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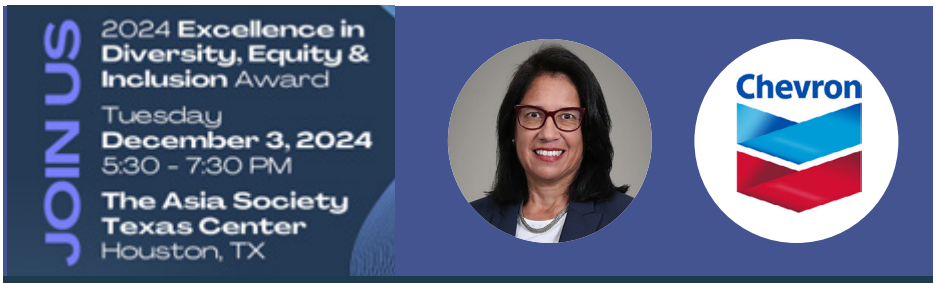

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INDUSTRY UPDATES

DOE Awards ARCH2 Hydrogen Hub $30 Million to Kickstart Blue and Green Hydrogen Projects

By Braden L. Christopher, Steptoe & Johnson PLLC

On July 31, 2024, the U.S. Department of Energy (DOE) awarded the Appalachian Regional Clean Hydrogen Hub (ARCH2) its first round of funding, marking the official launch from a funding perspective to one of the most significant hydrogen initiatives in the United States. *See* ARCH2 Phase 1 Announcement. ARCH2 received an initial $30 million award as part of its larger $925 million award in potential funding, which will be disbursed in four phases over the next eight to twelve years. *Id.; see also* Funding Notice. This funding, provided under the Infrastructure Investment and Jobs Act (IIJA), combined with certain nonfederal cost share requirements, is aimed at developing regional hydrogen hubs to facilitate the production, transportation, and consumption of clean hydrogen. 42 U.S.C. § 16161a. The IIJA mandates the creation of at least four regional hubs while the DOE has plans to initially fund seven such hubs. *Id.; see also* Hub Announcements. The full funding or award period is expected to include two to four years of operations beyond the six to eight years of planning, development, and construction. *See* Funding Notice.

ARCH2 is centered in West Virginia, Ohio, and Pennsylvania, a region historically known for its energy production from sources such as coal and natural gas. *See* ARCH2 Project Summaries. Accordingly, the hub will primarily focus on producing blue hydrogen, utilizing the area's abundant natural gas resources, paired with carbon capture and storage (CCUS) and carbon utilization technologies. *Id.* However, the hub also includes green hydrogen projects focusing on production from renewable sources such as biomass and food waste. *Id.* The initiative to develop both blue and green hydrogen aligns with Appalachia's natural strength in more traditional energy production while supporting the development of new energy systems. The hub is also expected to reduce CO2 emissions by nine million metric tons per year, and it will include projects seeking to develop hydrogen infrastructure such as pipelines, refueling stations, and sustainable aviation fuel to advance this goal. *See* ARCH2 Phase 1 Announcement; ARCH2 Project Summaries.

This first phase of funding and development is expected to last up to 36 months and involves initial planning, financial and technical analysis, and engagement with local stakeholders. *Id.; see also* Funding Notice. Another go/no-go decision point awaits ARCH2 before funding of the second phase, which focuses on finalization of engineering designs and business development, operational agreements (e.g., site access, labor, permitting, offtake), and additional community engagement. *See* Funding Notice. The third phase is the implementation step and will involve installation, integration, and construction activities. *Id.* The final phase will focus on operations and data collection to analyze the viability of operations, performance, and financials. *Id.*

The DOE's commitment to ARCH2 represents a broader national effort to develop hydrogen hubs across the United States, with a focus on utilizing regional strengths. For example, the Gulf Coast Hydrogen Hub (HyVelocity H2Hub) plans to leverage that region's traditional oil and natural gas resources in addition to its abundant solar and wind resources to produce blue and green hydrogen. *See* Hub Announcement. Similarly, the Mid-Atlantic Hydrogen Hub (MACH2) will produce pink hydrogen from nuclear energy and green hydrogen from renewable sources. *Id.* Other winners of early award funding from the DOE include the Pacific Northwest Hydrogen Hub (PNWH2) with $27.5 million and the California Hydrogen Hub (ARCHES) with $30 million. *See* Other Awards.

