disputes that arise for oil and gas pipelines in the United States require a perspective that recognizes this regulatory history (see “The Politics of U.S. Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling,” in *Energy Law Journal*, 2016).

Third, liquefied natural gas (LNG) provides another interesting example of limitations in neoclassical economics. The physical characteristics of gas require significant, upfront investments in liquefaction, specialized shipping, and regasification, to allow for international trade. Such long-lived investments require long-term contracts, vertical integration, equity ownership or other means of attracting capital. The type of worldwide spot and futures markets that exist for other commodities do not yet exist for gas (see “A Petroleum Tanker of a Different Color: Obstacles to an LNG-based Global Gas Spot Market” Submitted to *Economics of Energy & Environmental Policy*, in revision requested by Editor).

**VA: With the world in such an interesting place right now with COVID-19 and other related worries and issues, from your perspective as an economist, what do you see as some challenges and opportunities for the energy industry going forward?**

LO: From my perspective, challenges create opportunities. For the energy industry, the simultaneous challenges of falling oil prices, COVID-19 altering the way that people interact, and the impact of a recession on demand for energy all create uncertainty. But past experience with uncertainty in the energy industry and beyond has led to innovation in technology and business processes. I am optimistic that, while we cannot predict how things will turn out, the energy industry will take the opportunity to adjust and innovate going forward.

## Young Energy Professional Highlight – Joseph Ope, Exxon Mobil Corporation, Singapore

Interview by Vickie Adams



*Joe, you've worked in multiple countries and you are currently based in Singapore serving as Coordinating Counsel – Global LNG Marketing for Exxon Mobil Corporation. Could you describe a little of what your current role looks like on a day-to-day basis?*

A "typical" day begins with a quick briefing with the members of my team who support ExxonMobil's spot LNG trading business. One of the lawyers would have attended the daily trading meeting where the LNG traders discuss the status of live transactions and their priorities for the next 24 hours. Our briefing ensures that we understand those priorities and are well positioned to support the trading activities for the day. There are several ExxonMobil LNG marketing businesses located in Singapore and a large part of my role involves providing competition law advice on how those businesses can appropriately interact with each other. I spend a lot of time on competition law analysis on all sorts of matters from arm's length transactions between the businesses to movement of personnel.

*What is your favorite part of your job?*

I really enjoy the fact that in the morning I could be assisting on a potential transaction in Pakistan and I end the day discussing a Mozambique related issue. For me, nothing in my professional life tops the opportunity to work and interact with people from different nationalities, cultures and backgrounds.

*Has there been a time in your career where you felt like you made a mistake? If so, how did you deal with it?*

Absolutely, I think we all have experienced moments where we wish we had a do-over. In an age where email tends to be used a bit casually in the workplace for efficiency sake, there have been 1 or 2 email responses I wish I could take back.

The lessons for me are (I) phone calls or in person meetings are far better ways of dealing with difficult or delicate issues, (II) if possible, step away for at least 15 minutes before composing a response to an email you don't particularly agree with and (III) reply to all is not always your friend so think twice before doing so.

*In your career, you've served in multiple roles and multiple locations. What is it about a role that gets you interested and makes you think about moving to another country?*

As I previously mentioned, I enjoy working with people from different parts of the world so moving to another country (Singapore is the 6th country I've lived in) was relatively easy for me, particularly when I was single. Now that I have a family, it's extremely important that my wife is able to maintain her career and there are good schooling and healthcare options available. In terms of the role, I tend to be attracted to roles that either expose me to a completely different part of the business or roles that I know will involve legal issues I haven't dealt with in prior roles.

*Books and articles on mindfulness and avoiding burnout are becoming more and more popular, especially for those in the legal profession. Is there anything you do on a consistent basis to help avoid burnout?*

Nothing in particular. I just try to ensure that I'm intentional about creating time for the things that are important to me (family, friends, faith) even if that means coming in later or leaving earlier on a particular day. My kids love it when I pick them up from pre-school early to go for ice cream....they love the soya ice cream at IKEA.

