

## ENERGY ALERT

### ENERGY POLICY ACT OF 2005



#### TITLE III – OIL AND GAS

The following provides a brief review and summary of some of the major provisions in Title III, Oil and Gas, of the Energy Policy Act of 2005 (Act), as signed into law on August 8, 2005. Title III is divided into eight subtitles, as is the summary below.

#### SUBTITLE A: PETROLEUM RESERVE AND HOME HEATING OIL

The petroleum reserve and home heating oil provision in Subtitle A extends authorization for the Strategic Petroleum Reserve (SPR) and Northeast Home Heating Oil Reserve and directs that the SPR be filled to its one-billion barrel capacity. The secretary of Energy is directed to select necessary sites to accomplish this directive and promulgate procedures to acquire the necessary oil.

#### ENVIRONMENTAL ISSUES

- **SPR Site Selection.** In selecting the sites for the SPR, the Department of Energy (DOE) must consider and give preference to the five sites previously assessed in its draft environmental impact statement (EIS), DOE/EIS-0 165-D, but may ultimately select from other previously studied sites not listed in the EIS. (Sec. 303.)

#### SUBTITLE B: NATURAL GAS

Subtitle B extends Natural Gas Act (NGA) jurisdiction to the importation or exportation of natural gas in foreign commerce. Subtitle B gives the Federal Energy Regulatory Commission (FERC) exclusive authority to approve or deny an application for the siting, construction, expansion or operation of a liquefied natural gas (LNG) terminal, subject to applicable federal environmental statutes such as the Coastal Zone Management Act (CZMA), the Clean Air Act and the Federal Water Pollution Control Act, and applicable states' rights thereunder. This subtitle provides that before January 1, 2015, FERC shall not deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate will supply to the facility. Prior to January 1, 2015, FERC may

also not condition an order regarding an LNG project on: (1) a requirement that the LNG terminal offer service to customers other than the applicant or affiliates of applicant, (2) any regulation of the rates, or terms of service or (3) a requirement to file service schedules or contracts with FERC. These provisions cease to have effect on January 1, 2030.

FERC is to enter into a memorandum of understanding (MOU) with the secretary of Defense on coordination of siting, construction, expansion and operation of LNG facilities that affect active military installations.

Subtitle B allows FERC to grant market-based rate authority to storage projects that are in the public interest, even if a lack of market power cannot be shown.

Project applicants are allowed to seek expedited court review of a state or federal agency decision, or lack of decision, impacting a project, as set forth in FERC's schedule as lead agency. The U.S. Court of Appeals in the circuit where a natural gas facility is located is given exclusive power to review a state or federal agency action, other than FERC, affecting a project. The D.C. circuit is given exclusive jurisdiction over matters of delay or failure to act by federal or state agencies, other than FERC, regarding FERC's established schedule. These rights to direct appeal do not apply to CZMA action.

Criminal and civil penalties under the NGA and the National Gas Policy Act (NGPA) are significantly increased.

Prohibitions on market manipulation are promulgated and FERC is directed to facilitate price transparency.

A memorandum of understanding between FERC and the Commodities Futures Trading Commission related to information sharing is directed.

Within one year of enactment, federal and state LNG forums involving the secretaries of Energy, Homeland Security, Transportation and FERC as well as the governors of coastal states are directed to facilitate dialogue on issues related to the role of LNG, siting LNG facilities and LNG safety issues.

Rules barring individuals as officers or directors of a natural gas company are established for certain violations of NGA requirements.

## ENVIRONMENTAL ISSUES

- ***Applicability of Environmental Laws.*** While the Act grants FERC exclusive authority to approve or deny a siting application for an LNG terminal, states continue to have enforcement authority pursuant to applicable provisions of (1) the CZMA, (2) the Clean Air Act and (3) the Federal Water Pollution Control Act. (Sec. 311.)
- ***FERC Authority Over NEPA Process.*** FERC is designated as the lead agency for review of NGA jurisdictional projects under the National Environmental Policy Act (NEPA), and it is authorized to develop a schedule for completion of necessary review. Other affected federal and state agencies are directed to cooperate with FERC and comply with FERC's schedule. (Sec. 311.)
- ***Mandatory Prefiling Process.*** FERC must promulgate new regulations establishing a mandatory prefiling process under NEPA for all LNG facility applications. This process will codify FERC's current voluntary "prefiling process," designed to encourage the early involvement of interested stakeholders, facilitate interagency cooperation, and identify and resolve issues before the applicant seeks formal authorization to

construct an LNG terminal. Applicants must initiate the pre-filing process at least six months before applying to FERC. (Sec. 311.)

