



Alaska Energy & Environmental Policy Update

September 30, 2009

Congress is back in session, and policy makers are once again considering major proposals that will affect federal regulation of energy and natural resources. The House Committee on Natural Resources introduced a bill that would, among other things, significantly overhaul federal oil and gas leasing and royalty programs and create a regional planning framework for offshore oil and gas development. Today, Senators Barbara Boxer (D-CA) and John Kerry (D-MA) released draft comprehensive climate change legislation. From the Administration, the recently-formed Ocean Policy Task Force issued its Interim Report, laying out recommendations to President Obama for re-examining U.S. oceans and coastal management. The EPA finalized a major rule requiring power plants and large industrial facilities to monitor and report their greenhouse gas emissions on an annual basis. And from the Ninth Circuit, a three-judge panel upheld the legality of Lease Sale 202, a lease sale challenged in 2007 by the North Slope Borough and the Alaska Eskimo Whaling Commission.

CONGRESS

Rahall's Oil and Gas Leasing Reform Bill Placed on the Backburner... for Now

On September 8, House Committee on Natural Resources Chairman Nick Rahall (D-WV) introduced H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act ("CLEAR Act") of 2009, a bill that would, among other things, significantly overhaul federal leasing and royalty programs and create a new regional planning framework for offshore oil and gas development.

The CLEAR Act would raise onshore rental rates for the first time since the 1980s, require new rules to ensure diligent development of leases, and impose "best management practices" on new leases. The bill would create a new Office of Federal Energy and Minerals Leasing to handle onshore and offshore lease sales, inspection, enforcement and revenue collection. It would consolidate within the new Leasing Office all oil and gas, wind, wave and solar programs now carried out by BLM and the Minerals Management Service (MMS).

The legislation also would create four U.S. "regional ocean planning councils" for the outer continental shelf (OCS) that would be made up of representatives of the federal government, coastal governments,



regional, Tribes, and other groups. It should be noted that the legislation does *not* provide explicitly for representation on the planning councils of Alaska coastal communities or Alaska Native Corporations.

The regional ocean planning councils would be tasked with preparing marine spatial strategic plans to guide OCS energy development within the context of other activities occurring in the U.S. Exclusive Economic Zone. The strategic plans would then be incorporated into the five-year OCS leasing plans required under the Outer Continental Shelf Lands Act.

On September 16 and 17, the House Committee on Natural Resources held hearings on the CLEAR Act. The first hearing featured panelists from the Obama Administration, including Secretary of the Interior Ken Salazar and National Oceanic and Atmospheric Administration (NOAA) Chief Jane Lubchenco. Panelists cited various ongoing efforts of the Administration to reform U.S. oil and gas leasing management. Secretary Salazar also used the hearing as a platform to announce that he will end the MMS's oil and gas royalty-in-kind program (see discussion below).

NOAA Chief Lubchenco objected to the proposed regional planning councils, observing that the Obama Administration already has launched an initiative to develop a comprehensive, ecosystem-based marine spatial planning framework for the U.S. through the Interagency Ocean Policy Task Force created by the Administration earlier this summer (see discussion below).

The September 17 hearing featured representatives of the Pew Environment Group, the American Petroleum Institute, and other non-governmental groups.

Chairman Rahall had hoped that the CLEAR Act would proceed quickly to mark-up after the hearings. However, we are told that with the Senate bogged down with health care, appropriations, and financial reform legislation, and unable to turn its attention to energy and climate change bills, House leadership has put the brakes on the CLEAR Act for the time being. But don't lose track of this bill; while the CLEAR Act idles behind the scenes, committee staffers have indicated they are looking for ways to amend the bill so that it has traction when energy regains the spotlight.

As Comment Period on Five-Year Offshore Oil and Gas Leasing Plan Ends, Governor Parnell and Alaska Delegation Nudge Secretary Salazar on Arctic Development

On January 16, 2009, the Bush Administration proposed a new five-year offshore oil and gas leasing program that called for 31 offshore lease sales in 12 planning areas between 2010 and 2015, despite the fact that the current OCS five-year program is not set to expire until 2012. The Bush Administration's proposal included new sales in the Beaufort and Chukchi Seas and in Cook Inlet off Alaska.

