Energy Litigation 2024 Outlook

January 2024

For clients and friends of the firm, the Baker Botts Energy Litigation team has identified some key issues and trends in the energy sector that we think you should know about. Please feel free to reach out to the relevant team members if you have any questions about any of the issues and trends discussed below.

KEY ISSUE	CONTACT
1. **Combating Community Opposition to New Energy Projects.** The construction of energy infrastructure in all forms - transmission lines, solar generation, battery stations, wind farms, oil and gas pipelines and wells - is under attack in nearly every state, in both rural and urban areas, from “environmentalists” on the left and “property rights” advocates on the right. All of these suits play out in social media and the courthouse. The majority of these claims share a common theme - that energy infrastructure may be important to build, but just not in my neighborhood, city, county or state. We have successfully defended so many of these projects over the past several years that we have developed a deep understanding of how to develop a successful strategy for winning these claims so that these projects can be built. A comprehensive approach is typically required, involving good legal briefing, careful education and explanation of the project to the adjudicating tribunal, an effective public communication plan, well-prepared witnesses who can explain the project, and a thoughtful, responsible development and construction plan. With the Inflation Reduction Act spurring many new projects, these legal challenges will only grow in number We are studying further ways that we can effectively reduce the risks, cost, and delay from these suits, and how best to quickly get them resolved.	 **Bill Kroger** Partner bill.kroger@bakerbotts.com
2. **Price Disparities in LNG Markets Continue to Generate Disputes.** Most of us are not “superforecasters”. Parties enter into long-term LNG supply agreements without knowing precisely how unforeseen wars, natural disasters, or other significant global events could impact pricing in different LNG markets, or how these price disparities may cause their counterparties to behave. The Wall Street Journal recently reported that long-term purchasers of LNG from Venture Global’s LNG facility in Louisiana, including BP and Shell, have filed arbitrations alleging that Venture Global is selling its LNG at the much higher prices prevailing on the spot market (with prices in European LNG markets skyrocketing following Russia’s invasion of Ukraine), instead of performing under its long-term supply agreements. Baker Botts’ International Disputes team is handling similar disputes in confidential	 **Andrew Behrman** Partner andrew.behrman@bakerbotts.com

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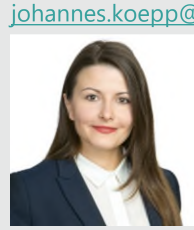
arbitral proceedings, and we expect to see more disputes arising in similar circumstances for as long as price disparities between different LNG markets continue.	 **David Turner** Special Counsel david.turner@bakerbotts.com
3. **Preparing for Shareholder, Consumer, and Other Private Litigation over ESG Disclosures.** This year, the SEC will finalize regulations that put climate change risk assessment front and center in a registrant's disclosures. It includes governance of climate-related risks and relevant risk management processes; how climate-related risks have or will materially impact its business and finances; and the impact of climate-related events. Additionally, the climate disclosure rules will require quantifying and disclosing Scope 1, Scope 2, and in some instances, Scope 3 emissions. Climate change already underpins a growing number of cases across the country, with litigation targeting a wide variety of industries, invoking claims based on torts, false advertising, consumer protection, fraud, misrepresentation, and deceptive business practices. With the newest SEC disclosure requirements, companies can be sure that shareholder and securities-based litigation are to follow. We will discuss the strategies for preparing climate disclosures to mitigate against the risk of potential enforcement and litigation. We will also explore and discuss the processes that companies should develop now to best ensure that the climate, and other ESG, reporting processes are protected by the attorney-client privilege.	 **Sterling Marchand** Partner sterling.marchand@bakerbotts.com  **Amy Hefley** Partner amy.hefley@bakerbotts.com
4. **Disruption to Contractual Relationships as a Result of Hostilities in the Middle East.** The ongoing conflicts in the Middle East will undoubtedly cause severe disruptions to many of our clients' contractual relationships, giving rise to complex contractual and, potentially, investment treaty disputes. Disputes are particularly likely in the energy, construction and infrastructure sectors and may result from, *inter alia*, destruction of assets and production facilities, supply chain disruption, and energy price volatility. In 2024, we expect to see an increase in parties complaining of inability to comply with contractual obligations and invoking force majeure, unforeseeable changes in circumstances and other relief available under the relevant applicable law to avoid liability for non-performance (or delayed performance). We have extensive experience advising clients in the region on force majeure events arising out of civil wars and other military conflicts. Where businesses and assets are destroyed as a result of a conflict, foreign investors may also consider bringing claims against host States under investment treaties, including bilateral investment treaties and the Organization of Islamic Cooperation multilateral investment agreement.	 **Johannes Koepp** Partner johannes.koepp@bakerbotts.com  **Valeriya Kirsey** Senior Associate valeriya.kirsey@bakerbotts.com
5. **Energy Justice.** Most companies are familiar with environmental justice, but the term energy justice is newly on the scene and worthy of note. Energy justice is focused on four core principles – access to healthy, sustainable energy production; access to the best available energy infrastructure; affordable energy; and uninterrupted energy service. Companies expanding operations to meet the growing demand for energy across the United States should expect be asked by surrounding community members how a project delivers on energy justice principles. Closely related to energy justice is the Biden Administration's "Justice 40" initiative, which seeks to ensure that 40 percent of the benefits of clean energy and	 **Alexandra Dapolito Dunn** Partner alexandra.dunn@bakerbotts.com

