



REARVIEW MIRROR 2020:
DISRUPTION AND TRANSITION
FOR THE ENERGY INDUSTRY

EDITOR'S NOTE

To our clients and friends,

Each year we take the opportunity to review significant developments in the worldwide energy industry for the previous year and offer our views on what these developments may mean for the coming year.

With 2020 in the rearview mirror as one of the most momentous and unprecedented years in recent memory for virtually every individual, company and industry across the globe, the effects on the energy industry were particularly acute. The outbreak of COVID-19 and its development into a pandemic in early 2020 resulted in seismic developments across the globe. In an attempt to prevent the spread of COVID-19, restrictions were placed on business operations, travel and the overall level of person-to-person interaction. This, in turn, significantly reduced global economic activity and energy consumption and resulted in a dramatic decrease in demand for, and thus the price of, crude oil and many other energy sources. In February of 2020, just when global economic activity began to significantly curtail in response to the virus, a production dispute erupted among several major oil-producing countries and the actions taken as a result thereof exacerbated the decline in crude oil prices. The crisis escalated further in late April of 2020 when concerns about U.S. and global crude oil storage capacity being inadequate to accommodate anticipated surpluses sent the trading price of crude oil negative for the first time ever. The swift decline in worldwide energy consumption and demand resulting from the outbreak of COVID-19, together with the protracted period over which the world attempted to contain its spread, created one of the worst situations imaginable for the energy industry and precipitated a wave of bankruptcies and consolidations, particularly among companies in the upstream, energy services and oil and gas drilling sectors.

Although 2020 was a devastating year for traditional fossil fuel based energy companies, it was a year of profound increasing momentum for the energy transition movement and renewables, with a noticeable shift in the level of traction that matters related to greenhouse gas emissions reduction and the environment were able to garner both in the private and public sectors. The efforts in recent years aimed at the investment community and various other financial intermediaries to reduce exposure to fossil fuels-based energy companies, through changes in lending and capital investment practices, intensified during 2020. Given market conditions for oil & gas, those arguments appeared to gain traction with investors and financial institutions suffering large losses in those sectors. At the same time, there was a strong increase in investor focus on environmental, social and governance ("ESG") practices and disclosures, as well as investor demand for ESG-focused investments. As a result, large amounts of capital were reallocated towards investments seen as aiding the energy transition, with a dramatic example being the almost 700% increase in Tesla's stock price during 2020. With this marked change in investor and public sentiment, companies like BP and General Motors also announced fundamental changes to their long term business strategy in an effort to better align with energy transition goals and several governments across the globe announced extremely ambitious initiatives and policies as a means of meeting ambitious greenhouse gas emissions reduction targets, many of which were already seen as being more aspirational in nature. Adding fuel to this investment fire was the proliferation in investor acceptance of, and demand for, initial public offerings of special purpose acquisition companies ("SPACs"), or blank-check companies, whose stated purpose was to raise capital to search for acquisition targets in the energy transition space.

The end of 2020 was just as eventful as the beginning, as Joe Biden's victory in the November 2020 presidential election and the Democrats' control of both the house and the senate signaled a change to the relationship domestic fossil fuel companies had enjoyed with the U.S. government over the past four years as a result of Donald Trump's push for U.S. energy independence.

2021 has presented a light at the end of the pandemic tunnel, as the distribution of several COVID-19 vaccines has become more widespread and many of the restrictions and measures to stem the spread of the virus have been softened or lifted in varying degrees around the world, resulting in a rebound in oil prices and demand. Nonetheless, a great deal of uncertainty remains, as new strains of the virus have emerged and U.S. relations with China remain tense. While there has been a recent rebound in commodity prices and demand for fossil fuels, it remains unclear when or whether demand will return to pre-pandemic growth levels. We also expect the momentum gained on the energy transition front to continue in 2021, both legislatively and in the private sector.

Thus far, the Biden Administration has already signaled its commitment to making clean energy reform a priority, and in the first three months of the new administration we have already seen the first appointment in our nation's history of a new "special presidential envoy for climate," the U.S.'s reentrance into the Paris Climate Agreement, the allocation of COVID-19 stimulus funds towards investments in clean energy, the roll back of several Trump-era energy policies and an overall increase in regulation for fossil fuel companies. On top of this, in February of 2021, acting chair of the Securities and Exchange Commission ("SEC"), Allison Herren Lee, announced that she was directing the SEC to enhance its focus on climate-related disclosures in public company filings. While we expect the demand for ESG-focused investments to continue in 2021 and beyond, whether that will include the continued stream of SPACs seen in 2020 is difficult to predict. Regardless, we expect companies with a compelling energy transition story to see tailwinds in the market while traditional fossil fuel-related energy companies will continue to seek ways to contribute to the energy transition and reduce their emissions, in order to allay concerns of the investment community and attract capital going forward.

This publication looks a little different this year, as we have converted to an entirely digital format. There are short synopses of each article and a link to the longer, more detailed piece.

We appreciate the trust that you place in us to handle your legal matters and wish you further success in 2021.

Baker Botts Energy Team

READ THE FULL REPORT.





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POWER & UTILITIES

North American Power & Utility Sector and Generation Assets

Like most sectors of the energy industry in 2020, the COVID-19 pandemic had a significant impact on the North American power and utility sector. Quarantines, work from home, social distancing and other measures implemented in response to COVID-19 were a substantial disruption to economic activity, causing a sharp decline in industrial and commercial activities. However, given its essential nature and the offset provided by increased residential usage, the impact on the power and utility sector was less significant than many others in the industry.

Decreased demand, COVID-19 measures and other industry challenges, such as increased costs from natural disasters and manmade threats, translated into a power and utility M&A deal volume drop of approximately 20% in 2020 from 2019 levels. Total deal value, which started off slow in 2020, rebounded in the second half of the year

to produce an increase of approximately 10% year-over-year. Large utility mergers and acquisitions deals (those exceeding \$1 billion in total transaction value), however, saw a resurgence in 2020, accounting for approximately half of 2020 total deal value.

