

REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report summarizes key federal enforcement and compliance developments in 2019, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (FERC or Commission), the Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the U.S. Department of Energy (DOE), and the U.S. Department of Justice (DOJ).*

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I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. *Reports, Policy Statements, and Rules*

1. Annual Enforcement Report

On November 21, 2019, the FERC Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff¹ activities during the fiscal year 2019 that, as in past years, identified its priorities as focusing on: (1) fraud and market

1. 2019 Report on Enforcement (FERC issued Nov. 21, 2019).

manipulation; (2) serious violations of the Reliability Standards; (3) anticompetitive conduct; and (4) conduct that threatened the transparency of regulated markets.

In pursuit of these priorities, Enforcement Staff opened twelve new investigations in fiscal year 2019, down from twenty-four investigations in 2018, while bringing fourteen pending investigations to closure with no action.² In addition, Enforcement resolved two cases through settlement, obtaining \$7.4 million in civil penalties and disgorgement of \$7 million in unjust profits.³ Enforcement's penalty and disgorgement amounts were lower than the \$83 million and \$66 million, respectively, assessed in 2018.⁴

2. Joint Staff White Paper on Critical Infrastructure Protection (CIP) Standards Notices of Penalties

On August 27, 2019, FERC issued a Notice of White Paper⁵ indicating that FERC Staff and the staff of North American Electric Reliability Corporation (NERC and with FERC Staff, Joint Staff) on August 27, 2019, had issued a White Paper proposing to change the current filing procedures used when NERC files a Notice of Penalty (NOP) alleging a violation of a NERC CIP Reliability Standard, and soliciting comments on that White Paper.

Joint Staff stated that an NOP submitted by NERC for an alleged violation of a CIP Reliability Standard is typically designated as non-public and Critical Energy/Electric Infrastructure Information (CEII),⁶ because it includes the name of the alleged violator, nature of the violation, potential vulnerabilities to cyber systems as a result of the violation, and mitigation activities. Joint Staff stated that FERC's practice is to treat information asserted to be CEII as non-public information until such time as it finds that the information is not entitled to CEII status.⁷ Joint Staff reported that FERC did not review NERC NOP filings for CEII status

2. *Id.* at 8.

3. *Id.* at 8.

4. 2018 Report on Enforcement (FERC issued Nov. 15, 2018).

5. FERC Docket No. AD19-18-000 (Aug. 27, 2019); *see also* FERC Docket No. AD19-18-000 (Sept. 19, 2019) (extending the deadline for comments from September 26, 2019, to October 28, 2019).

6. *See* FERC Docket No. AD19-18-000, at 2, 8.

7. *Id.* at 2 n.2 (citing 18 C.F.R. § 388.113(d)(1)(iv)).

until it received, for the first time, a Freedom of Information Act (FOIA)⁸ request for the name of the undisclosed CIP violator.⁹ Joint Staff stated that recently, FERC has “received an unprecedented number of FOIA requests” for the release of non-public CIP NOP information.¹⁰ Joint Staff proposed to revise the NOP process so that NERC will submit CIP NOPs with a public cover letter disclosing the alleged violator’s name, the Reliability Standard alleged to have been violated, and the penalty amount.¹¹ The remainder of the CIP NOP filing—details on the nature of the violation, mitigation activity, and potential vulnerabilities to cyber systems—would be included as a non-public attachment, along with a request for the designation of such information as CEII.¹²

Numerous parties filed comments in response to the White Paper, including utilities, public utility commissions, and private citizens.¹³ As of the end of 2019, FERC has not issued any orders substantively addressing the White Paper.

3. Final Rule on Data Collection

On July 18, 2019, FERC issued Order No. 860¹⁴ to require that “certain information currently filed in [its] electric market-based rate program” be submitted through an extensible markup language relational database¹⁵ effective October 1, 2020.¹⁶ Order No. 860 creates a new approach to data collection, by imposing numerous and detailed filing requirements concerning certain upstream ownership information, asset appendix information (including a new requirement to report long-term firm purchases) for the seller and its affiliates that do not have market-based rate authority, indicative screen information (used to determine whether a seller lacks market power), and certain other market-based rate information.¹⁷ In addition, Sellers¹⁸ subject to the rule will be required to update the database on a

8. Freedom of Information Act, Pub. L. No. 90-23, 80 Stat. 250 (1967) (codified as amended in 5 U.S.C. § 522).

9. FERC Docket No. AD19-18-000, at 3.

10. *Id.*

11. *Id.* at 10.

12. *Id.* at 3.

13. *Id.*

14. Order No. 860, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 F.E.R.C. ¶ 61,039 (2019), *request for reh’g pending*.

15. *Id.* at P 2 n.7 (defining a relational database as “a database model whereby multiple data tables relate to one another via unique identifiers.”).

16. *Id.* at P 2.

17. *Id.* at PP 5-6.

18. A Seller is defined as “any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act (FPA).” *Id.* at P 1 n.2.

monthly basis to reflect any changes.¹⁹ Further, the change in status filing requirement is changed from thirty days to a quarterly obligation.²⁰

One related issue specifically addressed in Order No. 860 was the extent to which a Seller could be liable for mistakes or misinformation in its submissions.²¹ FERC stated that while it “will not seek to impose sanctions for inadvertent errors, misstatements, or omissions in the data submission process,” it expects Sellers to apply due diligence to “ensure the accuracy of their filings and submissions,” and that the “intentional or reckless submittal of incorrect or misleading information could result in the imposition of sanctions, including civil penalties.”²² FERC added that “[a]ccuracy and candor by Sellers in their respective filings and submissions under the final rule are essential to the Commission’s mandate of ensuring just and reasonable rates and its ability to monitor for anomalous activity in the wholesale energy markets.”²³ FERC indicated that it generally would allow inadvertent errors to be corrected without sanctions, with any necessary corrections to be made on a timely basis, but declined to adopt any “safe harbor” or other provisions that would preclude enforcement actions.²⁴

Commissioner Glick filed an opinion dissenting in part, stating that while he generally supported Order No. 860, he opposed the decision not to adopt the requirement for Sellers and other entities to provide additional information regarding their legal and financial connections to various other entities (the Connected Entity Information).²⁵ While FERC had declined to require the provision of this information,²⁶ Commissioner Glick asserted this information is necessary to detect and combat market manipulation, in part because such information might not be easily available otherwise.²⁷

19. Order No. 860, *supra* note 14, at P 179.

20. *Id.* at P 8. The submissions required by Order No. 860 are due February 1, 2021. *Id.* at P 308.

21. *See id.* at P 286.

22. *Id.* at P 291.

23. Order No. 860, *supra* note 14, at P 292.

24. *Id.* at PP 293-94.

25. *Id.* dissent at P 1 (Glick, Comm’r, dissenting).

26. *Id.* at P 184 (FERC declined to impose this requirement in response to concerns about the difficulties and burdens of complying with the requirement, but indicated it would consider these issues in a separate docket).

27. *Id.* dissent at PP 1-2 (Glick, Comm’r, dissenting).

4. Rescission of Policy on Notices of Alleged Violations

On May 16, 2019, FERC rescinded its 2009 order authorizing the FERC Secretary to issue a Notice of Alleged Violations (NAV) in an informal enforcement investigation after an investigative subject has had an opportunity to respond to the FERC Office of Enforcement's proposed investigative findings.²⁸ Thus, public disclosure of an investigation would generally occur later in the investigatory process than previously under the NAV Order.