*In addition to an exciting career, you have a family with small children. What does a fun weekend for you and your family look like?*

We are all foodies and Singapore is the perfect place to try a variety of Asian cuisine so you can typically find us sampling food at one of the major food/hawker centers. We also love hanging out at the Singapore Zoo.

*Do you have any additional hobbies?*

I love attending sporting events and I'm really looking forward to attending the Formula 1 race in Singapore this year (it might be hard to top the Abu Dhabi race which I attended a few times while living in UAE).

*What is one fun fact that most people don't know about you.*

I was born in London. I promise, I have never had a British accent...

*What advice would you give to young professionals in the energy sector?*

I think it's safe to say that few industries have a bigger global reach than the energy industry. The world is your canvas so

don't be afraid to step outside your comfort zone for the type of learning experiences you desire regardless of where they are located.

## U.S. Climate Change Litigation: 2020 Update

Edward M. Duhe, Jr. and Elizabeth M. Byrne, Liskow & Lewis

The past several years have seen a proliferation of litigation involving the causes and effects of climate change. In the United States, the current landscape of this dynamic and evolving docket consists of:

### (1) Lawsuits Against Fossil Fuel Companies

- Two lawsuits brought by state governments against an oil and gas company alleging investor fraud, and
- Numerous cities, counties, and other local governments seeking compensation from fossil fuel companies for climate-change related damages.

### (2) Lawsuits Against the Government

- Nine lawsuits brought by a non-profit law firm, through children, against governments for failing to protect them from fossil fuel emissions.

Below, we take a closer look at each category of lawsuits and provide an update on where they stand today.

### Category #1: Lawsuits Against Fossil Fuel Companies

#### *Investor Fraud Lawsuits*

The first group of climate change litigation against fossil fuel companies alleges that oil and gas companies defrauded investors by falsely stating that the company had fully considered the risks of climate change regulation and had factored those risks into its business operations. The states of New York and Massachusetts, through their Attorneys General, each filed a suit against Exxon Mobil Corporation asserting investor fraud related claims under state law.

In the New York litigation, ExxonMobil successfully defended itself earlier this year. The twelve-day bench trial was the first time a fossil fuel company addressed in court its understanding of climate change and the risks climate change poses to its business. The Supreme Court of New York (New York's court of first impression) found that the Attorney General "failed to prove by a preponderance of the evidence that ExxonMobil violated [New York state law] in connection with its public disclosures concerning how ExxonMobil accounted for past, present and future climate change risks." *People by James v. Exxon Mobil Corp.*, 65 Misc. 3d 1233(A), 1 (N.Y. Sup. Ct. 2019). New York law required

that the Attorney General prove that ExxonMobil made a misrepresentation of material facts that a reasonable investor would consider in deciding how to act. *Id.* at 5-6. Notably, the law did not require proof of any intent to defraud on the part of ExxonMobil. The court found that "there was no proof offered at trial that established material misrepresentations or omissions contained in any of ExxonMobil's public disclosures that satisfy the applicable legal standard." *Id.* at 9-10 (emphasis in original). Instead, the court concluded that "the evidence at trial revealed that ExxonMobil executives and employees were uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible . . . . ExxonMobil has a culture of disciplined analysis, planning, accounting, and reporting." *Id.* at 37. On January 10, 2020, the New York Attorney General's Office announced that it would not appeal the trial court's decision.

The Commonwealth of Massachusetts also filed a lawsuit against ExxonMobil. While the Massachusetts lawsuit largely echoes the lawsuit won by ExxonMobil in New York, it contains unique allegations of consumer fraud. Specifically, the Attorney General of Massachusetts alleges that ExxonMobil deceived consumers through the sale of products it marketed as environmentally friendly and failed to disclose the potential for those products to contribute to climate change. ExxonMobil removed the case to federal court arguing that the lawsuit involves "complex federal statutory, regulatory, and constitutional issues and frameworks," which should supplant Massachusetts' interpretation of climate issues. On March 17, 2020, U.S. District Judge William G. Young rejected that argument and remanded the suit back to Suffolk County Superior Court, telling counsel via telephone conference call that "this is not a case where the issue [of remand] is in any substantial doubt." Judge Young denied ExxonMobil's subsequent request for the order to be delayed so it could appeal the decision to the First Circuit.

