

Energy Committees Newsletter

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WELCOME NOTE FROM THE EDITOR

Richard Roos-Collins
Vice Chair, Publications
Hydro Power Committee

This issue of the Energy Committees Newsletter focuses on the “The Energy Policy Act of 2005.” Passed by the U.S. House of Representatives, the bill is pending for a floor vote in the Senate as of the mid-June submittal of this issue for publication. The bill follows four similarly comprehensive proposals that Congress considered but did not enact in response to the president’s 2001 Energy Policy. The Energy Bill addresses a fundamental question: how should the United States meet its energy demand, predicted to grow by 30 percent by 2025, without increasing our dependence on the foreign sources which today supply 32 percent of demand?

The Energy Bill as passed by the House has 26 titles that address the production, distribution, marketing, and use of all forms of energy. The titles are: (I) Energy Efficiency, (II) Renewable Energy, (III) Oil and Gas–Commerce, (IV) Coal, (V) Indian Energy, (VI) Nuclear Matters, (VII) Vehicles and Fuels, (VIII) Hydrogen, (IX) Research and Development, (X) Department of Energy Management, (XII) Electricity, (XIII) Energy Tax Incentives, (XIV) Miscellaneous, (XV) Ethanol and Motor Fuels, (XVI) Studies, (XVII) Renewable Energy–Resources, (XVIII) Geothermal Energy, (XIX) Hydropower–Resources, (XX) Oil and Gas–Resources, (XXI) Coal, (XXII) Arctic Coastal Plain Domestic

Energy, (XXIII) Set America Free (SAFE – on reducing foreign dependence), (XXV) Grand Canyon Hydrogen-Powered Transportation Demonstration, and (XXVI) Additional Provisions.

The bill is massive, exceeding 1,000 pages. Due to page limitation, this issue addresses certain titles that are representatives of the bill’s scope and import. The issue begins with an article by Pat Wood, III, chairman of the Federal Energy Regulatory Commission (FERC) since 2001. Chairman Wood describes FERC’s policies and actions to enhance electricity generation and transmission as well as natural gas distribution. Although FERC, on his watch and at his initiative, has made very substantial progress in energy supply and regulatory process, Chairman Wood emphasizes that our energy infrastructure must be enhanced to meet future demand. Francis J. Devlin, chair of the Section’s Oil and Natural Gas Downstream Committee, reminds us that the opening of the Arctic National Wildlife Reserve and the safe harbor related to MBTE fuel additives, while highly controversial, are not the primary substance of the petroleum titles. Michael B. Wigmore and Sandra P. Franco describe bill provisions that would expand federal authority to site interstate facilities for electricity transmission. Finally, John H. Fahsbender describes provisions that expand the contribution of renewable energy, now 6 percent of total energy supply.

For further information on these titles and other sections of the 2005 Energy Bill, see the Congressional Bill Summary at <http://thomas.loc.gov/cgi-bin/bdquery/>

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On behalf of the energy committees, Richard Roos-Collins was editor of this issue and Gregory J. Copeland, Frank J. Devlin, James E. Hickey, Jr. Donald S. McCauley, Jr., Peter D. Mostow, and Joseph A. Siegel contributed to the preparation of this newsletter.

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z?d109:HR00006:@@D&summ2=m&. The Government Accountability Office (GAO) has produced a report on the bill, available at www.gao.gov/new.items/d05414t.pdf.

**ENERGY INFRASTRUCTURE:
ACCOMPLISHMENTS AND CHALLENGES**

**Pat Wood, III
Chairman, Federal Energy
Regulatory Commission
Washington, D.C.**

This article is adapted from a speech delivered at the National Hydropower Association's 2005 Annual Conference in Washington, DC, on April 5, 2005.

When I came to FERC four years ago, we made it clear to everyone that our job had three components: ensuring adequate energy infrastructure, developing market rules that serve the customer and monitoring these markets to protect the customers. In this article, I would like to address that first element: energy infrastructure. In some ways this is the most important element, because without adequate infrastructure, energy markets cannot perform.

I'll begin by putting all of this in perspective. As a nation we must recognize that we exist in a worldwide, free market economic system. Simply put, we compete with India, China and the European Union in product development, manufacturing and sales, and ultimately the jobs that go with all of these economic sectors. A critical element in this competition is the cost of energy. We have seen recently how quickly jobs can flow to countries where energy costs less. As an example, plants producing fertilizer for the American agricultural industry are quickly moving to countries where natural gas can be purchased for a fraction of the \$6 per million cubic feet cost here in the United States. Of course, an adequate energy infrastructure is critical to holding down the cost of energy.

The nation's existing infrastructure can be viewed as a gift from our predecessors in the same way that we

benefit from the interstate network of roads which our leaders conceived and constructed decades ago. But unless we want our legacy to be one of energy shortage and unnecessarily high cost, we must think ahead to the future. I think we have work to do.

I will start with a snapshot of where we are. Then I will review what FERC has done over the last four years. Finally, I will take a look at some of the problems before us, and how we can solve them.

Where We Are

In 2004, total U.S. energy demand was nearly 100 quadrillion BTUs, and demand for energy in the United States is increasing steadily. Oil provides the bulk of the nation's energy followed by natural gas and coal. Approximately 50 percent of the oil is used to fuel transportation. Domestic production is anticipated to level off through 2016. The relative contributions of the various fuel types are not expected to change much through 2025. The difference between demand and production must be made up by imports. According to the U.S. Energy Information Administration, oil and natural gas will continue to be the energy imports of choice.

By 2025, U.S. energy demand is expected to increase by almost 36 percent. Department of Energy, *Annual Energy Outlook 2005*. During that same period, the amount of electricity consumed will increase by almost 50 percent. The facilities, or infrastructure, that are in place to deliver this energy will not be adequate to meet this demand. We have enjoyed the fruits of excess infrastructure built 20 to 30 years ago. Increased demand has depleted those reserves, and now we risk passing to future generations a system that can barely meet existing demand.

What We Have Done

Ensuring that adequate infrastructure is available to maintain this nation's economic development is one of the Federal Energy Regulatory Commission's (FERC) greatest challenges. FERC's regulatory responsibilities affect much of the country's energy infrastructure. FERC has a direct effect on the natural gas industry because of its responsibility to analyze and, if

warranted, approve natural gas facilities for interstate and foreign commerce, including pipelines, storage fields and liquefied natural gas terminals. FERC heavily influences the hydroelectric industry through its responsibility to evaluate and license non-federal hydroelectric projects. While FERC does not regulate the siting of other electric-related facilities (*i.e.*, generation and transmission) or oil pipelines, its rate regulation in these areas affects these particular infrastructures.

In recent years, FERC has implemented initiatives that are designed to expedite its review and decision-making process for infrastructure. Since June 2001, FERC has issued 21 new hydropower licenses and 110 relicenses for a total capacity of 4,763 MWs. In addition, 400 MW have been authorized by amendments to existing licenses. FERC has also shortened the processing time for licenses from 47 to 35 months. Since 2001, FERC has also certified 4,154 miles of new interstate natural gas pipeline, the construction of 128 billion cubic feet (Bcf) of new natural gas storage, and approved 7.9 Bcf/day of new liquid natural gas vaporization capacity providing additional natural gas supply located near where the gas is needed.

Challenges

We have seen some significant accomplishments recently, but an integrated system is only as strong as its weakest part.

1. Electric Transmission

The national electric transmission grid is more accurately the North American energy grid and it is becoming increasingly so. During the last four years more than 185 GW of additional electric generation capacity has been constructed. Only ten major transmission projects have been constructed, however. Failure to construct additional electric transmission limits our ability to develop and to move generation to the customers.

Existing electric transmission facilities are inadequate to deliver low cost generation to potential customers. We must not only plan and construct electric transmission

that will meet future needs, we must relieve the costly congestion that exists today. Siting issues and cost recovery continue to be the biggest impediments to transmission construction. So is the disincentive of our current industry structure, which looks to generation owning companies to take the lead on constructing transmission. Such new transmission may facilitate competition from other companies' generation assets – perhaps shuttering the old plants, certainly reducing margins from them. So, here is a case where private interest and public interest are not in alignment, as they should be in well-functioning markets.

For this reason, FERC has strongly supported independent operation and ownership of transmission. Congress recently provided tax incentives for companies who choose to sell their transmission assets in furtherance of federal restructuring policy. FERC similarly provides incentives for this action. We have already identified just a few of the electric transmission corridors where new transmission lines will have to be constructed to meet the projected 2025 demand.

To enhance the reliability of the existing electrical grid and to allow its timely expansion to meet increasing demand, federal authority for electric transmission siting would appear to be in order. While the current energy bill's "backstop authority" would be a step forward toward rendering decisions, it may not accelerate the siting process since there are many contingencies that would inhibit quick action by FERC. Truly, the best method for siting interstate electric transmission is to amend the Federal Power Act and give such jurisdiction to FERC. In this way, initiatives to expedite authorization like the Pre-filing Process, which we have adapted from hydro to gas, can be effectively applied to electric transmission siting.