- ***State Consultation on Health and Safety Considerations.*** The Act also requires FERC to consult with a designated state agency in the relevant state on health and safety issues and to respond to state and local safety considerations raised by the siting application. (Sec. 311.)
- ***State Health and Safety Inspections.*** Once an LNG terminal commences operation, the relevant state agency has authority to conduct safety inspections and to provide the results to FERC for follow-up by appropriate federal entities. (Sec. 311.)
- ***Emergency Planning.*** An LNG terminal operator must prepare an emergency response plan in coordination with FERC, the U.S. Coast Guard and state and local agencies. (Sec. 311.)

## **SUBTITLE C: PRODUCTION**

Subtitle C makes several modifications and clarifications to federal statutes pertaining to the definitions of oil and natural gas as well as to the underground injection of natural gas and fluids for hydraulic fracturing purposes. Affected statutes include the Outer Continental Shelf Lands Act (OCSLA), the Deepwater Port Act, the Safe Drinking Water Act and the Federal Water Pollution Control Act.

### **ENVIRONMENTAL ISSUES**

- ***Safe Drinking Water Act.*** The Act narrows the definition of “Underground Injection” for the purposes of the Safe Drinking Water Act by excluding “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.” (Sec. 322.)
- ***Clean Water Act.*** The Act clarifies the stormwater runoff exclusion under the Clean Water Act’s National Pollutant Discharge Emission System (NPDES) permit requirement, 33 U.S.C. § 1362, to include “all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.” (Sec. 323.)

## **SUBTITLE D: NAVAL PETROLEUM RESERVE**

Subtitle D transfers administrative jurisdiction and certain specific responsibilities over certain specified public domain lands within the Naval Petroleum Reserve Numbered 2 in Kern County, California, from the secretary of Energy to the secretary of the Interior.

### **ENVIRONMENTAL ISSUES**

- ***Funding for Environmental Cleanup Based on Lease Revenues.*** The Act establishes a revolving “Lease Revenue Account,” not to exceed \$3,000,000 at any given time, as the sole and exclusive source of funds for investigation, cleanup, and disposition of the property known as “Naval Petroleum Reserve Numbered 2 Lands.” (Sec. 332.)

## SUBTITLE E: PRODUCTION INCENTIVES

Subtitle E promulgates various oil and gas production incentives. These include clarifications to the oil and gas royalty-in-kind programs on federal land and on the Outer Continental Shelf (OCS).

This subtitle also provides royalty relief for onshore marginal properties and directs that new regulations be promulgated regarding royalty relief for OCS marginal property. In addition, Subtitle E mandates royalty relief and incentives for various types of deep gas wells in the Gulf of Mexico, and it mandates various Alaska oil and gas production incentives, including leasing in the Alaska National Petroleum Reserve.

A North Slope Science Initiative is established under which the secretary of the Interior is to implement efforts to collect scientific data to provide a better understanding of terrestrial, aquatic and marine ecosystems of the North Slope of Alaska.

A program for remediating orphaned, abandoned and idled wells on federal land will be established.

The secretary of the Interior is directed to promulgate new regulations for combined hydrocarbon leasing on property involving oil, gas and tar sand.

A National Geological and Geophysical Data Preservation Program will be established to archive and catalog such technical information.

Incentives for natural gas production from hydrate resources and through carbon dioxide injection are provided.

Subtitle E mandates a study of the dependence of the state of Hawaii on use of oil.

Various energy development programs for the Denali Commission are mandated and funded.

A comprehensive inventory and analysis of OCS oil and gas resources is mandated.

## ENVIRONMENTAL ISSUES

- ***North Slope Science Initiative.*** The initiative would, *inter alia*, identify and prioritize the inventory, monitoring and research activities necessary to address the effects of past, present and future oil and gas development activities. (Sec. 348.)
- ***Abandoned, Orphaned or Idled Wells on Federal Land.*** Within one year of the Act's enactment, the departments of the Interior and Agriculture must develop and submit to Congress a plan for remediating, reclaiming and closing orphaned, abandoned or idled oil and gas wells located on land administered by their respective land management agencies; additionally, they must establish a process for recovering costs of such efforts from the appropriate parties. The Interior shall also establish a pilot program providing incentives for oil and gas lessees to conduct remediation or reclamation activities under future leases. (Sec. 349.)
- ***Abandoned, Orphaned or Idled Wells on Nonfederal Land.*** DOE shall provide technical assistance to oil- and gas-producing states in remedying environmental problems caused by orphaned and abandoned well sites on state or private land. (Sec. 349.)