With the increased push of ESG initiatives, utilities will be focused on balancing and rationalizing their portfolios to align with investor and stakeholder expectations. Additionally, the decreased activity of the past few years has many companies sitting on significant capital which they will need to deploy into attractive growth and yielding investments. Further, we expect renewables to continue to drive investment and deal activity in the sector.

READ THE FULL ARTICLE.

Protecting the Bulk Power System from Foreign Adversaries

The Trump Administration, the U.S. Department of Energy, the Federal Energy Regulatory Commission, and the North American Electric Reliability Corporation all acted in 2020 to protect the bulk power system against attacks by foreign adversaries.

- *Executive order on Securing the Bulk Power System.* On May 1, 2020, President Trump issued an Executive Order on Securing the United States Bulk-Power System (“EO”) declaring threats to the U.S. bulk-power system a national emergency. To address this threat, the EO prohibits the acquisition and installation of bulk-power system electric equipment designed, developed, manufactured, or supplied by foreign adversaries and initiates a process to identify, isolate, monitor, or replace existing bulk-power system assets.
- *FERC and NERC Issue White Paper.* On July 31, 2020, staff of the Federal Energy Regulatory Commission and the North American Electric Reliability Corporation issued a Joint Staff White Paper on Supply Chain Vendor Identification-Noninvasive Network Interface Controller (Staff Paper) warning the electric utility sector that it may be unwittingly using devices that could be targeted and exploited by foreign adversaries.
- *DOE and FERC Action.* On December 17, 2020, DOE and FERC took separate actions to protect the bulk power system from foreign adversaries and malicious actors. Specifically, the Secretary of Energy issued an order prohibiting utilities that own or operate defense critical infrastructure, and who serve critical defense facilities, from acquiring or using certain equipment (including software) manufactured by China or its agents. In a separate but complementary action, FERC proposed an incentive-based framework to encourage utilities to invest in cybersecurity measures.

READ THE FULL ARTICLE.

Represented NRG Energy in its Acquisition of Direct Energy for \$3.625 Billion

POWER REGULATORY

FERC Issues Landmark Order to Allow Participation by Distributed Energy Resources in the Wholesale Markets

On September 17, 2020, the Federal Energy Regulatory Commission (FERC) issued Order No. 2222, a landmark order that allows distributed energy resources (DERs) to participate in the organized wholesale markets and offer through aggregators energy, capacity, and grid services for compensation.

Highlights of Order No. 2222 include:

- DER aggregators will be subject to regulation as “public utilities” under the Federal Power Act and will need to meet the public utility requirements. However, DER owners will not be subject to FERC’s jurisdiction as a public utility.

- Each organized market operator must adopt rules to allow DER aggregators to register DER aggregations under one or more participation models.
- State utility commissions have discretion as to whether to allow the aggregation of DER-owning customers of smaller utilities and must opt-in such customers.

READ THE FULL ARTICLE.

Environmental Reforms Impacting Energy Infrastructure

The year 2020 brought with it the culmination of several key rulemakings and court decisions impacting the development and operation of energy infrastructure.

The Clean Water Act

Some of the most significant regulatory and judicial developments related to the Clean Water Act (“CWA”) arise from Section 404, which requires a permit to discharge dredge or fill materials into navigable waters. Section 404, however, provides a streamlined process through its nationwide permit (“NWP”) program for qualifying activities, including utility line construction (“NWP 12”). Presently, a pending challenge to NWP 12 threatens to disrupt energy companies’ reliance on that other NWPs.

CWA Section 401 also is important for energy infrastructure development. Last summer, the Environmental Protection Agency (“EPA”) comprehensively updated its regulations implementing that statutory provision. While there are pending lawsuits, no court reached a final decision on the merits of the 401 reform rule before President Biden took office. As of the writing of this article, it is anticipated that the Biden Administration likely will seek to stay the litigation and develop a new rulemaking to repeal or modify the Section 401 Rule.

National Environmental Policy Act

Additional relevant 2020 regulatory developments relate to the National Environmental Policy Act (NEPA). Last summer, the Council on Environmental Quality (“CEQ”) comprehensively updated its regulations implementing NEPA for the first time since their inception over forty years ago. There are multiple pending lawsuits challenging CEQ’s NEPA rule. As with the CWA Section 401 Rule, the new administration likely will seek to stay these lawsuits while CEQ works on repealing in part or whole its recent NEPA rule.

Wildlife Developments

On the rulemaking front, and despite the recent decision invalidating its guidance on the issue, the U.S. Fish and Wildlife Service adopted a final rule concluding that the Migratory Game Bird Act does not prohibit the incidental taking or killing of migratory birds. The Services also adopted joint ESA regulations defining “habitat” and outlining the process for excluding areas for critical habitat designations. Each of these rulemakings are very recent and narrow in scope, meaning the new administration likely will seek to quickly nullify their effectiveness.

READ THE FULL ARTICLE.



“They can handle regulatory or courtroom matters and they provide a lot of proactive prevention to stay out of the courtroom too.”
—Chambers USA 2020

UPSTREAM

U.S. Upstream Review and Outlook

The upstream oil and gas industry weathered numerous challenges throughout the first half of 2020, but with increased activity in the second half and an apparent stabilization in oil prices, industry participants are feeling cautiously optimistic heading into 2021.

Similar to 2019, M&A in the upstream sector was dominated by a handful of multi-billion-dollar transactions involving the consolidation of public companies. The capital markets remained challenging for most industry players, with most transactions being driven by capital structure management, rather than a need for growth capital.

