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FEDERAL NATURAL GAS POLICY AND THE ENERGY POLICY ACT OF 1992

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On October 24, 1992, President Bush signed the Energy Policy Act of 1992,[1] the first comprehensive energy policy legislation enacted in over a decade. This article traces the legislative history of the Energy Policy Act and summarizes the provisions of the law that will affect federal natural gas policy.

The Energy Policy Act includes provisions that are intended to stimulate natural gas production, remove regulatory obstacles to natural gas utilization, and promote the development of new markets for natural gas. The new law stands in marked contrast to the comprehensive energy policy legislation enacted in the late 1970s when natural gas was perceived as a rapidly diminishing resource to be husbanded for high priority uses.[2] By the late 1980s, the perception of natural gas had changed dramatically. Natural gas now is widely regarded as an abundant, clean domestic resource that can be produced economically and whose increased utilization furthers the ends of environmental and energy security policy.[3] This attitude is reflected in the Energy Policy Act.

I. BACKGROUND

A. The Role of Natural Gas in the Nation's Energy Economy

1. Natural Gas Consumption

In 1991 natural gas accounted for 25% of the United States' primary energy consumption.[4] This represented a 2% increase over the 20 year low in

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1. Pub. L. No. 102-486, 106 Stat. 2776 (1992) [hereinafter Energy Policy Act].
2. Joseph P. Riva, *Domestic Natural Gas Production*, Congressional Research Service (1989).
3. 137 CONG. REC. S10471 (daily ed. July 19, 1991) (statement of Sen. Johnston).
4. In 1991, the United States consumed a total of 81.51 quadrillion Btus (quads) of energy.

1986, but was still far below the level achieved in the early 1970s when natural gas accounted for approximately one third of the nation's energy mix.[5]

The United States consumed approximately 19 trillion cubic feet (tcf) of natural gas in 1991.[6] Despite the economic recession, natural gas consumption in 1991 rose 2% over the previous year. This increase is largely attributable to the price competitiveness of natural gas relative to other fuels.[7] According to the Department of Energy (DOE), gas consumption will increase to 19.79 tcf in 1992 and will increase again to 20.67 tcf in 1993.[8] The DOE projects that by the turn of the century U.S. gas consumption will once again attain its historical peak of 22.1 tcf reached in 1972. Thereafter, it is projected that by the year 2005 gas consumption will range between 22.5 and 23.9 tcf.[9]

As has been the case historically, the industrial sector was the largest user of natural gas in 1991. Industry consumed 7.23 tcf which accounted for 37.9% of national consumption.[10] This was a level of consumption in a range not seen since 1980-81. Still it is well below the historic highs achieved in the early 1970s. Largely due to the price competitiveness of natural gas, industrial gas consumption in 1991 rose by 4% over the previous year. Gas deliveries to industrial cogeneration facilities also contributed to the strength of the industrial gas market.[11] According to DOE projections, industrial use of natural gas will peak at between 7.5 and 8.0 tcf at the turn of the century. By the year 2010, DOE estimates that industrial gas consumption will decline to between 7.0 and 7.9 tcf as the economy shifts to less energy intensive industries.[12]

The residential sector ranks second in natural gas consumption. Homes accounted for 4.55 tcf of gas consumption and 23.9% of the national total in 1991.[13] Natural gas is especially important to the residential sector, as nearly one half of the homes in the United States are heated with gas. The number of residential gas consumers has been increasing steadily. In 1991 there were 51.6 million residential gas consumers which represented a 3% increase over 1990. Natural gas accounted for 60% of the new home market in 1991.[14] Still the

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Petroleum products accounted for the largest share of the energy mix at 32.72 quads. Natural gas was second at 20.16 quads followed closely by coal at 18.81 quads. Nuclear power accounted for 6.54 quads and hydroelectric power accounted for 3.08 quads. Other forms of renewable energy and miscellaneous sources accounted for the remaining 0.20 quads of energy consumption. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY REVIEW 1991 7 (1992).

5. ARTHUR ANDERSEN & CO, SC AND CAMBRIDGE ENERGY RESEARCH ASSOCIATES, NATURAL GAS TRENDS NORTH AMERICA 1992 41 (1992)[hereinafter NATURAL GAS TRENDS].

6. ENERGY INFORMATION ADMINISTRATION, NATURAL GAS ANNUAL 1991 4 (1992) [hereinafter NATURAL GAS ANNUAL].

7. *Id.* at 43.

8. ENERGY INFORMATION ADMINISTRATION, SHORT-TERM ENERGY OUTLOOK - QUARTERLY PROJECTIONS FOURTH QUARTER 1992 13 (1992).

9. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 1992 WITH PROJECTIONS TO 2010 34 (1992) [hereinafter ANNUAL ENERGY OUTLOOK].

10. NATURAL GAS ANNUAL, *supra* note 6, at 4.

11. *Id.* at 44.

12. ANNUAL ENERGY OUTLOOK, *supra* note 9, at 35.

13. *Id.* at 4.

14. *Id.* at 43.

level of gas consumption in the residential market depends heavily on weather-related home heating requirements. According to DOE projections, residential natural gas consumption will remain fairly stable and eventually decline. This will occur because efficiency improvements will more than offset the increased number of gas appliances in service.[15]

Electric utilities rank third in gas consumption. Gas-fired electric generation consumed 2.79 tcf which accounted for 14.6% of the national total in 1991.[16] This was virtually the same level of consumption as in 1990 and 1989. While natural gas prices were very competitive in 1991, the fact that nuclear plants in Texas and California were able to operate at near 100% of capacity during the summer of 1991 contributed to flat gas consumption in the electric utility sector.[17]

It is anticipated that electric power generation will be the major growth market for natural gas over the next decade. DOE projects that the utilization of natural gas for electric generation will rise rapidly from 2.8 tcf in 1990 to between 4.6 and 6.2 tcf in the year 2005. Thereafter, it is expected that gas use for electric generation will taper off as gas prices increase relative to coal and new coal-fired baseload generating units displace gas-fired combined cycle units.[18]

The commercial sector consumed natural gas at almost the same level as did the electric utility sector in 1991. This sector includes hospitals, schools, hotels, offices, retail establishments, and service firms. It also includes local, state and federal agencies and agriculture. The commercial sector consumed 2.73 tcf and accounted for 14.3% of the national total. This represented a 4% increase over 1990 and was the highest level of gas consumption by the commercial sector since 1979. Like the residential sector, gas demand in the commercial sector is heavily dependent on the weather and space heating requirements. Natural gas demand in the commercial sector is expected to grow slowly and to reach 3.2 tcf by the year 2010. This will be attributable to increased gas use for cogeneration, space heating and cooling.[19]

The emerging market for natural gas as a vehicular fuel accounted for 367 million cubic feet of gas consumption in 1991. While this was a statistically insignificant amount in terms of overall national consumption, it represented a 26% increase over the previous year.[20] The DOE projects that 100 billion cubic feet (bcf) of natural gas will be consumed as vehicular fuel by the year 2005 and that by the year 2010 this market will grow to 300 bcf.[21]

Finally, approximately 9% of the nation's natural gas supply in 1991 was consumed in getting the fuel to consumers. Lease and plant fuel accounted for 1.15 tcf and pipeline fuel accounted for 0.6 tcf.[22]

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15. *Id.* at 34.
16. NATURAL GAS ANNUAL, *supra* note 6, at 4.
17. NATURAL GAS TRENDS, *supra* note 5, at 43.
18. ANNUAL ENERGY OUTLOOK, *supra* note 9, at 34-35.
19. *Id.* at 34.
20. NATURAL GAS ANNUAL, *supra* note 6, at 46.
21. ANNUAL ENERGY OUTLOOK, *supra* note 9, at 35-36.
22. NATURAL GAS ANNUAL, *supra* note 6, at 4.

2. Natural Gas Production and Supply

Dry natural gas production[23] in the United States in 1991 totaled 17.69 tcf. Domestic production was supplemented by 1.8 tcf of imported natural gas, primarily from Canada. Exports of natural gas produced in the United States totaled 0.129 tcf. At the end of 1991, proved natural gas reserves[24] in the lower forty-eight states totaled approximately 165 tcf.[25] This translates into approximately 8.5 years of gas supply at current rates of consumption.

Proved reserves are to be contrasted with estimates of the natural gas resource base. The resource base includes not only proved reserves, but also undiscovered resources. These are resources which are estimated to exist on the basis of broad geologic knowledge and theory. The technically recoverable United States natural gas resource base is estimated at approximately 1,300 tcf, or about 65 years of gas supply at current consumption rates.[26]

3. Evolution of Natural Gas Regulation and the Natural Gas Market

Over the past two decades both the framework for federal regulation of the natural gas industry and the industry itself have undergone a radical transformation. A brief review of these developments will lend some perspective to the ensuing discussion of the federal natural gas policies enunciated in the Energy Policy Act of 1992.

Prior to enactment of the Natural Gas Policy Act of 1978 (NGPA)[27], the chain of interstate distribution of natural gas was regulated under a public utility model. The statutory framework for regulation was the Natural Gas Act (NGA),[28] enacted in 1938, under which the Federal Power Commission (FPC) set "just and reasonable" rates for pipelines and producers selling natural gas for resale in interstate commerce.[29]

The structure of the natural gas industry under NGA regulation was relatively straightforward. Producers sold natural gas in the production area to interstate pipelines at FPC-approved just and reasonable rates. Pipelines aggregated this purchased gas, together with any of their own production, and transported the gas to the city gate for resale to local distribution companies (LDCs). Again, this was done at FPC-approved just and reasonable rates that

23. Dry natural gas production is marketed production less extraction loss, which is the reduction in volume of natural gas due to the removal at gas processing plants of natural gas liquid constituents such as ethane, propane and butane.

24. Proved reserves are the estimated quantities of a resource that analysis of geological and engineering data demonstrate with reasonable certainty are recoverable from known oil and gas reservoirs under existing economic and operating conditions.

25. ENERGY INFORMATION ADMINISTRATION, U.S. CRUDE OIL, NATURAL GAS, AND NATURAL GAS LIQUIDS RESERVES 1991 ANNUAL REPORT 32 (1992).

26. NATIONAL PETROLEUM COUNCIL, THE POTENTIAL FOR NATURAL GAS IN THE UNITED STATES: EXECUTIVE SUMMARY 5-8 (1992).

27. 15 U.S.C.A. §§ 3301-3442 (West Supp. 1990).

28. 15 U.S.C. §§ 717-717w (1988).

29. The "just and reasonable" standard is set forth in § 4 of the NGA. 15 U.S.C. § 717c. In 1954, NGA regulation was extended to wellhead sales for resale in interstate commerce when the Supreme Court in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), held that the NGA obligated the FPC to regulate sales by independent producers to interstate pipelines.

recovered both the cost of gas and the cost of transportation. The LDCs resold the pipeline gas to residential, commercial, and industrial customers at rates subject to regulation by state and local authorities. Instances in which LDCs and direct end-users of natural gas purchased gas in the production area and contracted separately for pipeline transportation to the city gate were exceedingly rare.

NGA regulation produced a dual market for natural gas. Both the price and the allocation of natural gas sold at the wellhead for resale in interstate commerce were subject to regulation by the FPC under the NGA. During the late 1960s and the early 1970s the FPC kept the wellhead price for interstate natural gas low. Meanwhile, prices on intrastate markets were not restrained and rose to meet demand. The federal price restraints at the wellhead encouraged the consumption of gas in markets served by interstate gas and, at the same time, discouraged producers from dedicating reserves to the pipelines that served the interstate market. This regulatory policy resulted in a series of gas shortages in the mid-1970s.

In reaction to the shortages of natural gas on the interstate market, Congress enacted the NGPA in 1978. This law established a complicated framework for the partial decontrol of natural gas at the wellhead. First, the dual market was eliminated by extending federal wellhead price controls to all gas production and by authorizing natural gas transportation between the interstate and intrastate markets. Second, statutory ceiling prices for all categories of gas production were established in lieu of FPC-determined just and reasonable rates. The ceiling prices for certain categories of gas production were set at levels intended to provide an incentive for developing new sources of supply. Third, approximately one half of the nation's natural gas supply was scheduled to be decontrolled in three steps between 1979 and 1987.[30]

The NGPA also included provisions to restrain demand for natural gas. Under the law's incremental pricing sections,[31] pipelines and LDCs were required to charge higher prices to industrial gas users. Another statute enacted at the same time, the Power plant and Industrial Fuel Use Act of 1978 (FUA),[32] prohibited burning natural gas in industrial facilities and electric power plants.

The NGPA had a powerful effect on the natural gas market. The elimination of the dual market, the establishment of incentive ceiling prices for certain categories of gas production, and the expectations generated by the plan for phased wellhead decontrol of much of the nation's gas supply created incentives for increased natural gas production. Interstate pipelines were quick to commit to purchase new production and often agreed to take-or-pay for a significant share of the contract quantity at prices linked to the NGPA ceiling

30. The rest of the nation's gas production, primarily natural gas that had been dedicated to interstate commerce prior to enactment of the new law, would never have been decontrolled. It was anticipated that this forever regulated gas would diminish over time with the depletion of the dedicated reserves.

31. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§ 201-08, 92 Stat. 3371-81 (repealed 1987).

32. Pub. L. No. 95-620, 92 Stat. 3289 (codified in scattered sections of 15, 42, 45, and 49 U.S.C.).

prices.[33]

At the same time, other forces worked to limit the market for natural gas. First, the limitations on gas consumption imposed under the NGPA and FUA reduced the demand for natural gas. Second, the economic recession of the early 1980s caused the contraction of markets for natural gas. Third, consumers reacted to more expensive natural gas by reducing consumption and switching to less expensive alternative fuels. Due to contractual and regulatory inflexibility, natural gas was unable to compete with oil in dual fuel markets. Natural gas market loss was especially severe in the electric utility and industrial sectors of the economy.[34]

Thus, the interstate natural gas market was rapidly transformed from one in which there was a perceived shortage of supply to one in which there was an actual excess of deliverability. Interstate pipeline companies were committed to purchase natural gas from producers at prices and in quantities that could not be resold in downstream markets. This resulted in extensive negotiation and litigation and in the reformation of gas supply contracts. Large volumes of natural gas were released from pipeline system supply and were sold by producers in short-term transactions priced according to the spot market.

Federal regulation also responded to the changes precipitated by the NGPA. The FPC's successor, the Federal Energy Regulatory Commission (FERC), authorized special marketing programs (SMPs) and blanket certificate programs pursuant to which producers would release pipelines from the obligation to purchase natural gas in return for the pipeline's agreement to transport the released gas to certain enumerated classes of buyers who had agreed to purchase the released gas from the producer. While these programs ultimately were struck down as being unduly discriminatory and preferential in violation of the NGA, they marked the true beginning of the pipelines' role as a transporter of gas owned by others. The FERC also created an opportunity for LDCs to take advantage of competitive wellhead markets with the issuance of Order No. 380[35] which invalidated fixed cost minimum bills and minimum take obligations in pipeline tariffs.

In 1985 the FERC issued Order No. 436[36] which radically redefined the role of interstate pipelines. While nominally a voluntary program, Order No. 436 in practice required pipelines to become open access non-discriminatory transporters of natural gas. Pipelines also were required to permit their firm

33. ENERGY INFORMATION ADMINISTRATION, NATURAL GAS PRODUCTION RESPONSES TO A CHANGING MARKET ENVIRONMENT 1978-1988 4-6 (1990).

34. *Id.*

35. Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, Order No. 380, 49 Fed. Reg. 22,778 (1984), *aff'd*, Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985).

36. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985), *vacated and remanded*, Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *readopted on an interim basis*, Order No. 500, 52 Fed. Reg. 30,334 (1987), *remanded*, American Gas Ass'n v. FERC, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, 54 Fed. Reg. 52,344 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, 55 Fed. Reg. 6605 (1990), *aff'd in part and remanded in part*, American Gas Ass'n v. FERC, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991).

sales customers to convert their entitlement of firm sales service to volumetrically equivalent entitlement of firm transportation service over five years. Order No. 436, and its successor, Order No. 500,[37] put an end to the interstate pipeline as the aggregator and merchant of gas supply. In 1984, the last full year prior to the issuance of Order No. 436, transportation of gas owned by others accounted for only 8% of interstate pipeline throughput.[38] By 1992 the function of the pipeline had been reversed. In the first quarter of 1992, transportation gas accounted for 79% of pipeline throughput.[39]

Congress also took steps that would reestablish and create markets for natural gas and that would inject greater competition in the natural gas industry. In 1987, Congress repealed the incremental pricing provisions of the NGPA that required interstate pipelines to charge artificially high prices to industrial customers that use gas in large boilers.[40] Concurrently, Congress substantially amended the FUA by virtually eliminating the restrictions on the use of natural gas in electric power plants and other major fuel burning installations.[41] A year later, Congress amended the NGPA to remove the contract duration and right of first refusal requirements that attached to certain categories of gas produced on the outer continental shelf.[42] The next year, Congress enacted the Natural Gas Wellhead Decontrol Act of 1989.[43] Under this statute, all of the remaining NGPA "forever regulated" gas was decontrolled by January 1, 1993.

