

APRIL 2021

VOL. 21-4

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: A FOCUS ON CLIMATE CHANGE

Victoria Prussen Spears

BIDEN'S CLIMATE BLITZ

Sheila McCafferty Harvey, Elizabeth Vella Moeller, Meghan Claire Hammond, and Sid Fowler

THE U.S. FINANCIAL SYSTEM AND CLIMATE RISK: PUTTING THE REPORT OF THE CFTC'S CLIMATE-RELATED MARKET RISK SUBCOMMITTEE IN CONTEXT

Amy L. Edwards, Dianne R. Phillips, and Kara M. Ward

RECLAIMING A FEDERAL LEAD ON THE SOCIAL COST OF CARBON

Saqib Z. Hossain and Beth A. Viola

WIND IN THE SAILS FOR CLIMATE-TECH AND CLEANTECH STARTUPS

Louis Lehot

OHIO SUPREME COURT CONFIRMS MARKETABLE TITLE ACT EXTINGUISHES OIL AND GAS INTERESTS

Brian M. John and Lauren M. Oelrich

BANKRUPTCY COURTS CONTEMPLATE DEBTORS' REJECTION OF REAL PROPERTY COVENANTS IN MIDSTREAM CONTRACTS

Joseph M. Esmont, Mark L. Jones, Kristin D. Kluding, and Scott E. Prince

Pratt's Energy Law Report

VOLUME 21

NUMBER 4

April 2021

Editor's Note: A Focus on Climate Change

Victoria Prussen Spears

109

Biden's Climate Blitz

Sheila McCafferty Harvey, Elizabeth Vella Moeller, Meghan Claire Hammond,
and Sid Fowler

111

**The U.S. Financial System and Climate Risk: Putting the Report of the
CFTC's Climate-Related Market Risk Subcommittee in Context**

Amy L. Edwards, Dianne R. Phillips, and Kara M. Ward

117

Reclaiming a Federal Lead on the Social Cost of Carbon

Saqib Z. Hossain and Beth A. Viola

125

Wind in the Sails for Climate-Tech and Cleantech Startups

Louis Lehot

128

**Ohio Supreme Court Confirms Marketable Title Act Extinguishes
Oil and Gas Interests**

Brian M. John and Lauren M. Oelrich

132

**Bankruptcy Courts Contemplate Debtors' Rejection of Real Property
Covenants in Midstream Contracts**

Joseph M. Esmont, Mark L. Jones, Kristin D. Kluding, and Scott E. Prince

138

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Wind in the Sails for Climate-Tech and Cleantech Startups

*By Louis Lehot**

The outlook for investments in the climate-tech and cleantech sectors has never been brighter.

With a newly inaugurated presidential administration installed in Washington, pandemic-led shutdowns worldwide demonstrating the impact of human activity (and inactivity), and government stimulus programs around the world incentivizing fossil fuel reduction, the outlook for the climate-tech and cleantech industries in 2021 and beyond has never been brighter.

As the COVID-19 coronavirus pandemic continues to wreak havoc globally on our physical and mental health, governments globally are responding with unprecedented stimulus programs and corporate bailouts of impacted industries. While the industry has been idled, the one beneficiary has been our climate. As governments look to restart the economy, we expect that they will tie corporate bailouts to private industry commitments to achieve fossil fuel reduction, creation and use of renewable energy, and incentives for new clean and climate-protecting technologies. Never has the outlook for further investment in cleantech and climate-tech businesses been brighter.

The venture capital industry was burned in the wake of the cleantech boom that was spurred on by stimulus programs passed by governments to respond to the Great Recession. Technology innovation and adoption failed to keep pace with capital requirements, and companies went under as soon as the government funding expired. Names like Solyndra strike fear in the hearts of investors.

Will this time be different? In his first wave of executive orders on his first day in office, President Biden proclaimed the re-entry by the United States into the Paris Climate Accord. Even before inauguration the Congress adopted new bipartisan stimulus programs to incentivize cleantech and climate-tech businesses. Will the venture capital (“VC”) and private industry follow with a new investment? Will consumers continue the trend of electric vehicles and solar power? Will autonomous vehicles lower carbon emissions?

For the foreseeable future, the enthusiasm and positive outlook for cleantech and climate-tech are irrepressible.

Since early 2018, we have been startled by fires inside the Arctic Circle, record heat waves in Europe, and the deadliest wildfire seasons in Australia’s and

* Louis Lehot (llehot@foley.com) is a partner and business lawyer with Foley & Lardner LLP, based in the firm’s Silicon Valley, San Francisco, and Los Angeles offices.

California's history. The science showing the connection between global warming and greenhouse gases continues to grow.

As our planet continues to heat up, the climate-tech category is hot right now for inventors. A recent report by PwC, "The State of Climate Tech 2020," shows that in 2019, \$16.3 billion was invested into climate-tech around the globe. In 2013, that number was only \$418 million. According to the report, that is three times the growth rate of VC investment into artificial intelligence over the same period.