With the initial funding now in place, ARCH2 is taking the next steps to become a key player in the U.S. hydrogen economy, advancing both regional decarbonization efforts and the nation's overall energy security.

Texas Federal Judge Overturns Non-Compete Rule – What Energy Companies Should Do Next

By Alexandra (Ally) McCluskey, Oliva Gibbs LLP

On August 20, 2024, the United States District Court for the Northern District of Texas, Dallas Division, overturned the FTC Non-Compete Rule (16 C.F.R. § 910.1-.6), which was set to ban all new non-compete agreements in the U.S. starting September 4, 2024.

In the case of *Ryan LLC, et al., v. Federal Trade Commission* (Civil Action No. 3:24-CV-00986-E), the court had already issued a preliminary injunction on July 3, 2024, preventing the Rule from being enforced against the Plaintiffs. The August 20 order has now completely nullified the Rule, stating it is too broad and that the FTC did not have the authority to create it. As a result, the Rule did not take effect on September 4, 2024, or thereafter.

The FTC is considering an appeal. In the meantime, energy companies should operate under the status quo prior to the FTC's Non-Compete Rule and seek legal guidance when necessary to ensure compliance with any applicable state laws.

Colorado Codifies Pore Space Ownership and Regulation of Carbon Storage Operations

By Jim Tartaglia, Steptoe & Johnson PLLC

In May 2024, Governor Polis signed House Bill 24-1346 ("Act") into law, which amended several statutes related to Colorado's Energy and Carbon Management Commission ("Commission"). Among other things, the Act introduced the state's first legislative authority governing the ownership of pore space and the regulation of subsurface carbon dioxide storage operations.

The Act Adopts the Majority American Rule in Allocating Pore Space to Surface Owner

The Act is the first statutory guidance in Colorado to directly address the ownership of subsurface pore space and storage rights. The Centennial State is now aligned with the majority 'American rule' in allocating pore space rights to the owner of the overlying surface estate.

The Act defines "pore space" as any "cavity or void, whether natural or artificially created, in a subsurface stratum." *C.R.S. § 34-60-103(37)*. The owner of the "sequestration estate," or the interest(s) in any "geologic storage resource," is the person who owns the pore space "necessary for geologic storage." *Id. at -103(40), -103(19)*. In turn, "geologic storage" is defined as "the injection and underground sequestration of inject[ed] carbon dioxide in a geologic storage resource," pursuant to a valid Class VI permit issued under the U.S. Safe Drinking Water Act, 42 U.S.C. 300f et seq. *See id. at -103(14)*.

Specifically, the Act creates a statutory presumption "that ownership of the sequestration estate in the state is vested in the owner of the overlying surface estate" unless that ownership has been severed pursuant to C.R.S. § 34-60-140(2)(b), which provides that "ownership of the sequestration estate may be: (i) severed from the overlying surface estate; and (ii) conveyed or reserved in the same manner as ownership of the mineral estate." *See C.R.S. § 34-60-140(2)(a-b)*. In order to sever the sequestration estate from the surface, the parties must state such intent clearly in applicable muniments of title. Absent a prior severance, any conveyance of the surface of a tract of land will be deemed to include the underlying sequestration estate, unless "the conveyance instrument expressly reserves the sequestration estate, including by broad reservation of the pore space." *C.R.S. § 34-60-140(3)(a-b)*.

The Act also clarifies that ownership of the actual injected CO_2, and the related facilities and equipment used for storage operations, is held by the geologic storage operator that injects it into a geologic storage resource approved by the Commission, or any other party who later acquires such rights from the original injecting owner. *See id. at -140(2)(a)(II)(b)*.

Notably, these title-related provisions in the new C.R.S. § 34-60-140 are not intended to affect interests in pore space beyond the sequestration estate. The Act does not limit or impact the ability of a pore space owner to "(i) broadly convey or reserve all of the owner's right, title, and interest in and to the pore space, including the owner's interest in the sequestration estate; or (ii) convey or reserve any right, title, or interest in and to the estates in pore space other than the sequestration estate…" *C.R.S. § 34-60-140(5)(c)*. Further, these new statutes are prospective only and do not impact private or common law interpretations of any subsurface storage rights acquired or reserved before May 25, 2024. *See id. at -140(5)(a-b)*.