2. Electric Generation Capacity

In the not-too-distant future, we will need additional generation capacity. Based on a conservative increase in electric demand of two percent per year and taking into account projected retirements and new construction either under development or in advanced development, demand cuts into the reserve margin by 2016 and exceeds capacity by 2020. Considering the

length of time required for planning and construction of new electric generation, 2020 is closer than it seems.

The realignment of natural gas prices (and the fortuitous recent clarification of EPA future emissions requirements) means that we will see more coal – clean coal – plants, and eventually, once a standardized plant design is achieved in the United States, nuclear plants.

3. Hydropower

In 2002, hydropower generated seven percent of the nation's total electric output. This energy is extremely valuable in maintaining system stability and reliability. There is no better example of this asset than hydropower's important role in bringing the electric grid back online following the August 2003 blackout.

Historically, hydropower has been a backbone of our electric infrastructure and will continue to play a critical role. Continuing to streamline the license application process will encourage better utilization of our nation's hydropower potential, especially as the new technology is developed to better utilize the low-head and low-power sites.

A large part of Canada's hydropower potential remains untapped, as well. With the cost of other fuels used to fire electric generation increasing, Canada is expected to continue to develop its hydro potential. Substantial hydropower potential in Quebec, Manitoba and Labrador awaits development pending review, including: Eastmain-Rupert (1,280 MW), Toulnostoue (526 MW) and Peribonka (450 MW) in Quebec; Wuskwatim (250 MW), Conawapa (1,290) and Gull Rapids (560 MW) in Manitoba; and Gull Island in Labrador. Important additional developable capacity is available in the United States, yet determining how to economically utilize low-head and low-power resources is an increasingly important technological challenge.

I am glad to report that the Integrated Licensing Process (ILP) is alive and maturing nicely. On behalf of FERC, I would like to thank the hydropower industry for its role in the development of this process. Our ability to promulgate a new licensing rule in less

than a year is the direct result of the significant contributions from the hydropower industry, state and federal resource agencies, tribes and environmental groups. I am confident that the ILP will achieve our mutual goal of reducing the time and cost of licensing while continuing to ensure appropriate resource protection.

Our experience to date indicates that the process is working well. Our staff has been keeping track of lessons learned. But, as was the case with the rule, we also want to hear your thoughts on how it's going. To give you this opportunity, in June we will be holding regional outreach meetings to both educate the next round of licensees on the ILP process and to gather input on the effectiveness of the existing process. This examination will culminate on June 23, 2005, with a multi-stakeholder workshop at FERC headquarters to discuss ILP effectiveness.

Interest in the development of new hydropower continues. Currently, FERC has proposals to develop a total of 635 MW of additional energy from conventional hydropower facilities, and there is a growing interest in the development of nonconventional hydropower facilities. Preliminary permits have been issued for nonconventional facilities that would use wave and tidal power to generate electricity. Facilities are currently being evaluated for the straits of Florida, and off the coasts of Oregon, Rhode Island and New York City. In anticipation of these technologies, we are looking at our regulations to ensure that we do not inhibit the development of the next generation of hydropower facilities that seek to efficiently utilize low-head and low-power hydro sites.

State and federal incentives for hydropower development continue to be discussed. Renewable energy portfolios, enacted in many states, provide direct economic incentive to hydropower producers. This may stimulate interest in development of additional capacity at existing developments with efficiency improvements and capacity additions. Since June 2001, 21 original licenses with a total of 79 MW have been issued. In addition, 11 relicenses have been processed that resulted in additional environmental protection and enhancement measures, and at the same time, authorized 90 MW of additional capacity

Maintenance of existing hydroelectric facilities is becoming increasingly important as those facilities age. FERC has a world-renowned dam safety program, which helps to ensure the safety and integrity of the jurisdictional hydroelectric projects. And FERC will continue to ensure the safety and integrity of dams under our jurisdiction.

4. Natural Gas

We have over 188,000 miles of interstate natural gas pipelines delivering fuel for power generation, space heating and industrial use. The supply sources, however, for natural gas are changing. We cannot depend upon domestic production and pipeline imports from Canada to meet our demands. An increasing proportion of our gas supply will need to be imported in the form of liquefied natural gas (LNG) from diverse sources including: Norway, Russia, Algeria, Qatar, Indonesia, Nigeria, Angola, Australia, Malaysia, and Trinidad and Tobago. However, as this shift in composition of gas supply occurs, there will be a need to site more LNG terminals and to reconfigure the gas pipeline network to deliver the regasified LNG to customers. By 2025, we will need 40 percent more natural gas than we currently consume, and this will be provided by Arctic gas and LNG.

The interstate natural gas system is supported by natural gas storage facilities and LNG import terminals. We rely on this interdependent system to fuel our nation's energy demand and economic growth. In the short-term, new LNG import terminals must be constructed to provide new supply of natural gas in the vicinity of where it is being consumed. And siting continues to be a challenge. Redundant federal and state review processes also frequently delay project construction.

We are seeing the advent of new LNG import terminals in North America and the expansion of existing LNG terminals, which are necessary to accommodate increased LNG imports. New terminals are under construction, or construction will soon be initiated, in the United States, Canada and Mexico. There is no shortage of proposed sites for new LNG import terminals. It has already become clear that communities in the industrialized regions of the Gulf of

Mexico are more willing to embrace new LNG facilities than their brethren on either coast. However, there are logistic and economic advantages to locating infrastructure near the markets to be served.

As we ride the peaks and valleys of world natural gas prices, natural gas storage will become increasingly important for price arbitrage and reliability. Full storage fields with adequate pipeline capacity are very powerful tools in market stabilization. Construction of additional natural gas storage and pipeline capacity to meet market demands will go a long way to stabilize the price consumers pay for natural gas and enhance customer confidence.

Maintaining confidence in the market will require built-in buffering mechanisms. Use of natural gas storage for price arbitrage, providing adequate import terminals to ensure diversified geographic sources of LNG, and having adequate pipeline capacity to take advantage of multiple sources of supply will help to cushion the U.S. consumer from price fluctuations of the world market and to make a more robust natural gas infrastructure in the United States. In addition, demand side reduction through improved efficiency would also help to stabilize the market and maintain market confidence.

The security of our nation's energy infrastructure is a high priority. We continue to work with the industry and other state and federal agencies to improve security.

Conclusion

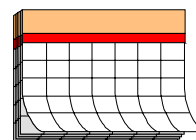
In conclusion, FERC is positioned to identify projects with high public interest benefits and facilitate their speedy completion, consistent with FERC's statutory mandates and due process. We will work effectively to enhance and enlarge the nation's energy infrastructure to meet future energy demands.

We have all worked hard over the past four years to enhance this nation's energy infrastructure. We have authorized new pipelines, encouraged the development of LNG terminals, promoted the construction of new electric transmission lines and sustained our

hydroelectric base. But there is much work to do, and this work requires us all to look beyond our own interests and needs. We must look after the public interest and the future of our great country and lay the groundwork today for our children's benefit tomorrow.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



ABA Annual Meeting

Aug. 4-9, 2005
Chicago, Illinois

13th Section Fall Meeting

Sept. 21-25, 2005
Nashville, Tennessee

Brownfields 2005

Nov. 2-4, 2005
Denver, Colorado

24th Annual Water Law Conference

Feb. 23-24, 2006
San Diego, California

35th Annual Conference on Environmental Law

March 9-12, 2006
Keystone, Colorado

***For more information, see the
Section Web site at
<http://www.abanet.org/environ>
or contact the Section at
(312) 988-5724.***

PETROLEUM PROVISIONS OF ENERGY BILL

Francis J. Devlin
Chair, Oil and Natural Gas
Downstream Committee
Houston, Texas

“ ‘Tis a lesson you should heed, Try, try again. If at first you don’t succeed, Try, try again.” Thomas Palmer (1782-1861), Teacher’s Manual (1840).

This oft-quoted advice has inspired members of the U.S. House of Representatives for a fifth time in the past four years to approve a broad energy policy bill – H.R. 6, titled “Energy Policy Act of 2005” (2005 EPA). H.R., 109th Cong., 1st Sess. (2005). 2005 EPA was passed by the House on April 21, by a vote of 249 to 183.

The bill is not only far-reaching, but it is very long, including 25 articles, almost 500 sections, and in the neighborhood of 1,000 pages. Petroleum is but one subject that receives attention in the bill, and, like many, the provisions regarding petroleum are not without some controversy.

At the outset, however, we might get past a somewhat less controversial provision of the 2005 EPA and one which will have the most immediate effect on most people – to amend the Uniform Time Act of 1966 (15 U.S.C. § 260a(a)) to extend daylight saving time to a period from the last Sunday of March to the last Sunday of November. 2005 EPA § 111.

It is not surprising that the rest of the bill contains many provisions that are sure to invite impassioned support and equally zealous opposition. Two issues regarding petroleum, in particular, stand out as lightning rods for opposition, as they have for the past four years – (1) further accelerating the opening of the Arctic National Wildlife Reserve (ANWR) to oil and gas exploration, development and production, and (2) providing a safe harbor from claims based on design or manufacturing defects relating to renewable fuels and fuel containing the additive methyl tertiary butyl ether (MTBE). 2005 EPA Title XXII; *id.* § 1502.

