# REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report summarizes key federal enforcement and compliance developments in 2020, 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 19, 2020, the FERC Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff activities during the fiscal year 2020 that, as in past years, identified its priorities as focusing on: (1) fraud and market manipulation; (2) serious violations of the Reliability Standards; (3) anti-competitive conduct; and (4) conduct that threatened the transparency of regulated markets.[1]

In pursuit of these priorities, Enforcement Staff opened six new investigations in fiscal year 2020, down from twelve investigations in 2019, while bringing eight pending investigations to closure with no action.[2] In addition, En-

1. FEDERAL ENERGY REGULATORY COMMISSION, 2020 REPORT ON ENFORCEMENT 6 (Nov. 19, 2020) (Docket No. AD07-13-014).

2. *Id.* at 7.

forcement resolved three cases through settlement, obtaining $437,500 in civil penalties and disgorgement of $115,876 in unjust profits.[3] Enforcement's penalty and disgorgement amounts were significantly lower than the $7.4 million and $7 million, respectively, assessed in 2019.[4]

2. Coronavirus Update: FERC Acts to Help Regulated Entities Manage Compliance

On April 2, 2020, FERC issued a news release outlining then-Chairman Chatterjee's proposed steps to proactively "help regulated entities manage their potential enforcement and compliance-related burdens during the COVID-19 pandemic."[5] The news release stated that Enforcement staff would take the COVID-19 pandemic into account when evaluating compliance programs and in assessing the timeliness of self-reports. The Chairman announced the creation of two Commission staff task forces to expeditiously process standards of conduct waiver requests and no-action letters. The statement further "confirmed that the pandemic qualifie[d] as an emergency, triggering the suspension of certain standards of conduct posting requirements in the Commission's regulations."[6]

3. Staff Review of NERC Enforcement Programs

On September 21, 2020, FERC released its summary of staff's annual oversight review of the North American Electric Reliability Corporation (NERC), Find, Fix, Track and Report (FFT), and Compliance Exception (CE) programs.[7] FERC staff reviewed a sample of twenty-four FFT possible violations out of 102 total FFT possible violations posted by NERC between October 2018 and September 2019. Staff also reviewed a sample of thirty-eight CE instances of noncompliance out of 957 total CE instances of noncompliance posted by NERC during the same time period. FERC staff concluded that the FFT and CE programs are generally meeting expectations.

4. Second Joint FERC-NERC Staff White Paper on Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards

On September 23, 2020, FERC and NERC issued a Second Joint Staff White Paper on Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards (Second White Paper).[8] On August 27,

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3. *Id.*

4. FEDERAL ENERGY REGULATORY COMMISSION, 2019 REPORT ON ENFORCEMENT 8 (Nov. 21, 2019) (Docket No. AD07-13-013).

5. Press Release, FERC, CORONAVIRUS UPDATE: FERC ACTS TO HELP REGULATED ENTITIES MANAGE COMPLIANCE, (Apr. 2, 2020) https://www.ferc.gov/news-events/news/coronavirus-update-ferc-acts-help-regulated-entities-manage-compliance.

6. *Id.*

7. Notice of Orders, *North American Electric Reliability Corporation; Notice of Staff Review of Enforcement Programs*, 85 Fed. Reg. 59,299 (2020).

8. FEDERAL ENERGY REGULATORY COMMISSION, SECOND JOINT STAFF WHITE PAPER ON NOTICES OF PENALTY PERTAINING TO VIOLATIONS OF CRITICAL INFRASTRUCTURE PROTECTION RELIABILITY STANDARDS (Sept. 23, 2020) (Docket No. AD19-18-000) [hereinafter SECOND JOINT STAFF WHITE PAPER].

2019, the FERC and NERC had issued a joint White Paper (First White Paper) containing a proposal regarding NERC's submission, and the Commission's processing, of Notices of Penalty (NOPs) for violations of Critical Infrastructure Protection (CIP) Reliability Standards.[9] The First White Paper proposed that CIP NOP submissions would consist of a public cover letter that discloses the name of the violator, the CIP Reliability Standard(s) violated, and the penalty amount.[10] Under the proposal, NERC would submit the remainder of the CIP NOP filing as a nonpublic attachment along with a request that such information be designated Critical Energy/Electric Infrastructure Information (CEII).[11] The First White Paper invited comments on the proposal. These comments were reviewed in the Second White Paper.

The Second White Paper concluded that because of the tangible risks of publishing CIP information, the First White Paper proposal is "insufficient to protect the security of the Bulk-Power System and does not implement the Commission's full legal authority to shield such information from public disclosure."[12] The Second White Paper explained that "[w]hile the First Joint White Paper proposal sought to strike a balance between security and transparency, the comments demonstrate[d] that the disclosure of CIP noncompliance information risks the security of the Bulk-Power System."[13] FERC and NERC determined that, going forward, CIP noncompliance filings and submittals by NERC will request that the entire filing or submittal be treated as CEII and Commission staff will designate such filings and submittals as CEII in their entirety.[14] Additionally, NERC will no longer publicly post redacted versions of the CIP noncompliance filings and submittals.

5. Final Rule on Civil Monetary Inflation Adjustments

On January 2, 2020, FERC issued Order No. 865, its Final Rule on Civil Monetary Penalty Inflation Adjustments.[15] FERC indicated that the Federal Civil Penalties Inflation Adjustment Act of 1990,[16] as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act),[17] required each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty within the agency's jurisdiction.[18] FERC stated that the 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

9. *Id.* at 2.

10. *Id.*

11. *Id.*

12. SECOND JOINT STAFF WHITE PAPER, *supra* note 8.

13. *Id.* at 5.

14. *Id.* at 2.

15. Order No. 865*, Civil Monetary Penalty Inflation Adjustments*, 170 F.E.R.C. ¶ 61,001 (2020).

16. 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).

17. Federal Civil Penalties Inflation Act Adjustment Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015).

18. Order No. 865, *supra* note 15, at P 2.

thereafter.[19] FERC indicated that Order No. 865 is intended to implement the annual adjustment.[20]

The Energy Policy Act of 2005[21] 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.[22] FERC concluded that applying the requisite inflation adjustments resulted in a maximum civil penalty of $1,291,894 per violation.[23] FERC also adjusted other civil monetary civil penalties it is authorized to assess under these and other statutes.[24] Order No. 865 became effective January 14, 2020, the date it was published in the Federal Register.[25]

*B. Requests Regarding Enforcement and Investigations*

1. Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.

