



THE **Energy Dispatch**

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

CONTENTS

EXPERT INTERVIEW - PATRICK DUNN	2
ENERGY LAW THEN & NOW: A MULTIGENERATIONAL DISCUSSION – PART II...	4
FOUR TIPS TO IMPROVE YOUR HOME WORKSPACE.....	5
YOUNG ENERGY PROFESSIONAL HIGHLIGHT	6
U.S. ROUND UP.....	7
MEETING ENERGY STORAGE GOALS—NEW YORK IS ON TRACK	8
SOME LEGAL CONSIDERATIONS OF REGULATORY PRORATIONING OF OIL PRODUCTION	10

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

Expert Interview - Patrick Dunn



Patrick Dunn is a founding partner of the Austin based law firm Shapiro & Dunn, PLLC. He has more than a decade of domestic and international transactional experience with a focus on energy and various corporate and commercial matters and has also

*served as in-house counsel for private and publicly traded companies. Patrick has served as Chair of the Young Energy Professionals Practice Committee and as a member of the IEL's Executive Committee. He is interviewed here by Laura Brown of Liskow & Lewis, managing editor of *The Energy Dispatch*.*

Patrick, what did you study in college?

I was a Poli-Sci major, so it was very much the traditional path for someone like me, who'd wanted to be a lawyer ever since I was a little kid. After an elementary school field trip to a courthouse, I was so impressed by the venue—you know, the columns and the wood and all that—that I decided that this was what I wanted to do.

The wood-paneled aesthetic reeled you in?

Yes, it felt very prestigious and impressive to a fourth grader—even though I didn't become a litigator, and so ironically, I rarely see the inside of a courtroom (managing litigation as in-house counsel).

With that level of awe, it sounds like you didn't come from a family of attorneys?

No, I'm the only lawyer in my family. We have plenty of doctors, engineers, PhDs, but no other lawyers.

So as the trailblazer in your family, would you recommend the legal profession to your own children?

Definitely. The legal profession has been good to us as a family, but I'll say this: it is what you make it. I've been fortunate to work where I've worked; I don't have the pedigree that others do. But the risks I've taken, and the experiences I've had, have brought me to a good place. And I'm fortunate that I've been able to maintain contacts from past work as colleagues and clients today. You can't get hung up on what you're not; accept your shortcomings, focus on your strengths and work hard.

Where did you begin your legal career?

I started out at a small operating company working as a landman—not earning very much—but I rapidly learned about all facets of the oil and gas business. I did stand-up title opinions in the courthouse, put together leasing blocks, worked on marketing and selling blocks, and managed involvement in operating the assets. It was basically a micro-version of a large oil and gas company, so I got exposure to everything—land, mergers and acquisitions, business development, procurement and supply chain. The breadth of experience was tremendous for me. But, after four years, I still had student loans from St. Mary's and was looking to transition to something new. I interviewed in New York with the General Counsel of Hess and was hired as legal counsel with Hess in Houston. A week and a half later, I was on a plane to Ghana for a meeting with the Ministry of Energy (along with a small delegation of more senior members of the legal department at Hess).

Fast-paced! Tell me more about your time with Hess.

At Hess, I was part of a five-person Houston-based legal team. Because our team was small, I found myself with an unusual amount of responsibility over a broad piece of the world. I started off focused on onshore U.S. and West Africa, which evolved into onshore and offshore U.S., West Africa, and occasionally other areas of the world. I also had a role with HR (secondment matters) and managed the relationship with Global Supply Chain. I was getting the experience I wanted and then some, but I still wanted to expand my professional portfolio and gain more offshore experience. Hess facilitated that by offering me an assignment in Kuala Lumpur. I was relocated to Malaysia, and the experience abroad was formative for my legal development. It was illuminating to see how the rest of

world views the law and legal issues. And professionally, having international experience was a big credibility builder for me.

What came after Hess?

I'd built a business relationship with ZaZa Energy, LLC that was on the verge of a reverse merger. After the merger, ZaZa Energy had assets in the U.S. and France, as well as some legacy assets in Turkey, and Hungary.

That international experience coming into play.

