

WEEKLY HIGHLIGHTS AT-A-GLANCE

FEDERAL – Legislative

- **H.R. 4239.** On November 8, [H.R. 4239](#), introduced by House Majority Whip Steve Scalise (R-LA) on November 3, was approved by the House Natural Resources Committee and will now head to the House floor for further consideration. The bill, known as the “Strengthening the Economy with Critical Untapped Resources to Expand American Energy Act” or the “SECURE American Energy Act”, would reform federal onshore and offshore energy resource management policies and contains several provisions similar to the [Discussion Draft](#) released last month by the Natural Resources Committee’s Energy and Minerals Subcommittee. Among other provisions, the legislation would enable states with established regulatory programs to manage certain federal permitting and regulatory responsibilities for oil and gas development on federal lands. [Read more.](#)

FEDERAL – Regulatory

- **BLM Master Leasing Plans.** As part of the Bureau of Land Management’s (BLM) October 24 report on regulatory burdens to domestic energy production ([Access the report here](#)), the agency is considering rescinding the policy authorizing Master Leasing Plans (MLPs). “The directive states that the ‘BLM expects to rescind’ the policy authorizing MLPs. It states that current BLM Resource Management Plans will be the source of land allocation decisions for oil and gas.” The report states that this “will result in more streamlined National Environmental Policy Act analysis, and a shorter timeframe for acreage nominations to make it to a competitive lease sale.” In fact, the report envisions cutting down the time from nomination of oil and gas leases to their sale from 16 months to eight or six months. [Read more.](#)
- **BLM Methane Rule.** On November 2, numerous Democrat congressional representatives and senators [sent a letter](#) to Interior Secretary Ryan Zinke petitioning him to implement and begin to enforce the Bureau of Land Management’s methane venting and flaring rule. Their letter came nearly a month after the agency proposed suspending or delaying certain requirements under the regulation while it considers revising or repealing the rule. The rule is also still subject to pending federal litigation (covered in last week’s Report). Zinke has yet to respond publicly to the letter. [Read more.](#)
- **U.S. Energy Information Administration.** President Donald Trump has nominated Linda A. Capuano, currently a fellow at Rice University’s Baker Institute for Public Policy’s Center for Energy Studies, to lead the U.S. Energy Information Administration. Capuano’s

previous experience includes working as vice-president of technology at Marathon Oil Corp. in Houston from 2008 to 2013. [Read more.](#)

STATE – Regulatory

- **Permitting; Hydraulic Fracturing – Illinois.** The first company to obtain a permit for hydraulic fracturing in Illinois announced on November 3 that they will no longer use it, citing both market conditions and the state’s “burdensome and costly” regulations. According to a statement by Kansas-based Woolsey Companies Inc. vice president, Mark Sooter, “The process we have gone through to receive a permit was burdensome, time consuming and costly due to the current rules and regulations of the state of Illinois, and it appears that this process would continue for future permit applications.” [Read more.](#)
- **Texas Railroad Commission.** On October 26, Christi Craddick, chairwoman of the Railroad Commission of Texas, told attendees at the Permian Basin Petroleum Association’s annual meeting, that her agency “will focus in 2018 on rule revisions and efficiency improvements, measures to retain and attract expert staff, and development with the legislature of a better funding structure for the commission.” [Read more.](#)

STATE – Legislative

- **Forced Pooling – West Virginia.** On October 30, West Virginia Senate President Mitch Carmichael (R) said the Senate has given up on trying to pass legislation to allow for forced pooling of natural gas resources. “Forced pooling has no chance,” said Carmichael. “But that doesn’t mean the state Legislature will not pursue bills aimed at encouraging oil and gas drilling in the Mountain State.” Carmichael added that “West Virginia’s outdated mineral rights laws are discouraging companies from drilling in West Virginia and encouraging them to drill in neighboring states.” [Read more.](#)

