Message from the Chair

Meeting Goals, Gaining Momentum and Giving Thanks

With this newsletter, thanks to several tremendous articles, we are continuing our stated goal of delivering information on key developments in environmental and energy related construction matters. These articles are thoughtful and detailed explorations on the topic matters addressed and are a key feature of Division 10’s objective of getting back to the core roots of its mission within the Forum.

We are also proud to report yet another successful release of the Annual 50 State Construction Law Update, delivered due to the diligence and dedication of Angela Stephens, Matt DeVries, Amber Floyd and a host of contributors of material for that Update. We continue to develop Division 10 relevant content and deliver that material through our Web Page, our List Serve notices, our Division calls and, of course, this very Newsletter, 2x4x10. We have some great collaborations for programming on the horizon and also look forward to our next Division 10 planning meeting to be held in Chicago in conjunction with the Forum’s Fall Meeting. In short, we are achieving what we set out to accomplish, and we are moving forward with momentum, but we still need everyone’s assistance in keeping Division 10 and its mission on track.

We welcome our new members to Division 10, our new Steering Committee Members, Melissa Beutler (Green Building Chair) and Peter Yoars (State Legislation Chair/Co-Publications Liaison), and thank outgoing Steering Committee Member Hardy Roberts for his contributions to Division 10. However, I close this introductory message with a very special thank you to Erin Fallon, who we will be losing (hopefully on a temporary basis) as our Co-Publications Liaison and a major force behind what you have come to welcome and appreciate from and in the form of 2x4x10. Erin, your dedication, creativity and contribution will be missed, we wish you all the best, and the Division looks forward to welcoming you back some day (hopefully not too too far in the future).
Implementation Of Small/Low-Impact Hydro-Development Reform

For over 100 years hydropower electricity has been operating within the U.S. In 2013, Congress found that while hydropower is the largest source of clean, renewable electricity in the U.S., providing nearly seven percent of electricity generated, there is substantial potential for additional development. On August 9, 2013, President Obama signed into law H.R. 267, the Hydropower Regulatory Efficiency Act (“HREA”), which impacts Federal Energy Regulatory Commission (“FERC”) oversight, and H.R. 678, the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act (“Reclamation Act”).

According to HREA, Congress estimated that by leveraging untapped resources at nonpowered dams the U.S. could add 60,000 megawatts (“MW”) of new hydropower capacity and 700,000 new jobs over the next 12 years. The HREA and Reclamation Act are geared towards easing the burden of permitting associated with hydro-development, while attempting to balance environmental concerns. The Federal Water Power Act of 1920 was, in fact, the first matter regulated by FERC’s predecessor the Federal Power Commission and today FERC regulates over 1,700 non-federal dams in the U.S., while cooperating with various Federal and State agencies throughout the country.

Ultimately, HREA and the Reclamation Act strive to reduce licensing and construction permitting requirements, within the intersecting layers of FERC and environmental oversight. Increased exemptions for certain small, low-impact hydropower projects, as well as an opportunity for extended preliminary permit periods are some of the most significant changes created by the 2013 hydropower legislation.

According to the report issued by FERC Staff on January 16, 2014, developers are beginning to take advantage of some of the opportunities provided under HREA, with greater activity anticipated in the near future. So far, for example, 18 projects have applied for status as “qualifying conduit hydropower facilities” excluded from the FERC licensing requirements per Section 4 of HREA. Further, between February 5, 2014 through May 5, 2014, FERC is accepting applications for pilot projects to test an expedited, two-year licensing process created after a FERC workshop/public comment process held pursuant to Section 6 of the HREA. FERC has stated that as one of the general principles of the pilot, it expects that projects proposed will have little to no impact on environmental resources, thereby illustrating the balance of energy/environmental interests being attempted under the reforms.

HREA REFORMS

The changes imposed under HREA which materially impact project development include:

**Exclusion for Qualifying Conduit Hydropower Facilities**: Exclusion from licensing requirements for “qualifying conduit hydropower facilities” which file a Notice of Intent to Construct with FERC demonstrating that the project is (i) no greater than 5 MW, (ii) not already licensed under/exempted from the licensing requirements, and (iii) that the project is constructed, operated, or maintained for generation of electric power and uses only the hydroelectric potential of a non-federally owned conduit. The process for obtaining status as a qualifying conduit hydropower facility, includes an opportunity for notice and comment on applications with FERC and has an approximate 2 month turnaround period (assuming no public opposition, FERC deficiency notice or FERC rejection is issued).

**Expands Conduit Project Exemption For Private Projects Up To 40 MW**: Permits FERC to exempt conduit hydropower projects with up to 40 MW capacity from FERC licensing requirements (this discretionary conduit project exemption was previously capped at 15 MW for privately developed projects). Note, that such an exemption may still include terms and conditions imposed by Federal and State resource...
Ultimately, HREA and the Reclamation Act strive to reduce licensing and construction permitting requirements... Increased exemptions for certain small, low impact hydropower projects... are some of the most significant changes...

Expands Small Project Exemption For Small Projects Up To 10 MW: Allows FERC to exempt small hydropower projects up to 10 MW (previously capped at 5 MW), in connection with existing dams, from FERC licensing requirements. This exemption does not exempt any project from requirements applicable under the National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the Endangered Species Act, or other Federal Law – including the Clean Water Act which entails Section 401 Certifications.

Ability To Extend Preliminary Permits: Enables FERC to extend preliminary license permits establishing priority of license applications for two years in addition to the 3 year term allowed under Section 5 of the FPA, if FERC finds that the permittee diligently carried out activities under the permit in good faith. This rule enables a preliminary permit to continue (and maintain licensing priority) for a total of 5 years, and thus may be materially beneficial to developers who previously had no opportunity to extend an existing preliminary permit.

