

JUNE 2017

VOL. 17-6

PRATT'S

# ENERGY LAW

## REPORT



### **EDITOR'S NOTE: DISRUPTION**

Victoria Prussen Spears

### **TRUMP JETTISONS OBAMA CLIMATE POLICIES**

Andrew D. Weissman, Sheila McCafferty Harvey, Matthew W. Morrison, Anthony B. Cavender, Jeffrey S. Merrifield, Meghan Claire Hammond, and Robert B. Ross

### **THE FUTURE OF DISTRIBUTED ENERGY IN NEW YORK**

Florence K.S. Davis and David T. Doot

### **CALIFORNIA COURT OF APPEAL STRIKES DOWN CARB'S SECOND REVIEW OF LOW CARBON FUEL STANDARDS**

Jennifer L. Hernandez and Rob Taboada

### **ELECTRIC COOPERATIVE RECEIVES FAVORABLE INTERPRETATION OF EXCESS REVENUE STATUTE AND CLASS ACTION DISMISSAL**

Christina M. Schwing, Lawrence J. Hamilton II, and Laura Beard Renstrom

### **EPA ISSUES FINANCIAL RESPONSIBILITY REQUIREMENTS FOR THE HARDROCK MINING INDUSTRY AND ANNOUNCES INTENT TO REGULATE OTHER INDUSTRIES**

Rachel S. Tennis, Lynn Kerr McKay, and James K. Vines

### **YOUR VESSEL JUST DISCHARGED OIL IN THE LONE STAR STATE. HAVE YOU NOTIFIED THE TEXAS GENERAL LAND OFFICE?**

Jeremy A. Herschaft

### **INDUSTRY NEWS**

Victoria Prussen Spears

# Pratt's Energy Law Report

---

---

VOLUME 17

NUMBER 6

JUNE 2017

---

**Editor's Note: Disruption**

Victoria Prussen Spears 205

**Trump Jettisons Obama Climate Policies**

Andrew D. Weissman, Sheila McCafferty Harvey,  
Matthew W. Morrison, Anthony B. Cavender, Jeffrey S. Merrifield,  
Meghan Claire Hammond, and Robert B. Ross 207

**The Future of Distributed Energy in New York**

Florence K.S. Davis and David T. Doot 215

**California Court of Appeal Strikes Down CARB's Second  
Review of Low Carbon Fuel Standards**

Jennifer L. Hernandez and Rob Taboada 220

**Electric Cooperative Receives Favorable Interpretation  
of Excess Revenue Statute and Class Action Dismissal**

Christina M. Schwing, Lawrence J. Hamilton II, and  
Laura Beard Renstrom 225

**EPA Issues Financial Responsibility Requirements for the  
Hardrock Mining Industry and Announces Intent to  
Regulate Other Industries**

Rachel S. Tennis, Lynn Kerr McKay, and James K. Vines 228

**Your Vessel Just Discharged Oil in the Lone Star State.  
Have You Notified the Texas General Land Office?**

Jeremy A. Herschaft 233

**Industry News**

Victoria Prussen Spears 238

**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 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.

# Your Vessel Just Discharged Oil in the Lone Star State. Have You Notified the Texas General Land Office?

*By Jeremy A. Herschaft\**

*This article provides a brief overview of the Texas General Land Office to reinforce why this particular agency will be a critical component to any owner's "Texas" marine pollution spill response plan.*

When a marine pollution incident occurs in the United States, a vessel owner may find itself communicating with a myriad of federal and state response agencies, depending upon the size of the spill. If such an event occurs in Texas state waters, however, then one of the most important authorities that you will likely deal with is the Texas General Land Office ("TGLO").

This article provides a brief overview of the TGLO to reinforce why this particular agency will be a critical component to any owner's "Texas" marine pollution spill response plan. Keep in mind that obligations under Texas state law are in addition to obligations to abide by federal marine casualty and pollution response statutes and regulations.