Yes. The company offered me the role of General Counsel of E&P, and I accepted. I spent four years there, and when the economic downturn came, I joined EDF as Associate General Counsel. I started off in Houston but was aware that EDF was gearing up to open a gas division in Austin, TX and so after a few months on the trading floor in Houston, I relocated to Austin as the GC for EDF Trading Resources, EDF's new gas division. EDF was in a joint venture with Alpha Natural Resources, a mining company, as well as the operator of some ETX assets we acquired. Eventually, the French parent of EDF soured on hydraulic fracturing and mandated a divestment of all its oil & gas assets. As part of that process, we sold off our Marcellus assets to our joint venture partner, Alpha Natural Resources, and that company hired me when EDF shut down and I continued to manage the assets through a stalking horse bid process conducted through the bankruptcy courts. The process successfully concluded, and the assets were sold for a premium. Before the closing, my wife told me she was happy in Austin and didn't want to move back to Houston, essentially telling me to figure out a way to continue to work in Austin, so I had a choice to make. After speaking with one of my best friends, a colleague of mine from law school who had a successful solo practice in Austin, he convinced me to stay in Austin and we founded Shapiro & Dunn, PLLC with two other amazing attorneys.

That's an impressive career, and yet I notice that some of your transitions resulted from challenging circumstances like bankruptcies and dissolutions. Can you talk about the ability to pivot when there are setbacks?

I think that when faced with adversity or a negative situation, you have to realize that there's always opportunity. As long as there are deals to be made, and legal work to be had – which is always – you just have to find a way to plug yourself in to it. Don't allow yourself to be limited to what you did in the past: you're capable, you've made it this far in life. So sometimes you'll have to push a little harder, do a little more work or different work, and shift your focus to make up a shortfall. It's just a matter

of developing a transferrable skill set, and then finding a landing spot. I will say this, of all the turmoil and downturns, working for yourself is the most comforting, which seems counterintuitive but really is a source of stability.

Speaking of plugging in, how did you become involved in IEL?

Initially, Hess signed me up as a representative. Within the organization, I started working with David Sweeney, who recommended me for a few things – the first being the YEPs. I was vice chair and then chair of the YEPs for a few years, graduated to some other committee roles, and have previously served on the Executive Committee for several years.

Why IEL? Can you share any professional or personal "success stories" from your IEL involvement?

I don't think I can name specific business opportunities, at least not directly. But one thing IEL has given me is a deeper contact list. When you're working on something for a client, and you know the attorney at the other company or on the other side from a planning committee, you have a point of contact that you can reach out to. Having that shared connection is going to give you more traction every time. As a practitioner, I've also gotten invaluable business skills through my involvement. IEL taught me how to plan a program, and how to assemble large-scale events with people at the height of the industry. It has especially pushed me from a public speaking perspective. If you're in IEL, sooner or later, you're going to be speaking at a conference or recruiting someone else to.

Beyond that, I love everything IEL stands for. It gets people excited about energy law and the practice of energy law. You meet people, exchange ideas, and get the best of the scholarship out there. In that way, you're contributing to something that truly matters in the industry and participating in the perpetuation and betterment of something that has been around literally for generations. IEL is one of the oldest and most prestigious organizations in our field and keeping it alive and pumping new life into it is one of the ways that I can give back to our profession.

It was inevitable that we would get to coronavirus. As we wind up, can you share something you enjoy about the adaptations COVID-19 has caused?

In my community, it's really been great to see everyone without a schedule packed full of obligations and away from home commitments. I've enjoyed the family time. In place of carloads of people rushing to get here or there, you see tons of kids running around, riding bikes, people jogging, parents walking; it's a kind of Norman Rockwell vibe that's really nice—for now.

That's my neighborhood, too. Little boys in electric jeeps careen into my yard usually right around the time I'm trying to take a call outside.

We've got a red toy motorized G wagon in our garage, too. It's kind of like being the Pied Piper, you walk outside and turn on the engine, and from every direction – kids, dogs, wheels flood the streets, at a safe social distance, obviously.

Patrick, thanks so much and I'm sure I'll see you around at IEL events whenever that becomes a thing again.

Energy Law Then & Now: A Multigenerational Discussion – Part II

Throughout 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 a member of IEL's 2019/2020 Leadership Class.

In Part II of this interview, Martin reflects on changing roles and skill sets for in-house and outside counsel.

Your first job out of law school was in-house counsel for Gulf Oil Company, which seems unusual today. Can you talk about your work and whether you see a difference between your role then and the practices of in-house counsel today?

Some of my first responsibilities were over environmental matters. A new refinery at Belle Chasse was in the process of getting discharge permits under the Federal Water Pollution Control Act. A couple of us in the law department had to learn the regulations and the procedures and guide the refinery's compliance. We negotiated with the federal agency over the terms of the permits and the calculation of the discharge amounts that were allowed. This involved trips to the plant and learning the mechanics of refining. Another big issue was the development of SPCC Plans: Spill Prevention Control and Countermeasures. These were especially important for our offshore rigs, so I got to fly on company helicopters out to the rigs to learn their operations.