#### *Cities, Counties, States, and Other Local Governments*

The second group of climate change litigation against fossil fuel companies includes cases by cities, counties, municipalities and/or state governments in California, Maryland, New York, Hawaii, Colorado, Washington, and Rhode Island. The majority of these cases have been brought under state nuisance laws. For example, eight municipalities in California allege that the oil and gas companies have been "misleadingly promot[ing] their fossil-fuel products through 'large scale, sophisticated advertising and communications campaigns to promote pervasive fossil fuel usage,' including by deliberately concealing the known consequences of climate change on public infrastructure."

Plaintiffs-Appellants' Consolidated Reply Brief at 2, *City of Oakland, et al v. BP P.L.C., et al*, No. 18-16663 (9th Cir. July 1, 2019). California federal district courts have treated the cases differently, though: a district court exercised jurisdiction and dismissed the case brought by the cities of Oakland and San Francisco (Docket No. 18-16663), while other district courts found no federal jurisdiction and remanded back to state court lawsuits brought by the counties of San Mateo (Docket No. 18-15499), Marin (Docket No. 18-15503), and Santa Cruz (Docket No. 18-16376) and the city of Imperial Beach (Docket No. 18-5502). The appeals from the five California cases are before a single panel in the Ninth Circuit and remain pending. The court held oral argument on February 5, 2020, and the panel took the appeals under submission.

Most recently, the Fourth Circuit upheld a district court's decision remanding Baltimore's suit against twenty-six fossil fuel companies back to state court. *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, No. 19-1644 (4th Cir. March 6, 2020). In this case, Baltimore alleges that the defendant companies contributed to climate change by producing, promoting, and misleadingly marketing fossil fuel products despite knowing of associated dangers. Based on these allegations, Baltimore asserts state law claims for nuisance, product liability, trespass, and violation of consumer protection laws. Chevron Corporation and Chevron U.S.A. Inc. removed the case to federal court, arguing federal question jurisdiction and federal officer removal.

The Fourth Circuit's review was limited to whether removal was proper under 28 U.S.C. § 1442, commonly referred to as the federal officer removal statute. (The Fourth Circuit determined that its appellate review was confined to this issued by 28 U.S.C. § 1447(d), and that it lacked jurisdiction to consider whether the district court properly remanded the case based on a lack of federal question jurisdiction.) In order for a private defendant to remove a case under the federal officer removal statute, the defendant must show "(1) that it 'act[ed] under' a federal officer, (2) that it has 'a colorable federal defense,' and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority." *Id.* at 14 (alterations in original) (citing *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017)). The Fourth Circuit rejected the argument that entering into fuel supply and strategic petroleum reserve agreements with the United States Navy and holding federal offshore drilling leases conferred federal officer status upon Chevron, and instead held that defendants' historical contractual relationships failed to satisfy either the acting-under prong, or the nexus prong of the federal officer removal statute. Defendants filed a writ of certiorari with the U.S. Supreme Court on April 1, 2020. The state court case is Docket No. 18-

cv-02357.

The most recent suit against fossil fuel companies comes from the city and county of Honolulu and is based on public nuisance and failure to warn theories of liability. Honolulu alleges that oil companies knew for decades about their products' impact on climate change but hid the information from the public to protect their profits. As a result, Honolulu contends that it suffered "injury or destruction of City-owned or operated facilities critical for operations, utility services, and risk management, as well as other assets essential to community health, safety, and well-being; increased planning and preparation costs for community adaption and resiliency to the effects of the climate crisis; decreased tax revenue due to impacts on the city's tourism and ocean-based economy and property tax base." Complaint at 88, *City and County of Honolulu v. Sunoco LP, et al.*, No. 1CCV-20-0000380 (Haw. Circ. Ct. Mar. 9, 2020).