In 2021, it is likely that trend of consolidation will drive M&A activity as smaller companies seek scale in order to remain competitive versus larger companies. The outlook for public equity and debt capital markets activity is a bit less optimistic unless the rise in commodity prices can be sustained. On the regulatory and political front, the Biden Administration and the Democrat-controlled Congress have signaled support for strengthened regulation throughout the industry as the focus on climate change continues to gain momentum, which will present new challenges for the industry.

READ THE FULL ARTICLE.

Global Upstream M&A Update

The international oil & gas sector suffered numerous challenges in 2020, a year of reduced energy demand linked to the COVID-19 pandemic, with price volatility and, for a time, a sustained reduction in oil prices.

These challenges created distance on deal pricing between would-be sellers and buyers, which resulted in sale processes being shelved and deals being restructured or terminated. In addition, the focus of upstream companies on carbon reduction and energy transition increased in 2020, as a result of the economic downturn, also playing a part in reducing M&A activity.

The attitude towards investment in the oil & gas sector in 2021 remains shaped by economic trends that developed though the COVID-19 pandemic. While investments are expected to marginally recover, it is unclear how the projected investments will affect M&A in the upstream industry globally. However, recent announcements of long term strategic upstream divestment programs may indicate that levels of activity are set to improve.

READ THE FULL ARTICLE.

Represented BP PLC's \$5.6 billion sale of its Alaska business to an affiliate of private equity-backed Hilcorp Energy

MIDSTREAM

Permian Producers All Piped Up with Nowhere to Go

In 2019, midstream players in the Permian Basin rushed to satisfy demand for pipeline capacity driven by booming oil and gas production. However, demand for that takeaway capacity cratered in mid-March as a result of falling commodity prices resulting from the Saudi-Russia price war compounded by the collapse in energy demand resulting from the COVID crisis.

Despite a gradual recovery in crude production, new projects will likely ensure that takeaway capacity outstrips demand for the foreseeable future. To make matters worse for midstream operators, 2020 was generally not a great year for midstream operators in the courts.

A number of upstream producers filed for bankruptcy in 2020, and many of them sought to reject all or a portion of their midstream contracts and were markedly successful in doing so.

Due to the above factors, 2021 for midstream companies is likely to be a year of low growth and increased free cash flow due to deferral or cancellation of major capital projects.

READ THE FULL ARTICLE.

A Tough Year for Midstream Companies in the Bankruptcy Courts

Resulting, in part, from the collapse in oil prices related to the Saudi-Russia price war during the first quarter of 2020, compounded by the destruction of energy demand resulting from the COVID pandemic in the second quarter of 2020, a number of upstream companies filed for bankruptcy in 2020. This provided the opportunity for bankruptcy courts to again address the hotly contested issue of whether midstream contracts “run with the land” and, therefore, are not subject to rejection as executory contracts under Section 365 of the United States Bankruptcy Code.

Key Takeaways

- Extraction, Southland Royalty and Chesapeake illustrate that judges are considering, and, at least in Delaware, willing, to reject midstream contracts even if they contain a valid covenant running with the land so long as they are executory.
- At least according to Chesapeake, contractual language matters with regards to whether dedications run with the land. There do not appear to be any simple “magic words” that are sufficient to establish privity in dedication language.

- The Delaware courts’ rulings in *Extraction* and *Southland Royalty* and *In re Alta Mesa Resources, Inc.* present apparently contrasting analyses as to whether a covenant running with the land inoculates a midstream agreement against rejection as an executory contract.
- Midstream contracts that limit equitable remedies like specific performance and injunctive relief, but instead provide for liquidated damages or easily ascertainable contractual damages, may indicate that the parties did not intend for the contract to run with the land.

The opinions in *Extraction* (including the *Extraction Bench Ruling*), *Chesapeake* and *Southland Royalty* provide insight into bankruptcy courts’ evolving approaches to midstream contracts with dedication provisions. Debtors dealing with burdensome midstream contracts may find Delaware bankruptcy courts as appealing venues. This may be a development to watch in 2021 and beyond.

READ THE FULL ARTICLE.



Advised the Conflicts Committee of Noble Midstream Partners LP in Acquisition by Chevron Corporation of Noble Midstream Partners LP

OIL AND GAS REGULATORY

Changes to the Bonding Rules in the Gulf of Mexico

On December 15, 2020, the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) concluded the comment period for proposed rulemaking with implications for those with a current or past interest in an oil and gas lease, right-of-use and easement (RUE) or pipeline right-of-way (ROW) on the Outer Continental Shelf of the Gulf of Mexico. A final rule is now pending, the ultimate form of which may differ from what was originally proposed.

Among other changes, BOEM's proposed rulemaking eliminates the requirement for a lessee or ROW or RUE grant holder to post additional security if there is a creditworthy co-lessee or co-grant holder or predecessor lessee or grant holder or (in the case of lessees) if the proved reserves on the lease are sufficiently valuable. The proposed rules would supersede prior guidance regarding additional security requirements.

In addition, BSEE's proposed rulemaking would create a new procedure for establishing the sequence in which BSEE will order predecessors to carry out decommissioning obligations when the current lessee or grant holder fails to do so. BSEE's proposal would also require a lessee or grant holder to post a surety bond in order to stay an administrative ruling pending appeal and clarify that RUE grant holders are also responsible for decommissioning obligations.

[READ THE FULL ARTICLE.](#)

FERC Sets New Adder for Oil and Liquids Pipeline Index Rates

On December 17, 2020, FERC issued an order setting a new adder for crude oil and liquids pipeline rates subject to indexing. The new index level, which goes into effect on July 1, 2021, is the Producer Price Index for Finished Goods plus 0.78% (PPI-FG+0.78%).

Every five years, FERC examines pipeline industry costs to set a new adder. Among other things, this year's review assessed the impact of the corporate tax cuts adopted pursuant to the Tax Cuts and Jobs Act of 2017. In setting the new adder, FERC had also proposed to take into account the elimination of the income tax allowance for certain master limited partnership and other pipelines organized as a pass-through entity.

