



Legislation Proposed by House Democrats Seeks Sweeping Restructuring of Federal Energy Programs: The Federal Lands and Resources Energy Development Act of 2009

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Recently, the Committee on Natural Resources of U.S. House of Representatives, released a majority staff discussion draft of the proposed "Federal Lands and Resources Energy Development Act of 2009" (the Federal Energy Bill). This proposed legislation is sweeping in seeking to "reform" the planning, leasing, and royalty collection regimes for both onshore and offshore federal minerals. In addition to completely restructuring future energy leasing, siting, and development, the Federal Energy Bill will also likely have ramifications for development on existing leases.

This legislation also includes significant provisions on renewable energy sources (wind and solar), uranium, and electric transmission. It is important to note that the bill refers to two types of energy: (1) "renewables" (primarily wind and solar); and (2) "nonrenewables," (focusing on natural gas and oil). Key onshore provisions for oil and gas are briefly summarized below.

Title I - Consolidation of Department of the Interior Leasing Programs.

Title I of the Federal Energy Bill essentially abolishes the Minerals Management Service, and removes energy management authority from Bureau of Land Management (BLM) field offices. Title I creates a new bureau within the Department of the Interior (Interior) called the Office of Federal Energy and Minerals Leasing (FEML).

The FEML office would be responsible for all aspects of onshore and offshore leasing and lease development. With respect to onshore energy management, as explained in Section 101(b), this new office would be responsible for "renewable and nonrenewable energy resource exploration, siting, production, and development." To staff this office, Section 102

provides that the Secretary of the Interior (Secretary) may permanently transfer personnel from the BLM and other bureaus in Interior.

Title III – Onshore Energy Siting and Development Planning.

Title III establishes “comprehensive energy land use planning” for the stated purpose of promoting “coordinated State, tribal, regional, and Federal efforts to improve the siting of energy facilities on Federal lands and development of Federal energy resources . . . for the long-term economic and environmental benefit of the United States.” Section 301 explains further that one of the purposes of this provision is to designate “cost-effective, environmentally sensitive, energy zones on Federal lands.”

Section 302 establishes “Energy Siting and Development Teams” (Team) for each State with federal lands. These teams are to be comprised of the Director of BLM, the Chief of the Forest Service, a representative from the Bureau of Indian Affairs “and all Federal agencies and departments that have expertise in energy siting and development, land and water resource management, and conservation.” The BLM State Director for each State shall be the Chair of the Team for that State. In addition, the BLM Director has authority to invite other representatives to serve on the Team such as “environmental nongovernmental organizations,” and those from the “energy, transportation, tourism, and recreation industries.”

One of the most significant provisions is in Section 303 regarding the development of “Strategic Plans” for each State with federal lands that consists of a “comprehensive energy plan for the Federal lands and resources in the State.” Prior to developing these Strategic Plans, each State Team established in Section 302 must first perform an initial assessment of Federal lands and energy resources.

This initial assessment must include analysis of: (1) potential Federal renewable and nonrenewable energy resources located in that State; (2) existing production and transmission infrastructure and projections for future production and transmission requirements in the State; (3) status of the ecosystem and ecology of the State and relevant economic factors; and (4) areas that should not be open for development.

Within two years of completing the initial assessment, Section 303 requires each State Team to prepare a Strategic Plan, which shall, among other things:

- describe short and long term goals for siting and development of Federal energy resources;

- recommend long-term monitoring measures for important ecological areas;
- identify “State, tribal, and Federal priority issues within the State;”
- describe ecosystem-based management solutions and policies to address the priority issues; and
- identify distinct “zones” for production of nonrenewable and renewable energy.

Within 4 years after approval of the Strategic Plan for a State, and at least once every 5 years, the initial assessment prepared under Section 303 must be updated with more detailed information and with any new information that becomes available after the Plan is approved. Similarly, each Strategic Plan must be reviewed and revised at least once every 5 years. The Strategic Plans will be available for public review and comment.

The BLM Director and Chief of the Forest Service are tasked with developing and issuing regulations to implement this Title.

The proposed Strategic Plans are considered “major federal actions” and will therefore also require preparation of an Environmental Impact Statement under the National Environmental Policy Act (NEPA). It is not clear whether these Strategic Plans will also serve to add additional mitigation measures and conditions of approval for development on existing leases, or serve only to apply to future leasing, and future development on that leasing.

Title V – Oil and Gas Royalty Reform.

Title V addresses federal oil and gas royalty issues that have been advocated by Democrats for many years. As written, this provision will introduce significant changes to several provisions of the Federal Oil and Gas Royalty Management Act of 1982. The changes encompass a broad array of topics including the following:

- Eliminates Onshore and Offshore Royalty-in-Kind Program;
- Fines and Penalties: treble damages plus interest on willful violations of royalty regulations and up to \$25,000 per day for other violations;
- Interest: eliminates interest on overpayments;
- Continuing liability for royalty payments by operating interests and record title owners; and
- Establishes pilot program for the automatic transmission of production data (upstream & midstream).

Title VI – Onshore “Reforms.”

Title VI encompasses significant changes to the Federal onshore energy leasing program. In conjunction with the creation of the Office of Federal Energy and Minerals Leasing, that office is required to prepare a 5-year leasing program beginning in 2012 and “periodically revise, and maintain” these plans.

The leasing program must identify “areas of land subject to the leasing program; . . . any environmental stipulations, timing limitations, or surface occupancy restrictions . . . recommended frequency [for offering these lands for lease]; and the earliest date the lands . . . shall be offered for lease.”

The Mineral Leasing Act is also amended to reduce to mandatory minimum number of lease sales from 4 per year, to only a minimum of one lease sale each year; but more can be held if necessary. Only lands identified and available through the 5-year leasing program will be up for auction.