While not strictly an energy law, the Clean Air Act Amendments of 1990[44] represent another significant legislative action that will have an effect on markets for natural gas. That legislation, signed into law on November 15, 1990, was the culmination of Congressional proposals advanced for over a decade. This law created a role for natural gas as a cost-effective option for compliance with the market based acid rain program designed to reduce emissions of sulfur dioxide through an allowance and emissions trading program. The amendments were also designed to promote the use of alternative fuels, such as natural gas, in the transportation sector.[45]

The latest of the FERC's major natural gas rulemakings, Order No. 636,[46] was issued in April 1992. Order No. 636, known as the restructuring rule, significantly changes the structure of the services provided by interstate

37. Order No. 500, 52 Fed. Reg. 30,334 (1987).

38. Interstate Natural Gas Ass'n of America, Issue Analysis: Carriage Through the First Half of 1991 at Table A-1 (1991).

39. *Energy Information* Administration, NATURAL GAS MONTHLY, Feb. 1992 at Table 15 .

40. Pub. L. No. 100-42, 101 Stat. 314 (1987).

41. Pub. L. No. 100-42, 101 Stat. 310 (1987).

42. Pub. L. No. 100-439, 102 Stat. 1720 (1988).

43. Pub. L. No. 101-60, 103 Stat. 157 (1989).

44. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

45. U.S. ENVIRONMENTAL PROTECTION AGENCY, THE CLEAN AIR ACT AMENDMENTS OF 1990 SUMMARY MATERIALS 1 (Nov. 15, 1990).

46. Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (1992), *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *appeal filed*, Northern Indian Public Service Co. v. FERC (No. 92-1342) [appeals also are pending in the U.S. Court of Appeal for the 11th Circuit], *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992).

natural gas pipelines. The stated purpose of the restructuring rule is to promote greater competition among natural gas sellers and to achieve a more efficiently structured gas industry. The order puts all natural gas suppliers on an even footing by requiring that pipelines provide transportation service that is equal in quality for all gas supplies, whether a customer purchases gas from the pipeline or from another supplier.

Natural gas prices at the wellhead have declined steadily since the mid-1980s. In 1984 the national average wellhead price was $2.26 per thousand cubic feet (mcf). By 1991, the national average wellhead price had dropped to $1.64 per mcf, the lowest price since 1980 when wellhead prices averaged $1.59 per mcf. When restated in 1980 dollars, the 1991 average wellhead price was $1.00 per mcf, or 37% less than the comparable 1980 price.[47] Wellhead prices rebounded slightly in 1992. The DOE estimates that the average wellhead price for 1992 will be $1.79 per mcf.[48]

The restructuring of the natural gas industry has not been without its costs. Many producers went out of business when the wellhead market collapsed. Interstate pipelines incurred huge liabilities in restructuring and obtaining release from uneconomic gas purchase contracts. Two pipelines went into bankruptcy under the weight of these obligations. While consumers benefited from competitive wellhead markets, the FERC did permit the interstate pipelines to recover a portion of their contract reformation costs from downstream markets.[49]

It was against this backdrop of Congressional and administrative action that the Congress considered the natural gas provisions of the Energy Policy Act.

II. LEGISLATIVE HISTORY

Iraq's August 1990 invasion of Kuwait and the ensuing Gulf War set the stage for the Energy Policy Act. These events brought into focus once again the perils of the United States' dependence on imported oil and the need for a coherent national energy policy.[50]

A. Background

On August 2, 1990, Iraq invaded Kuwait, and nearly all of Kuwait's 1.8 million barrels per day of oil production were shut down. The United Nations ordered an embargo on imports of Iraqi oil which removed an additional 2.5 million barrels of oil per day from the world market. Many speculated that the oil fields in Saudi Arabia, then producing 5.5 million barrels per day, were

47. NATURAL GAS ANNUAL, *supra* note 6, at 8.

48. Energy Information Administration, NATURAL GAS MONTHLY, Nov. 1992 at 13.

49. As of October 31, 1990, interstate pipelines had paid a total of $9.1 billion to producers in settlement of take-or-pay liabilities. Of this total, DOE estimated that almost $5.4 billion would be eligible for recovery from pipeline customers under the mechanisms provided under FERC Order No. 500 and 528. Mary Carlsonet et al., *Take-or-Pay Settlements*, NATURAL GAS MONTHLY, Jan. 1991 at 1-9.

50. *See, e.g., Implications of the Middle Eastern Crisis for Near-Term and Mid-Term Oil Supply: Hearings Before the Senate Committee on Energy and Natural Resources*, 101st Cong., 2d Sess. 1-9 (1990).

likely to be the next target of the Iraqis.[51] By the time the U.N. coalition forces initiated hostilities to liberate Kuwait in January 1991, the United States had committed nearly 500,000 troops to the region.[52]

In 1990, prior to the Iraqi invasion of Kuwait, imports from the Persian Gulf represented 12% of U.S. consumption and 26% of net imports.[53] At the time of the invasion, the United States depended on imports for approximately 42% of its oil needs and, under business as usual, the United States was projected to be headed for levels of oil import dependence of 60 to 75% in the next two decades.[54] Domestic oil production had been decreasing steadily since the mid-1980s.[55] The Middle East crisis affected the market price for oil. In early June of 1990, spot market prices for West Texas Intermediate (WTI) benchmark crude oil were as low as $13.00 per barrel. The post-invasion high price occurred on October 11, 1990, when WTI hit $41.07 per barrel on the spot market. This translated into increases in the price of gasoline. The price of retail unleaded regular self-service gasoline was $1.075 on August 1, 1990. The price hit a post-invasion high of $1.347 on October 19, 1990.[56] The General Accounting Office estimates that U.S. consumers spent $21 billion more for crude oil and petroleum products between August 1 and December 1, 1990, than they would have spent had the Middle East crisis not occurred.[57]

On February 20, 1991, the Bush Administration released its National Energy Strategy (NES),[58] which was based on energy options recommended by a broad array of interests over an eighteen month period.[59] The NES proposed a series of initiatives to "remove barriers to an efficient energy market."[60] It served as the basis for the Administration's version of a comprehensive energy bill, S. 570.[61]

Congressional consideration of omnibus energy policy legislation spanned the entire 102d Congress. The forerunners of the Energy Policy Act were introduced in the first days of Congress in early February 1991. The confer-

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51. S. REP. NO. 72, 102d Cong., 1st Sess. 201 (1991). Over 60% of the world's proven oil reserves lie in the Persian Gulf. Saudi Arabia alone accounts for 25.7% of world oil reserves and Iraq ranks second with 10% of the world's proven reserves. UNITED STATES DEPARTMENT OF ENERGY, STATISTICAL SUMMARY, Provided to the Senate Committee on Energy and Natural Resources, Aug. 8, 1990.

52. *Id.*

53. ENERGY INFORMATION ADMINISTRATION, PERSIAN GULF FACT SHEET, Aug. 29, 1990.

54. UNITED STATES DEPARTMENT OF ENERGY, STATISTICAL SUMMARY, Provided to the Senate Committee on Energy and Natural Resources, Aug. 8, 1990.

55. Domestic production was 7.3 million barrels per day in 1990, compared to almost 9 million barrels per day in 1985. UNITED STATES DEPARTMENT OF ENERGY, NATIONAL ENERGY STRATEGY FIRST EDITION 1991/1992 74 (1991).

56. Patricia Beneke and Donald Santa, Memorandum Regarding Hearing on the Implications of the Middle Eastern Crisis for Near-Term and Mid-Term Oil Supply Before the Senate Committee on Energy and Natural Resources (Sept. 11, 1990).

57. UNITED STATES GENERAL ACCOUNTING OFFICE, TRANSITION SERIES: ENERGY ISSUES 8 (1992) (draft).

58. UNITED STATES DEPARTMENT OF ENERGY, *supra* note 55.

59. S. REP. NO. 72, 102d Cong., 1st Sess. 203 (1991) [hereinafter S. 1220 REPORT].

60. *Hearings on S. 341, To Reduce the Nation's Dependence on Imported Oil, to Provide for the Energy Security of the Nation and for Other Purposes, and on the Administration's National Energy Strategy Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., 1st Sess. 493 (1991).

61. S. 1220 REPORT, *supra* note 59, at 203.

ence report did not pass until 20 months later during the final week of the second session of Congress in October 1992. While during the course of the process, memories of the Gulf War may have faded on the part of many,[62] addressing oil import dependency and the desire to have a coherent national energy policy continued to be a driving force behind the legislation.

B. The Senate Bill

The vehicle for Senate consideration of comprehensive energy legislation was the National Energy Security Act authored by the chairman and ranking minority member of the Committee on Energy and Natural Resources, Senator J. Bennett Johnston of Louisiana and Senator Malcolm Wallop of Wyoming. The Johnston-Wallop bill was introduced on February 5, 1991, as S. 341, the National Energy Security Act of 1991.[63]

S. 341 was referred to the Committee on Energy and Natural Resources. Between February 21 and April 3, 1991, the committee held 17 public hearings on S. 341 and related legislation.[64] The committee considered S. 341 at 13 business meetings, or markups, held between April 16 and May 23, 1991. At these markups the committee members offered, debated, and approved or rejected numerous amendments to the bill. By a margin of 17 in favor and 3 against, the Committee voted to report favorably the amended S. 341. On June 5, 1991, the amended bill was reported by the Committee as an original bill, S. 1220.[65]

On November 1, 1991, the Senate failed to invoke cloture on the motion to proceed to consideration of S. 1220. The motion failed on a vote of 50 senators in favor of invoking cloture and 44 senators against invoking cloture.[66] Under the Senate rules, a three-fifths majority of 60 senators is need to bring debate to a close.[67] By failing to invoke cloture on the motion to proceed, the Senate precluded itself from considering S. 1220 on the merits.[68]

The Johnston-Wallop bill was reintroduced as S. 2166, the National Energy Security Act of 1992, on January 29, 1992.[69] S. 2166 was identical to S. 1220 but for the deletion of four provisions: (1) title VII regarding oil and gas leasing in the Arctic National Wildlife Refuge; (2) title III regarding cor-

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62. *See, e.g.*, Judith Barra Austin, *New Energy Plan Affects Cars, Lights, Fuels - Even Urinals*, GANNETT NEWS SERVICE, Oct. 8, 1992 ("The struggle to write a strategy dates to January 1991 when the country was fighting in the Persian Gulf to keep oil supplies flowing. The war - and the threat to the energy supply - faded by the end of that year, making passage of the strategy less compelling to the public and more difficult for Congress.").

63. 137 CONG. REC. S1505 (daily ed. Feb. 5, 1991).

64. *Hearings on S. 341, To Reduce the Nation's Dependence on Imported Oil, to Provide for the Energy Security of the Nation and for Other Purposes Before the Committee on Energy and Natural Resources*, S. Hrg. No. 5, 102d Cong., 1st Sess., pts. 1-16 (1991).

65. S. REP. NO. 72, 102d Cong., 1st Sess. (1991).

66. 137 CONG. REC. S15,754-55 (daily ed. Nov. 1, 1991).

67. S. DOC. NO. 25, 101st Cong., 2d Sess. 15-16 (1990) (Standing Rules of the Senate, Rule XXII, Para. 2).

68. A filibuster had been mounted against the bill due to the inclusion of provisions to authorize oil and gas leasing on the coastal plain of the Arctic National Wildlife Refuge. In addition, provisions addressing the issue of corporate average fuel economy standards for motor vehicles were controversial.

69. 138 CONG. REC. S607 (daily ed. Jan. 29, 1992).

porate average fuel economy for motor vehicles; (3) subtitle D of title VI regarding used oil energy production; and (4) section 14201 regarding the applicability of new source review to existing electric utility steam generating units, the so-called WEPCo issue.[70]

S. 2166 was placed directly on the Senate calendar and, therefore, was not referred to the Committee on Energy and Natural Resources. Senate consideration of S. 2166 began on February 3, 1992, and the Senate passed the Johnston-Wallop bill on February 19, 1992, by a vote of 94 senators in favor and 4 senators against.[71] A total of 110 amendments were adopted during Senate consideration of S. 2166.[72] Ten other amendments either were tabled or defeated on roll call votes.[73]

C. The House Bill

The vehicle for House consideration of comprehensive energy legislation began as a package of five sequentially numbered bills, H.R. 776 through H.R. 780, introduced on February 4, 1991, by the chairman of the Subcommittee on Energy and Power of the Committee on Energy and Commerce, Congressman Philip Sharp of Indiana.[74] Between January 9 and June 25, 1991, the Subcommittee on Energy and Power held 22 public hearings on Congressman Sharp's package of energy bills, other related energy legislation, and energy issues in general.

On October 31, 1991, the Subcommittee on Energy and Power voted to report H.R. 776, the Comprehensive National Energy Policy Act, by a vote of 21 in favor and 1 against. As reported, H.R. 776 was an amendment in the nature of a substitute for the bill that had been introduced by Congressman Sharp in February. This amendment represented a compilation of committee

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70. The WEPCo issue concerns the application of Clean Air Act new source review (NSR) standards to physical or operational changes at electric powerplants. NSR can lead to the requirement of more stringent emissions controls than would be the case if no changes were made. Beginning with a 1988 proceeding involving Wisconsin Electric Power Company (WEPCo), the Environmental Protection Agency interpreted its NSR regulations so as to bring more sources under NSR. Changes at electric powerplants such as the installation of pollution controls, fuel switching from oil or coal to natural gas, and safety or operational efficiency improvements were found to trigger NSR. S REP. NO. 72, 102d Cong., 1st Sess. 349-51 (1991) (description of WEPCo issue).

71. 138 CONG. REC. S1696 (daily ed. Feb. 19, 1992).

72. Only a single amendment was adopted on a rollcall vote. The amendment was a second degree amendment offered by Senator Johnston as a substitute for an amendment offered by Senators Bob Graham and Connie Mack of Florida regarding development of the Outer Continental Shelf offshore Florida. 138 CONG. REC. S1642 (daily ed. Feb. 19, 1992). The other 109 amendments were adopted by voice vote.

73. These included two amendments that addressed natural gas regulatory issues. Senator Larry Craig of Idaho offered an amendment to require a case specific finding of public convenience and necessity before eminent domain could be exercised in connection with an interstate pipeline authorized under section 11101 of S. 2166, the optional certificate procedure. The Craig amendment was tabled on a vote of 60 Senators in favor of tabling and 35 Senators against. 138 CONG. REC. S1576-82 (daily ed. Feb. 18, 1992).

Senators Howard Metzenbaum of Ohio and James Jeffords of Vermont offered an amendment to amend sections 4 and 5 of the Natural Gas Act to increase pipeline refund obligations in rate cases and complaint proceedings. The Metzenbaum-Jeffords amendment was defeated by a vote of 41 Senators in favor and 57 Senators against. 138 CONG. REC. S1582-87, S1627-32 (daily eds. Feb. 18-19, 1992).

74. H.R. 779, the Natural Gas Enhancement Act of 1991, addressed natural gas regulatory issues.

prints that had been approved at a series of eight subcommittee markups held between May 8 and October 31, 1991.

On March 10 and 11, 1992, the Committee on Energy and Commerce met and ordered H.R. 776 reported with amendments by a vote of 42 in favor and 1 against. H.R. 776 was reported by the Committee on March 30, 1992.[75] That same day, H.R. 776 was referred to eight other House committees with jurisdiction over parts of the bill.[76] These committees were instructed to consider H.R. 776 for a period to end no later than May 1, 1992.

After each of the committees that chose to exercise jurisdiction over H.R. 776 completed its review of the energy bill, the House Rules Committee met for two days and reported a rule governing consideration of the bill by the full House. The rule granted by the committee specified the original bill for purposes of amendment, a time limit for general debate, the amendments that would be in order to be offered, and time limits for debate on each of those amendments.

The House began floor debate on the energy bill on May 20, 1992. On May 27, 1992, the House of Representatives passed H.R. 776 by a vote of 381 in favor to 37 against.[77]

D. Senate Amendments to the House Bill

The fact that both houses of Congress had passed their own versions of a comprehensive energy bill did not create the necessary conditions for a House-Senate conference committee to reconcile the differences between the two bills.[78] A conference committee could not be convened, because neither chamber had passed the other's bill. This precondition was satisfied on July 30, 1992, when the Senate passed an amended version of H.R. 776 by a vote of 93 to 3.[79] The Senate amended H.R. 776 by deleting the House-passed text and

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75. H.R. REP. NO. 474, 102d Cong., 2d Sess., pt. 1 (1992) [hereinafter H.R. 776 REPORT].