STATE – Judicial

- **Landman Licensing – Ohio.** (*Update from 3/13/17 Weekly Report*) In a positive and long-awaited turn for landmen, on November 1, the Ohio Supreme Court finally accepted for judicial review the appeal of [Dundics v. Eric Petroleum Corp.](#) (Case No. 2017-0448), in which the Ohio Court of Appeals for the Seventh District held that landmen are subject to the requirements of state law, R.C. Chapter 4735, requiring real estate broker’s licenses in order to be entitled to compensation for brokering deals with landowners on behalf of oil and gas companies. Agreeing with the trial court’s ruling, the appellate court held that “real estate,” for purposes of the statute, was broadly defined to include “leaseholds as well as any and every interest or estate in land” – which, under Ohio law, includes oil and gas rights. For more information about this pivotal case, check out the Vorys Energy & Environmental Law Blog [here](#). Of particular note, AAPL has been engaged in this case since the first appeal in December 2015,

when we produced and filed an Amicus Brief in support of the plaintiff's position to the appellate court, and earlier this year AAPL also submitted a Support Brief to the Ohio Supreme Court urging them to hear the case. Now that the Ohio Supreme Court has accepted AAPL's proposition of law we will be submitting a full Amicus Brief to the Ohio Supreme Court by year's end. We will continue to keep members informed as the case progresses. [Read more.](#)

- **Dormant Mineral Act; Marketable Title Act – Ohio.** On September 27, the Ohio Supreme Court accepted for review a conflict of courts case stemming from a decision in [Blackstone v. Moore](#) (Case No. 2017-Ohio-7751) before Ohio's Seventh District Court of Appeals. The case involved a discrepancy as to whether an interest at issue was a perpetual non-participating royalty or a fee interest in minerals and the application of the state's Dormant Mineral Act and Marketable Title Act in resolving the case. At issue is that the *Blackstone* decision conflicts with a decision from another state appellate court addressing application of these statutes. Now that the Ohio Supreme Court has agreed to step in, its decision will affect the extent to which property owners can use the Ohio Marketable Title Act to claim minerals they did not previously own. [Read more.](#) Access the Ohio Supreme Court case docket [here.](#)
- **Duhig Rule; Royalties – Texas.** On December 5, the Texas Supreme Court will hear oral argument on an appeal from the Texas 14th Court of Appeals in [Perryman v. Spartan Texas Six Capital Partners, Ltd. et al.](#) (Case No. 16-0804). This case involves an oil and gas royalty dispute and application of the *Duhig* rule. The petitioners claim that the appellate court erred by overruling the trial court by applying the *Duhig* rule under the facts of the case. Here, petitioners claim the *Duhig* rule does not apply to grants containing a reservation of a fraction of what "grantor owned" at the time. [Read more.](#)
- **Statute of Frauds; Contracts – Texas.** On October 10, oral argument was held before the Texas Supreme Court in [Hill v. Shamoun & Norman](#) (Case No. 16-0107) on appeal from the Texas 5th Court of Appeals. Although not specifically an oil and gas case, the case raises issues of contract law and the Statute of Frauds as it relates to agreements between a client and attorney in the state. At issue is whether the appellate court violated the Statute of Frauds by reinstating a jury verdict that gives legal effect to an otherwise unenforceable oral contingency fee agreement. [Read more.](#)
- **Leasing – Texas.** On December 5, the Texas Supreme Court will hear oral argument on appeal from the Texas 4th Court of Appeals in [Adams v. Murphy Exploration & Production Co.—USA](#) (Case No. 16-0505). At issue in the case is the meaning of a drainage offset clause in an oil and gas lease. Murphy contends that its well satisfied the lease requirements for an offset well, although the term "offset well" was not defined in the oil and gas lease. The respondents, however, claim that the appellate court read an "unprecedented and unworkable drainage-protection requirement into" the offset well clauses. [Read more.](#)