Because Gulf had long term gas purchase contracts with the Texas Eastern Pipeline, I had to learn about the problems arising under such contracts and how they affected royalty payments to our lessors. Likewise, I had to learn about joint operating agreements that were negotiated by our landmen but had to be approved by the law department.

On litigation matters, Gulf was represented by New Orleans firms and other firms in the state, and I sometimes worked with the firms on pending matters. In some matters we

cooperated with other oil companies on cases where two or more companies were in the same suit. Thus, I got to know other lawyers in the firms and in the companies.

On occasion the company sent me to federal and state agency hearings, such as a week of hearings on an expanded leasing program on the OCS that was held in Princeton, New Jersey, and CLE programs. So, in the fall of 1974 I attended a CLE program at LSU on the newly enacted Louisiana Mineral Code that was about to go into effect. It was there that I first met Professor Fred Ellis. Like me, he had been a Gulf Oil attorney in New Orleans. A couple of years later he recruited me to come from my teaching position in Tulsa to LSU Law.

From the brief description you can see I had a varied practice as an in-house counsel. It was remarkable for a new grad. Most law firms can't give their new associates that sort of responsibility and breadth of experience.

The path to in-house counsel now is after some years of practice, but I have the impression that company lawyers do have a wide range of activity and responsibility. And most of them do the same sort of things I was doing forty years ago. Companies typically go to outside counsel for litigation, but those law firms work closely with in-house lawyers to develop cases. The in-house counsel may have a different perspective where he or she is responsible for the same problems over a number of states, while the local law firm may have a more limited perspective and experience. This is true in such matters as royalty litigation, operating agreement controversies, marketing practices and so forth.

You've taught many lawyers who are now leading mineral law. Have the basic skillsets required changed at all, i.e., a need for more flexibility, greater emphasis on technological proficiency, a need for more constant communication with clients, etc.?

The basic knowledge or skill sets for successful law practice remain the same as they have for centuries in Britain, Europe, and the United States. These are mastering the concepts of Contract, Property, Tort, and Constitutional Law (which includes Administrative Law). And all lawyers must know the laws of procedure for courts and agencies. The more specialized topics important for energy lawyers are subsets of these. Oil and gas law is a mixture of all four. Environmental law has less emphasis on Contract and is very weighted towards administrative practice. Successful lawyers must be able to absorb new information quickly and see its application to new legal environments and technology. They must be ready to re-tool themselves. Think how quickly lawyers in, say, commercial transactions in New Orleans in the decade 1820 to 1830 had to adapt their contract guidance to clients who went from shipping by sailing vessels to steamships.

Suddenly there was vast river traffic going upriver as well as out to sea. Insurance lawyers had to consider risks from boiler explosions that had never been a problem for sailing ships. They simply had to apply contract and tort concepts to a new technology. Likewise, in recent years with a revolution in electronics, lawyers have had to adapt new concepts of contract and property to apply to, say, computer applications and copyright, moving from a sale-of-a-good model to a licensing model. Book publishers now can have students “rent” electronic copies of a college text rather than sell a physical book; since the software can be created to terminate, there’ll be no after-market for used books. Energy lawyers in my career have had to shift from price-controlled markets in oil and in natural gas to a free market environment, requiring the mastering of bodies of regulatory law and new types of contract.

There are cultural shifts to which lawyers must adapt. The ubiquity of email and cellphones have led clients to expect immediate access to their lawyers. Because of the internet and electronic records, large clients can demand access to billing practices and records of their outside lawyers. Because of vast amounts of electronic documents and records that are subject to discovery, those vast amounts can be searched and examined in no time at all, whereas a couple of decades earlier teams of paralegals or associates would have had to read through and mark thousands of pages. Westlaw and Lexis put a huge library of cases, statutes, law reviews, treatises, and other legal materials in the palm of your hand that would have required a full floor of a law office.

What’s one thing about the practice of law that’s better now than it was when you started?

The vast materials available on Westlaw and Lexis. They greatly facilitate research.

What’s something worse?

The vast materials available on Westlaw and Lexis. With so much material available, it’s necessary to go into much greater depth to perform competently. As someone who has published a lot of words, it’s easy for someone to search all those words and turn them into a potential embarrassment.