Most of the other cases are pending in various United States Courts of Appeal. Plaintiffs have appealed trial court decisions dismissing the cases, while defendants have appealed federal district court orders remanding the cases to the state courts in which they were filed. At present, appeals are pending before the First, Second, and Tenth Circuit Courts of Appeal. Given the potential for a circuit split to emerge, these cases are likely headed to the Supreme Court.

## Category #2: Lawsuits Against Government

### *The Children's Climate Change Lawsuits*

The second category of climate change lawsuits involves the public trust doctrine. Plaintiffs allege that governments are trustees of the environment and as such, have breached that trust by supporting fossil fuel development. Many of the lawsuits in this category have been brought or backed by Our Children's Trust, "a non-profit public interest law firm that provides strategic, campaign-based legal services to youth from diverse backgrounds to secure their legal rights to safe climate." *Our Mission*, Our Children's Trust (last visited January 14, 2020), <https://www.ourchildrenstrust.org/mission-statement>.

While Our Children's Trust has brought nine cases so far, the 2015 case *Juliana v. United States* is at the forefront. *Juliana v. United States*, No. 6:15-cv-1517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018), appeal docketed, No. 18-36082 (9th Cir. Dec. 27, 2018). The Juliana plaintiffs bring public trust claims, asserting that the federal government violated the young plaintiffs' constitutional rights by allowing fossil fuel companies to emit dangerous carbon dioxide concentrations. The plaintiffs asked the court to "order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels



... swiftly phase out CO2 emissions, as well as take such other actions as necessary to ensure that atmospheric CO2 is no more concentrated than 350 [parts per million] by 2100.” First Amended Complaint for Declaratory and Injunctive Relief at 12, *Juliana v. United States*, No. 6:15-cv-1517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018), ECF No. 7. On January 17, 2020, the Ninth Circuit reversed the district court’s denial of the government’s motion to dismiss. In a 2-1 decision, the Ninth Circuit held that the plaintiffs lacked standing under Article III of the United States Constitution because the plaintiffs’ alleged injuries could not be adequately redressed by a federal court decision. Specifically, the court found that “[t]he crux of the plaintiffs’ requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions.” *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). The Ninth Circuit concluded that the requested remedy was “beyond the power of an Article III court to order, design, supervise, or implement.” *Id.* at 1171.

Similar cases have been brought in Washington, Alaska, and Florida. Like the *Juliana* plaintiffs’ claims against the federal government, these cases allege that state governments have not protected the plaintiffs’ climate-related rights.

In addition to domestic litigation, comparable cases are also proceeding abroad. Notably, on December 20, 2019, the Dutch Supreme Court found that the Dutch government had an obligation to “urgently and significantly reduce emissions in line with its human rights obligation.” *The State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands (December 20, 2019). This is the first case in which citizens established that a government had a duty to protect them from climate change. While the case has no binding effect on the U.S. cases, it is possible that the Dutch court’s reasoning will influence both domestic and foreign courts in *Juliana*-style cases pending around the world.

## Colombia: A Path Forward for Shale Development?

Kenyon S. Weaver

### Introduction

On February 28, 2020, the Government of Colombia adopted a new rule setting a path forward for the country’s first shale oil and gas projects with hydraulic fracturing of horizontal wells. (Presidential Decree No. 328 of February 28, 2020, entitled: “By which guidelines are established to advance Pilot Projects of Integrated Research (PPII) in

Unconventional Hydrocarbon Deposits (YNC) with the use of the Multi-stage Hydraulic Fracturing Technique with Horizontal Drilling (FH-PH), and other provisions are dictated.”) This rule had been a long time in the making; companies signed contracts to explore and produce in Colombia’s shale, or “unconventional” deposits, back in 2014. The rule moreover is limited to a few pilot projects. But if these pilot projects are a success, Colombia could join the handful of countries with commercial shale production. This article discusses Colombia’s new rule, its implications for Colombia, and what it might represent for shale outside of the U.S.