Expedited Licensing Process: As reflected by HREA and the Reclamation Act, hydropower licensing can take several years to be completed. To reduce delays and costs for hydropower development, Congress directed FERC to investigate feasibility of a two-year licensing process for nonpowered dams and closed loop pumped storage projects, to test pilot projects under such an expedited permit process, and to enter into memorandum of understanding with applicable Federal and State agencies to implement the pilot.

As discussed in more depth below, FERC is accepting applications for pilot projects from February 5th through May 5th. The expedited process is geared towards projects anticipated to have little to no environmental impacts. So far, FERC and the California State Water Resources Control Board have signed one such MOU.

RECLAMATION ACT REFORMS
The Reclamation Act authorizes the Secretary of the Interior through the Bureau to contract for such small conduit hydropower, establishes the Bureau as the lead office for establishing policies and procedures for small conduit hydropower projects with up to 5 MW of capacity, and applies the Bureau’s categorical exemption under NEPA to such projects. In addition, when exercising such authority, the Secretary must first offer the lease of power privilege to an irrigation district /water users association operating the applicable transferred conduit or receiving water from the applicable reserved conduit. If that offer is not accepted, then the Secretary shall offer the lease of power to others. Applicability of the NEPA exclusion may be considered a significant advantage for small conduit hydropower projects falling under the Reclamation Act, however, it is still uncertain as to the extent to which the NEPA exclusion will go unchallenged in practice.

IMPLEMENTATION OF SMALL/LOW-IMPACT HYDRO-REFORMS:
Since August 2013, FERC has begun implementing the changes under HREA. FERC has updated its guidance on the process for obtaining conduit and small hydropower exemptions, summary and provided details on the process for seeking status as a qualifying conduit hydropower facility.

The process for seeking status as a qualifying conduit hydropower facility, for example begins with submission of a Notice of Intent to Construct, and FERC’s initial determination of qualifying conduit hydropower facility status follows within 15 days. If no comments are filed within 45 days contesting that determination, FERC issues a letter approving the facility. In total, this equates to an approximately 60 day, or 2 month, period of review – assuming that no rejection or notice of filing deficiency is issued by FERC. As of January 16th, 18 of such Notices of Intent to Construct a qualifying conduit hydropower facility had been filed with FERC. Out of those 18 applications, 16 have been approved, one has been rejected, and one is pending. Further, FERC’s list of projects having submitted such Notices of Intent to Construct demonstrates that one of the 16 projects approved had initially been rejected but succeeded upon revising and refiling with FERC. FERC Staff also
reported that based on inquiries received, it expects a significant number of additional qualifying conduit hydropower facility filings in the future.\textsuperscript{13} No applications under the 10 MW small hydropower project exemptions have been submitted yet, nor have there been any applications by private developers under the 40 MW conduit hydropower project exemption procedures.\textsuperscript{14} It seems too early to begin questioning the impact of these reforms on development of hydropower projects outside of the 5 MW small conduit exclusion – particularly as the two-year expedited permitting process is still in early testing stages.

FERC also provided information on the process for seeking a preliminary permit extension. Such applications must be filed within 30 days prior to expiration of the preliminary permit and must specify the requested term of the extension. In the application, developers must describe the applicants’ diligent and good faith efforts to carry out activities under the permit. FERC Staff’s recent report noted that out of seven applications for extension thus far, two had been granted, two are pending, and two had been rejected for insufficient showing of diligent efforts during the initial three year preliminary permit period.\textsuperscript{15} Developers should take note of such rejections, and increase record keeping on activities undertaken to lay the groundwork for any future, potential requests for extension.

Further, per the directives in the HREA, between October 2013 through January 2014, FERC held an initial workshop on feasibility of an expedited two-year licensing process for projects at existing, non-powered dams or closed-looped pumped storage projects, examined comment and testimony on such a process, and issued notice of its request for pilot projects to test the process. While FERC’s notice should be carefully reviewed by any developer contemplating proposing its project for the test pilot, at a minimum, a proposal should meet the following criteria, which reflect FERC’s intent to apply the process to low-impact projects:

- “The project must cause little to no change to existing surface and groundwater flows and uses;
- The project must not adversely affect federally listed threatened and endangered species;
- If the project is proposed to be located at or use a federal dam, the request to use the two-year process must include a letter from the dam owner saying the plan is feasible;
- If the project would use any public park, recreation area, or wildlife refuge, the request to use the two-year process must include a letter from the managing entity giving its approval to use the site; and
- For a closed-loop pumped storage project, the project must not be continuously connected to a naturally flowing water feature.”\textsuperscript{16}

Moreover, applicants must demonstrate having coordinated with resource agencies, tribal authorities, non-governmental organizations, and the public regarding the project and potential pilot proposal. The application must also include copies of written comments from affected resource agencies and tribal authorities regarding availability of existing information and the potential need for additional studies. Further workshops and studies of the success of the pilot will be held in the future. It will be important to determine the extent to which the two-year licensing process provides a realistic method for reliably expediting hydropower development.

Together, the hydropower efficiency reforms passed in 2013 and being implemented now may spur greater development and lead to the increased hydropower development that Congress referenced in HREA. However, as noted above, it is too soon to determine what impacts the reforms may have, particularly as the expedited licensing process has yet to be tested and both developers and environmentalists are still examining the extent to which their interests are successfully balanced.

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2. Conduit is defined under HREA and the Reclamation Act as “any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.”


4 See HREA, at Section 4; and Section 30 of the Federal Power Act (“FPA”) (16 USC §823a(a)).

5 See HREA, at Section 4; and 16 USC §823a(b).

6 16 USC §823a(c).