## THE TGLO

The TGLO is the oldest state agency in Texas (established by the Constitution of the *Republic* of Texas), having been created in 1836. Among its many missions is to "promote the prudent stewardship of state lands and natural resources."<sup>1</sup> Following the creation of the Federal Oil Pollution Act of 1990 (commonly known as "OPA"),<sup>2</sup> Texas enacted the Oil Spill Prevention and Response Act of 1991 ("OSPRA") to protect Texas coastal waters, which the legislature determined to be "a matter of the highest urgency and priority."<sup>3</sup> To such ends, OSPRA empowers the TGLO with the direct responsibility for administering oil spill response and clean-up efforts in the event of an unauthorized discharge of oil in Texas "coastal waters, rivers, lakes, estuaries,

---

\* Jeremy A. Herschaft, a partner at Blank Rome LLP and a member of the firm's Maritime Emergency Response Team, represents publicly traded and privately owned companies in all phases of international corporate litigation, arbitration, and commercial counseling, with particular emphasis on the global marine and energy industries. He may be reached at [jherschaft@blankrome.com](mailto:jherschaft@blankrome.com).

<sup>1</sup> See <http://www.glo.texas.gov/the-glo/about/overview/index.html>.

<sup>2</sup> 33 U.S.C. § 2701 et. seq. (1990).

<sup>3</sup> See TEX. NAT. RES. CODE ANN. § 40.002(a) (Vernon Supp. 2000).

marshes, tidal flats, beaches, and public lands”<sup>4</sup> The commissioner delegates this responsibility through various officers, agencies, and subdivisions of the TGLO, who operate across the Texas coastline (with five major field offices in Port Arthur, La Porte, Corpus Christi, Port Lavaca, and Brownsville, Texas). “Post-spill” administration matters are ultimately handled through the direction of TGLO’s head office in Austin, Texas. Of note, in the event that an unauthorized discharge of oil is subject to the U.S. National Contingency Plan (i.e., in addition to being subject to the provisions of OSPRA), then the TGLO commissioner is required to cooperate with the federal on-scene coordinator or other federal agency or official “to the greatest extent practicable.”<sup>5</sup>

### CONTINGENCY PLANS FOR VESSELS

For the general international shipowner, preparing for a spill *before* it occurs is not only good seamanship and sound business practice, but it is also required under Texas law. Under § 40.114, any vessel with a capacity to carry 10,000 gallons of oil or more as fuel or cargo that operates in Texas coastal waters, or waters adjoining and accessible from coastal waters, shall maintain a written vessel specific discharge and prevention response plan. The plan must provide for response actions that include notification to the TGLO commissioner, verification of the unauthorized discharge, identification of the pollutant, assessment of the discharge, vessel stabilization, and discharge abatement and mitigation.<sup>6</sup> The plan must also designate an on-board spill officer who is tasked with certain qualification and crew-training requirements set forth in OSPRA.<sup>7</sup> Notably, a discharge prevention and response plan that complies with requirements under U.S. federal laws and regulations for a vessel-specific plan will satisfy the above mentioned OSPRA requirements.<sup>8</sup>

### NOTIFYING THE TGLO OF A SPILL

Pursuant to OSPRA § 40.101(a):

(a)ny person responsible for an unauthorized discharge of oil or the person in charge of any vessel or a terminal facility from or at which an unauthorized discharge of oil has occurred, as soon as that person has

---

<sup>4</sup> *Id.*, § 40.002(a). “Coastal waters” are further defined as “the waters and bed of the Gulf of Mexico within the jurisdiction of the State of Texas, including the arms of the Gulf of Mexico subject to tidal influence, and any other waters contiguous thereto that are navigable to vessels with a capacity to carry 10,000 gallons or more of oil as fuel or cargo.” *See* § 40.003(2).

<sup>5</sup> § 40.102(b).

<sup>6</sup> § 40.114(b)(1).

<sup>7</sup> § 40.114(b)(2).

