VENABLE LLP

capitol view

A PUBLICATION OF VENABLE'S LEGISLATIVE GROUP

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In this issue

THE CONGRESS

Energy Wars

In the approximately four weeks between the end of the July 4 Recess and the beginning of the August Recess, the Congress spent much of its time trying, unsuccessfully, to adopt a legislative policy in response to the sharp increase in gas prices and the overall rise in the cost of energy in general. The atmosphere among Members in both the Senate and the House seemed to reflect the lack of legislative achievements. On July 30, the Senate failed to invoke Cloture on S.3335, the Jobs, Energy, Families and Disaster Relief Act, which would extend tax credits for renewable energy. Majority Leader Harry Reid (D-NV) complained that this was the 92nd filibuster conducted by the Republicans in this session of Congress. In early June, the Republican Leadership in the Senate had employed a parliamentary maneuver to force the Clerk to read the entire 491 page America's Climate Security Act (S.3036) on the Senate Floor, a task taking more than 10 hours. The Republican Leadership complained that the Senate Majority Leader has used the procedural tactic of "filling the amendment tree" and thereby preventing Senators from offering amendments to the underlying bill more than 13 times since the beginning of the 110th Congress. Republicans charged that Reid has employed this tactic more often than any other Majority Leader since 1985.

In the House, a Motion to Suspend the Rules and pass H.R.6604, the Commodity Markets Transparency and Accountability Act concerning speculation in oil markets, failed on July 30. On August 1, Speaker Nancy Pelosi (D-CA) adjourned the House after refusing to schedule a vote allowing drilling for oil on the Outer Continental Shelf. The House Republican Leadership had opposed the Adjournment Motion and insisted on a vote on the drilling amendment. Even after the House adjourned, several dozen Republican Members remained on the House Floor demanding that the Speaker call the House back in session and allow a vote on the amendment. These protest sessions on the House Floor continued through the August Recess.

So far the 110th Congress has adopted 294 public laws, fewer than any Congress has enacted in the last 20 years. Apparently the public was not impressed with this performance by the Congress. A CNN Opinion Research poll released on July 31 found that 22% approved of how Congress was doing its job, while 77% disapproved.

In addition to the renewable energy tax credit bill, the Senate considered but failed to pass a variety of energy related bills, including measures to increase regulation of energy futures trading (S.3268), subject the Organization of Petroleum Exporting Countries to domestic U.S. antitrust statutes (H.R.2264), and require oil companies to invest some of their profits in alternative energy products (S.3044). Senate Republicans also joined their House colleagues in unsuccessfully pushing for a vote on a measure to allow drilling for oil in currently prohibited areas.

On July 9, the Senate gave final approval to H.R.6304, the Foreign Intelligence Surveillance Act Amendments of 2008, by a vote of 69-28. The Act gave the Administration enhanced authority to conduct electronic surveillance of persons located outside the United States in order to acquire foreign intelligence information and also provided immunity to telecom companies that had assisted the government in previous surveillance programs. The President signed the bill on July 7 (P.L.110-261).

The Senate gave final Congressional approval to the massive Housing and Economic Recovery Act of 2008 (H.R.3221) by a vote of 72-13 on July 26. This bill was passed in response to the mortgage and housing crisis and represents the biggest involvement in the financial markets by the Federal Government since the New Deal. Among its major provisions are a reinforced government safety net for Fannie Mae and Freddie Mac and programs administered by the Federal Housing Administration to assist homeowners with troubled mortgages to refinance their loans at lower rates. The President signed the bill into law (P.L.110-289) on July 30.

On the same day the President signed the Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act (H.R.5501) into law (P.L.110-293). This program authorizes up to $48 billion over five years for anti-retroviral drug treatment and training for at least 140,000 new health care workers to provide HIV prevention, treatment and care.