7 See HREA, at Section 3; and Section 405 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) (16 USC §2705).

8 See HREA, at Section 5; and Section 5 of the FPA (16 USC §798).


10 See Reclamation Act; and 43 USC §485h(c).

11 Thus far, little implementation activity appears to have been completed under the Reclamation Act.

12 FERC also prepared a chart which provides a bird’s eye view of the capacity/ location/ ownership/ term/ other limitations associated with the various exemptions and exclusion after HREA See Small/Low-Impact Hydropower Projects, Project Comparison Chart, FERC, (last updated Sept. 17, 2013), available at https://www.ferc.gov/industries/hydropower/gen-info/licensing/small-low-impact/get-started/exemp-licenses/project-comparison.asp.


14 FERC Staff January 16, 2014 Presentation

15 Id.
Offshore Wind Projects: One Example of the Challenges on the Horizon

In 1950, Cleveland, Ohio was the fifth largest city in the United States. However, between 1980 and 2000, Cleveland lost one sixth of its population, and then lost another 17% of the population between 2000 and 2010. In 2003, the Brookings Institute reported that Cleveland’s unemployment rate was the second highest among large cities in the United States.

An opportunity to create additional jobs in the Cleveland region arose in 2006 when a utility-scale turbine was installed at Cleveland’s Great Lakes Science Center, drawing attention to the region’s ability to generate wind power. In 2009, Cuyahoga County, Lorain County, the City of Cleveland, Lake County, the Cleveland Foundation, and NorTech Energy Enterprise formed a public-private partnership, the Lake Erie Energy Development Corporation (“LEEDCo”), to lead the region’s efforts in initiating an offshore wind farm in Lake Erie. LEEDCo has since entered into an agreement with Siemens to commission nine turbines by 2015.

LEEDCo’s regional partnership was the key to securing approval to construct the first freshwater offshore wind farm in the United States in the Cleveland region. In order to do so, LEEDCo has also had to overcome common controversies associated with wind farm development, particularly those offshore in United States federal waters.

BACKGROUND
A wind turbine is a machine that transforms the free flow of wind into electricity. Wind turbines can be located on either land or water, and are structured with three blades attached to a central tower by a rotor. The tower is typically between 150-300 feet in height and the rotor blade diameter is the same length. A cluster of wind turbines is a wind farm.

Presently, wind farms are located on United States’ land, but none are located in United States’ waters. On October 6, 2010, after nearly a decade of litigation, the Cape Wind Energy Project (“Cape Wind”) received approval from the U.S. Interior Secretary to construct a wind farm off of the coast of Cape Cod, Massachusetts. Still, Cape Wind has not made progress with construction as it has been tied up in litigation.

Even considering the progress of Cape Wind, LEEDCo’s project was the first freshwater offshore wind farm to be approved for construction in the United States and is poised to be the second freshwater offshore wind farm in the world. LEEDCo’s hope is that the offshore wind farm in Lake Erie will position Cleveland to be an epicenter for freshwater wind energy, which will create research, engineering, manufacturing and maintenance jobs, draw more residents to the area, and potentially encourage a turbine manufacturer to build a full assembly plant in Ohio.

TYPICAL HURDLES FOR OFFSHORE WIND FARM DEVELOPMENT
LEEDCo strategically positioned Cleveland to be the site of the first freshwater offshore wind farm in the United States. LEEDCo sought to achieve that objective with little opposition by using a regional strategy to confront offshore wind development’s typical hurdles, such as NIMBY-ism, funding and environmental preservation.

NIMBY-ism
Wind farms change the aesthetics of the areas in which they are located. Turbines are very large and nearly impossible to hide, and produce both aerodynamic noise (the sound of wind hitting the blades of the turbines) and mechanical noise (the sound of the gearbox and generator converting the kinetic energy into electricity). Though mechanical noise has been reduced to nearly non-existent levels through technological advancements, and some people even consider wind farms to be aesthetically pleasing, many groups still oppose wind farm development under the auspices of declining local property values due to the aesthetics and noise of the turbines. This “Not In My Back Yard” ("NIMBY") phenomenon is characterized by opposition to a development
that could negatively impact local property values or aesthetics, even if the development would create more benefit to the community than harm.\(^{18}\)

Many contend that NIMBY-ism is the basis behind the litigation opposing the Cape Wind project, consisting of 130 turbines to be located on twenty-four square miles of the Horse-shoe Shoal in Nantucket Sound.\(^{19}\) This area of the Nantucket Sound is within the direct view of the affluent communities residing on Cape Cod, Martha’s Vineyard, and Nantucket. The landowners in these affluent communities organized into community groups, such as the Alliance to Protect Nantucket Sound (“Alliance”), which is funded by William Koch, and the Ten Taxpayer Citizens Group (“Ten Taxpayers”), to initiate lawsuits to stop the construction of Cape Wind.

Some of the lawsuits filed by the Alliance and the Ten Taxpayers includes Ten Taxpayer Citizens Group v. Cape Wind Associates,\(^{20}\) Alliance to Protect Nantucket Sound v. United States Army Corps of Engineers,\(^{21}\) Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board,\(^{22}\) and Town of Barnstable v. Federal Aviation Administration.\(^{23}\) In all of these lawsuits, the plaintiffs challenged the jurisdiction of the state and federal permitting agencies and the processes used to issue the permits; in all of these lawsuits, the courts dismissed their suits.