The Rescission Order reinstates FERC's pre-2009 practice of barring public notice of an investigation until a matter was resolved through settlement or the Commission issued a show cause order.²⁹ The order states that the intended transparency benefits of the NAV Order have been limited, and that NAVs have not been a significant source of information for market participants or for FERC Staff investigations.³⁰ FERC also stated that the potential risk of reputational harm from the public disclosure of an investigation in the early stages weighed against continuing the 2009 policy.³¹

FERC indicated that the NAV Order was intended to increase transparency regarding investigations and conduct that Enforcement considers unlawful, while still protecting investigative subjects' confidentiality in the early stages of an investigation.³² FERC noted, however, that it would monitor the NAV procedure and would remain open to re-evaluating after FERC Staff acquired some experience with the revised procedure.³³

5. Final Rule on Civil Monetary Inflation Adjustments

On January 8, 2019, FERC issued Order No. 853, its Final Rule on Civil Monetary Penalty Inflation Adjustments.³⁴ FERC indicated that the Federal Civil Penalties Inflation Adjustment Act of 1990,³⁵ as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act),³⁶ required each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty within the agency's jurisdiction.³⁷ FERC stated that the

28. *Enforcement of Statutes, Regs., & Orders*, 167 F.E.R.C. ¶ 61,153 (2019), *vacating Enf't of Statutes, Regs., & Orders*, 129 F.E.R.C. ¶ 61,247 (2009), *order on reh'g*, 134 F.E.R.C. ¶ 61,054 (2011).

29. 167 F.E.R.C. ¶ 61,153 at PP 3, 6.

30. *Id.* at PP 7-8.

31. *Id.* at P 9.

32. *Id.* at PP 3-4.

33. *Id.* at P 5.

34. Order No. 853, *Civil Monetary Penalty Inflation Adjustments*, 166 F.E.R.C. ¶ 61,014 (2019).

35. Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461).

36. Federal Civil Penalties Inflation Act Adjustment Improvements Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, 599 (2015).

37. Order No. 853, *supra* note 34, at P 2.

2015 Act requires it to make an initial inflation adjustment to its civil monetary penalties, and adjust each such penalty on an annual basis every January 15 thereafter.³⁸ FERC indicated that Order No. 853 is intended to implement the annual adjustment.³⁹

The Energy Policy Act of 2005⁴⁰ initially granted the Commission the authority to assess civil penalties under Part II of the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act (NGPA), in amounts up to \$1,000,000 per violation for each day that the violation continues.⁴¹ FERC stated that applying the requisite inflation adjustments resulted in a maximum civil penalty of \$1,269,500 per violation.⁴² FERC also adjusted other civil monetary penalties it is authorized to assess under these and other statutes.⁴³ Order No. 853 became effective February 1, 2019, the date it was published in the Federal Register.⁴⁴

B. Requests Regarding Enforcement and Investigations

1. The Midcontinent Independent System Operator, Inc.'s 2015/16 Planning Resource Auction

On July 19, 2019, FERC issued an order dismissing a series of complaints filed against certain sellers of capacity in Illinois Local Resource Zone 4 arising from the Midcontinent Independent System Operator, Inc. (MISO) 2015/16 Planning Resource Auction.⁴⁵ Prices in the 2015/16 Planning Resource Auction in Zone 4 had cleared at \$150/megawatt (MW)-day, while prices in other MISO zones cleared at \$3.48/MW-day or less.⁴⁶ One seller, Dynegy, Inc. (Dynegy),

38. *Id.*

39. *Id.*

40. Energy Policy Act of 2005, 109 Pub. L. 58, 119 Stat. 594.

41. *See generally* 16 U.S.C. § 825o-1(b) (2020); 15 U.S.C. § 717t-1(a) (2020); 15 U.S.C. § 3414(b)(6)(A)(i) (2020).

42. Order No. 853, *supra* note 34, at P 8.

43. *Id.*

44. *Id.* at P 15; *see* Final Rulemaking, *Civil Monetary Penalty Inflation Adjustments*, 84 Fed. Reg. 966 (2019) (to be codified at 18 C.F.R. pts. 250, 385).

45. *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 F.E.R.C. ¶ 61,042 (2019), *amended by Errata Notice*, Docket Nos. EL15-70-000 (July 19, 2019).

46. *See id.* at P 5.

owned 6,106 MW of generation in Zone 4.⁴⁷ The complainants filed four complaints, alleging that the 2015/16 Planning Resource Auction resulted in an unjust, unreasonable, and unduly discriminatory rate increase in Zone 4.⁴⁸ Complainants argued that the \$150/megawatt price may be the result of “(1) unjust and unreasonable Tariff rules governing MISO’s Auction process; (2) illegal market manipulation by Dynegy; and/or (3) the exercise of market power by Dynegy.”⁴⁹ In an earlier order, FERC had granted the complaints in part, finding that MISO’s then-existing tariff provisions associated with market power mitigation and certain import limits were no longer just and reasonable for prospective application, but left other issues open for a further decision.⁵⁰

The July 19 Order dismissed the remaining issues pending in the complaints, stating that the complainants failed to clearly specify and explain what statutory or regulatory violations had occurred.⁵¹ In addition, while the complainants had urged FERC to open an investigation into alleged market manipulation, FERC stated that its Office of Enforcement had previously opened, and then closed, a complete investigation of the issue.⁵² FERC rejected claims that Dynegy had exercised market power.⁵³ The order stated that Dynegy’s bids were below the cap established by the MISO tariff, and that the MISO tariff had sufficient mechanisms to protect against economic withholding.⁵⁴ FERC also declined to establish a new rate, suspend the auction clearing price or establish a refund effective date for that auction, or order hearing or settlement procedures.⁵⁵

In his dissenting opinion, Commissioner Glick asserted that FERC failed to address whether or not the auction results were just and reasonable, and stated that the fact of MISO and market participants following the tariff was not enough to show the auction results were just and reasonable.⁵⁶ Glick stated that the decision to close the investigation of the auction results was made unilaterally by the FERC Chair without any public disclosure of the investigation’s finding.⁵⁷ Commissioner Glick stated that while the results of the investigation were non-public, he believed the evidence was sufficient to warrant continuing the investigation.⁵⁸

47. *Id.* at P 6.

48. *Id.* at PP 1, 8.

49. *Id.* at P 8.

50. 168 F.E.R.C. ¶ 61,042 at PP 1-2.

51. *Id.* at P 21.

52. *Id.* at P 30.

53. *Id.* at P 84.

54. *Id.* at PP 84-85

55. 168 F.E.R.C. ¶ 61,042 at P 86.

56. *Id.* dissent at P 2 (Glick, Comm’r, dissenting).

57. *Id.* dissent at PP 1, 4 (Glick, Comm’r, dissenting).

58. *Id.* dissent at P 4 (Glick, Comm’r, dissenting).

Glick went on to state that “[g]uarding against market manipulation remains one of the Commission’s most important obligations.”⁵⁹

2. CPV Shore, LLC

On July 22, 2019, FERC issued an order denying the request of CPV Shore, LLC (CPV) for a one-time waiver of penalty provisions under schedule 2, section 5.1(a) of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement).⁶⁰ CPV had submitted certain offers to sell energy in the PJM markets using yet-to-be-approved fuel cost data, and was notified by PJM that it would be subject to penalties under the Operating Agreement for making cost-based energy offers inconsistent with its effective fuel cost policy.⁶¹ CPV then sought waiver from FERC of the applicable Operating Agreement provisions.⁶² FERC denied the waiver, stating the CPV had not satisfied FERC’s waiver standards, specifically finding that CPV had not shown it acted in good faith in failing to submit the necessary pricing information on obtaining approval of price data in a timely manner, and using pricing data that had not been approved by PJM.⁶³

C. Enforcement Litigation and Adjudication

1. FERC v. Richard Silkman, et al.

On January 4, 2019, the United States District Court for the District of Maine (Woodcock Jr., J.) granted FERC’s motion for summary judgment in *FERC v. Richard Silkman, et al.*, determining that FERC’s attempt to enforce nearly \$9 million

59. *Id.* dissent at P 7 (Glick, Comm’r, dissenting).

60. *CPV Shore, LLC*, 168 F.E.R.C. ¶ 61,048 at P 1 (2019).

61. Certain documents in this proceeding were filed on a non-public basis, and the amount of penalties imposed on CPV is not discussed in the public versions of the documents. *Id.* at PP 4-5.