In the final days before leaving for the August Recess, the Congress adopted the Conference Reports on the College Opportunity and Affordability Act (H.R.4137) and the Consumer Product Safety Improvement Act (H.R.4040). H.R.4137 reauthorized the Higher Education Act and increased the maximum Pell grant for low income students from the current level of $5,800 to $8,000 per year by the academic year of 2014-2015. It also established a $10,000 student loan forgiveness program for graduates who take jobs in certain public service positions such as teaching or nursing. The Consumer Act would ban lead in children's products, establish toy safety standards, protect whistleblowers and increase fines for manufacturing of faulty products. The President signed both of these measures into law on August 14.

The Road Ahead

The Congress returns from its August Recess on September 8. The Senate will then turn to consideration of the National Defense Authorization Act for FY 2009 (S.3001). No doubt the Republican Leadership in both Chambers will resume the energy wars with legislative maneuvers to obtain a vote on measures to provide for oil drilling on the Outer Continental Shelf. Both the Senate and the House will also renew consideration of legislation to curb speculation in the oil futures markets.

One possible avenue for compromise on the energy issue could be the proposed New Energy Reform Act of 2008, put together shortly before the start of the August Recess by a bipartisan group of five Democratic and five Republican Senators led by Senator Kent Conrad (D-SD) and Senator Saxby Chambliss (R-GA). The draft plan contains three basic components: efforts to transition vehicles to non-petroleum based fuels, increased commitments to conservation and energy efficiency, and targeted production of domestic energy resources. The domestic production component would retain a 50 mile offshore buffer zone where no new oil production would be allowed, but would authorize Virginia, North Carolina, South Carolina and Georgia to determine if drilling would be allowed beyond that zone.

It is not clear if this limited drilling allowance would satisfy those Members favoring increased domestic oil production. The proposals they favor simply allow drilling on the Outer Continental Shelf rather than leaving the decision up to a limited number of state legislatures. Moreover, the New Energy Reform plan does not allow drilling in the Alaska National Wildlife Reserve. In addition to resolving these energy issues, the Congress will try to enact legislation in September to extend a package of renewable energy tax incentives that expire at the end of the year.

During September, Congress may also consider a new "stimulus supplemental" bill. The Chairman of the Senate Appropriations Committee, Senator Robert Byrd (D-WV), released a draft supplemental proposal for $24.1 billion in spending on housing, infrastructure, natural disaster recovery and energy assistance. Speaker Nancy Pelosi (D-CA) has spoken of a stimulus supplemental of $50 billion. The House Minority Leader, John

Boehner (R-OH), and the White House Budget Director, Jim Nussle, are not convinced of the need for a new stimulus package.

While Congress may attempt to adopt a number of the 12 Appropriations bills, it will also need to pass a Continuing Resolution before adjourning to fund the Federal Government for a portion of FY2009. The House Democratic Leadership has announced a target sine die adjournment date of September 26. However, those targets are subject to change. Congressional Democrats would like to avoid the need for a post election lame duck session. This would be particularly the case if Senator Obama won the Presidential election. In that case, the 111th Congress could convene in 2009 with Democrats in control of the Senate, the House and the Presidency.

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ALTERNATIVE ENERGY ON THE OUTER CONTINENTAL SHELF

Wind farms on land in the United States are providing natural energy at increasing rates. In 2007, the United States reached a wind energy generating capacity of roughly 16 billion kWh.[1] While this production is impressive, it is a tiny fraction of the estimated 10,777 billion kWh of potential annual United States wind energy.[2] Much of the gap between actual output and potential output could be closed by utilizing the potential wind energy on the Outer Continental Shelf (OCS) of the United States. Aesthetic, radar and environmental concerns have impeded the realization of this potential, but scientific studies, technological advances, tax benefits, and new legislation have the potential to catalyze this profitable, zero-emissions energy industry in the current era of environmental consciousness.