The ANWR title of the 2005 EPA involves what is commonly referred to as an “upstream” issue; the portion of the bill dealing with MTBE liability involves a “downstream” issue. The petroleum and natural gas industry is typically divided into its upstream and downstream areas. The upstream part of the petroleum and natural gas industry includes exploration, development, and production of those resources, while the downstream portion of the industry includes transportation, refining, and sale of products manufactured from the raw materials produced in the upstream. The upstream ANWR issue has long been a bone of contention in Congress, and the downstream MTBE issue provoked a filibuster in the Senate that killed the 2003 EPA in the fall of that year.

Conflict over ANWR drilling is being brought to a head not only by its inclusion in the 2005 EPA, but also by the passage in both houses of Congress of the 2006 budget resolution. (H. Con. Res. 95, 19th Cong., 1st Sess. (2005) (See www.govtrack.us/congress/bill.xpd?bill+hc109-95 for status and text of the bill. The non-binding resolution was passed by the Senate on April 27, 2005 by a vote of 52 to 47, having been previously adopted in the House by a vote of 218 to 214 on March 17, 2005.)) The debate boils down to (1) supporting arguments that opening ANWR to development will reduce the nation’s foreign energy dependence and will not cause significant environmental or wildlife problems, and (2) opposing claims that ANWR and its wildlife will be significantly damaged without a corresponding, significant reduction in foreign energy dependence. (See, *e.g.*, the Web site of Arctic Power at <http://anwr.org> and a Web site maintained by Defenders of Wildlife at <http://savearcticrefuge.org>.)

On May 12, 2005, the leadership of the Senate Energy & Natural Resources Committee (Chairman Pete V. Domenici and Ranking Member Jeff Bingaman) announced the May 17-19 mark-up of nine draft titles of the energy bill. To follow progress of the energy bill in the Senate, refer to www.energy.senate.gov.

Upstream Petroleum

The 2005 EPA authorizes the expansion of the capacity of the Strategic Petroleum Reserve (SPR)

from 700 million to one billion barrels and the use of that full capacity during periods of stability. 2005 EPA § 301. The bill also directs the secretary of Energy to suspend the delivery of royalty-in-kind oil to the SPR until the price of crude oil falls below \$40 per barrel for two consecutive weeks on the New York Mercantile Exchange. *Id.* § 304. A definition of “oil and gas exploration and production” is added to the Federal Water Pollution Control Act. *Id.* § 328 (amending section 502 of the Federal Water Pollution Control Act, 33 U.S.C. § 1362).

Provision is included to improve access to federal lands for exploration and production of petroleum resources. The secretaries of the Interior and Agriculture will be required to enter into a memorandum of understanding regarding oil and gas leasing on public and national forest lands to make that process more efficient and timely. 2005 EPA §§ 344, 346.

Title IX of the bill deals with research and development programs and makes provision for oil and gas research and development. The secretary of Energy is directed to conduct a research, development, demonstration and commercial application program to “advance the science and technology available to domestic petroleum producers, particularly independent operators.” The focus of these efforts is on developing new and improved technologies to discover and extract additional supplies of crude oil, to “extract methane hydrates in an environmentally sound manner,” to improve further extraction of hydrocarbons from known reservoirs, and to reduce costs of exploration and extraction activities, particularly from “unconventional sources such as tar sands, heavy oil, and shale oil.” 2005 EPA § 964. Section 968B of the bill mandates the secretary of Energy to “carry out a program to promote cooperation on energy issues with Western Hemisphere countries.” It authorizes more than \$65 million in appropriations through 2010 to assist Western Hemisphere nations in formulating and adopting policies to increase energy production and energy efficiency and to assist in developing and transferring energy supply and efficiency technologies using universities “as sources of unbiased technical and policy expertise.” *Id.* § 968B. The bill’s title on

“Studies” directs the secretary of Energy to conduct a study on petroleum and natural gas storage capacity and submit a report on the results to Congress within one year of enactment of the 2005 EPA. The issues to be addressed include the historical normal ranges for inventory levels, historical and projected storage capacity trends, estimated operating inventory levels below which shortage indicators appear, explanations for inventory levels below normal, and “the ability of industry to meet United States demand for petroleum and natural gas without shortages or price spikes, when inventory levels are below normal range.” *Id.* § 1601.

Title XX of the bill makes detailed provision for production incentives, including the United States’ taking of its royalties-in-kind (including a “small refiner preference” in the sale of federal royalty-in-kind oil) and reduced royalty rates on production from “marginal property.” 2005 EPA §§ 2002-2003. A “marginal property” is defined as a property producing less than 15 barrels per day or 90 million BTUs per day over a three-month period, much the same as those properties known as “stripper wells.” The reduced rate is triggered when the spot price for West Texas Intermediate crude oil at Cushing, Oklahoma, falls below an average of \$15 per barrel for 90 consecutive trading days. Royalty relief for deep water oil production in the Gulf of Mexico is also included. *Id.* § 2005.

The bill directs that an Office of Federal Energy Project Coordination be established to replace the current White House Energy Projects Task Force. 2005 EPA § 2021. It also makes extensive provision for management of and consultation on federal oil and gas leasing programs and coordination. *Id.* §§ 2022-2027.

As noted at the outset, Article XXII, titled “Arctic Coastal Plain Domestic Energy Security Act of 2005,” is probably the most controversial of the provisions of the 2005 EPA dealing with upstream issues. The title calls for the establishment of a competitive oil and gas leasing program for the “Coastal Plain” area of Alaska. The Coastal Plain consists of approximately 1.5 million acres in the northeast corner of Alaska within the

Arctic National Wildlife Refuge. (See section 1002(b) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3142(b)(1).) It is slightly larger than the state of Delaware and extends about 100 miles across Alaska's coast on the Beaufort Sea and 30 miles inland. (See www.anwr.org for the basis of this description and a map of the area.) The bill requires the secretary of the Interior to administer the leasing program to "ensure the oil and gas . . . activities on the Coastal Plain will result in no significant adverse effect on fish and wildlife, their habitat, subsistence resources, and the environment." 2005 EPA § 2203(a)(2).

The critical provision of the ANWR article is the repeal of the prohibition against oil and gas development in ANWR enacted in 1980 as part of the Alaska National Interest Lands Conservation Act, which required an Act of Congress before any leasing or other development leading to the production of oil and gas. 2005 EPA § 2203(b)(1); 16 U.S.C. § 3143. The bill also provides that the Final Legislative Environmental Impact Statement issued in 1987 on the Coastal Plain is to be deemed to satisfy the requirements of the National Environmental Policy Act of 1969 applicable to pre-lease activities. 2005 EPA § 2203(c)(2). The bill establishes the standard for environmental protection to be one of "no significant adverse effect on fish and wildlife, their habitat, and the environment" and requires site-specific assessment and mitigation. *Id.* § 2207. This section also sets forth detailed environmental regulatory requirements for and limitations on the leasing program.

The bill stipulates the lease terms and conditions which include (1) a minimum royalty of 12.5 percent in amount or value, (2) discretionary closing by the Interior secretary of portions of the area to protect caribou calving areas and other fish and wildlife, (3) provision for reclamation, (4) provision for fair share of employment and contracting for Alaska Natives and Alaska Native Corporations, and (5), as was the case in the development of Prudhoe Bay and the trans-Alaska pipeline, a prohibition on export of oil produced from a Coastal Plain lease. 2005 EPA § 2206.

In anticipation of judicial challenges, 2005 EPA provides for expedited judicial review, limiting venue to

the U.S. Court of Appeals for the District of Columbia. 2005 EPA § 2208.

The bill also includes tax relief in Article XIII, titled the "Enhanced Energy Infrastructure and Technology Tax Act of 2005," including provision for accelerated depreciation for geological and geophysical expenditures. 2005 EPA §§ 1300 *et seq.*

Downstream Petroleum

The downstream petroleum provisions of the bill are all but lost in the vituperative and vitriolic debate over the "Fuels Safe Harbor" provision. 2005 EPA § 1502. In November 2003, during the previous Congress, an energy bill including a similar provision was passed by the House of Representatives, but failed to achieve Senate passage when opponents launched a filibuster primarily because of the inclusion of an MTBE safe harbor provision. Supporters fell two votes short of the 60 senators needed to bring closure to the filibuster.

2005 EPA cuts a broad swath of the downstream petroleum industry from refining to fuels, in addition to the provocative provisions dealing with MTBE. The bill includes the "United States Refinery Revitalization Act of 2005" (Refinery Act). 2005 EPA Title III, §§ 371-379. As part of the Refinery Act, the Congress makes several findings that bear noting. Refineries in the United States are operating at 95 percent of capacity and are still falling short of supplying the nation's thirst for petroleum products, thereby necessitating the importation of more than five percent of those products. *Id.* § 372(3). The findings further note that there has not been a new refinery built in the United States since 1976, that the nation now has 149 refineries as compared with 324 in 1981, and that many smaller refineries have been idled "because of regulatory uncertainty and generally low returns on capital employed." *Id.* § 372(5). The 11 findings include references to projected increases in demand for fuels, regulatory barriers, and the need for certainty and streamlining in the regulatory process. *Id.* § 372.