### Colombia’s Unconventional Deposits

The big story for shale in South America has always been Argentina and its Vaca Muerta formation. But Colombia’s Middle and Upper Magdalena Basins are believed to have considerable unconventional deposits (*yacimientos no convencionales*). (The U.S. Geological Survey estimated mean undiscovered, continuous resources of 449 million barrels of oil and approximately 1.0 trillion cubic feet of gas in Colombia. See <https://pubs.usgs.gov/fs/2017/3060/fs20173060.pdf>.) Unlike the U.S., which has private ownership of subsoil minerals, Colombia’s subsoil oil and gas belong to the nation. Colombia’s national oil company, EcoPetrol, produces a substantial portion of this oil and gas, and is a major contributor to the government’s budget. But the country’s proven oil reserves have been shrinking: Colombia has perhaps 1.7 billion barrels remaining of “conventional” oil, equal to some 6-7 years of consumption at present rates. (See ANH’s reserves report 2019.) Hence Colombia has looked to shale to stave off imports and maintain EcoPetrol’s dividends to the government treasury.

### How Colombia Got Here

Colombia’s upstream oil and gas regulator, the National Hydrocarbons Agency (ANH), tendered out blocks for unconventional development in 2014. At that time, ANH adopted a new contract for unconvensionals (with new time periods, operator requirements, etc.) for companies to sign. Colombia lowered royalties to about 60% of that applied to conventional oil, with other elements of the fiscal regime (taxes, etc.) the same. In addition, that same year, Colombia’s Ministry of Energy and Mining (MinMinas) adopted technical requirements for drilling, testing, cementing, and casing requirements for unconventional exploration. (The Ministry of Energy and Mining (MinMinas) formulates policy for the energy sector as a whole, is responsible for all technical regulations and overseeing activities and operational compliance.)

In Colombia, however, a company cannot proceed without

also obtaining an environmental license from the National Environmental Licensing Agency (ANLA). This independent agency (under the Ministry of the Environment and Sustainable Development or MinAmbiente for short) has the mandate to review a company's Environmental Impact Assessment and corresponding Environmental Management Plan (EIAs; EMPs, respectively). MinAmbiente formulates environmental policy and planning as a whole, and is responsible for adopting environmental regulations. Without ANLA's approval of a project's EIA and EMP – effectively, an application for an environmental license – the company cannot proceed.

The handful of companies with contracts to explore and produce unconventional blocks – such as EcoPetrol, ExxonMobil, and ConocoPhillips – submitted their applications for an environmental license soon after receiving their blocks. But ANLA did not approve any applications. These years, 2015-2018, marked a time of deepening anxiety about potential impacts from unconventional development. The public discourse around oil and gas, and in particular hydraulic fracturing – “fracking” – grew increasingly polarized and litigious. (Colombia experienced anti-fracking protests, and one of the main candidates in the 2018 Presidential elections, Gustavo Petro, made a fracking ban a centerpiece of his election platform. Lawsuits were filed, and one successfully halted the use of the 2014 technical rules on the basis of the “precautionary principle,” effectively prohibiting the Government of Colombia to move forward.)

In 2018, Ivan Duque was elected President of Colombia. Within a few months, the Duque Administration decided to convene a “Committee of Experts” to study unconventional and make recommendations for whether and how to proceed. That Committee of Experts kicked off in October 2018, and its mandate was nothing if not ambitious given the short time: The Committee was charged with meeting with local communities, investigating the fiscal impacts of prohibiting (or allowing) unconventional development, and synthesizing research into impacts from unconventional development. Ultimately the Committee had to issue recommendations for how the Government of Colombia should proceed.