76. The committees and the titles over which they had jurisdiction in whole or in part were as follows: (1) Foreign Affairs — title XII (renewable energy) and title XIII (coal); (2) Government Operations — title III (alternative fuels); (3) Judiciary — title VI (electric vehicles) and title VII (electricity); (4) Interior and Insular Affairs — title VIII (high-level radioactive waste), title IX (uranium enrichment corporation), title X (remedial action at active processing sites), title XI (uranium enrichment health, safety and environment issues), and title XIX (miscellaneous); (5) Merchant Marine and Fisheries — title II (natural gas pipelines), title XVI (greenhouse warming - energy implications), and title XVII (additional Federal Power Act amendments); (6) Public Works and Transportation — title I (energy efficiency), title IV (alternative fuels - non-federal programs), and title XVIII (oil pipeline regulatory reform); (7) Science, Space and Technology —title VI (electric motor vehicles), title XI (uranium enrichment corporation), title XII (renewable energy), and title XIII (coal); and (8) Ways and Means — title X (remedial action at active processing sites), title XI (uranium enrichment health, safety and environment), and title XIV (strategic petroleum reserve). Also, some of these committees reported additional titles.

77. 138 CONG. REC. H3811-12 (daily ed. May 27, 1992).

78. From a procedural standpoint, a significant difference between H.R. 776 and S. 2166 was that H.R. 776 included tax provisions. This necessitated the referral of H.R. 776 to the Senate Committee on Finance. On June 18, 1992, the Finance Committee ordered H.R. 776 reported after the bill had been amended by the committee to include tax provisions. These included the so-called Rockefeller Amendment. This provision addressed the issue of health care benefits for retired coal miners. The Rockefeller Amendment proved to be highly controversial and delayed Senate action until a compromise was achieved.

79. 138 CONG. REC. S10,857 (daily ed. July 30, 1992).

substituting the text of the Senate-passed bill, S. 2166, along with a series of energy tax amendments that had been reported by the Committee on Finance[80] and miscellaneous other amendments.

E. The Conference Report

A total of 111 House conferees representing 12 committees and 34 Senate conferees representing 7 committees were appointed to the conference committee on H.R. 776. The conferees began meeting on September 10, 1992, and, after three weeks of negotiation, reached final agreement on a conference report in the early morning hours of October 1, 1992.

The House adopted the conference report by a vote of 363 to 60 on October 5, 1992.[81] The Senate approved the conference report by a voice vote on October 8, 1992, after invoking cloture by a vote of 84 to 8.[82]

On October 24, 1992, in the shadow of a drilling rig in Lafayette, Louisiana, President Bush signed H.R. 776 into law. In his signing statement, the President hailed the Energy Policy Act as a development that would "place America upon a clear path toward a more prosperous, energy efficient, environmentally sensitive, and economically secure future."[83]

III. NATURAL GAS PROVISIONS

Several provisions of the Energy Policy Act deal directly with natural gas. These include provisions relating to natural gas production, natural gas regulation, and the development of markets for natural gas, as well as several miscellaneous gas-related provisions. In addition to describing the provisions enacted into law, this section will describe the provisions in the House bill and the Senate amendment.

A. Provisions Relating to Natural Gas Production

1. Background

Several provisions in the Energy Policy Act relate to natural gas production. Key among these is relief for independent producers from the Alternative Minimum Tax (AMT).

During the floor debate on AMT in the Senate, considerable attention was given to the state of the domestic oil and gas industry.[84] According to industry sources, over 400,000 jobs were lost in the oil and gas industry in the last ten years, more jobs than were lost in the automobile, textile, steel and

80. 138 CONG. REC. S8483-92 (daily ed. June 18, 1992) (technical explanation of the Senate Finance Committee amendments to title XIX of H.R. 776).

81. 138 CONG. REC. H11,449-50 (daily ed. Oct. 5, 1992).

82. 138 CONG. REC. S17,625 (daily ed. Oct. 8, 1992). The Senators from the State of Nevada had made known their intention to mount a filibuster over the issue of certain nuclear waste disposal provisions contained in title VIII of the Conference Report. This necessitated a vote to invoke cloture on the motion to proceed to consideration of the Conference Report.

83. President George Bush, Statement to Accompany the Signing of the Energy Policy Act of 1992 (Oct. 24, 1992).

84. 138 CONG. REC. S10,744 (daily ed. July 29, 1992) (vote to table Bradley Amendment to strike repeal of minimum tax preferences for intangible drilling costs and percentage depletion).

electronics industries. During June of 1992, just prior to Senate consideration of the bill, the rig count fell to 596, the lowest level ever recorded. According to industry estimates, natural gas reserve replacement fell below 70% during 1991, whereas the United States usually replaces between 90% and 95% of the gas it consumes each year.[85] Statistics such as these provided impetus for the inclusion of provisions in the Energy Policy Act intended to stimulate oil and gas production.[86]

2. Section 1915 — Repeal of Minimum Tax Preferences for Depletion and Intangible Drilling Cost of Independent Oil and Gas Producers and Royalty Owners

Section 1915 of the Energy Policy Act[87] amends the Internal Revenue Code (IRC) to provide relief from the AMT preferences and adjustments for certain taxpayers with oil and gas operations. AMT was enacted as part of the Tax Reform Act of 1986 to make it more difficult for corporations to "zero out," *i.e.*, avoid paying any federal income tax by claiming deductions and exemptions that totally offset income. AMT is calculated by applying a reduced tax rate to a tax base larger than that used to calculate the regular tax.[88] The taxpayer then pays the higher of the regular tax and the AMT.

Under regular tax, intangible drilling costs (IDCs) and percentage depletion[89] may be taken as deductions. In contrast, under AMT, IDCs and percentage depletion are among the preference items that an oil and gas producer must add to regular taxable income to calculate the AMT tax base.[90] Should the taxpayer later pay regular tax, these costs would be recoverable as a credit over 11 years.[91]

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85. Letter from Denise Bode, President, Independent Petroleum Association of America, to Member of the Senate (June 25, 1992) (discussing H.R. 776) [hereinafter IPAA LETTER].

86. These statistics were also raised during the debate on an amendment offered by Senators Bob Graham and Connie Mack of Florida relating to oil and gas leasing and development off the coast of Florida. 138 CONG. REC. S1640-54 (daily ed. Feb. 19, 1992). In rejecting the Graham-Mack amendment and adopting a perfecting amendment offered by Senator Johnston, the Senate specifically declined to agree to a long-term moratorium on Outer Continental Shelf leasing and preleasing activities off the Florida panhandle area, where significant discoveries of natural gas had been made. *Id.* at S1654.

87. Energy Policy Act § 1915, 106 Stat. at 3023-24.

88. In calculating the tax base for AMT purposes, regular taxable income is (i) increased by certain preference items that are not subject to regular tax and (ii) adjusted to provide other items less favorable treatment. *Alternative Minimum Tax: Hearings Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102d Cong., 2d Sess. 72 (1992) (prepared statement of Robert S. McIntyre, Director, Citizens for Tax Justice).

89. IDCs are expenditures having no salvage value that are incurred in preparing sites and drilling wells. IDCs can account for as much as 80% of the cost of drilling an exploratory well. Percentage depletion is a deduction equal to 15% of the gross income from a petroleum property. Percentage depletion is subject to a number of limitations and may be used only by independent producers. *See* INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, THE IMPACT OF THE ALTERNATIVE MINIMUM TAX ON INDEPENDENT OIL AND GAS PRODUCERS 7-8 (1992).

90. *See* H.R. REP. NO. 1018, 102d Cong., 2d Sess. 406-07 (1992) (Conference Report description of preexisting law).

91. *Alternative Minimum Tax: Hearings Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102d Cong., 2d Sess. 46 (1992) (prepared statement of Craig G. Goodman, Vice President, Mitchell Energy Corp.).

AMT relief was the principal legislative objective of independent oil and gas producers in the 102d Congress.[92] The producers contended that, compared to other industries, AMT unfairly penalized the oil and gas industry, because: (1) only the principal business expenditures of oil and gas exploration and development (IDCs) are singled out for preference treatment; and (2) only the capital recovery system for the mineral extraction industry (percentage depletion) is singled out for preference treatment.[93]

Producers also argued that AMT had contributed to the decline of the domestic oil and gas industry, because of its adverse effect on the industry's ability to generate capital.[94] Generally the oil and gas industry must rely on internally generated capital to finance exploratory wells. Under regular tax, the deductibility of IDCs and percentage depletion enables producers to reinvest internally generated capital in new drilling. By treating a substantial portion of IDCs and percentage depletion as taxable income, AMT deprived the oil and gas industry of the capital needed to drill new wells.[95] The producers also argued that AMT violated the principle of tax neutrality, because investments that would be profitable under regular tax are made unprofitable under AMT.[96] An estimated 75% of the domestic oil and gas industry is subject to AMT.[97]

For taxpayers other than integrated oil companies, section 1915 of the Energy Policy Act amends the IRC to repeal: (1) the excess intangible drilling cost preference for IDCs related to oil and gas operations; and (2) the excess percentage depletion preference for oil and gas.[98] Section 1915 also repeals certain deductions that an AMT taxpayer could have taken under the preexisting law to reduce alternative minimum taxable income.[99]

Both the House bill and Senate amendment included AMT relief, with the only difference being the duration of the relief provided. Generally, the AMT relief provided by the House would have been for five years beginning in 1993. The Senate amendment would have made the repeal permanent. The conferees agreed to the Senate amendment.[100]

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92. *E.g.*, IPAA LETTER, *supra* note 86.

93. *E.g.*, *Alternative Minimum Tax: Hearings Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102nd Cong., 2d Sess. 4 (1992) (statement of Sen. Boren).

94. *Id.* at 3-4 (statement of Sen. Boren).

95. *Id.* at 9 (statement of Jack Graves, President, Callmet Oil Co.).

96. *Id.* at 46-47 (prepared statement of Craig G. Goodman, Vice President, Mitchell Energy Corp.).

97. *AMT Relief Seen Helping Drilling in '93*, PLATT'S OILGRAM NEWS, Oct 26, 1992, at 1.

98. Section 1915, however, places limits on the amount by which repeal of the IDC preference may reduce a taxpayer's income for AMT purposes. The Joint Explanatory Statement of the Committee of the Conference explained that "[t]he repeal of the excess IDC preference, however, may not result in more than a 40 percent reduction (30 percent for taxable years beginning in 1993) in the amount of the taxpayer's alternative minimum taxable income computed as if the present-law excess IDC preference had not been repealed." H.R. REP. NO. 1018, 102d Cong., 2d Sess. 407 (1992).

99. In particular, AMT is amended to repeal the adjusted current earnings adjustments for: (1) IDCs for oil and gas wells paid or incurred in taxable years beginning in 1993; and (2) percentage depletion for oil and gas. The new law also repeals the minimum tax energy deduction. H.R. REP. NO. 1018, 102d Cong., 2d Sess. 407-08 (1992).

100. Section 1918 of the Energy Policy Act amends § 29 of the IRC to extend the nonconventional fuels credit for facilities that produce gas from biomass and that produce synthetic fuels from coal. The

3. Section 2013 — Natural Gas Supply

Section 2013 of the Energy Policy Act[101] directs the Secretary of Energy to conduct a five-year program to increase the recoverable natural gas resource base. This section is an amalgamation of section 2013 of the House bill and section 13104 of the Senate amendment.

In particular, section 2013 directs the Secretary to increase gas recovery from: (1) discovered conventional sources; (2) tight sands, Devonian shales and other unconventional sources; (3) the surface gasification of coal; and (4) biofuels, including municipal solid waste. The section also directs the Secretary to establish a five-year program "on cofiring natural gas with coal in utility and large industrial boilers in order to determine optimal natural gas injection levels for both environmental and operational benefits."[102]

Section 2013 authorizes the appropriation $29,745,000 for fiscal year (FY) 1993 and $45,000,000 for FY 1994 to carry out its programs and the programs authorized in sections 2014 (natural gas end-use technologies) and 2015 (Mid-Continent Energy Research Center). The House bill had authorized $40,000,000 for FY 1993 and $240,000,000 for FYs 1994 through 1997 to carry out section 2013. The Senate amendment had authorized such sums as may be necessary for FYs 1992 through 1994.

B. Provisions Relating to Regulation of the Natural Gas Industry

1. Background

During consideration of the Energy Policy Act, several natural gas regulatory issues were debated and considered. The legislation included title II concerning the FERC's regulation of interstate natural gas pipelines, provisions in title I concerning integrated resource planning for natural gas utilities, and provisions in title IV concerning the use of natural gas as a vehicular fuel. While some of these provisions were enacted into law, many others were dropped from the final bill.

As enacted, title II of the Energy Policy Act of 1992 concerning natural gas regulation contains only two sections: (1) a section concerning fewer restrictions on natural gas imports and exports; and (2) a sense of the Congress concerning competitive natural gas wellhead markets. In conference, title II underwent a dramatic contraction when the conferees dealt with an impasse over several highly contentious issues by deleting virtually the entire title. Natural gas regulatory provisions also were enacted as parts of title I concerning energy efficiency and title IV concerning alternative fuel vehicles.

In most respects, the natural gas regulatory provisions of the House bill and the Senate amendment were similar. The underlying purpose of the provisions in both bills was to eliminate regulatory barriers that inhibit natural gas

conferees, however, did not extend the § 29 credit for natural gas produced from geopressurized brine, Devonian shale, coal seams, or tight formations. Consequently, the production credit for nonconventional gas expired at the end of 1992.

101. Energy Policy Act § 2013, 106 Stat. at 3059-10.

102. *Id.* § 2013(c)(1).

from getting to markets where it is needed. The Senate and House natural gas provisions shared the following elements.

First, both bills included "fast track" procedures for the FERC to authorize the construction of new pipelines in cases where project sponsors would be willing to assume the financial risk.[103] These procedures included the optional certificate procedure and amendments to section 311 of the NGPA.[104]

Second, both bills included provisions intended to reduce procedural delays in administrative proceedings at the FERC. The bills provided for expedited environmental reviews in connection with pipeline certificate applications. The bills would have amended section 19 of the NGA[105] and section 506 of the NGPA[106] to eliminate delays caused by the FERC's issuance of tolling orders on rehearing. Both bills also would have streamlined the traditional Natural Gas Act certificate process.[107]

Third, both bills would have taken steps to enhance natural gas producers' access to markets. Joint rates for multiple pipeline movements of gas would have been authorized. The FERC would have been empowered to order an interstate pipeline to interconnect with upstream facilities when such facilities were located in the production area.[108] The Senate amendment included limited antitrust relief for small producer cooperatives.[109]

Finally, both bills included provisions intended to resolve jurisdictional ambiguities that were feared might discourage local distribution companies (LDCs) and others from selling natural gas as a fuel for motor vehicles.[110]

The major differences between the Senate and House natural gas provisions were: (1) natural gas imports; (2) local distribution company bypass; and (3) prorationing. First, the House bill amended section 3 of the NGA[111] to eliminate regulatory impediments to natural gas imports.[112] As passed by the Senate, the energy bill did not include a provision addressing gas imports. Second, the House bill and the Senate amendment provided different forms of relief for an LDC whose existing sales or transportation service may be displaced by construction authorized under the optional certificate procedure or NGPA section 311.[113] Third, the House bill included an amendment, adopted

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103. *Compare* S. 1220 REPORT, *supra* note 59, at 323-27 *with* H.R. 776 REPORT, *supra* note 75, at 178-79.

104. 15 U.S.C. § 3371 (1988).

105. 15 U.S.C. § 717r.

106. 15 U.S.C. § 3416.

107. *Compare* S. 1220 REPORT, *supra* note 59, at 328-29, 331-32, 334-36 *with* H.R. 776 REPORT, *supra* note 75, at 180-81.

108. *Compare* S. 1220 REPORT, *supra* note 59, at 329, 336 *with* H.R. 776 REPORT, *supra* note 75, at 180-81.

109. Section 11107(b) of the Senate amendment provided that "[i]n any civil action under the antitrust laws, the formation or operation of an independent producer cooperative shall be legal if the procompetitive effects outweigh the anticompetitive effects." H.R. 776, 102d Cong., 2d Sess. § 11107(b) (1992) (Senate amendment).

110. *Compare* S. 1220 REPORT, *supra* note 59, at 333-34 *with* H.R. 776 REPORT, *supra* note 75, at 184.

111. 15 U.S.C. § 717b.

112. *See* H.R. 776 REPORT, *supra* note 75, at 177-78.