The Refinery Act directs the secretary of Energy to designate as a "Refinery Revitalization Zone" any area that the secretary of Labor has determined has

experienced mass layoffs at manufacturing facilities or contains an “idle refinery” and that has an unemployment rate exceeding the national average by at least 10 percent. 2005 EPA § 374. It requires the secretary of Energy to enter into a memorandum of understanding with the administrator of the Environmental Protection Agency to implement the provisions for expanded refinery capacity and provides that state governors and Indian Tribe representatives may join in the memorandum. *Id.* § 375. Provision is made for review of applications for federal authorization for refinery facilities and for expeditious permitting and environmental review coordinated among federal, state, local and Indian Tribe authorities. *Id.* §§ 376-377.

In addition to efforts to facilitate refinery capacity expansion, President Bush suggested in a speech a week after the House passed 2005 EPA that new refineries be constructed on closed military bases. Elisabeth Bumiller, *Bush Offers Plan to Bolster Refineries and Nuclear Plants*, N.Y. TIMES, Apr. 28, 2005, Section A, at 18, col. 1. A major refiner and petrochemical trade association has commented positively on the President’s proposal, saying that it “is interested in and supportive of the president’s suggestion that surplus military property may be suitable for refinery construction.” National Petrochemical & Refiners Association, Press Release (Apr. 27, 2005), available at www.npra.org/news/releases/detail.

The bill has significant provisions regarding vehicle efficiency and enhancement, and Title VII of the bill mandates a research and development program with respect to transportation fuels intended “to increase the price elasticity of oil supply and demand by focusing research on (1) reducing the cost of producing transportation fuels from coal and natural gas and (2) indirect liquefaction of coal and biomass.” 2005 EPA § 965. Provision is also made for a research and development program relating to fuel cells for “low-cost, high efficiency, fuel flexible, modular power systems.” *Id.* § 966.

The heart of those provisions of the bill affecting downstream issues appears in Title XV, titled “Ethanol

and Motor Fuels.” Attempting to address a debate that has persisted for over 20 years with respect to oxygenated fuels, MTBE and ethanol, section 1501 of the 2005 EPA mandates a “renewable fuel program.” The program will replace the oxygenate requirements for fuels under the Clean Air Act. The definition of renewable fuel, which would be added to section 211 of the Clean Air Act, includes cellulosic biomass ethanol (*e.g.*, grasses, dedicated energy crops and trees), waste derived ethanol (*e.g.*, from animal or municipal solid wastes), and biodiesel. 2005 EPA § 1501. The mandated program will require motor vehicle fuel sold or dispensed in the United States to contain a requisite amount of renewable fuel, increasing in each year (2005 through 2012) from 3.1 billion gallons to five billion gallons and thereafter an amount equal to the product of multiplying the subsequent year’s estimated sales of gasoline by a ratio with a numerator of *f* million gallons and a denominator of the number of gallons sold in calendar year 2012. Detailed provisions are included for the determination of the required volume of renewable fuel, the establishment of a credit program for biodiesel fuels, provision for seasonal variation in renewable fuel use and waivers. A relic of the days of Price and Allocation Controls in the 1970s persists in the establishment of the “small refiner exception.”

The bill also responds to the number of mandated regionally distinctive or “boutique” fuels and their effect on supply and price. Two sections seek to reduce the proliferation of both state fuel controls and of boutique fuels. One includes a provision amending the Clean Air Act directing the EPA administrator to “not approve a control or prohibition respecting the use of a fuel or fuel additive . . . unless the Administrator . . . [finds] that such control or prohibition will not cause fuel supply or distribution interruptions or have a significant adverse impact of fuel producibility in the affected area or contiguous areas.” 2005 EPA § 1509. The other non-proliferation section authorizes the EPA administrator to temporarily waive a control or prohibition of a regulated fuel or additive if it is determined with the concurrence of the secretary of Energy that “extreme and unusual . . . supply circumstances” exist in a state or region resulting from a natural disaster, act of God, pipeline or refinery

failure, or other event similar to a *force majeure* event, and the granting of a waiver is in the public interest. *Id.* § 1541 (amending section 211 of the Clean Air Act). The latter section also denies the administrator authority to approve a State Implementation Plan (SIP) if the approval would increase the total number of fuels approved as of Sept. 1, 2004, in all SIPs, and further mandates a study and report to Congress within a year on boutique fuels.

The bill sets up a system for what is called “MTBE Merchant Producer Conversion Assistance.” Finding that the establishment of a fuel oxygenate standard for reformulated gasoline in the Clean Air Act Amendments of 1990 had led to substantial fuel industry investments in MTBE production and delivery systems, 2005 EPA provides for “limited transition assistance” for MTBE producers to convert certain production facilities to iso-octane and alkylates. 2005 EPA § 1503. The amount of \$250 million is authorized for the transition assistance for each of fiscal years 2004 through 2006.

Although some active opponents of the bill have maintained that 2005 EPA would draw into question state prohibitions on the inclusion of MTBE in motor vehicle fuels, the bill includes a provision specifically stating that the amendments to the Clean Air Act under the bill “have no effect regarding any availability authority of States to limit the use of methyl tertiary butyl ether in motor vehicle fuel.” 2005 EPA § 1503(d). At the present time, 20 states have enacted MTBE bans taking effect at various dates over the next three years. These states are Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oregon, South Dakota and Wisconsin. Several other states (including New Jersey, Montana and Rhode Island) have legislation pending on an MTBE ban in their states. The “Fuels Safe Harbor” section provides that

no renewable fuel, as defined by Section 211(o)(1) of the Clean Air Act, or fuel containing MTBE, used or intended to be used as a motor vehicle fuel, nor any motor vehicle fuel containing such

renewable fuel or MTBE, shall be deemed defective in design or manufacture by virtue of the fact that it is, or contains, such a renewable fuel or MTBE, if it does not violate a control or prohibition imposed by the Administrator under section 211 of such Act, and the manufacturer is in compliance with all requests for information under subsection (b) of such section 211(b) of the Clean Air Act. If the safe harbor provided by this section does not apply, the existence of a design defect or manufacturing defect shall be determined under otherwise applicable law. Nothing in this paragraph shall be construed to affect the liability of any person for environmental remediation costs, drinking water contamination, negligence, public nuisance or any other liability other than liability for a defect in design or manufacture of a motor vehicle fuel.

2005 EPA § 1502(a). The safe harbor will be effective at the date of enactment and apply to all claims filed on or after that date. *Id.* § 1501(b).

The fuels safe harbor provision has elicited vigorous support from organizations such as the American Petroleum Institute and the National Petrochemical & Refiners Association. (See the API Web site at www.api.org, and the NPRA Web site at www.npra.org/issues/fuels.) Equally voluble in opposition are Sens. Charles Schumer, D-N.Y., and Barbara Boxer, D-Calif.. See http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005 (May 6, 2005); <http://sfgate.com/cgi-bin/article.cgi?file+/c/a/2005/04/22>.




Liability for remediation of and damages caused by leaking underground storage tanks (LUSTs) had until recently been limited to the owner and/or operator of the LUST based upon negligence and trespass grounds. The theory for recovery by water companies, municipalities and property owners, however, has recently revolved around claims that refiners have placed into commerce a defective product (whether caused by a design and/or manufacturing defect) for which they are strictly liable without relation to the individual refiner’s negligence culpability or even its lack of ownership or operating

responsibility for the leaking tank. The issue of MTBE in groundwater arose most dramatically in two California communities – Santa Monica and South Lake Tahoe. Those with an interest in tracking the progress of MTBE litigation should follow the multidistrict litigation in the U.S. District Court for the Southern District of New York, MDL 1358, *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*. This case consists of over 60 cases filed in 16 states and 13 declaratory judgment actions. The slate of defendants totals more than 250 (although many are related corporate entities) and includes all of the major refiners. The plaintiffs include water districts and authorities and municipalities. The most recent decision of Judge Scheindlin in the case announced a new market share theory of liability called the “commingled product theory.” 2005 WL 906322 (S.D.N.Y. 2005).

Contamination of water supplies by motor vehicle fuels leaking from underground storage tanks has been a significant issue since the mid-1970s. A full Subtitle of Article XV is devoted to amendments to the underground storage tank provisions of the Solid Waste Disposal Act in the form of the “Underground Storage Tank Compliance Act of 2005” (UST Act). 2005 EPA §§ 1521-1533. The UST Act, among others, (1) requires USTs not inspected since Dec. 22, 1998, to be inspected within two years of enactment; (2) requires periodic inspection thereafter; and (3) provides for training programs for UST owners and operators, remediation, release prevention and prohibition of delivery to ineligible facilities. It also makes further provision for distribution of the Leaking Underground Trust Fund, created by a 0.1 cent per gallon fee on every gallon of motor fuel sold in the United States, for cleanup. *Id.* § 1522. An extensive resource on underground storage tanks can be found at www.epa.gov/swerst1.