On March 19, 2020, FERC denied rehearing of a July 2019 order (the July 2019 Order)[26] dismissing complaints regarding the conduct of certain capacity sellers in Local Resource Zone 4 in connection with the Midcontinent Independent System Operator, Inc. (MISO) 2015/16 Planning Resource Auction.[27]

In MISO's 2015/2016 auction, the clearing price for Zone 4 was $150/MW-day, significantly higher than that zone's prior year clearing price of $16.75/MW-day.[28] Following the auction, Public Citizen, Inc. (Public Citizen) and other complainants alleged to various extents that this rate increase may have been caused by: (1) unjust and unreasonable Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) rules governing MISO's Auction process; (2) illegal market manipulation by Dynegy Inc. (Dynegy); and/or (3) the exercise of market power by Dynegy, which had become a pivotal supplier following its acquisition of certain generating resources in Zone 4.[29]

In its initial December 2015 order, FERC addressed the portions of the complaints relating to MISO's tariff explaining that its Office of Enforcement was investigating whether market manipulation had occurred before or during

19. *Id.*
20. *Id.* at P 1.
21. Energy Policy Act of 2005, 109 Pub. L. No. 109-58, 119 Stat. 594.
22. *See* 16 U.S.C. § 825o-1(b) (2005); 15 U.S.C. § 717t-1(a) (2005); 15 U.S.C. § 3414(b)(6)(A)(i) (2005).
23. Order No. 865, *supra* note 15, at P 8.
24. *Id.*
25. *Id.* at P 15; *see also* Final Rulemaking, *Civil Monetary Penalty Inflation Adjustments*, 85 Fed. Reg. 2016 (2020) (to be codified at 18 C.F.R. pts. 250, 385).
26. *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 F.E.R.C. ¶ 61,042 (2019) [hereinafter July 2019 Order].
27. *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc*., 170 F.E.R.C. ¶ 61,227, at PP 1-2 (2020) [hereinafter March 2020 Order].
28. March 2020 Order, *supra* note 27, Glick Dissent at P 5, n.15 (citing July 2019 Order, *supra* note 26, at P 5).
29. *Id.* at PP 1-2.

the 2015/2016 auction.[30] The July 2019 Order stated that the Office of Enforcement's investigation had been closed and that, based on the investigation, the conduct at issue did not violate rules against market manipulation.[31] FERC also found that the results of the auction were just and reasonable.[32] Then-Commissioner Glick's dissent to the July 2019 Order focused on the fact that the Office of Enforcement's investigation had been unilaterally closed by then-Chairman Chatterjee.[33]

One of the complainants, Public Citizen, requested rehearing of FERC's July 2019 Order.[34] In addition to contesting FERC's conclusion that the auction results were just and reasonable, Public Citizen challenged FERC's determination regarding market manipulation, arguing that the Commission failed to explain its conclusion and improperly relied on the non-public, unilaterally terminated Office of Enforcement investigation.[35]

FERC denied Public Citizen's request for rehearing, emphasizing that "the Commission has discretion on whether and how to explore the possibility that market manipulation has occurred" and, in this case, "the Commission reasonably exercised its discretion."[36] FERC further explained that "Public Citizen both in its complaint and on rehearing fails to accurately articulate and address the definition of 'market manipulation' in the [Federal Power Act]" and "has not met its burden as a complainant to demonstrate that activity meeting that definition occurred and resulted in rates that are unjust and [un]reasonable."[37] FERC concluded by affirming that:

> the results of the 2015/2016 Auction were just and reasonable because Dynegy's bids were authorized under a valid market-based rate tariff and because, as noted in the July 2019 Order, the bids complied with the terms of the MISO Tariff, which had been approved by the Commission and were in effect at the time of the 2015/16 Auction.[38]

Then-Commissioner Glick again dissented, focusing on the fact that the Office of Enforcement investigation "was terminated by the Chairman without a vote by the Commission and the details of that investigation remain confidential."[39] As such, then-Commissioner Glick argued that "the Commission has at no point provided Public Citizen with an adequate response to the concerns raised in its complaint or explained why, in light of those concerns, the auction results were just and reasonable."[40] Then-Commissioner Glick also argued that "the fact that MISO and the individual market participants appear to have fol-

30. *Id*. at P 3 (citing *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 F.E.R.C. ¶ 61,385 (2015)).

31. *Id.* at PP 3-4 (citing July 2019 Order, *supra* note 26).

32. *Id.* at P 4.

33. July 2019 Order, *supra* note 26, Glick Dissent, at PP 1, 4.

34. March 2020 Order, *supra* note 27, at P 1.

35. *Id.* at P 5.

36. *Id.* at P 13.

37. *Id.* at P 14.

38. *Id.* at P 23.

39. March 2020 Order, *supra* note 27, Glick Dissent, at P 1.

40. *Id.*

lowed the relevant tariff language does not insulate them against the argument that market manipulation rendered the resulting rates unjust and unreasonable."[41]

Public Citizen on May 15, 2020, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the July 2019 Order as well as the March 2020 Order.[42] Briefing in the case is ongoing.

2. Midship Pipeline Co., LLC

On October 15, 2020, FERC addressed a request for rehearing of (a) July 30, 2019, delegated letter orders responding to individual landowner complaints alleging non-compliance with environmental conditions by Midship Pipeline Company, LLC (Midship), and (b) a July 31, 2019, delegated letter order authorizing Midship to resume construction activities.[43] In the order on rehearing, FERC declined to take further investigatory or enforcement measures.

Between March and July 2019, individual landowners filed eighteen complaints alleging that Midship was not complying with the environmental conditions in the certificate of public convenience and necessity authorizing construction of the Midcontinent Supply Header Interstate Pipeline Project in Oklahoma.[44] On July 3, 2019, the Director of FERC's Office of Energy Projects (OEP) issued a stop work order for a portion of the project due to environmental compliance concerns.[45] A designee of the Director of OEP, however, responded to landowner complaints on July 30, 2019, and on July 31, 2019, authorized Midship to resume the construction activities that had been subject to the stop work order.[46] The landowners sought rehearing of those delegated letter orders.

The landowners' request for rehearing raised both procedural and substantive arguments, all of which were rejected by the Commission.[47] While the landowners argued that they were deprived of their right to file a complaint under Rule 206 of the Commission's Rules of Practice and Procedure, FERC determined that it "appropriately referred to Commission staff the Midship Landowners' compliance allegations," explaining that "[t]he Commission's practice of referring pipeline construction and restoration compliance allegations to Commission staff enables the Commission to address these concerns in an efficient and timely manner."[48] The Commission also disagreed with the landowners' claim that the delegation of authority to the Director of OEP was improper.[49]

On the substance, FERC rejected the argument that it "erred in failing to investigate the alleged violations and in failing to either impose penalties or refer the matter to the Commission's Office of Enforcement."[50] In support of this

41. *Id.*, Glick Dissent, at P 2.
42. *Pub. Citizen, Inc. v. FERC*, No. 20-1156 (D.C. Cir., filed May 15, 2020).
43. *Midship Pipeline Co.*, 173 F.E.R.C. ¶ 61,075, at P 1 (2020).
44. *Id.* at PP 2, 5.
45. *Id.* at P 4.
46. *Id.* at P 1.
47. 173 F.E.R.C. ¶ 61,075, at PP 5-6, 10.
48. *Id.* at PP 11-12, 14.
49. *Id.* at PP 22-24.
50. *Id.* at P 25.