I suspect some lawyers might think there is less cordiality and more rudeness in the practice, but I’m skeptical of that. Most lawyers are very professional, and most respect their opponents and can maintain friendships though on opposite sides in much of their practice. Professional organizations such as the Inns of Court and the IEL, the Louisiana Mineral Law Institute, the Rocky Mountain Mineral Law Foundation, the ABA and others bring lawyers together in non-confrontational settings and contribute to amiable relations among attorneys.

Be sure to look for Part III of this multi-part series in our next issue!

Four Tips to Improve Your Home Workspace

Laura Brown, Liskow & Lewis, and Anna Gryska, Winston & Strawn LLP

By the time this issue of *The Energy Dispatch* reaches you, you may have returned to your regular office from the exile of your home office, kitchen counter, or basement. We don’t know what the future holds, but the past has given us an immediate lesson in the desirability of creating a functional, comfortable place to work in the space of your home.

Federal Rule of Civil Procedure 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Your authors, energy attorneys with degrees in English Literature and Classics, are not experts in interior design. But after hearing what works (and doesn’t) from colleagues, reading magazines, watching YouTube videos about it, and possessing some degree of common sense, we’re happy to present four recommendations to elevate your home office space.



Tip #1: Check Your Lighting

Some interior designers recommend that a room should have three different sources of light. Your laptop screen does not count, so if you have a window and an overhead light, you’re short a light source. The easy fix is to add a desk lamp or floor lamp. If you’re in a windowless room, add both. Varied light sources add

dimension to a room, but most importantly in this context, they help you work. If you believe in the premise of “mood lighting,” you won’t need an expert to tell you that the concept applies to many moods. When you’re working, having sufficient light helps you feel energized and focused. And of course, it helps you see.

Tip #2: Check Your Neck

If you are working from a laptop, oftentimes the angle of the screen may cause you to look down, straining your neck. The solution is to raise your computer screen – if you can’t get a stand, prop it up on books. (For a temporary standing desk, put an empty banker’s box on top of your work surface.) Make sure your screen is pushed back to widen the angle.

Tip #3: Personalize Your Space

We have learned, to varying degrees, that we cannot always control where we work or when we work. But, choosing not to work in a busted environment is still solidly within your control. Personalization can be as simple as choosing to put a family photo, a plant, or a vacation souvenir within view to make a space less sterile. For the more ambitious, other opportunities to help define a space—without taking up square footage—are your walls and floors. Consider a bright runner or small rug under your chair. If you see a blank wall whenever you look up from your screen, consider a large piece of abstract canvas art. (Like from the internet. No need to commit to a serious art purchase right now. Or have kids at home? Put them to work on some décor for your space.) A workspace that looks intentional helps you feel intentional about working there. The less it looks like an ad hoc response to chaos in the world, the less it will feel that way. You are capable and you are creative, your environment should reflect that.

Tip #4: Get a Mouse

Upon returning to my regular office with all my old things, I realized with sudden clarity that the ailment in my right thumb was not from over-scrolling on my cell phone as self-diagnosed, but from not using a mouse. If I’d consulted Anna earlier, then her recommendation to get a USB keyboard and mouse might have spared some discomfort. Get a mouse.

The living situations of young attorneys are diverse, and we’re all operating within different constraints. We hope these tips are general enough to be of some use. The bottom line is that whether the future includes extended time working at home, or even just the occasional weekend, take the necessary steps to feel comfortable and happy in your environment.

Young Energy Professional Highlight – Elly Vecchio Partner, Phelps Dunbar LLP

Interview by Anna Gryska, Winston & Strawn LLP



Pipelines and Poise

Elly’s practice focuses on eminent domain and condemnation related issues. She represents pipeline companies, water districts, and other condemning entities in connection with the acquisition of easements and rights-of-way for

construction of public use projects. Not only does Elly enjoy representing entities that serve a public use, she has also learned to keep a straight face in challenging situations—including once when opposing counsel appeared at a hearing in a three-piece suit and ten-gallon hat to lecture the court about his historical view of property ownership and valuation in Europe without presenting any actual evidence!

Advice to Young Lawyers

“Get involved in organizations early – especially organizations that have a lot of younger lawyers. It’s a great way to meet people who are interested in your area of law, make connections, and learn something. Also, as someone who is naturally a pretty awkward person, I wish I had realized that almost everyone else at networking events is feeling just as awkward as you are. Just embrace the awkward cringe sweats, find someone else who looks equally as uncomfortable, and dive in!”