Finally, the bill directs the comptroller general to “conduct a study of the consolidation of the refiners, importers, producers, and wholesalers of gasoline with the sellers of such gasoline at retail,” providing that the study include analysis of such consolidation’s impact on, among others, the retail price of gasoline, small business ownership, and “other corollary effects on the market economy of fuel distribution.” 2005 EPA

§ 1614. The study, due to be submitted to Congress one year after enactment of the 2005 EPA, can then be stacked atop all of its predecessors. Those include the May 2004 report of the General Accountability Office entitled *Effects of Mergers and Market Concentration in the U.S. Petroleum Industry*, available at www.gao.gov/htext/d0496.html and the 263-page report in August 2004 of the Bureau of Economics of the Federal Trade Commission entitled *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, which is available at <http://ftc.gov/os/2004/08/040813/mergersinpetrolberpt.pdf>.



Energy Committees Newsletter

LIKE TO WRITE?

The Energy Committees welcome the participation of members who are interested in writing articles for this Newsletter.

Interested members are asked to submit one paragraph proposals for articles for the next issue of the Newsletter. The topic will be “Emerging Connections Between Energy and Environmental Goals.” Proposals should be e-mailed by July 15, 2005, to Joe Siegel at siegel.joseph@epa.gov.

Prior issues of this Newsletter and other Committee Newsletters can be found at www.abanet.org/environ/pubs/newslettershome.html. Information regarding the Energy Committees can be found at www.abanet.org/environ.committees/descriptions.html.

ELECTRICITY TRANSMISSION PROVISIONS IN THE ENERGY BILL

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The massive power outage in 2003 that produced a blackout across the Midwest and Northeast of the United States (and even into Canada) highlighted the challenges faced by the nation's transmission infrastructure to meet the growing demands for electricity. One of the frequently cited problems with the current system is the inability of utilities to build new transmission facilities, which largely stems from the difficulties associated with the siting process. Because the siting process may require obtaining authorizations from state, local, federal and even tribal governments prior to the construction of any transmission line, it often results in long delays, even in the most straightforward projects. The process becomes increasingly complex as a transmission line crosses state boundaries and/or lands under federal jurisdiction.

A comprehensive energy bill was reported out of a Senate-House conference in the 108th Congress in November 2003 and approved by the House, but the conference bill was not passed by the Senate. In a weekly radio address in April 2005, President Bush again called on Congress to pass an energy bill, noting that "[d]emand for electricity has grown more than 176% in the past decade, while our transmission ability lags behind." (*Bush urges Congress to pass energy bill*, USA TODAY, Apr. 16, 2005.) The Energy Policy Act of 2005 (the "Energy Bill") includes many of the same provisions as the 2003 Energy Bill, including provisions aimed at facilitating siting of transmission lines. This article outlines some of the key issues associated with the siting of interstate transmission lines and describes how the Energy Bill proposes to address those issues.

The Energy Bill also attempts to address economic disincentives to investing in transmission infrastructure, another frequently cited impediment to construction of

new transmission lines. For example, the Energy Bill grants the Federal Energy Regulatory Commission (FERC) authority to establish incentive-based rate treatments for interstate transmission of electricity and allows transmission providers (including Regional Transmission Organization (RTOs) or Independent System Operators (ISOs)) to submit to FERC pricing plans to pay for transmission infrastructure improvements. Economic impediments to new transmission construction, which have become exceedingly complex in the era of deregulation, are beyond the scope of this article.

Background

As electricity demand in the United States continues to grow, transmission capacity has been unable to keep up with increases in generation. In 2001, the United States had approximately 157,810 miles of transmission lines, but only 7,000 miles of new lines were expected to be built over the next 10 years. Reliable, Affordable, and Environmentally Sound Energy For America's Future, Report of the National Energy Policy Development Group, 7-5 (2001) (National Energy Policy), available at www.whitehouse.gov/energy. This increase of 4 percent in transmission lines can be compared to the 25 percent expected increase in electric power demand over the next 10 years. *Id.* Moreover, new transmission lines are mostly geared towards serving the local load and connecting new generation, rather than providing new high-voltage transmission needed to strengthen regional electricity markets. In the late 1990's, higher voltage line-miles (115 kV and higher) were growing by 0.3 percent, while lower voltage line-miles (69 kV and below) were growing at 3.5 percent.

Transmission congestion, sometimes referred to as a "bottleneck," has resulted from increased generation being transmitted over a limited number of transmission lines. Hoang Dang, *New Power, Few New Lines: A Need for a Federal Solution*, 17 J. LAND USE & ENVTL. LAW 327, 328 (2002). The Department of Energy (DOE) is currently seeking to identify, designate and consider options for mitigating transmission bottlenecks. DOE has found that national interest transmission bottlenecks create congestion that

“significantly decreases reliability, restricts competition, enhances opportunities for suppliers to exploit market power, increases prices to consumers, and increases infrastructure vulnerabilities.” U.S. Department of Energy, National Transmission Grid Study, 10 (2002) (Grid Study), available at www.eh.doe.gov/ntgs/reports.html#reports. It has been noted that “[m]ost experts agree that new transmission is needed to remedy the significant limitations in the current grid.” Cassandra Burke Robertson, *Bringing the Camel into the Tent: State and Federal Power over Electricity Transmission*, 49 CLEV. ST. L. REV. 71,72 (2001).

Addressing the current problems with the nation’s transmission infrastructure is an essential element of any comprehensive national energy policy. The National Energy Policy Development Group, established by President George W. Bush through Executive Order 13212 (May 18, 2001), identified various constraints on the ability to improve the transmission system in the country. National Energy Policy, at 7-5 to 7-8. One of the key problems identified is the siting process.

Unlike other interstate facilities, such as natural gas pipelines, oil pipelines, and interstate highways, where the federal government plays a role, the siting of electric transmission lines is the responsibility of state governments. Although a few states have consolidated siting authority, state requirements and procedures for siting of transmission facilities vary greatly, with authority often resting with local governments, state environmental regulators, and/or state public utility commissions. In addition, construction of transmission lines often requires compliance with numerous laws and regulations that are under the jurisdiction of federal, or sometimes tribal, agencies. Often these overlapping requirements are not coordinated even with the same state. While some states have established time limits on the permitting process, which can be and often are extended through procedural mechanisms, other states have no specific time limits. Because of the complex nature of the process and the numerous agencies involved, obtaining the necessary siting authorizations for interstate transmission lines can take many years and cost millions of dollars. Moreover, the various procedural requirements

provide additional avenues for project opponents to delay the siting process. Usually, the siting process is contested, and interested parties may intervene in the case and present evidence in opposition to the transmission line.

State-focused siting processes can also inhibit the siting or expansion of the transmission system when the importance of a proposed transmission facility to interstate or regional needs may not be taken into account. Most states require a showing that the proposed facility is needed and that the transmission line will serve the public interest. This “certificate of public need” requirement can result in the rejection of transmission proposals that benefit an entire region, rather than the host state.

In the context of the certification process, approximately 30 states require consideration of environmental protection and a siting review. Michael Dworkin, et al., *The Environmental Duties of Public Utility Commissions*, 18 PACE ENVTL. L. REV. 325, 328 (2001). Environmental issues that are often raised include, among others, concerns about opening new areas to development, disruption of habitat, impacts on endangered species, potential health effects of electromagnetic fields and visible impacts that may create aesthetic concerns. The siting authority may be required to make a determination of environmental compatibility prior to the certification being issued. Some state utility commissions also have environmental review authority in the compliance phase of a project, requiring regulated utilities to submit compliance plans to assist the commission to ensure ongoing compliance with environmental standards.

Local opponents often can sway local authorities to deny or delay authorizations. As one example, in 1995, Florida Power was allowed to recover \$23 million in costs spent on a proposed 500 kV line that was never built. Issue Paper E-1, David H. Meyer and Richard Sedano, *Transmission Siting and Permitting*, E-4 (2002) (prepared in support of the U.S. Department of Energy’s National Transmission Grid Study) (Transmission Siting Issue Paper), available at www.eh.doe.gov/ntgs/reports.html#reports. Although the line was approved by the

Florida Public Service Commission in 1984, continued local opposition led to protracted and costly litigation, forcing Florida Power to develop an alternative plan and abandon its proposed transmission line.

Delays and expenses also result from the numerous permits under local, state and federal laws that must be obtained prior to construction of transmission facilities, though some states such as Florida have attempted to streamline the permitting process. Associated environmental reviews under state and federal law can further extend the siting process. The National Environmental Policy Act (NEPA) requires federal agencies to conduct an environmental review prior to any major federal action that significantly affects the quality of the human environment. Federal agencies are under no time limits to complete this review or to render a decision, which can often take many years. Numerous states also have their own “mini NEPAs,” which require state agencies to undergo an environmental review similar to that under NEPA. Likewise, there are often no time limits placed on these state reviews.

The federal requirements become of great importance when federal lands or areas of federal jurisdiction are involved. As one example, a 163-mile transmission line proposed by Sierra Pacific in 1992 (approved by Nevada in 1993) finally obtained a necessary permit from the U.S. Forest Service in 1997 to cross a three-mile portion of the Modoc National Forest. Grid Study, at 55. After litigation over the agency’s decision, the permit was upheld in 1998. Sierra Pacific estimated that the project was delayed by at least two years at a cost of more than \$20 million. *Id.* Presumably, these additional costs will be passed on to the ratepayers.