## **SUBTITLE F: ACCESS TO FEDERAL LAND**

Subtitle F establishes new provisions for review by the secretary of the Interior, in consultation with the secretary of Agriculture, of onshore oil and gas leasing and permitting practices with the objective of making recommendations to Congress for improving and expediting same.

Regarding federal oil and gas leasing programs, Subtitle F requires improved management by mandating:

(1) expeditious compliance with NEPA and an improvement in the consultation/coordination process with states and the public, (2) development of best management practices to improve the administration of the onshore oil and gas leasing program and to ensure timely action on permit applications, (3) development of regulations with specific timeframes for processing leases and applications, (4) improvement of inspection and enforcement of oil and gas activities, including terms and conditions in drilling permits and (5) a memorandum of understanding (MOU) between the secretaries of the Interior and Agriculture regarding oil and gas leasing on public lands and on National Forest System lands with the objective of streamlining the processing of oil and gas lease applications, surface use plans of operations and applications for permits to drill.

Subtitle F contains numerous provisions intended to encourage the development of domestic energy supplies. These include an expanded assessment of onshore oil and gas resources and a more detailed review of impediments to the development and transportation of oil and gas.

Subtitle F requires the secretary of the Interior to establish a Federal Permit Streamlining Pilot Project in cooperation with the secretary of Agriculture, the administrator of the Environmental Protection Agency (EPA) and the chief engineer of the Army Corps of Engineers. The secretary of the Interior may request participation of the governors of Wyoming, Montana, Colorado, Utah and New Mexico. The results of the pilot project are to be reported to Congress no later than three years after enactment of the energy law.

Several provisions of Subtitle F amend prior legislation in order to encourage the development of domestic energy resources. Section 17 of the Mineral Leasing Act is amended so as to impose strict and short deadlines with regard to applications for drilling permits. The Federal Land Policy and Management Act of 1976 (FLPMA) is amended to revise the formula for determining the fair market value for use of land encumbered by a linear right-of-way and to amend the regulations to reflect current values of land.

Regarding energy facility rights-of-way and corridors on federal land, the secretaries of Agriculture, the Interior, Commerce, Defense and Energy are to consult with the FERC, tribal and local governments and stakeholders regarding rights-of-way and corridors for oil and gas pipelines and electric transmission and distribution facilities, and they are to designate utility corridors on federal land.

This subtitle also establishes the Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels Act of 2005. This act identifies oil shale, tar sands and other unconventional fuel sources as strategically important domestic resources. This act provides incentives for leasing and development of oil shale, tar sand and other unconventional fuels on federal land. Provisions for environmental review under a programmatic environmental impact statement with the Department of the Interior as lead agency are established. Coordination of agency review and expedited permitting, are also directed.

In addition, there are provisions in this subtitle that address specific issues on specific federal lands: (1) the Padre Island National Seashore, (2) Finger Lakes National Forest and (3) mineral rights related to a prior land transfer in Louisiana.

Provisions on reinstatement of terminated leases are provided, and procedures for unified and coordinated right-of-way review on federal land are provided in this subtitle.

## ENVIRONMENTAL ISSUES

- **Review of Current Leasing and Permitting Practices.** The Department of the Interior, in consultation with the Department of Agriculture, must perform an internal review of federal onshore oil and gas leasing and permitting practices to assess, *inter alia*, existing processes for identifying stipulations relating to site-specific environmental concerns and conditions. (Sec. 361.)
- **Expeditious Compliance With NEPA.** Both the departments of the Interior and Agriculture must ensure expeditious compliance with applicable environmental and cultural resource laws, including requirements for environmental impact statements under NEPA. (Sec. 362.)
- **Best Management Practices.** Within 18 months, the Interior must develop best management practices for processing leases, resource management plans, permits, etc. Within 18 months thereafter, DOI must propose regulations establishing time frames for processing lease applications in accordance with such best management practices. (Sec. 362.)
- **Memorandum of Understanding.** The departments of the Interior and Agriculture must enter into an MOU that will assure timely, consistent and nonduplicative environmental and other processing of oil and gas lease applications on federal lands. (Sec. 363.)
- **Assessment of Impediments to Tapping Domestic Oil and Gas Reserves.** The Act directs the DOE to evaluate the extent and impact of post-lease restrictions, impediments and delays from environmental permit processing on the development of domestic oil and gas resources underlying federal lands. (Sec. 364.)
- **Pilot Program to Improve Federal Permit Coordination.** Within 90 days of the Act, the departments of the Interior and Agriculture, the EPA, and the Army Corps of Engineers must coordinate to establish a pilot project staffed by agency experts in the Endangered Species Act, the Clean Water Act, the Clean Air Act, the National Forest Management Act and NEPA to streamline the permitting process. (Sec. 365.)
- **Deadlines for Consideration of Permit Applications.** The Act establishes a variety of deadlines for Department of the Interior action on oil or gas lease applications, but conditions such deadlines on completion of NEPA requirements and other applicable law. (Sec. 366.)
- **Energy Right-of-Way Corridors on Federal Land.** In designating energy right-of-way corridors for pipelines and transmission and distribution facilities within Western states identified in the Act, Agencies must perform any required environmental reviews. (Sec. 368.) The Act does not address the applicability of environmental reviews to right-of-way corridor designations in other States. *Id.*
- **Oil Shale, Tar Sands and Other Unconventional Fuels.** Within 18 months, the Interior must complete a programmatic environmental impact statement under NEPA for a commercial leasing program for oil shale