IEL Leadership

Taking her own advice, Elly is a member of IEL’s second Leadership Class, and has recently started a position as the Chair of the Young Energy Professionals Social Subcommittee. Although the year is going differently than expected, Elly and her committee look forward to creating events where YEP members can make new connections. Those events may include opportunities for small groups to socialize (and practice axe throwing skills!) or virtual events like Zoom trivia contests.

Away from the Desk

Elly spends time outside of work with her husband, Jason, their pets, families, and friends. Gardening is an aspirational hobby for Elly, but so far she has “only gardened in spurts and [her] results are frequently unfruitful (pun intended).” She enjoys bike rides to explore her neighborhood (especially in the time of remote working), as well as reading and taking in documentaries and podcasts about ancient civilizations—then putting that knowledge to work on trivia night!



Oklahoma! Colorado! Pennsylvania! California! What's new, interesting, or important to watch in your state? Please submit your highlights to The Energy Dispatch and help us cover the broadest geographic area possible.

All States. On May 1, 2020, President Trump signed an executive order prohibiting U.S. electric utilities from installing grid devices from foreign manufacturers that could threaten national security stating that “the unrestricted foreign supply of bulk-power system electric equipment constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.” A task force led by the Secretary of Energy will develop energy infrastructure procurement policies to integrate national security considerations.

- Eduardo Marquez Certucha, Sidley Austin LLP

Louisiana. Over the last century, thousands of miles of pipeline canals have been dredged in Louisiana's marshes pursuant to private right-of-way agreements. Often, these contracts are silent on what obligations the grantee has relative to the canals after dredging them and installing the pipelines. Today, the landscape around many of these historic canals has converted to open water, and plaintiffs' firms have begun to file lawsuits seeking to “restore” canal erosion – at great cost – based on Louisiana contract law and property law. The first such case set for trial in Louisiana state court, *Vintage Assets v. Tennessee Gas Pipeline Company*, No. 62-659 (25th JDC Louisiana), is scheduled to head to trial in July.

- Laura Brown, Liskow & Lewis

Maine. After a two-year review period, the Maine Department of Environmental Protection issued permits for Central Maine Power's New England Clean Energy Connect transmission project on May 11. The transmission line will deliver 1,200 MW of hydropower to New England from Quebec. The project, estimated to cost \$950 million, will be paid for by Massachusetts electric customers as one component of a suite of contracts approved by the Massachusetts Department of Public Utilities in June 2019 between the

state's utilities and Hydro-Quebec. Most of the 145-mile transmission line will be built along Central Maine Power's existing transmission corridor, while the remainder will traverse commercial timberland in western Maine. The project now awaits approval from the U.S. Army Corps of Engineers and a presidential permit to cross the Canadian border.

- Laura T.W. Olive, NERA Economic Consulting

New Mexico. Practitioners who defend environmental tort suits in New Mexico have another positive trial outcome to draw from. In 1928, the New Mexico Hobbs field was discovered. Located in southeastern New Mexico, it is part of the larger Permian basin system, one of the largest oil fields in the world. Historical oil exploration led to a booming economy, and also to the use of oilfield pits. Pit practices changed over time with evolving knowledge, and a growing population led to new neighborhoods in old fields – and environmental tort lawsuits. In February and March of 2020 one such lawsuit, involving multiple asthma and autoimmune diseases, was tried in state court in Lovington, New Mexico against Shell Oil Company. After hearing weeks of testimony, including environmental, medical, and epidemiology expert testimony, the jury returned a complete defense verdict for Shell. A similar case was tried in 2007 with the same result. Shell was represented in both cases by Haynes and Boone, LLP. For those who wish to mine the docket sheet, the case is *Shirley Lumbley, et al. v. Shell Western Exploration and Production, Inc.*; D-506-CV-1999-509, 5th JDC, Lea County, New Mexico.

- Ann Al-Bahish, Haynes and Boone, LLP

Texas. Parties to operating and other agreements relating to oil and gas operations on the Outer Continental Shelf have successfully pursued claims for contractual indemnification against parties with whom they are in privity of contract for the costs of compliance with governmental decommissioning obligations. In a novel case, the Southern District of Texas held that a former sub-assignee of the lessee's operating rights interest, who had no direct contractual relationship with the lessee, could recover *equitable subrogation* (via the rights of the government) from the lessee for 100% of such costs, even though the lessee did not participate in the operations (though it did receive royalties) and despite the lessee's argument that the sub-assignee should at least bear 20% of the costs in proportion to the percentage of the operating rights it formerly held. *Sojitz Energy Venture, Inc. v. Union Oil Co. of California*, 394 F. Supp. 3d 687 (S.D. Tex. 2019). Important to the court's holding was the fact that the sub-assignee paid the original assignee its share of the estimated costs of decommissioning and obtained a release of liability from the assignee when it re-assigned its rights back to the assignee. The case is pending before the

Fifth Circuit, which has postponed oral argument previously scheduled for April 27.