conclusion, FERC highlighted the Commission staff's investigation, corrective actions and remediation plans required by Commission staff, and the Commission's discretionary investigation authority.[51] FERC also determined that Commission staff acted appropriately in lifting the stop work order.[52]

Then-Commissioner Richard Glick wrote a separate concurrence, explaining that while he "ultimately agree[d] with the determinations made in this order," he believes that FERC should "redouble its efforts to accommodate landowners as they try to navigate the sometimes byzantine set of rules and regulations that can make up a FERC proceeding."[53]

3. Forensic Investigation of Flooding, Breaches at Michigan Dams

On August 11, 2020, FERC announced that it had hired an independent forensic investigation team to evaluate the May 19, 2020, flooding and breaches involving four dams near Midland, Michigan.[54] FERC explained that it retained the team "after the owner of the dams, Boyce Hydro, failed to contract with the investigators by July 13 as ordered by FERC."[55]

On December 9, 2020, FERC issued an Order to Show Cause and Notice of Proposed Penalty regarding Boyce Hydro's failure to comply with orders addressing the forensic investigation and other alleged compliance issues.[56] This order to show cause is discussed in greater detail below in section I.D.6.

*C. Enforcement Litigation and Adjudication*

1. FERC v. Vitol, Inc.

On January 6, 2020, FERC filed a complaint in the Eastern District of California against Vitol, Inc. (Vitol), and one of its traders, Federico Corteggiano, alleging that the defendants violated FPA section 222(a)[57] and the Commission's Anti-Manipulation Rule[58] by selling 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 Congestion Revenue Rights (CRRs).[59] The Commission previously ordered Vitol to pay a civil penalty of $1,515,738 and disgorge unjust profits of $1,227,143, plus applicable interest.[60] The Commission also ordered Corteggiano to pay a $1,000,000 civil penalty.[61]

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51. *Id.* at PP 25-26.

52. 173 F.E.R.C. ¶ 61,075, at PP 29-31.

53. *Id.*, Glick Concurrence.

54. Press Release, FERC, FORENSIC INVESTIGATION OF FLOODING, BREACHES AT MICHIGAN DAMS MOVES FORWARD (Aug. 11, 2020) https://www.ferc.gov/news-events/news/forensic-investigation-flooding-breaches-michigan-dams-moves-forward.

55. *Id.*

56. *Boyce Hydro Power, LLC*, 173 F.E.R.C. ¶ 61,217, at PP 1, 3 (2020).

57. 16 U.S.C. § 824v(a) (2005).

58. 18 C.F.R. § 1c.2 (2006).

59. FERC v. Vitol, Inc., No. 2:20-cv-0040, ECF 1 (E.D. Cal., Jan. 6, 2020).

60. *Vitol, Inc.*, 169 F.E.R.C. ¶ 61,070, at P 1 (2019).

61. *Id.*

On March 6, 2020, the defendants filed motions to dismiss and to stay discovery. Vitol argues that the alleged violations (1) are time-barred under the applicable statute of limitations, and (2) fail to state a manipulation claim.[62] Corteggiano joins those arguments and additionally argues that (1) the alleged violations fail to state a manipulation claim; (2) venue for a claim against him does not lie in in the Eastern District; and (3) the court lacks personal jurisdiction over him.[63] FERC opposed both motions.[64] The motions are currently pending before the court.

2. FERC v. Powhatan Energy Fund, LLC, et al.

On February 11, 2020, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding that FERC's claim for civil penalties under the FPA against Powhatan Energy Fund, LLC, and certain of its traders and affiliates (Powhatan), was not barred by the statute of limitations.[65]

On December 17, 2014, FERC had issued an Order to Show Cause directing Powhatan to demonstrate why it should not be penalized over $29 million in civil penalties and $4 million in disgorgement for alleged market manipulation violations involving fraudulent Up-To Congestion transactions in the PJM Interconnection, L.L.C. market between June 1, 2010, and August 3, 2010.[66] Powhatan elected to have the case proceed via the FPA "Alternative Option"—under which FERC assesses penalties after finding a violation has occurred and then must institute an action in federal district court if the defendant fails to pay the penalty within sixty days—rather than the FPA "Default Option"—which involves a formal hearing before an administrative law judge.[67] After Powhatan failed to pay the penalty within sixty days, FERC filed to enforce the penalty in the U.S. District Court for the Eastern District of Virginia in July 2015.[68]

The defendants moved to dismiss the claim, in part, on the ground that it was time-barred by the five-year statute of limitations because more than five years had lapsed since most of the allegedly fraudulent conduct and the filing of the complaint in District Court.[69] Reasoning that FERC's cause of action had not accrued until the defendants failed to pay the assessed penalties and disgorgement, the District Court denied the motion, but permitted the defendants to seek interlocutory appeal to the Fourth Circuit.[70]

The Fourth Circuit affirmed the District Court's denial of Powhatan's motion to dismiss.[71] The court reasoned that FERC's cause of action did not "accrue" for statute of limitations purposes until FERC had satisfied all of the "sub-

62. *FERC v. Vitol, Inc.*, 2:20-cv-0040, ECF 30 (E.D. Cal., March 6, 2020).
63. *FERC v. Vitol, Inc.*, 2:20-cv-0040, ECF 33 (E.D. Cal., March 6, 2020).
64. *FERC v. Vitol, Inc.*, 2:20-cv-0040, ECF 38 (E.D. Cal., April 21, 2020).
65. FERC v. Powhatan Energy Fund, LLC, 949 F.3d 891, 905 (4th Cir. 2020).
66. *Houlian Chen*, 149 F.E.R.C. ¶ 61,261, at p. 62,745, 62,749-50, 62,783 (2014).
67. *Powhatan Energy Fund, LLC*, 949 F.3d at 893-95.
68. *Id.* at 896.
69. *Id.*
70. FERC v. Powhatan Energy Fund, LLC, 345 F.3d 682, 711 (E.D. Va. 2018).
71. *Powhatan Energy Fund, LLC*, 949 F.3d at 905.

stantive prerequisites that Congress has placed on the right to file the underlying lawsuit."[72] The court identified several such prerequisites, including providing notice of the proposed penalty, opportunity for a public hearing, an order assessing penalties, and sixty days for the defendants to pay the penalties.[73] Therefore, the court concluded that FERC's suit in the District Court was not time barred because it was filed within five years from when Powhatan failed to pay the assessed penalties.[74] The court also rejected Powhatan's arguments that its holding would potentially leave companies forever exposed to liability because the FPA's enforcement scheme effectively requires FERC to issue an Order to Show Cause within five years of the conduct at issue.[75] Following denial of the defendants' request for rehearing and rehearing *en banc*, the case was remanded to District Court for further proceedings.[76]

