

APRIL 2019

VOL. 19-4

PRATT'S

ENERGY LAW

REPORT



EDITOR'S NOTE: UNCERTAINTY

Victoria Prussen Spears

**NEPA OVERHAUL PROPOSED BY TRUMP
ADMINISTRATION DEPENDS ON SECOND TERM**

Nathan Frey and Jessica K. Ferrell

**NATURAL GAS INDUSTRY'S INFRASTRUCTURE
RISKS AND OPPORTUNITIES**

Michael J.P. Hazel, Rachel Jacobson,
Sarah C. Judkins, and Benjamin Hanna

**RISING FROM THE ASHES: HOW PG&E'S
BANKRUPTCY THREATENS THE ENERGY SECTOR
AND CALIFORNIA'S PROGRESS ON CLIMATE CHANGE**

Kevin Poloncarz, Dianne F. Coffino, Mark L. Perlis,
Donald L. Ristow, and Jake Levine

**PIPELINE APPEALS GRANT OF
SUMMARY JUDGMENT TO SOUTH PORTLAND
REGARDING ITS BAN ON MARINE LOADING
OF CRUDE OIL**

Hans C. Eysenbach

**THE BREXIT BLINDSPOT: NUCLEAR
RETRANSFERS**

James A. Glasgow and Meghan Claire Hammond

**MEGA SOLAR: 40MW AND UP
SUBJECT TO ENVIRONMENTAL IMPACT
ASSESSMENT ACT**

Yoichi Katayama and Minako Wakabayashi

Pratt's Energy Law Report

VOLUME 19

NUMBER 4

APRIL 2019

Editor's Note: Uncertainty Victoria Prussen Spears	105
NEPA Overhaul Proposed by Trump Administration Depends on Second Term Nathan Frey and Jessica K. Ferrell	107
Natural Gas Industry's Infrastructure Risks and Opportunities Michael J.P. Hazel, Rachel Jacobson, Sarah C. Judkins, and Benjamin Hanna	113
Rising from the Ashes: How PG&E's Bankruptcy Threatens the Energy Sector and California's Progress on Climate Change Kevin Poloncarz, Dianne F. Coffino, Mark L. Perlis, Donald L. Ristow, and Jake Levine	118
Pipeline Appeals Grant of Summary Judgment to South Portland Regarding Its Ban on Marine Loading of Crude Oil Hans C. Eysenbach	123
The Brexit Blindspot: Nuclear Retransfers James A. Glasgow and Meghan Claire Hammond	126
Mega Solar: 40MW and Up Subject to Environmental Impact Assessment Act Yoichi Katayama and Minako Wakabayashi	133

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2019 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2019 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

Pipeline Appeals Grant of Summary Judgment to South Portland Regarding Its Ban on Marine Loading of Crude Oil

*By Hans C. Eysenbach**

The U.S. District Court for the District of Maine found that South Portland's Clear Skies Ordinance was neither a "preempted pipeline facility safety standard or a discriminatory ordinance enacted for an economically protectionist purpose," and granted summary judgment to the city. The author of this article discusses the decision and its implications.

Judge Woodcock of the U.S. District Court in Portland, finding that the South Portland's Clear Skies Ordinance (the "Ordinance") was neither a "preempted pipeline facility safety standard or a discriminatory ordinance enacted for an economically protectionist purpose," has granted summary judgment to the city. The Portland Pipeline Line Corporation ("PPLC") subsequently filed a notice of appeal from that summary judgment order, a hearing date is pending.

According to a press statement, PPLC remains convinced "that the so-called Clear Skies ordinance is preempted by state and federal law and otherwise violates the United States Constitution."¹ At a time when attention and pressure is mounting for infrastructure projects around the state, this order—and whether the U.S. Court of Appeals for the First Circuit affirms it—will be a noteworthy signal for energy and utility industry stakeholders regarding the bounds of local control.