The Act Expands Commission Authority to Regulate and Unitize Geologic Storage Operations

The Act broadens the purview of the Commission to include the regulation of all "energy and carbon management operations," including all "activities performed for the purpose of engaging in geologic storage in the state," such as the construction, drilling and operation of injection wells, flow lines and related facilities used in the subsurface storage of carbon dioxide. *See C.R.S. § 34-60-103(10), -103(17)*. The Act authorizes the Commission to issue and enforce permits and establish other rules necessary to administer its statutory

directions, including the collection of permitting and other fees associated with the Commission's regulation of geologic storage operations. *See id. at -106(9)(c-d)*.

The Act empowers the Commission to issue unit orders that establish terms and conditions for the unitized operation of geologic storage facilities. The Commission may, upon application and hearing, issue a "geologic storage unit order" if such unitized development "is reasonably necessary to effectuate a geologic storage project." *C.R.S. § 34-60-141(4)(a-b)*. The size of the geologic storage unit area "must be based on site characterization and modeling conducted pursuant to the" federal Safe Drinking Water Act and any Commission rules adopted pursuant thereto. *See id.*

Each geologic storage unit order must be just and reasonable and establish a plan for unit operations. Specifically, the unit plan must include: (1) a description of the geologic storage area and proposed storage operations to be conducted [*see id. at -141(4)(c)(II)(A-B)*]; (2) an explanation of how storage rights are allocated in the unit area and how those several owners will be compensated for the proposed operations [*see id. at -141(4)(c)(II)(C-D)*]; and (3) a description of the proposed management, operation, term, and cost liability for the proposed storage unit [*see id. at -141(4)(c)(II)(E-F)*].

Like unitized oil and gas development, all operations conducted pursuant to an effective geologic storage unit order on any portion of the unit area will constitute operations on each separately owned tract within the unit area. *See C.R.S. § 34-60-141(8)*. However, a storage unit order shall not be construed to transfer or convey any owner's title to any part of the sequestration estate within the unit area. *See id. at -141(9)*.

For a geologic storage unit order to take effect, the unit plan must be "approved in writing by those persons that, pursuant to the geologic storage unit order, collectively own at least [75%] of the geologic storage resources included in the geologic storage unit area." *See id. at -141(4)(d)*. An owner of a sequestration estate that was not included in a storage unit order may petition the Commission for inclusion. *Id. at -141(6)*.

In several aspects, the Act also broadens the scope of prior statutes such that Commission authority and procedure will extend to geologic storage operations much like they already applied to oil and gas development. For example, administrative penalties for violations set forth in C.R.S. § 34-60-121 were amended to cover all "energy and carbon management" operators and operations. Similarly, the existing statutory promotion of local government jurisdiction over oil and gas operations also applies to geologic storage. *See C.R.S. § 34-60-131*. On the other hand, the Act, or any geologic storage unit order issued thereunder, expressly does not confer eminent domain authority on any approved unit operator. *See id. at -141(7)(a-b)*.

Finally, the Act provides an avenue to local governments that are seeking technical assistance regarding geologic storage siting and land use decisions to request that the Commission appoint a technical review board to assist the local government's analysis of a given operation or decision. *See C.R.S. § 34-60-142*. The Act also directs the Commission to establish accounting procedures for CO_2 storage operations and to work together with the state's Department of Public Health and Environment "to facilitate the monitoring, verification and accounting of carbon dioxide in geologic storage operations." *See id. at -143*.

"Artful But Not Sustainable" - Oil Companies Win Key Ruling in Climate Change Lawsuit

By John Parker, Liskow

Earlier this year, a Maryland court dismissed a lawsuit seeking to hold major oil companies liable for the alleged impacts of global warming to the Baltimore area. The case, *Mayor and City Council of Baltimore v. BP, L.L.C., et al.*, began in July of 2018 when the Mayor and City Council of Baltimore filed suit against twenty-five major national and international fossil fuel companies, alleging that the companies were individually and collectively responsible for a substantial portion of the total greenhouse gases emitted in the world. After weighing the merits of the plaintiff's allegations, the Baltimore City Circuit Court dismissed all claims, finding none to have merit under applicable state law.

Specifically, Baltimore alleged that the defendants must be held accountable for "deceiving consumers by disseminating misleading information that undermined the scientific community's consensus about climate change which led to the overuse of fossil fuels around the world." Baltimore claimed that it had suffered climate change related injuries such as sea rise, increased frequency and severity of extreme precipitation events, drought, heat wave and extreme temperatures, and consequently social and economic injuries associated with those physical and environmental damages. In response, the defendants filed a motion to dismiss Baltimore's claims, raising several challenges to Baltimore's complaint. Most notably, the defendants argued that Baltimore's claims were preempted by federal common law and the Clean Air Act (CAA).

