

JUNE 2023
VOL. 23-6

PRATT'S

ENERGY LAW

REPORT



EDITOR'S NOTE: CARBON

Victoria Prussen Spears

THE "INTEGRITY" CHALLENGE IN CARBON OFFSETS

Tim Baines, J. Paul Forrester and Oliver Williams

AMBITIOUS NEW EPA AUTO EMISSIONS STANDARDS PROPOSAL AIMS TO ACCELERATE ELECTRIFICATION OF U.S. TRANSPORTATION

Paul Hemmersbaugh, Paul Wierenga and Doug Lavey

INTELLECTUAL PROPERTY AND THE RENEWABLE ENERGY TRANSITION: FIVE CRITICAL IP ISSUES

Zayd Alathari, Zachary Wegmann and Vlada Wendel

A PRACTICAL APPROACH TO REDUCING ENFORCEMENT RISKS IN THE UNITED STATES UNDER THE INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS

Kierstan L. Carlson and Jeanne M. Grasso

FIRST-IN-NATION ENVIRONMENTAL JUSTICE RULES ADOPTED IN NEW JERSEY

Paul R. Recuperero

5 MINE SAFETY PREDICTIONS

Christopher G. Peterson and Arthur M. Wolfson

Pratt's Energy Law Report

VOLUME 23

NUMBER 6

June 2023

Editor's Note: Carbon

Victoria Prussen Spears

187

The "Integrity" Challenge in Carbon Offsets

Tim Baines, J. Paul Forrester and Oliver Williams

189

Ambitious New EPA Auto Emissions Standards Proposal Aims to Accelerate Electrification of U.S. Transportation

Paul Hemmersbaugh, Paul Wierenga and Doug Lavey

195

Intellectual Property and the Renewable Energy Transition: Five Critical IP Issues

Zayd Alathari, Zachary Wegmann and Vlada Wendel

209

A Practical Approach to Reducing Enforcement Risks in the United States Under the International Convention for the Prevention of Pollution from Ships

Kierstan L. Carlson and Jeanne M. Grasso

214

First-in-Nation Environmental Justice Rules Adopted in New Jersey

Paul R. Recupero

218

5 Mine Safety Predictions

Christopher G. Peterson and Arthur M. Wolfson

221

QUESTIONS ABOUT THIS PUBLICATION?

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

Jessica Carnevale, Esq. at (212) 229-4942

Email: jessica.carnevale@lexisnexis.com

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 © 2023 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

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Kirkland & Ellis 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 © 2023 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, 631.291.5541. 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.

The “Integrity” Challenge in Carbon Offsets

*By Tim Baines, J. Paul Forrester and Oliver Williams**

In this article, the authors set forth recent developments relating to voluntary credit market governance frameworks.

A recent attention-grabbing report¹ by the Guardian, Die Zeit and Source-Material claimed that “more than 90% of rainforest carbon offsets by biggest certifier are worthless.” This prompted a swift detailed rebuttal² by Verra – the world’s largest certifier of offsets and the organization subject to the criticism – which argued that the Guardian’s reporting contained “numerous falsehoods and distortions” and asserted that the studies cited in the related analysis were “not appropriate for avoided deforestation projects funded by carbon credits” and that the reporting had used “selective data and views to produce one-sided grandiose and sensational headlines.” Verra also offered a “fact-check” for the “most significant errors” in the Guardian’s reporting. In what may be a conciliatory move, the Guardian subsequently published³ a letter that offered a point and counterpoint discussion of avoided deforestation credits.

While this type of controversy is not unusual for avoided deforestation credits⁴ – which have long faced criticism for both the lack of additionality (namely, the determination of the baseline for the avoided deforestation and the demonstration of the “threat” of actual deforestation to be avoided) and the difficulty of related measurement and verification of an activity not actually taken – this public attention is both timely and important, as various international standard setters are currently considering additional requirements and guidance to provide greater integrity to the voluntary credit market (VCM). The value of the VCM was reported to be around US\$2 billion at

* Tim Baines (tbaines@mayerbrown.com) and J. Paul Forrester (jforrester@mayerbrown.com) are partners in Mayer Brown. Oliver Williams is a trainee solicitor at the firm.

¹ <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe>.

² <https://verra.org/verra-fact-check-of-die-zeit-article/>.

³ <https://www.theguardian.com/environment/2023/jan/27/carbon-credits-towards-net-zero-or-zero-credibility>.

⁴ See for example, the April 2021 story “Top airlines’ promises to offset flights rely on ‘phantom credits’” on Greenpeace’s Unearthed blog, at <https://unearthed.greenpeace.org/2021/05/04/carbon-offsetting-british-airways-easyjet-verra/>. See also the December 2022 story “Middlemen Snag Carbon-Credit Cash Aimed at Peruvian Amazon,” at https://www.wsj.com/articles/middlemen-snag-carbon-credit-cash-aimed-at-peruvian-amazon-11672321001?cx_testId=3&cx_testVariant=cx_160cx_artPos=1&mod=WTRN#cxrecs_s.

year-end 2022; it grew over 160% from the prior year and is projected to grow 10-fold by 2030.