The effect these proposed changes will have on the existing leasing program is unclear at this time. The proposed changes do not explain how leasing will be conducted, if at all, from the time this legislation is enacted until the 5-year leasing plan is prepared and implemented sometime after 2012. Because this legislation amends provisions of the Mineral Leasing Act, it appears upon preliminary review that leasing of federal minerals in the interim period may be deferred until a 5-year leasing plan is in place.

Lease Exclusion Nominations.

A significant provision in Title VI requires the Secretary to issue new regulations for procedures for “receipt and consideration of nominations for any area to be offered for lease or **to be excluded from leasing.**” Section 601(h) (emphasis added).

Leasing Program Development.

The development of the new leasing program appears open to State and local governments with the Secretary’s discretion to invite “any other person” (*e.g.* nongovernment environmental organizations) to provide input into the program’s development. After a proposed leasing plan developed, the Governor of the state where the lands are proposed for leasing, is given a preview of the leasing program and the opportunity to comment on the proposed program.

After the Governor consistency review and any changes made therein, the proposed leasing program is then to be submitted to Congress, the Attorney General, and the Governors of the affected states where the Attorney General may submit comments regarding competition. The proposed leasing plan is also subject to "comments and recommendations as to any aspect of such proposed program."

At that point, the proposed plan is submitted to the President and Congress along with the comments submitted including a justification as to why certain comments were not incorporated into the plan. The Secretary of the Interior then has up to 6 months to approve. After final approval, the leasing program is then up for revision at least once a year.

Diligent Development – "Use it or Lose it"

Title VI also includes provisions for diligent development of leases. This provision is the so-called "use it or lose it" provision that has been pushed by environmental advocates who criticize the number of acres under lease that are not producing. The diligent development provision requires the Secretary to develop "benchmarks for oil and gas development" and the requirement that lessees submit a "diligent development plan showing how the lessee will meet the benchmarks." Lessees are subject to lease termination if they fail to comply with any requirements issued under the diligent development section.

Lease Terms

The primary term for new leases will be for 5 years instead of 10. The primary term can be extended by the Secretary for one year terms if the lease is producing or the lessee is diligently developing the lease. If a lessee extends the lease for each year after the primary term, the rental rate shall be "not less than double the rental rate that applied for the last year of the initial period." Non-producing lessees are also subject to biannual reports to the Secretary about the steps being taken to diligently develop the lease.

Royalty rates will be not less than 18.75% on "production removed or sold from the lease." The minimum bonus bid will be raised to \$2.50 per acre and rental rates on new leases shall be \$2.50 per acre.

Bidding on lease will no longer be by live auction but conducted only through sealed, competitive bidding. Noncompetitive leasing is repealed in its entirety.

The legislation also instructs the Secretary to promulgate "regulations that require oil and gas operators to use best management practices that ensure

the sound, efficient, and environmentally responsible development of oil and gas on Federal lands in a manner that shall avoid, where practical, minimize , and mitigate actual and anticipated impacts to environmental habitat functions resulting from oil and gas development.”

Title VIII – Imposition of Production Incentive Fee.

Title VIII establishes a production incentive fee for “all leases in effect on the date of enactment of this Act.” The fee applies in the fourth and fifth year of leases and will be \$4.00 per acre. Beginning in the sixth year, the fee will be raised to \$10.00 per acre. This fee applies to all leases that have “produced for less than 90 days in a calendar year.”

Preliminary Observations. The scope of the Federal Energy Bill is unprecedented and, if enacted, has potential significant ramifications for new leasing and development, but also development on existing leases. As we have seen during the creation of new federal Resource Management Plans over the past 8 years in the West, these planning efforts result in substantial delays for development of existing leases, and can create a de facto moratorium on development, as experienced in the Uinta Basin for the last three years. BLM and Forest Service are hesitant to authorize new projects until completion of new land use plan updates to ensure consistency and to avoid litigation.

The Federal Energy Bill proposes development of overarching Strategic Plans which will result in revision and amendment of each RMP in a given State. Given the continued update requirements for these plans, and related documents needed to comply with NEPA, FEML and Interior will be in a perpetual planning phase. On top of the Strategic Plans, the Federal Energy Bill requires creation of 5-Year Leasing Plans, which also require NEPA documents, and revision every year. These plans and plan updates will likely to be subject to the same types of legal challenges as are filed against lease sales, land use plan updates, and project approvals.

In addition to the likely delays resulting from such massive undertakings, energy companies will still need to perform site-specific analysis under NEPA to obtain project-level approvals. These site-specific analyses will need to be consistent with the applicable RMP for the resource area, and the state-wide Strategic Plan. Achieving consistency with the plans may be difficult given the perpetual changes contemplated for Strategic Plans and related assessments.

The comprehensive restructuring proposed for management and administration of federal energy leasing and development on federal lands involves amendment and/or interaction with numerous existing federal

statutes, including: the Mineral Leasing Act, Mineral Leasing Act for Acquired Lands, the Federal Oil and Gas Royalty Management Act, the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, the Federal Land Policy and Management Act, and the Energy Policy Act of 2005.

Detailed legal analysis still needs to be performed to determine the full extent of the potential implications of the proposed Federal Energy Bill, as well as whether certain provisions are viable under existing law.

There are significant opportunities to impact and influence this legislation. After release from committee, the legislation goes to the House, then Senate, then to a conference committee. There are also opportunities to engage the Office of Management and Budget, and the House and Senate Appropriations committees that will be eventually tasked with funding the new FEML Office and related programs.

For a copy of the legislation or for more information, please contact [Bret Sumner](#) or [Andrew Bremner](#).



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