62. CPV requested a one-time waiver of PJM’s penalty provision, Schedule 2, Section 5.1(a). In the alternative, CPV requested a waiver of Schedule 2, Section 2.3(c) to allow its Revised Fuel Cost Policy, which was approved by PJM on January 26, 2018, to have an effective date of January 3, 2018, in which case a penalty would not be appropriate. *See id.* at P 6.

63. *Id.* at PP 22-23. FERC indicated it will grant tariff provisions when the applicant: (1) acted in good faith; (2) the requested waiver is of limited scope; (3) the waiver requested addresses a concrete problem; and (4) the requested waiver does not have undesirable consequences. *Id.* at P 22.

worth of fines against Respondents⁶⁴ was not time-barred based on the statute of limitations. Respondents had moved to dismiss, claiming that FERC began the lawsuit outside of the applicable five-year statute of limitations.

Between July 2007 and February 2008, Respondents allegedly inflated their baseline electricity loads during the Day-Ahead Load Response Program measuring period for ISO New England Inc., followed by repeatedly offering load reductions to hold their inflated baselines.⁶⁵ FERC alleged that such actions maximized Respondents' load-reduction payments for nonexistent reductions.⁶⁶

According to the court, the central issue turned on whether the five-year statute of limitations for the enforcement of civil penalties, 28 U.S.C. § 2462, as applied to those civil penalties FERC assessed against Respondents, accrued when Respondents committed the alleged violation or at the time FERC assessed the penalty.⁶⁷ In its holding, the court ruled that 28 U.S.C. § 2462 affords an additional five-year period after a final administrative assessment of a civil penalty during which the government may sue to enforce the action.⁶⁸ The Court determined that FERC's actions were not time-barred by the statute of limitations⁶⁹ because its assessment of the underlying civil penalties was an administrative adjudication, rather than a criminal prosecution.

D. Settlements and Show Cause Orders

1. Vitol Inc. and Federico Corteggiano

On October 25, 2019, FERC issued an Order Assessing Civil Penalties against Vitol Inc. (Vitol) and Federico Corteggiano (Corteggiano) (collectively, Respondents),⁷⁰ finding that Respondents violated section 222(a) of the Federal Power Act⁷¹ and FERC's Anti-Manipulation Rule.⁷² FERC found that Vitol and Corteggiano violated the Anti-Manipulation rule when Respondents sold physical power at a loss in the California Independent System Operator Corporation's (CAISO) wholesale electric market to avoid more significant losses in Vitol's positions held in a separate financial product (congestion revenue rights).⁷³ FERC issued an Order to Show Cause and Notice of Proposed Penalty on July 10, 2019, that directed Respondents to show cause as to why they should not be assessed

64. FERC v. Silkman, 359 F. Supp. 3d 66, 122 (2019).

65. *Id.* at 70-71.

66. *Id.*

67. *Id.* at 117.

68. *Id.* at 121.

69. *Silkman*, 359 F. Supp. 3d at 121-122.

70. *Vitol Inc. and Federico Corteggiano*, 169 F.E.R.C. ¶ 61,070 (2019).

71. *Id.*; *see also*, 16 U.S.C. § 824v(a) (2018).

72. 169 F.E.R.C. ¶ 61,070 at P 1; *see also*, 18 C.F.R. § 1c.2(a) (2019).

73. 169 F.E.R.C. ¶ 61,070 at P 12.

civil penalties of \$6,000,000 (Vitol) and \$800,000 (Corteggiano).⁷⁴ In its Order Assessing Civil Penalties, FERC departed from its Penalty Guidelines, concluding that Corteggiano was the primary actor responsible for the market manipulation, and assessed civil penalties of \$1,515,738 to Vitol and \$1,000,000 to Corteggiano, while further directing Vitol to disgorge \$1,227,143 in unjust profits (including interest).⁷⁵

2. Virginia Electric & Power Co.

On May 3, 2019, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Virginia Electric and Power Company (doing business as Dominion Energy Virginia (DEV)),⁷⁶ finding that DEV violated FERC's Anti-Manipulation Rule. Enforcement determined that DEV offered its combustion turbine units in PJM's day-ahead market with price-based offers with substantially increased start-up and no-load values compared to those previously used and with discounted incremental energy offers.⁷⁷ By doing so, Enforcement concluded that this strategy sought to obtain more day-ahead commitments while at the same time reducing the chance that the units would be dispatched by PJM.⁷⁸ This strategy resulted in increased lost opportunity credits in certain hours when the combustion turbine units had a risk of operating at a loss.⁷⁹ DEV agreed to pay a civil penalty of \$7,000,000 and to disgorge \$7,000,000.⁸⁰

3. Footprint Power LLC and Footprint Power Salem Harbor Operations LLC

On February 25, 2019, FERC terminated its Order to Show Cause proceeding involving Enforcement and Footprint Power LLC and Footprint Power Salem Harbor Operations LLC (together, Footprint)⁸¹ regarding potential violations of sev-

74. *Id.*

75. *Id.* at PP 223-231.

76. *Virginia Electric and Power Co.*, 167 F.E.R.C. ¶ 61,103 (2019).

77. *Id.* at P 9.

78. *Id.* at PP 9-11.

79. *Id.* at P 14.

80. *Id.* at P 2.

81. *Footprint Power LLC*, 166 F.E.R.C. ¶ 61,150 (2019).

eral provisions of ISO-NE's tariff (Tariff) and section 35.41 of FERC's regulations.⁸² FERC determined to terminate the proceeding in light of submissions made by Footprint regarding the potential violations, as well as Enforcement's recommendation not to pursue any remaining alleged violations.⁸³

On June 18, 2018, FERC issued an Order to Show Cause and Notice of Proposed Penalty to Footprint for submitting false or misleading supply offers and failing to report the fuel status and related operational status of its capacity resource from June 26, 2013 through July 25, 2013.⁸⁴ At that time, FERC proposed a civil penalty of \$4,200,000 and disgorgement of \$2,049,571.⁸⁵

On August 2, 2018, Footprint filed a response to the Show Cause Order, arguing that Enforcement had ignored the resource's 17.5 hour start-up and ramp time and the related impact on fuel consumption.⁸⁶ Footprint explained that when the cold start-up requirements were factored in to Enforcement's analysis, it actually had sufficient fuel to meet its capacity obligation and its reporting accurately reflected its fuel and operational status.⁸⁷ On September 19, 2018, Enforcement replied to Footprint's answer, finding "merit in Footprint's new defense relating to the start-up requirements."⁸⁸ Enforcement agreed with Footprint that its conduct from June 27 through July 17, 2013, did not violate the Tariff provisions and regulations at issue; however, Enforcement still contended that Footprint violated the Tariff and FERC regulations from July 18 to July 25 because Footprint's start-up requirements' defense did not apply then.⁸⁹ Enforcement recommended that, "in light of the now more limited scope and nature of the violations," FERC vacate the Order to Show Cause and assess no penalty.⁹⁰

4. Algonquin Gas Transmission, LLC

On January 7, 2019, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Algonquin Gas Transmission, LLC (Algonquin).⁹¹ Enforcement concluded that Algonquin violated the express terms of FERC's certificate authorizing the construction of the Algonquin Incremental

82. 18 C.F.R. §35.41 (2012).

83. 166 F.E.R.C. ¶ 61,150 at P 10.

84. *Footprint Power LLC*, 163 F.E.R.C. ¶ 61,198 (2018).

85. *Id.* at P 2.

86. *Id.* at P 5.

87. Footprint Power LLC, Reply of Enforcement Litigation Staff to the Answer of Footprint Power LLC and Footprint Salem Harbor Operations LLC and Recommendation to Vacate Order to Show Cause, Docket No. IN18-7-000 (FERC issued Sept. 19, 2018).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Algonquin Gas Transmission, LLC*, 166 F.E.R.C. ¶ 61,012 (2019).