- Leasing; Retained Acreage Clauses – Texas.** On January 9, 2018, the Texas Supreme Court will hear oral argument on appeal from the Texas 11th Court of Appeals in [Endeavor Energy Resources v. Discovery Operating, Inc.](#) (Case No. 15-0155). The case involves a dispute regarding oil and gas lease interpretation and specifically where a lease provides for partial termination and the lease lapsing in areas without a well, while remaining in force in areas where there is a well. The leases at issue say that each producing well holds the lease for one “proration unit” of acreage. The issue is how much acreage that means: the number of acres found in the Texas Railroad Commission filed rule (160 acres) or the number of acres found on the plats in Endeavor’s regulatory filings (81 acres). [Read more.](#)
- Leasing; Retained Acreage Clauses – Texas.** On January 9, 2018, the Texas Supreme Court will hold oral argument on an appeal of [XOG Operating, LLC v. Chesapeake Exploration Limited Partnership](#) (Case No. 15-0935). Like the *Endeavor* case above, but from the Texas 7th Court of Appeals, this case involves a retained acreage clause dispute, but here the retained acreage clause was not included in an oil and gas lease but in a lease assignment from XOG. The assignment provided that once the continuous development period expired the lease would revert to the assignor, except that portion of the lease included within the proration or pooled unit of each well drilled under the assignment and producing, or capable of producing, oil and/or gas in paying quantities. [Read more.](#)
- Mineral Executive Rights; Leasing – Texas.** On November 20, the Texas Supreme Court will hold oral argument on an appeal of [Texas Outfitters v. Nicholson](#) (Case No. 17-0509) from the Texas 4th Court of Appeals. This case [involves a dispute](#) addressing the duty of holders of the mineral executive right to its non-executive mineral owner. In its decision, the appellate court held that “[a]lthough protecting an existing use of the surface estate is a legitimate interest, an executive breaches its duty if it protects the surface estate by refusing to permit any mineral lease.” In other words, “it is a breach of the executive’s duty to seek benefits for itself at the expense of the non-executive as a condition to its agreement to lease, whether or not it succeeds.” [Read more.](#)
- Leasing; Royalties – Texas.** The Texas Supreme Court has opened a second petition for review in [Samson Lone Star, LP v. Hooks](#) (Case No. 16-0776), with respondents’ reply brief due November 22. In the [first appeal](#) before the Texas Supreme Court, the court held that the Hooks’ royalty claims of fraud were not barred by limitations in a case regarding whether a mineral owner’s claims of fraud and breach of contract in the leasing and pooling of his mineral interests are, as a matter of law, barred by limitations. In the current appeal, Samson has petitioned for review of the award of \$17.5 million in fraud damages it was ordered to pay Hooks. [Read more.](#)
- Leasing; Royalties; Post-Production Costs – Texas.** The Texas Supreme Court has opened for review an appeal from the Texas 13th Court of Appeals in [Burlington Resources v. Texas Crude Energy](#) (Case No. 17-0266). At issue in the case is whether Burlington Resources

could deduct post-production costs from overriding royalty payments made under certain assignment instruments. The trial court concluded that the assignments did not allow for the deduction of these costs and ruled in favor of Texas Crude Energy. The appellate court affirmed the trial court decision. Here, the petitioners argue that under its agreements Texas Crude Energy agreed to “an ordinary overriding royalty” and not one free of post-production costs and that the lower courts incorrectly held that the assignments superseded Texas Crude’s contracts with Burlington Resources which would have allowed for the deductions. [Read more](#).