Current Status of Wind Energy

Recent European success in wind energy on the OCS has entrepreneurs hurrying to take advantage of the United States' potential.[3] Wind rushing over the OCS blows stronger and more steadily than wind slowed by forests, hills, and buildings on land. It also tends to continue blowing during the hottest times of the day when energy is needed most.[4] Additionally, the transportation and construction problems that on-land projects face are mitigated off-shore where marine shipping and handling equipment is better adapted to the size and lifting challenges posed by the large

[1] WIND ENERGY FAST FACTS (2008), http://www.awea.org/newsroom/pdf/Fast_Facts.pdf.
[2] *Id.*
[3] W. Musial & S. Butterfield, Future for Offshore Wind Energy in the United States (June 28-29, 2004) (on file with U.S. Department of Energy) *available at* www.nrel.gov/docs/fy04osti/3613.pdf.
[4] Steve Hamm, *Wind: The Power. The Promise. The Business.*, BUSINESSWEEK, July 7, 2008, at 53.

turbines.[5]

The financial outlook for wind energy is bright. Wind farms on the OCS are better located to provide energy to large cities where energy is needed most and energy rates are highest.[6] The Renewable Energy Tax Credit has been extended through 2008.[7] Moreover, legislation to further extend the tax credit for wind power has passed the House and is currently pending in the Senate.[8] Despite the practical and economic advantages, wind energy projects have been met with opposition.[9]

Opposition to Wind Energy

Opponents of wind energy cite aesthetic, radar, and environmental concerns. However, technology may enable future projects to avoid aesthetic opposition altogether. Floating deepwater platforms are being developed that will enable companies to locate wind farms at depths greater than the current 60 meter limit.[10] This will make it possible to place wind farms out of view from the coast.

In 2006, the Department of Defense released a report stating that wind turbines present challenges to radar systems and consequently cause problems for aviation and national defense. The Department of Defense noted, however, that there are ways to mitigate the negative effects, and these methods should be applied on a case-by-case basis.[11]

Opponents also cite harmful effects on the environment. The National Oceanographic and Atmospheric Administration has warned that the electromagnetic waves from underwater cables could disrupt senses that certain fish need for hunting and navigation. In Europe, however, Danish officials reported that marine life has actually increased near turbine supports.[12]

Original concerns that the blades posed a threat to migratory birds have also been countered. New, smooth towers discourage nesting, and the slow moving blades do not pose the same threat that the old-style, faster blades posed.[13] Additionally, radar images of migrating birds show that birds perceive the presence of the wind turbines and fly around them even in times of bad visibility.[14]

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[5] Musial, *supra* note 3.
[6] 20% WIND ENERGY BY 2030: INCREASING WIND ENERGY'S CONTRIBUTION TO U.S. ELECTRICITY SUPPLY (2008), www1.eere.energy.gov/windandhydro/pdfs/41869.pdf.
[7] *Union of Concerned Scientists, Production Tax Credit for Renewable Energy*, http://www.ucsusa.org/clean_energy/clean_energy_policies/production-tax-credit-for-renewable-energy.html (last visited July 28, 2008).
[8] H.R.6049, S.3335.
[9] Hamm, *supra* note 4, at 52.
[10] W. Musial & S. Butterfield, Energy from Offshore Wind (Feb. 2006) (on file with U.S. Department of Energy).
[11] OFFICE OF THE DIR.OF DEF. RESEARCH AND ENG'G, 109TH CONG., REPORT TO THE CONG. DEF. COMMS.: THE EFFECT OF WINDMILL FARMS ON MILITARY READINESS (2006).
[12] Leah Hoenen, *Decision of Offshore Wind Farm Could Come as Early as July 31; Federal Regulations Critical to Wind Farm*, CAPE GAZETTE, July 11, 2008.
[13] Linda Halstead-Acharya, *South-Central Montana a Hot Spot for Wind*, BILLINGS GAZETTE, July 11, 2008.
[14] MIKE ROBINSON & WALT MUSIAL, OFFSHORE WIND TECHNOLOGY OVERVIEW (2006), http:://www.nrel.gov/docs/gen/fy07/40462.pdf.