The Energy Bill

One of the proposed solutions to the problems associated with the current siting regime is granting the federal government authority over the siting process. During consideration of a similar bill in 2003, the Senate recognized: “Siting difficulties for electric transmission lines is a major factor hindering expansion of the electric system.” Report of the Committee on

Energy and Natural Resources, United States Senate, on S. 1005, at 130 (May 6, 2003), available at www.energy.senate.gov/legislation/energybill2003/report.pdf. The Energy Bill attempts to address this concern. Section 1221 of the Energy Bill would amend the Federal Power Act by adding new section 216, which creates new federal authority over siting of transmission lines that have an interstate, regional or national benefit.

Representative Joe Barton, R-Texas, introduced the current version of the Energy Bill (H.R. 6) on April 18, 2005. The House passed H.R. 6 by a 249 to 183 vote on April 21, 2005, referring the bill to the Senate. The Senate Energy and Natural Resources Committee approved the Senate version of the bill (unnumbered) by a 21 to 1 vote on May 26, 2005, sending the bill to the floor of the Senate. As of May 31, 2005 no date had been set for floor debate in the Senate, although it has been reported that the Republican leadership plans to bring the bill to the floor during June. All citations in this article are to the bill as passed by the House, with citations to Senate version, when different, in brackets immediately thereafter.

1. FERC Permit Authority

Section 216 would allow a utility to seek a permit or permits from FERC to construct or modify an electric transmission facility if the state siting process is moving slowly or lacks the authority to account for interstate benefits. FERC’s authority to issue permits, and thereby preempt state siting requirements, applies only to transmission lines that are in a “national interest electric transmission corridor.” These corridors are designated pursuant to section 216(a) by the secretary of Energy based on studies of electric transmission congestion conducted in consultation with affected states and any regional entity authorized under section 215 of the Federal Power Act (16 U.S.C. § 824n). National interest electric transmission corridors may include “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.” The studies designating such corridors must be completed within one year after the date of enactment, and every three years thereafter. Section 216(a)(2) [216(a)(4)]

outlines various factors that the secretary of Energy must consider when designating a “national interest electric transmission corridor,” which include:

- (a) whether the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;
- (b) whether (i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and (ii) a diversification of supply is warranted;
- (c) whether the energy independence of the United States would be served by the designation;
- (d) whether the designation would be in the interest of national energy policy; and
- (e) whether the designation would enhance national defense and homeland security.

Section 216(b) grants FERC authority to issue a permit or permits, after notice and an opportunity for hearing, if it finds that:

- (a) approval under the state siting procedure has taken more than one year or is conditioned in such a manner that the transmission line will not reduce transmission congestion in interstate commerce or is not economically feasible,
- (b) a state does not have authority to site the line or to take regional issues into account, or
- (c) the utility is not eligible for a permit from the applicable state because the utility does not serve customers in that state.

FERC must also find that: (1) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce, and (2) the proposed construction or modification (a) is consistent with the public interest, (b) will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers, and (c) is consistent with sound national energy policy and will enhance energy independence. An amendment to the Senate version of the Energy Bill, offered by Sen. Talent, R-Mo., and adopted in Committee, would also require that FERC consider whether the “proposed modification will maximize, to the extent reasonable

and economical, the transmission capabilities of existing towers or structures so as to minimize the environmental and visual impact of the proposed modification.”

Under section 216(d), FERC must allow each state in which a transmission facility covered by the permit is or will be located, each affected federal agency and Indian tribe, private property owners and other interested persons a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit. A utility, however, is not required to undergo this new federal permitting process, and may construct or modify any transmission facility pursuant to state law, as provided in section 216(f) [216(g)].

2. Coordination of Federal Review Process

Section 216(h) provides a process for the coordination of federal authorizations for transmission facilities at the request of an applicant or a prospective applicant for a permit from FERC. Section 216(h) of the Senate version provides that DOE “act as lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of a transmission facility.” The House version allows DOE to act as the lead agency at the request of an applicant. The House version also addresses “distribution facilities” in section 216(h), while the Senate version does not.

Under section 216(h)(1) [216(h)(2)], DOE will act as the lead agency for purposes of coordinating all applicable federal authorizations (which is defined to include authorizations required under federal law, whether issued by a federal or a state agency) and related environmental reviews of the facility. To the maximum extent practicable, the secretary of Energy is required to coordinate the federal authorization and review process with any Indian tribes, multi-state entities and state agencies that are responsible for conducting any separate permitting and environmental reviews of the facility.

Under section 216(h)(5) [216(h)(7)], DOE is required to promulgate implementing regulations within 18 months after the date of enactment. Within one year of

the date of enactment, the secretary and the heads of all federal agencies with authority to issue federal authorizations must enter into Memoranda of Understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.

Section 216(h)(2) [216(h)(4)] requires DOE to establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and federal decisions relating to, the proposed facility. All permit decisions and related environmental reviews under all applicable federal laws are required to be completed within one year or, if a requirement of another federal law “makes this impossible,” as soon thereafter as is practicable. The Senate Bill avoids the somewhat nebulous standard of impossibility in this context and, instead, provides that if another provision of federal law “does not permit compliance” with the one-year deadline, a decision should be made as soon as practicable thereafter. Regardless, if either standard is ultimately enacted into law, the federal courts should have ample opportunities to better define the exception to the one-year permitting time limit, as decisions on transmission projects are rarely made within this time frame.

The secretary of Energy also must provide an expeditious pre-application process for prospective applicants to confer with the agencies involved in the decision. Each such agency must communicate to the prospective applicant, within 60 days of when the prospective applicant submits a request for such information, (a) the likelihood of approval for a potential facility; and (b) key issues of concern to the agencies and public. Assuming there is no obvious fatal flaw with a project that the proponents somehow missed, however, it is difficult to understand how an agency can gauge the likelihood of approval of a project prior to its receiving all the information required in an application and the information that will be developed during the subsequent environmental review.

Section 216(h)(3) [216(h)(5)] provides that DOE, in consultation with the affected agencies, prepare a single environmental review document for the proposed project, which may be an environmental assessment or environmental impact statement under

NEPA or other statute. The secretary of Energy and the heads of other agencies are also required to streamline the review and permitting of facilities within corridors designated under section 503 of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. § 1763), by fully taking into account prior analyses and decisions relating to the corridors. Section 503 of FLPMA allows the secretary of the Interior and the secretary of Agriculture to designate rights-of-way corridors to allow for various uses, including transmission lines, rather than establishing separate rights-of-way on federal lands.

Section 216(h)(4) [216(h)(6)] allows the applicant or any state in which the facility would be located to file an appeal with the secretary; the Senate version provides that any appeals go instead to the president. The secretary shall, in consultation with the affected agency, review any denial of or failure to take action on an application for authorization. Based on the overall record, and in consultation with the affected agency, the secretary may then either issue the necessary authorization with any appropriate conditions or deny the application. The secretary must issue a decision within 90 days of the filing of the appeal. In making this decision, the Secretary must comply with applicable requirements of federal law, including any requirements of NEPA, FLPMA, the Endangered Species Act (ESA), the Clean Water Act and the National Forest Management Act. Given the time necessary to complete the often lengthy reviews required under such statutes as NEPA and the ESA, it is difficult to see how these time limits can be practically enforced.

Under section 216(h)(6) [216(h)(8)], federal land use authorizations are to be issued for a duration as determined by the secretary of Energy, commensurate with the anticipated use of the facility, and with appropriate authority to manage the right-of-way for reliability and environmental protection. Upon the expiration of any authorization granted, the authorization must be reviewed for renewal, taking into account reliance on the electricity infrastructure, recognizing its importance for public health, safety and economic welfare, and as a legitimate use of federal lands. Section 216(h)(7) [216(h)(9)] requires that the secretary of Energy regularly consult with FERC,

FERC-approved electric reliability organizations (established pursuant to section 1211 of the Energy Bill, which adds new section 215 to the Federal Power Act) and FERC-approved RTOs and ISOs in exercising its responsibilities under section 216.

3. Eminent Domain

Section 216(e) would allow a permit holder to acquire a right-of-way on private property by the exercise of eminent domain if such right-of-way is necessary and the permit holder cannot acquire the property by contract or is unable to agree with the owner of the property as to the proper compensation. Any such exercise of eminent domain is deemed a taking of private property for which just compensation is due. Compensation can be sought in the district court of the United States for the district in which the property is located, or in the appropriate court of the state in which the property is located. The district court must follow as closely as possible the practice and procedure of the courts of the state where the property is situated.

Just compensation is defined by section 216(g) [216(f)] to be the amount equal to the full fair market value of the property taken on the date of the exercise of eminent domain authority, except that the compensation shall exceed fair market value if necessary to make the landowner whole for decreases in the value of any portion of the land not subject to eminent domain. Any parcel of land acquired by eminent domain under this subsection shall be transferred back to the owner from whom it was acquired (or the owner's heirs or assigns) if the land is not used for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.