Market (AIM) Project.⁹² Specifically, Enforcement determined that Algonquin tried to retrieve a broken drill stem via excavation using heavy construction equipment in wetlands on the banks of the Hudson River that were outside the AIM Project's approved workspace.⁹³ Enforcement concluded that because Algonquin began excavation prior to filing for a variance, and did not wait for approval from FERC of the required variance request to retrieve the equipment, Algonquin violated the AIM Project certificate.⁹⁴ Algonquin agreed to pay a civil penalty of \$400,000 and to provide semi-annual compliance reports for at least one year and up to two years.⁹⁵

5. Calpine Corporation

On November 1, 2019, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement Texas Reliability Entity, Inc., North American Electric Reliability Corporation (NERC) and Calpine Corporation (Calpine).⁹⁶ Based on an internal, fleet-wide investigation of its power plants and subsequent self-report to FERC, Enforcement concluded that Calpine violated the Reliability Standard for protection systems maintenance and testing (PRC-005-1 R2), and the California Independent System Operator Tariff regarding forced outages.⁹⁷ These instances of noncompliance with PRC-005-1 R2 involved monthly, quarterly, annual and/or periodic tests for thirty-six batteries at eight Calpine generating plants.⁹⁸ Enforcement determined that there were 215 total instances of non-compliance during the period from December 29, 2012 to December 26, 2015.⁹⁹ Calpine agreed to pay a civil penalty of \$375,000 to Texas RE, a civil penalty of \$25,000 to the United States Treasury, and to be subject to compliance monitoring.¹⁰⁰

92. *Id.*

93. *Id.* at PP 4-5.

94. *Id.* at P 7.

95. *Id.* at PP 12-13.

96. *Calpine Corp.*, 169 F.E.R.C. ¶ 61,092 (2019).

97. *Id.*

98. *Id.* at P 5.

99. *Id.*

100. *Id.* at P 2.

II. THE COMMODITY FUTURES TRADING COMMISSION

A. *Energy-Related Enforcement Cases*

1. In the Matter of David Smothermon

On May 9, 2019, the CFTC filed a civil enforcement action in the U.S. District Court for the Southern District of New York against former natural gas trader David Smothermon.¹⁰¹ The CFTC alleges that between December 2015 and September 2016 Smothermon defrauded his former company¹⁰² by scheming to inflate the reported mark-to-market profit-and-loss value of the gas division's overall trading book in order to conceal losses that ultimately grew to more than \$100 million. According to the CFTC, he did so by exaggerating the profits and losses of the gas division's positions in futures contracts, such as New York Mercantile Exchange, Inc. (NYMEX) natural gas futures contracts positions, and by deceptively exaggerating the profits and losses of certain of the division's physical natural gas trades. The CFTC sought, among other relief, monetary penalties, restitution, disgorgement, and trading bans.¹⁰³ On July 15, 2019, the court stayed the CFTC's civil action pending the resolution of a parallel criminal proceeding, also in a federal court in New York City.¹⁰⁴

2. In the Matter of The Kane Capital Investment Group, LLC

On June 20, 2019, the U.S. District Court for the Eastern District of Virginia entered a consent order resolving the CFTC's charges against The Kane Capital Investment Group, LLC (Kane Capital) and Amrit J.S. Chahal of commodity futures fraud, commodity pool fraud, illegally commingling Kane Capital's funds with Chahal's personal funds, and failure to register with the CFTC as a commodity pool operator.¹⁰⁵ According to the CFTC's April 4, 2018 complaint, from at least January 1, 2015, through December 31, 2017, the defendants fraudulently solicited more than \$1.2 million from approximately 50 members of the public (pool participants) for the Kane Capital commodity pool, which traded NYMEX West Texas Intermediate Light Sweet Crude Oil futures contracts, E-mini Nasdaq 100, E-mini S&P 500, and CBOE Volatility Index contracts, among others.¹⁰⁶ The consent order imposed a permanent trading ban, a permanent injunction against violations of the CEA and CFTC Regulations, and an obligation

101. *Commodity Futures Trading Comm'n. v. Smothermon*, No.19-CV-4185, 2019 WL 2062081 (S.D.N.Y.).

102. Smothermon's employer was not identified in the action. *Id.*

103. *Id.*

104. *Commodity Futures Trading Comm.*, 2019 WL 2062081 (order Granting Motion to Stay).

105. *Commodity Futures Trading Comm. v. Kane Capital Investment Group, LLC*, No. 1:18-cv-00422, 2019 WL 2743437, at *2-3 (E.D. Va., June 20, 2019).

106. *Id.* at *4.

to pay restitution.¹⁰⁷ On June 21, 2019, the same district court entered a final judgment against Chahal to resolve additional charges by the SEC.¹⁰⁸ The resolution of all agencies' civil charges followed Chahal's guilty plea to criminal wire fraud and securities and commodities fraud charges.¹⁰⁹ On March 15, 2019, Chahal was sentenced to a prison term of thirty months followed by three years of supervised release, and ordered to pay forfeiture of \$1,232,510 and restitution of \$445,633.¹¹⁰

3. In the Matter of Classic Energy LLC, and Mathew D. Webb

On October 1, 2019, the CFTC filed and settled charges against broker Classic Energy LLC (Classic) and its owner Mathew D. Webb for misusing material, nonpublic block trade order information provided by Classic's customers in connection with natural gas futures trades on ICE Futures US, as well as related supervision and recordkeeping violations.¹¹¹ The order alleges that between April 2014 and September 2015, Webb misused the block trade order information.¹¹² Instead of executing their block orders against third-party market participants, Webb allegedly, without disclosure to his customers, took the other side of these block trades in his personal proprietary trading account.¹¹³ The order also finds various supervision and recordkeeping failures by the company and Webb.¹¹⁴ The order imposes a monetary penalty of \$1.5 million on Classic and Webb and requires Webb to disgorge \$413,065 in alleged ill-gotten gains.¹¹⁵ The order further bans Webb from trading on or subject to the rules of any CFTC-registered entity and from engaging in any activities requiring registration with the CFTC, until January 3, 2022.¹¹⁶

107. *Id.*

108. *SEC v. Chahal*, No. 1:18-cv-00426 (E.D. Va., filed April 12, 2018).

109. *U.S. v. Chahal*, No. 1:18-cr-00152 (E.D. Va. 2018).

110. *Id.*

111. *In re Classic Energy LLC and Mathew D. Webb*, CFTC No. 19-50 (Sept. 30, 2019).

112. *Id.* at 4.

113. *Id.*

114. *Id.* at 4-5.

115. *Id.* at 12.

116. *In re Classic Energy*, CFTC No. 19-50.

4. *Commodity Futures Trading Commission v. Kraft Foods Group, Inc.*

This pending CFTC civil action in the U.S. District Court for the Northern District of Illinois drew interest in 2019 as a case of first impression in the U.S. Court of Appeals for the Seventh Circuit.¹¹⁷ The Seventh Circuit's ruling dealt with whether or not individual CFTC commissioners are subject to restrictions, including confidentiality obligations that otherwise govern the agency pursuant to the terms of CEA section 2(a)(10)(C), when they choose to comment on agency actions.¹¹⁸

The Seventh Circuit's decision arose from a petition filed by the CFTC for an order of mandamus to bar the district court from hearing claims that the CFTC, several commissioners, and certain agency staff, violated a confidentiality requirement in a consent order that the Kraft defendants and the CFTC (by a unanimous vote of the commissioners) agreed to as part of settling the CFTC v. Kraft case.¹¹⁹ The consent order, which set forth the sanctions the defendants agreed to, had two uncommon features for CFTC settlements: (1) it did not contain any findings of fact or conclusions of law, and (2) it included a confidentiality provision that stated, "[N]either party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in any legal proceedings, testimony or by court order."¹²⁰

The defendants moved that the CFTC be held in contempt for allegedly violating the confidentiality agreement by statements made in the CFTC's press release announcing the settlement and by public statements made by the CFTC Chairman and three commissioners.¹²¹ The CFTC's press release stated, among other things, that the \$16 million penalty to be paid under the settlement was three times the defendants' alleged gain.¹²² It also said the matter had been brought to a successful resolution, and the settlement advances the CFTC's mission of fostering transparent markets.¹²³ The press release included a statement by Chairman Heath Tarbert, in which he spoke about market manipulation, denying farmers the fair value of their hard work, and hurting American families who have to pay more

117. *Commodity Futures Trading Comm'n v. Kraft Foods Group Inc.*, 153 F.Supp.3d 996 (N.D. Ill. 2015) (alleging that in 2011 Kraft Foods Group Inc. (Kraft) and Mondelez International Inc. (Mondelez) manipulated the cash market prices for wheat to lower levels by establishing a significantly large long position in wheat futures contracts at prices below the then prevailing cash market prices).