WHAT IS CLIMATE-TECH?

Today, climate-tech encompasses a range of sectors that tackle the challenge of decarbonizing the global economy, with the ultimate goal to reach net-zero emissions before 2050 or sooner. This includes low-to-negative carbon approaches to cut critical sources of emissions across energy, mobility, food, and land use, as well as areas like carbon capture and storage, or enabling better carbon management, such as through transparency and accounting.

WHY CLIMATE-TECH IS IMPORTANT

Of course, there is some uncertainty that the sector could decline again, but this time is different.

For one, several major corporations, including oil companies and tech firms, have committed to lowering their emissions over the next three decades.

Second, it is clear that carbon-neutral or even carbon harmful solutions have far fewer costs than carbon-producing ones.

Also, the new U.S. presidential administration has shown support for clean energy. Many climate-tech startups work in high barrier-to-entry sectors, like energy, heavy industry, and transport.

To get ahead, many turn to corporate venture capital ("CVC"). Thirty percent of the climate tech deals in mobility and transport included a CVC firm, while in energy, 32 percent of capital came from CVCs. Corporates' involvement will be critical to climate-tech's success—in terms of net-zero commitments driving demand for new solutions and investments in commercializing innovation. It is not just their financial mean, but also the commercial and industry knowledge to quickly help startups navigate how to scale innovations into the market.

WHAT ARE VCS DOING?

In 2020 alone, VCs spent almost \$16 billion on the climate-tech sector, according to clean-tech data from PitchBook,¹ which is an increase from an average of about \$5.6 billion per year between 2008 and 2016. The reality is that VCs have no shortage of companies to choose from. The PwC report identified more than 1,200 startups working on a range of technologies, from fusion energy to plant-based proteins. Overall, the most significant drivers for growth in climate-tech, according to the report, relate to mobility and transport, greenhouse gas capture, and storage. They are followed closely by food, land use, energy and climate, and Earth data generation.

When it comes to geography, about half of these venture investments (approximately \$60 billion), went to U.S. and Canadian climate-tech startups, while China came in second at \$20 billion. The European market attracted \$7 billion. Climate-tech investment in the San Francisco area for startups came in at around \$11.7 billion and was 56 percent higher than its nearest rival, Shanghai, which reached \$7.5 billion.

Ten of the top cities for climate-tech startup investment, outside of the U.S. and China, included Berlin, London, Labege (France), and Bengaluru, India, attracting \$1.3 billion, mostly across energy, agriculture, and food and land use.

Where is the investment coming from? Climate-tech investment is coming from a variety of sources. It is mainly coming from traditional VC firms specializing in sustainability and corporate investors, global consumer goods companies and big tech, government-backed investment firms, and private equity players. It is also coming from CVCs, especially startups with high capital costs aimed at disrupting incumbent industries with high entry barriers.

LEGAL ISSUES TO KNOW

Over the last several years, businesses in industries of all kinds are being hit by big lawsuits demanding more important disclosures on climate risk, strategy changes to reduce future environmental impact, as well as compensation for emissions. Along with physical threats, energy transition, and policy change, businesses face another significant risk. According to a Columbia Law School blogpost,² more than 1,100 climate-related lawsuits are happening worldwide, with more than 120 aimed directly at companies.

The first kind is comprised of typical tort-law and public nuisance-based cases that target corporates relating to past environmental issues.

¹ See <https://money.yahoo.com/meet-46-climate-tech-startups-163218179.html>.

² See <http://blogs.law.columbia.edu/climatechange/2021/01/13/january-2021-updates-to-the-climate-case-charts/>.

The second kind aim to influence future conduct by demanding greater transparency over climate-related risks and changes to strategic direction to lower emissions. Instead of seeking to prove individual companies are responsible for future climate-related damage, these lawsuits test corporate conduct by reference to things like disclosure requirements and obligations under human rights laws. These lawsuits, especially in the United States, have received a great deal of media coverage. In 2018 alone, over a dozen claims were filed.

POLICY PERSPECTIVE

As we move further into 2021 under a new presidential administration in the United States, we expect significant new regulations to restore climate change goals previously jettisoned, and shelve operations deemed dangerous to the environment. We also expect that new stimulus packages will contain investment tax credits and other programs to incentivize new renewable energy capability. The ability to access government-funded research and development programs, stimulus and investment tax credits, and applying those programs to private industry, will be a driver of new companies into the decade.

LOOKING TO THE FUTURE

Entrepreneurs who take the risk of launching a new startup are mission-driven. Investors that back them are equally aligned.

Although over 300 global companies have committed to achieving net-zero emissions before 2050, with just 10 years to reduce by half global greenhouse gas emissions to limit global warming to 1.5°C, climate-tech needs a rapid injection of capital, talent, and public-private support to match its potential to build and accelerate faster, bolder innovation.

Now, the sun is shining brightly, batteries are powering up, and the wind is in the sails for the cleantech and climate-tech sectors.