Other than construction, modification, operation, or maintenance of electric transmission facilities and related facilities, property acquired through this authority may not be used for any purpose (including use for any heritage area, recreational trail, or park) without the consent of the owner of the parcel from whom the property was acquired (or the owner's heirs or assigns). Section 216(e)(2) of the Senate version would provide that the right-of-way acquired be used

exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition. This provision arguably would not allow for use the right-of-way for other purposes on consent of the landowner, as the House version does. Thus, the rights-of-way used in national interest electric transmission corridors on private land would appear to be more limited than those on federal land. Section 503 of FLPMA currently provides that each right-of-way or permit across federal lands under the jurisdiction of the secretary of the Interior or the secretary of Agriculture "shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way granted pursuant to this Act." 43 U.S.C. § 1763.

4. Interstate Compacts/ERCOT

Section 216(i) recognizes recent efforts by states to move towards agreements to coordinate and streamline regional or interstate transmission lines. A number of Western governors, for example, are working towards increasing coordination of siting decisions in interstate transmission lines. The "Protocol Among the Members of the Western Governors Association, the U.S. Department of Interior, the U.S. Department of Agriculture, the U.S. Department of Energy, and the Council on Environmental Quality Governing the Siting and Permitting of Interstate Electric Transmission Lines in the Western United States" is meant to establish "a framework that will enable affected states, local governments, federal agencies and tribal governments to participate in a systematic, coordinated, joint review process for siting and permitting of interstate transmission lines." Western Governors Association, *Western Transmission Protocol, 2*, available at www.westgov.org/wieb/electric/Transmission%20Protocol/wtp_page.htm. This protocol has at least eight signatory states, including California.

Three or more contiguous states may enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to review, certify and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property

owned by the United States). The secretary of Energy is authorized to provide technical assistance to regional transmission siting agencies established under this subsection. FERC may only issue a permit in a state subject to an interstate compact where the members of a compact are in disagreement and the secretary, after notice and an opportunity for a hearing, makes a finding that the approval of the siting has been withheld for more than one year, or is conditioned in such a manner that the transmission line will not reduce transmission congestion in interstate commerce or is not economically feasible.

Section 216(k) of the House bill contains an exception from the federal siting process for the entire area covered by the Electric Reliability Council of Texas (ERCOT) (16 U.S.C. § 824k(k)(2)(A)), which administers Texas's power grid. The Senate version does not contain a similar exception. According to its Web site, ERCOT is "the organization entrusted to keep electric power flowing to approximately 20 million Texans, representing 85 percent of the state's electric load and about 75 percent of the Texas land area. As the Independent System Operator for its region, ERCOT manages the scheduling of power on an electric grid consisting of 78,000 megawatts of generation capacity and 38,000 miles of transmission lines." ERCOT, *Welcome to ERCOT*, available at www.ercot.com.

5. Federal Lands

Section 1221(b) of the Energy Bill includes a provision to identify problems in siting of transmission lines through federal lands. Section 1221(b) would require the secretary of the Interior, the secretary of Energy, the secretary of Agriculture, and the chairman of the Council on Environmental Quality to submit a joint report to Congress, within 90 days of the date of enactment, which identifies:

- (a) all existing designated transmission and distribution corridors on federal land and the status of work related to proposed transmission and distribution corridor designations under Title V of the Federal Land Policy and Management Act (43 U.S.C. 1761 *et. seq.*),
- (b) the schedule for completing such work,

- (c) any impediments to completing the work, and
- (d) steps that Congress could take to expedite the process.

The report must also identify and describe pending applications to locate transmission and distribution facilities on federal lands, including information on how long each application has been pending, the schedule for issuing a timely decision as to each facility, and progress in incorporating existing and new rights-of-way into relevant land use and resource management plans or their equivalent. Finally, the report must identify the number of existing transmission and distribution rights-of-way on federal lands that will come up for renewal within the following 5-, 10- and 15-year periods, and a description of how the secretaries plan to manage such renewals.

Reactions

Perhaps the best reflection of the frustration with the current siting regime can be found in section 2031 of the House Bill, which specifically addresses the siting and construction of a high-voltage transmission line right-of-way through the Cleveland National Forest and adjacent lands in California under the jurisdiction of the Bureau of Land Management and the U.S. Forest Service. This section requires (1) that all environmental reviews be completed within one year of the date of enactment; (2) that the secretaries of Agriculture and the Interior issue all authorizations for the line within 60 days of completing the environmental reviews; and (3) that the secretaries give preference to applications submitted before Dec. 31, 2002 for the project.

There has been some general support for the siting provisions in the Energy Bill as a means of streamlining the siting of interstate transmission facilities. Mostly, a possible federal backstop to the state siting process has been identified as useful to facilitate siting of transmission lines needed to address interstate or regional power needs versus local needs. Proper pre-planning with federal agencies can facilitate and help coordinate federal authorizations and reviews, and the codification of this process has been identified as a helpful step. Some believe that the ability of states to enter into interstate compacts for purposes of siting

decisions is a more useful means of streamlining the siting process for interstate transmission lines than a highly centralized federal system, and this option is preserved by the Energy Bill.

Problems with siting, however, are likely still to arise even if the provisions in the bill are enacted. Significant delays may continue to result if DOE cannot obtain agreements from state agencies to coordinate their processes. Some have raised concerns that over-centralization of the siting process could result in delays, or hasty or poor decisions, particularly given the potentially arbitrary deadlines. Given the need to comply with applicable federal environmental laws including NEPA, however, hasty decisions may not be among the new issues faced. Moreover, a new federal siting process could trigger reviews, such as those under NEPA, the ESA and the National Historic Preservation Act, that might not be applicable to current state siting processes. Still others have complained that the requirement to report to Congress and the three-year intervals for designating national interest transmission corridors could add delays to particular projects as well. The provisions relating to transmission siting through federal lands also would not appear to provide much help for several years, and then only if Congress decided to take further action.

Predictably, several state organizations and advocacy groups have expressed opposition to federal siting authorization. Concerns have also been raised with respect to granting the power of eminent domain, and preempting state eminent domain laws that may be more favorable to property owners. Some criticisms of centralized, federal siting authority include the concern that local interests, such as local health, safety and environmental impacts, would not be reasonably balanced when states lose jurisdiction over transmission line siting. Some argue that the proposed siting provisions do not require the evaluation of alternatives that may have less impacts on communities or the environment, although an analysis of alternatives generally would be required under NEPA. Further, local opponents may find it difficult to participate in a FERC process, as compared to one before local and state agencies.

Electricity is something most people take for granted – you just plug something into a wall outlet and on it goes. There is a general lack of appreciation by the public of the need for a reliable electrical system, and the critical role such a system plays in protecting human health (*e.g.*, power for hospitals and home medical devices), the environment (*e.g.*, operation of waste water treatment facilities and pollution control equipment) and safety (*e.g.*, emergency response communications and equipment). Moreover, in light of recent world events, there is a growing recognition of the need for a reliable transmission system for homeland security purposes. While disruption of a generating facility or distribution facilities may result in localized outages, a single major disruption of a critical transmission facility could result in long-term, regional outages. Unfortunately, it may take one or more repeats of the Midwest and Northeast blackout of 2003 or, even worse, a terrorist action affecting the transmission grid to begin to change the prevailing public opposition to siting new transmission lines.

There is an ongoing dispute in the Congress over a number of provisions in the Energy Bill, for the most part unrelated to the transmission siting provisions. The Energy Bill has yet to be passed by the full Senate, and the House-passed version again contains several provisions that led to a successful filibuster of the Conference Bill in the 108th Congress. For some time yet, we may not know whether the proposed provisions in the Energy Bill would allow for more timely and rational transmission siting decisions. What is certain, however, is that vehement local (and sometimes even national) opposition to siting high voltage transmission lines is unlikely to change absent one or possibly a series of major disruptions, and this opposition cannot be extinguished legislatively.

This article was prepared by Michael B. Wigmore and Sandra P. Franco of Swidler Berlin LLP in Washington, D.C. The authors represent American Electric Power with respect to permitting a 765 kV transmission line currently under construction in southern West Virginia and southwestern Virginia. Any questions or comments may be addressed to mbwigmore@swidlaw.com.

RENEWABLE ENERGY PROVISIONS IN THE ENERGY BILL

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One of the leading policy themes running through the Energy Policy Act of 2005 (the Act or 2005 EPA) is energy independence. According to express findings contained in the Act, the United States has grown too dependent on imported energy, and the current high cost of fossil fuels is hurting the economy. 2005 EPA § 935. The Act's approach to gaining greater energy independence has essentially three components: (1) increasing domestic production of energy, in part by opening more federal land to exploration and production (most notably in the Alaska National Wildlife Refuge); (2) encouraging greater conservation and efficiency; and (3) encouraging the use of renewable energy sources. This article will focus on this third component of the approach to energy independence – renewable energy.