118. *In re Commodity Futures Trading Comm'n v. Kraft Foods Group, Inc.*, 941 F.3d 869 (7th Cir. 2019).

119. *Id.* at 871.

120. *Id.*

121. *Id.*

122. *Id.* at 874.

123. *In re Commodity Futures Trading Comm'n*, 941 F.3d at 874.

for food.¹²⁴ Commissioners Dan Berkovitz and Rostin Behnam published statements explaining why each voted in favor of accepting this settlement.¹²⁵

“The district judge set the motion for a hearing and directed” the Chairman, the Commissioners, the CFTC’s Director of Enforcement, and several of the CFTC’s “other employees to appear in court and testify under oath.”¹²⁶ “The judge stated that he would administer *Miranda* warnings to these witnesses in preparation for a finding of criminal contempt and would demand that the witnesses explain the thinking behind the press release and the separate statements.”¹²⁷ “Chairman Tarbert and the Commissioners protested.”¹²⁸

Prior to the hearing, the CFTC petitioned the Seventh Circuit to issue a writ of mandamus directing the district court to terminate the hearing and deny the defendants’ motion.¹²⁹ On October 22, 2019, the Seventh Circuit granted the petition in part and denied it in part, holding that the issue of whether the CFTC should be held in contempt was justiciable by the district court, but that no claim lay against the commissioners as individuals because CEA section 2(a)(10)(C) specifically provides that:

Whenever the Commission issues for official publication any opinion, release, rule, order, interpretation, or other determination on a matter, the Commission shall provide that any dissenting, concurring, or separate opinion by any Commissioner on the matter be published in full along with the Commission opinion, release, rule, order, interpretation, or determination.¹³⁰

The appellate court declared that this provision gives every member of the Commission a right to publish an explanation of his or her vote and that this is a right that the Commission cannot negate.¹³¹ The court thus held that

if we understand the consent decree as an effort to silence individual members of the Commission, it is ineffectual, for no litigant may accomplish through a consent decree something it lacks the power to accomplish directly, unless some other statute

124. *Id.*

125. *Id.* at 871.

126. *Id.*

127. *Id.*

128. *In re Commodity Futures Trading Comm’n*, 941 F.3d at 871.

129. Petition for Plaintiff, *In re Commodity Futures Trading Comm’n*, 941 F.3d 869 (7th Cir. 2019) (No. 19-2769).

130. *In re Commodity Futures Trading Comm’n*, 941 F.3d at 872-73; 7 U.S.C. § 2(a)(10)(c).

131. *In re Commodity Futures Trading Comm’n*, 941 F.3d at 873.

grants that power—and no one argues that any other statute overrides §2(a)(10)(C).”¹³²

The Seventh Circuit also held that the testimony from the Chairman, commissioners, and staff was unnecessary to decide the agency’s liability because that determination should be based on the settlement, consent decree, and the press release alone.¹³³

On remand, the district court did not determine liability with regards to the contempt issue, choosing instead to vacate the consent order entirely because “the factual record undermines the notion that the parties ever agreed to the CFTC’s recent legal theory that the Consent Order would somehow bind the CFTC as an entity, but not bind the very agents through which it acts, i.e., its Chairman, Commissioners, or staff members.”¹³⁴ The decision thus reopens the case for adjudication, although the district court judge’s order makes clear that “[i]f the parties still wish to settle this matter short of trial, they remain free to do so and may submit a new proposed consent order for this Court’s review.”¹³⁵

5. In the Matter of Upstream Energy Services LLC

On October 24, 2019, the CFTC filed and settled charges against Upstream Energy Services LLC (Upstream) for acting as an unregistered futures commission merchant (FCM).¹³⁶ The CFTC’s order found that between April 2017 and September 2018, Upstream accepted orders from two clients to trade natural gas commodity futures and options on NYMEX even though it had never registered with the CFTC.¹³⁷ According to the order, “Upstream accepted money (or extended credit in lieu thereof) and provided margin for the transactions on behalf of its clients and was later reimbursed by its clients.”¹³⁸ In addition, the CFTC concluded that the company acted as an FCM because it received “compensation for its services in connection with the futures and options orders and transactions.”¹³⁹ The order assessed a civil money penalty of \$75,000.¹⁴⁰

132. *Id.*

133. *Id.*

134. Notification of Docket Entry at 1, CFTC v. Kraft Foods Group Inc. et al., (N.D. Ill. Oct. 23, 2019) (No. 1:15-cv-02881).

135. *Id.*

136. In re Upstream Energy Services LLC, CFTC No. 20-03 (Oct. 24, 2019).

137. *Id.*

138. *Id.*

139. In re Upstream Energy Services LLC, CFTC N. 20-03 (Oct. 24, 2019).

140. *Id.*

B. CFTC Division of Enforcement First Public Enforcement Manual

On May 8, 2019, the CFTC’s Division of Enforcement (Division) publicly released its first Enforcement Manual (CFTC Manual).¹⁴¹ The CFTC Manual provides guidance to the Division’s staff with respect to “detecting, investigating, and prosecuting violations of the Commodity Exchange Act” (CEA) and CFTC Regulations.¹⁴² The publication of the CFTC Manual is part of a broader effort by the CFTC to increase the transparency and consistency across enforcement matters.¹⁴³ In a statement on the release of the Manual, the Division’s Director James McDonald explained that “[o]ur Manual aims to increase the level of clarity and transparency in our work. Clarity and transparency in our policies should promote fairness, increase predictability, and enhance respect for the rule of law. We expect the publication of our Manual to advance these goals going forward.”¹⁴⁴

The CFTC Manual is divided into eleven sections.¹⁴⁵ It starts with an overview of the CFTC, the CEA, CFTC Regulations, and the Division.¹⁴⁶ The following sections focus on the policies and procedures applied during the lifecycle of a CFTC investigation—from the Division’s intake of leads through its conduct of preliminary inquiries and investigations to its policy on closing letters and litigation.¹⁴⁷ For example, the CFTC Manual outlines the procedures for informing individuals “who may be named in a proposed enforcement action of the nature of the allegations against them before the action is filed,” commonly referred to as a “Wells Notice.”¹⁴⁸ The litigation section provides detail on the types of relief available to the CFTC in civil injunctive actions in Federal Court and administrative enforcement proceedings, along with the Division’s settlement procedures.¹⁴⁹

The second half of the CFTC Manual provides an overview of the various tools available to the CFTC in carrying out their duties and their procedures for

141. COMMODITY FUTURES TRADING COMM’N, ENFORCEMENT MANUAL (2019), <https://www.cftc.gov/media/1966/download>.

142. *Id.*

143. Press Release, CFTC, CFTC’s Division of Enforcement Issues First Public Enforcement Manual (May 8, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7925-19>.

144. *Id.*

145. *See generally* COMMODITY FEATURES TRADING COMM’N, *supra* note 141.

146. *Id.* at 1-5.

147. *Id.* at 5-29.

148. *See id.* at 18 (citing Appendix A to Part 11 of the Regulations, 17 C.F.R. pt. 11 app. A).