- **Leasing; Assignments – Texas.** The Texas Supreme Court has opened for review an appeal from the Texas 12th Court of Appeals in [Barrow-Shaver Resources v. Carrizo Oil & Gas](#) (Case No. 17-0332) in a case determining whether a duty to act reasonably is implied in a consent-to-assign provision in a farmout agreement. The case arose from Barrow-Shaver suing Carrizo for its refusal to consent to an assignment of Barrow-Shaver’s rights to a third party. Barrow-Shaver [claimed](#) that Carrizo “had unreasonably conditioned its consent and had defrauded Barrow-Shaver into entering into the agreement by assuring it that Carrizo would act reasonably.” Although Barrow-Shaver won a \$27.7 million judgment at trial, the appellate court reversed “concluding that the contract allowed Carrizo to withhold consent and that it had no obligation to act reasonably.” [Read more](#).
- **Floating Royalty; Deeds – Texas.** (Update from 10/31/16 Weekly Report) The Texas Supreme Court has opened for review a fraction-of-royalty appeal from the Texas 8th Court of Appeals in [Greer v. Shook](#) (Case No. 17-0028). In the case, the appellate court concluded that a deed conveying a 1/2 mineral interest that included a 1/2 royalty interest created a 1/2 floating royalty interest in any production on the land described in the deed based on the “legacy of the 1/8th royalty” and “estate misconception” doctrines. [Read more](#).

INDUSTRY NEWS FLASH:

◆ **Fossil fuels to remain main energy source for decades.** A recent [OPEC report](#) predicts that while global demand for fossil fuels may diminish in the coming decades, it will still remain the main energy source. “The report by the 14-nation Organization of the Petroleum Exporting Countries says that the use of fossil fuels — 81 percent of the global energy mix in 2015 — will decline by 2040. But the cartel says they will still account then for 74 percent of all energy used.” [Read more](#). OPEC also acknowledged the dominance of U.S. shale, “boosting its long-term estimate for growth in North American shale production by 56 percent from a year earlier...to reach 7.5 million barrels a day in four years.” [Read more](#).

State-by-State Legislative Session Overview

Massachusetts, Ohio and Wisconsin are in regular session. The **District of Columbia** Council, **Puerto Rico** and the **United States** Congress are also in regular session.

Michigan and **Pennsylvania** are in recess until November 13. **New Jersey** and **Rhode Island** are in recess to the call of the chair.

Oklahoma convened a special session related to budget issues on September 25, [News OK](#) reports. **Alaska** convened its fourth special session related to budget issues on October 23, the [Juneau Empire](#) reports. A proclamation authorizing the session from Independent Gov. Bill Walker can be found [here](#).

Connecticut reconvened its first special session on October 25 to address budget issues and recessed to the call of the chair on October 26, [Reuters](#) reports.

Maine adjourned its special session on November 6, the Lewiston [Sun Journal](#) reports. **Illinois** adjourned a veto session on November 9, [WCIA](#) reports.

North Carolina Democratic Gov. Roy Cooper has until November 16 to act on legislation or it becomes law. **Alaska** Independent Gov. Bill Walker has 15 days, Sundays excepted, to act on legislation from the regular and special sessions or it becomes law. **Connecticut** Democratic Gov. Dannel Malloy has 15 days from presentment to act on special session legislation or it becomes law. **Delaware** Democratic Gov. John Carney has 10 days, Sundays excepted, to act on legislation or it becomes law. **Illinois** Republican Gov. Bruce Rauner has 60 days from presentment to act on all legislation passed during the veto session or it becomes law. **Maine** Republican Gov. Paul LePage has until three days after the next meeting of the legislature to act on legislation or it becomes law. **New Hampshire** Republican Gov. Chris Sununu has five days, Sundays excepted, to act on legislation or it is pocket vetoed. **New York** Democratic Gov. Andrew Cuomo has 10 days from presentment, Sundays excepted, to act on legislation from the regular and special sessions or it becomes law. **Rhode Island** Democratic Gov. Gina Raimondo has six days, Sundays excepted, to act on special session legislation or it becomes law. **South Carolina** Republican Gov. Henry McMaster has until two days after the next meeting of the legislature to act on regular session legislation presented after May 6 and special session legislation or it becomes law.

Maine Republican Gov. Paul LePage had acted on all special session legislation upon adjournment on November 6.