In light of this anticipated expansion in the VCM, there have been, and will continue to be, several developments to the VCM governance frameworks. This article sets out some of the recent related developments below.

ICVCM

The Integrity Council for the Voluntary Carbon Market (ICVCM) is intending to release its “high-integrity” label to the VCM in Q3 of 2023. The ICVCM has concluded a 60-day public consultation⁵ (launched in July 2022) on its draft Core Carbon Principles (CCPs), Assessments and Assessment Procedure. ICVCM stated that it was pleased with the breadth and depth of the more than 5,000 comments it received in over 350 submissions to the consultation. Interestingly, Verra published a statement on September 21, 2022, titled “Draft Core Carbon Principles and Assessment Framework on Wrong Track,”⁶ stating that the “ICVCM should drastically revise its process for developing the Core Carbon Principles (CCPs) and Assessment Framework (AF) for the voluntary carbon market.” The release of the ICVCM’s “high-integrity label” is, therefore, highly anticipated since it may give rise to a revised governance framework.

ISSB

The International Sustainability Standards Board (ISSB), part of the IFRS Foundation, is also aiming to complete its work on its initial Sustainability Standards exposure drafts, i.e., IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (draft IFRS S1) and IFRS S2 Climate-related Disclosures (draft IFRS S2), that were published in March 2022. The comment period on these two exposure drafts closed on September 30, 2022. In the ISSB’s January 2023 update⁷ (that concluded a three-day meeting in Frankfurt), the ISSB reported that it will continue to redeliberate and discuss the proposals in draft IFRS S1 and S2 in relation to climate-related and sustainability-related financial disclosures. Although the ISSB did not confirm whether it will discuss carbon credits and offsetting more generally in its update, in relation to emissions targets, the ISSB tentatively decided to:

- (a) Confirm the proposed requirement to disclose the intended use of carbon credits but clarify that an entity’s net emissions targets and

⁵ <https://icvcm.org/public-consultation/#key-resources>.

⁶ <https://verra.org/icvcm-course-correction-needed/>.

⁷ <https://www.ifrs.org/content/dam/ifrs/meetings/2023/january/issb/ap4-climate-related-disclosures-cover-note-and-summary-of-redeliberations.pdf>.

intended use of carbon credits should be disclosed separately from the entity’s gross emission reduction targets;

- (b) Use the term ‘carbon credit’ in draft IFRS S2 in the context of offsetting emissions in the transition plan;
- (c) Clarify the different types of targets – in particular, that, under the proposed requirements, a climate-related target is set by an entity to address aspects of its climate-related risks and opportunities and the role of emissions targets in transitioning to a low-carbon economy; and
- (d) Clarify that an entity would be required to disclose any emissions targets it has set (both net emission and gross emission reduction targets) and those it is required to meet under local legislation.

Furthermore, in relation to greenhouse gas emission measurement methods, the ISSB tentatively decided to:

- (a) Amend its proposals so that an entity would be required to apply the GHG Protocol Standards, subject to relief in specific circumstances; and
- (b) Specify that an entity is required to apply the applicable version of the GHG Protocol Standards in force on March 31, 2022.

This essentially means that entities covered by the ISSB’s to-be-finalized Sustainability Standards will be required to report on their Scope 1, 2 and 3 greenhouse gas (GHG) emissions and offsets in accordance with the relevant GHG Protocol Standards. In-scope companies will, therefore, be required to disclose in accordance with the GHG Protocol Standard that applies to companies, namely the GHG Protocol Corporate Accounting and Reporting Standard (2004)⁸ (the GHG Corporate Standard) as in force on March 31, 2022.

In respect of offsets, the GHG Corporate Standard requires companies to disclose their own internal scope 1 and scope 2 emissions (but, notably, only recommends the disclosure of scope 3 emissions) in separate accounts from the offsets used to meet their GHG emissions reduction targets rather than simply providing a net figure. This means that companies need to report on each of their gross GHG emissions, offsets and net GHG emissions to be compliant with the GHG Corporate Standard. However, the GHG Corporate Standard does not require companies to report the granular details of their GHG emissions, nor does it require companies to conduct any value or quality assessment; it is only recommended that companies do so.

⁸ <https://ghgprotocol.org/corporate-standard>.

In light of this, the GHG Protocol is considering an update of the GHG Corporate Standard, as well as some of its other relevant standards, including the Corporate Value Chain (Scope 3) Standard (2011),⁹ Scope 3 Calculation Guidance (2013),¹⁰ and Scope 2 Guidance (2015).¹¹ Since these standards were published, there have been many important developments in GHG accounting and reporting. Among these are the introduction of the Science Based Targets initiative,¹² the global trend toward adopting net-zero targets, the increase in mandatory climate disclosure regulations, the significant increase in the number of companies reporting emissions in accordance with the GHG Corporate Standard, and the publication of more sophisticated academic research on GHG emission reporting.