### 3. FERC v. Coaltrain Energy, L.P., et al.

On November 18, 2020, the United States District Court for the Southern District of Ohio granted FERC's motion for partial summary judgment and denied the defendants' motions for summary judgment in *FERC v. Coaltrain, L.P., et al.*, a case in which FERC seeks to enforce civil penalties of $38 million and disgorgement of $4.12 million for alleged market manipulation and subsequent violation of 18 C.F.R. § 35.41(b).[77] The Court granted partial summary judgment to FERC with respect to FERC's § 35.41(b) claim and disposed of the defendants' affirmative defenses (waiver, estoppel, selective prosecution, laches, unclean hands, and fault of others).[78] It denied the defendants' motions for summary judgment with respect to liability for market manipulation.[79]

#### a. 18 C.F.R. § 35.41(b) Claim

The Court concluded that Coaltrain is liable for violating section 35.41(b) based on Coaltrain's initial failure to produce screenshots and keystroke data files captured by a computer monitoring software (Spector) used by Coaltrain.[80] To reach this conclusion, the Court rejected Coaltrain's assertion that intent to deceive is required for a section 35.41(b) violation.[81] The Court also rejected Coaltrain's argument that the ultimate production of the information initially withheld caused the omission to be immaterial, concluding that the materiality

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72. *Id.* at 897-98.
73. *Id.* at 898-99.
74. *Id.* at 905.
75. *Id.* at 901-02, 904-05.
76. FERC v. Powhatan Energy Fund, LLC, No. 18-2326, 2020 U.S. App. LEXIS 11976, at *1 (4th Cir. Apr. 15, 2020).
77. FERC v. Coaltrain Energy, L.P., No. 2:16-cv-732, 2020 WL 7767498, 2020 U.S. Dist. LEXIS 245632, at *28-29, *93-94 (S.D. Ohio Nov. 18, 2020).
78. *Id.* at *93.
79. *Id.* at *94.
80. *Id.* at *31-32, *48-49.
81. *Id.* at *32-37.

requirement applies to the information omitted and not the detrimental effect of the omission.[82]

The Court further held that diligence is an affirmative defense to a section 35.41(b) claim, placing the burden of proof on Coaltrain to demonstrate due diligence.[83] Looking to FERC's regulations and precedent in the securities fraud context, the Court explained that "[a respondent] can avoid liability if it shows that it conducted a reasonable investigation to make sure it produced the relevant and material information and followed a process to ensure the accuracy of its responses."[84] It found that Coaltrain did not meet this burden.[85]

Specifically, the Court determined that simply hiring outside counsel to aid in production does not constitute "a process to ensure data accuracy and sufficiency" as required to qualify for the due diligence defense.[86] The Court also rejected the argument that instructing employees to preserve and not destroy information reflected due diligence with respect to the production of information and rejected the argument that the definition of "documents" was unclear.[87] It also declined other arguments described by the Court as "excuses" (e.g., it not occurring to the Seller that the omitted information was responsive, employee departures, and FERC's knowledge of the use of the software).[88] Ultimately, the Court concluded that the record lacked evidence of "any processes to ensure accuracy or examples of reasonable measures [Coaltrain] took to not omit material information."[89]

#### b. Manipulation

The defendants moved for, but were denied, summary judgment on the issue of market manipulation.[90] The Court rejected the defendants' assertion that the "sole or primary purpose" standard applied by FERC to satisfy the scienter requirement needed to be included in the regulations as an element of the offense.[91] The Court found that the "sole or primary purpose" standard is a higher standard than the recklessness standard allowed, that it is a "manageable" standard, and that FERC precedent had not altered the standard.[92] Pointing to prior FERC orders on the subject and public filings by Coaltrain and another company owned by the individual defendants, the Court also found at least a dispute of fact exists regarding the defendants' notice that their conduct was impermissible.[93] Finally, with respect to the liability of the two individual defendants, the

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82. *Coaltrain Energy, L.P.*, 2020 U.S. Dist. LEXIS 245632, at *37-39.
83. *Id.* at *39-40.
84. *Id.* at *42
85. *Id.* at *42, *49.
86. *Id.* at *42-43.
87. *Coaltrain Energy, L.P.*, 2020 U.S. Dist. LEXIS 245632, at *44-46.
88. *Id.* at *46-49.
89. *Id.* at *49.
90. *Id.* at *49-65.
91. *Id.* at *53-55.
92. *Id.* at *54-62.
93. *Coaltrain Energy, L.P.*, 2020 U.S. Dist. LEXIS 245632, at *62-65.

Court found evidence of their intent and direct or indirect involvement in the prohibited scheme sufficient to deny summary judgment.[94]

c. Affirmative Defenses

The Court granted summary judgment to FERC with respect to the defendants' affirmative defenses of waiver, estoppel, selective enforcement, laches, unclean hands, and fault of others.[95]

With respect to waiver, the defendants argued that FERC conceded the defendants' conduct was permissible in litigation prior to the conduct in question, but the Court found that the prior decisions did not contradict FERC's litigation theory in the case at hand.[96] The Court also rejected the defendants' arguments that FERC is estopped from bringing the claims based on the defendants' assertions that the regional transmission operator and its independent market monitor acted as agents of FERC and mislead the defendants to believe their conduct was permissible.[97] The Court offered that the defendants are not prohibited from using such claims at trial to negate their intent.[98]

As for the equal protection claim of selective enforcement, the Court found no evidence to support a claim that FERC acted in bad faith or without any rational basis, noting that FERC brought enforcement claims against other firms similarly referred by the independent market monitor.[99] The Court also concluded laches does not apply when actions are brought by the government within the statute of limitations, and the affirmative defense of unclean hands does not apply against the government in the context of enforcement actions.[100] Finally, the Court found that the defendants "fail[ed] to provide any legal basis for their fault of others defense."[101]

4. BP America, Inc.; BP Corporation North America Inc.; BP America Production Company; and BP Energy Company

On December 17, 2020, FERC issued an order addressing arguments raised in a request for rehearing of its July 2016 opinion affirming an Administrative Law Judge's Initial Decision finding that BP America, Inc.; BP Corporation North America Inc.; BP America Production Company; and BP Energy Company (collectively, BP) violated section 4A of the NGA and the Commission's Anti-Manipulation Rule.[102] While the Commission modified its discussion on rehearing, it did not alter the result, affirming that BP is still ordered to pay \$20,160,000 in civil penalties and \$207,169 in disgorgement.[103]

94. *Id.* at *65-85.
95. *Id.* at *85-93.
96. *Id.* at *85-86.
97. *Id.* at *86-88.
98. *Id.* at *87-88.
99. *Coaltrain Energy, L.P.*, 2020 U.S. Dist. LEXIS 245632, at *88-91.
100. *Id*. at *91-93.
101. *Id*. at *93.
102. Opinion No. 549-A, *BP America Inc.*, 173 F.E.R.C. ¶ 61,239, at P 1 (2020).
103. *Id*. at Ordering Paragraphs (B), (C).