The following states are currently holding interim committee hearings: [Alabama](#), [Alaska](#), [Arizona](#), [Arkansas](#), [California Assembly](#) and [Senate](#), [Colorado](#), [Connecticut](#), [Delaware](#), [Florida House](#) and [Senate](#), [Georgia House](#) and [Senate](#), [Hawaii](#), [Idaho](#), [Illinois House](#) and [Senate](#), [Indiana](#), [Iowa House](#) and [Senate](#), [Kansas](#), [Kentucky](#), [Louisiana](#), [Maine](#), [Maryland](#), [Minnesota](#), [Mississippi House](#) and [Senate](#), [Missouri House](#) and [Senate](#), [Montana](#), [Nebraska](#), [New Hampshire House](#) and [Senate](#), [New Mexico](#), [New York House](#) and [Senate](#), [North Dakota](#), [Oklahoma House](#) and [Senate](#), [Oregon](#), [Rhode Island](#), [South Carolina House](#) and

[Senate](#), [South Dakota](#), [Tennessee](#), [Texas House](#) and [Senate](#), [Utah](#), [Vermont](#), [Virginia](#), [Washington](#) and [Wyoming](#).

The following states are currently posting bill drafts, profiles and interim studies for the 2018 session: [Alabama](#), [Arkansas](#), [Colorado](#) (proposed legislation appears on interim committee pages), [Florida House](#) and [Senate](#), [Georgia](#), [Iowa](#), [Kentucky](#), [Maine Short Titles](#), [Preliminary Titles of Agency Requested](#) bills and [Study Items](#), [Montana](#), [Nebraska](#), [New Hampshire Legislative Service Requests](#) and [Withdrawn LSRs](#), [North Dakota](#), [Oklahoma profiles](#) and [House](#) and [Senate](#) interim studies, [South Carolina](#), [Utah](#) and [Wyoming](#).

Landmen

Employee Classification

Although a non-producing state, the following **Massachusetts** bills are notable regarding employee classification and are scheduled for hearings in the Joint Labor and Workforce Development Committee:

[HB 1018](#) would amend [General Law Section 148B](#) of Chapter 149, which governs employee classification, by striking out paragraph (a) and replacing it with the definition that people should be classified as employees unless:

- The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- The service is performed outside the usual course of the business of the employer; or
- The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

[HB 1036](#) would amend [General Law Section 148B](#) of Chapter 149, which governs employee classification, by striking out paragraph (a) and replacing it with the definition that people should be classified as an employee unless the person is a separate business entity or all of the following criteria are met, in which case they should be classified as an independent contractor:

- The person is free from control and direction in performing the job.
- The service is performed outside the usual course of business of the contractor for which the service is performed.
- The person is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue.

[SB 1043](#) would amend [General Law Section 148B](#) of Chapter 149, which governs employee classification, by adding that the state should adopt rules and regulations to align the state law with [section 3121](#) of the Internal Revenue Code and [section 530 \(d\)](#) of the Revenue Act of 1978.

[SB 1049](#) would amend [General Law Section 148B](#) of Chapter 149, which governs employee classification, by adding that a person is an independent contractor if they have consented to that

classification and paid a compensation that is equal to, or exceeds, \$30 per hour, \$1,200 per week or \$5,160 per month. They would also have to provide certain professional services, use discretion and independent judgment or advanced knowledge in a field, or retain ownership or copyright to their work.

[SB 1050](#), would amend [General Law Section 148B](#) of Chapter 149, which governs employee classification, by adding people who are in franchise agreements should not be considered employees of the parent company that granted them the license or authority to sell the product or service.

Lands

Land Permits

Pennsylvania [HB 1009](#) is scheduled for a hearing in the Senate State Government Committee on November 13 after the conclusion of the Senate floor session. This bill would release Project 70 restrictions on a parcel of property and structure located in West Newton Borough in Westmoreland County in return for the development of park and open space in the West Newton Borough in Westmoreland County.

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