113. Under the Senate amendment, such an LDC would be entitled to protest the authorization to

during floor consideration, that would have distinguished between authorized and prohibited types of state regulation of natural gas production. The Senate bill did not include a provision addressing this issue.

2. Title II of the Conference Report

Despite the great similarity of the natural gas regulatory provisions of the House bill and the Senate amendment, the conferees were unable to reconcile differences in the legislation due to an impasse on three issues: (1) FERC Order No. 636; (2) natural gas imports; and (3) natural gas prorationing. At their final meeting, the conferees agreed to delete all of title II except for: (1) an amended section 201 of the House bill concerning natural gas imports and exports; and (2) a sense of the Congress provision concerning competitive natural gas wellhead markets.

a. FERC Order No. 636

FERC Order No. 636,[114] the pipeline service restructuring rule, was not directly addressed by either the House bill or the Senate amendments. Still, there did exist some relationship between the issues addressed in the legislation and FERC's rulemaking. Order No. 636 and the Mega NOPR[115] that preceded the final rule were the subject of Congressional oversight. In the Senate, the Committee on Energy and Natural Resources held an oversight hearing on the Mega NOPR and the Order No. 555 construction rule on January 29, 1992.[116] In the House, the Subcommittee on Energy and Power considered Order No. 636 as part of a July 8, 1992 oversight hearing concerning the effect that new federal and state natural gas rules might have on residential consumers.

In conference, Congressman Sharp contended that the provisions to liberalize the standards for authorizing new pipeline construction approved by the Senate and reported by the House Committee on Energy and Commerce prior to the issuance of Order No. 636 ought to be reconsidered in light of the fact that restructuring rules had reordered the landscape for regulation of the natu-

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construct such new pipeline facilities, and, if the FERC found that such displacement of existing service would in fact occur, the construction would be reviewed by the FERC as a traditional certificate application under § 7 of the NGA. The House bill provided for 60-days notice to an LDC before a bypass contract could take effect. The House bill also provided that, if the bypassed LDC was liable to the bypassing pipeline for take-or-pay costs, the pipeline could not continue to collect from the LDC costs allocable to the customer served directly by the pipeline. *Compare* S. 1220 REPORT, *supra* note 59, at 323-27 *with* H.R. 776 REPORT, *supra* note 75, at 179-80.

114. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267 (1992), *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *appeal filed*, Northern Indian Public Service Co. v. FERC (No. 92-1342) [appeals also are pending in the United States Court of Appeal for the 11th Circuit], *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992).

115. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commissions's Regulations*, 56 Fed. Reg. 38372 (1991).

116. *Federal Energy Regulatory Commission's Mega-NOPR and Order No. 555 Construction Rule*, S. Hrg. 520, 102d Cong., 2d Sess. (1992).

ral gas industry. Congressman Sharp also contended that Order No. 636 was a proper issue for consideration by the conference committee, because section 201(b) of the House bill would have undermined the Order No. 636 transition cost recovery mechanism.

Section 201(b) of the House bill would have amended section 4 of the NGA to add a new subsection (h):

> In exercising its authority under this section and sections 5 and 7 of this Act with respect to transportation rates and charges of an interstate pipeline (as such term is defined in section 2(15) of the Natural Gas Policy Act of 1978), the Commission shall base any determination of whether rates and charges are just and reasonable on costs and other relevant factors relating directly to an interstate pipeline's transportation function, and not on any factors relating to the natural gas being transported by the interstate pipeline or on rates and charges with respect to pipelines not subject to the Commission's jurisdiction.[117]

The report accompanying H.R. 776, issued by the Committee on Energy and Commerce, explained that new section 4(h) of the NGA barred the FERC "from basing pipeline rates (A) on the type of gas being carried in the pipeline, i.e., Canadian gas, or (B) on the rates or charges imposed on that gas while being shipped earlier in 'upstream' Canadian pipelines."[118] In conference, Congressman Sharp contended that the directive to the FERC to set just and reasonable rates and charges based on "costs and other relevant factors relating directly to an interstate pipeline's transportation function" would bar the FERC from authorizing pipelines to use a surcharge on the demand charge to recover Order No. 636 transition costs.

The Senate conferees refused to accept anything that would upset FERC's authority to implement Order No. 636 and, as a result, the conference report is silent with respect to Order No. 636. Section 201(b) of the House bill, the language that Congressman Sharp contended would have undermined the Order No. 636 transition cost recovery mechanism, was stricken when the conferees amended section 201. Because of the linkage that Congressman Sharp established between Order No. 636 and the provisions in title II to liberalize the standards for authorizing new pipeline construction, the deadlock over Order No. 636 contributed to the decision to delete the bulk of title II.[119]

b. Section 201 — Fewer Restrictions on Certain Natural Gas Imports and Exports

i. Section 201 of the House Bill

As passed by the House, section 201 of H.R. 776 would have amended the NGA to eliminate regulatory impediments to natural gas imports.[120] Section 201 was added during the Energy and Power Subcommittee's consideration of H.R. 776 and, in part, was a reaction to provisions added during the

117. H.R. 776, 102d Cong., 2d Sess., § 201(b) (1992).

118. H.R. 776 REPORT, *supra* note 75, at 178.

119. 138 CONG. REC. S17,643 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston); 138 CONG. REC. H11,418 (daily ed. Oct. 5, 1992) (statement of Rep. Synar).

120. H.R. 776, 102d Cong., 2nd Sess., § 201.

consideration by the Senate Committee on Energy and Natural Resource of S. 341.

Section 201 would have amended the NGA to add a new section 3(b) governing imports of natural gas from countries with which the United States has in effect a free trade agreement (FTA) requiring national treatment for trade in natural gas and imports of liquefied natural gas (LNG). Paragraph (1) of the new section 3(b) would have given such imports "first sale" treatment under the Natural Gas Policy Act of 1978. This meant, as with wellhead sales of domestic decontrolled gas, no certificate of public convenience and necessity would be needed for sales of such imported gas. Paragraph (2) would have barred federal and state regulators from treating such imports differently from domestic gas. Paragraph (3) stated that for purposes of the preexisting section 3 of the NGA, now redesignated as subsection (a), "the importation of such natural gas shall be deemed to be consistent with the public interest, and applications for such importation shall be granted without modification or delay."[121] The net effect of paragraph (3) would have been to make the approval process for the importation of gas from FTA countries and for the importation of LNG purely automatic.[122] Finally, section 201 would have amended section 4 of the NGA[123] to bar the FERC from basing interstate pipeline rates on the type of gas carried in the pipeline or on the rates or charges imposed on that gas while it was shipped on an upstream pipeline.

ii. The Wirth-Domenici Amendment to S. 1220.

As passed, the Senate bill was silent on the issue of natural gas imports. As reported by the Committee on Energy and Natural Resources, however, the Senate bill included a natural gas import amendment offered by Senators Timothy Wirth of Colorado and Pete Domenici of New Mexico. The Wirth-Domenici amendment was stricken during Senate consideration of S. 2166.[124]

The Wirth-Domenici amendment was intended to address the so-called rate tilt created by the fact that United States and Canadian regulators used different rate designs for setting the rates for pipelines within their respective jurisdictions. Senators Wirth and Domenici contended that the disparity in rate designs gave Canadian natural gas an artificial competitive advantage over domestic gas when the two sources of supply competed for United States markets.[125]

The Wirth-Domenici amendment directed the Secretary of Energy to delegate to FERC authority to administer the provisions of NGA section 3. The amendment also would have amended NGA section 3 to require the Commission to condition any import authorization to redress any anti-com-

121. *Id.* § 201(c) (amending 15 U.S.C. 717b).
122. H.R. 776 REPORT, *supra* note 75, at 177.
123. 15 U.S.C. § 717c.
124. 138 CONG. REC. S1160-66 (daily ed. Feb. 6, 1992).
125. S. 1220 REPORT, *supra* note 59, at 422-28 (additional views of Senators Domenici and Wirth).

petitive impacts on domestic natural gas producers. The anti-competitive impacts that the Commission would have been required to redress included, but would not have been limited to, competitive disparities resulting from different rate designs applied to the pipeline transportation of domestic and imported natural gas.[126] The authority conferred by this amendment to NGA section 3 would not have applied to LNG imports. Finally, the amendment would have required the Department of Justice, in consultation with the Department of Energy (DOE), the FERC, and the Office of United States Trade Representative, to report to the Committee on Energy and Natural Resources and to the House of Representatives regarding the DOE's and the FERC's authority under applicable law to address and remedy regulatory advantages that may be conferred on imported natural gas. This report would have been required to be filed within six months of enactment of the legislation.[127]

iii. Section 201 of the Conference Report

The conferees adopted an amended version of section 201 of the House bill. First, paragraph (2) of the new section 3(b) was amended to state that "the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis."[128] This differed from paragraph (2) as passed by the House in two ways: (1) the amended paragraph applied only to the Commission and not the states; and (2) the amended paragraph adopted from section 5 of the NGA the prohibition on "unjust, unreasonable, unduly discriminatory, or preferential" treatment while paragraph (2) originally prohibited treating FTA gas and LNG "differently" from domestic gas.

Second, paragraph (3) of the new section 3(b) was redesignated as subsection (c) and made to apply to "the exportation of natural gas to a nation with which there is a free trade agreement requiring national treatment for trade in natural gas."[129] This means, as will be the case for imports of natural gas from FTA countries, the approval process for the export of domestic gas to FTA countries will be purely automatic. As passed by the House, section 201 applied to imports only.[130]

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126. In LAIPRO v. FERC, 958 F.2d 1101 (D.C. Cir. 1992), the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FERC's decision in Order No. 357 not to adjust the rates of the Iroquois Gas Transmission System in response to allegations that the disparity between U.S. and Canadian rate design put domestic natural gas producers at a competitive disadvantage. In its decision, the court traces the history of the adjudication of the rate tilt issue.

127. S. 1220 REPORT, *supra* note 59, at 330-31.

128. Energy Policy Act § 201, 106 Stat. at 2866.

129. *Id.*

130. Finally, § 201(b) of the House bill, discussed above in the context of the Order No. 636 issue, was not included as part of the conference report.

c. Section 202 — Sense of Congress

The House bill included the Markey-Scheuer amendment pertaining to the so-called prorationing issue which would have amended section 602 of the NGPA[131] to make a distinction between authorized and prohibited types of state regulation of natural gas production. The amendment was adopted on May 20, 1992, as a floor amendment to H.R. 776.[132]

The Markey-Scheuer amendment was adopted in response to the actions taken in early 1992 by Oklahoma and Texas to revise their systems for setting natural gas production allowables.[133] The actions taken by these states provoked an outcry from the consuming states and their representatives in the Congress. They claimed that Oklahoma and Texas, under the guise of preventing waste and protecting property rights, really were out to restrain the supply and raise the price of natural gas.[134]

The Markey-Scheuer amendment would have explicitly authorized state regulation "which has the substantial purpose or effect of furthering legitimate state interests in resource conservation, the prevention of physical waste, and the protection of correlative rights of producers in a common reservoir," and recognized that such authorized state regulation may have an "incidental effect" of "restricting production and increasing prices." The amendment would have prohibited the states from regulating gas production when such regulation "has the substantial purpose or effect of generally restricting natural gas production and raising the general price level of natural gas." It would have expressly prohibited: (i) market demand prorationing; (ii) statewide prorationing; (iii) prorationing between unconnected reservoirs; and (iv) prorationing which prevents the purchase of lower-priced natural gas in preference to higher-priced gas.[135]

The Senate bill did not include a prorationing provision. Following passage of the Markey-Scheuer amendment by the House, the Committee on Energy and Natural Resources on June 18, 1992, held an oversight hearing on state regulation of natural gas production.[136] At that hearing, the committee's

131. 15 U.S.C. § 3432.

132. 138 CONG. REC. H3653-60 (daily ed. May 20, 1992).

133. Also, during the same period, Louisiana was actively considering whether to revise its allowables system. Production allowables sometimes also are referred to as prorationing rules. For many years, dating back nearly to the turn of the century in some cases, the states have used production allowables and other forms of conservation regulation to protect against the effects of unrestrained production. The constitutional limits on state authority to regulate the production of oil and gas have been litigated before the federal and state courts on many occasions. In some cases, this litigation has made it to the Supreme Court. *E.g.*, Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989); Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi, 474 U.S. 409 (1986).

134. *E.g.*, 138 CONG. REC. H3654-5 (daily ed. May 20, 1992) (statements of Mr. Markey, Mr. Scheuer, Mr. Moorehead, and Mr. Lent).

135. H.R. 776, 102d Cong., 2d Sess. § 214 (as passed by the House of Representatives on May 27, 1992).

136. *Issues Concerning State Regulation of Natural Gas Production: Hearing Before the Senate Committee on Energy and Natural Resources*, S. Hrg. No. 814, 102d Cong., 2d Sess. (1992).

chairman, Senator J. Bennett Johnston, made it clear that he opposed the Markey-Scheuer amendment.[137] In the House, the Subcommittee on Energy and Power received testimony on prorationing as part of its July 8, 1992, oversight hearing concerning the effect of new state and federal natural gas rules on residential consumers.

The conference report included, in section 202, a sense of the Congress "that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market."[138] The joint explanatory statement of the committee of the conference explained that "[o]ne of the reasons that [the] conferees decided not to include section 214 is the recognition that, under existing law, a state cannot use its proration authority for the purpose of restricting gas supplies and raising the price of natural gas."[139]

3. Section 115 — Integrated Resource Planning for Natural Gas Utilities

Section 115 of the Energy Policy Act[140] amends title III of the Public Utility Regulatory Policies Act of 1978 (PURPA)[141] regarding retail policies for natural gas utilities. Section 115 amends section 303 of PURPA[142] to require state regulatory commissions to consider requiring two new federal standards for state-regulated gas utilities: (1) integrated resource planning (IRP); and (2) the ability to earn a profit on investments in energy efficiency. Under section 115, a state may choose not to implement the federal standards, but must nonetheless hold a hearing and state why it is not implementing the federal standard.

Section 115 defines "integrated resource planning" as:

> planning by the use of any standard, regulation, practice or policy to undertake a systematic comparison between demand-side management measures and the supply of gas by a gas utility to minimize life cycle costs of adequate and reliable utility services to gas consumers. Integrated resource planning shall take into account necessary features for system operation such as reliability, dispatchability, and other factors of risk and shall treat demand and supply to gas consumers on a consistent and integrated basis.[143]

In the joint explanatory statement, the conferees clarified their intent that IRP be considered only for local distribution companies that serve the ultimate consumers of natural gas. Also, it is intended that IRP examine and compare demand-side options with the general option of additional gas supplies. IRP is not intended to include an examination of the sources, conditions, or other characteristics of upstream gas supply.[144]

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137. *Id.* at 1-4.
138. Energy Policy Act § 202, 106 Stat. at 2866.
139. H.R. REP. No. 1018, 102nd Cong., 2d Sess., at 386 (1992).
140. Energy Policy Act § 115, 106 Stat. at 2803-05.
141. Pub. L. No. 95-617, 92 Stat. 3149-54 (1978).
142. 15 U.S.C. § 3203.
143. Energy Policy Act § 115(a), 106 Stat. at 2803.
144. H.R. REP. No. 1018, 102d Cong., 2nd Sess., at 383 (1992).

Section 111 of the Energy Policy Act[145] amends title I of PURPA, regarding retail regulatory policies for electric utilities, to impose similar requirements for when states regulate electric utilities. As passed by the House, H.R. 776 included IRP and energy efficiency provisions for both electric and gas utilities. The Senate amendment included these provisions only for electric utilities. Neither section 115 nor section 111 include a requirement that a utility's least cost plan include consideration of externalities. Such a requirement had been part of the House bill.

4. Regulatory Provisions in Title IV on Alternative Fuels

a. Section 404 — Vehicular Natural Gas Jurisdiction

Section 404 of the Energy Policy Act[146] is intended to promote the development of a retail distribution infrastructure for vehicular natural gas (VNG) by eliminating regulatory disincentives for participation by existing natural gas distributors and automotive fuel marketers.[147] The House bill and the Senate amendment included virtually identical sections addressing VNG jurisdiction.

Subsection (a)[148] amends section 1 of the NGA[149] to add a new subsection (d), the purpose of which is to assure that persons who are not otherwise natural-gas companies[150] or who are primarily subject to regulation by a state commission will not be subject to NGA jurisdiction by reason of their sale (including the sale for resale) or transportation of VNG.[151] Subsection (a) also amends section 2 of the NGA to define "Vehicular Natural Gas" as "natural gas that is ultimately used as fuel in a self-propelled vehicle."[152] It is intended that the term "self-propelled vehicle" be construed broadly to include both vehicles now technologically capable of fueling with natural gas, such as automobiles, trucks, boats, and trains, as well as other vehicles that may become technologically capable of fueling with natural gas in the future.[153]

145. Energy Policy Act § 111, 106 Stat. at 2795-96.

146. *Id.* § 404, 106 Stat. at 2879-80.