- *Jillian Marullo, Liskow & Lewis*

West Virginia. The beginning of 2020 saw a flurry of oil and gas-related legislation in West Virginia. HB 4088 provides, in part, that proceeds from certain oil and gas wells due to individuals whose names and addresses are unknown are to be kept in a separate fund and shall be transferred to the Oil and Gas Reclamation Fund if not claimed within seven years. SB 554 requires a lessee to execute and deliver to a lessor a recordable release for a terminated, expired or canceled oil and gas lease within 60 days of termination, expiration or cancellation of the lease, unless the terms of the lease provide for a different time. SB 554 also provides a procedure by which a lessor may request a release from a lessee and allow a lessor to file an affidavit of termination, expiration and cancellation if the lessee does not provide the requested release. HB 4088 and SB 554 were both signed into law on March 25, 2020.

- *Chelsea Heinz, Babst Calland*

Meeting Energy Storage Goals—New York is on Track

Danielle Mettler-LaFeir, Ekin Senlet, and Angela Sicker, Barclay Damon LLP

New York State continues to accelerate its efforts to curb greenhouse gas emissions and promote increased reliance on renewable energy resources for electric generation. Energy storage is an essential piece of the power puzzle, as the Empire State aims to drastically increase renewable electric generation and have a zero-carbon emission electrical system by 2040.

The Climate Leadership and Community Protection Act, or CLCPA, passed by the New York State Legislature on June 20, 2019, expands on New York’s Reforming the Energy Vision, or REV. The CLCPA establishes an energy storage capacity requirement of 3 GW by 2030, and requires the state’s Public Service Commission, or PSC, to establish a program by June 30, 2021. The CLCPA further requires 70% of New York’s electric generation to come from renewable energy sources by 2030, an increase from the state’s current Clean Energy Standard of 50% renewable generation by 2030, and 100% greenhouse gas free electrical system by 2040. In order to meet the targets established by the CLCPA, New York must transform its electrical grid to enable it to store greater amounts of energy produced from renewables and cleaner traditional generation, so that it can meet electric demand during peak periods and high energy demand days,

and also to make carbon-free resources viable as reliable baseload energy producers.

New York State’s fiscal year 2021 state budget includes another renewable energy related bill—the Accelerated Renewable Energy Growth and Community Benefit Act—which directs the New York Energy Research and Development Authority, or NYSERDA, to find underutilized sites that have the potential for the development of energy storage facilities in an effort to further its energy storage and renewable generation goals.

Energy Storage Development in New York

The PSC and NYSERDA have already taken many actions to increase energy storage capacity in New York. To implement the state’s energy storage capacity goals established prior to the CLCPA, on June 21, 2018, the PSC established a separate docket (PSC Case No. 18-E-0130) for an energy storage program. NYSERDA developed an energy storage roadmap, and in December 2018, the PSC issued an Order Establishing Energy Storage Goal and Development Policy, which includes several requirements and incentives to increase energy storage capacity in New York.

On April 1, 2020, the New York Department of Public Service (DPS) issued its first “State of Storage” annual report detailing the progress in reaching New York’s statewide energy storage goal, which is 3 GW by 2030 with an interim objective of deploying 1,500 MW by 2025. Although there is currently only about 39 MW of energy storage capacity in the New York electrical system, the report stated that the total deployed or awarded/contracted projects at the end of 2019 resulted in 706 MW in capacity, or about 47% of the 2025 target and 24% of the 2030 target. The number of energy storage projects in various interconnection queues, which reflects some of these reported projects, as well as potential projects in the pipeline, also indicates robust activity in the industry. These results suggest the PSC’s portfolio of programs coupled with the declining costs of storage technology, as well as the ability to pair energy storage with solar photovoltaic to capture additional revenue streams, have been effective in building a market for the development and installation of qualified energy storage systems in New York.

Moreover, the combination of energy storage with utility-scale wind or solar projects has become increasingly popular among the state legislature, regulators, and developers as a way to enhance the ability of renewable energy resources to provide power to the electric grid, even when the wind is not blowing and the sun is not shining.