In setting the adder at 0.78%, FERC's order adopted a significantly higher index level than the 0.09% adder it originally proposed in June 2020. For comparison, the current adder that was applied on July 1, 2020 and over the past five years was 1.23%.

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"Baker Botts has a strong oil and gas practice, with a good international reach."
—Chambers Global 2020



CHEMICALS/REFINING/LNG



COVID-19 Trends Among Pureplay U.S. Refiners

2020 was supposed to be a great year for many U.S. based pureplay refiners. Unfortunately, COVID-19 dramatically changed the global landscape and government shutdowns and other restrictions on individual movement resulted in a precipitous drop in demand for jet fuel and gasoline.

The primary method the U.S. pureplay refiners used to shore up liquidity was through short-term borrowings. As the pandemic begins to subside and demand begins to return, there may be an increase in liability management transactions to deal with much of the short-term debt these companies took on to ride out the storm.

Depressed oil and gas consumption also accelerated the shift by many U.S. pureplay refiners into renewables. As more and more governments begin to push for low carbon emissions and restrictions on traditional gasoline powered vehicles, the demand for renewable diesel is expected to increase.

Project deferrals and refinery turnarounds, when combined with the likelihood of increased regulation under a Biden Administration, are likely to benefit those refiners who continued to invest.

READ THE FULL ARTICLE.



**“They are a really good oil and gas firm in upstream, midstream, downstream and LNG.”
—Chambers Global 2020**

Chemicals Update

Mergers and acquisitions activity in the U.S. chemical industry slowed in 2020 versus 2019, both in terms of the number of deals and value. Many industry observers are predicting that the chemicals M&A market is poised for a major rebound in 2021 following a pandemic-hindered 2020 as business confidence returns and central banks keep financing markets buoyant.

In 2020, the U.S. chemical industry reeled under the effects of global manufacturing slowdown, protectionist trade policies and uncertainties surrounding the U.S. elections. However, the industry benefited from higher demand for inputs that are used to make products (including personal protective equipment, plastic packaging, disinfection and sanitation products) used in the global fight against the pandemic. The U.S. chemical industry started to recover in the third quarter on the back of an improvement in major end-use markets and continues to take hold. The outlook for the next year is positive backed by solid fundamentals.

Positive news on the vaccine front, continuing central bank policies boosting liquidity and a new US Administration that could ease global trade tensions are all giving encouragement to the M&A market. It seems that transaction multiples have held up well during the pandemic while public valuations for chemicals companies have seen robust recoveries in anticipation of a global economic recovery post-coronavirus.

READ THE FULL ARTICLE.

LNG Update

The LNG industry was not spared the turmoil that affected much of the global economy due to the COVID-19 pandemic. Major themes for 2020 included a demand shock, which the industry worked through, a growing interest in low-carbon LNG, and a strong finish to the year through rising prices and even the launch of an LNG export project.

While LNG has long been regarded as a “bridge fuel” into a lower-carbon future, the natural gas industry has faced increased pressure from investors to expediate the achievement of climate change objectives and other ESG goals. As a result, this has brought about much discussion of green LNG as a product within the LNG industry.

LNG markets are currently experiencing a rebound following the collapse in demand caused by the COVID-19 pandemic. At the end of 2020 and heading into 2021, we have seen an increase in LNG demand, fueled by growth in China, Japan, and South Asia.

READ THE FULL ARTICLE.

RENEWABLES

Renewables Continuing Their Upward Trajectory

2020 saw dramatic growth in the area of corporate renewables procurement. Corporations purchased a record 23.7 GW of clean energy in 2020, up from 20.1 GW in 2019 and 13.6 GW in 2018, according to Bloomberg New Energy Finance (BNEF). The increase came in the face of terrific headwinds, including a year wracked by the COVID-19 pandemic, a global recession and political uncertainty ahead of the US presidential election. Underpinning the market is surging interest in corporate sustainability and access to clean energy on a global scale.

The renewable energy industry generally views the Biden Administration and the possibility of favorable federal policy support positively. In December 2020, before taking office, President Biden published his renewable energy and climate plan entitled "Plan for Clean Energy Revolution and Environmental Justice, and Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future" (the Biden Climate Plan). Under the Biden Climate Plan, the newly elected President stated his intention to spend \$2 trillion over four years to address climate change, the increased use of clean energy and strengthen infrastructure.

Wind

According to the American Clean Power Association, total operating wind capacity in the U.S. reached 122,468 MW (or 1.22 GW) in nameplate capacity as of the end of Q4 2020, with another 34.7 GW of wind projects in near-term advanced development. Total US operating wind capacity comes from over 60,000 wind turbines across 41 states and two U.S. territories and a combined output sufficient to supply 32 million homes in the U.S. and to avoid approximately 240 million tons of carbon dioxide emissions annually.

Wind power, which currently produces about 9% of U.S. electricity, is expected to produce from one-quarter to one-third of the world's electricity by 2050. Such dramatic growth presents several grand challenges, including the need for an improved understanding of atmospheric and wind power plant flow physics, according to the National Renewable Energy Laboratory (NREL).

Solar

According to the Solar Energy Industries Association (SEIA)/Wood Mackenzie Power & Renewables U.S. Solar Market Insight Report, dated December 15, 2020, in Q3 2020 the U.S. solar market installed 3.8 GW_{dc} of solar photovoltaic (PV), a 9% increase from Q2 2020 as the industry experienced a recovery from the COVID-19 pandemic. The lifting of pandemic-related restrictions helped accelerate project completions, but such restrictions complicated and delayed development timelines overall.

