Energy Insights

An Update from the First Quarter of 2016

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In this edition of Seyfarth Shaw's Energy Insights Newsletter, our Energy and Clean Technologies team covers important developments in Q1 2016 for the energy industry including 1) the fate of the Clean Power Plan and potential impact on U.S. compliance with the Paris Agreement, 2) the increased pressure by the DOL to wage and hour practices in the oil and gas industry, and 3) growing interest and use of EB-5 financing for renewable energy projects and proposed changes to the program.

Clean Power Plan Awaits Decision

In June 2014, Environmental Protection Agency (EPA) issued its proposed Clean Power Plan (CPP) to regulate CO2 emissions from existing power plants under section 111(d) of the Clean Air Act (CAA), which proposes to limit carbon emissions from existing fossil fuel-fired electric generating units, including steam generating, integrated gasification combined cycle, or stationary combustion turbines (in either simple cycle or combined cycle configuration) operating or under construction by January 8, 2014. Specifically, the CPP requires states to reduce carbon dioxide emissions from existing power plants by 32 percent below 2005 levels by 2030. States are required to submit compliance plans to reduce their emissions by 2022, with full compliance not required until 2030. The Department of Energy (DoE) believes implementing the CPP will forestall hundreds of millions of tons of greenhouse-gas emissions from human activities, a key driver of climate change.

However, immediately following the release of these proposed regulations, two dozen states and numerous interested corporations and industry groups sued the administration claiming the EPA overstepped its constitutional authority and statutory authority under the CAA. And on February 9, 2016, the U.S. Supreme Court granted a stay preventing the implementation of the CPP pending further review. Oral arguments are scheduled for June 2nd and even though it could take up to a year for a final ruling to be released, some experts believe the three judge panel will seek to render a decision by the end of summer 2016 since the judges' clerks change at the end of August, a potential delay.

Many have argued that the stay could, and if the CPP is struck down entirely, would, impact the U.S.'s ability to meet the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement goals of (1) reducing emissions "in the range" of 17 percent below 2005 levels by 2020 and (2) a "further emission reduction" up to 26-28 percent of total reductions below 2005 levels by 2025.

Interestingly, voting in favor of the stay was Justice Scalia's last decision before passing away suddenly. A 4-4 decision would have upheld the lower court's reversal and thus implementation of the CPP.

The Oil and Gas Industry's Wage and Hour Practices Remain A High Priority for the Department of Labor

In 2012, the Department of Labor's Wage and Hour Division (WHD) began an initiative to improve oil and gas industry compliance with the Fair Labor Standards Act (FLSA) and in particular, the federal law that requires overtime compensation for hours worked over 40 in a workweek. According to the WHD, this ongoing initiative was meant to "focus resources where data shows that violations are common and business models lend themselves to violations."

Through 2015, the WHD has obtained several high-dollar settlements from oil and gas companies. Notable recent settlements include a $4.5 million settlement with an oil and gas exploration and production company for failure to compensate employees for pre-shift meetings and an $18.3 million settlement with an oilfield services company for misclassification of employees in 28 job positions. These investigations, and their subsequent settlement, demonstrate both the depth and the breadth of the WHD's expending reach. Already in the first quarter of 2016, the WHD has touted settlements with six oil and gas companies for a total of almost $2 Million under similar wage hour theories. These companies' services range from drilling to engineering to selling oil and gas equipment. The WHD recently expressed its hope that industry executives will take the lead and serve as models for industry-wide compliance.

And, while the "industry" on the radar used to include only oil and gas exploration and production, or oilfield services, companies, the WHD has expanded its pursuit to include related businesses, such as water and stone haulers, trucking, lodging, water, and staffing companies. One prime example of this expansion lies with a supply chain management company that settled with the WHD to the tune of over $146,000 in August of 2014 for failure to pay overtime at time and a half for hours worked over 40 in a week.

After four years, 1,100 investigations, and $40 million in settlements, the WHD is still on the hunt and it shows no signs of slowing down. As the WHD stated in a recent press release, "employers must know and comply with the law." Employers in the oil and gas industry should continue to review their current wage and hour practices to ensure compliance.

Foreign Investors Going Green in Pursuit of Green Cards

For those who have heard of or read about "EB-5" financing, they may have only thought it was for certain categories of assets such as resorts, casinos, hotels, multi-family and mixed use office properties, which make up more than half the EB-5 funding distributed. However, a smaller (3-5%), but growing segment of financing obtained from foreign investors participating in the employment-based, fifth-preference visa category (EB-5) has been within the renewable energy industry, and has significantly contributed toward the development of large-scale energy projects across the United States. Not only has the percentage of EB-5 financing in the alternative energy space grown, so has the number and size of projects in the areas of utility scale solar power, alternative fuel production and lithium battery production, especially in California. As the nation's preference for clean energy over traditional fossil fuels has gained momentum and states increasingly seek to implement aggressive renewable portfolio standards, marketing EB-5 projects to foreign investors has become much more common since it positively correlates with increased job creation.

By way of background, under the United States Citizenship and Immigration Services' (USCIS) EB-5 Immigrant Investor Pilot Program (Program), foreign individuals who invest $1,000,000 (or $500,000 in targeted employment areas (TEA) in a new commercial enterprise are able to pursue permanent residency in the United States if they can prove that their investment created a minimum of ten full-time jobs. The permitted $500,000 investment amount for projects located in areas of high unemployment or rural tracts of land is ideal for the alternative energy industry since the power plants, solar panel farms, and other energy-generating equipment installations require large amounts of land.

The Program was initially due to expire on September 30, 2015 and received a one-year extension. However, in connection with a potential further extension, some bad press and bad apples has caused lawmakers to draft new bills to provide additional protections for investors in EB-5 projects. For example, the Integrity Act, introduced by Senators Schumer, Flake and Cornyn on December 17, 2015, seeks to strengthen the Program by requiring greater government oversight of regional centers (entities that sponsor the EB-5 projects), including authority to assess fines for noncompliance, and requiring registration of all affiliated parties of regional centers. Other bills include increasing the required minimum investment amount in a TEA from $500,000 to $800,000, and from $1 million to $1.2 million for non-TEA investments. Further, the SEC has been carefully watching EB-5 financings and their compliance with securities laws. However, despite the new oversight, developers continue to move full-steam ahead and raise hundreds of millions of dollars in EB-5 funding to create jobs, including those in the renewable industry.

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