Future Outlook for Energy Storage in New York

For New York to meet the ambitious renewable and greenhouse gas requirements of the REV and the CLCPA, a drastic increase in New York's energy storage capacity is essential. To meet the CLCPA target of 3 GW of installed energy storage capacity by 2030, and create a self-sustaining energy storage market in New York, the state needs to continue to provide financial incentives for energy storage development, increase investor owned utilities' (IOUs) energy storage requirements, and set in place a framework for valuation of energy storage that makes it competitive with traditional energy resources. While a market for energy storage development exists, the amount of storage capacity in the system is far from the target.

Both stand-alone storage, and storage directly connected to renewables, is necessary to allow for more renewable generation capacity on the electric system. To increase energy storage to 3 GW by 2030, New York will need to continue to increase incentives for energy storage systems paired with both large and small existing renewable generation, such as wind and solar projects that are generally located in upstate New York, which in return creates valuable opportunities for investment in energy storage in New York.

The current state of energy storage technology, and the associated costs of installing such technology, means the largest near-term opportunities for energy storage deployment are from stand-alone battery systems and battery systems paired with existing traditional electric generation resources in the most congested parts of the state, mainly in the downstate area, where peak energy use and energy prices are the highest, and the impact of these resources on meeting New York's goals will be the largest.

In order to make energy storage systems competitive with more traditional energy generation resources to meet baseload and peak electric demand, especially in the upstate area, direct state funding and a system of valuing energy storage resources that compensates them for more than just the energy they provide, will be necessary. The PSC is currently grappling with the appropriate method of compensating smaller distributed resources, including energy storage battery systems, in its VDER docket (PSC Case No. 15-E-0751). The PSC system being developed for valuing energy storage resources seeks to compensate for the ability to export their stored energy to the grid, shave peak electric demand and provide relief in certain congested areas, support renewable generation additions to the electrical grid, and provide environmental benefits. By sending these dynamic price signals to the marketplace,

the PSC hopes to increase energy storage penetration in the electric grid.

Challenges for Energy Storage

Despite the momentum for energy storage development seen in New York, there are challenges ahead. One such challenge is increasing energy storage capacity in the upstate New York region. Without significant incentives or direct IOU requirements, the current cost of installing battery systems, or other energy storage systems, makes them largely uneconomical in upstate New York, where the cost of energy during peak demand is much lower than in the downstate area.

Another challenge is having enough energy storage resources to meet most or all of the peak electrical demand in New York City. The downstate region cannot obtain the power it needs from upstate generating facilities due to transmission constraints. So, the capacity needed, including during periods of peak demand, must be generated and stored in the downstate area. As noted in a May 2020 draft report issued by NYISO, titled "Reliability and Market Considerations for a Grid in Transition," as more storage and renewables are added to the New York City electrical system, the amount (and duration) of storage needed to meet the reliability needs of the electrical system increases. Therefore, a significant increase in the amount of energy storage would be needed to meet the capacity needs of New York City currently provided by fossil-fueled peaking units during periods of high demand.

COVID-19 has also posed a huge challenge for the development of energy storage projects. Although it is too early to determine the full effects of the pandemic, the energy sector has taken a hit. There are many project delays due to New York's "PAUSE" order, which caused all non-essential businesses to close. The development of new energy storage projects is not considered essential, so construction has stalled, and for some projects financing is now uncertain. It is not clear whether the pre-PAUSE level of momentum in energy storage development will return once the order is lifted. Only time will tell.

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Some Legal Considerations of Regulatory Prorating of Oil Production

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Massive U.S. shale oil production, political in-fighting between OPEC and Russia over oil production cuts, and plunging global oil demand from COVID-19 recently combined to send global oil prices plummeting – with futures in the U.S. even temporarily reaching negative prices over storage concerns. This oil price apocalypse has led certain operators and industry groups to ask state regulators for market-demand prorating of oil production for the first time in decades. The last time this happened in Texas, for example, was in 1973. Essentially the proponents of market-demand prorating are asking the regulators to limit the oil that can be produced to reduce supply to meet demand.

So far, these efforts have failed in all major oil producing states – the regulators preferring for industry to police itself by voluntarily curtailing production through shut-ins and drilling fewer wells. But if the industry is unable to do that, then the regulators may step back in and curtail production through prorating. After all, it was the industry's inability to adequately police itself that led to the enactment of proration rules in the first place long ago. This article discusses some of the legal issues that should be considered in the event such proration rules are enacted.