Storage

The energy storage industry has passed rapidly from an initial pilot/pioneer stage, to a period of increased procurement for evaluation and now finally to a stage of widespread adoption driven in large part by the participation of utilities. Storage and battery solutions are expected to propel rapid electrification of the transport, building and manufacturing sectors, allowing for the smooth integration of variable renewable resources and providing financial flexibility. Storage technologies increase the reliability of renewable generation smoothing out the variability of solar and wind resources. At the same time, storage and battery systems provide ancillary and support services to the power grid.

READ THE FULL ARTICLE.



"They just get what's going on during a project and provide clients with relevant advice and work product as necessary. In addition, it's remarkable how well coordinated they are, even on short timelines."
—Chambers Global 2021





The Growth of Hydrogen and CCUS

At the federal level, legislative and administrative actions encouraged the development of hydrogen markets in the United States. On December 21, 2020, the Senate and the House passed the Consolidated Appropriations Act, 2021. In addition to providing relief related to the effects of COVID-19, the legislation also contains crucial provisions for the fuel cell and hydrogen industry, including appropriations funding, policy authorizations, and tax incentives.

Private sector activity in 2020 included merger and acquisition activity and increased investment, growing adoption of technologies for utilizing hydrogen for power generation, and the announcement of at least one pilot project to blend hydrogen in the natural gas stream.

The CCUS industry made advances in 2020, both in terms of government incentives and private activities. The Consolidated Appropriations Act authorized research, development, and demonstration program and large-scale pilot program for carbon capture and sequestration that includes hydrogen steam methane reformation plants and fuel cell technologies for modular power systems.

Private sector actors advanced hydrogen and CCUS projects in 2020. Prompted by the credits for carbon storage under Section 45Q, interest in permanent geologic sequestration of CO₂ increased in the United States.

READ THE FULL ARTICLE.

Clean Energy Technology – Paving the Way for the Energy Transition

Dips in oil prices, falling demand, and supply chain issues brought on by the COVID-19 pandemic are causing traditional oil and gas companies to shift priorities and focus on alternative energy, carbon reduction and other environmentally friendly solutions. Globally recognized names in oil and gas, such as Chevron and Shell, have created funds with the aim of investing in the development of clean energy technologies.

It is not just oil and gas companies that are turning their investing capital towards energy transition technologies. Corporations and venture capitalists from all industries have taken notice of the multi trillion-dollar opportunity created by the need to develop technology to reduce greenhouse gas emissions. Even tech giants such as Amazon and Microsoft are have made significant investments into clean energy.

Improvements to battery technology is set to play a key role in a successful transition to clean energy. It is estimated that energy storage will have to grow exponentially in order to meet the world's sustainable energy goals.

There has been a shift in public opinion towards the importance of climate change and as a result, consumer demand for renewable and clean energy technology has increased drastically over the past several years. We expect this trend to continue throughout the year, with substantial opportunities innovation and investment.

READ THE FULL ARTICLE.

Represented AES in its 10-Year Strategic Alliance with Google to Accelerate the Future of Energy

RENEWABLES REGULATORY

FERC Rejects Challenge to State Net Metering Programs

State net metering programs allow a retail customer to produce electricity from a generation source located on the same side of the retail meter as the customer's load and net the amount of energy it produces against the amount of energy it consumes from the interconnecting utility. For almost two decades, FERC has disclaimed jurisdiction over net metering transactions where there is no net sale over the applicable billing period, typically one month. According to FERC, such transactions do not constitute sales of electric energy at wholesale in interstate commerce under the Federal Power Act because there is no "sale."

FERC's position was challenged in April 2020 by the New England Ratepayers Association (NERA). In its July 16, 2020 order, FERC dismissed NERA's request on procedural grounds, maintaining the current status quo for the regulation of net metering and leaving intact FERC's longstanding precedent disclaiming jurisdiction.

[READ THE FULL ARTICLE.](#)

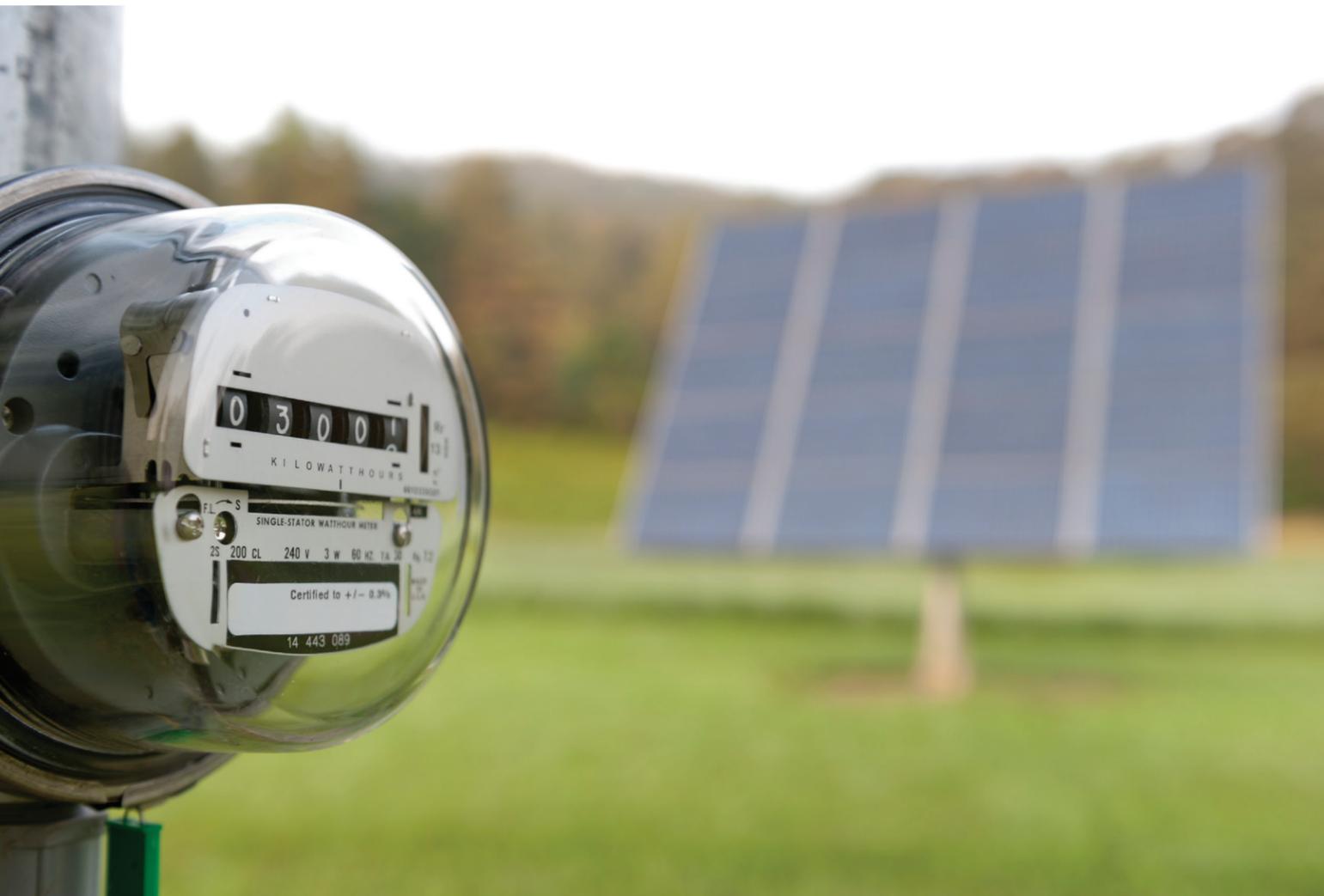
FERC Adopts Revisions to PURPA Rules Applicable to Small Renewable and Cogeneration Facilities