Remarkably, the Committee not only finished its draft Report within a few months – Experts offered a preview of it at a public forum in Bogota on February 2019 – the Committee then finalized and published the Report a few months after that, in April 2019. The nearly 140-page Report was a landmark. (The full name for the Report is: “The Report on Environmental and Economic Effects of the Exploration of Hydrocarbons in Areas with Possible Deployment of Hydraulic Fracturing Techniques of Source Rock Through Horizontal Drilling.”) Critically, the Report recommended

that the Government of Colombia proceed with a set of “pilot projects” while meeting enhanced institutional and regulatory safeguards. (The Report also called for: revised regulations to address the issues unique to unconventional oil and gas development; new collaborative mechanisms among ministries and agencies and regulators, and with outside stakeholders; greater transparency of information and the decision-making process; more studies to establish baselines; and capacity building and training for Government of Colombia and local regulators and related entities.)

These pilot projects should be treated “as experiments of a scientific and technical nature, subject to the strictest design, surveillance, monitoring and control conditions.” Companies would not be allowed to move to commercial production, nor to drill additional wells in the area, until after the pilot projects were evaluated. The Committee of Experts, in other words, put the ball back in the Government of Colombia's court and, for the first time, set out the rules of the game.

### The New Rule

On December 26, 2019, the Government of Colombia circulated the new draft rule. This draft rule largely reflected the Report's recommendations. About two months later, on February 28, 2020, the Government of Colombia published the final rule. As expected, this final rule designates a set of initial wells as *Proyectos Piloto Integrales de Investigación*: pilot projects with the purpose of “evaluat[ing] the feasibility of hydraulic fracturing and collect[ing] the information necessary to mitigate environmental, social, and seismic impacts so as to move to, if appropriate, commercial exploration and production.” The rule directs MinMinas to determine the scopes of the pilot projects and technical requirements for drilling, MinAmbiente to develop an environmental license application template for companies, and ANLA to issue an exploration environmental license. But the rule also does substantially more. It sets out a framework for unconventional development: how regulators will work together, how experts and expertise will be leveraged, and how information will be gathered and communicated among local communities. In doing so, the rule likely previews how the government would regulate any future commercial shale production in Colombia.

### Three Phases

The new regulation provides for three phases: before operations; during operations; and evaluation of the projects. Each time period has its own requirements.

- During the first phase: Regulators and companies must establish baselines (environmental, social, health, seismicity) before the environmental license is granted,

in the first phase. But the regulation also requires for regulators to undertake a kind of institutional self-assessment to determine where there are gaps, and then develop a plan to fill those gaps. All the new key institutions must also be established.

- During the second phase, when the companies are drilling and hydraulically fracturing the pilot wells, the regulation requires ongoing “technical, environmental, social, institutional and health aspects” to be “reviewed, managed and complemented” and community engagement.
- Finally, in the third phase, the Evaluation Committee must not only evaluate the pilot projects themselves, but also the results of the project management, the community dialogues, and the institutional strengthening.

#### *Leveraging Existing Expertise*

The new regulation smartly leverages some of Colombia’s existing expertise. It requires, for example, that the Alexander Von Humboldt Institute develop the baselines for biodiversity, and that the Institute of Hydrology, Meteorology and Environmental Studies develop the baseline for surface waters. It also deploys Colombia’s Geological Service (SGC) for groundwater and seismic baselines and monitoring, and local health authorities for health baselines.

#### *A New Inter-Governmental Coordinating Body*

Having tasked so many governmental and quasi-governmental actors, the rule also creates a new overall authority charged with overseeing the entire process. This “Intersectoral Commission for Technical and Scientific Accompaniment” – or Intersectoral Commission for short – is comprised of government institutions/regulators and also the new Transparency Advisor (discussed below). The Intersectoral Commission is moreover supported by new entities: monitoring subcommittees to track the technical and scientific information, and roundtables to track citizen engagement.

