

OCTOBER 2016
VOL. 16-9

PRATT'S

ENERGY LAW REPORT



EDITOR'S NOTE: DAMAGES

Victoria Prussen Spears

DEALING WITH DAMAGES IN INFRASTRUCTURE CONTRACTS

Seth Belzley

CEQ ISSUES FINAL GREENHOUSE GAS GUIDANCE DIRECTING FEDERAL AGENCIES TO CONSIDER CLIMATE CHANGE IN THEIR NEPA REVIEWS

Craig P. Wilson, Cliff L. Rothenstein,
Sandra E. Safro, Ankur K. Tohan,
David L. Wochner, and Michael L. O'Neill

DOE ISSUES UPDATES TO ITS LOAN GUARANTEE PROGRAMS

Mark J. Riedy, Robert H. Edwards Jr.,
and Ariel I. Oseasohn

NET METERING DEBATE MOVES EAST

Megan E.L. Strand and Ana Vucetic

INDONESIA INTRODUCES NEW SOLAR POWER REGIME

Luke Devine, Kirana Sastrawijaya, Martin David,
and Kim Hock Ang

Pratt's Energy Law Report

VOLUME 16

NUMBER 9

OCTOBER 2016

Editor's Note: Damages

Victoria Prussen Spears 337

Dealing with Damages in Infrastructure Contracts

Seth Belzley 339

CEQ Issues Final Greenhouse Gas Guidance Directing

Federal Agencies to Consider Climate Change in Their NEPA Reviews

Craig P. Wilson, Cliff L. Rothenstein, Sandra E. Safro,
Ankur K. Tohan, David L. Wochner, and Michael L. O'Neill 347

DOE Issues Updates to Its Loan Guarantee Programs

Mark J. Riedy, Robert H. Edwards Jr., and Ariel I. Oseasohn 355

Net Metering Debate Moves East

Megan E.L. Strand and Ana Vucetic 358

Indonesia Introduces New Solar Power Regime

Luke Devine, Kirana Sastrawijaya, Martin David, and Kim Hock Ang 363

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

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) 487-3000

Fax Number (518) 487-3584

Customer Service Web site <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 (518) 487-3000

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 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 Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, 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.

An A.S. Pratt® Publication

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.

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

WANDA B. WHIGHAM

Senior Counsel, Holland & Knight LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

DOE Issues Updates to Its Loan Guarantee Programs

*By Mark J. Riedy, Robert H. Edwards Jr., and Ariel I. Oseasohn**

In this article, the authors explain the U.S. Department of Energy's updates to the Loan Guarantee Solicitation for Applications for Renewable Energy and Energy Efficiency Projects as well as to the Loan Guarantee Solicitation for Applications for Advanced Fossil Energy Projects.

The Loan Program Office ("LPO") of the U.S. Department of Energy ("DOE") recently introduced a number of important updates to the Loan Guarantee Solicitation for Applications for Renewable Energy and Energy Efficiency Projects¹ (the "Renewable Energy Program") as well as to the Loan Guarantee Solicitation for Applications for Advanced Fossil Energy Projects² (the "Advanced Fossil Program") (together, the "Solicitations"). The Solicitations were issued pursuant to Title XVII of the Energy Policy Act of 2005. These updates include the recent extension of the submission deadlines for Part 1 and Part 2 of the applications, the payment schedule of applicable fees under the Facility Plan,³ and clarification concerning the prohibition against using additional federal support concurrently with the loan guarantee.

SUBMISSION DEADLINES

On June 22, 2016, the LPO issued supplements to the Solicitations, effectively extending the submission deadlines for Part 1 and Part 2 applications for both Solicitations. Pursuant to the foregoing supplements, Part 1 and Part 2 must be submitted no later than November 30, 2016. This new deadline supersedes the previous deadlines—July 13, 2016 and October 19, 2016, for Part 1 and Part 2 of both Solicitations, respectively.

* Mark J. Riedy is a partner at Kilpatrick Townsend & Stockton LLP and co-team leader of the Energy, Project Finance and Clean Technologies Practice, focusing on U.S. and international project development and finance and private placement representation of renewable and conventional energy, clean technology, environmental, and infrastructure clients. Robert H. Edwards Jr. is a partner at the firm and co-team leader of the Energy, Project Finance and Clean Technologies Practice. Ariel I. Oseasohn is an energy transactions analyst in the firm's Energy, Project Finance & Technology Practice. The authors may be reached at mriedy@kilpatricktownsend.com, rhedwards@kilpatricktownsend.com, and aoseasohn@kilpatricktownsend.com, respectively.