In 2020, FERC issued a Final Rule modernizing its regulations under the Public Utility Regulatory Policies Act of 1978 (PURPA) that apply to qualifying small power production facilities, including many renewable energy facilities, and qualifying cogeneration facilities (QFs).

The Final Rule adopts the following revisions to FERC's PURPA rules:

- *Mandatory Purchase Obligation:* The Final Rule lowers the capacity threshold from 20 MW to 5 MW for QFs to qualify for the rebuttable presumption that such QFs have non-discriminatory access to organized wholesale electric markets. By lowering the threshold, small projects are no longer guaranteed to receive mandatory compensation from interconnected utilities.
- *Rates:* The Final Rule grants states more flexibility with respect to the rates to be received by QFs.
- *One-Mile Rule:* Parties will now be able to challenge whether multiple facilities that are located more than one mile apart, but less than 10 miles apart, are separate facilities.
- *Legally Enforceable Obligation (LEO):* States are required to establish objective and reasonable criteria to determine a QF's commercial viability and financial commitment to construction before a QF is entitled to a contract or LEO.
- *Challenging QF Certifications:* Parties may now protest a QF's self-certification (or-recertification) without the need to file and pay for a separate petition for declaratory order.

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"Great honest people that are easy to work with and provide an outstanding work product in a timely manner at a fair rate."

—Legal 500 US 2020

RENEWABLES FINANCE

Got SPACs? Leveraging SPACs for Clean Energy

Special Purpose Acquisition Companies (SPACs), and in particular SPACs targeting companies in the clean-energy space, were the capital markets story of 2020. SPACs are entities formed to raise capital through an IPO for the purpose of taking an existing private company public via the de-SPAC transaction. While SPACs have been around for almost three decades, the recent entry of reputable players in the SPAC market, the high-profile targets acquired and unstable market conditions for traditional IPOs in recent years have thrust SPACs into the mainstream.

Since many clean-energy companies are early stage, with little to no revenue and have a tendency to be capital intensive, SPACs can be an attractive vehicle to invest in clean-energy companies, as investors have the ability to exit the SPAC with a full refund of their investment if they do not like the De-SPAC acquisition. In addition, unlike in a traditional IPO, the SEC disclosure associated with a de-SPAC transaction can contain projections regarding expected future performance, allowing the clean-energy company to tell its story to potential investors in a way that is not possible in a traditional IPO. Finally, the access to public markets obtained through an acquisition by a SPAC can help provide the capital to clean-energy companies.

There are risks associated with clean-energy SPACs. The frothy valuations ascribed to these companies in 2020 have led to some volatile stock prices. In addition, many clean-energy companies and technologies are nascent, with limited operational history or proven efficacy.

READ THE FULL ARTICLE.

Continued Evolution in Sustainable Finance

As green loans and green bonds have continued to gain traction in recent years, other financial products tied to ESG indicators also gained prevalence in 2020.

Unlike green bonds and loans, which require a specific application of proceeds to the financing or refinancing of an eligible green project, sustainability-linked loans provide more flexibility and do not require a particular application of funds but rather include some structural features designed to reward the borrower for achieving pre-determined sustainable performance targets. These developments reached the bond market as well, allowing the proceeds of sustainability-linked bonds to be used for general corporate purposes, but the bond terms have characteristics that can vary depending on whether the issuer achieves specified sustainability targets.

With the increasing focus on ESG considerations by lenders, investors and other market participants, innovation is expected to continue in order to expand the universe of potential borrowers and issuers for instruments of this type and provide additional tools for sustainable, social and transition finance.

READ THE FULL ARTICLE.

**Baker Botts Represented Clearway Energy Operating LLC
in Offering of \$925 Million “Green Bond”**





RENEWABLES TAX

Lifelines for Renewable Tax Credits and Indications of More to Follow

Under the Internal Revenue Code, the rate for the production tax credit (PTC) and investment tax credit (ITC) generally hinges on when the applicable facility or project “began construction.” The COVID-19 pandemic initially seemed as though it could upend certain PTC and ITC planning based on the Continuity Safe Harbor and the 3½-Month Rule. The IRS responded by extending the Continuity Safe Harbor by one year for projects that began construction in 2016 or 2017 and modifying the 3½-Month Rule to deem equipment prepaid for after September 16, 2019 as satisfying the rule if actually provided by October 15, 2020.