149. *Id.* at 22-29.

working with companies, individuals, and other agencies.¹⁵⁰ This includes an outline of how the Division considers self-reporting, cooperation, and remediation while conducting investigations and enforcement actions.¹⁵¹ The CFTC Manual also provides a summary of the privileges available to all parties, such as attorney-client privilege and the Fifth Amendment privilege against self-incrimination.¹⁵² The CFTC Manual closes with a description of the CFTC's Whistleblower Program, how to qualify, the protections available, and how information received through the program is processed.¹⁵³

The CFTC Manual is similar to the manual published by the SEC.¹⁵⁴ Much like the SEC's, the CFTC's Manual reflects only the views of the Division—not the CFTC as an agency or its individual commissioners—and does not “create any rights, substantive or procedural, enforceable by any party in any matter, civil or criminal.”¹⁵⁵

III. THE PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

During 2019, the PHMSA initiated 223 pipeline safety enforcement actions, an increase from the 173 cases the agency initiated in 2018.¹⁵⁶ Despite the increase in enforcement actions, PHMSA proposed \$3,904,000 in total civil penalties in 2019, a decrease from the \$7,058,000 proposed in 2018.¹⁵⁷ In addition, enforcement orders issued by the PHMSA in 2019 increased over those issued in 2018 from eighty-one orders issued in 2018 to 109 in 2019.¹⁵⁸

A. *Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfiguration, Expansion of Assessment Requirements, and Other Related Amendments*

On October 1, 2019, the PHMSA issued a final rule amending the Federal Pipeline Safety Regulations in 49 C.F.R. Parts 191 and 192 in order “to improve

150. COMMODITY FEATURES TRADING COMM'N, *supra* note 141, at 29-52.

151. *Id.* at 29-33.

152. *Id.* at 38-40.

153. *Id.* at 49-52.

154. SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL (2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. In contrast, FERC has never publicly released its enforcement procedures.

155. COMMODITY FEATURES TRADING COMM'N, *supra* note 141, at ii.

156. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIVITY – NATIONWIDE (2019), <https://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html>.

157. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF CASES INVOLVING CIVIL PENALTIES (2019), https://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html?nocache=7670.

158. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIONS (2019), https://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html?nocache=7732#_TP_1_tab_2.

the safety of onshore gas transmission pipelines.”¹⁵⁹ The PHMSA explained that its final rule focuses on integrity management requirements.¹⁶⁰ In addition, the final rule details the

(1) required actions operators must take to reconfirm the maximum allowable operating pressure of previously untested natural gas transmission pipelines and pipelines lacking certain material or operational records; (2) periodic assessments of pipelines in populated areas not designated as “high consequence areas;” (3) reporting exceedances of maximum allowable operating pressure; (4) consideration for seismicity as a risk factor in integrity management; (5) safety features on in-line inspection launchers and receivers; (6) a six-month grace period for seven-calendar-year integrity management reassessment intervals; and (7) related recordkeeping provisions.¹⁶¹

The PHMSA announced that the final rule will become effective on July 1, 2020.¹⁶²

B. Pipeline Safety Safety of Hazardous Liquid Pipelines

On October 1, 2019, the PHMSA issued a final rule amending the Federal Pipeline Safety Regulations in 49 C.F.R. Part 195 that govern the use of Transportation of Hazardous Liquids by Pipeline.¹⁶³ The PHMSA explained that its final rule was issued in response to significant hazardous liquid pipeline accidents in recent years in order to improve the safety of pipelines transporting hazardous liquids.¹⁶⁴ The final rule will become effective on July 1, 2020.¹⁶⁵

In general, the rule expands the existing regulations under Part 195 to address risks to pipelines outside of environmentally sensitive and populated areas, requiring integrity assessments and leak detection for all pipelines (subject to certain

159. Final Rulemaking, *Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfiguration, Expansion of Assessment Requirements, and Other Related Amendments*, 84 Fed. Reg. 52,180 (2019) (to be codified at 49 C.F.R. pts. 191, 192).

160. *Id.* at 52,180.

161. *Id.*

162. *Id.*

163. Final Rulemaking, *Pipeline Safety: Safety of Hazardous Liquid Pipelines*, 84 Fed. Reg. 52,260 (2019) (to be codified at 49 C.F.R. pt. 195).

164. *Id.* at 52,260.

165. *Id.*

exceptions).¹⁶⁶ In addition, the rule changes existing integrity management requirements (including data integration) and emphasizes the use of inline inspection technology.¹⁶⁷ More specifically, the final rule

(1) extends reporting requirements to certain hazardous liquid gravity and rural gathering lines; (2) requires pipeline inspections in areas affected by extreme weather and natural disasters; (3) requires integrity assessments at least every ten years of onshore hazardous liquid pipeline segments located outside of high consequence areas and that can accommodate in-line inspection devices; (4) extends the use of leak detection systems beyond high consequence areas to all regulated, non-gathering hazardous liquid pipelines; and (5) requires that all pipelines in or affecting high consequence areas be capable of accommodating in-line inspection tools within twenty years, with some exceptions.¹⁶⁸

C. Pipeline Safety: Enhanced Emergency Order Procedures

On October 1, 2019, the PHMSA issued a final rule implementing emergency order authority conferred on the Secretary of Transportation by the “Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016.”¹⁶⁹ The PHMSA adopted, with modifications, its October 14, 2016 Interim Final Rule that established various procedures for the PHMSA to issue emergency orders to prevent an imminent hazard to public health and safety or the environment.¹⁷⁰ Under the final rule, these imminent hazard circumstances include unsafe conditions or practices that present a “substantial likelihood” that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment will occur before the agency has an opportunity to complete a formal proceeding that would lessen the risk.¹⁷¹

Under the final rule, the PHMSA may issue an emergency order that can impose various “restrictions,” “prohibitions,” or “safety measures” on owners and operators of gas or hazardous liquid pipeline facilities, without advance notice or opportunity for hearing.¹⁷² The PHMSA clarified that any such emergency order must be “tailored to abate the imminent hazard.”¹⁷³ In addition to describing the duration and scope of such emergency orders, the PHMSA’s final rule also pro-

166. *Id.*

167. *Id.*

168. *Id.* at 52,260.

169. Final Rulemaking, *Pipeline Safety: Enhanced Emergency Order Procedures*, 84 Fed. Reg. 52,015 (2019) (to be codified at 49 C.F.R. pt. 190).

170. *Id.* at 52,015.

171. *Id.* at 52,026.

172. *Id.* at 52,016.

173. *Id.* at 52,024.

vides the mechanisms by which pipeline owners and operators subject to, and aggrieved by, emergency orders can seek administrative or judicial review.¹⁷⁴ The PHMSA's final rule became effective December 2, 2019.¹⁷⁵

D. Pipeline Safety: Exercise of Enforcement Discretion Regarding Farm Taps

On March 26, 2019, the PHMSA announced its exercise of enforcement discretion with regard to certain portions of its regulations pertaining to farm taps (i.e., individual service lines directly connected to transmission, gathering, or production pipelines).¹⁷⁶ Specifically, the PHMSA explained that it would not take enforcement action against operators who forego the maintenance and inspection requirements the PHMSA previously established on January 23, 2017 in its final rule titled, "Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes."¹⁷⁷ Instead, those operators may mitigate any future risk associated with farm taps through compliance with the PHMSA's existing Distribution Integrity Management Program regulations.¹⁷⁸ The PHMSA noted that its announced discretion was effective immediately, March 26, 2019.¹⁷⁹

IV. THE DEPARTMENT OF ENERGY

The Office of Enterprise Assessments (EA) supports the [DOE's] mission priorities and strategic plan for the secure and safe operation of the nuclear weapons complex, science and energy research, and environmental cleanup activities.¹⁸⁰ The EA "conduct[s] independent assessments of [] security and safety performance" throughout the DOE, "holding contractors accountable for violations of security and safety regulations."¹⁸¹ The EA also "provid[es] training programs

174. 84 Fed. Reg. 52,015, at 52,027.

175. *Id.* at 52,015.

176. Final Rulemaking, *Pipeline Safety: Exercise of Enforcement Discretion Regarding Farm Taps*, 84 Fed. Reg. 11,253 (2019) (to be codified at 49 C.F.R. pts. 192).