#### *Transparency and Citizen Participation*

The rule establishes a new “Transparency Center” under the Intersectoral Commission to “centralize and disseminate” information. The “Transparency Center,” guided by a Transparency Advisor, is mandated to ensure that any information “must be easily accessible and available to the general public.” There are three new mechanisms to boost that citizen engagement:

- A “Participatory Environmental Monitoring Plan” to allow citizen involvement in environmental monitoring and monitoring of pilot project activities.
- A new “scientific pedagogy program” to communicate clearly but accurately information on oil and gas, hydraulic fracturing, the pilot projects, and risks.
- New “Territorial Dialogues,” defined as a “social dialogue between companies, communities and the State.”

#### *Additional Economic Benefits*

In addition, companies must now spend some \$300,000 USD (one billion Colombian pesos), “for each well drilled for projects for the benefit of communities.” Communities will decide on projects through the new dialogues. It is worth noting that this payment is in addition to community economic benefits already required under companies’ contracts with ANH.

#### *Evaluation of the Pilot Projects*

After the pilot project wells have been drilled and hydraulically stimulated, and the information gathered, the Intersectoral Commission turns over the results to an Evaluation Committee. Comprised of both Ministry representatives and experts appointed by “the academic community,” the Evaluation Committee will render a final judgment. This judgment will be not only on the risks and impacts posed by unconventional development but also how the Government of Colombia handled those risks and impacts. The Evaluation Committee must publish its conclusions – part of the transparency mandate of this rule. Critically, the Evaluation Committee will have the power to give the green light for commercial production of Colombia’s shale, not just in the pilot projects but nationwide.

#### **Implications and Conclusions**

Companies with pilot projects will now need to resubmit for an environmental license. But unlike years past, Colombia has signaled that complete applications will be timely approved. Meanwhile, it is worth considering the rule’s implications for Colombia, and beyond Colombia.

First, does putting in a new regulatory framework provide assurance or does it actually deepen economic risk? While Colombia has finally signaled to companies it is ready to allow them to proceed, the new rule comes with more uncertainty. Uncertainty has costs. It imposes a new \$300,000 per well economic benefit that had not been part of the original “deal.” Although the industry is comfortable with operating under stricter environmental regulations, it

is also wary of how these environmental regulations can be used as a “stick” for leverage and what it portends for the future investment climate.

Second, can Colombia’s new regulatory framework scale up to commercial production? If the Evaluation Committee deems the pilot projects to be “safe” and if companies seek to move to production, Colombia’s regulators – MinMinas, MinAmbiente, ANLA, and others – will presumably now work within the new rule’s framework. Some elements of the new rule will be natural to carry over: for example, the new rule requires companies to use “Minimum Impact Technology.” Other entities may be dissolved, such as the Evaluation Committee. But Colombia’s regulators and new entities will need to rise to the challenge of potentially significant commercial production: the Intersectoral Committee, the citizen involvement in environmental monitoring, the dialogues and the projects. For other countries pondering shale and watching Colombia, it will be instructive to see how institutions and companies adjust to the extensive new regulatory framework, and of course vice-versa.

All this assumes the production could be commercial. The new per-well community benefit may make any large-scale development untenable, especially if oil prices remain low. Colombia may need to adjust this to a lower per-well cost or imposing instead a per-well pad charge. This would also encourage the use of multi-well pads and reduce the overall surface footprint.

Finally, will the new institutions be able to achieve that elusive “social license to operate”? Colombia’s new rule marshals an impressive gathering of governmental officials and academic experts. It commits the Government to the new Transparency Center, and to local roundtables. But it remains stubbornly difficult to communicate uncertainty and risk to local communities and the national public. There will be a number of lessons learned as the pilot projects go forward, for Colombia and other countries, and hopefully they are the right lessons.

For the U.S., shale has unlocked an incredible amount of oil and gas, and attendant benefits (jobs, lower energy costs, etc.), while at the same time challenging regulators’ capacities to manage the social and environmental impacts. With this new rule, Colombia takes its first cautious steps. With this new rule – and, later, the Evaluation Committee’s final judgment – the country may be poised to join the small club of commercial producers of shale oil and gas. Whether it does, and how, will offer some light into what extent the “Shale Revolution” will ever truly be a global one.

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