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climate related investments flow to disadvantaged communities. Companies interested in learning which communities are considered disadvantaged can look at the Department of Energy's (DOE's) energy investment mapper or the White House's Climate and Economic Justice Screening Tool (CEJST).

6. **Allocation Wells Versus Pooling Under a Lease.** A lack of pooling authority in an oil and gas lease alone does not prohibit drilling under a production-sharing agreement (PSA) in the context of a PSA permit issued by the Texas Railroad Commission to drill a horizontal well. Following the shale revolution, horizontal drilling has enabled significant increases in the production of oil and gas driven by allocation and PSA wells. Pooling inherently differs from the methods for designating how to share production under a PSA or allocation well that traverses the boundary between two or more leases that have not been pooled. But a PSA well is not pooling by another name where pooling is otherwise prohibited by the lease, because production through a PSA well is not the same as pooling under Texas law.

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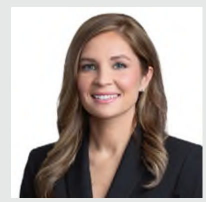

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7. **Fixed v. Floating Royalties.** Last year, the Texas Supreme Court issued its latest opinion addressing the use of double fractions in royalty reservations – *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023) – an issue that continues to generate frequent litigation. The Court held that a reservation of "one-half of one-eighth of all minerals" reserved one half of the mineral interest, not one sixteenth. In other words, the reservation floated with the then-applicable royalty rate, as opposed to being fixed at one sixteenth. In reaching this conclusion, the Court stated that other courts interpreting similar double fraction language should begin with the presumption that the use of 1/8 in older instruments was intended to refer to the entire mineral interest based on historical use of that fraction to refer to a standard royalty rate or the full mineral interest retained by a lessor. The Court was quick to point out, however, that this presumption can be rebutted by language in the deed reflecting a contrary intent. The Court also looked to the presumed grant doctrine, a "common law form of adverse possession," to bolster its floating royalty opinion and noted that this doctrine could displace deed construction in appropriate cases. There are currently several double fraction cases pending in various lower courts across Texas. We will be watching to see how these courts apply the *Van Dyke* holding, in particular where the floating royalty presumption and presumed grant doctrine may conflict.