147. S. 1220 REPORT, *supra* note 59, at 333. The FERC also has taken steps to eliminate such regulatory disincentives. In Order No. 543, the FERC promulgated regulations providing for the automatic issuance of blanket sales certificates to all persons who engage in the sale for resale in interstate commerce of VNG. *Regulations Governing Vehicular Natural Gas*, Order No. 543, 57 Fed. Reg. 32,890 (1992).

148. Energy Policy Act § 404(a), 106 Stat. at 2879.

149. 15 U.S.C. § 717.

150. "Natural-gas company" is a defined term under the NGA (15 U.S.C. § 717a(6)). Having the status of a natural-gas company triggers the FERC's jurisdiction under the statute.

151. Persons that already are natural-gas companies, such as interstate pipelines, will remain subject to NGA jurisdiction with respect to both their VNG and non-VNG activities. VNG transactions by certain other companies that are already natural-gas companies but that are primarily subject to regulation by a state commission (as defined in NGA section 2(8)) are also exempt from NGA regulation. Examples of such persons include LDCs that hold service area determinations under NGA section 7(f) or limited jurisdiction certificates under section 7(c). Finally, in the case of an integrated company, VNG transactions will be deemed exempt from NGA jurisdiction if they are engaged in by that portion of the company that is subject to state commission regulation. S. REP. No. 72, 102d Cong., 1st Sess. 333-34 (1991).

152. 15 U.S.C.A. § 717a(10) (West Supp. 1993).

153. S. 1220 REPORT, *supra* note 59, at 333.

Subsection (b) provides that the transportation of natural gas in closed containers, or the sale of natural gas, by a person who is not otherwise a public utility to a person for use as fuel in motor vehicle shall not be deemed the transportation or sale of natural gas within the meaning of any state law, regulation or order in effect prior to January 1, 1989.[154] This provision would not apply to any state law, regulation or order relating to public safety. The purpose of subsection (b) is to preclude the unintended state regulation of VNG pursuant to statutes that could not have been meant to apply to such utilization of natural gas. Nothing in subsection (b), however, deprives a state of the prerogative to regulate VNG sales if a state concludes that such regulation is necessary or appropriate.

Subsection (c)[155] provides that a company shall not be considered to be a gas utility company under the Public Utility Holding Company Act of 1935 (PUHCA)[156] solely by virtue of entering the business of selling or distributing VNG. This subsection provides further that the status of companies already registered under PUHCA would not be affected if such companies entered the VNG business.

b. Section 408 — Federal Energy Regulatory Commission Authority to Approve Recovery of Certain Expenses in Advance

Section 408 of the Energy Policy Act[157] authorizes the FERC, under the NGA or the FPA, to allow natural gas companies or electric utilities to recover in advance as part of their rates for jurisdictional services expenses for alternative fuel vehicle research, development, and demonstration (RD&D) activities by the Gas Research Institute (GRI)[158] and the Electric Power Research Institute. Section 408 permits the inclusion of such expenses as part of FERC-approved rates "if the Commission finds that the benefits, including environmental benefits, to existing and future ratepayers resulting from such activities exceed all direct costs to existing and future ratepayers."[159] The FERC is required to ensure that, to the maximum extent practicable, the expenses for RD&D activities covered by this section are shared by sources other than ratepayers.[160] With respect to natural gas, section 408 encom-

154. Energy Policy Act § 404(b), 106 Stat. at 2879-80.

155. *Id.* § 404(c), 102 Stat. at 2880.

156. 15 U.S.C. § 79-79z-6 (1988).

157. Energy Policy Act § 408, 106 Stat. at 2881-82.

158. Section 408(a) addresses the April 19, 1991, decision of the United States Court of Appeals for the District of Columbia Circuit in Process Gas Consumers v. FERC, 930 F.2d 926 (D.C. Cir. 1991), which remanded GRI's RD&D programs in natural gas vehicles and emissions control back to the Commission for further consideration. GRI is a collaborative research organization of the natural gas industry which performs extensive RD&D activities. GRI's projects currently are financed almost exclusively via direct FERC-approved surcharges on the jurisdictional throughput of interstate natural gas pipelines.

159. Energy Policy Act § 408, 106 Stat. at 2881-82.

160. H.R. REP. No. 1018, 102d Cong., 2d Sess., at 387 (1992). The conference committee amended the cofunding requirement to refer to "such projects." Section 409(a) of the House bill would have made the

passes "projects on the use of natural gas to control pollutants and to control emissions from the combustion of other fuels" in addition to alternative fuel vehicle RD&D.

Section 408 was part of H.R. 776 as passed by the House, but was not part of the Senate amendment. As reported by the Committee on Energy and Natural Resources, S. 1220 included a provision authorizing the FERC to permit the recovery of GRI expenses for alternative fuel vehicle and emissions control RD&D. This provision was stricken during floor consideration of S. 2166, because the issue had been addressed as part of the Energy and Water Development Appropriations Act.[161]

C. Provisions Relating to Markets for Natural Gas

1. Background

The Energy Policy Act contains provisions which some believe will lead to new or expanded markets for natural gas.[162] Chief among these are the titles pertaining to reform of the Public Utility Holding Company Act of 1935 (PUHCA)[163] and electric transmission and alternative fuels and alternative fuel fleets. Other sections address research, development and demonstration initiatives to expand natural gas end-use technologies.

a. Natural Gas and Electric Power Regulation

Title VII of the Energy Policy Act[164] amends PUHCA and the FPA, two New Deal era laws constituting much of the statutory framework for federal regulation of the electric power industry.[165] Subtitle A of title VII is intended to remove the organizational obstacles to independent electric power generation that are created by PUHCA.[166] Subtitle A amends PUHCA to create a new type of corporate entity, the exempt wholesale generator (EWG), for purposes of holding company regulation. EWGs are defined as corporate entities engaged exclusively in the business of wholesale electric generation.[167] EWGs

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cofunding requirement applicable to "each project." *Compare* Energy Policy Act § 408(a), 106 Stat. at 2881-82 *with* H.R. 776, 102d Cong., 2d Sess. § 409(a) (passed by the House of Representatives on May 27, 1992).

161. 138 CONG. REC. S1018 (daily ed. Feb. 5, 1992).

162. *See, e.g.*, Letter from the American Gas Association, the Interstate Natural Gas Association of America, and the Independent Petroleum Association of America, to the Honorable Thomas S. Foley (May 14, 1992) (supporting H.R. 776 as enhancing the production and use of natural gas).

163. 15 U.S.C. §§ 79-79z-6.

164. Energy Policy Act §§ 711-31, 106 Stat. at 2905-21.

165. A detailed discussion of title VII of the Energy Policy Act concerning electricity is not within the scope of this article since that title does not pertain directly to natural gas.

166. The report to accompany S. 1220 described these obstacles as follows: "For practical and financial reasons, anyone that intends to develop an independent power project (utility or non-utility) must generally create a separate corporate entity to do so. In turn, the developing party becomes a holding company. PUHCA, however, places extensive restrictions on the use of holding companies in electric generation. Without changes to the Act, many opportunities for independent power production are therefore precluded." S. REP. NO. 72, 102d Cong., 1st Sess. 210 (1991).

167. Energy Policy Act § 711, 106 Stat. at 2905-10.

are exempt from corporate organizational restrictions under PUHCA.

Subtitle B of title VII amends section 211 of the FPA[168] to allow the FERC upon application to order the provision of wholesale transmission service by utilities.[169] Subtitle B also amends section 212 of the FPA to prescribe standards for the pricing of transmission services.[170]

Segments of the natural gas industry actively supported the PUHCA and FPA amendments contained in title VII, because they believed that these statutory reforms would facilitate greater utilization of natural gas as a fuel for electric generation.[171] The Department of Energy also promoted PUHCA reform as being beneficial for natural gas.[172]

The arguments regarding the connection between PUHCA reform and natural gas were twofold. First, it was maintained that eliminating the PUHCA obstacles to independent power production would enable companies in the natural gas industry to become equity participants in independent power projects. In this way, the gas industry effectively would be creating its own market.[173] Second, based on the fact that natural gas had been the fuel of choice for independent power generators,[174] it was maintained that by creating new opportunities for independent power generation PUHCA reform also would create new expanded markets for natural gas.[175]

b. Natural Gas and Alternative Fuel Vehicles

Many also view the provisions in the Energy Policy Act relating to alternative fuels and fleets as having the potential to open significant new markets for natural gas.[176] While the alternative fuel provisions of the Energy Policy Act are "fuel neutral," many believe that natural gas is well positioned to be

168. 16 U.S.C. § 824j.

169. Energy Policy Act § 721, 106 Stat. at 2915-16. Section 721 of the Energy Policy Act makes this authority subject to certain conditions, including consideration of the effect that such an order may have on the reliability of the electric system and the ability to obtain the property rights and other approvals necessary to provide the ordered transmission service.

170. *Id.* § 722, 106 Stat. at 2916-19. Other provisions of subtitle B amend the FPA to: (1) prohibit the FERC from ordering or conditioning the provisions of retail wheeling; (2) prohibit sham wholesale transactions; (3) require utilities to provide transmission service information; and (4) provide penalties for the violation of transmission orders or rules. *Id.* §§ 723-25, 106 Stat. at 2919-21.

171. *See, e.g., The Gas Industry's "Strong, Unified Support" for PUHCA Reform*, INSIDE F.E.R.C., May 8, 1989, at 9.

172. *See, e.g.*, DEPARTMENT OF ENERGY, RECORD OF PROCEEDINGS: CONFERENCE ON STATE REGULATION AND THE MARKET POTENTIAL FOR NATURAL GAS: CHALLENGES AND OPPORTUNITIES 5-6 (1992) (statement of W. Henson Moore).

173. 137 CONG. REC. S10,472 (daily ed. July 19, 1991) (statement of Sen. Johnston).

174. In 1991, gas-fired facilities accounted for 20.4 megawatts (MW) of the 49.6 MW of installed non-utility gnerating capacity in the United States. In that same year, gas-fired facilities accounted for almost one half of non-utility power generated in the United States. ARTHUR ANDERSEN & CO, SC AND CAMBRIDGE ENERGY RESEARCH ASSOCIATES, ELECTRIC POWER TRENDS 1992 36-37 (1992).

175. *See, e.g., Senate and House Conferees Adopt Comprehensive Energy Legislation Without Natural Gas Provisions, But Indirect Benefits Please Gas Industry*, FOSTER NATURAL GAS REPORT, Oct. 1, 1992, at 3.

176. 137 CONG. REC. S10,471-72 (daily ed. July 19, 1991) (statement of Sen. Johnston).

the fuel of choice, given its abundance, environmental attributes, and the fact that it does not require costly refining or processing.[177]

The transportation sector offers the primary opportunity to displace imported oil with other fuels, one of which is natural gas. Transportation accounts for 63% of the oil consumed in the United States. Automobiles and light trucks alone are responsible for 40% of the oil consumed. The transportation sector is currently about 95% dependent on oil products.[178]

Substitution of alternative fuels such as compressed natural gas, methanol, ethanol, and electricity faces difficult obstacles. Currently less than 1% of automobile and truck fuel is currently provided by such alternative fuels. However, massive investments will be needed to develop the infrastructure necessary to produce and distribute these fuels.[179]

The alternative fuels issue presents a classic "chicken or egg" paradox. On the one hand, fuel providers will not produce fuel and create the infrastructure unless there are alternative fueled vehicles and a market. On the other hand, alternative fuel vehicle manufacturers will not manufacture the vehicles unless the fuels are certain to be available. In drafting the alternative fuels and fleets provisions of the Energy Policy Act, Congress recognized that an effective policy in this area must address both sides of the supply and demand relationship.[180]

2. Title III — Alternative Fuels

a. Background

Title III deals with programs relating to the use of alternative fueled vehicles by the federal government. Title III also defines the statutory terms used in all three titles of the Energy Policy Act pertaining to alternative fuels and alternative fueled fleets.

For purposes of titles III, IV, and V, the term "alternative fueled vehicle" is defined to mean a dedicated vehicle or a dual fueled vehicle.[181] The term "alternative fuel" is defined to include: (1) methanol, denatured ethanol, and other alcohols; (2) certain mixtures of alcohol with gasoline or other fuels; (3) natural gas; (4) liquefied petroleum gas; (5) hydrogen; (6) coal-derived liquid fuels; (7) fuels (other than alcohol) derived from biological materials; (8) electricity; and (9) any other fuel that the Secretary of Energy determines by rule is substantially not petroleum and would yield substantial energy security and environmental benefits.[182]

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177. *Id.*

178. D.E. Gushee, Issue Brief IB93009, *Alternative Transportation Fuels: Are They Reducing Oil Imports?* CONGRESSIONAL RESEARCH SERVICE, (Jan. 15, 1993).

179. S. REP. NO. 72, 102d Cong., 2d Sess. 204-05 (1991).

180. *Id.*

181. Energy Policy Act § 301(3), 106 Stat. at 2776, 2867.

182. *Id.* § 301(2), 106 Stat. at 2866.

b. Federal Fleets Program

i. Background

Both the Senate amendment and the House bill contained provisions mandating the purchase by the federal government of a certain percentage of alternative fueled fleet replacement vehicles.[183] These provisions were driven at least in part by the sentiment that the federal government has a role to play as a leader in the use of alternative fuels.[184] Many argued that by taking a leadership stance, the federal government could help to trigger consumer acceptance of alternative fueled vehicles.[185]

Both the House bill and the Senate amendment would have required the purchase by the federal government of a specified number of alternative fueled vehicles from 1993 to 1995.[186] The House-passed bill would have required that in the year 1996, at least 25% of the replacement vehicles obtained by the federal government be alternative fueled with the number increasing to 33% in 1997 and 50% in 1998 and thereafter.

In addition, the House bill provided that if the Secretary determined that certain goals regarding replacement fuel use were not likely to be achieved, the schedule for the acquisition of alternative fueled replacement vehicles would be modified to 60% in FY 2000, 70% in FY 2001, and 75% in FY 2002 and thereafter.[187] The House bill also would have made the requirements applicable to federal fleets of 10 or more. The Senate bill would have required that starting in 1996, a designated percentage of replacement vehicles be alternative fueled, ranging from 25% in 1996 to 90% in 2000 and thereafter.[188]

ii. The Conference Report

The Energy Policy Act provides for a federal fleets program imposing certain purchase requirements on the federal government. Section 303[189] of the conference report requires the federal government to acquire at least 5000 light duty alternative fueled vehicles in FY 1993, 7500 such vehicles in FY 1994, and 10,000 such vehicles in FY 1995. In FYs 1996 through 1999 and thereafter, a certain percentage of vehicles acquired by a federal fleet must be alternative fueled. These percentages range from 25% in 1996 to 75% in 1999 and thereafter. Section 303 defines the term "Federal fleet" to mean 20 or

183. *See* § 4102 of the Senate amendment and § 302 of H.R. 776.

184. *See, e.g., Alternative Fuel Fleets: Hearing Before the Senate Committee on Energy and Natural Resources on Title VII of S. 570*, 102d Cong., 1st Sess. 77 (1991) (statement of T. Boone Pickens, Jr.).

185. *Id.*

186. Both bills would have required the purchase of 5000 alternative fueled vehicles in 1993, 7500 in 1994, and 10,000 in 1995.

187. H.R. 776, 102d Cong., 2d Sess. § 304.

188. The Senate Amendment would have imposed the following schedule for replacement vehicle purchases by the federal government: 25 % in 1996; 33 % in 1997; 50 % in 1998; 75 % in 1999; and 90 % in 2000 and thereafter.

189. Energy Policy Act § 303, 106 Stat. at 2871-72.

more light duty vehicles located in a metropolitan area with a population of 250,000 or more persons, that are centrally fueled or capable of being centrally fueled and are owned, operated, leased, or otherwise controlled by the federal government.[190]

c. Amendments to the Energy Policy and Conservation Act

The Energy Policy Act amends section 400AA of the Energy Policy and Conservation Act (EPCA)[191] to expand the types of alternative fueled vehicles that could be acquired to fulfill EPCA's requirements.[192] The amendments make the EPCA provisions applicable to heavy duty as well as light duty vehicles acquired by the federal government. Prior to amendment, the law required the Secretary to ensure that the maximum number of passenger automobiles and light duty trucks acquired annually by the federal government be alcohol powered, dual powered, natural gas powered, or natural gas dual energy vehicles.

