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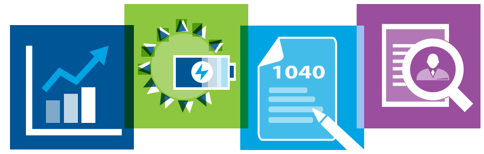
Energy Insights



An Update from the First Quarter of 2014

By Robert S. Winner, Philip L. Comella, Christopher Carolan and Dennis A. Clifford

Welcome to the inaugural issue of Energy Insights, Seyfarth's quarterly publication focusing on issues of potential interest to companies, financial sponsors and advisors active in the energy and clean technology sectors. In this issue, we discuss (1) the prospect of a renewable energy production tax credit revival, (2) recommended changes to the chemical disclosure registry on fracturing, (3) the rise of the EB-5 Visa Program as a financing tool, and (4) the common wage and hour traps oil and gas companies should avoid when classifying and paying their employees.

Production Tax Credit May Have New Life

The U.S. Senate Committee on Finance passed the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act, which includes a number of modifications to the U.S. tax code, including the re-implementation of the Renewable Energy Production Tax Credit (PTC). In its 20-year history, minus a few year-long expirations in the past, the PTC has promoted tremendous growth in the US wind industry, from under 2,000 MW installed wind capacity in 1992 to over 60,000 MW as of the end of 2013, enough energy to power over 15 million homes and generate hundreds of thousands of jobs around the United States. The good news is that the EXPIRE Act would retroactively extend the PTC from Jan. 1, 2014 to Dec. 31, 2015, with the same incentives as under the now-expired PTC: $0.23/kWh of credit, available for electricity produced during the first 10 years after a turbine has been placed in service. The bad news is that given 2014 is an election year, it is unlikely that a vote on the EXPIRE Act will occur until November, 2014, if at all depending on the outcome. As a result, it is hard for wind energy companies to rely on such subsidies or build them into their financial model. So new wind energy projects that have not already qualified for the PTC will need to find alternative ways to finance their projects. It is interesting to note that a study by Bloomberg New Energy Finance (BNEF) in Australia has discovered that certain forms of renewable energy are cheaper to produce than the old conventional fossil fuel sources, without the subsidies. BNEF's research found that the cost of wind generation in Australia has fallen 10% since 2011, and the cost of solar panels has dropped by nearly a third (29%). In comparison, the costs of extracting and burning fossil fuels to generate electricity are climbing. The research calculates that by the end of the decade, large-scale solar panel projects will be cheaper than gas and coal, when inevitable carbon prices are factored in. A sign of things to come?

FracFocus 2.0 Under Review

FracFocus 2.0 Chemical Disclosure Registry is an industry-backed database created to house information collected from Federal and State regulatory agencies as part of industry requirements to disclose the composition and quantities of fracturing fluids that are injected into unconventional oil and gas wells. In 2013, the Secretary of Energy charged The Secretary of Energy Advisory Board (SEAB), the federal government's oversight body, with reviewing whether FracFocus 2.0 was sufficiently and properly meeting the public's need to monitor water quality and maintain public health. What resulted is the FracFocus "Task Force Report" completed February 24, 2014, which provides findings and recommendations to the SEAB Task Force on FracFocus. Notable in the Draft Report is its claim that a: "large fraction of reporting wells claim at least one trade secret exemption. The Task Force, however, favors full disclosure of all known constituents added to fracturing fluid with few, if any exceptions." The Report suggests: A "systems approach" that reports the chemicals added separately from the additive names and product names that contain them, generally should provide adequate protection of trade secrets. The

Task Force further calls for state and federal regulators to adopt standards for making a trade secret claim and establish an accompanying compliance process and a challenge mechanism. No final rules have been adopted to date.

Record Demand for EB-5 Visa Applications in 2013

The number of EB-5, or "startup" visas issued by the U.S. Citizenship and Immigration Service (USCIS) hit record numbers in 2013. Last year, 6,434 individuals applied for EB-5 visas, a five percent increase from 2012. The EB-5 visa program allows foreigners and their families to live in the U.S. if they invest a minimum of $500,000 or $1,000,000 (depending on where the enterprise is located) in a new commercial enterprise that creates at least 10 jobs within two years. After two years, if both the jobs and the investment are still standing, the visas can be converted into green cards, which allow for permanent residency. Though the EB-5 financing was authorized under the Immigration Act of 1990, changes made to the program in 2011 by the USCIS dramatically increased the utilization of the program by (i) allowing investments made to the regional centers to be pooled and made available in larger amounts to the target enterprise, (ii) allowing the job creation requirement to be calculated to include direct, indirect, and induced jobs, increasing the likelihood of satisfying the job creation requirement, and (iii) allowing the investment to be managed by the Regional Center itself, which in turn allows the investor to take a passive role. For the target enterprise, a Regional Center can provide a greater, collective amount of financing (rather than dealing with groups of investors) and perhaps greater expertise and familiarity with the underlying development. EB-5 capital, however, is not suitable for every project. Some of the visa program requirements can be burdensome and EB-5 capital is deployed most effectively where job creation is assured, where government plays a role in the financing of the project through bond issuance, guarantees, additional loans, or tax credits, and in larger, more complex projects such as mixed use real property, health care facilities, assisted living facilities, factories, or infrastructure projects.

Guidance for Employers to Avoid Common Wage & Hour Traps

Through aggressive investigation and enforcement initiatives, the Department of Labor has recently intensified its scrutiny of employers in the oil-and-gas industry. Among other things, the DOL is looking for employees who have been misclassified as independent contractors, while inspecting employers' pay practices to ensure compliance with the often-Byzantine wage-and-hour laws. These investigations have resulted in some employers paying large settlements to the DOL (while enjoying unwanted media attention). Even if they don't involve your company directly, that can make your business sector—and thus your company—a target for private collective- or class-action lawsuits. To avoid these risks and ensure compliance, you need to know about six wage-and-hour traps that are common in the energy industry[1].

TRAP NO. 1: Failing to pay overtime on top of day rates and shift rates.

TRAP NO. 2: Failing to include bonuses and similiar compensation in the regular rate.

TRAP NO. 3: Misclassifying independent contractors.

TRAP NO. 4: Paying for scheduled time instead of actual time.

TRAP NO. 5: Failing to properly pay for travel time.

TRAP NO. 6: Mischaracterization of per diem pay.

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[1] *See* *Part I* and *Part II* of Strategies & Insights from Seyfarth's Energy Employment Law Group.

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