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8. **Sustainability Disclosures.** This year, sustainability disclosures are a major focus. The status of the U.S. Securities and Exchange Commission's proposed rule remains uncertain. While the SEC's regulatory agenda sets finalization in the first half of 2024, it remains possible that the SEC will choose to amend and re-propose the rule to curtail the risk of litigation over elements such as the Scope 3 greenhouse gas emissions requirements. Canada and Australia have also proposed rules. Other jurisdictions now have rules in effect, including the European Union, the United

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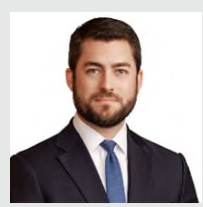
Kingdom, India, and Singapore. Understanding the overlap and differences across the mandates is a priority for us. In California, we will monitor rulemaking to implement the Climate Corporate Data Accountability Act (SB 253) and the Climate-Related Financial Risk Act (SB 261). When signing SB 253 and SB 261, California Governor Gavin Newsom expressed concern about the bills' timelines, and California's proposed 2024-25 budget may pause funding for the implementation rules. In Europe, with the Sustainability Reporting Standards newly in place, a key topic will be "double materiality" assessments. The results of these internal assessments inform the scope of a company's reporting. For each issue in the Standards—such as climate change, marine resources, and biodiversity—companies need to assess both the issue's impact on the company and the company's impact on the issue.	travis.wofford@bakerbotts.com  **Julie Cress** Special Counsel julie.cress@bakerbotts.com  **Aaron Ramcharan** Associate aaron.ramcharan@bakerbotts.com
9. Supreme Court's Review of Chevron Deference. This year, the Supreme Court will decide whether to overrule the doctrine of judicial deference established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), which has become a bedrock of administrative law. Under the *Chevron* doctrine, when a legislative delegation to an administrative agency on an issue is implicit, a court may not substitute its own interpretation or judgment for the administrative agency's interpretation so long as the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. The two cases before the Supreme Court are *Loper Bright Enterprises, et al. v. Raimondo, et al.*, Docket No. 22-451 and *Relentless Inc., et al. v. Department of Commerce, et al.*, Docket No. 22-1219. Both cases, which were argued on January 17, challenge the National Marine Fisheries Services' promulgated rule requiring an industry-funded monitoring program. The outcome of these cases could reshape administrative law and have a significant impact on the EPA and FERC's rulemaking authority to regulate the energy sector.	 **Kristina Vu** Senior Associate kristina.vu@bakerbotts.com
10. Clarification of Obligations of Texas Electricity Market Participants to Consumers. Following widespread power outages related to Winter Storm Uri in February 2021, numerous lawsuits seeking damages - including personal injury, property damage, and other losses - allegedly caused by a lack of electricity during the winter storm were filed across Texas state courts against various participants in the Texas electricity market. These cases have been consolidated before a Multidistrict Litigation ("MDL") pretrial court, which issued rulings on initial motions concerning the viability of plaintiffs' claims. The MDL pretrial court's rulings will be reviewed by Texas's appellate courts, which will likely clarify the scope of any obligations owed by Texas electricity market participants, such as power generators and transmission and distribution utilities, to Texas electricity consumers.	 **Matthew Sheridan** Senior Associate matthew.sheridan@bakerbotts.com

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11. **Increased US DOJ Scrutiny of Non-US Business Activities.** Companies should ensure their compliance and due diligence procedures take into account new priorities and tools of the US Department of Justice. While, over the last two decades, many energy companies have developed Foreign Corrupt Practices Act (FCPA)-focused compliance procedures, DOJ in the past two years has poured resources into the investigation of sanctions and export control violations, with DOJ's number two official declaring "sanctions are the new FCPA." In addition, in late 2023, the new Foreign Extortion Prevention Act (FEPA), which allows DOJ to prosecute foreign officials for receiving bribes, was signed into law with bi-partisan US Congressional support. Companies should ensure their compliance and diligence programs have kept up to date with DOJ's new priorities and tools.