The renewable energy industry eyed Congress with uncertainty as December approached. The ITC for solar, qualified fuel cells and certain other technologies, having stepped down to 26% in 2020, was slated to step down again to 22%; the PTC for wind facilities was to expire for facilities beginning construction in 2021. However, under

the stimulus package signed into law on December 27, 2020, the 26% ITC was extended to projects that begin construction in 2021 and 2022. The PTC for wind facilities was extended by one year at the 2020 rate, and a new 30% ITC was enacted for certain offshore wind facilities that begin construction before 2026.

Going forward, President Biden and Democratic leadership in both houses of Congress have made clear that promoting the development of renewable energy is a top priority, which could translate to concepts from the GREEN Act, which included a reversion to a 30% ITC and extended the PTC (at the 2020 rate) for wind facilities, in each case through 2025, and included an expanded ITC for energy storage, becoming the subject of legislation early in the near future.

[READ THE FULL ARTICLE.](#)

Carbon Capture Projects Incentivized by Tax Credit Guidance: Section 45Q

The federal income tax credit in Internal Revenue Code section 45Q was enacted to incentivize investment in carbon capture and sequestration. However, the statutory provision left the interpretation of many key provisions to Treasury and the IRS. In 2020, after a clamor from both legislators and their constituents for much-delayed guidance, Treasury finally released numerous pieces of guidance. These developments, together with the general push for ESG investments, can be expected to make 2021 the year that carbon capture project development takes off.

Apart from regulatory guidance, the legislative outlook for the section 45Q tax credit is encouraging. Previously introduced pieces of legislation would have created a direct payment option for the carbon capture tax credit, among other enhancements. While these provisions did not pass the previous Congress, President Biden and Democratic leadership in both houses of Congress have made clear that promoting clean energy incentives is a top priority.

[READ THE FULL ARTICLE.](#)

‘Fit for 55’ – the EU’s Climate Ambitions and the Proposed Border Tax Adjustment

The European Union is preparing the world’s most ambitious climate goal: to reduce emissions by about 55 percent over the next decade and to become the world’s first carbon neutral economy by 2050. ‘Fit for 55’ is the Commission’s nickname for this massive package of EU legislation which aims to conform European laws to the bloc’s new climate objective for 2030.

The ‘fit for 55’ package will include the much-awaited carbon border adjustment (CBA) mechanism, which aims to re-establish a level playing field between European industries and manufacturers with those in other parts of the world which do not face the same carbon costs.

Although the exact mechanics and timing of a carbon border tax must still be determined and be approved by the EU’s legislative bodies, it should be noted that the requirement to measure, report, and factor in the costs of a product’s carbon footprint is already in place in the EU. It could soon become a requirement for companies that export to Europe as well.

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—Legal 500 US 2020

CORPORATE PPAS

Trends in U.S. Corporate PPAs

After several years of year-over-year double-digit growth, 2020 marked a slight slowdown in the corporate PPA space in terms of megawatts under contract. Nevertheless, driven by stakeholder and consumer demand, corporate buyers continue to compete amongst themselves with respect to grand public commitments to renewable procurement. Therefore, many analysts conclude that the market for corporate PPAs will grow in 2021, even if at a slower and steadier pace than in previous years.

We expect the following trends in 2021:

- *Enhanced Products.* PPA products with power and carbon free attributes to match, hour for

Trends in European Corporate PPAs

Prior to the spread of the coronavirus, corporate power purchase agreements (PPAs) were surging in Europe. According to a study by Bloomberg NEF, corporate PPAs increased rapidly across the globe by 44% in 2019 and the first quarter of 2020. The uncertainty during the start of the global pandemic resulted in a reduced appetite for PPAs on the corporate side as most businesses across Europe have either shutdown under lockdown and/or experienced changes in their creditworthiness.

Notwithstanding the hiatus caused in the beginning of the spread of the coronavirus, renewable energy remains increasingly at the top of the agenda of large corporations from a range of industries. The world's largest oil and gas companies have started to set ambitious goals to reduce emissions. Additionally, game changing PPAs in Europe emerged in the last quarter of 2020.

hour, customer load (also known as "24/7 CFE"); an increasing marketplace for PPAs with proxy generation; and the develop even more finetuned mechanisms to decarbonize the grid.

- *Onsite Opportunity.* Certain trends may favor of the growth of onsite PPAs (also known as Commercial and Industrial or "C&I").
- *Buying Power.* In response to pressure from corporate customers, renewable developers are taking on more and more risk.

[READ THE FULL ARTICLE.](#)

According to LevelTen's latest European PPA price index, PPA prices remain mostly flat and the spread of the coronavirus did not have a significant impact on pricing. It is predicted by Pexapark that the European PPA market is set to exceed 10GW in 2021, up from 8.6 GW in 2020. In addition to stable prices, there are further reasons to foresee high long-term demand for renewables in the next six to twelve months.

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—Chambers Global 2020



ENVIRONMENTAL & REGULATORY

EPA Efforts to Address Greenhouse Gas Emissions from the Energy Sector

In 2019, the Trump Administration repealed the Clean Power Plan (CPP) and, in its place, adopted the Affordable Clean Energy (ACE) Rule. Unlike the CPP Rule's "beyond the fence line" approach, the ACE Rule adopted an interpretation of CAA Section 111 that limited the best system of emission reduction to measures that can be applied at and to a particular source.