<sup>8</sup> § 40.114(c).

knowledge of the discharge, shall: (1) *immediately* notify the commissioner of the discharge; and (2) undertake all reasonable actions to abate, contain, and remove pollution from the discharge.<sup>9</sup>

“Discharges” of oil are defined as an “intentional or unintentional act or omission by which *harmful quantities* of oil are spilled, leaked, pumped, poured, emitted, or dumped into or on coastal waters or at a place adjacent to coastal waters where, unless controlled or removed, an imminent threat of pollution to coastal waters exists.”<sup>10</sup> In turn, “harmful quantity” is broadly defined under OSPRA to mean “that quantity of oil the discharge of which is determined by the commissioner to be harmful to the environment or public health or welfare or may reasonably be anticipated to present an imminent and substantial danger to the public health or welfare.”<sup>11</sup>

Although the Texas Commission on Environmental Quality (a separate state entity from TGLO) has adopted a “sheen rule” whereby the “reportable quantity” for oil is whether the discharge is sufficient to create a sheen on the water,<sup>12</sup> TGLO has no such rule—in theory, even minuscule discharges that do not create a “sheen” would be subject to reporting. Indeed, the author was recently involved in a case where the TGLO investigated and assessed a civil penalty for a spill that involved only 0.5 gallons of bunker fuel during a bunker transfer. This example illustrates that the TGLO takes the reporting of even the most minor of marine spills very seriously.

### POST-SPILL MECHANICS

Once the responsible party reports a discharge, a TGLO officer will typically appear on-scene to participate in assessment and response efforts. Vessel interests should cooperate with TGLO officers to provide them with an accurate factual background. Ideally, maritime counsel should be on-scene as well to represent owners during this critical phase and assist them in dealing with TGLO representatives during their investigation.

At the conclusion of the on-site inspection, the first step in the TGLO’s penalty assessment phase is to issue a “letter of state interest” to entities that

---

<sup>9</sup> Emphasis added. According to the TGLO website, as of the date of this article, all spills can be reported via telephone to 1.800.832.8224. See <http://www.glo.texas.gov/ost/contact/index.html>. Notably, § 40.251(b)(1) of OSPRA authorizes the TGLO to assess a civil penalty for failing to “immediately” notify the TGLO of an unauthorized discharge of oil into Texas coastal waters.

<sup>10</sup> § 40.003(8) (Emphasis added).

<sup>11</sup> § 40.003(12).

<sup>12</sup> See 30 Tex. Admin. Code § 327.4.

“may be” or are in fact designated as “the responsible person for the incident.”<sup>13</sup> If selected by the TGLO, an alleged “responsible person” may challenge their designation within five days from the date of the letter of state interest.

Upon completion of their investigation, the TGLO will issue (if applicable) a “notice of violation” to the responsible person. A “preliminary report” that summarizes the TGLO’s factual findings will accompany the notice of violation, and it will outline the facts of the case, the statutory bases for the alleged violation, and the recommendation for the specific penalty and fine(s) to be imposed.

A responsible person is given 20 days from the notice of violation to either: 1) consent in writing to the notice; or 2) request a hearing before a TGLO hearing examiner to defend against the claims.<sup>14</sup> The TGLO is amenable to holding an informal conference with TGLO staff before setting a formal hearing to seek a resolution of the matter (if possible) vis-a-vis the penalties and fines imposed.

The schedule for the amounts and levels of penalties that can be assessed by the TGLO following a spill are fairly granular and beyond the scope of this general article. Predictably, the fiscal penalties that the TGLO can impose have the potential to be significant depending on the specific facts of the spill at issue.

Notably, pursuant to § 40.203(f):

[i]f any actual or threatened unauthorized discharge of oil was the result of gross negligence or willfull misconduct or a violation of any applicable federal or state safety, construction, or operating regulation, the person responsible for such [actions] is liable *for the full amount of all damages* to natural resources.<sup>15</sup>

As such, proper planning to prevent unauthorized discharges will obviously be a key component to any vessel interest’s training regimen, as the amount of penalties for an unauthorized discharge are expansive in scope.

---

<sup>13</sup> “Responsible person” is defined at § 40.003(20) as the owner or operator of a vessel or terminal facility from which an unauthorized discharge of oil emanates or threatens to emanate; the person who would be the responsible person immediately prior to abandoning a vessel or terminal facility; or any other person who causes, allows, or permits an unauthorized discharge of oil or threatened unauthorized discharge of oil.

<sup>14</sup> § 40.254(d).

<sup>15</sup> Emphasis added.

## **CONCLUSION**

Any safe passage through Texas waters will require a vessel owner to fully appreciate the TGLO's authority and role and its potential involvement during an oil spill. Understanding the obligations to the TGLO *before* such an event occurs will allow owners to be prepared in advance when disaster strikes.