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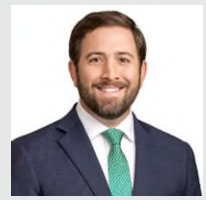
12. **Renewable Project Resets.** On the heels of multiple offshore wind project cancellations and a tepid first offshore auction in the Gulf of Mexico, expect continued headwinds for U.S. offshore wind development in the form of interest rates, inflation, and supply chain challenges. Given developers' challenges to meet pipeline projections, expect parties to seek resets of project economics and to diversify supply chains. Onshore wind and solar, while more nimble than large offshore projects, will face similar challenges with regulatory bottlenecks and electric grid limitations. While overall investment in U.S. renewables remains healthy, this macro environment should generate more commercial disputes and litigation related to project restructuring.



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13. **Environmental Reviews & Energy Infrastructure**. The National Environmental Policy Act (NEPA) requires federal agencies to assess the environmental impacts of major federal actions. In 2022, the Council on Environmental Quality (CEQ) issued the "NEPA Phase 1 Rule," which expanded the scope of agency reviews to include "indirect effects" and "cumulative effects," while also expanding the breadth of the "purpose and need" statement, which is the critical starting point for NEPA review. In July 2023, CEQ published the proposed "Phase 2 Rule," which would further reverse Trump-era NEPA changes, implement new NEPA statutory provisions enacted by Congress as part of the Fiscal Responsibility Act (FRA), and seek to advance the Biden Administration's broader climate and environmental justice initiatives. CEQ is expected to finalize the Phase 2 Rule in April 2024. While the FRA sought to promote more timely NEPA reviews through various "deadline" provisions, the Proposed Phase 2 Rule does little to provide meaningful deadline-forcing mechanisms. In doing so, CEQ seems to have passed on an opportunity to clarify the FRA's statutory language in a way that would make NEPA deadlines more meaningful. On the other hand, the Proposed Rule offers some new flexibilities on how agencies adopt and employ "categorical exclusions," which can help to facilitate environmental reviews and allow agencies to focus on impacts that are potentially significant. To speed up reviews, project proponents may need to encourage agencies to make more extensive use of categorical exclusions where appropriate.

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14. Challenges to Transmission Development Incentives and Policies. 2023 saw courts strike down and remand for reconsideration Iowa and Texas statutes, respectively, that provided incumbent transmission developers with a preference or right of first refusal to bid on new transmission projects. These cases, when viewed in concert with recent statements from FERC Commissioner Mark Christie criticizing current policies allowing for recovery of prudently incurred costs on abandoned transmission facilities, may portend another year of increased scrutiny on transmission developers and their contemplated projects.	 **Ryan Norfolk** Special Counsel ryan.norfolk@bakerbotts.com
15. Federal Trade Commission's Green Guides Update. The Federal Trade Commission ("FTC") is planning to release proposed updates to its *Guides for the Use of Environmental Marketing Claims* ("Green Guides"), which are currently intended as guidance to help prevent misleading environmental advertising claims. On December 20, 2022, the FTC published a request for public comment on potential updates to the Green Guides, which were last revised in 2012. 87 Fed. Reg. 77,766. In that request, the FTC indicated it is considering providing additional guidance related to carbon offsets and climate change, including terms such as "net zero" and "carbon neutral." Additionally, the FTC asked whether it should provide guidance on sustainability and energy efficiency claims, and whether it should consider rulemaking to establish independently enforceable requirements environmental claims. Even though the Green Guides do not currently constitute binding regulations on the federal level, courts have looked to the Green Guides in consumer protection cases, and certain states have laws incorporating them. We actively track greenwashing lawsuits, some of which involve disputes regarding how energy companies advertise their sustainability and emissions reductions efforts. The forthcoming Green Guides revisions could play a significant role in how these lawsuits proceed in the future.	 **Megan Berge** Partner megan.berge@bakerbotts.com  **Scott Novak** Associate scott.novak@bakerbotts.com
16. Coal Combustion Residuals Enforcement and Regulation. Coal-fired power plants manage coal combustion residuals (CCR, or coal ash) in landfills and surface impoundments. EPA released its first federal regulations addressing CCR in 2015 and has revised the regulations several times since with more rulemakings still pending. In 2023, EPA released a proposed rule designed to significantly expand the scope of the federal CCR regulations to legacy ponds (inactive surface impoundments at retired generating facilities) and "CCR Management Units," or "CCRMUs," at active power plant sites. This proposed rule is expected to be finalized in Q2 2024, and may impose groundwater monitoring, corrective action, and closure requirements on a large number of units previously outside the scope of the federal regulations. At the same time, EPA is continuing to enforce the CCR regulations through notices of violation and consent decree discussions. We are working with clients to develop short-term and long-term solutions that navigate these litigation and enforcement risks, ensure regulatory compliance, and align with business planning.	 **Martha Thomsen** Partner martha.thomsen@bakerbotts.com
17. Regulation of Greenhouse Gas Emissions from Power Plants. This year, EPA anticipates issuing rules to reduce greenhouse gas ("GHG") emissions from new and existing fossil fuel-fired power plants. This is EPA's third attempt to regulate GHG emissions from existing power plants, with the latest rules primarily expected to affect existing coal-fired steam generating units and large, frequently operated natural gas-fired stationary combustion turbines. If finalized, the rules would encourage coal-fired unit retirements by imposing increasingly stringent GHG emission limits on units the longer they operate. Coal-fired units that continue operating until the mid-2030s would face capacity restraints and GHG emission	 **Debra Jezouit** Partner debra.jezouit@bakerbotts.com