The amendments also expand the types of alternative fueled vehicles that may fulfill the requirements of EPCA. Furthermore, it is clarified that the EPCA purchase requirements are in addition to those set forth in section 303 of the Energy Policy Act.[193] The EPCA amendments also require that the subject vehicles be operated on alternative fuels unless the Secretary determines that operation on the alternative fuels is not feasible.

The amendments also require that vehicles acquired under EPCA come from original equipment manufacturers. If such vehicles are not available from original equipment manufacturers, vehicles converted to use alternative fuels may be purchased so long as the original warranty continues to apply. The amendments require that at least 50% of the alternative fuels used in vehicles acquired pursuant to EPCA shall be derived from domestic feedstocks, and that vehicles acquired under the provision must be manufactured in the United States or Canada, except to the extent inconsistent with the General Agreement on Tariffs and Trade.

d. Additional Provisions

i. Refueling

Section 304 of the Energy Policy Act[194] provides that federal agencies shall, to the maximum extent practicable, arrange for the fueling of alternative

190. *Id.* § 303(a)(3), 106 Stat. at 2871-72. Excepted from the definition are: (1) motor vehicles held for lease or rental to the public; (2) motor vehicles used for manufacturer product evaluations or tests; (3) law enforcement vehicles; (4) emergency vehicles; (5) motor vehicles acquired and used for military purposes that the Secretary of Defense has certified to the Secretary must be exempt for national security reasons; and (6) non-road vehicles.

191. 42 U.S.C. § 6374 (1988).

192. Energy Policy Act § 302, 106 Stat. at 2868-71.

193. *Id.* § 303, 106 Stat. at 2871-72.

194. *Id.* § 304, 106 Stat. at 2872.

fueled vehicles acquired pursuant to the Energy Policy Act at commercial fueling facilities that offer alternative fuels for sale to the public. If such facilities are not available, federal agencies are authorized to enter into other commercial arrangements for purposes of fueling the federal alternative fueled fleet vehicles. These arrangements can include, as appropriate, purchase, lease, contract, construction, or other arrangements in which the federal government is a participant.

ii. Promotion, Incentives, Information, and Reports

The Energy Policy Act contains provisions requiring the Secretary of Energy to: (1) promote programs and educate federal officials and employees on the merits of alternative fueled vehicles: (2) provide information to federal agencies relating to alternative fuels; and (3) provide guidance and technical assistance to federal agencies in procurement and geographic location of alternative fueled vehicles.[195] The law authorizes the Director of the General Services Administration (GSA) to offer a reduction in fees charged to agencies for the lease of alternative fueled vehicles below those charged for the lease of comparable conventionally fueled motor vehicles.[196]

3. Title IV — Alternative Fuels — Non-Federal Programs

a. Alternative Fuel Bus Program

Section 410 of the Energy Policy Act[197] authorizes the Secretary of Transportation, in consultation with the Secretary of Energy, to enter into cooperative agreements and joint ventures proposed by any municipal, county, or regional transit authority in an urban area with a population of over 100,000 persons to demonstrate the feasibility of the commercial application of alternative fuels for mass transportation. The section also authorizes the Secretary of Transportation to provide financial assistance in such urban areas to meet the incremental costs of dedicated alternative fueled school buses. These costs may include the purchase and installation of alternative fuel refueling facilities for school buses and the conversion of school buses to dedicated vehicles. A total of $30 million for each of FYs 1993 through 1995 is authorized for the program.

195. *Id.* § 305, 106 Stat. at 2872-73.

196. *Id.* § 306, 106 Stat. at 2873. In addition, the Energy Policy Act provides for an awards program to recognize federal employees who demonstrate the strongest commitment to the use of alternative fueled vehicles and fuel conservation in federal vehicles. It also requires the Administrator of GSA to measure the percentage of alternative fuel use in dual-fueled vehicles procured by GSA. The law also addresses information collection and requires certain reports by the GSA and the United States Postal Service relating to alternative fueled vehicles. *Id.* §§ 307-10, 106 Stat. at 2873-75.

197. *Id.* § 410, 106 Stat. at 2884-85.

b. State and Local Incentive Programs

Section 409[198] directs the Secretary of Energy to establish guidelines for comprehensive state alternative fuels and alternative fueled vehicle incentives and program plans designed to accelerate the introduction and use of such fuels and vehicles. The Secretary is directed to invite state governors to submit such plans within one year after the issuance of the guidelines.[199]

The Secretary of Energy may provide financial assistance for implementation of the state plan and the purchase of alternative fueled vehicles. The states must provide 20% of the cost of the activities for which federal financial assistance is received. The Energy Policy Act authorizes the program to receive $10 million for each of the five fiscal years after the date of enactment of the law.

c. Low Interest Loan Program

Section 414[200] requires the Secretary to establish a low interest loan program to finance the cost of converting vehicles to alternative fuels and the incremental costs of purchasing alternative fueled vehicles or non-road alternative fueled vehicles or engines. Preference is to be given under the program to small businesses that own or operate fleets. A total of $25 million for each of FYs 1993 through 1995 is authorized for the program.

d. Additional Provisions

Title IV of the Energy Policy Act expands the programs under the Alternative Motor Fuel Act (AMFA)[201] to include all alternative fuels.[202] It also amends Title V of the Motor Vehicle Information and Cost Savings Act[203] to make fuel economy credits available for vehicles running on any alternative fuel, not just alcohols or natural gas,[204] but does not otherwise change the conditions for receiving fuel economy credits.

Title IV also: (1) provides for a public information program;[205] (2) requires the Federal Trade Commission to establish uniform labeling requirements for alternative fuels and alternative fueled vehicles;[206] (3) establishes a

198. *Id.* § 409, 106 Stat. at 2882-84.

199. Each plan is to examine factors set forth in the legislation including: (1) exemption of alternative fueled vehicles, facilities, or alternative fuels from certain state or local taxes; (2) special parking at public buildings and transportation facilities; (3) public education programs; (4) methods of facilitating the availability of alternative fuels; and (5) allowing public utilities to include in rates the incremental cost of new alternative fueled vehicles, conversions, and installing alternative fuel fueling facilities. *Id.* § 409(a)(3), 106 Stat. at 2882-83.

200. *Id.* § 414, 106 Stat. at 2886-87.

201. Part J of Title III of the Energy Policy and Conservation Act.

202. Energy Policy Act §§ 401 and 402, 106 Stat. at 2875-76.

203. 15 U.S.C. § 2001-2013 (1988).

204. Energy Policy Act § 403, 106 Stat. at 2876-79.

205. *Id.* § 405, 106 Stat. at 2880.

206. *Id.* § 406, 106 Stat. at 2880-81.

data acquisition program with respect to data that would be useful to persons involved with alternative fueled vehicles;[207] and (4) provides for a certain studies and reports relating to alternative fuels.[208] In addition, the law requires the Secretary of Energy to ensure that the federal government establishes a program for the certification of training programs for technicians who are responsible for the conversion of gasoline or diesel-fueled vehicles into alternative fueled vehicles and for the maintenance of such vehicles.[209]

4. Title V — Availability and Use of Replacement Fuels, Alternative Fuels, and Alternative Fueled Private Vehicles

a. Background

While both the House bill and the Senate amendment established goals for the use of alternative fuels and mandated the acquisition of alternative fueled replacement vehicles for certain types of fleets, the bills differed substantially in the details of these provisions. The conference report blended the House and Senate approaches.

b. Alternative and Replacement Fuels Supply and Demand

i. The Senate Amendment

The Senate amendment would have required the Secretary of Energy to establish a program to promote the development and use of domestically produced replacement and alternative fuels.[210] The Secretary would have been required to estimate the demand for alternative and replacement fuels and require the providers of such fuels to certify the amount of each type of fuel that such provider would plan to produce. Next, the Secretary would have been required to obtain voluntary supply commitments from producers of domestic alternative and replacement fuels to meet the projected demand. Finally, the Senate amendment would have directed the Secretary, in the event that the Secretary determined that the amount of alternative and replacement fuels in any area of the United States would be insufficient to meet public demand, to provide written notice to Congress and to submit a plan setting forth the actions the Secretary might take to require providers of motor fuels to make available to the public adequate domestic supplies of such fuels. The Secretary would have been authorized to implement the plan sixty days after its submission to the Congress.[211]

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207. *Id.* § 407, 106 Stat. at 2881.

208. *Id.* §§ 412, 413, 106 Stat. at 2886.

209. *Id.* § 411, 106 Stat. at 2885-86.

210. The alternative fuels provisions are set forth in Subtitle C of Title IV of the Senate amendment to H.R. 776, which was approved by the Senate on July 23, 1992. Section 4304(6) of the Senate amendment defined "alternative fuels" as substantially nonpetroleum motor fuels not designed to be mixed with gasoline. Section 4304(7) defined "replacement fuels" as motor fuels capable of mixing with gasoline or diesel.

211. H.R. 776, 102d Cong., 2d Sess. §§ 4306-08 (1992).

These provisions of the Senate amendment were identical to the provisions of S. 1220 reported by the Committee on Energy and Natural Resources on June 5, 1991.[212] The alternative and replacement fuels provisions of S. 1220 were adopted as an amendment during Committee consideration of the legislation. This amendment was offered as an alternative when some members of the Committee expressed interest in offering an amendment that would have been identical to S. 716, legislation previously introduced by Senator James Jeffords of Vermont.[213]

S. 716 was strongly opposed by the Bush Administration, refiners and others.[214] The Jeffords legislation would have mandated that, according to a specified time schedule, a certain percentage of total sales by refiners be domestically-produced replacement and alternative fuels for use as motor fuels. When this approach was not adopted by the Committee on Energy and Natural Resources, Senator Jeffords offered an amendment to this effect during Senate consideration of S. 2166. The amendment was tabled by the Senate.[215]

ii. The House Bill

The House bill also would have directed the Secretary to establish a program to promote the development and use of domestic replacement fuels.[216] In particular, the Secretary would have been required to estimate the domestic and nondomestic production capacity for replacement fuels and alternative fueled vehicles and to determine the technical and economic feasibility of achieving the goals of producing sufficient replacement fuels to replace at least 10% by the year 2000 and at least 30% by the year 2010 of the projected consumption of motor fuel in the United States for each year.[217] The Secretary also would have been required to make demand estimates and obtain certifications from fuel providers similar to those required by the Senate amendment.[218] Next, the Secretary would have been directed to obtain voluntary supply commitments from fuel providers sufficient to meet the fuel replacement goals.[219] Under the House bill, however, a non-federal fleet requirements program would have been conditional upon a determination by

212. Subtitle C of Title IV of S. 1220, 102d Cong., 1st Sess. (1991)

213. S. 716, 102d Cong., 1st Sess. (1991).

214. *See, e.g.*, 138 CONG. REC. S975 (daily ed. Feb. 5, 1992) (statement of Sen. Johnston quoting letter from the Secretary of Energy); 138 CONG. REC. S961-62 (daily ed. Feb. 5, 1992) (statement of Sen. Grassley).

215. The motion to table was agreed to by a vote of 57 yeas to 39 nays. 138 CONG. REC. S978 (daily ed. Feb. 5, 1992).

216. Section 502 of H.R. 776, passed by the House of Representatives on May 27, 1992. The legislation defined "replacement fuels" essentially as the portion of any motor fuel that is not petroleum and would yield substantial energy security benefits and substantial environmental benefits. *Id.* § 301(12).

217. Section 502(b) of H.R. 776, as passed by the House of Representatives. The Secretary, however, would have had authority to modify the goals for the use of replacement fuels. *Id.* at § 504.

218. *Id.* § 503.

219. *Id.* § 505.

the Secretary that implementation of such a program would be necessary to meet the fuel replacement goals.[220]

iii. The Conference Report

The conference report largely adopted the House replacement fuel supply and demand program.[221] The conferees added provisions clarifying that nothing in the Energy Policy Act was to be construed to give the Secretary authority to mandate the manufacture of alternative fueled vehicles or marketing or pricing practices, policies, or strategies for alternative fuels or the delivery of such fuels.[222]

c. Private, Municipal, and State Fleet Requirement Program and Fuel Provider Program

i. The Senate Amendment

The Senate amendment contained an ambitious fleet requirement program applicable to certain private and municipal fleets.[223] Under its provisions, when any private person or municipality controlling fifty or more fleet vehicles acquired vehicles for fleets meeting specified criteria, a certain percentage of those newly acquired vehicles, ranging from 30% in 1998 to 70% in 2000 and thereafter, would have been required to be alternative fueled. The requirements would have been applicable to fleets that contained at least twenty motor vehicles that were capable of being centrally fueled and were used primarily within a metropolitan area of 250,000 or more persons.[224]

The Senate amendment also addressed state fleet requirements. Under those provisions when any state that controlled at least fifty motor vehicles acquired vehicles for use in a fleet that contained at least twenty motor vehicles that were capable of being centrally fueled and were used primarily in a metropolitan area of 250,000 or more persons, a certain percentage of the newly-acquired vehicles would have been required to be alternative fueled. The requirements would have commenced in 1995, with 10% of new vehicles required to be alternative fueled, and increased to 90% in the year 2000 and thereafter.

ii. The House Bill

Section 507 of the House-passed bill contained provisions relating to a fleet requirement program for private, municipal and state fleets of ten or more vehicles. Under that section, a fleet program would have been applicable

220. *See infra* discussion in section 4(c)(iii).

221. Energy Policy Act §§ 502-06, 106 Stat. at 2888-91.

222. *Id.* § 504(c), 106 Stat. at 2890.

223. The Bush Administration had proposed an even more far-reaching fleets program in its National Energy Strategy (NES), as contained in the Bush Administration's proposed implementing legislation for the NES. *See* S. 570, 102d Cong., 1st Sess. (1991).

224. S. 2166, 102d Cong., 1st Sess. § 4104 (1992).

if the Secretary determined that a fleet program was "necessary." This would have required a determination that without a fleet program, the goal of 30% for replacement fuel use in 2010 would not be achieved and the goal would have been actually achievable through implementation of the fleet program. The Secretary would have been required to make this determination by January 1, 2000.

If the Secretary concluded that the program was necessary, starting in model year 2002, 20% of a fleet's new light duty vehicles would have been required to be alternative fueled, with the percentage increasing to 70% in model year 2005 and thereafter. The Secretary would have been granted discretion to scale back the program by increasing the minimum fleet size to up to 100 vehicles.

Exemptions would have been available in instances where alternative fueled vehicles or alternative fuels meeting the normal requirements of the principal business of the fleet owner were not available or, in the case of a municipal government, where the application of the program would have posed unreasonable financial hardship. The Secretary would have been granted discretion to include law enforcement vehicles and urban buses in the program.

Under section 507(e)(4), the Secretary would have been granted discretion to allow vehicles operating on reformulated gasoline to be treated as alternative fueled vehicles for purposes of the fleets requirement program. This discretion, however, would have been limited to fleets also covered by the requirements of the fleets provisions of the Clean Air Act Amendments of 1990.

The House bill also contained a program imposing fleet purchase mandates on "fuel providers."[225] That provision would have applied to persons whose principal business was producing, generating, storing, refining, processing, transporting, distributing, importing, or selling alternative fuels. In addition, it would have applied to persons producing, importing, or producing and importing in combination, an average of 50,000 or more barrels of petroleum per day if a substantial portion of that person's business was producing alternative fuels.

Starting in 1994, persons subject to the requirements of the fuel provider program would have been required to purchase only alternative fueled vehicles. An exemption was authorized for alternative fuel providers with gross annual revenues of less than $100,000 and in situations where alternative fueled vehicles meeting normal business requirements were not available.

The stated purpose of this provision, which would have imposed the mandate on businesses "who will profit most if alternative fuels really take off"[226] was to "create a workable, cost-effective test bed for alternative fuels . . . [that]

225. H.R. 776, 102d Cong., 1st Sess. § 501.
226. H.R. 776 REPORT at 137 (1992).

can ultimately lead to acceptance of these fuels and vehicles by the public."[227]

iii. The Conference Report

Title V of the conference report contains provisions addressing alternative fueled fleet requirements programs for private, municipal, and state fleets and fleets owned by fuel providers. As in the Senate amendment, the programs are applicable only to persons who control: (1) fifty or more vehicles within the United States and (2) a fleet that contains at least twenty motor vehicles that are capable of being centrally fueled and are used primarily in metropolitan areas of 250,000 or more in population.[228] "Fleets" are defined to exclude certain categories of vehicles, such as motor vehicles held for lease or rental to the general public, law enforcement vehicles, and emergency vehicles.[229] The provisions apply only to light duty motor vehicles unless specifically noted.[230]

Like the House bill, the imposition of fleet mandates on owners of private and municipal fleets is contingent upon a rulemaking by the Secretary. However, assuming a program is put in place, the schedule for acquiring alternative fueled vehicles is more ambitious than the original House-passed version.