What is the legal basis for market-demand prorating? The regulatory schemes are different in each state, but on this issue they are very similar. State constitutions grant the legislatures the power to prevent the waste of natural resources. The legislature enacts laws prohibiting the waste of natural resources and directs the regulatory agency to enforce those prohibitions. In Texas, for example, Section 85.046 of the Texas Natural Resources Code defines “waste” to include specific operating practices, including “production of oil in excess of transportation or market facilities or reasonable market demand” and allows the Railroad Commission to determine reasonable market demand. Proponents of regulatory action argue that more oil is currently being produced than the reasonable market demand – constituting waste.

What would market-demand prorating look like? That is an open question. Historically, proration has occurred on a field by field basis – with production allowable formulas tailored to the field's specific characteristics to allow for efficient and fair production. But that is not the same as market-demand proration, where the problem is simply too much oil production to meet the current demand. One Texas Railroad Commissioner proposed requiring operators producing over 1,000 barrels of oil per day in January 2020 to reduce their

state-wide oil production to 20% less than their October 2019 oil production levels, or face a \$1,000 per barrel penalty. This would exempt small operators and give affected operators flexibility as to how to get to the 20% supply cut. Other commentators have suggested using a prorating system to account for operators' other waste, such as flaring. Such a system would put more of the supply cut burden on those operators with more “wasteful” operations and encourage them to mitigate such other waste to get higher production allowables. Whatever the proration mechanism adopted by a particular state, it would have immediate impacts along the entire oil production chain – operators, royalty owners, and midstream companies.

For operators to quickly cut supply, they would likely have to limit production from certain existing wells and change future drilling plans. Quickly determining how to cut production from thousands of existing wells without damaging their ultimate recoveries could be very difficult. Also, does the operator have either leases that will expire if not drilled soon or continuous drilling obligations to hold acreage? Does the operator have binding contracts with service companies or suppliers for future planned wells? What about oil and gas gathering and related midstream commitments? Is the operator bound to supply certain volumes?

Royalty owners would be affected in different ways depending on the language of their leases. At a minimum, they would receive fewer royalties from reduced production, but such actions could also implicate shut-in royalty provisions, force majeure provisions, and continuous drilling obligations, among others.

Reduced production would also impact gas, NGL, and oil pipelines and other midstream producers, depending on the terms of their contracts. Are operators obligated to supply certain volumes? What are the remedies if they do not supply those volumes? What do the force majeure provisions provide?

These are just some of the ways regulatory prorating of oil production would impact operators, royalty owners, and midstream companies. While many companies are against regulatory prorating, such action might make it easier to claim force majeure to mitigate some impacts under contracts with royalty owners, suppliers, and midstream companies, since “governmental action” is often a reason for claiming force majeure.

Until recently, parties typically did not consider prorating when transacting in the oil field. Even though it has not happened yet, the fact that regulators are considering such measures means that it is a possibility and one should

think about how such rules might affect a deal. How would assets to be acquired affect the buyer's production quotas under proration rules like those proposed in Texas? Do you consider prorationing when valuing assets to be acquired? Should there be additional representations and warranties or indemnities related to possible regulatory fines for violations of proration rules? Would prorationing allotments run with the wells assigned or stay with the assignor? How should you draft the force majeure provision to specifically cover proration regulatory actions so as to avoid later disputes?

As for litigation, such actions could spawn all sorts of claims. Of course, there would be challenges to the regulatory actions themselves. Did the regulator overstep its authority? Is the prorationing formula unfair or discriminatory? There would also likely be claims by other parties negatively impacted by the prorationing – particularly lessors, service companies, and midstream companies. With lessors, there will likely be lease termination battles – particularly where production totally ceases and the lessee is relying on shut-ins, force majeure, and other savings clauses to hold the leases. There could also be claims about the failure to market or breach of the continuous drilling obligation – all depending on the circumstances and language of the particular lease. Service companies and suppliers could be aggrieved as projects are cancelled. Were the operators bound? If so, would force majeure excuse that performance? And for the midstream companies, whose projects are often financed based on binding volume commitments from producers, what if the contracted volumes are not provided? Can the producer claim force majeure relief or must the producer pay for the shortfall? What if the producer refuses to pay for the shortfall?

We, as an industry, are in uncharted waters. The supply / demand imbalance is so great that for the first time in almost fifty years, we are talking about possible oil prorationing by regulators. Though regulators have not yet taken this drastic step, depending on what happens in the market, it remains a possibility. Lawyers need to be thinking today about how such prorationing rules might impact their clients' operations, transactions, and litigation.



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