As part of this potential update, the GHG Protocol is currently conducting four surveys in respect of (1) the GHG Corporate Standard, (2) the Corporate Value Chain (Scope 3) Standard and the Scope 3 Calculation Guidance, (3) and the Scope 2 Guidance and on (4) Market-based Accounting Approaches. Notably, the survey in respect of the GHG Corporate Standard has asked (among other things) whether the respondents propose making changes to the operational boundaries of the reporting requirements, such as mandating the reporting of scope 3 emissions, and/or the requirements and guidance on verification or assurance. It is also important to note that the survey in respect of Market-based Accounting Approaches has asked (among other things) if the respondents think purchases of offset credits should be accounted for within GHG inventory reporting.

The four surveys have been sent to recipients of the GHG Protocol email list, who must respond by March 14, 2023. The GHG Protocol Secretariat will then analyze the responses and determine the need and scope of the updates required in consultation with the Advisory Group and Technical Working Group. The results will be used to prioritize and sequence any relevant updates to the GHG Protocol standards. This may well, therefore, result in more detailed reporting requirements under the GHG Protocol standards, thereby placing more scrutiny on companies' emissions and offsets reporting.

REGULATORY SCRUTINY

There also appears to be increasing formal regulatory scrutiny of this area. For example, on November 30, 2022, the European Commission published a

⁹ <https://ghgprotocol.org/corporate-value-chain-scope-3-standard>.

¹⁰ <https://ghgprotocol.org/scope-3-calculation-guidance-2>.

¹¹ <https://ghgprotocol.org/scope-2-guidance>.

¹² <https://sciencebasedtargets.org/about-us>.

regulatory proposal for an EU-wide voluntary framework¹³ to reliably certify high-quality carbon removals. The proposal is intended to “boost innovative carbon removal technologies and sustainable carbon farming solutions, and contribute to the EU’s climate, environmental and zero-pollution goals.” According to the European Commission, the proposal would significantly improve the EU’s capacity to quantify, monitor and verify carbon removals. Higher transparency would help build trust from stakeholders and industry whilst also helping prevent greenwashing.

Though perhaps a less interesting bellwether, the European Financial Reporting Advisory Group (EFRAG)¹⁴ – a private organization that provides technical assistance to the European Commission – has been tasked by the European Commission with publishing draft reporting requirements under the EU’s Corporate Sustainability Reporting Directive (CSRD). In its current form, EFRAG’s draft climate change reporting requirements, ESRS E1 (Climate Change),¹⁵ would require detailed reporting on the use and nature (no pun intended) of offsets. Similar information is also required in respect of any biodiversity credits (a separate topic that also looks to be ripe for “standardization”) under ESRS E4 (Biodiversity and ecosystems).¹⁶

CONCLUSION

So what are our key takeaways?

Despite the recent Guardian/Verra spat, the “voluntary” carbon markets appear to be far too embedded to disappear any time soon. They are, for example, an integral part of international aviation’s response to climate change under the Carbon Offsetting and Reduction Scheme for International Arbitration (CORSA).¹⁷

Although there are acknowledged challenges, there have been bumps on the road to holistic carbon market governance before. Let’s not forget the changes to the EU Emissions Trading System that prohibited compliance using credits from certain hydro and hydrofluorocarbon projects (back in the day when offsets could be used for EU Emissions Trading System compliance).

¹³ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7156.

¹⁴ <https://www.efrag.org/>.

¹⁵ https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FsiteAssets%2FED_ESRS_E1.pdf.

¹⁶ https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FsiteAssets%2FED_ESRS_E4.pdf.

¹⁷ <https://www.icao.int/environmental-protection/CORSA/Pages/default.aspx>.

We do, however, expect increasing scrutiny not just of VCM standard setters, but also of corporates. But this goes hand-in-hand with increased scrutiny of supply chains overall. See, for example, the latest EU requirements in respect of mandatory environmental and human rights due diligence in the EU,¹⁸ which will also affect many non-EU businesses. Such scrutiny is being, and will continue to be, enhanced by the increasing adoption of mandatory disclosure regimes across the globe. We have, for example, already seen the EU adopt sustainability disclosure requirements under the CSRD whilst the UK intends to adopt similar sustainable disclosure requirements of its own in the near future.

The move to mandatory reporting regimes will inevitably lead to the mandated disclosure of more granular details regarding voluntary offsets and potentially categorization of 'high integrity' offsets and other offsets. Of course, the mandated disclosure of any such details would likely increase the risk of disclosing organizations facing accusations of "greenwashing" by regulators and activist stakeholders, which may well lead to enforcement action and/or litigation against companies using offsets.

As a result of these developments, companies that report on their voluntary offsets should probably consider it necessary to align their reporting with the currently voluntary disclosure frameworks offered by the likes of the GHG Protocol and start preparing for such frameworks to become mandatory and, in all likelihood, more granular in detail.¹⁹

¹⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

¹⁹ Since this article was written, the ICVCM issued its Core Carbon Principles, Program-level Assessment Framework and Assessment Procedure intended to establish "rigorous thresholds on disclosure and sustainable development for high-integrity carbon credits and establishing a pathway towards even higher ambition.