On February 10, Interior Secretary Salazar announced that he would extend the public comment period on the Draft Proposed Five-Year OCS Oil and Gas Leasing Program for 2010-2015 by 180 days. The comment period ended last week, on September 21.



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Governor Sean Parnell submitted comments to Interior Secretary Salazar on the proposed plan, emphasizing the importance of keeping the Trans Alaska Pipeline System (TAPS) operating and providing natural gas for the proposed Alaska natural gas pipeline. Governor Parnell, who traveled to Washington, D.C. to meet with Administration officials on the proposed natural gas pipeline and other issues two weeks ago, asked the Administration to move as “expeditiously as possible” toward meaningful development that would create jobs in Alaska

Senator Murkowski also expressed her interest in seeing responsible offshore development in the Beaufort and Chukchi Seas, recently publishing an opinion piece in Alaska newspapers entitled “Getting Alaska’s Offshore Development Back on Track.” Earlier this summer, Senator Murkowski introduced legislation that would guarantee sharing of revenues derived from offshore oil and gas leasing and production in federal waters off of Alaska with the State of Alaska, Alaska coastal communities, and Alaska Native Corporations. The proposed legislation also would require that oil produced from the Arctic OCS be transported by pipeline to and through Alaska, implicitly recognizing that a marine tanker accident like the Exxon Valdez oil spill in the Beaufort or Chukchi Seas would have a devastating impact on the Arctic marine environment. Senator Begich also has introduced revenue-sharing legislation and is a co-sponsor of Senator Murkowski’s bill.

Senator Begich also submitted comments to the Department of the Interior (DOI) on the proposed five-year offshore leasing plan, emphasizing his support for “careful, considered development” of Alaska’s offshore resources with “cost-effective environmental protection measures.” Senator Begich’s comments emphasized his keen interest in developing a process “that gives local communities a voice in development off the changing Arctic coast,” a reference to his efforts earlier this summer to introduce legislation that would establish an Arctic Regional Citizens Advisory Council (RCAC).

Secretary Salazar recently commented that he is in no hurry to “rush into” a decision on the proposed five-year plan for 2010-2015, suggesting that the Interior Secretary may leave the hard decisions on new offshore drilling until 2012.

Alaska Delegation Pushes for Tax Parity for Alaska Native Corporations

On September 15, Senators Mark Begich and Lisa Murkowski and Congressman Don Young introduced legislation that would amend the Internal Revenue Code to allow an Alaska Native Corporation to deduct from taxable income the value of a qualified donation of a conservation easement on lands conveyed to the Corporation under the Alaska Native Claims Settlement Act (ANCSA).

Senator Begich, in introducing the bill, observed that Alaska’s Native community is not eligible for a 50 percent deduction currently available to certain individuals who permanently protect their land because Alaska Native Corporations are federally chartered as C corporations under ANCSA. Alaska Native Corporations also do not have sufficient gross income from traditional farming to be eligible for a 100 percent deduction available to qualified farmers or ranchers.



Under the proposed amendment, if an Alaska Native Corporation qualifies for a deduction in excess of the applicable percentage-of-income limitation, the Corporation could carry-forward the deduction for up to 15 years.

ADMINISTRATION

CEQ Issues Interim Report of the Interagency Ocean Policy Task Force

In August, a high-level delegation of Administration officials conducted a short tour of several Arctic coastal communities in Alaska. Members of the delegation included Nancy Sutley, Chair of the White House Council on Environmental Quality (CEQ); Jane Lubchenco, head of NOAA; David Hayes, Deputy Secretary of the Interior; and Admiral Thad Allen, Commandant of the U.S. Coast Guard. The officials are senior members of the Interagency Ocean Policy Task Force (“Task Force”), a group of 24 senior policy-level officials from executive departments, agencies, and offices in the federal government. The Task Force members were in Alaska to conduct the first of six regional public meetings. That meeting took place in Anchorage on August 21.

