

MAY 2017

VOL. 17-5

PRATT'S

# ENERGY LAW

## REPORT



### **EDITOR'S NOTE: IN THE STATES AND AROUND THE WORLD**

Steven A. Meyerowitz

### **USDA RENEWABLE ENERGY PROGRAM FORECAST**

Taite R. McDonald, Nathaniel T. Kron, and Isabel C. Lane

### **ILLINOIS' FUTURE ENERGY JOBS ACT**

Bruce A. Bedwell, Sameer A. Ghaznavi, Melanie J. Gnazzo, and Kristin L. Parker

### **THE TEXAS SUPREME COURT CLARIFIES "COMMON CARRIER" STATUS CRITERIA**

Anthony P. Raven, Olivia Matsushita, and Andrew R. White

### **U.S. DISTRICT COURT FINDS U.S. COAST GUARD'S NATIONAL POLLUTION FUNDS CENTER ACTED ARBITRARILY AND CAPRICIOUSLY WHEN DENYING OIL SPILL CLAIM**

Jonathan K. Waldron, Jeanne M. Grasso, and Sean T. Pribyl

### **SUPREME COURT RULING ON BREXIT—IMPLICATIONS AND NEXT STEPS FOR THE UK ENERGY SECTOR**

Iain Elder and Sarah Kirkness

### **THE FORECAST FOR URANIUM DEMAND, PRODUCTION, AND EXPORT, ILLUSTRATED BY DEVELOPMENTS IN GREENLAND'S URANIUM EXPORT LEGAL REGIME**

Chelsea Gunter

# Pratt's Energy Law Report

---

VOLUME 17

NUMBER 5

MAY 2017

---

**Editor's Note: In the States and Around the World**

Steven A. Meyerowitz 165

**USDA Renewable Energy Program Forecast**

Taite R. McDonald, Nathaniel T. Kron, and Isabel C. Lane 167

**Illinois' Future Energy Jobs Act**

Bruce A. Bedwell, Sameer A. Ghaznavi, Melanie J. Gnazzo,  
and Kristin L. Parker 171

**The Texas Supreme Court Clarifies "Common Carrier"  
Status Criteria**

Anthony P. Raven, Olivia Matsushita, and Andrew R. White 181

**U.S. District Court Finds U.S. Coast Guard's National  
Pollution Funds Center Acted Arbitrarily and Capriciously  
When Denying Oil Spill Claim**

Jonathan K. Waldron, Jeanne M. Grasso, and Sean T. Pribyl 184

**Supreme Court Ruling on Brexit—Implications and Next Steps  
for the UK Energy Sector**

Iain Elder and Sarah Kirkness 188

**The Forecast for Uranium Demand, Production, and Export,  
Illustrated by Developments in Greenland's Uranium Export  
Legal Regime**

Chelsea Gunter 198

**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 © 2017 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](http://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*

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 2017 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](mailto: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](mailto:smeyerowitz@meyerowitzcommunications.com), 718.224.2258. 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.

# The Texas Supreme Court Clarifies “Common Carrier” Status Criteria

*By Anthony P. Raven, Olivia Matsushita, and Andrew R. White\**

*The Texas Supreme Court has clarified the criteria for “common carrier” status. Affected private landowners will still be able to challenge a CO<sub>2</sub> pipeline owner’s self-designation as a common carrier. In this article, the authors examine the final decision.*

The Texas Supreme Court, in the *Texas Rice II* decision,<sup>1</sup> recently provided judicial clarity on the “reasonable probability” public use test that might positively demonstrate that a pipeline owner is a common carrier for the purposes of Texas law.

## THE TEXAS SUPREME COURT CLARIFIED KEY QUESTIONS REGARDING THE CRITERIA FOR “COMMON CARRIER” STATUS

The issue before the Texas Supreme Court was whether or not CO<sub>2</sub> pipeline owner Denbury Green Pipeline-Texas LLC had demonstrated “common carrier” status and was therefore able to rely on Texas law condemnation authority to acquire private land to construct a CO<sub>2</sub> pipeline.

Key to this decision was whether or not Denbury had satisfied the “reasonable probability” public use test.