The orders arose from Enforcement's allegations "that BP engaged in uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel, and in the transportation of natural gas from Katy, Texas to Houston Ship Channel . . . in a manner that was intended to manipulate market prices and benefit related financial positions in the aftermath of Hurricane Ike" in September 2008.[104]

The order on rehearing addressed a number of arguments raised by BP, including arguments related to (a) the burden of proof; (b) whether BP engaged in manipulation based on the totality of the evidence; (c) specific acts that purportedly evidenced or furthered BP's alleged scheme to manipulate; (d) the relevant control period for purposes of statistical analysis; (e) the Commission's rejection of BP's explanations for its conduct; (f) the weight given to witness testimony; (g) issues related to scienter, including the relevance of certain phone calls, motive, and consciousness of guilt; (h) jurisdictional questions, including the use of non-jurisdictional transactions in the allegedly manipulative scheme and the jurisdictional status of BP's fixed price sales; (i) the factors supporting FERC's civil penalty assessment, including the number of violations, the amount of loss and duration, whether the alleged violations occurred within five years following an adjudication of similar misconduct, whether BP violated an injunction, and BP's compliance program; (j) the payment directives in FERC's July 2016 order, including directives regarding interest on unpaid civil penalties; and (k) FERC's compliance with the Administrative Procedure Act's separation of functions rule.[105]

The order on rehearing also addressed BP's December 11, 2017, motion to dismiss the action as time-barred based on the statute of limitations.[106] FERC concluded that "BP waived any statute of limitations defense by failing to raise it earlier in this proceeding" and, therefore, denied BP's motion.[107]

### *D. Settlements and Show Cause Orders*

#### 1. Emera Energy, Inc.

On January 10, 2020, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Emera Energy Inc. (Emera Energy).[108] The consent agreement stems from alleged violations of the ISO New England tariff and the Commission rule requiring sellers in organized markets to comply with Commission-approved rules and regulations of the applicable ISO.[109] These alleged violations relate to sixteen instances between August 2015 and November 2016, when Emera Energy supported Fuel Price Adjustment Requests for an affiliated natural gas-fired power plant with screenshots from the Intercontinental Exchange (ICE), reflecting the Emera Energy's own offers to

104. *Id*. at P 4.
105. 173 F.E.R.C. ¶ 61,239.
106. *Id.* at PP 329-49.
107. *Id*. at P 1.
108. *Emera Energy Inc.*, 170 F.E.R.C. ¶ 61,007 (2020).
109. *Id.* at P 5.

sell natural gas at the relevant pricing point.[110] The order explained that because the natural gas market at the relevant location was illiquid, Emera Energy at times was unable to provide trading platform screenshots to support its view that the cost of gas for the affiliated power plant was higher than the reference level used by the Internal Market Monitor.[111] In such situations, Emera Energy's gas desk submitted offers to ICE to sell natural gas at the subject location, which then allowed Emera Energy to provide the type of documentation needed to support its Fuel Price Adjustment Requests.[112]

Emera Energy self-reported the alleged violations on November 21, 2016.[113] Enforcement alleged that Emera Energy's conduct violated the ISO New England tariff provision requiring that evidence supporting a Fuel Price Adjustment Request reflect "an arm's length transaction."[114] Emera Energy agreed to pay a civil penalty of $5,000 and disgorgement of $14,120 plus interest.[115]

2. Exelon Generation Co., LLC

On January 10, 2020, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Exelon Generation Company, LLC (Exelon) related to Exelon's use of erroneous start-up fuel data for its Mystic 7 generating unit.[116] Mystic 7 is a dual fuel generator capable of running on either natural gas or fuel oil.[117] When starting up, the unit requires a blend of both fuels.[118] Beginning in December 2014, Exelon submitted supply offers indicating, however, that Mystic 7 used only fuel oil when starting up.[119] According to the order, this inaccuracy was caused by an error in an internal spreadsheet that resulted in excessive payments to Exelon when Mystic 7 was dispatched for reliability purposes and compensated based on its stated operating costs.[120]

The error caused Exelon to violate (a) two provisions of ISO New England's tariff on offer data, (b) the Commission rule requiring sellers in organized markets to comply with Commission-approved rules and regulations, and (c) the Commission rule requiring sellers to provide accurate information to Commission-approved independent system operators.[121] The order noted that the violation was identified when ISO New England's Internal Market Monitor began investigating Mystic 7's fuel use in August 2016 and has since been fully

110. *Id*.

111. *Id*.

112. 170 F.E.R.C. ¶ 61,007, at P 5.

113. *Id*. at P 6.

114. *Id.* at P 8 (citing ISO NEW ENGLAND INC. TRANSMISSION, MARKETS, AND SERVICES TARIFF § III.A.3.4(b) (2020)).

115. *Id*. at P 2.

116. *Exelon Generation Co., LLC*, 170 F.E.R.C. ¶ 61,008 (2020).

117. *Id.* at P 3.

118. *Id*.

119. *Id*. at P 5.

120. *Id*.

121. 170 F.E.R.C. ¶ 61,008, at PP 10-11 (citing 18 C.F.R. § 35.41(a)-(b) (2012); ISO NEW ENGLAND INC., OPEN ACCESS TRANSMISSION TARIFF § III.1.7.20(b), 13.6.1.1.2 (2019)).

corrected.[122] Exelon agreed to pay a civil penalty of $32,500 and disgorgement of $101,156 plus interest.[123]

3. Coral Energy Res., L.P.

On August 17, 2020, FERC issued an order terminating a March 2005 Stipulation and Consent Agreement between the Office of Enforcement (formerly the Office of Market Oversight and Investigations) and Coral Energy Resources, L.P. (Coral Energy), now, Shell Energy North America.[124] The March 2005 settlement agreement resolved an investigation into alleged false responses provided by Coral in a prior Commission investigation involving the Western energy crisis of 2001.[125] The settlement agreement stipulated that Coral Energy had falsely reported to FERC that its traders had not provided inaccurate pricing information to natural gas index publications during the Western energy crisis investigation.[126] The March 2005 settlement imposed a multi-million dollar fine and ongoing requirements on Coral Energy related to price reporting.[127] The Commission explained that "[a]fter more than fifteen years since approval by the Commission, the requirements in the Settlement Agreement either have been completed by Shell Energy [North America] or rendered superfluous by subsequent Commission regulations and actions."[128]

4. High Desert Power Project, LLC

On October 23, 2020, FERC approved a Stipulation and Consent Agreement between Enforcement and High Desert Power Project, LLC and Middle River Power LLC (collectively, High Desert) regarding alleged violations of the Commission's prohibition on market manipulation.[129] The settlement relates to Residual Unit Commitment (RUC) awards and associated Bid Cost Recovery (BCR) payments in the California Independent System Operator (CAISO) market in October and November 2016.[130] In October 2016, High Desert—which leases and operates an 830-MW gas-fired generator in Victorville, California—began submitting RUC offers at non-zero prices.[131] On October 20, 2016, High Desert began obtaining RUC awards even though the relevant RUC clearing prices were well below High Desert's offer prices.[132] High Desert's energy manager submitted an inquiry to CAISO and was told that CAISO "had identified a software issue that it was working with its vendor to resolve."[133] Through No-

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122. *Id*. at P 6.