On June 12, 2009, President Obama issued a memorandum establishing the Task Force, to be led by CEQ. Within 90 days of the issuance of the June 12 memorandum, the Task Force was directed to develop recommendations for the Administration with respect to national policy on oceans and coastal ecosystems, a framework for coordinating efforts to improve stewardship of oceans and coastal ecosystems, and an implementation strategy to achieve the objectives of the proposed national policy for oceans and coastal ecosystems. Within 180 days of the date of the president’s June 12 memo, the Task Force is to develop, with public input, a recommended framework for “effective coastal and marine spatial planning.”

On September 10, the Task Force issued its Interim Report of the Interagency Ocean Policy Task Force (“Interim Report”), which lays out recommendations as requested by the President, and identifies nine over-arching national policy objectives for U.S. oceans and coastal management, including five “Areas of Special Emphasis”. One of the five areas of emphasis is the need to address changing conditions in the Arctic.

The Task Force is now tasked with developing a framework for coastal and marine spatial planning, which is due to President Obama by December 9, 2009. Marine spatial planning (often shortened to “MSP”) is generally defined as an integrated, ecosystem-based approach to the regulation, management and protection of the marine environment. Marine spatial planning may utilize “zoning” concepts for coastal and ocean planning, allocating space in a manner that permits governments to address multiple, cumulative and potentially conflicting uses of the sea while allowing sustainable development.



EPA Finalizes GHG Rule While Cap-and-Trade Stalls in Senate

The Environmental Protection Agency (EPA) has finalized a major rule requiring power plants and large industrial facilities to monitor and report their greenhouse gas (GHG) emissions on an annual basis. The reporting rule would apply to most stationary sources emitting at least 25,000 tons CO₂-equivalent per year – a threshold that would cover approximately 10,000 facilities around the country, representing about 85% of U.S. emissions. Emissions monitoring would begin on January 1, 2010, with the first emission reports due March 31, 2011.

The White House Office of Management and Budget (OMB) recently completed its review of two significant proposed EPA rulemakings concerning GHG emissions from stationary sources, suggesting that the release of the two proposals is imminent. The first rulemaking would limit the applicability of the Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) preconstruction permitting program to new or modified sources emitting at least 25,000 tons CO₂-equivalent per year. The second rulemaking is a reconsideration of an EPA memorandum which determined that PSD requirements would not apply to GHG emissions until GHGs become subject to mandatory emission controls under the CAA.

Last week, Senator Murkowski proposed an amendment to the Interior and Related Agencies appropriations bill that would have prevented EPA from regulating GHGs from stationary sources, arguing that regulation of GHGs under the CAA could have a devastating impact on the domestic economy. Senator Murkowski's move to amend the appropriations bill proved unsuccessful.

Meanwhile, Senators Barbara Boxer (D-CA), Chairman of the Environment and Public Works Committee, and John Kerry (D-MA), Chairman of the Committee on Foreign Relations, released the draft text of comprehensive climate change legislation on September 30th. The 801-page draft bill builds on the Waxman-Markey climate change legislation passed this summer by the House of Representatives, raising the 2020 GHG emission reduction target to 20 percent below 2005 levels, and introducing strong incentives for deployment of natural gas-fired power plants.

Notwithstanding limited movement in the Senate, however, Senate Majority Leader Harry Reid (D-NV) recently acknowledged that the Senate might not pass a comprehensive energy and climate change bill before the end of 2009, prompting many observers to suggest the Senate may choose to pursue passage of an energy bill that leaves cap-and-trade for later action. Earlier this summer, the Senate Committee on Energy and Natural Resources passed a comprehensive energy bill out of committee. The energy bill has yet to be taken up on the floor of the Senate.

For up-to-date coverage of major climate change-related policy developments, sign up to receive our weekly Climate Change Policy Update, www.vnf.com/news-signup.html.