177. *Id.*

178. *Id.*

179. *Id.*

180. DEP'T OF ENERGY, MISSION, <https://www.energy.gov/ea/mission> (last visited Mar. 3, 2020).

181. *Id.*

that institutionalize enterprise security and safety lessons learned.”¹⁸² In addition, EA has been designated to implement congressionally authorized contractor enforcement programs pertaining to classified information security, nuclear safety, and worker safety and health.¹⁸³ During 2019, the DOE EA’s Office of Enforcement did not settle any enforcement proceedings initiated under 10 C.F.R. Parts 820, 824, and 851.¹⁸⁴

A. Nuclear Safety Enforcement (10 C.F.R. Pt. 820)

The Office of Nuclear Safety Enforcement implements the Department’s nuclear safety enforcement program in accordance with 10 C.F.R. Pt. 820, *Procedural Rules for DOE Nuclear Activities*, as authorized by the Atomic Energy Act.¹⁸⁵ In 2019, the Office of Nuclear Safety issued four Notice of Investigation Letters and one Notice of Violation.¹⁸⁶

B. Security Enforcement (10 C.F.R. Pt. 824)

“The Office of Security Enforcement implements the Department’s classified information security enforcement program in accordance with 10 C.F.R. Pt. 824, *Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations*, as authorized by the Atomic Energy Act.”¹⁸⁷ In 2019, the Office of Nuclear Safety issued one Notice of Investigation Letters, one Enforcement Letter, and one Notice of Violation.¹⁸⁸

C. Worker Safety and Health Enforcement (10 C.F.R. Pt. 851)

The Office of Worker Safety and Health Enforcement implements the Department’s worker safety and health enforcement program in accordance with 10 C.F.R. Part 851, *Worker Safety and Health Program*, as authorized by the Atomic

182. *Id.*

183. *Id.*

184. See generally DEP’T OF ENERGY, CONSENT ORDERS AND SETTLEMENT AGREEMENTS, <https://www.energy.gov/ea/listings/consent-orders-and-settlement-agreements> (last visited Mar. 3, 2020).

185. DEP’T OF ENERGY, OFFICE OF NUCLEAR SAFETY ENFORCEMENT, MISSION, <https://www.energy.gov/ea/office-nuclear-safety-enforcement> (last visited Mar. 3, 2020).

186. DEP’T OF ENERGY, NOTICE OF INVESTIGATION LETTERS, <https://www.energy.gov/ea/listings/notice-investigation-letters> (last visited Mar. 4, 2020); DEP’T OF ENERGY, NOTICES OF VIOLATION, <https://www.energy.gov/ea/listings/notices-violation> (last visited Mar. 4, 2020).

187. DEP’T OF ENERGY, OFFICE OF ENFORCEMENT, ENFORCEMENT, <https://www.energy.gov/ea/services/enforcement> (last visited Mar. 4, 2020).

188. DEP’T OF ENERGY, OFFICE OF ENTERPRISE ASSESSMENTS, ENFORCEMENT LETTERS, <https://www.energy.gov/ea/listings/enforcement-letters> (last visited Mar. 4, 2020).

Energy Act.¹⁸⁹ In 2019, the Office of Nuclear Safety issued four Notice of Investigation Letters, two Enforcement Letters, and one Notice of Violation.¹⁹⁰

V. THE DEPARTMENT OF JUSTICE

A. *Energy-Related Investigations*

1. B. Charles Rogers Gas Ltd.

On December 11, 2019, the DOJ announced that, B. Charles Rogers Gas Ltd. (BCR), along with its owners Bill Charles Rogers Jr. and Wynon Rogers, “agreed to pay \$3.575 million to resolve” various allegations under the False Claims Act that they fraudulently reduced mineral royalty payments to the U.S.¹⁹¹ Additionally, the DOJ announced that “Thomas R. Lutner III of [] Texas, who worked with BCR while employed as a gas supply manager at a natural gas distributor,” agreed to pay \$800,000 for his role in BCR’s alleged royalty fraud.¹⁹² The DOJ claimed that “BCR, at the direction of Mr. and Mrs. Rogers and Mr. Lutner, issued . . . false transaction statements” to producers as part of BCR’s gas purchases as a gas marketer in the San Juan Basin of New Mexico and southern Colorado.¹⁹³ By issuing “statements [that] allegedly underreported the volume and value of natural gas liquids that BCR purchased,” the DOJ claimed that several producers with federal gas leases in the area underpaid royalties owed to the U.S. for the underlying gas removed from those leases.¹⁹⁴

2. Matthew Taylor

On March 22, 2019, the DOJ announced that Matthew Taylor pled guilty in the U.S. District Court for the District of Colorado for conspiracy to defraud the U.S., conspiracy to commit money laundering, and money laundering as part of a fraudulent scheme in which “Taylor and co-conspirators . . . fil[ed] false claims

189. ENFORCEMENT, *supra* note 187.

190. ENFORCEMENT LETTERS, *supra* note 188.

191. Press Release, U.S. Dep’t of Justice, Jury Finds Pennsylvania Biofuel Company Owners Guilty of Tax and False Statements Conspiracy (May 1, 2019), <https://www.justice.gov/opa/pr/gas-marketer-b-charles-rogers-gas-and-three-individuals-agree-pay-4375-million-resolve>.

192. *Id.*

193. *Id.*

194. *Id.*

for tax credits under a federal program” regarding the “production and use of renewable fuels.”¹⁹⁵ According to the DOJ, Taylor created a fake company, Shintan Inc. (Shintan) that claimed it created renewable fuels.¹⁹⁶ “Taylor and co-conspirators filed [false] claims with the IRS for over \$7.2 million in tax credits” from 2010 to 2013, even though Shintan produced no qualifying renewable fuel.¹⁹⁷ “Taylor and co-conspirators transferred the fraudulently obtained [credits] through bank accounts belonging to Shintan and other shell companies” in order to avoid detection.¹⁹⁸

3. Alpha Bioenergy LLC

On October 22, 2019, the DOJ announced that Chandra Yarlagadda, owner and operator of Alpha Bioenergy LLC (Alpha), formerly known as Naturol Bioenergy LLC, pleaded guilty to filing a false income tax return after he substantially overstated expenses associated with the purchase of Renewable Identification Numbers from 2009 to 2011 as part of Alpha’s purchase and sale of biodiesel fuel.¹⁹⁹ In total, Yarlagadda falsely reported expenses of over \$14.2 million, instead of approximately \$800,000.²⁰⁰ Yarlagadda also avoided paying \$2.3 million in additional income taxes by claiming the inflated expenses.²⁰¹ As part of his plea agreement, Yarlagadda agreed to pay \$2,310,948 in restitution to the IRS.²⁰²

4. Sunoco Pipeline L.P.

On January 30, 2019, the DOJ, along with the EPA and the Louisiana Department of Environmental Quality (LDEQ), jointly announced that Sunoco Pipeline L.P. (Sunoco) agreed to pay civil penalties and state enforcement costs and to implement corrective measures to resolve alleged violations of the Clean Water Act and state environmental laws stemming from three separate crude oil spills that occurred in Texas (2013), Louisiana (2014), and Oklahoma (2015), respectively.²⁰³ According to the announcement, Sunoco will pay \$5 million in

195. Press Release, U.S. Dep’t of Justice, Jury Finds Pennsylvania Biofuel Company Owners Guilty of Tax and False Statements Conspiracy (Apr. 23, 2019), <https://www.justice.gov/opa/pr/jury-finds-pennsylvania-bio-fuel-company-owners-guilty-tax-and-false-statements-conspiracy>.

196. *Id.*

197. *Id.*

198. *Id.*

199. Press Release, U.S. Dep’t of Justice, Michigan Biodiesel Dealer Pleads Guilty to Tax Fraud (Oct. 22, 2019), <https://www.justice.gov/opa/pr/michigan-biodiesel-dealer-pleads-guilty-tax-fraud>.