123. *Id*. at P 2.

124. *In re Coral Energy Res., L.P.*, 172 F.E.R.C. ¶ 61,143 (2020).

125. Monica Perin, *Coral Energy Settles with FERC*, HOUSTON BUS. J. (Mar. 4, 2005), https://www.bizjournals.com/houston/stories/2005/02/28/daily73/.

126. 172 F.E.R.C. ¶ 61,143, at P 2.

127. *Id*. at P 2.

128. *Id*. at P 3.

129. *High Desert Power Project, LLC*, 173 F.E.R.C. ¶ 61,087 (2020).

130. *Id.* at PP 1, 7, 12.

131. *Id*. at PP 3, 6.

132. *Id*. at P 7.

133. 173 F.E.R.C. ¶ 61,087, at PP 7, 9.

vember 1, 2020, High Desert continued submitting non-zero RUC offers—increasing its offer prices to close to the $250/MWh cap—and continued receiving RUC awards even though the relevant RUC clearing prices were below High Desert's offers.[134]

Enforcement concluded that "High Desert knew or should have known that High Desert's potential BCR payments were based upon RUC awards that CAISO was awarding by mistake – due to a software issue."[135] Enforcement further concluded that High Desert violated the Commission's Anti-Manipulation Rule because "rather than continue to submit RUC offers based upon supply and demand fundamentals, High Desert submitted RUC offers in a manner that sought to maximize any BCR that might be awarded."[136] High Desert agreed to pay a civil penalty of $390,000 and disgorgement of $176,000 plus interest and consented to compliance monitoring.[137]

5. Competitive Energy Services, LLC and Richard Silkman

On November 25, 2020, FERC issued an order approving a Stipulation and Consent Agreement between the Office of Enforcement and Competitive Energy Services, LLC (CES) and Richard Silkman (Silkman) to resolve longstanding litigation of FERC's claim that CES and Silkman committed market manipulation.[138]

FERC, in August 2013, issued Orders Assessing Civil Penalties against CES and Silkman, alleging that between July 2007 and February 2008 they inflated baseline electricity loads for Rumford Paper Company during ISO New England's Day-Ahead Load Response Program measuring period and submitted load reduction offers based on the inflated baseline.[139] FERC contended that this resulted in payments for non-existent demand response.[140] FERC assessed roughly $8.9 million in civil penalties and disgorgement against CES and Silkman.[141]

In December 2013, FERC filed suit in federal district court seeking an order affirming its Orders Assessing Civil Penalties.[142] The Stipulation and Consent Agreement approved by FERC resolves this litigation.[143] While neither admitting nor denying the alleged violations, CES and Silkman agreed to make payments totaling $1,475,000 in installments over seven years.[144]

134. *Id*. at PP 8-12.
135. *Id*. at P 15.
136. *Id*. at P 16 (citing 18 C.F.R. § 1c.2).
137. 173 F.E.R.C. ¶ 61,087, at P 2.
138. *Competitive Energy Servs., LLC*, 173 F.E.R.C. ¶ 61,176 (2020) [hereinafter CES and Silkman Settlement].
139. *Competitive Energy Servs., LLC*, 144 F.E.R.C. ¶ 61,163 (2013); *Silkman*, 144 F.E.R.C. ¶ 61,164 (2013).
140. 144 F.E.R.C. ¶ 61,164, at P 84.
141. 144 F.E.R.C. ¶ 61,163, at PP 75-76.
142. *See* CES and Silkman Settlement, *supra* note 138, at P 8.
143. *Id*. at P 1.
144. *Id*. at P 2.

6. Boyce Hydro Power, LLC

On December 9, 2020, FERC issued an Order to Show Cause and Notice of Proposed Penalty regarding alleged violations of FERC staff orders and license provisions by Boyce Hydro Power, LLC (Boyce Hydro), the owner of four closely-linked dams on the Tittabawassee River in Gladwin and Midland counties, Michigan.[145] FERC alleged that:

> following catastrophic failures of two of its dams [on May 19, 2020], Boyce Hydro failed to begin a required forensic study of the dam failures and ignored staff's orders to conduct engineering safety studies and to file certain required reports to ensure homes and other buildings surrounding the Boyce Projects were not at risk of further damage.[146]

FERC alleged that these failures to comply with staff orders violated Standard Article 4 of Boyce Hydro's licenses and section 12.4(b) of FERC's regulations (on the supervisory authority of the Regional Engineer or other authorized representative).[147] The order also noted that the May 19, 2020, failure of Boyce Hydro's facilities is estimated to have caused over $190 million in economic harm and that "Boyce Hydro's troubled compliance history" led FERC to revoke its license for one of the three projects on September 10, 2018.[148]

FERC proposed a civil penalty of $15 million for the alleged violations.[149] In support of this proposed penalty, FERC argued that "[t]he dam safety violations here chanced further failure of project works and shoreline, thereby putting surrounding communities at risk of additional flooding and other significant harm to human life, property, and the environment" and that "[b]y ignoring its dam safety obligations, Boyce Hydro elevated its own economic interests (*e.g.*, avoidance of professional fees) above the safety of its neighbors."[150] The order noted that Boyce Hydro has filed for bankruptcy and that, in order to avoid "imperil[ing] any direct recovery of damages" by the victims of the dam breaches and flooding, FERC "will request to have any recovery of civil penalties given lower priority than the victims' recovery in the bankruptcy proceeding."[151]

## II. THE COMMODITY FUTURES TRADING COMMISSION

### *A. CFTC Division of Enforcement Civil Monetary Penalty Guidance*

On May 20, 2020, the CFTC Division of Enforcement (Division) issued new guidance outlining factors it considers in recommending civil monetary penalties to the Commission in enforcement proceedings (CMP Guidance).[152] The CMP Guidance states that the Division will consider three factors in recommending a penalty to the Commission: (1) the gravity of the violation; (2) any

145. *Boyce Hydro Power, LLC*, 173 F.E.R.C. ¶ 61,217 (2020).
146. *Id*. at P 1.
147. *Id*. at PP 30-37.
148. *Id*. at PP 5, 8.
149. 173 F.E.R.C. ¶ 61,217, at P 1.
150. *Id*. at P 44.
151. *Id*. at P 45.
152. Memorandum from the CFTFC on Civil Monetary Penalty Guidance (May 20, 2020).

mitigating and aggravating circumstances; and (3) other considerations, such as penalties in analogous cases.[153] The CMP Guidance enumerates relevant circumstances for each of these factors, including the number, duration, type, and degree of the violations.[154] The CMP Guidance is the first public update from the Division since it issued its Penalty Guidelines in 1994 and, like the public release of the Division's Enforcement Manual in May 2019,[155] is part of a larger effort to increase the transparency of the CFTC's enforcement process.[156]