The Alliance and the Ten Taxpayers never explicitly screamed “Not In My Back Yard!” in court, but their statements out of court, along with their lawsuits, could be interpreted as embodying NIMBY-ism. For instance, in a previous version of its website, the Alliance described itself as “a nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound” and self-admittedly supported wind power as an alternative energy source, but opposed “the proposed Cape Wind plant in Nantucket Sound due to [its] potential adverse economic, environmental and public safety impacts.”\(^{24}\) Additionally, Robert Kennedy, Jr., a member of the Alliance, wrote an opinion piece for *The New York Times* about how he supported wind power, but not in Nantucket Sound.\(^{25}\)

LEEDCo has avoided NIMBY-based litigation. This accord can be explained in a multitude of ways. For one, the lawsuits initiated in response to Cape Wind have not yet been successful in preventing construction. Perhaps possible litigants in the Cleveland area looked to the Cape Wind legal precedent and reasoned that if the Kennedys and a Koch brother could not successfully fight a wind farm, then they could not either.\(^{26}\)

The economic regional differences between residents around the Nantucket Sound and the residents in Northeastern Ohio could also explain the difference in number of NIMBY claims surrounding LEEDCo and Cape Wind. For instance, real estate values in the Cleveland region are much lower than real estate values in the Cape Cod region. Further, Northeastern Ohio has a much higher rates of unemployment than the Cape Cod region, and as such could have been more welcoming to economic stimulating construction. Indeed, LEEDCo rallied support at the county level and stressed that the wind farm could be a solution to the region’s unemployment problem.\(^{27}\)

LEEDCo has also approached the wind farm with a regional focus by including members from all municipalities affected by the project in planning and by holding frequent community meetings to hear and address residents’ concerns.\(^{28}\) LEEDCo took regionalism to the next level in 2011 by encouraging its member counties to enter into a Revenue Sharing Agreement after LEEDCo obtained a lease option from the State of Ohio for the exclusive rights to the proposed wind farm site in Lake Erie.\(^{29}\) The lease option provides that LEEDCo will pay the State of Ohio $54,000 per year for use of the nine square mile piece of land in Lake Erie. LEEDCo will then sublease the land to Freshwater Wind, a joint venture between the Bechtel Development Co. of San Francisco (the project management firm), Cavallo Great Lakes Ohio Wind LLC (the energy development company), and Great Lakes Wind Energy LLC of Youngstown (a group of individual project developers formed to participate in the wind farm development).

Under Ohio law, Ohio must give 50% of the revenue from the lease to the Cleveland-Cuyahoga County Port Authority.\(^{30}\) Instead of pocketing the $27,000 itself, however, the Cleveland-Cuyahoga County Port Authority entered into a Revenue Sharing Agreement with Ashtabula, Lake, and Lorain counties.\(^{31}\) Under the Revenue Sharing Agreement, the Cleveland-Cuyahoga County Port Authority is to receive 40% of the $27,000 ($10,800) and the three other counties are to share the remainder in equal portions of 20% ($5,400).\(^{32}\) Although $5,400 is not a lot of money, the agreement sets a precedent in the event that the wind farm expands at a later date. The agreement also solidifies regional support for the project, giving each member county a stake in the wind farm’s success.

**Funding**

Another hurdle for development of wind farms is funding for the project. As the United States does not yet have a fully constructed offshore windfarm, the technological knowhow and the patent rights for the turbine designs must be imported.
from other countries. In the case of the Cleveland offshore wind farm, five initial turbines were previously estimated to cost $100 million to purchase and install. Plus, the site in Lake Erie needs to be leased for $54,000 per year. Then there are costs for transporting the turbines by ship to the erection site to consider. The estimated investment payback period may take as long as 20 years.

Due to the relative infancy of the wind power industry, government subsidies are generally required to remain competitive. Yet, Congress allowed the Wind Energy Tax Credit, which previously credited renewable energy developers 2.3 cents per kilowatt-hour produced during a project’s first 10 years of existence, to expire on December 31, 2013. In Ohio, financial support for alternative energy generation is also variable.

LEEDCo has made an effort to seek more predictable sources of funding from a variety of sources, such as the Cleveland Foundation, Cuyahoga County, Case Western Reserve University, the City of Cleveland, the Fund for Our Economic Future, the Cleveland-Cuyahoga County Port Authority, and the Generation Foundation. However, it has still received several substantial grants, including a $4 million grant from the U.S. Department of Energy, with the possibility of $47 million of additional funds in 2014 after a 12-month performance period.

Environmental Preservation

Environmental preservation is also often a point of contention in the development of wind farms. On the one hand, wind energy has many benefits over traditional methods of energy generation. Wind power does not result in oil spills or mining disasters because it does not involve fuel extraction methods like mining or drilling. Additionally, wind power saves water because it does not require the use of water to cool generators used to burn fossil fuel. Further, unlike nuclear energy, wind power does not present a threat of nuclear reactor meltdown and hazardous waste disposal. Most importantly, unlike traditional forms of energy generation, wind farms do not emit heat-trapping gases (e.g., carbon dioxide, methane, nitrous oxide, and halocarbons) that cause global warming and acid rain. The Great Lakes Region, in particular, is a very heavy emitter of carbon dioxide; power plants in the eight Great Lakes states emitted an estimated 679 million tons of carbon gas in 2010, which accounts for 30% of the United States annual emissions. Ohio consistently ranks between the fifth and the seventh heaviest energy consuming state in the United States with 86% of their electricity coming from the combustion of coal. Locating a wind farm in this region could mitigate this pollution.

Despite these environmental benefits, wind farms pose environmental detriments as well. First, as it exists today, wind power technology does not completely eliminate the need for other forms of energy generation. Because wind is intermittent, wind power is intermittent as well, so other energy resources must remain on standby. Therefore, wind power does not completely eliminate harmful emissions and the risks of nuclear, mining and drilling disasters posed by other conventional forms of energy generation.