The conference report provides for two rulemakings to determine whether mandatory fleet program will be implemented. Under section 507(b)[231] of the conference report, the Secretary is required to complete the first rulemaking by December 15, 1996, to determine if a fleet requirements program is "necessary." The same standards as contained in the House bill apply to this determination (*i.e.*, whether the replacement fuel goals will be achieved and whether the goals are actually achievable through implementation of the fleet program). In addition, however, the Secretary must make affirmative findings regarding availability of infrastructure and alternative fueled vehicles, ability of the fleet vehicles to meet performance requirements, and competition and economic effects. In the event that the Secretary determines that the fleet program is necessary, the percentage of newly purchased replacement vehicles that must be alternative fueled is 20% in model year 1999, increasing to 70% in model year 2006 and thereafter.

If, as a result of the first rulemaking, the Secretary does not conclude that a fleet program is necessary, the Secretary must undertake a second rulemaking, pursuant to section 507(e),[232] to determine by no later than January 1, 2000, whether such a program is "necessary." In making this determination, the Secretary need not make the additional affirmative findings relating to

227. *Id.*
228. Energy Policy Act § 301(5), 106 Stat. at 2867.
229. *Id.* § 301(9), 106 Stat. at 2867-68.
230. *Id.*
231. *Id.* § 507(b), 106 Stat. at 2895.
232. *Id.* § 507(e), 106 Stat. at 2895.

infrastructure and vehicle availability, performance requirements, and competition and economic effects, required under the first rulemaking.

If the Secretary determines that a fleet requirement program is necessary, the percentage of newly purchased vehicles that must be alternative fueled is 20% in model year 2002, ranging up to 70% in model year 2007 and thereafter.

A significant issue in conference was whether reformulated gasoline could be used to fulfill the requirements of the fleets title.[233] The Senate amendment did not recognize reformulated gasoline as a method of compliance, based on the argument that allowing the use of reformulated gasoline in the fleets program would undercut the objective of reducing reliance on oil in the transportation sector. The House bill granted the Secretary authority to allow reformulated gasoline as a means of compliance.

During conference discussions, concern was expressed over the necessity of coordinating the fleets provisions with those already in place under the Clean Air Act Amendments of 1990, which recognize the use of reformulated gasoline as a compliance method. As a compromise, the conferees provided under section 507(g)(4)[234] that a vehicle operating only on reformulated gasoline is not considered to be an alternative fueled vehicle. However, the Secretary may determine as part of the rulemakings under section 507, that for fleets subject to the fleet requirements of the Clean Air Act Amendments of 1990, vehicles operated on reformulated gasoline fulfill the requirements of Title V.

The conference report provides for exemptions from the municipal and private fleets requirement program under section 507. Paragraph (g)(3) of section 507[235] provides that the fleet operator is not to be required to acquire any alternative fueled vehicle or fuel that does not meet the normal business requirements and practices of the fleet. In addition, subsection 507(i)[236] sets forth specific exemptions from the program. Paragraph (2) of that subsection provides that private fleets garaged at personal residences under normal operations are exempt from the private fleets requirement program. Paragraph (g)(2) of section 507[237] grants the Secretary authority to establish lesser acquisition requirements and to extend the dates under the acquisition schedule. Section 507(n)[238] provides the Secretary with suspension authority as specified.

The conferees also adopted a mandatory state fleet requirements program similar to that provided for in the Senate amendment. Section 507(o)[239] pro-

233. *See, e.g., DOE Making Final Push for Energy Bill*, PLATT'S OILGRAM NEWS, Oct. 8, 1992, at 4.
234. Energy Policy Act § 507(g)(4), 106 Stat. at 2895.
235. *Id.* § 507(g)(3), 106 Stat. at 2895.
236. *Id.* § 507(i), 106 Stat. at 2895.
237. *Id.* § 507(g)(2), 106 Stat. at 2895.
238. *Id.* § 507(n), 106 Stat. at 2896-97.
239. *Id.* § 507(o), 106 Stat. at 2897.

vides that when vehicles are purchased for a state government fleet, starting in model year 1996, 10% of such vehicles must be alternative fueled, ranging up to 75% in model year 2000 and thereafter.

Finally, the conferees adopted a modified version of the House program relating to fleets controlled by alternative fuel providers. Rather than requiring that 100% of the vehicles acquired by these persons be alternative fueled as in the House bill, the conferees compromised on a phased-in approach. Under section 501[240] of the conference report, of the new light duty motor vehicles acquired by an alternative fuel provider, starting in model year 1996, 30% must be alternative fueled, ranging up to 90% in model year 1999 and thereafter.

The alternative fuel provider program set forth in section 501 is, through the definition of "covered person" contained in title III, subject to criteria as set forth in the Senate amendment. These criteria make the program applicable only to fleets of twenty or more vehicles capable of being centrally fueled and used primarily in cities of 250,000 or more population where the alternative fuel provider owns fifty or more vehicles nationwide. Thus, the program is intended to apply only to relatively large business concerns.[241]

Paragraph (a)(2) of section 501[242] describes the alternative fuel providers to whom the program requirements apply, and like the House bill, covers persons whose principal business is producing, generating, storing, refining, processing, transporting, distributing, importing, or selling alternative fuels, and those who produce or import 50,000 barrels per day of oil and a substantial portion of whose business is producing alternative fuels.

Subparagraph (a)(3)(A) of section 501 clarifies that the program is intended to apply only to those affiliates, divisions, or other business units of the alternative fuel provider which are substantially engaged in the alternative fuels business, as determined by the Secretary. Subparagraph (a)(3)(B) provides that alternative fuel providers who are engaged in a principal business of transforming alternative fuels into a product that is not an alternative fuel or consuming alternative fuels as a feedstock are not covered.

Several exemptions applicable to the fuel provider program are included in the conference report. Paragraph (a)(5) of section 501 requires the Secretary to promulgate regulations providing for a prompt exemption, through a simple and reasonable process, from the acquisition requirements if the alternative fuel provider demonstrates that alternative fueled vehicles meeting its needs are not reasonably available or that the needed fuels are not available in the area where the vehicles are to be operated.

In addition, section 507(g)(3)[243] of the legislation provides general

240. *Id.* § 501, 106 Stat. at 2887-88.

241. 138 CONG. REC. S17,644 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

242. Energy Policy Act § 501(a)(2), 106 Stat. at 2887.

243. *Id.* § 507(g)(3), 106 Stat. at 2888.

authority that nothing in the title is to be construed to require any alternative fuel provider, or other fleet operator subject to requirements imposed by the title, to acquire alternative fueled vehicles or alternative fuels that do not meet the normal business requirements and practices and needs of the fleet. Finally, the Secretary is granted under section 501(b)[244] authority after model year 1997 to revise the percentage requirements under the program downward and to extend the time under the acquisition schedule for up to two model years.

5. Section 1913 — Tax Treatment of Clean Fuel Vehicles

Section 1913 of the Energy Policy Act[245] amends the Internal Revenue Code of 1986 (IRC) to provide deductions for qualified clean-fuel vehicle property and qualified clean-fuel vehicle refueling property. The legislation also provides for an income tax credit for qualified electric vehicles. The provisions were designed to encourage taxpayers to purchase or convert to motor vehicles that are propelled by clean-burning fuels and to invest in refueling property for such vehicles in order to reduce pollution and to reduce the dependence of the United States on imported petroleum products.[246]

The law allows a deduction for a portion of the cost of vehicles that are propelled by clean fuels.[247] The amount of the deduction varies depending upon the type of vehicle involved, with the limitation being $2000 for cars, $5000 for trucks or vans weighing 10,000 to 26,000 pounds, and $50,0000 for trucks or vans over 26,000 pounds.

The Energy Policy Act also allows a deduction for the cost of clean-fuel refueling property in the year that the property is placed in service. Clean-fuel refueling property is defined as property that is used for the storage or dispensing of clean-burning fuel into the fuel tank of the motor vehicle propelled by such fuel so long as the storage or dispensing occurs at the location where the vehicle is refueled. Also included is property dedicated to the recharging of motor vehicles located at the point where the vehicles are recharged.

Finally, the legislation includes an income tax credit equal to 10% of the cost of a qualified electric vehicle for the year that the vehicle is placed in service. The maximum amount of the credit is $4000, with the credit phased out for vehicles placed in service after December 31, 2001.

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244. *Id.* § 501(b), 106 Stat. at 2888.

245. *Id.* § 1913, 106 Stat. at 3016-20.

246. H.R. REPORT at 38.

247. For purposes of the provision, clean-burning fuel is defined as natural gas, liquefied petroleum natural gas, liquefied petroleum gas, hydrogen, electricity, and any other fuel if at least 85% of the fuel is methanol, ethanol, any other alcohol, ether, or any combination thereof. The provision applies to vehicles put in service after June 30, 1993, and is phased out, so that no deduction is allowed for property placed in service after Dec. 31, 2004.

6. Provisions for the Development of Natural Gas Utilization Technologies

a. Section 2014 — Natural Gas End-Use Technologies

Section 2014[248] is based on section 13103 of the Senate amendment and addresses natural gas end-use technologies not covered by overlapping provisions of the House bill. The section directs the Secretary of Energy to carry out a five-year program on new and advanced natural gas utilization technologies. The program shall include: (1) stationary source emissions control and efficiency improvements; and (2) natural gas storage. The authorization of appropriations to carry out section 2014 is covered by the authorization in section 2013.[249]

b. Section 2102 — Natural Gas and Electric Heating and Cooling Technologies

Section 2102[250] is an amalgamation of section 2102 of the House bill and section 13111 of the Senate amendment. The section directs the Secretary of Energy to carry out a five-year program on energy efficient natural gas and electric heating and cooling technologies for residential and commercial buildings. The natural gas program shall include activities concerning: (1) thermally activated heat pumps, including absorption heat pumps and engine-driven heat pumps; and (2) other advanced natural gas technologies including fuel cells for residential and commercial applications.

There is no specific authorization of appropriations for section 2102. Section 2101 authorizes appropriations of $178,250,000 for FY 1993 and $275,000,000 for FY 1994 for carrying out subtitle A of title XXI.

c. Section 2112 — High Efficiency Heat Engines

Section 2112[251] directs the Secretary of Energy to conduct a five-year program to improve the efficiency of heat engines.[252] The section follows closely section 2112 of the House bill; section 13105 was the comparable provision of the Senate amendment.

The program under section 2112 is required to include demonstrations of sufficient scale and number so as to establish technical and economic feasibility and incorporate materials that increase engine efficiency. Section 2112 specifies that the following technologies be demonstrated: (1) mechanically recuperated gas turbines; (2) intercooled gas turbines with steam injection or

248. Energy Policy Act § 2014, 106 Stat. at 3060.

249. *Id.* § 2013, 106 Stat. at 3059-60.

250. *Id.* § 2102, 106 Stat. at 3059-60.

251. *Id.* § 2112, 106 Stat. at 3072-73.

252. A heat engine is an engine for changing heat into mechanical energy, such as a steam engine or gasoline engine. Webster's New World Dictionary, Second College Edition 646 (1979). In the case of § 2112, the term generally referred to gas turbines.

recuperation; (3) gas turbines utilizing reformulated fuels or hydrogen; and (4) high efficiency simple cycle gas turbines. The Secretary is required to submit a program plan within 180 days of enactment and to solicit proposals within one year of enactment.

Section 2112 authorizes the appropriation of such sums as may be necessary for carrying out its provisions. Such sums are required to be derived from the sums authorized under section 2101(e) for the entire improved energy efficiency program. The House bill authorized the appropriation of $125,000,000 for the period covering FYs 1993 through 1997 to be derived from the sums authorized for the improved energy efficiency program. Section 13105 of the Senate amendment authorized the appropriation of not more than $25,000,000 for each of FYs 1992, 1993, and 1994.

d. Section 2115 — Fuel Cells

Section 2115[253] directs the Secretary of Energy to conduct a five-year program having the goal of developing cost-effective, efficient, and environmentally benign fuel cell systems which will operate on fossil fuels. The section instructs that the program include molten carbonate, solid oxide, including tubular, monolithic, and planar technologies. Section 2115 authorizes for appropriation $51,555,000 for FY 1993 and $56,000,000 for FY 1994.

Section 2115 follows closely section 2117 of the House bill. The Senate amendment did not include a provision dealing exclusively with fuel cells; however, section 13103 of the Senate amendment, dealing with natural gas end-use technologies, included fuel cells among the natural gas utilization technologies to be included in its program.

D. Additional Provisions Relating to Natural Gas

The Energy Policy Act contains several additional provisions relating to natural gas, as described below.

1. Title XVI — Global Climate Change

Title XVI of the Energy Policy Act reflects the continuing debate among policy makers on the issue of global climate change. The dominant source of anthropogenic greenhouse gas emissions is the energy industry and the burning of fossil fuels.[254] Fossil fuel combustion is the primary source of CO2 emissions and also results in the emission of other greenhouse gases. Of all the fossil fuels, natural gas has the lowest intensity of emissions of CO2.[255] One policy option identified by some to curb these emissions is to substitute less

253. *Id.* § 2115, 106 Stat. at 3074.

254. The Alliance to Save Energy, American Gas Association, and Solar Industries Association, An Alternative Energy Future 4:1 (April 1992).

255. J.R. Justus, Issue Brief IB8900, *Global Climate Change* CONGRESSIONAL RESEARCH SERVICE, CRS-5 (Jan. 21, 1992).

CO2-intensive fossil fuels, like natural gas, for coal and oil.[256] Thus, any legislative initiative on the issue could have significant implications for the natural gas industry.

Both the House bill and the Senate amendment contained provisions dealing with the global climate change issue. The conferees adopted aspects of both bills in the conference agreement. The legislation: (1) mandates a report on global climate change, assessing the feasibility and implications of various scenarios for stabilizing and reducing the generation of greenhouse gases in the United States;[257] (2) requires the Secretary to prepare a least-cost energy strategy[258] as part of the National Energy Policy Plan required under the Department of Energy Organization Act;[259] (3) requires the Secretary to establish, within the Department, a Director of Climate Protection;[260] (4) requires the Secretary to establish an innovative technology transfer program to encourage the export of U.S. technologies that substantially reduce environmental pollutants;[261] and (5) establishes a Global Climate Change Response Fund to act as a mechanism for United States contributions to assist global efforts in mitigating and adapting to global climate change.[262]

In addition, section 1605[263] of the Energy Policy Act directs the Secretary to develop an inventory of national aggregate emissions of each greenhouse gas for a baseline period. The Secretary is to issue guidelines for the voluntary reporting of information on sources of greenhouse gases, including information on emissions during a baseline period and on annual reductions of such emissions. The provision allows persons voluntarily to document their achieved reductions in greenhouse gas emissions.

2. Section 1340 — Establishment of Data Base and Study of Transportation Rates

Section 1340[264] directs the Secretary of Energy to review the information currently collected by the federal government regarding the transportation rates for rail and pipeline shipment of coal, oil and gas during the period between 1988 and 1997, and determine whether such information is reasonably available. If the Secretary determines that such information is not reasonably available, the Secretary is directed to establish a data base of such information.

The Energy Information Administration (EIA) of the Department of Energy is directed, to the extent that any other agency of the federal government is not already doing so, to study the effect of the Clean Air Act Amendments of 1990 and other federal policies on the rates and distribution patterns

256. *Id.* at 1. Other identified options include energy efficiency and conservation and the substitution of nuclear energy and renewable energy. *Id.*

257. Energy Policy Act § 1601, 106 Stat. at 2999.

258. *Id.* § 1602, 106 Stat. at 2999-3001.

259. 42 U.S.C.A. § 7321 (West Supp. 1992).

260. Energy Policy Act § 1603, 106 Stat. at 3001-02.

261. *Id.* § 1608, 106 Stat. at 3003-07.

262. *Id.* § 1609, 106 Stat. at 3007-08.

263. *Id.* § 1605, 106 Stat. at 3002-03.

264. *Id.* § 1340, 106 Stat. at 2992-93.

of domestic coal, oil and gas. The Secretary is directed to report to Congress regularly regarding progress in implementing the section.

Section 1340 is an amalgamation of section 1316 of the House bill and section 14113 of the Senate amendment. The Senate amendment required the compilation of data and the study of the effects of the Clean Air Act Amendments and other policies only for coal transportation, not oil and gas.

3. Section 3012 — Alaska Natural Gas Transportation Act of 1976

The Alaska Natural Gas Transportation Act of 1976 (ANGTA)[265] established a mechanism for the President to designate an exclusive route for a pipeline to bring Alaskan natural gas to the lower forty-eight states.[266] ANGTA also created the Office of Federal Inspector (OFI) to coordinate regulatory reviews and monitor construction. In 1977 President Carter designated the route and selected a project sponsor for the ANGTS.