Addressing the question of federal common law preemption, the defendants asserted that, regardless of how Baltimore's complaint was framed, the suit sought damages for alleged harms caused by gas emission from all over the world and interstate pollution is governed by federal common and statutory law. The court agreed with defendants, calling

Baltimore's complaint "artful but not sustainable" since Baltimore's allegations clearly spanned beyond state lines and global pollution-based complaints were never intended by Congress to be handled by individual states.

The court also found that Baltimore's claims similarly failed to overcome the CAA, even if they had been brought in federal court. According to the Maryland court, "when claims are based on out of state sources/emissions, the CAA preempts to the extent that the claims seek to regulate emissions." Because Baltimore's claims for climate change damages "would operate as a *de facto* regulation on greenhouse gas emissions," they were likely preempted by the CAA.

Based on these rulings, the court dismissed Baltimore's lawsuit. To-date, several states and municipalities have filed similar lawsuits against oil and gas companies under the novel theory that these companies' production, marketing, and sale of fossil fuels have contributed to global climate change in a way that allows plaintiffs to seek relief in the courtroom for alleged harms suffered as a result. So far, federal and state courts have differed greatly in their opinions on the same issues grappled by the court in this case. For example, the Baltimore decision comes at the heels of a similar case, *Sunoco v. City of Honolulu*, which reached the opposite conclusion and as of the writing of this article awaits a U.S. Supreme Court decision on whether to review the matter.

In such a developing area of litigation, these recent and conflicting conclusions by different courts highlight the need for a consistent rule regarding the validity of this new species of environmental lawsuits against the oil and gas industry. However, victory for oil and gas companies in the Baltimore case stands as the most recent addition to a growing docket of case law protecting the industry from similar lawsuits.

An Overview of the Wyoming Split Estate Act

By John R. Chadd, Steptoe & Johnson PLLC

In Wyoming, when surface real property and the corresponding oil and gas interests under that surface are owned or possessed by different parties, the Wyoming Split Estate Act (the Act) – codified in Wyoming Statutes (WY Stat) §§ 30-5-401 *et seq.* – governs the interactions between the parties. The Act codifies the accommodation doctrine, which recognizes the need for each party to reasonably accommodate the use of the land by the other party. In a split estate situation, the Wyoming Supreme Court has noted that the surface estate and the mineral estate are "mutually dominant and mutually servient."

The Act was enacted in 2005 and is specific to oil and gas operations, as Wyoming has different split estate statutes related to hard rock mining.

The Act places a reasonableness standard on the surface estate and oil and gas estate parties. Specifically, the Act expressly provides any "oil and gas operator" (operator) with a right to "enter the land for all purposes reasonable and necessary to conduct oil and gas operations to remove the oil or gas underlying the surface of that land." WY Stat § 30-5-402(a). However, the operator must first comply with the provisions of the Act and "reasonably accommodate existing surface uses." *Id.* A surface owner may waive in writing any rights afforded to it under the Act.

The Act differentiates between an operator's "nonsurface disturbing activities" and "oil and gas operations" (the latter of which, by definition, disturbs the surface).

Nonsurface Disturbing Activities

An operator has the right to enter upon the surface land for nonsurface disturbing activities that are reasonable and necessary to determine the feasibility and location of oil and gas operations. Nonsurface disturbing activities include inspections, staking, surveys, measurements, and general evaluation of proposed routes and sites for access and facility location. Prior to initial entry upon the land for nonsurface disturbing activities, the operator must provide at least five days prior notice to the surface owner. *See* WY Stat § 30-5-402(b).

Oil and Gas Operations

The Act defines "oil and gas operations" as "the surface disturbing activities associated with drilling, producing and transporting oil and gas, including the full range of development activity from exploration through production and reclamation of the disturbed surface." WY Stat § 30-5-401(a)(iv). An operator must take several required steps under the Act before entering the surface land to conduct oil and gas operations.

Requirements Prior to Entry

Before entering the land for oil and gas operations, the operator must provide the required notice (discussed in more detail below), attempt good faith negotiations, and either: (i) secure the written consent or waiver of the surface owner for entry onto the land for oil and gas operations; (ii) obtain an executed surface use agreement providing for compensation to the surface owner for damages to the land and improvements as provided in the Act; (iii) secure a waiver from the surface owner as permitted by the Act; or (iv) in lieu of complying with clause (i) or (ii), execute a sufficient surety bond or other guaranty to the Wyoming Oil and Gas Conservation

Commission (the Commission) for the use and benefit of the surface owner to secure payment of damages. *See* WY Stat § 30-5-402(c).