THE CLEAR SKIES ORDINANCE

The Clear Skies Ordinance is a zoning measure that the City Council of South Portland enacted by a six to one vote in July of 2014.² Residents lobbied for the zoning measure in response to PPLC's increasing interest, as of 2007, in reversing the flow of its oil pipeline and shipping from South Portland crude oil derived from oil sands in Canada's and North Dakota's unconventional oil

* Hans C. Eysenbach is an associate at Verrill Dana LLP working on a variety of utility and energy matters before the Maine PUC, FERC, and FCC on behalf of energy, telecommunication, and water utility entities, among others. He may be reached at heysenbach@verrilldana.com.

¹ "Portland Pipe Line Corp. plans to appeal court ruling on 'Clear Skies' ordinance," Portland Press Herald (Nov. 7, 2018).

² *Portland Pipe Line Corp. v. City of South Portland*, Docket No. 2:15-cv-000540JAW (Dist. Me. Oct. 9, 2018).

reserves.³ The Ordinance's stated purpose, similar to most zoning ordinances, is to "protect the health, safety and welfare" of the city's residents.⁴ The principal effect of the Clear Skies Ordinance, however, is to prohibit the "storing and handling of petroleum and/or petroleum products for the bulk loading of crude oil onto any marine tank vessel" in the zoning districts in which PPLC operates its oil tank farm, which has since 1941 transported oil and at times natural gas between South Portland and Canada.⁵

THE LITIGATION

PPLC and co-plaintiff, American Waterways Operators, filed a nine-count complaint on February 6, 2015, principally arguing that the Ordinance is preempted by federal pipeline safety and waterway safety statutes, the president's foreign affairs power, and the Commerce Clause.⁶ PPLC and the court both painted a stark reality for the pipeline: if the Ordinance is upheld, PPLC will likely go out of business.⁷

After a four-day bench trial, the court issued an order of summary judgment to the city on all counts except for the two dealing with (1) the Commerce Clause issues and (2) a civil rights claim that the court dismissed without prejudice.⁸ The court denied PPLC's summary judgment motion in full.⁹ Concluding that the Ordinance was not per se invalid as an extraterritorial or discriminatory regulation, the court found "little difference between the Ordinance and other zoning prohibitions"¹⁰ and reasoned that "there can be no disparate burden on interstate or foreign competitors" when PPLC has no other competitors in South Portland or within the rest of Maine.¹¹ While Judge Woodcock agreed with PPLC regarding the city's motivation and purpose for enacting the Ordinance, the court disagreed that the city's fear of "the local risks of handling crude oil derived from tar sands" were demonstrative of any discriminatory intent regarding "the fact that the tar sand originated outside Portland and Maine."¹² Notwithstanding some evidence in the legislative

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

record suggesting that the city intended to design an Ordinance that would withstand judicial scrutiny and address some of its residents' public safety and spillage concerns, the court found sufficient evidence that the city "considered tar sands to be a dangerous article with greater health and environmental risks than other types of crude oil and intended to alleviate th[ose] risks."¹³ "That purpose," the court concluded, "is not equivalent to economic favoritism that the dormant Commerce Clause prohibits."¹⁴

The court proceeded to apply a balancing test (known as the "Pike test") regarding the weight of the local benefits and the burdens on foreign and interstate commerce potentiated by the Ordinance.¹⁵ On one side of the scale were residents' sincere concerns with increased hazardous air emissions resulting from the flow reversal project's bulk loading of crude onto tankers—the marine loading from the pipeline on to tankers would yield greater emissions than the unloading activities previously associated with PPLC's piping of crude to Canada.¹⁶ PPLC unsuccessfully attempted to argue that those benefits were illusory or were outweighed by the negative impacts to jobs and commercial revenues on the other side of the scale.¹⁷ The city's unrebutted evidence regarding the local aesthetic and redevelopment benefits from the Ordinance and the reality that all the burdens will fall on local Maine companies further convinced the court not to "second-guess legislative judgment about [the public health and safety benefits'] importance in comparison with related burdens on interstate commerce."¹⁸

CONCLUSION

The city has already invested mightily in drafting and defending its Ordinance, but it will have to brace for further costs from PPLC's appeal. The outcome of this appeal may ultimately yield a litmus test for localities, utilities, and energy companies regarding the balance between uniform federal standards, unimpeded interstate commerce, and local health and welfare regulation.

¹³ *Id.* & n.6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*