Section 3012 of the Energy Policy Act[267] repeals the authority for OFI contained in section 7(a)(5) of ANGTA,[268] and transfers to the Secretary of Energy the authority and functions that had been vested in the Inspector. As passed by the House, section 3012 would have transferred the Inspector's functions to the Chairman of FERC. The Senate amendment did not address the issue of ANGTA and the OFI.

4. Coalbed Methane and Coal Gasification

While it has long been known that coalbeds contain large quantities of methane, interest in the commercial recovery of this resource has been only recent. Greater understanding of the geology and the technology necessary to produce coalbed methane (CBM), together with a federal tax credit for CBM production,[269] have been the catalysts for this interest.

CBM production in the United States rose from 26 bcf in 1987 to 348 bcf in 1991, when CBM accounted for 2% of dry gas production in the United

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265. 15 U.S.C. § 719-719o (1988).

266. The lower one-third of the system was completed in the early 1980s and now is fully utilized to transport Canadian natural gas from Alberta to United States markets in the Midwest and on the West Coast. The remaining two-thirds of the ANGTS, from the North Slope to the Yukon border and from there to Alberta, never have been constructed.

267. Energy Policy Act § 3012, 106 Stat. at 3128.

268. 15 U.S.C. § 719e(a)(5).

269. CBM is one of the fuels that qualifies for the nonconventional fuels tax credit under § 29 of the IRC. 26 U.S.C. § 29. The nonconventional fuels tax credit was enacted as part of the Crude Oil Windfall Profits Tax Act of 1980 and originally applied to wells drilled after Dec. 31, 1979, but before Jan. 1, 1991. The qualification period for the credit has been extended twice. Under current law, a CBM well must have been drilled by the end of 1992 in order for its production to be eligible to receive the credit through the end of the year 2002. Despite a vigorous lobbying campaign to win a third extension, the Congress let the qualification period expire at the end of 1992. *See* Margaret E. Kriz, *Fuel Duel*, 24 NATIONAL JOURNAL 2119-21 (1992). The significance of the nonconventional fuels credit as an incentive for CBM development can be measured by the fact that in 1991, when the average wellhead price for natural gas in the United States was $1.59 per mcf, the tax credit for CBM production was approximately $0.90 per mcf. ENERGY INFORMATION ADMINISTRATION, U.S. CRUDE OIL, NATURAL GAS, AND NATURAL GAS LIQUIDS RESERVES 1991 ANNUAL REPORT at 36-37 (1992).

States.[270] According to DOE estimates, 1991 proved reserves from fields identified as having CBM were 8,163 bcf, representing a 60% increase in reserves over a year earlier.[271] Proved reserves of CBM are located primarily in New Mexico, Colorado, and Alabama.

While the Congress did not extend the tax credit for CBM production,[272] the Energy Policy Act did include several provisions intended to encourage CBM production and coal gasification.

a. Section 1306 — Coalbed Methane Recovery

Section 1306,[273] which is based on section 1312 of the House bill, directs the Secretary of Energy, in consultation with the Administrator of the Environmental Protection Agency and the Secretary of the Interior, to study: (1) barriers to CBM recovery and options for eliminating such barriers; and (2) environmental and safety aspects of flaring CBM liberated from coal mines. The Secretary of Energy also is directed, in consultation with the other agency heads, to disseminate to the public information on CBM recovery techniques and to conduct a demonstration and commercial application program concerning technologies for enriching medium-quality CBM to pipeline quality, as well as other CBM utilization technologies.

b. Section 1309 — Underground Coal Gasification

Section 1309 of the Energy Policy Act directs the Secretary of Energy to "conduct a research, development, demonstration and commercial application program for underground coal gasification technology for in-situ conversion of coal to a cleaner burning, easily transportable gaseous fuel."[274] Underground coal gasification was addressed by section 14104 of the Senate amendment. The House bill included no comparable provision.

c. Section 1339 — Ownership of Coalbed Methane

Questions regarding the ownership of CBM have proven to be an impediment to the development of the resource. Most oil and gas leases do not address the issue of who owns the gas found in coal seams. State law on the issue is not well developed.[275] The obstacles to CBM development created by ownership disputes have been especially troublesome in the Appalachian states.[276]

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270. NATURAL GAS ANNUAL 1, *supra* note 6 at 8 (1992).

271. ENERGY INFORMATION ADMINISTRATION, U.S. CRUDE OIL, NATURAL GAS, AND NATURAL GAS LIQUIDS RESERVES 1991 ANNUAL REPORT at 36 (1992).

272. NATURAL GAS TRENDS, *supra* note 5, at 4.

273. Energy Policy Act § 1306, 106 Stat. at 2974-75.

274. *Id.* § 1309, 106 Stat. at 2975.

275. Herbert M. Black, *Update on U.S. Coalbed Methane Production*, ENERGY INFORMATION ADMINISTRATION, NATURAL GAS MONTHLY, Oct. 1990 1, at 3.

276. *See* M. Jill Morgan and Elizabeth A. McClanahan, *Competing Ownership Claims to Coalbed Methane Development in the Appalachian Basin*, THE LANDMAN, July-Aug. 1990, at 19-23.

Section 1339 of the Energy Policy Act[277] establishes a forced pooling mechanism for the purposes of encouraging the development of CBM resources and resolving ownership disputes that frustrate this development. Section 1339 is an amended version of section 1314 of the House bill.[278] The Senate amendment did not address CBM ownership.

Section 1339 applies to "Affected States" which are to be listed by the Secretary of the Interior (hereinafter the Secretary), with the participation of the Secretary of Energy.[279] The section includes a list of specific states which shall be "Affected States" until the Secretary publishes a different list [280] and a list of states which shall not ever be included on the Secretary's list.[281] The Secretary is required to remove a state from the list upon the receipt of a Governor's petition requesting deletion, or a law or resolution enacted by the state's legislative body requesting deletion.[282] The Secretary is authorized to implement section 1339 in an Affected State if, within three years of becoming an Affected State, that state has not placed in effect "by statute or by regulation, a substantial program promoting the permitting, drilling and production of coalbed methane wells (including pooling arrangements)."[283]

As passed by the House, section 1339 would have required Affected States to establish or designate one or more state agencies as the "State Board" to administer the CBM program, with the Secretary authorized to administer the program only if the Affected State failed to establish a State Board. In conference, section 1339 was amended to authorize the Secretary alone to administer the statute.[284] This was done after the Department of Justice pointed out that having the State Board administer the statute created a problem under the Appointments Clause of the Constitution.[285] Section 1339 also

277. Energy Policy Act § 1339, 106 Stat. at 2986-92.

278. Section 1314 of H.R. 776 was modeled after the Virginia Oil and Gas Act of 1990. (1990 Va. Acts Ch. 92 (codified as VA. CODE ANN. § 45.11-361.40 Supp. 1990)) H.R. REP. NO. 474, 102d Cong., 2d Sess., pt. 1, at 214 (1992).

279. The Secretary is to designate "Affected States" based on the criteria that in such states: (1) there are "disputes, uncertainty, or litigation . . . regarding the ownership of coalbed methane gas"; (2) "the development of significant deposits of coalbed methane gas is being impeded by such existing disputes, uncertainty or litigation"; (3) there is not "in effect a statutory or regulatory procedure or existing case law permitting and encouraging the development of coalbed methane gas"; and (4) there is not "extensive development of coalbed methane gas." Energy Policy Act § 1339(b), 106 Stat. at 2986-87.

280. These are West Virginia, Pennsylvania, Kentucky, Ohio, Tennessee, Indiana, and Illinois. *Id.* § 1339(b), 106 Stat. at 2987.

281. These are Colorado, Montana, New Mexico, Wyoming, Utah, Virginia, Washington, Mississippi, Louisiana, and Alabama. *Id.*

282. In the case of a Governor petitioning for removal from the list, however, the Governor must provide the state's legislative body with six months' notice of his intention to petition for removal and may not make such a petition if within that period the legislature has enacted a law or resolution disapproving of the Governor's petition. *Id.* § 1339(b), 106 Stat. at 2986-87.

283. Energy Policy Act § 1339(c), 106 Stat. at 2987.

284. *See generally* 138 CONG. REC. H11,402 (daily ed. Oct. 5, 1992) (statement of Rep. Sharp).

285. Letter from W. Lee Rawls, Assistant Attorney General, U.S. Department of Justice to J. Bennett Johnston, Chairman, Senate Committee on Energy and Natural Resources (Sept. 15, 1992).

was amended in conference to make it easier for states to opt out of the program.

In states where the program applies, section 1339 will operate as follows. First, the Secretary is authorized to establish requirements for spacing CBM wells.[286] Second, upon application by a person claiming a CBM ownership interest, the Secretary shall issue an order establishing the boundaries of a CBM spacing unit.[287]

Third, after a CBM claimant files an application for pooling[288] the Secretary shall hold a hearing and, if the statutory criteria are met, issue an order allowing the pooling of acreage within a designated spacing unit for purposes of drilling for and producing CBM.[289] As part of the pooling order, the Secretary is required to designate a unit operator who shall be authorized to drill and operate the spacing unit. Section 1339 provides for notice to persons who may claim a CBM ownership interest. The law requires that such claimants be offered options for participating in the development of the resource.[290]

Fourth, the unit operator must apply to the Secretary for a permit to drill a CBM well in the spacing unit and must provide notice of such application to persons who are operating, or who have the right to operate, a coal mine within specified horizontal and vertical distances from the proposed well.[291] Upon objection by such a person, the Secretary may refuse to approve an application if the proposed well would interfere unreasonably with the development of coal resources or create a safety hazard.[292] The Secretary also may approve an application modified to address such objections.

Fifth, in the event that persons who are operating, or who have a right to operate, a coal mine within specified horizontal and vertical distances of a CBM well do not consent to the stimulation of the coal seam, the unit operator may request that the Secretary make a determination regarding stimulation of the seam.[293] As passed by the House, section 1339 gave coal operators an effective veto over the stimulation of the coal seam. The House bill required the CBM operator to seek the coal operator's consent to stimulate the

286. Energy Policy Act § 1339(e), 106 Stat. at 2987.

287. *Id.* § 1339(f), 106 Stat. at 2987-88.

288. Section 1339 does not define the term "pooling." Pooling is generally understood to mean the bringing together of small tracts or fractional mineral interests for the drilling of a single well for primary production on a spacing unit.

289. Energy Policy Act § 1339(g), 106 Stat. at 2988.

290. The law also provides that where title is uncertain due to conflicting claims of ownership, there will be established an escrow account into which shall be paid the costs and proceeds attributable to the disputed interests. The Secretary is authorized to disburse the principal and accrued interest from the escrow account upon the resolution of conflicting ownership claims. Energy Policy Act § 1339(h), 106 Stat. at 2988-89.

291. *Id.* § 1339(k), 106 Stat. at 2990-91.

292. Congressman Sharp described the purpose of this and other parts of § 1339 which provide notice to coal operators as "promot[ing] coalbed methane development in a manner that is protective of our Nation's coal resources and coal mine safety." 138 CONG. REC. H11,402 (daily ed. Oct. 5, 1992).

293. Energy Policy Act § 1339(j), 106 Stat. at 2989-90.

coal seam and provided no recourse if such consent was denied. In conference, the Senate conferees were concerned that this coal operator veto would frustrate the goal of the section to promote the development of CBM resources.[294] The conferees amended this subsection to create a procedure for recourse to the Secretary in the event of denial of consent by the coal operator.[295]

III. CONCLUSION

When the Energy Policy Act passed both Houses of the Congress on the last day of the session, Senator J. Bennett Johnston, a key sponsor of the measure proclaimed it "a legislative miracle"[296] for its balance between energy conservation and energy production.[297] On October 24, 1992, when President Bush signed the legislation, Secretary of Energy James D. Watkins said the bill was "the most comprehensive and balanced energy legislation ever enacted, and it will serve to fuel new jobs, greater energy security and a cleaner environment."[298]

According to Department of Energy estimates, the Energy Policy Act will reduce oil imports by approximately 4.7 million barrels per day by the year 2010, save domestic electricity consumers approximately $250 billion over the same period, and increase use of renewable energy by 20% and increase the use of alternative fuels by 50% over projected 2010 levels.[299]

Exactly what effect the Energy Policy Act will have on the production and use of natural gas is yet to be seen. Many view relief from the alternative minimum tax as a key provision to stimulate increased production. Secretary Watkins described AMT relief as a "cornerstone" of the legislation which will grant more than a billion dollars in tax relief for independent oil and gas producers over the next five years. Representatives of independent producers said that AMT reform would create at least 25,000 new jobs and predicted that field drilling activity will rebound to 1990 levels within a year of enactment.[300]

While the Energy Policy Act does not include the sweeping regulatory

294. 138 CONG. REC. S17,644 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

295. *Compare* Energy Policy Act § 1339(j), 106 Stat. at 2989-90 *with* H.R. 776, 102d Cong., 2d Sess. § 1314(i).

296. *DOE Gears Up for New Tasks Under Bill*, INSIDE ENERGY WITH FEDERAL LANDS, Oct. 12, 1992, at 1.

297. Others may have considered it a "legislative miracle" that the bill ultimately passed the Congress, given the difficulties encountered. For example, one report stated, "Congress pushed, pulled, shoved and shouted for nearly two years to produce a national energy strategy, then sent it to President Bush Thursday with a quiet sigh." Judith Barra Austin, *New Energy Plan Affects Cars, Lights, Fuels - Even Urinals*, GANNETT NEWS SERV., Oct. 8, 1992. Senator Johnston also reportedly stated, "I can't believe we're across the goal line." *DOE Gears up for New Tasks Under Bill*, INSIDE ENERGY WITH FEDERAL LANDS, Oct. 12, 1992, at 1. Deputy Secretary of Energy Linda G. Stuntz was quoted as stating, "If there was ever a pothole this bill could fall into, it fell into it." *Id.*

298. *President Bush Signs National Energy Policy Act Triggering Reform of PUHCA, Softening Restrictions on Electric Transmission Access, and Expanding National Programs in Areas of Energy Conservation and Alternative Fuels Development*, FOSTER NATURAL GAS REPORT, Oct. 29, 1992, at 1.

299. *Id.*

300. *Id.*

reform provisions contained in the House and Senate bills relating to authorization for pipeline construction, many view the legislation as having the potential to open important new markets for natural gas. For example, reform of the Public Utility Holding Act is expected by many to increase the use of natural gas in electric power generation. The extensive authorizations for natural gas research, development, and demonstration could lead the way to the development of new applications for natural gas.

The alternative fuels provisions contained in the Energy Policy Act are likely to bring about increased demand for such fuels, including natural gas. One DOE official maintained that a sudden burgeoning of alternative fueled cars is virtually assured.[301] The Department of Energy estimates that up to 2.6 million alternative fuel vehicles will be on the road in 2010, and that this will replace up to 120,000 barrels per day of gasoline, as a result of the initiatives contained in the Energy Policy Act.[302] The combination of the fleet mandates, incentive programs, and tax code revisions relating to alternative fuels combine to make a strong and comprehensive program.[303]

Many view natural gas as an important key to our energy future, given the fact that it is abundant, reasonably priced, has a well-developed distribution infrastructure, and is the cleanest fossil fuel.[304] The significant provisions contained in the Energy Policy Act to stimulate natural gas production, remove regulatory obstacles to the use of natural gas, and promote the development of new markets for natural gas, may help to make natural gas a fuel of choice for the future.

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301. David L. Chandler, *Alternative-fuel Cars Expected to Get Boost from Energy Bill*, BOSTON GLOBE, Oct. 10, 1992, at 39 (*quoting* J. Michael Davis, former Assistant Secretary of Energy for Conservation and Renewables, as stating that the legislation represents "one of the best days that renewables have ever seen in this country. This country is going toward alternative fuels.")

302. D.E. Gushee, *Issue Brief IB93009, Alternative Transportation Fuels: Are They Reducing Oil Imports?*, CONGRESSIONAL RESEARCH SERVICE Jan. 15, 1993, at 1.

303. *Id.* One natural gas industry representative was quoted as stating, "The bill provides an excellent foundation to build on for reducing oil imports by promoting the use of alternative fuels such as natural gas for transportation. . . ." *President Bush Signs National Energy Policy Act Triggering Reform of PUHCA, Softening Restrictions on Electric Transmission Access, and Expanding National Programs in Areas of Energy Conservation and Alternative Fuels Development*, FOSTER NATURAL GAS REPORT October 29, 1992, at 1 (quoting Michael Baly III, President of the American Gas Association).

304. 137 CONG. REC. S10,471 (daily ed. July 19, 1991) (statement of Sen. Johnston).