Just prior to the 2020 election, the D.C. Circuit heard oral arguments addressing EPA's authority under Section 111(d) of the Clean Air Act (CAA) to impose greenhouse gas emission standards on existing fossil fuel fired power plants, and whether those standards can impose limits based on measures applied beyond the fence line of the facility. Most observers found the D.C. Circuit panel skeptical of the Trump Administration's approach, and on the eve of President Biden's Inauguration, the panel delivered on that skepticism with a lengthy opinion disagreeing with EPA's narrow reading of Section 111, vacating the ACE Rule.

With regard to the EPA methane NSPS rules found at Subpart OOOO/OOOOa (commonly referred to as the "Quad-O and Quad-Oa" standards), EPA issued final rules in 2020 providing that these standards are inapplicable to the transmission and storage segment of the oil and natural gas source category while also rescinding the methane-specific requirements of these standards for the remaining segments of oil and natural gas production and processing.

Initially, the D.C. Circuit stayed the Quad-O and Quad-Oa rules, but just a week before the election, the court dissolved the administrative stay. Environmental petitioners filed their brief on December 7, 2020 and the Justice Department filed a brief on January 15, 2021 strongly defending EPA's methane rule, just a few days before the arrival of the Biden Administration. On its first day in office, the Biden Administration identified these rules as a top priority for reconsideration.

READ THE FULL ARTICLE.

Environmental Enforcement Trends & Changing Priorities

The Biden campaign promised significant changes in direction at the U.S. Department of Justice, with a renewed focus on environmental enforcement. Particular areas of focus are likely to include actions implicating climate change and environmental justice concerns, especially those in the energy sector. The Biden Administration is also expected to rollback various Trump-era enforcement reforms.

A new presidential administration may also lead to changed priorities for environmental organizations like Sierra Club and Natural Resources Defense Council. After fighting the Trump Administration's regulatory reforms and rollbacks for the last four years, citizen groups are now expected to refocus on enforcement actions.

READ THE FULL ARTICLE.



Energy Regulatory Developments to Watch

At least three energy regulatory developments across the country in 2020 deserve particular notice:

First, as oil prices plummeted in late February and early March, prompted by the combined effects of COVID-19 and the Russian-OPEC price war, regulators in a number of oil producing states began debating whether to limit the production of oil within their borders. Commissions in Texas, Oklahoma and North Dakota all considered prorationing but ultimately took no action. Instead, these states opted for easing other regulatory burdens on producers and giving producers temporarily expanded authority to voluntarily shut in their wells to avoid the "waste" of producing non-economic oil.

Second, flaring for economic reasons has come under increasing scrutiny. Midstream companies that have invested in building pipeline infrastructure bristle at the idea that producers can avoid shipping on their pipelines by simply burning their gas in the field. Environmental groups have found an increasingly sympathetic audience for their argument that flaring contributes to climate

change. Producers, however, continue to have genuine operational and economic issues that are best addressed by flaring. The highly publicized, public debates over prorationing in 2020 provided a forum for opponents of flaring, and some regulators appear to have seized on increased scrutiny of flaring.

Finally, oil and gas pipelines continue to face serious challenges to their construction and routing. In April, a federal judge in Montana vacated Keystone XL's Nationwide Permit ("NWP") 12, an expedited permit relied upon by many pipeline and other energy infrastructure projects. Observers are watching to see what, if anything, the Biden Administration will do regarding other pipelines. Whether and how new pipeline infrastructure can overcome regulatory and legal challenges under a new administration will be a key question for the energy industry in 2021.

READ THE FULL ARTICLE.



"Clients praise the firm as 'among the most sophisticated environmental practice groups; their understanding of the business issues related to the legal side is very useful.'"

—Chambers USA 2020



ENERGY ESG

Biden’s “Whole Government” Approach to Environmental Justice

President Biden has been very clear that environmental justice (“EJ”) will be a priority of his administration. His public plans employ a “whole of government” approach that seeks to use environmental justice, as well as climate, to drive decision-making across agencies and sectors. The new administration’s focus will drive not only enforcement, but also decisions on federal investment and strategy across sectors, which will impact a variety of corporate operations in the coming years.

President Biden’s approach recognizes EJ as an intersection between traditional environmental issues and social justice. Big picture, the Biden Administration seeks to tie the overall economic health and climate well-being of these EJ communities into federal decisions from

enforcement to procurement strategy.

Companies should examine how existing and planned operations may be implicated by the new administration’s governmentwide priorities, not just with respect to permitting and siting, but also in connection with corporate EJ and climate profiles that may impact overall investor valuation. Proactive approaches might include assessment and revision of ESG policies, the conduct of EJ and climate reviews for facilities, and the review of internal audit scopes to build in EJ and climate considerations.

READ THE FULL ARTICLE.

COVID-19 Effects in the Energy Industry

The COVID-19 pandemic affected the energy industry in at least two important ways. First, the pandemic altered supply and demand dynamics for the entire industry. Second, it required individual market participants to monitor COVID orders and guidance decrees in every jurisdiction in which they operate.

The coronavirus outbreak dampened world demand for oil just as the Russia-OPEC price war was boosting supply. The result was one of the most dramatic oil price collapses in memory, with oil prices in the United States briefly dipping into negative territory and a sustained period of sub-\$40 prices.

Virus countermeasures also reshaped demand for electricity, with significant reductions in industrial and commercial demand only partially offset by increases in residential demand as people remained in lockdown and working from home.

Finally, in the face of industry-wide effects, many energy companies found themselves forced to adapt their day-to-day business operations to an often-confusing patchwork of COVID-19 measures that differed not only from state to state, but often among more local jurisdictions within a single state. COVID-19 compliance is likely to remain a time-consuming task for energy companies well into 2021 at least.

READ THE FULL ARTICLE.

Baker Botts Represented NRG Energy, Inc. in Offerings of Nearly \$4 Billion of Senior Notes and Pre-Capitalized Trust Securities, Including First Issuance of Sustainability-Linked Bond by a North American Company

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