## III. THE PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

During 2020, PHMSA initiated 195 pipeline safety enforcement cases, a decrease from the 223 cases initiated in 2019.[157] In addition, PHMSA closed 137 enforcement actions in 2020, a decrease over the 200 actions closed in 2019.[158] PHMSA also assessed $4,125,521 in final civil penalties in 2020, an increase over the $3,862,400 assessed in 2019.[159]

### *A. Pipeline Safety Rulemakings*

#### 1. Pipeline Safety: Safety of Underground Natural Gas Storage Facilities

On February 12, 2020, PHMSA issued a final rule amending the safety standards for underground natural gas storage facilities in 49 C.F.R. Parts 191, 192, and 195.[160] The rule incorporates by reference the American Petroleum Institute's (API) Recommended Practices 1170[161] and 1171[162] into PHMSA's regulations.[163] The API Recommended Practices describe ways to maintain the functional integrity of design, construction, operation, monitoring, maintenance, and documentation practices for underground natural gas storage facilities.[164] The final rule also amended underground natural gas storage regulations that were implemented pursuant to a 2016 Interim Final Rule (IFR).[165] PHMSA issued the IFR to meet a Congressional Mandate of the 2016 PIPES Act to establish minimum safety standards for depleted-hydrocarbon reservoirs, aquifer reservoirs, and solution-mined salt caverns used for the storage of natural gas.[166] The February 2020 final rule amended the IFR in several important ways, including (i)

153. *Id.* at 2.
154. *Id.* at 3.
155. *Id.* at 1.
156. *Id.*
157. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT CASE STATUS (Mar. 1, 2021), https://primis.phmsa.dot.gov/comm/reports/enforce/CaseStatus_opid_0.html.
158. *Id.*
159. *Id.*
160. Final Rulemaking, *Pipeline Safety: Safety of Underground Natural Gas Storage Facilities*, 85 Fed. Reg. 8,104 (Feb. 12, 2020).
161. *Id.*
162. *Id.*
163. *Id.* at 8104-05.
164. 85 Fed. Reg. 8,104 at 8,105.
165. *Id.*
166. *Id.* at 8,104.

reversing a requirement in the IFR to treat all non-mandatory language in the API Recommended Practices as mandatory because it adds clarity to the provisions which should help improve compliance while providing at least an equivalent level of safety as the IFR; (ii) formalizing requirements and deadlines for operators to develop and implement integrity management programs for underground natural gas storage facilities; and (iii) narrowing the scope of reportable events, such as incidents and safety-related conditions, at facilities.[167] On July 23, 2020, PHMSA issued a rule to correct certain reporting requirements that were inadvertently removed by the February 2020 final rule.[168]

2. Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments: Response to a Joint Petition for Reconsideration

On July 6, 2020, PHMSA issued a final rule in response to a joint Petition for Reconsideration submitted by various trade associations (Association Petition).[169] The final rule granted the Association Petition's request (i) to clarify the applicability of certain recordkeeping requirements for records that document current class location determinations and records that demonstrate how an operator arrived at such a determination for each class location; and (ii) to limit the applicability of the maximum allowable operating pressure reconfirmation requirements.[170]

3. Hazardous Materials: Liquefied Natural Gas by Rail

On July 24, 2020, PHMSA, in coordination with the Federal Railroad Administration (FRA), issued a final rule amending the Hazardous Materials Regulations 49 CFR Parts 172, 173, 174, 179, and 180.[171] The rule authorizes the transportation of liquefied natural gas (LNG) in rail tank cars.[172] Specifically, the rule allows for the transport of LNG by rail in DOT-113 tank cars with certain additional design requirements.[173] Prior to the PHMSA's issuance of the rule, the Hazardous Materials Regulations did not authorize transportation of LNG by rail, but permitted such transport only pursuant to a PHMSA special permit or in a portable tank pursuant to FRA approval.[174] In addition to the existing applicable requirements of the Hazardous Materials Regulations, the final

167. *Id.*at 8,105.

168. Correcting amendments, *Pipeline Safety: Safety of Underground Natural Gas Storage Facilities; Correction*, 85 Fed. Reg. 44,477 (July 23, 2020).

169. Final rulemaking; petition for reconsideration, *Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments: Response to a Joint Petition for Reconsideration*, 85 Fed. Reg. 40,132 (July 6, 2020).

170. *Id.* at 40,132-33.

171. Final Rulemaking, *Hazardous Materials: Liquefied Natural Gas by Rail*, 85 Fed. Reg. 44,994 (July 24, 2020).

172. *Id.*

173. *Id.*

174. *Id.* at 44,995.

rule adopts supplemental operational controls for braking, monitoring, and route analysis.[175]

4. Frequently Asked Questions (FAQ) for the Final Rule titled "Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments"

On September 15, 2020, PHMSA issued a "Frequently Asked Questions" guidance document to assist gas pipeline owners and operators in complying with PHMSA's pipeline safety regulations prescribed in 49 C.F.R. Parts 191 and 192 (FAQs).[176] The FAQ focuses on issues related to PHMSA's October 2019 final rule, *Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments* (Gas Transmission Rule).[177] PHMSA voluntarily published the FAQs in the Federal Register and considered public comments prior to finalizing the document.[178] The FAQs address several important topics, including (i) key implementation dates of the Gas Transmission Rule; (ii) applicability of Gas Transmission Rule requirements to regulated gas gathering lines; (iii) moderate consequence area guidance; (iv) material verification; and (v) establishment and reconfirmation of maximum allowable operating pressure; assessments outside of high consequence areas.[179]

## IV. THE DEPARTMENT OF ENERGY

DOE's Office of Enterprise Assessments (EA) supports the Secretary of Energy and other stakeholders by enhancing the DOE's safety, security, and cybersecurity programs.[180] The EA "independently evaluat[es] the effectiveness of requirements, performance, and risk management; conduct[s] objective and effective enforcement activities; and provid[es] high-quality training."[181] 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.[182] In 2020, EA's Office of Enforcement issued one Consent Order,[183] six Notices of Intent to Investigate,[184] three Notices of Violation,[185] and five Enforcement Letters.[186]

175. *Id.* at 44,996.

176. PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., FREQUENTLY ASKED QUESTIONS (FAQ) FOR THE FINAL RULE TITLED *"PIPELINE SAFETY: SAFETY OF GAS TRANSMISSION PIPELINES: MAOP RECONFIRMATION, EXPANSION OF ASSESSMENT REQUIREMENTS, AND OTHER RELATED AMENDMENTS,"* PUBLISHED ON OCTOBER 1, 2019 (Sept. 15, 2020).

177. *Id*. at 1.

178. *Id.*

179. *Id.*

180. DEP'T. OF ENERGY, MISSION, https://www.energy.gov/ea/mission (last visited Jan. 4, 2021).

181. *Id.*

182. *Id*.