limits based on the co-firing of natural gas while units with no planned retirement dates would be subject to GHG emission limits based on the use of carbon capture and storage ("CCS"). Large, frequently operated stationary combustion turbines would be subject to GHG emission limits. New natural gas-fired stationary combustion turbines also would face GHG emission standards based on co-firing of low-GHG hydrogen or CCS. Significant concerns were raised in comments on the proposed GHG standards, particularly with respect to the use of low-GHG hydrogen and CCS, including that the proposed schedule does not allow adequate time for the production of sufficient low GHG hydrogen, or for required infrastructure such as pipelines, regulatory approvals, permitting, and construction. Importantly, significant concerns also have been raised about the impact of coal plant retirements on grid reliability. Recently, in November 2023, EPA issued a supplemental proposal seeking suggestions on how to ensure grid reliability. Given all of the concerns raised, it is highly likely the rules will be challenged, which could lead to further delays in EPA's efforts to limit GHG emissions from fossil fuel-fired power plants.

18. **Subsurface Trespass and Pore Space Liability.** The Texas Supreme Court has not decided whether subsurface migration can cause an actionable trespass to a surface owner's possessory interest in pore space. A mineral lessee has no right to exclude others from pore space where the mineral lessee retains the ability to extract its minerals. While the Texas Supreme Court has looked at the issue of subsurface migration in the context of displacement of minerals as a result of hydraulic fracturing operations and the rule of capture, and the Court has considered a surface owner's legally protectable ownership interest in the pore space, the issue of subsurface migration that could support a trespass cause of action remains unresolved.

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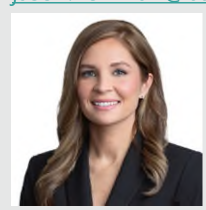

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19. **EPA Climate Enforcement and Compliance Strategy.** EPA recently issued its Climate Enforcement and Compliance Strategy directing all EPA enforcement and compliance offices to address climate change, wherever appropriate, in every matter within their jurisdiction. This Strategy builds on EPA's newly introduced climate enforcement initiative which specifically targets methane emissions from oil and gas facilities and landfills and enforcement of specific climate-related rules. EPA further prioritizes enforcement actions to reduce emissions of other GHGs, which could include both civil and criminal investigations into areas such as gas flaring, emissions from storage tanks and wastewater treatment systems, incineration/combustion operations, and compliance with the Greenhouse Gas Reporting Rule. Examples of these efforts include EPA's current nationwide enforcement activities regarding BWON compliance and benzene emissions at petroleum refineries. Climate risk will play a key role in identifying potential enforcement targets, and EPA is expressly encouraging consideration of settlement resolutions that include mitigation or Supplemental Environmental Projects that provide climate benefits. Energy companies can expect significant scrutiny as EPA ramps up implementation of these directives.