¹ Solicitation Number: DE-SOL-0007154.

² Solicitation Number: DE-SOL-0006303.

³ A plan whereby DOE supports, under one loan guarantee application, the financing of a single project comprised of multiple phases or the installation of multiple facilities.

FEES AND COSTS

According to the provisions of the Solicitations, an applicant is required to pay various fees and costs to the LPO in connection with facilitating a loan guarantee. Namely, an application fee of \$150,000 to \$400,000 is due in separate payments: \$50,000 on the submission date of Part 1, and \$100,000 on the submission date of Part 2, as long as the senior debt is at or below \$150,000,000. If in excess of this amount, the Part 2 application fee is \$350,000. Also, the applicant must pay a facility fee of one percent or 1.6 percent of the total amount of the senior debt, if such debt is at or below \$150,000,000 or if such debt exceeds \$150,000,000, respectively. The facility fee is due according to the following schedule: 25 percent on the conditional commitment execution date, and 75 percent on the closing date. Additionally, an annual maintenance fee of up to \$500,000 (depending on the amount of the guaranteed senior debt) is due each year in advance.

Each applicant also must be responsible for paying the fees and expenses incurred by DOE's independent consultants and outside legal counsel in connection with such applicant's project. Furthermore, each applicant under the Solicitations generally must bear the full credit subsidy cost ("CSC") associated with the requested loan guarantee. However, if the project qualifies as an "Eligible Project" under the Appropriations Act of 2011 for the Renewable Energy Program, the applicant will bear the CSC up to seven percent of the total senior debt, and DOE will bear the CSC above seven percent of the senior debt (capped at \$17,000,000). In the Advanced Fossil Program, the applicant must pay the entire CSC without any DOE offset. The CSC represents the net present value of the estimated long-term cost to the U.S. government of a loan guarantee, as determined under the applicable provisions of the Federal Credit Reform Act of 1990.

The CSC is due in its entirety upon reaching closing of the loan guarantee. This requirement may be particularly taxing for applicants pursuing the Facility Plan. In such cases, the project developer generally seeks to secure lending in advance for all phases or facilities comprising the project, but draw down on such loan in tranches, pursuant to a certain time or progress schedule with respect to the construction of each phase or facility. These applicants, in practice, intend to use a fraction of the overall guaranteed loan initially, but previously were required to pay 100 percent of the CSC at closing of the overall DOE Facility Plan loan, causing liquidity and cost difficulties. In order to assist these applicants, the LPO recently published an answer under the online Frequently Asked Questions ("FAQs") section of the Solicitations, permitting multiple conditional commitments, phase-by-phase or facility-by-facility, for each tranche of the underlying Facility Plan loan. Furthermore, the LPO now

would allow the applicant to pay, upon subsequent closing of each respective portion of the overall Facility Plan loan, only the CSC associated with such tranche for that particular phase or facility.

It is important to note, however, the clear risk associated with adopting the new CSC payment schedule pursuant to the foregoing LPO clarification in the event that the applicant does not close the entire Facility Plan loan in one financial closing and pay all associated fees and costs. In this regard, while the execution of each phase or facility commences in reliance on the validity of the financial underpinnings supporting the entire project, a meaningful portion of such Facility Plan loan under the Solicitations remains in “conditional commitment” status, and is subject to Congressional removal of LPO funds, expenditure of all LPO funds and/or termination due to finalized competing commitments (i.e., closings) from other applicants in the event the LPO funds diminish substantially.

FEDERAL SUPPORT

Subject to limited exceptions that are set forth in each of the 2009 and 2011 Appropriations Acts, DOE was unable to issue loan guarantees to projects that already use other federal financial support, such as grants, loans and loan guarantees from federal agencies or entities, contractual commitments with federal agencies or entities (such as off-taking a project’s products or services, acquisitions or leases by federal agencies or entities, and other federal arrangements), or any other federal financial measure that supports the project.

In an answer issued recently under the LPO FAQs section of the Solicitations, the LPO clarified that the effective date for the foregoing prohibition is now the date the applicant submits the certification required by the DOE in connection with obtaining an approval from the Director of the Office of Management and Budget to issue the loan guarantee. This step occurs 30 to 60 days prior to the date of execution of a loan guarantee agreement between the applicant and DOE. This important clarification affords applicants more time, flexibility, certainty, and funding (where appropriate). By allowing applicants to spend or use previously obtained federal support until such an advanced stage in the loan guarantee application process, applicants have more time to make any additional, necessary financial arrangements to effect the financial closing of the particular DOE loan guarantee.