But what is renewable energy? The Energy Information Agency defines renewable energy as: "Energy obtained from sources that are essentially inexhaustible (unlike, for example, the fossil fuels, of which there is a finite supply). Renewable sources of energy include wood, waste [such as municipal solid waste, agricultural and silvicultural wastes, and sewage waste], geothermal, wind, photovoltaic, and solar thermal energy." Energy Information Agency, Emissions of Greenhouse Gases in the United States 1987-1994, Glossary (1995), available at www.eia.doe.gov/oiaf/1605/95report/glossary.html. For purposes of the Act, alternative fuels such as ethanol; natural gas from sources such as landfills, feedlots, sewage treatment plants, etc.; and hydrogen also fall within the definition of renewable. 2005 EPA § 1501(a).

This article examines how, and how well, the Act encourages greater development of and reliance on renewable energy sources.

Substantive Provisions of the Act

The Act promotes the development and use of renewable energy in five ways: (1) effecting and coordinating renewable energy policy and programs, (2) establishing renewable energy requirements for government agencies, (3) funding government R&D and demonstration projects, (4) creating and extending financial incentives for renewable energy, and (5) otherwise aiding the incorporation of renewables into the overall national energy portfolio. Each of these will be discussed in turn.

1. National Renewable Energy Policy

Since the oil crisis of the 1970s, Congress has enacted a variety of laws that encourage the use of renewable energy, ranging from the solar, wind and ethanol programs of the 1970s to the renewable energy tax credits and alternative fuel fleet requirements of the 1990s. Additionally, many states have their own renewable energy programs. The Act takes some first steps toward clarifying what these state and federal programs have accomplished.

First, the Act requires the secretary of Energy to complete an annual assessment of renewable energy resources in the United States and publish a report detailing his findings. The report must contain a detailed inventory of the amount and type of renewable energy resources available, information that would be useful for developing these resources, and identification of barriers to bringing energy from remote sources to market. 2005 EPA § 201. The Act also requires the secretary to complete a study of the effects of alternative-fuel fleet requirements in the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, on the development and availability of alternative fueled vehicle technology and the cost of alternative fueled vehicles. 2005 EPA § 706. The information generated by these assessments would help the secretary better understand the renewables landscape.

But perhaps the Act's most ambitious attempt at shaping renewable energy policy is the implementation of the president's Hydrogen Fuel Initiative. 2005 EPA §§ 801-811. Under this initiative, the federal

government, in partnership with the private sector, would work toward developing the technology and infrastructure needed for the introduction of safe, reliable and affordable hydrogen-powered cars available to the mass consumer market by 2020. Elements of this program include the production of hydrogen from diverse sources (fossil fuels as well as renewables), development of commercially feasible mobile and stationary fuel cell technology, vehicle design and development of a hydrogen fuel infrastructure. *Id.* at § 803. The secretary of Energy is tasked with developing an agenda and plan for the first five years of the program and coordinating the efforts of the federal government. The Act would authorize over \$4 billion in funding for this program over the next five years.

2. Research & Development and Demonstration Programs

The Act contains a broad program for renewable energy research and development, demonstration projects, and commercial application for solar, bioenergy (including biofuels, biomass, and biodiesel), wind, and geothermal energy. 2005 EPA § 937. The Act also provides for a marine renewables research project to evaluate the feasibility of obtaining energy from waves, tides, currents and thermal gradients in the ocean, as well as a demonstration and technology transfer project to help install state and local government buildings with solar and other renewable energy systems. *Id.* at § 943. The Act would authorize approximately \$4 billion in funding for these programs through 2010.

3. Federal Government Use of Renewable Energy

The federal government is a significant consumer of energy. Thus, an effort by the federal government to use more renewable energy would necessarily result in expanding the market for renewables. The Act provides for increased use of renewable energy by the federal government in two ways. First, the Act requires the federal government (to the extent economically feasible and technically practicable) to fulfill an increasing amount of its energy needs from renewable sources, starting with at least 3 percent in

2007 to not less than 7.5 percent in 2013 and thereafter. 2005 EPA § 203. Second, the Act allows, but does not require, the establishment of a program to purchase and install photovoltaic systems on federal buildings, with a goal of putting 150 MW of photovoltaic capacity into service over the next five years. *Id.* at § 205.

4. Financial Incentives

The Act contains a number of incentive programs intended to encourage the use of renewable energy. Specifically, the Act adds landfill gas, livestock methane and ocean-based energy to the list of eligible renewable energy sources for which renewable energy production credits are available under the National Energy Policy Act of 1992. 2005 EPA § 202. Additionally, the Act authorizes incentive payments for electricity generated by capacity added to existing hydroelectric facilities and for facilities generating electricity from fuel cells or other advanced power technology. *Id.* at §§ 241, 1226. The Act establishes or extends tax incentives for producing energy from a non-conventional source (often referred to as “Section 29 credits”) and for businesses that install certain types of fuel cells. *Id.* at § 1305 (recasting the section 29 credit as a business credit under new section 45J of the Internal Revenue Code, 26 U.S.C. § 45J); *id.* at § 1312. The Act further provides for loan guarantees and grants to assist in the construction of facilities that produce ethanol or other approved renewable fuels for agriculture residues, wood residues, municipal solid waste or agricultural byproducts. *Id.* at §§ 1511, 1512. It also establishes grant programs for facilities that generate electricity or produce fuel from trees, brush, slash, and other biomass removed from forests to reduce risk of wildfire, infestation, or disease. *Id.* at § 1701 (preference in awarding the grants is given to small communities located near forests at high risk). Finally, the Act establishes maximum royalty payments and rent limitations for geothermal and wind projects, respectively, on public lands. *Id.* at §§ 1804, 2501.

5. Incorporating Renewables

The Act contains two significant provisions that relate to incorporating renewable energy into the energy and power supply of the United States. First, it amends the

Clean Air Act to require that motor vehicle fuel sold in the United States contains a minimum volume of “renewable fuel” (essentially ethanol derived from biomass or waste and biodiesel). 2005 EPA § 1701. The minimum volume ranges from 3.1 billion gallons in 2005 to 5.0 billion gallons in 2012. Considering that the total volume of fuels ethanol (which constitutes the bulk of “renewable fuels” produced) was approximately 3.5 billion gallons in 2004, this does not appear to represent a substantial increase. Renewable Fuels Association, Homegrown for the Homeland: Ethanol Industry Outlook for 2005, available at www.ethanolrfa.org/outlook2005.html. Notably, the current Senate version of the Act requires a total of 8.0 billion gallons of alternative fuel by 2012. S. 650 § 101.

Second, the Act amends the Public Utility Regulations Policy Act (PURPA), a statute that obligates utilities to purchase electricity generated by certain cogeneration and small power facilities. The Act would remove the purchase obligation once the secretary of Energy has deemed that the cogeneration or small power facility has nondiscriminatory access to competitive or comparably competitive wholesale electric markets and/or interconnection and transmission services. 2005 EPA § 1253. Removing the PURPA purchase requirement, however, will likely cause some concern with cogeneration and small facility operators, who highly value having a guaranteed buyer for power generated. As a side note, a similar provision in the Energy Policy Act of 2003 alarmed cogeneration facility operators. (See the U.S. Combined Heat and Power Association Web site at <http://uschpa.admgt.com/PURPAletterFinalRevision.pdf>.)

The Missing Piece

Perhaps what is most striking about the Act is what it does not contain. Notably absent is the establishment of a federal renewable portfolio standard, or RPS. Under an RPS, electric utilities are required to gradually increase their use of renewable energy resources, thus creating a growing demand for renewable energy over time. Not surprisingly, states that have RPS programs in place have generally experienced a greater increase in renewable energy

usage than those states without programs. The RPS is a market-based approach that does not rely on direct government incentives in the form of grants, tax credits or other subsidies. Bills establishing a federal RPS have been introduced in the House and Senate, but it is not clear how they will fare. *See, e.g.*, S. 427; H.R. 983. For a discussion of how RPS promotes renewables and for links to reports on this issue, see the Union of Concerned Scientists’ Web site at www.ucsusa.org/clean_energy/renewable_energy/page.cfm?pageID=1755.

To be fair, the Act contains a number of noteworthy provisions that will spur renewable energy use and development. But the rate of renewable energy growth will be much slower than it would be with the vast market for renewables that would be created by a federal RPS. And without a mature and vibrant renewables market, the road to energy independence will be a bit longer.



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NOTE FROM THE HYDRO POWER COMMITTEE CHAIR

Bill Kinsey
Chair, Hydro Power Committee

The Hydro Power Committee wants to keep its members informed about developments in the operation, configuration and relicensing of hydroelectric projects. We regularly contribute speakers for panels on energy issues at the annual meetings of the ABA's Section of Environment, Energy, and Resources, a hydro power chapter to the Section's annual publication *The Year in Review*, articles for the Energy Committees Newsletter, periodic messages to our members via the committee's list serve and updates to our Web site. We are also working with the energy committees to commence a series of teleconferences on energy, including hydro power issues.

Help us to be as active as possible! This can be as easy as sending me or one of the committee's vice chairs a message about a development on which you are working: a case, an agreement, a FERC decision, a rule, etc. We will include your news in one of our communications to committee members. Just send us an e-mail! Our contact information, plus information about how to join the committee, appears on our Web site at www.abanet.org/environ/committees/hydropower/home.html#message.

Allow me to express a special thanks to Richard Roos-Collins, our co-vice chair for Newsletters, for serving as editor of this newsletter.

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