Salazar Kills Royalty-In-Kind Program

Interior Secretary Ken Salazar used a September 16 hearing on the CLEAR Act (discussed above) as a platform to announce that DOI will phase out the oil and gas royalty-in-kind program administered by the Department's MMS.

Currently, companies are permitted to pay crude oil and natural gas royalties "in kind" (with product) rather than in cash. MMS is then tasked with selling the crude oil or natural gas product on the open market. In September 2008, DOI's inspector general issued a report on problems within the royalty-in-kind program, citing specific instances of corruption, inappropriate relationships, and conflicts of interest. Earlier last week, a report issued by the Government Accountability Office concluded that inadequate tracking and verification of natural gas royalty-in-kind payments has resulted in lost federal revenues.

MMS Director Liz Birnbaum and BLM Director Robert Abbey will work with Wilma Lewis, Assistant Interior Secretary for Land and Minerals Management, to help transition from the royalty-in-kind program to a more transparent royalty collection operation.

Newly Nominated or Appointed

On September 10, President Obama nominated Harris Sherman to be Undersecretary of the Department of Agriculture (USDA) for Natural Resources and Environment. Mr. Sherman takes the place of former USDA Undersecretary Mark Rey.

Mr. Sherman currently oversees the Colorado Department of Natural Resources, where he oversees the state's energy, water, wildlife, parks, forestry, and lands programs. A White House announcement regarding the nomination reports that Mr. Sherman successfully started and expanded Colorado's minimum stream flow program, developed the state's first mining reclamation program, revised and modernized the state's oil and gas regulatory programs, started Colorado's Natural Areas Program, participated in the largest expansion of the state's wilderness and parks programs, and formulated the state's role in managing synthetic fuel development.

Mr. Sherman will supervise policy development for and the operations of the U.S. Forest Service and the Natural Resources Conservation Service. He also will be the lead federal official charged with addressing the national fallout over the scope of the Roadless Rule, which was first promulgated by President Clinton in January 2001.

On September 24, the Senate confirmed Jonathan Jarvis as director of the National Park Service (NPS). Mr. Jarvis has been with the NPS for 30 years, serving, among other positions, as Superintendent of the Wrangell-St. Elias National Park and Preserve in the 1990s and as Regional Director for the Pacific West Region since 2002.



NINTH CIRCUIT

Appeals Court Upholds 2007 MMS Lease Sale Environmental Review

On August 27 a three-judge panel of the Ninth Circuit upheld the legality of Lease Sale 202, a lease sale challenged in 2007 by the North Slope Borough and the Alaska Eskimo Whaling Commission (AEWC).

The panel found that MMS met the requirements of the National Environmental Policy Act by taking the requisite “hard look” at the effect of changing economics of oil development on the Arctic environment. The plaintiffs had argued that rising oil prices would result in oil and gas development beyond that analyzed in an environmental impact statement (EIS) issued by MMS.

The panel also rejected the plaintiffs’ contention that a supplemental EIS was required to address new information about the impact of seismic activity on Inupiat subsistence activities, finding that the new information and mitigation measures were adequately analyzed in a 2006 programmatic environmental assessment (EA).

The panel found that MMS did not act arbitrarily or capriciously in determining that the risks posed to polar bears by the cumulative effects of global warming could be mitigated, and that MMS was not required, in issuing an EA as opposed to an EIS, to disclose the opinions of dissenting scientists on whether supplemental environmental review was required to address new information about the impacts of Lease Sale 202 on Arctic wildlife. “The duty to disclose and respond to ‘responsible opposing viewpoints’”, the panel held, “applies only to environmental impact statements, not environmental assessments.”

The Ninth Circuit panel’s decision follows a decision earlier this summer by the Court of Appeals for the D.C. Circuit that vacated the 2007-2012 OCS oil and gas leasing program, and ruled that Bush Administration officials failed to conduct sufficient scientific and environmental analysis before scheduling oil and gas lease sales off Alaska. On July 28, the D.C. Circuit clarified that its ruling applies only to Alaska’s Chukchi, Beaufort, and Bering Seas.

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