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20. BLM Venting & Flaring Rules and EPA's "Waste Methane" Rule. As soon as January of 2024, the Bureau of Land Management (BLM) is anticipated to finalize new regulations to address venting and flaring activities on federal and tribal lands. This new rule comes after years of back-and-forth rulemakings and court rulings on this issue. If consistent with the proposal issued in late 2022, the final rule would require operators to use "all reasonable precautions to prevent waste of oil or gas developed from [leases]," submit "waste minimization plans" with all drilling permit applications, restrict the amount and duration of methane venting and flaring activities, and require further upgrades to production sites, among other things. The proposal also stated that BLM could block drilling permits if "available gas capture infrastructure" is not adequate to service production capacity. Once a final rule is published, a new round of litigation is anticipated. Relatedly, on January 12, 2024, EPA proposed to adopt a new "waste emissions charge" on large emitters of waste methane from the oil and gas sector. Arising from the Inflation Reduction Act, this new charge, if finalized, would apply to certain oil and gas facilities that report emissions of more than 25,000 metric tons of carbon dioxide equivalent per year under EPA's Subpart W of the Greenhouse Gas Reporting Program ("GHGRP"). The purpose of this charge is to curb methane emissions by incentivizing adoption of new emissions control technology and best practices. Some exemptions are proposed, such as for certain kinds of permit delays, plugged wells, and facilities that are in compliance with NSPS OOOOb and state emissions guidelines under OOOOc.	 **Jeff Wood** Partner jeff.wood@bakerbotts.com
21. Enforceability of ROFRs in Chapter 11. With many companies facing increased costs, upcoming debt maturities, and refinancing challenges in a higher for longer interest rate environment, the uptick in chapter 11 filings across industries will likely continue in 2024. The energy sector will face questions that arise, often abruptly, from the financial distress of counterparties. One such question energy companies should anticipate is whether a right of first refusal (ROFR) will remain enforceable against a contract counterparty that files for chapter 11 bankruptcy. In chapter 11, each executory contract (*i.e.*, a contract that neither party has finished performing) must either be assumed, rejected, or assumed and assigned to a third party, often as part of a "free and clear" sale transaction under section 363 of the Bankruptcy Code. Assignment of an executory contract requires a cure of any monetary defaults and an adequate showing of the assignee's ability to perform. For most types of commercial contracts, restrictions on assignment—such as typical consent to assign clauses—are unenforceable under section 365(f) of the Bankruptcy Code. Where a debtor intends to assign a contract with a ROFR, the facts are critical. A district court in Delaware, for example, has enforced a ROFR, finding under the facts before it that the ROFR did not impermissibly restrict assignment of the contract or otherwise frustrate the debtor's efforts to maximize the value of its contract rights. *In re IT Grp., Inc.*, 302 B.R. 483 (D. Del. 2003). Other courts have considered the practical effects of enforcement, such as the potential "chilling effect that a [ROFR] would have on" an asset sale. *In re Chicago Invs.*, LLC, 470 B.R. 32, 88 (Bankr. D. Mass. 2012). More recently, the Bankruptcy Court for the Southern District of Texas suggested (in a case involving ROFRs in upstream joint operating and development agreements) that ROFRs impermissibly restrict a debtor's ability to assign a contract and thus are *per se* unenforceable. *See In re Cobalt Int'l Energy, Inc.*, No. 17-36709 (Bankr. S.D. Tex., Feb. 13, 2018). The parties to this case ultimately resolved the issue out of court, so the issue remains undetermined in the Southern District of Texas—one of the nation's most popular chapter 11 venues.	 **Shelby Saxon** Associate shelby.saxon@bakerbotts.com