Second, Lake Erie is a habitat for various endangered or threatened species, such as the Lake Erie water snakes, American burying beetles, bald eagles, copperbelly water snakes, Indiana bats, lakeside daisies, Scioto madtoms, purple cat’s paw pearly mussels, running buffalo clovers, and migratory piping plovers. Locating a wind farm in these species’ habitat could endanger them even further. For instance, migratory birds sometimes fly into turbines’ propellers; the Altamont Pass Wind Resource Area (“Altamont Pass”) in California is estimated to kill more than 1,000 birds every year. Additionally, construction of offshore wind farms involves drilling into the lake floor to lay transmission cables from the wind turbines to the shoreline as well as to secure the turbines in the water with concrete bases. This construction can disrupt the lake’s ecosystem by disturbing sludge on the lake floor and by circulating construction debris into the lake. LEEDCo again used a regional approach to address environmentalists’ concerns about endangered species and the lake’s ecosystem preservation by holding community meetings to discuss LEEDCo’s tactics to minimize the wind farm’s impairment of the environment and why the wind
farm is important despite some negative impacts.\textsuperscript{53}

To minimize the negative effects of the wind farm on the natural environment, LEEDCo had the project’s design conform with the Ohio Department of Natural Resources Office of Coastal Management’s Wind Turbine Placement Favorability Analysis Map, which maps out the best places for a wind farm in Lake Erie based on navigability, distance from shore, proximity to fisheries and environmental concerns.\textsuperscript{54} Additionally, LEEDCo proposed to take a sediment sample at the location for every single turbine, and committed that they would not locate turbines in places where the sample revealed circumstances detrimental to the environment.\textsuperscript{55} Further, deaths of migratory birds can be minimized by reducing the number of available perches for birds on the turbines, reducing the amount of noise generated by the turbines, strategically placing the turbines far apart from one another to reduce the probability that birds will become trapped in the wind farm, changing the blade painting pattern to contrast with the surroundings, and broadcasting a certain radio frequency to deter birds from entering into the general vicinity of the wind farm.\textsuperscript{56}

**CONCLUSION**

So far, LEEDCo has been successful in its efforts to locate the site of the first freshwater offshore wind farm in the United States off the coast of Cleveland and to achieve their objectives with little opposition. LEEDCo’s example of building regional coalitions of both local governments and private, not-for profit companies has been a good foundation for the project. LEEDCo has also actively sought the support of residents in the region. These partnership efforts have been productive because they ensure that one vision of the wind farm is advanced, rather than the visions of separate government entities, the public and private industry.

By confronting offshore wind development’s typical hurdles – such as NIMBY-ism, funding and environmental preservation – with a regional strategy, LEEDCo has been able to progress more consistently and at a steadier speed than other similar projects. In this fashion, it has been pushing the frontier of alternative energy design and construction in many different respects.


\textsuperscript{2} Cleveland in Focus: A Profile from Census 2000 (The Brookings Institution 2003) at 1.

\textsuperscript{3} Helliker at 1.

\textsuperscript{4} Cleveland in Focus at 1.


\textsuperscript{9} Cotter at 407.

\textsuperscript{10} Cotter at 407.

\textsuperscript{11} Cotter at 409.

\textsuperscript{12} See generally U.S. Dep’t of Interior, Bureau of Energy Mgmt. Regulation & Enforcement, Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf, Lease No. OCS-A 0478 (November 1, 2010).

\textsuperscript{13} See Town of Barnstable, Massachusetts v. Fed. Aviation Administration, 740 F.3d 681 (D.C. Cir. 2014).

\textsuperscript{14} At the time the LEEDCo project was proposed, the only freshwater wind farm in the world was a ten-turbine project in Lake Venern, Sweden, which at the time had only been on-line for one year. See Maude L. Campbell, Tilting at Windmills: Cleveland May Win the Race to Build Offshore Turbines, but Why have Others Stopped Trying?, Cleveland Scene, June 15, 2011, available at http://www.clevelandscene.com/cleveland/tilting-at-windmills/Content?oid=2622437.


\textsuperscript{16} Cotter at 419.

\textsuperscript{17} Cotter at 419.


\textsuperscript{21} Alliance to Protect Nantucket Sound v. U.S. Dep’t of the Army, 398 F.3d 105 (1st Cir. 2005).

\textsuperscript{22} Alliance to Protect Nantucket Sound v. Energy Facilities Siting Bd., 932 N.E.2d 787 (Mass. 2010).

\textsuperscript{23} Town of Barnstable v. Fed. Aviation Administration, 740 F.3d 681 (D.C. Cir. 2014).

\textsuperscript{24} Alliance to Protect Nantucket Sound, About Us (2011).


28 id.


30 id.

31 id.

32 id.

33 Lebo at 3.

34 Campbell at 1.

35 id.

36 id.

37 Lebo at 18.

38 Id. at 6.


40 Lebo at 9 (Former Ohio Governor Ted Strickland backed incentives, such as the Advanced Energy Portfolio Standard, to encourage the development of wind farms, but Governor John Kasich’s administration has reportedly been less willing to support the subsidies).

41 Lebo at 16.

42 Lebo at 11.

43 Conger at 746.

44 id.

45 id.

46 id.

47 Gallucci at 1.


49 Cotter at 421.

50 Dunn & Russ at 584.

51 Cotter at 420.

52 Campbell at 1.

53 id.

