

JANUARY 2018

VOL. 18-1

PRATT'S

ENERGY LAW

REPORT



EDITOR'S NOTE: CERCLA IN THE CIRCUITS

Victoria Prussen Spears

**CERCLA CONTRIBUTION: NINTH CIRCUIT
ADDRESSES TWO CIRCUIT SPLITS**

Eric A. Rey

**OWNER MEANS OWNER: TENTH CIRCUIT FINDS
U.S. LIABLE UNDER CERCLA BASED ON TITLE
IN LANDS SUBJECT TO UNPATENTED MINING
CLAIMS**

Robert C. Kirsch, Rachel Jacobson, and
Nathaniel B. Custer

**CALIFORNIA EXTENDS GHG CAP-AND-TRADE
PROGRAM**

Megan Berge, Chris Carr, and Kevin Vickers

**UK RENEWABLE ENERGY: THE 2017 CONTRACT
FOR DIFFERENCE AUCTION ROUND**

Paul Exley and Matt Lewy

**MAKING THE MOST OF LEANER TIMES: A
CONTRACTOR'S GUIDE TO COMMON ENGLISH
LAW ISSUES - PART II**

James Brown

Pratt's Energy Law Report

VOLUME 18

NUMBER 1

JANUARY 2018

Editor's Note: CERCLA in the Circuits

Victoria Prussen Spears 1

CERCLA Contribution: Ninth Circuit Addresses Two Circuit Splits

Eric A. Rey 3

**Owner Means Owner: Tenth Circuit Finds U.S. Liable Under CERCLA
Based on Title in Lands Subject to Unpatented Mining Claims**

Robert C. Kirsch, Rachel Jacobson, and Nathaniel B. Custer 9

California Extends GHG Cap-and-Trade Program

Megan Berge, Chris Carr, and Kevin Vickers 13

**UK Renewable Energy: The 2017 Contract for Difference
Auction Round**

Paul Exley and Matt Lewy 18

**Making the Most of Leaner Times: A Contractor's Guide to Common
English Law Issues—Part II**

James Brown 23

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 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 Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2018 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, 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.

An A.S. Pratt® Publication

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.

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

WANDA B. WHIGHAM

Senior Counsel, Holland & Knight 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. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2018 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. 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, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires 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, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. 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, 121 Chanlon Road, North Building, New Providence, NJ 07974.

UK Renewable Energy: The 2017 Contract for Difference Auction Round

*By Paul Exley and Matt Lewy**

This article examines the background to the 2017 auction round for the UK government's contract for difference feed-in tariff scheme, considers the results of the 2017 auction round and compares these results with the prior 2015 auction round, and draws-out implications for investors and other market participants.

According to the UK National Grid, on June 7, 2017 for the first time ever more electricity was produced by wind, nuclear, and solar than gas and coal combined. This underlines the increasing importance of renewables to the UK's energy supply.

This article looks at the background to the 2017 auction round for the UK government's contract for difference feed-in tariff ("CfD") scheme, which is designed to support the provision of new UK renewable energy generation capacity, considers the results of the 2017 auction round and compares these results with the prior 2015 auction round, and draws-out implications for investors and other market participants.

2017 AUCTION ROUND

In the first CfD auction round in 2015, the UK government's budget to support renewable generation through the CfD regime was divided into two categories—representing "more established" and "less established" renewable technologies.

The second CfD auction round closed on April 21, 2017. In this round the UK government set a budget of up to £290 million solely for the "less established" technologies category, with generators (and their investors) invited to submit bids to deliver operational projects in either 2021/22 or 2022/23.

The 2017 round was open to the following technologies and at the following off take pre-auction "strike prices":

* Paul Exley is a partner at Baker Botts L.L.P. practicing international and domestic transactional work with a particular focus on cross-border M&A in the energy sector. Matt Lewy is an associate at the firm advising clients on a range of corporate matters. The authors may be contacted at paul.exley@bakerbotts.com and matt.lewy@bakerbotts.com, respectively.

UK RENEWABLE ENERGY

Technology	2021/22 Generation Year Strike Price (£/MW hour)	2022/23 Generation Year Strike Price (£/MW hour)
Offshore wind	105	100
Advanced Conversion (with or without CHP) ¹	125	115
Anaerobic Digestion (with or without CHP) minimum 5MW	140	135
Dedicated Biomass with CHP	115	115
Wave	310	300
Tidal Stream	300	295
Geothermal	140	140

Energy generators were invited to submit their bid with a strike price for the off take of electricity per megawatt hour. The prices in the above table were designed to set the opening auction price, with bids being made at or below these prices. The winning (i.e. lowest viable) bids receive 15 year CfDs with a UK government counterparty. Once such projects are operational, to the extent the “reference price” (a measure of the average market price for electricity in the UK) is below the agreed auction strike price, the UK government counterparty will pay the difference to the generator (and vice versa). The overall aim is to provide energy generators with normalized and stable long term returns for their investment into UK renewable energy infrastructure.

The results of the second CfD auction round were published on September 11, 2017, and are summarized in the Table below:

Technology		2021/22 Delivery Year	2022/23 Delivery Year	Total Capacity (MW) by technology
Advanced Conversion (Six projects in total)	£/MWh	74.75	40.00	
	MW	56.31	8.00	64.31
Dedicated Biomass with CHP (Two projects in total)	£MWh	74.75	N/A	
	MW	85.64	0	85.64
Offshore Wind	£MWh	74.75	57.50	

¹ “CHP” refers to combined heat and power.