200. *Id.*

201. *Id.*

202. *Id.*

203. Press Release, U.S. Dep’t of Justice, Sunoco Pipeline LP to Pay More Than \$5.4 Million and Take Oil-Spill Prevention Steps to Settle Claims for Pipeline Spills in Three States, (Jan. 30, 2019), <https://www.justice.gov/opa/pr/sunoco-pipeline-lp-pay-more-54-million-and-take-oil-spill-prevention-steps-settle-claims>.

federal civil penalties, along with \$436,274 to LDEQ for additional civil penalties and response costs.²⁰⁴ Sunoco also agreed to a variety of different actions and procedures designed at preventing future spills, including pipeline inspections and repairs, along with other actions that would prevent, identify, and remediate the types of problems (corrosion) that caused the spills in 2013, 2014, and 2015.²⁰⁵

5. ExxonMobil Oil Corporation

On March 6, 2019, the DOJ, along with the EPA, jointly announced that ExxonMobil Oil Corporation (ExxonMobil) agreed to pay a \$616,000 civil penalty and take other actions as part of a settlement to resolve alleged violations of federal Clean Air Act provisions associated with an April 17, 2013, fire at ExxonMobil's oil refinery in Beaumont, Texas that killed two employees and injured ten others.²⁰⁶ According to the announcement, the 2013 fire began when ExxonMobil workers used a torch to remove bolts from the top of a heat exchanger.²⁰⁷ The torch used in the incident ignited hydrocarbons released from the top of the heat exchanger.²⁰⁸ As part of the settlement, ExxonMobil will hire a third party auditor to review ExxonMobil's procedures for opening process equipment at ten different process units at the Beaumont refinery.²⁰⁹ ExxonMobil will also purchase a hazardous materials Incident Command Vehicle for the Beaumont Fire & Rescue Service.²¹⁰

B. Other

1. The DOW Chemical Company

On November 8, 2019, the DOJ announced that, along with the State of Michigan and the Saginaw Chippewa Indian Tribe of Michigan, it had reached a

204. *Id.*

205. *Id.*

206. Press Release, U.S. Dep't of Justice, ExxonMobil to Pay Civil Penalty and Take Remedial Measures to Resolve Clean Air Act Violations Stemming from Deadly Fire at Texas Refinery (Mar. 6, 2019), <https://www.justice.gov/opa/pr/exxonmobil-pay-civil-penalty-and-take-remedial-measures-resolve-clean-air-act-violations>.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

settlement with The Dow Chemical Company (Dow) to fund approximately \$77 million in natural resource reclamation projects to help compensate for various injuries to natural resources caused by the releases of hazardous substances from Dow's Midland, Michigan facility.²¹¹ According to DOJ's underlying complaint in the case, "Dow released dioxin-related compounds and other hazardous substances" that negatively "affected fish, invertebrates, birds and mammals, contributed to the adoption of multiple health advisories to limit consumption of certain wild game and fish, and resulted in soil contact advisories in certain areas."²¹² As part of the settlement, Dow will fund and implement eight specific restoration projects to help restore natural resources, pay \$6.75 million for a designated restoration account to fund five separate projects, and pay another \$15 million to be used for various purposes, including \$5 million that must be used to support future natural resource restoration projects.²¹³

2. NCR Corp.

On December 11, 2019, the DOJ announced that, along with the EPA, the Kalamazoo River Natural Resource Trustee Council, and the Michigan Department on Environment, Great Lakes, and Energy, it had proposed a consent decree requiring NCR Corporation to clean up and fund future actions regarding the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site.²¹⁴ According to DOJ's announcement, the superfund site is divided into six different segments that require cleanup.²¹⁵ As part of the agreed-upon settlement, "NCR Corporation has agreed to spend approximately \$137.5 million cleaning up three areas" within one of the superfund site segments.²¹⁶ In addition, NCR Corporation has agreed to pay \$76.5 million to the EPA in support of river cleanup activities; \$27 million for natural resources damage assessment and claims; and \$6 million to the State of Michigan for past and future costs.²¹⁷

211. Press Release, U.S. Dep't of Justice, Settlement Reached With Dow Chemical Co. to Restore Natural Resources in Three Mid-Michigan Counties (Nov. 8, 2019), <https://www.justice.gov/opa/pr/settlement-reached-dow-chemical-co-restore-natural-resources-three-mid-michigan-counties>.

212. *Id.*

213. *Id.*

214. Press Release, U.S. Dep't of Justice, EPA and Justice Department Announce \$245 Million Agreement for Cleanup at the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund Site (Dec. 11, 2019), <https://www.justice.gov/opa/pr/epa-and-justice-department-announce-245-million-agreement-cleanup-allied-paper-incportage>.

215. *Id.*

216. *Id.*

217. *Id.*

3. Ben T. Wootton and Race A. Miner, co-owners of Keystone Biofuels Inc.

On April 23, 2019, a jury in Harrisburg, Pennsylvania found that Ben T. Wootton and Race A. Miner, co-owners of Keystone Biofuels Inc. (Keystone), were guilty of various charges, including six counts of making false statements to the EPA, one count of conspiracy to make false statements to the EPA, and one count of conspiracy to defraud the IRS after they fraudulently generated renewable fuel credits and claimed corresponding tax refunds based on the Biodiesel Mixture Tax Credit.²¹⁸

Based on evidence presented by the DOJ, Wootton and Miner co-owned and operated Keystone, which purported to be a producer and seller of biodiesel.²¹⁹ “From August 2009 through September 2013, Wootton and Miner ‘participated in a conspiracy to fraudulently generate renewable fuel credits . . . through January 2012, fraudulently claim tax refunds based on the Biodiesel Mixture Tax Credit, a federal excise tax credit for persons or businesses or individuals who mix biodiesel with petroleum and use or sell the mixture as fuel.’”²²⁰ Wootton and Miner also reported inflated fuel amounts to the IRS to support their claims for tax refunds.²²¹ The DOJ also claimed during trial that Wootton and Miner falsified books and records to account for the inflated fuel amounts, and doctored fuel samples and test results for fuel that did not meet the requisite standards to qualify for the Biodiesel Mixture Tax Credit.²²² The DOJ estimated that the fraudulent sales totaled more than \$10 million, resulting in a tax loss to the government of approximately \$4.15 million.²²³

4. United States of America v. David M. Dunham, Jr.

On May 1, 2019, a federal jury in Reading, Pennsylvania, for the Eastern District of Pennsylvania, convicted David M. Dunham Jr., owner of Smarter Fuels,

218. Press Release, U.S. Dep’t of Justice, Green Energy Fraudster Convicted at Trial for Scamming Multiple Federal Agencies, Customers (Apr. 23, 2019), <https://www.justice.gov/usao-edpa/pr/green-energy-fraudster-convicted-trial-scamming-multiple-federal-agencies-customers>.

219. *Id.*

220. *Id.*

221. *Id.*

222. Press Release, *supra* note 218.

223. *Id.*

for various charges, including conspiracy to commit wire fraud and defraud the U.S.; wire fraud; filing false tax documents; and obstruction of justice, based on Dunham's fraudulent claims for renewable tax credits in his "green energy" business.²²⁴ In total, Dunham was convicted of fifty-four charges and acquitted on a single count of filing a false tax return.²²⁵ Dunham was previously indicted for the underlying claims in 2015.²²⁶

Based on evidence presented by the DOJ, Dunham used Smarter Fuels to fraudulently apply for, receive, and sell renewable biofuel credits from approximately 2010 to 2015.²²⁷ During this time, Dunham obtained \$50 million in fraudulent revenue from the Renewable Fuel Standard Program.²²⁸ Apart from Dunham, Ralph Tomasso, a co-defendant in the underlying case, previously pleaded guilty to conspiracy to defraud federal programs.²²⁹

224. *Id.*

225. Peter Hall, *Bethlehem biofuel entrepreneur convicted in renewable energy fraud trial*, THE MORNING CALL (May 1, 2019), <https://www.mcall.com/news/police/mc-nws-bethlehem-renewable-energy-entrepreneur-fraud-trial-verdict-20190501-3tuewlsjcjemp4c62vfmzvtwy-story.html>.

226. *Id.*

227. Press Release, *supra* note 218.

228. *Id.*

229. *Id.*

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