In handing down its final judgment, the Texas Supreme Court clarified the criteria needed to satisfy this “reasonable probability” public use test:

1. *When determining whether or not the “reasonable probability” public use test has been met, is the subjective belief or intention of the pipeline owner to serve the public interest relevant or not?*

According to the Texas Supreme Court, less focus should be given to

---

\* Anthony P. Raven (anthony.raven@pillsburylaw.com) is a partner at Pillsbury Winthrop Shaw Pittman LLP, where he is the Tokyo office managing partner and co-leader of the firm’s Tokyo Energy & Infrastructure Projects practice. Olivia Matsushita (olivia.matsushita@pillsburylaw.com) is a partner in the firm’s Tokyo office focusing on the development and financing of projects with a particular focus on renewable energy, petrochemicals, and power. Andrew R. White (andrew.white@pillsburylaw.com) is an attorney in the firm’s Tokyo office who focuses on corporate and commercial contracts, mergers and acquisitions, and energy work. This article is a supplement to the authors’ prior article discussing the regulatory regime for the transportation of CO<sub>2</sub> across public and private land in the United States and the procurement of rights-of-ways to CO<sub>2</sub> pipeline corridors, which appeared in the November/December 2016 and February 2017 issues of *Pratt’s Energy Law Report*.

<sup>1</sup> *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, No. 15-0025 (Tex. Jan. 6, 2017) (“*Texas Rice II*”).

the subjective intention of the pipeline owner to build a pipeline that would service the public interest, and more focus given to the objective evidence presented by the parties.<sup>2</sup>

In Denbury's case, there was relevant evidence to suggest that Denbury's CO<sub>2</sub> pipeline would serve the public by transporting gas for customers other than Denbury itself.

2. *What other factors and evidence are likely to be taken into account when the court considers the "reasonable probability" public use test?*

In the *Texas Rice II* case, Denbury had submitted evidence that it had entered into a CO<sub>2</sub> transportation contract with a third party after construction of the pipeline had been completed. This evidence went some way to satisfy the Texas Supreme Court's "reasonable probability" public use test "that there was a reasonable probability that, at some point after construction, the pipeline would serve the public by transporting CO<sub>2</sub> for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."<sup>3</sup>

Whilst a post-construction contract to transport CO<sub>2</sub> is therefore a relevant factor, it alone is not enough. The Texas Supreme Court decision makes it clear that the court will also analyze other factors such as the proximity of, and economic benefit to, potential customers to the CO<sub>2</sub> pipeline, and the existence of other CO<sub>2</sub> pipelines in the market.

When applying these criteria to the *Texas Rice II* case, the Texas Supreme Court found that the Denbury CO<sub>2</sub> pipeline was the only CO<sub>2</sub> pipeline sufficiently close to transport the CO<sub>2</sub> of its potential customers, Airgas Carbonic and Air Products. When considered in view of the lack of competing pipelines in the region, the fact that, without the Denbury CO<sub>2</sub> pipeline, Air Products contended that it could not have completed its CO<sub>2</sub> capture program, and that at least one potential customer, Airgas Carbonic, was to retain title to its CO<sub>2</sub>, the court agreed that Denbury surpassed the standard that it was "more likely than not" that "at some point after construction" the Denbury CO<sub>2</sub> pipeline would serve the public interest.<sup>4</sup>

---

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (citing *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 363 S.W.3d 192, 202 (Tex. 2012) ("*Texas Rice I*").

<sup>4</sup> *Id.*

3. *Is there a threshold for verifying the “public use” element of the “reasonable probability” public use test?*

Generally speaking, the answer is no. The Texas Supreme Court in its decision has held that “evidence that establishes a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use under the *Texas Rice I* test.”<sup>5</sup> No additional analysis was needed to determine the substantiality of the public interest served because the “reasonable probability” test had been satisfied.

## CONCLUSION

While the Texas Supreme Court provided clarity with its decision, the “reasonable probability” public use test, and ultimately whether or not a CO<sub>2</sub> pipeline owner has demonstrated satisfaction of other criteria for designation as a common carrier, remains a fact-intensive analysis.

Private landowners affected by Texas law condemnation authority will nevertheless continue to be able to challenge a CO<sub>2</sub> pipeline owner’s self-designation as a common carrier.

---

<sup>5</sup> *Id.*