Technology		2021/22 Delivery Year	2022/23 Delivery Year	Total Capacity (MW) by technology
(Three projects in total)	MW	860	2336	3196

TECHNOLOGY CHOICE AND THE 2017 AUCTION ROUND

As was the case in the 2015 auction round, the 2017 round did not ring-fence set amounts of the budget for specified technologies within the “less established technologies” category (for example, by allocating a fixed amount to biomass). The result was that, as expected, the least developed technologies (i.e. wave, tidal stream, and geothermal) with a correspondingly high degree of project and return risk were not successful in the 2017 auction round. This was also the case in the 2015 auction round.

In the 2015 auction round, the “less established” technologies category was ultimately dominated by two successful bids from large offshore wind projects. A similar trend emerged from the 2017 round, especially as the opening auction strike prices of £105 MW/hour for the 2021/22 and £100 MW/hour for the 2022/23 delivery years were actually relatively high when compared against the equivalent metrics for recently consented offshore wind projects in other European jurisdictions. For example, in the Netherlands DONG Energy recently won the tender for the Borssele I and II projects with off take strike prices of EUR 71.1591 MW/hour and EUR 73.807 MW/hour respectively. Further, there are actually several offshore wind projects that had recently been granted UK planning consent without an underpinning revenue support mechanism—including Moray Firth, Triton Knoll, and Hornsea Two. It was not a surprise that each of these three projects were successful in the 2017 CfD auction round.

The most striking feature of the 2017 round was the continuing and dramatic downward trend in delivery strike prices for offshore wind. Hornsea 2 will be the world’s largest offshore wind farm, powering over 1.3 million UK homes at a strike price of £57.50 MW/hour. The implication is that offshore wind is now significantly cheaper than the more conventional options of nuclear and natural gas fuelled generation. To illustrate this point, the UK government recently approved the Hinkley Point C nuclear plant at a comparable £92.50 per MW/hour, and UK government calculations price the successful 2017 offshore wind projects at a lower price per MW/hour, on a levelized basis, than natural gas fuelled alternatives.

Alongside offshore wind, the only other successful bids from the “emerging technologies” category in the 2015 auction round were three advanced

conversion projects, for which a total of 62 MW of CfDs were awarded. In the 2017 auction round, the UK government set a maximum aggregate limit of 150MW of generation capacity to be awarded CfDs for “fuelled technologies” (i.e. advanced conversion, anaerobic digestion and biomass). This policy may make intuitive sense as the requirement for large quantities of biodegradable fuel for these projects reduces their credentials as true sources of sustainable, renewable energy. However, the fact that in the 2017 auction round an aggregate 149.95MW of generation capacity was awarded to advanced conversion and biomass projects (i.e. just below the 150MW generation limit) suggests that these two technologies are competitive and that auction bids may have exceeded the generation limit. This, (together with the points made above) appears to demonstrate an implied UK government preference for offshore wind.

It is worth noting that one of the advanced conversion projects (Redruth EfW, an 8MW/hour project for delivery in 2022/23) has been awarded a CfD at a strike price of £40 MW/hour. This is below the current and UK government projected wholesale electricity price, meaning that Redruth could ultimately be liable to pay the UK government counterparty under the CfD framework. It remains to be seen whether this project is economically viable and will reach operational completion.

In the 2017 auction round, only large scale anaerobic digestion projects in excess of 5MW/hour were eligible to apply for a CfD. There are only five anaerobic digestion projects currently operating in the UK at or in excess of this threshold, primarily because a project of this size generally requires over 100,000 tonnes of feedstock per annum. No anaerobic digestion projects were successful in the 2017 auction round, which indicates that due to such logistical constraints no competitive bids were made for such projects of the requisite scale.

The UK government did not initially set an auction strike price for geothermal energy, and whilst a price of £140/MW hour was eventually set, it is acknowledged that geothermal is the most nascent of all the technologies in the “less developed technology” category (at least from a UK perspective) and there is insufficient UK-centric data for an accurate auction strike price to be set. Accordingly, the UK government has opened a consultation process to consider an appropriate strike price for geothermal energy in future rounds. Given this, it was not a surprise that no CfDs were awarded to geothermal projects in the 2017 round.

A UK government consultation has also been opened into non-mainland UK onshore wind projects. This is a result of lobbying activity from generators interested in the Scottish islands—who argue that the complexity of establish-

ing economically viable onshore wind projects in remote islands means they should be treated as a separate category to onshore wind, with a lower baseline auction strike price and potentially being categorised within the “emerging technologies” category.

FUTURE AUCTION ROUNDS AND AN INVESTOR'S PERSPECTIVE

The UK government had previously announced that the 2017 auction round would be the first of three within the 2015–20 UK Parliament, with a total of £730 million being allocated across the three rounds. Of this total, only £176 million was allocated in the 2017 round, with the clear overall “winner” being offshore wind which represented over 95 percent of the total generation capacity awarded a CfD. It remains to be seen how the 2017 UK general election and resulting Conservative minority administration will impact this overall budget, timing proposals and the CfD regime more generally over a short to medium term horizon.

Looking at a longer term horizon, significant uncertainty exists both economically and politically as the UK proceeds with the Brexit negotiation process. It is not possible to predict at this stage what impact the Brexit process will have on the CfD policy framework and more generally the investment climate for UK renewables.

The CfD scheme is designed to allow investors and developers to model their returns with greater accuracy and as such to make the investment in and development of CfD accredited UK renewables an attractive prospect. However, the costs of meeting the CfD qualification criteria are significant and the risk that these costs may be wasted is deterring some developers and investors. This is especially the case as the competitive nature of the sealed-bid CfD auction process is designed to be opaque in that information on other bidders, their strategies and financial models is limited.

Large scale international investors are likely to prefer to acquire operational assets that have already obtained a CfD through secondary markets acquisition activity—thus reducing the risk profile of their investment.