Notice Prior to Entry

Before entering upon the land for oil or gas operations, the operator must give all affected surface owners a written notice of its proposed oil and gas operations on the land. The notice must be given no more than 180 days nor less than 30 days before commencement of any oil and gas operations on the land. *See* WY Stat § 30-5-402(d), (e).

Contents of Prior Notice

The notice must sufficiently disclose the plan of work and operations to enable each surface owner to evaluate the effect of oil and gas operations on the surface owner's use of the land. The notice must include at a minimum: (i) the proposed dates on which planned operations shall commence; (ii) to the extent reasonably known at the time, the proposed facility locations and access routes related to the proposed oil and gas operations, including locations of roads, wells, well pads, seismic locations, pits, reservoirs, power lines, pipelines, compressor pads, tank batteries and other facilities; (iii) the name, address, telephone number and, if available, facsimile number and electronic mail address of the operator and its designee, if any; (iv) an offer to discuss and negotiate in good faith any proposed changes to the proposed plan of work and oil and gas operations prior to commencement of oil and gas operations; and (v) a copy of the Act. *See* WY Stat § 30-5-402(e).

Good Faith Negotiations

After providing the notice of proposed oil and gas operations to the surface owner, the operator and the surface owner shall attempt good faith negotiations to reach a surface use agreement. The surface use agreement should provide for protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for any damages caused by the oil and gas operations. At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes (including mediation or arbitration) may be employed or the informal procedures for resolving disputes established pursuant to Wyoming Statutes Title 11 Chapter 41 may be requested through the Wyoming Agriculture and Natural Resource Mediation Program. *See* WY Stat § 30-5-402(f).

The operator shall not engage in work, location of facilities and access routes, or oil and gas operations substantially and materially different from those previously disclosed to the surface owner, without first providing additional written notice disclosing the proposed changes and offering to schedule a meeting to comply with the requirement of good faith negotiation of a surface use agreement. *See* WY Stat § 30-5-402(g).

Related Oil and Gas Commission Filing

Before an application for permit to drill is approved by the Commission, the operator who filed the application must also file a statement with the Commission that includes the applicable surface owner's identity and contact information, and includes a certification that (i) proper notice of proposed oil and gas operations was provided to the surface owner, (ii) the parties attempted good faith negotiations to reach a surface use agreement, as required by the Act, and (iii) the other requirements for entry upon the land for oil and gas operations have been met. *See* WY Stat § 30-5-403(a).

Surety Bond or Other Guaranty

Any surety bond or other guaranty required by the Act must be executed either by the operator or a bonding company acceptable to the Commission. Additionally, any forms of guaranty other than a surety bond must be acceptable to the Commission. Any surety or guaranty required by the Act shall be in addition to the surety bonds or other guaranties required by other Wyoming law for reclamation and compliance with the administrative rules and promulgated orders of the Commission. *See* WY Stat § 30-5-404 for the above and below information on surety bonding and other guaranty requirements.

Amount; Other Requirements

The surety bond or other guaranty shall be in an amount of not less than $10,000 per well site on the surface owner's land unless the operations involve seismic activities. If the operations involve seismic activities, the surety bond shall be as provided in WY Stat § 30-5-104(d)(v)(A), which states that the surety bond or other guaranty shall be in an amount of not less than $5,000 for the 1,000 acres or portion thereof for which access is sought for seismic activities and not less than $1,000 for each additional 1,000 acres or portion thereof for which access is sought for seismic activities. For the purpose of assuring compliance with this minimum bonding requirement, the Commission may pool parcels of land of different surface owners where no single parcel exceeds 40 acres.

At the request of the operator, after attempted consultation with the surface owner the Commission may establish a blanket bond or other guaranty in an amount covering oil and gas operations on the surface owner's land, provided the blanket bond shall be in an amount not less than $10,000 per well site.

The Commission shall notify the surface owner of receipt of the surety bond or other guaranty or the establishment of a blanket bond or other guaranty based on the operator's request. The surface owner has 30 days to object to the bond.

If, at the expiration of 30 days after receipt of the Commission's notice, the surface owner does not make an objection to the amount or the type of surety bond or guaranty, the Commission shall approve the surety bond or guaranty.