54 Saks at 227-228.

55 Campbell at 1.

56 Cotter at 420.

*845 Third Avenue - 8th fl.
New York, NY 10022-6601
ed@gdblaw.com
Upcoming Forum Events

- 2014 Fall Meeting
  October 16-17, 2014
  The Hilton, Chicago, IL

- 2015 Midwinter Meeting
  January 29-30, 2015
  Westin Kierland Resort & Spa, Scottsdale, AZ

- 2015 Annual Meeting
  April 16-18, 2015
  Boca Raton Resort & Club, Boca Raton, FL

- 2015 Fall Meeting
  October 8-9, 2015
  Hilton Austin, Austin, TX

Important Division Events

- Division 10 Upcoming Call Begins at 5:30 PM EST
  
  Date: August 21, 2014
  Phone: 866-646-6488
  Pass code: 660-581-7144

- Division 10 Planning Meeting to be Held in Chicago, IL in Conjunction with the Forum Fall Meeting - Look for Email Updates Regarding Date, Time and Location

- Division 10 2014 Fall Meeting Joint Luncheon Program with Division 8 (International) and Division 5 (Project Performance) - Presentation on Keystone XL Pipeline
  
  Thursday, October 16, 2014, 12:15 PM – 1:45 PM

  Speakers: Jim White, TransCanada
  Penny Favel, TransCanada
  Moderator: Reza Nikain, Navigant

  Two General Counsels from TransCanada, Jim White and Penny Favel, will present on permitting issues, delays, political interference, etc., and address the implications for a project proponent’s construction contracts when a large infrastructure like KXL is afflicted with significant permitting delays (respectively).
There is an old adage in the “water world” of Colorado, “Whisky is for drinking and water is for fighting.” The Colorado court system recognizes that this adage holds true and has an extensive, although sometimes complex, administrative and legal system to promote full beneficial use of this precious resource, while protecting senior water right holders. To provide just one example of this unique system, generally cases involving water rights are tried in special “Water Courts” located throughout the state. Water Court decisions are appealed directly to the Colorado Supreme Court, versus an interim appellate court.

Every year, a number of Colorado Supreme Court cases involving water issues are decided. In addition, a number of legislative mandates are passed each year to address the complex and ever-changing water issues that arise. What follows is a brief overview some of the 2013 Colorado legislative changes, one Colorado Supreme Court decision regarding tribal versus State Engineer authority, and three 2013 United States Supreme Court cases.

**COLORADO LEGISLATION**

**Graywater**

House Bill 1044 allows the use of graywater, which is defined as the portion of residential, commercial or industrial wastewater collected for beneficial use prior to treatment. Graywater use is limited to areas where local government has adopted measures approving such systems, and the systems may not collect human, animal or vegetable matter or hazardous chemicals, and must exclude water from toilets, kitchen sinks, dishwashers and utility sinks. The bill also authorizes the Colorado Water Quality Control Commission to establish regulations and standards for graywater use to protect public health and water quality. Users may implement graywater systems to be served by individual wells or municipal water systems, but the use must be in accordance with any applicable decree, well permit or contract.

**Fallowing-leasing programs**

House Bill 1248 authorizes the Colorado Water Conservation Board (CWCB) to approve up to 10 pilot projects to fallow agricultural land to allow leasing of associated water rights to municipal use. Projects are limited to 10-year terms. The proponent of a potential leasing project must provide an analysis of the historical consumptive use of the water right to be leased, including historical consumptive use and patterns of return flows, and a plan for replicating historical return flows. Notice of the proposal must be published and comments reviewed. The State Engineer must make a determination that the proposal will be temporary, not injure other water rights, and not impair interstate compact compliance. On receipt of the State Engineer’s determination, the CWCB may approve the project if it adopts all of the SEO’s terms and conditions. CWCB decisions approving such pilot projects are subject to de novo appeal to the Water Court using the same standards applicable to change of water right and plan for augmentation applications.

**Limitations on historical consumptive use reductions for conservation purposes**

Senate Bill 19 establishes safe harbor for water users in Divisions 4, 5 and 6 subject to quantification of historical consumptive use. In those Divisions, a court may not determine a reduction in historical consumptive use resulting from 1) enrollment of land to which the water has historically been applied in a federal land conservation program, 2) participation in a state- or local district-approved water conservation program, 3) observance of a water conservation program established by local government action or ordinance, 4) participation in an approved land fallowing program, or 5) participation in a water banking program.

**Conditional water storage rights**

Senate Bill 41 expands the definition of beneficial use to include storage of water for later use for which an appropriation was initially made.
bill explicitly establishes that a conditional storage water right is made absolute for all decreed purposes to the extent the water has been diverted to storage, regardless of the extent to which the water has been released from storage. The bill also protects storage rights by exempting them from the possibility of abandonment for failure to release the water to subsequent beneficial use.

**Water Quality Control Permits**

Senate Bill 73 requires the Public Health and Environment’s Division of Administration to follow a process when proposing new or changing discharge permit requirements regarding water quality control. The process requires the Division to provide a statement of basis and purpose, and to provide supporting evidence. Public notice is required, and if comments are received a cost-benefit “analysis must be undertaken.

**Legacy ditch bill**

Senate Bill 74 provides greater certainty to water users seeking changes of water rights decreed prior to 1937. To determine the lawful historical use of such water rights, the maximum historical irrigated acreage is established as the largest area irrigated within the first 50 years following entry of the original decree, unless that decree expressly limits irrigation to a lesser area. The same standard for determining lawful historical irrigation applies to any enforcement actions the state may pursue claiming an impermissible expansion of a water right.

**Designated ground water basin final well permits**

Senate Bill 75 protects designated ground water appropriators seeking to conserve water from future reductions in their appropriations. After an appropriator receives a final well permit, the user’s conservation efforts cannot be used to limit the 1) maximum annual volume permitted, 2) maximum permitted pumping rate, or 3) maximum acreage permitted to be irrigated.

**Erroneously decreed points of diversion**

Senate Bill 78 determines that surface water diversions within 500 feet of a water right’s decreed point of diversion, and ground water diversions within 200 feet of a water right’s decreed point of diversion are operating within the terms of the decree. Points of diversion varying in greater distances from the decree due to a clerical mistake in the decree may be corrected as a clerical mistake within three years from the date the variance was discovered. Greater variances not due to clerical mistakes are eligible for correction in a change of use proceeding that does not subject the water right to a historical use analysis. The varying point of diversion is subject to a rebuttable presumption that the change will not enlarge the historical use and will not injure other water rights, so long as the right has been diverted at the same point since entry of the original decree. Such water rights are similarly exempt from anti-speculation analysis.