183. *See generally* DEP'T OF ENERGY, CONSENT ORDERS AND SETTLEMENT AGREEMENTS, https://www.energy.gov/ea/listings/consent-orders-and-settlement-agreements (last visited Jan. 4, 2021).

## V. THE DEPARTMENT OF JUSTICE

### *A. Energy-Related Investigations*

1. Hector Garza Jr. and Tammy Garza, owners of HTG Trucking LLC and Freedom Fuel Inc.

On January 24, 2020, DOJ announced that Hector Garza Jr. and Tammy Garza, along with the couple's companies, HTG Trucking LLC and Freedom Fuel Inc., were sentenced on January 23, 2020, in federal court in Richland, Washington for fraud and false statement charges in connection with a renewable energy fraud scheme.[187] According to the press release, the defendants were involved in a conspiracy with another renewable energy company, Gen-X Energy Group Inc. (Gen-X), in which they "falsely claimed the production of hundreds of thousands of marketable renewable energy credits, which they then sold for more than $296,000, and filed false claims with the IRS for $284,546 in excise credit refunds."[188] According to DOJ, the Garzas' companies were used to "round" supposed renewable fuel by "driving the same [renewable fuel] back and forth between Gen-X's Moses Lake facility and the Garzas' businesses in Othello, Washington."[189] Hector Garza Jr. was sentenced to two years in prison to be followed by a three-year term of supervised release.[190] Meanwhile, Tammy Garza was sentenced to four months in prison and one year of supervised release.[191] Finally, DOJ announced that all of the defendants were ordered to pay restitution to the U.S. Treasury of $284,546 and a $100,000 fine.[192]

2. Lev Aslan Dermen

On March 16, 2020, DOJ announced that a federal jury in Salt Lake City, Utah had convicted Lev Aslan Dermen of criminal charges relating to a $1 billion renewable fuel tax credit fraud scheme.[193] According to the press release, from 2010 to 2016, Mr. Dermen used his company, Noil Energy Group, in order to conspire with others to "fraudulently claim more than $1 billion in renewable

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184. *See generally* DEP'T OF ENERGY, NOTICE OF INVESTIGATION LETTERS, https://www.energy.gov/ea/listings/notice-investigation-letters (last visited Jan. 4, 2021).

185. *See generally* DEP'T OF ENERGY, NOTICES OF VIOLATION, https://www.energy.gov/ea/listings/notices-violation (last visited Jan. 4, 2021).

186. *See generally* DEP'T OF ENERGY, ENFORCEMENT LETTERS, https://www.energy.gov/ea/listings/enforcement-letters (last visited Jan. 4, 2021).

187. U.S. Attorney's Office, *Washington State Couple and Companies Sentenced for Fraud and False Statements in Connection with Renewable Energy Fraud Scheme*, U.S. DEP'T OF JUSTICE (Jan. 24, 2020), https://www.justice.gov/usao-edwa/pr/washington-state-couple-and-companies-sentenced-fraud-and-false-statement-connection.

188. *Id*.

189. *Id*.

190. *Id*.

191. U.S. Attorney's Office, *supra* note 187, at 1.

192. *Id*.

193. *Jury Finds Los Angeles Businessman Guilty in $1 Billion Biodiesel Tax Fraud Scheme*, U.S. DEP'T OF JUSTICE (Mar. 16, 2020), https://www.justice.gov/opa/pr/jury-finds-los-angeles-businessman-guilty-1-billion-biodiesel-tax-fraud-scheme.

fuel tax credits from the IRS."[194] Specifically, DOJ explained that Dermen "shipped millions of gallons of biodiesel within the U.S. and from the U.S. to foreign countries and back again to create the appearance that qualifying renewable fuel was being produced and sold."[195] Mr. Dermen faces a maximum sentence of twenty years in prison, as well as a period of supervised release, restitution, and monetary penalties.[196] The judge will set Mr. Dermen's sentencing at a later date.

3. David Dunham, Smarter Fuel LLC

On August 6, 2020, DOJ announced that David Dunham, owner of Smarter Fuel LLC, and co-owner of Greenworks Holdings LLC, was sentenced to seven years in prison to be followed by a three-year term of supervised release, and ordered to pay $10,207,000 in restitution for "defrauding multiple federal agencies and customers."[197] According to DOJ, from 2010 to 2015, Mr. Dunham "fraudulently applied for, received, and sold EPA 'credits' for producing biofuels that he, in fact, did not produce and, in many instances, had never possessed in the first place."[198] Additionally, DOJ explained that Mr. Dunham obtained nearly $50 million in fraudulent revenue and that the evidence at trial demonstrated that Mr. Dunham "engaged in multiple cover-ups designed to hide his crimes from authorities."[199]

4. Ben Wootton and Race Miner, owners of Keystone Biofuels Inc.

On October 20, 2020, DOJ announced that Ben Wootton and Race Minder were sentenced to prison for "conspiracy and making false statements to the U.S. Environmental Protection Agency (EPA) and conspiracy to defraud the IRS and preparing a false tax claim" after the defendants engaged in a multi-million dollar scheme in which they falsely represented that their company, Keystone Biofuels Inc. (Keystone), could produce biodiesel.[200] According to the press release, Mr. Wootton and Mr. Miner falsely claimed they were entitled to renewable fuel credits for the biodiesel, in addition to fraudulently claiming federal tax refunds based on IRS's Biofuel Mixture Credit."[201] Based on these crimes, Mr. Wootton, as president of Keystone, was sentenced to seventy months in prison, while Mr. Miner, as founder and chief executive officer of Keystone, was sentenced to six-

194. *Id*.

195. *Id*.

196. *Id*.

197. U.S. DEP'T OF JUSTICE, BIOFUEL FRAUDSTER SENTENCED TO SEVEN YEARS IN PRISON FOR SCAMMING MULTIPLE FEDERAL AGENCIES AND CUSTOMERS (Aug. 6, 2020), https://www.justice.gov/opa/pr/biofuel-fraudster-sentenced-seven-years-prison-scamming-multiple-federal-agencies-and.

198. *Id*.

199. *Id*.

200. Press Release, U.S. DEP'T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, PENNSYLVANIA BIOFUEL COMPANY AND OWNERS SENTENCED ON ENVIRONMENTAL AND TAX CRIME CONVICTIONS ARISING OUT OF RENEWABLE FUELS FRAUD (Oct. 20, 2020), https://www.justice.gov/opa/pr/pennsylvania-biofuel-company-and-owners-sentenced-environmental-and-tax-crime-convictions.

201. *Id*.

ty-six months in prison.[202] In addition, both men were ordered to pay restitution of $4,149,383.41 to the IRS and $5,076,376.07 to the Pennsylvania Department of Environmental Protection.[203]

202. *Id*.
203. *Id*.

# DISPUTES AND RESOLUTION STEERING COMMITTEE