and tar sands on public lands. The Interior must then publish a final regulation establishing the leasing program within six months of completing the programmatic EIS. Under any such program, the Interior shall act as the lead federal agency in coordinating federal environmental reviews and shall coordinate with state and tribal agencies with respect to separate state permitting and environmental requirements and shall implement regulations governing such interagency coordination within six months. DOE shall identify promising technologies for development of oil shale and tar sands and provide assistance with respect to environmental regulatory requirements. (Sec. 369.)

- ***Interagency Coordination on Environmental Reviews.*** Within six months, the departments of Energy, the Interior, Agriculture and Defense shall enter into an MOU to coordinate applicable federal authorizations and environmental reviews for proposed or existing facilities on designated energy rights-of-way, including the preparation of a single environmental review document for all federal authorization decisions. (Sec. 372.)

## SUBTITLE G: MISCELLANEOUS

Certain royalty relief under OCSLA is provided.

A study on the availability of skilled workers to meet U.S. energy and mineral security requirements is directed.

A Great Lakes oil and gas drilling ban is instituted.

The OCSLA is amended to provide new right-of-way provisions to support exploration, development, production, transportation or storage of oil or natural gas.

## ENVIRONMENTAL ISSUES

- ***Appeals to Consistency Determinations Under the CZMA.*** The Act revises the specific deadlines and time limits for closing the administrative record on, and for responding to, appeals to consistency determinations made by federal agencies under the CZMA. (Sec. 381.) Such appeals shall be based on a consolidated administrative record reflecting actions taken by all federal and state agencies. (Sec. 382.)
- ***Coastal Impact Assistance Program.*** The Act provides \$250 million annually between 2007 and 2010 to fund various conservation, protection and restoration activities in energy in coastal states or political subdivisions based on each area's OCS production revenues. (Sec. 384.)
- ***Great Lakes Drilling Ban.*** The Act bans slant, directional, or offshore drilling for new oil and gas under the Great Lakes. (Sec. 386.)
- ***Alternate Uses on the OCS.*** The Act requires that any alternate, energy-related uses for the OCS be carried out in a manner that provides for safety, environmental protection and conservation of the natural resources of the OCS. (Sec. 388.)
- ***OCS Mapping Initiative.*** The departments of the Interior, Commerce and Defense and the Coast Guard shall establish an initiative to map the OCS, including the location of areas designated for the purposes of environmental protection or conservation and management of living marine resources. (Sec. 388.)

- ***Oil Spill Recovery Institute.*** The Act extends funding for the Oil Spill Recovery Institute on Prince William Sound, Alaska, until one year after oil and gas exploration, development and production in Alaska have ceased. (Sec. 389.)
- ***Categorical Exclusions From NEPA Review.*** The Act establishes a rebuttable presumption that certain limited oil and gas-related exploration or development activities fall under a categorical exclusion to NEPA requirements. (Sec. 390.)

## SUBTITLE H – REFINERY REVITALIZATION

This subtitle identifies domestic refining capacity as a national interest and promulgates statutory provisions to streamline the environmental permitting provisions for refineries.

### ENVIRONMENTAL ISSUES

- ***Federal and State Efforts to Streamline Refinery Permitting.*** The governor of a state can request EPA to enter into a cooperative agreement to streamline the environmental permitting process for a new refinery, including allowing for applicants to file a consolidated application for all EPA permits and coordination of the application review among federal and state agencies. (Sec. 392.)

## CONTACT INFORMATION

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