**COLORADO SUPREME COURT CASE**

**Tribal Rule – SEO Rulemaking – Ground Water – Coalbed Methane**

On November 25, 2013, the court decided an appeal concerning nontributary ground water extracted during coalbed methane (CBM) production. Prior to 2009, the SEO did not require permits for water extracted during CBM production, believing that this role was handled by the Colorado Oil and Gas Conservation Commission (COGCC). In 2009, the court rejected the SEO’s position stating that such water was subject to COGCC regulation, as well as SEO regulations, specifically the Water Right Determination and Administration Act of 1969 and the Colorado Ground Water Management Act. Pawnee Well Users v. Dick Wolfe, 2013 CO 67, ¶¶1-2 (Colo.2013), citing Vance v. Wolfe, 205 P.3d 1165, 1172-73 (Colo.2009), §§37-92-101 to 602, and §§37-90-101 to 143, C.R.S. (2013).

Since the court’s decision in Vance potentially would require the SEO to issue permits for 40,000+ existing wells, the General Assembly subsequently enacted House Bill 09-1303 granting the SEO authority “to adopt rules to assist with the administration”. Pawnee, 2013 CO 67, ¶¶2-3, citing H.B. 1303, which is codified at §§37-90-137, 138(2) and 37-92-308(11) (Colo.2009).

After following its rulemaking process, the SEO promulgated the Produced Nontributary Ground Water Rules (Final Rules). The Final Rules included “basin-specific” rules, including one known as the “Fruitland Rule”, which impacts the Southern Ute Indian Reservation (Reservation) subject to Tribal Rule. The Final Rules included a Tribal Rule stating: “[t]hese rules and regulations shall not be construed to establish the jurisdiction of either the State of Colorado or the Southern Ute Indian Tribe over nontributary ground water within the boundaries of the Southern Ute Indian Reservation as recognized in Pub. L. No. 98-290, §3, 98 Stat. 201 (1984).” Id. at ¶3.

Various water rights owners and citizen groups opposed the Final Rules. The water court reviewed extensive briefing on the matter and determined that the Final Rules should be upheld, except for the Fruitland Rule. The water court reasoned that since the Tribal Rule “essentially divested” the SEO’s authority to promulgate the Fruitland Rule, the SEO had issued an “improper ‘advisory’ rule”, and must obtain a judicial determination of SEO authority over the water underlying the Reservation. Id. at ¶4-5.
The SEO, Tribe and others appealed the water court’s decision. This court agreed with the SEO, Tribe and other appellants stating that the General Assembly, via H.B. 1303, granted the SEO authority to promulgate the Final Rules, including the Fruitland Rule. Id. at ¶16-17. The court stated that

[t]he Tribal Rule does not, and indeed cannot, divest the State Engineer of his authority as established in H.B. 1303. The Tribal Rule explicitly states that the Final Rules to not “establish” the State Engineer’s jurisdiction. But simply because the Final Rules do not establish the State Engineer’s jurisdiction does not mean – as the water court believed – that jurisdiction was not established elsewhere. In this case, H.B. 1303 established jurisdiction. Moreover, the State Engineer cannot establish or disestablish his own jurisdiction. As we have held, state agencies are creatures of statute and have “only those powers expressly conferred by the legislature”.

Id. at ¶19, citing Hawes v. Colo. Div. of Ins., 65 P.3d 1008, 1016 (Colo.2003). The court determined that the water court erred when it invalidated the Fruitland Rule, and therefore reversed and remanded the case for further proceedings consistent with the court’s determination. Id. at ¶22.

SUPREME COURT OF THE UNITED STATES CASES

Clean Water Act – NPDES Permit – Deference to Agency Interpretations

On March 20, 2013, the Court decided a case regarding whether runoff from a logging road is considered a discharge from a point source that requires a National Pollutant Discharge Elimination System (NPDES) permit pursuant to the Clean Water Act (CWA). Doug Decker v. Georgia-Pacific West, Inc., 133 S.Ct. 1326 (2013). The CWA provides that an NPDES permit is required before pollutants can be discharged into navigable water of the US. Decker, 133 S.Ct. at 1328, citing 33 U.S.C. §§1311(a), 1362(12). Under the Environmental Protection Agency’s (EPA) Industrial Stormwater Rule, as amended shortly before oral argument in this case, the NPDES permit requirement only applies to certain industrial activities, as listed in the Silvicultural Rule. Id. Petitioner, Georgia-Pacific West has a contract to harvest timber from a state of Oregon forest. The related logging roads discharge water into nearby waterways that “often contain large amounts of sediment”. Id. However, the EPA’s amendment clarified that Georgia-Pacific’s logging activities were not subject to the permitting process. The Court agreed with the EPA and reversed the court of appeals. Id. at 1338.