The Act specifically provides that neither the minimum amount of the bond or other guaranty specified or referenced in the Act nor a blanket bond or other guaranty established by the Commission is intended to establish any amount for reasonable and foreseeable damages.

The Commission shall not accept a surety bond for seismic activities for lands upon which the operator or seismic activity operator has no right to enter. The operator shall provide evidence of the right to enter derived from one or more mineral interest owners.

Release

The Commission authorizes the release of any surety bond or other guaranty. Prior to the release of any applicable bond or other guaranty, the Commission must make a reasonable effort to contact the surface owner and confirm that either: (i) compensation has been received, (ii) an agreement for release has been entered into with the operator, or (iii) the surface owner has failed to give the written notice required (see Remedies below) or failed to bring a timely action for damages. The Commission *may*, in its sole discretion, release any surety bond, other guaranty or blanket bond related to particular lands if the operator shows just cause for the release. *See* WY Stat § 30-5-404(f).

The Act *requires* the Commission to release a surety bond or other guaranty after: (i) compensation for damages has been paid to the surface owner(s); (ii) an agreement for release has been executed by all parties; (iii) final resolution of the judicial appeal process for any action for damages has occurred and all damages have been paid; or (iv) the operator has certified in a sworn statement that the surface owner has failed to give the written notice required under WY Stat § 30-5-406(a) or has failed to bring an action for damages within the required time period. *See* WY Stat § 30-5-404(e).

Surface Damage and Disruption Payments; Remedies

Payments and Late Payment Penalty

The Act requires the surface owner and the operator to agree on a surface damage payment to be paid by the operator. The amount shall equal the damages sustained by the surface owner for loss of production and income, loss of land value, and loss of value of the surface improvements caused by the oil and gas operations. The Act prohibits the severance of the right to receive surface damage payments from the surface estate. *See* WY Stat § 30-5-405(a).

An operator who fails to timely pay an installment under any annual damage agreement negotiated with a surface owner is liable to the surface owner for twice the amount of the unpaid installment if the installment payment is not paid within 60 days of receipt of notice of failure to pay from the surface owner. *See* WY Stat § 30-5-405(b).

Remedies

In the event an operator commences oil and gas operations without an agreement for compensation for all damages, the affected surface owner shall give written notice of the improper operations to the operator and a description of the damages sustained. The notice must be sent within two years after the surface owner discovered the damage or should have discovered the damage through due diligence. *See* WY Stat § 30-5-406(a).

Unless both parties agree otherwise in a written agreement, within 60 days after the operator receives notice of surface damages the operator shall make a written offer of settlement to the surface owner. This offer may be accepted or rejected by the surface owner. *See* WY Stat § 30-5-406(b).

If the surface owner who submits a notice as detailed above either receives no reply to its notice, receives a written rejection or counteroffer, or rejects an offer or counteroffer from the operator, the surface owner may bring an action for compensation for damages in the district court in the county where the damage was sustained. *See* WY Stat § 30-5-406(c).

Statute of Limitations

A surface owner entitled to bring an action for damages under the Act, or to seek any other remedy at law for damages caused by oil and gas operations, must bring such action within two years after it discovered the damage, or should have been discovered through due diligence. *See* WY Stat § 30-5-409.

Join the Institute for Energy Law for a reception and awards ceremony honoring Chevron and Linda Perez Clark of Kean Miller LLP as the recipients of the 2024 Excellence in Diversity, Equity, and Inclusion Award, December 3, from 5:30 – 7:30 p.m. at The Asia Society Texas Center in Houston.

A Message from IEL

Registration is open for the 23rd Annual Energy Litigation Conference, November 12th in Houston, TX (early bird registration pricing available until October 22nd); and the 13th ITA-IEL-ICC Joint Conference on International Energy Arbitration, January 16-17 in Houston, TX (early bird registration pricing available through December 20th). Mark your calendars for IEL's 76th Annual Energy Law Conference, February 13-14 in Houston, TX (FREE for IEL Advisory Board Members); and the 8th National Young Energy Professionals Conference, April 2-3 in Las Vegas, NV.

NEW MEMBERS

We are honored and excited to add the following companies and individuals to IEL's membership roster. Please join us in welcoming them to our organization!

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Energy Law Advisor
Institute for Energy Law
The Center for American and International Law
5201 Democracy Drive
Plano, TX USA 75024

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