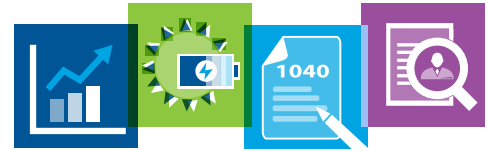


Energy Insights

An Update from the Third Quarter of 2015



By Robert S. Winner and Joshua L. Ditelberg

In this edition of Seyfarth Shaw's Energy Insights Newsletter our [Energy and Clean Technologies team](#) covers important developments in Q3 2015 for the energy industry including 1) the latest initiatives from the Environmental Protection Agency on clean power, climate and chemical regulation, 2) the National Labor Relations Board's major shift on joint-employer status impacting contractor relationships, and 3) the surprising results upon Mexico opening its energy markets.

The EPA Has a Very Busy Third Quarter

In a flurry of activity in this past quarter, the Environmental Protection Agency (EPA) issued its final version of the Clean Power Plan (CPP), proposed new regulations to reduce methane emissions under the Climate Action Plan (CAP), and tightened chemical regulations for safe use, ahead of the proposed changes to the Toxic Substances Control Act of 1976 (TSCA).

The CPP is specifically geared towards the reduction of carbon emissions from power plants and energy producing facilities. In the final rules the Clean Power Plan call for a reduction in greenhouse gas emissions from their 2005 levels by 32% by the year 2030, but the deadline for commencing reduction has been pushed back to 2022. Opponents are already challenging the right of the EPA under the Clean Air Act to implement and enforce such rules and it is expected that the legal challenge will reach all the way to the Supreme Court, potentially further delaying implementation.

Similar to the Clean Power Plan, the EPA's proposed regulations under the Climate Action Plan announced back in 2013 to reduce methane gas emissions from oil and gas producing activities, such as hydraulic fracking, also has its sights on reduction in such emissions by 45% by the year 2025.

Finally, the EPA took the lead in identifying a list of 83 "Work Plan" chemicals for further risk assessments and potential regulation. The TSCA grants the EPA the power to regulate the manufacture and sale of chemicals that may be a risk to the public. Congress is expected to finally pass The Toxic Substance Control Modernization Act, which will, among other things, significantly overhaul some outdated methods, provide for a shift in expense towards the chemical companies, and set safety standards for thousands of chemicals currently unregulated.

The often maligned EPA may be hitting its stride in the twilight of Obama's second term and ahead of the UN Climate Change Conference set for Paris in November.

The *Browning-Ferris* Decision and Potential Implications on Energy Industry

In a ruling that will affect most business relationships and extends far beyond either labor law or the concept of employment generally, the National Labor Relations Board (NLRB) recently issued a much awaited decision, *Browning-Ferris Industries of California* (Browning-Ferris), that expansively broadened the definition of who is a joint employer -- an unrelated entity that

arguably does not determine matters governing essential employment terms of another employer's employees but that nevertheless is found to bear responsibilities to those employees under the National Labor Relations Act (NLRA).

Under the NLRB's newly expanded test, two or more otherwise unrelated employers may be found to be a joint employer of the same employees under the NLRA "if they 'share or codetermine those matters governing the essential terms and conditions of employment.' In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." Affecting both unionized and non-union companies (and even entities that have no employees of their own) alike, the decision has broad implications for other employment laws and government agencies such as the Department of Labor, EEOC and OSHA.

For the energy industry, which heavily relies on staffing companies, subcontractors and outsourcing to perform services such as well drilling, well-head services, equipment operation and services, and water and oil and gas transportation, to name just a few, the implications can be far reaching and potentially crippling. Employers will need to reevaluate their relationships and protections against unintended liability or consequences.

A Tale of Two Energy Markets in Mexico: Renewables Ramp Up While Oil Falters

In August of 2014, Mexico passed sweeping legislation opening up its largely closed energy markets, breaking up the government's 70+ year monopoly in the areas of oil and gas, electricity and other power segments. Large oil and gas blocks would now be available and auctioned off for foreign investment and lease, and changes in the electricity market would cause new competition with longer fixed price power purchase contracts, with a clearly defined push towards clean energy / renewable power generation of 35% by 2024.

A year after that legislation passed, Mexico held its first auction for oil and gas reserve blocks and by all accounts, the auction was a "disappointment", with only two of the fourteen block up for auction actually sold. Some blamed the oil market in general, others blamed minimum prices, the terms and conditions of the auction. Whatever the circumstance or reasoning, Mexico is finding it difficult to offload large oil and gas reserves to foreign investment.

Conversely, the first auction for renewable energy projects will be held later this year and interest is strong, in particular for solar energy projects. 5-10 GW of solar power projects have already been permitted in 2015 and if proposed goals are to be met, much more will be required. The longer term 15 year PPAs at fixed price with clean energy certificate obligation lasting 20 years, and solar prices on par with other power generating facilities, the conditions are ripe for Mexico to take advantage of the opportunity.

Let's hope officials learned from their mistakes at the oil and gas auction and listen to the bidding public on what they need to make projects financially attractive.

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