Of particular note in this case, Justice Roberts, although concurring in the decision, raises a point of interest regarding the extensive deference given to agency interpretations of their own rules. In the past, agencies have received a great deal of deference regarding their interpretations of their rules, generally known as the Seminole Rock or Auer defense. Id. at 1338, see Auer v Robbins, 519 U.S. 452 (1997) and Bowles v Seminole Rock & Sand Co., 325 U.S. 410 (1945). Justice Roberts stated that “[e]nough is enough… For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of ‘defer[ring] to an agency’s interpretation of its own regulations’”. Id. at 1339, quoting Talk America, Inc. v Michigan Bell Telephone Co., 131 S.Ct. 2254, 2265 (2011). Justice Roberts walks us through the various justifications for the deference, but reveals the practical shortcomings of the process to date. Although parties can rely on an agency’s opinion, “as soon as an interpretation uncongenial to the agency is pronounced by a district court, the agency can begin the process of amending the regulation to make its meaning entirely clear.” Id. at 1341-42. Perhaps most importantly, Justice Roberts points out that “however great may be the efficiency gains derived from Auer deferences, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.” Id. at 1342. As such, Justice Roberts’ statements may indicate the court’s willingness in the future to afford less “automatic” deference to agencies, which may or may not help those impacted in the future.
Cross-border Rights
On June 13, 2013, the Court reviewed a case involving a compact agreement (Compact) between Arkansas, Louisiana, Oklahoma and Texas. *Tarrant Regional Water Dist. v. Herrmann*, 133 S.Ct. 2120 (2013). In this case, Tarrant Regional Water District (Tarrant) filed an application to take water from a point in Oklahoma to Texas, which was denied. *Tarrant*, 133 S.Ct. at 2122. Tarrant claimed that the Compact created a borderless area for the subject water rights, which the Court of Appeals for the Tenth Circuit denied. *Id.* at 2123. The Court held that such Compacts are “construed under contract-law principles”, and since the Compact did not include provisions that trumped Oklahoma laws, and did not include provisions that allowed such crossings without approval, the Court upheld the court of appeals. *Id.* at 2137. Colorado attorneys working on interstate compacts are advised to heed the Supreme Court’s ruling on this issue and to specifically include cross-border rights, if such are intended.

Wetlands Takings – Mitigation
On June 25, 2013, the Court heard a case involving an agency requirement that a permit applicant conduct mitigation in order to obtain a wetlands permit. *Koontz v St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013). Koontz had sought a permit to build on wetlands and proposed to offset any environmental damage by deeding to the District a conservation easement. *Koontz*, 133 S.Ct. at 2589. The District refused and Koontz subsequently brought suit. The trial court found that the District’s action were “unlawful because they failed the requirements of *Nollan/Dolan*, which requires that a permit may not be conditioned on relinquishment of property “unless there is a nexus and rough proportionality between the government’s demand and the effects of the proposed land use”. *Id.* at 2589, citing *Nollan v California Coastal Comm’n*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374. The Florida Supreme Court disagreed and reversed. *Id.* at 2591.

The Court disagreed with Florida and held that *Nollan* and *Dolan* “provide important protection against the misuse of the power of land-use regulation”, and that creative argument will not evade those protections. *Id.* Regardless, future parties are on now on notice that the principles set forth in *Nollan* and *Dolan* will apply across the board to such mitigation and permitting issues. Primarily, there must be a “nexus” and “rough proportionality” to an agency’s mitigation requirements tied to a requested land use permit.

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2. For a more extensive review of these and other decisions, readers may review the Colorado Bar Association’s 2013 Annual Survey of Colorado Water Law. This publication should be available shortly and includes chapters on water and construction law. Readers may also want to review the Colorado Water Law Benchbook. Both publications are available for purchase at [http://cle.cobar.org/](http://cle.cobar.org/).

*2300 Wilson Blvd., Ste. 400  
Arlington, VA 22201  
cilibertoc@agc.org*
Division 10 Steering Committee

Edward B. Gentilcore
Division 10 Chair
Sherrard, German & Kelly, P.C.
555 Smithfield St., Ste. 300
Pittsburgh, Pennsylvania 15222
Phone: (412) 258-6714
Email: ebg@sgkpc.com

Angela R. Stephens
50 State Contact Listserv Chair / Young Lawyers Liaison
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, Kentucky 40202
Phone: (502) 681-0588
Email: astephens@stites.com

Lauren Rodriguez
Environmental Chair
FJ Dick – Trumbull – Lindy Paving
225 North Shore Drive
Pittsburgh, Pennsylvania 15212
Phone: (412) 807-2174
Email: Lauren.Rodriguez@trumbullcorp.com

Rhonda Caviedes
Programming Chair / SPEC Liaison
CB&I
2 Riverway, Ste 1500
Houston, Texas 77056
Phone: (713) 469-3889
Email: rhonda.caviedes@cbi.com

Emily Anderson
Diversity Committee Liaison / Social Liaison
Gallet Dreyer & Berkey, LLP
845 Third Avenue - 8th fl.
New York, NY 10022-6601
Phone: (212) 935-3131
Email: eda@gdblaw.com

Wendy Venoit
Governing Committee Member / Liaison to Division 10
McElroy, Deutsch, Mulvany & Carpenter LLP
400 Columbus Boulevard
Hartford, CT 06103
Phone: (860) 241-2647
Email: wvenoit@mdmc-law.com

Keith J. Bergeron
Immediate Past Chair
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, Louisiana 70130
Phone: (504) 993-0789
Email: kbergeron@desklaw.com

Matthew J. DeVries
Technology Chair / Liaison
Stites & Harbison, PLLC
401 Commerce Street, Suite 800
Nashville, Tennessee 37219
Phone: (615) 782-2200
Email: matthew.devries@stites.com

William R. Warnock, Jr.
Membership Chair / Liaison
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, South Carolina 29401
Phone: (843) 722-3400
Email: wwarnock@wcrsr.com

Allen W. Estes III
Federal Legislation Chair / Diversity Liaison
Gordon & Rees LLP
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104
Phone: (206) 695-5100
Email: aestes@gordonrees.com

Peter Yoars
State Legislation Chair / Publications Liaison
Knox McLaughlin Gornall & Sennett, P.C.
120 West Tenth Street,
Erie, PA 16501-1461
Phone: (814) 923-4912
Email: pyoars@kmgslaw.com

Melissa Beutler
Green Building Chair
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702)-669-4600
Email: mabeutler@hollandhart.com