Proposed Rule

Demonstrated by success on land in the United States and on the OCS in Europe, wind energy on the OCS in the United States has potential to significantly contribute to the country's energy production. The industry's environmental and economic advantages seem to outweigh the radar, environmental, and aesthetic concerns that are increasingly mitigated by developing technologies and studies. In response to the circumstances, the U.S. Department of the Interior's Minerals Management Service published a proposed rule to clarify the procedure that will ensure that all wind energy activities capitalize on the advantages in accordance with aesthetic, radar, and environmental concerns.

On July 9, 2008, the U.S. Department of the Interior's Minerals Management Service (MMS) published a proposed rule in the Federal Register that will establish a program to grant leases, rights-of-use and easements (RUE), and rights-of-way (ROW) for orderly, safe, and environmentally responsible alternative energy projects and alternate uses of existing facilities on the OCS. This includes the production, transportation, and transmission of energy from sources other than oil and gas on locations with or without existing energy production facilities. Activities including site characterization, technology testing, construction, operation, and decommissioning will be regulated. The Energy Policy Act (EPAct) of 2005, which amended the Outer Continental Shelf Lands Act, grants the MMS this authority. *Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 73 Fed. Reg. 39376 (proposed Jul. 9, 2008) (to be codified at 30 C.F.R. pts. 250, 285, 290).*

To qualify for a lease or grant under the proposed rule, you must show that you are either: a citizen or a national of the United States; an alien lawfully admitted for permanent residence in the United States; a private, public, or municipal corporation organized under the laws of any state of the United States, any of its States or territories, or the District of Columbia; or an association of any of the parties described previously. 30 Fed. Reg. 39461 (to be codified at 30 C.F.R. pt. 285).

Available Opportunities

The MMS has proposed two types of leases, a commercial lease and a limited lease, to be available to those that qualify. A commercial lease "would provide the access and operational rights, subject to necessary approvals, to produce, sell, and deliver power on a commercial scale, through spot market transactions or a long-term power purchase agreement." Id. at 39392 (to be codified at 30 C.F.R. pt. 285). A commercial lease would be issued over the long term, up to approximately thirty years, with possible renewals. A limited lease, on the other hand, does not confer rights of commercial sale or distribution of produced energy, but would provide the access rights necessary to conduct preliminary activities such as site assessment and technology testing. A limited lease would be issued for a shorter term, up to five years, with possible renewals. Id. at 39470 (to be codified at 30 C.F.R. pt. 285).

The MMS anticipates that companies will prefer to acquire a commercial lease rather than a limited lease, but proposes the option of the limited lease so that small companies can pursue alternative energy opportunities without the expenses of a long-term lease. With a limited lease, a company can assess the viability of alternative energy without the expense and documentation of the bidding and lease acquisition associated with commercial leases. Nonetheless, the MMS encourages applicants to pursue a commercial lease because commercial leases can be relinquished by the lessee if the lessee loses interest in the project. Id.

Rights to use the land for alternative energy may also be obtained through ROW grants and RUE grants. A ROW grant authorizes companies with alternative energy projects not on the OCS to use the OCS to install cables, pipelines, and associated facilities that involve the transportation or transmission of electricity or other energy product from the alternative energy projects. Id. at 39403 (to be codified at 30 C.F.R. pt. 285).

A RUE grant is similar to an MMS-issued alternative energy lease in that the grant authorizes the holder to construct and maintain facilities on the OCS that support the production, transportation, or transmission of electricity or other energy product from any alternative energy source. A RUE grant is different from a lease under the proposed rule because a RUE grant is issued for alternative energy projects that are located on state submerged lands, rather than more distant locations on the OCS. Id.

Additionally, an Alternate Use RUE grant will be used when a company seeks to use an existing oil or gas facility as an alternative energy facility. The MMS proposes an approach where the original lessee and the alternate use applicant share a balance of the financial assurance and decommissioning responsibilities. Id. at 39434 (to be codified at 30 C.F.R. pt. 285).

The MMS also proposes a procedure for dividing the rights, at the outset, of a previously unused location. During the leasing process, the MMS will clarify the scope (e.g. wind, wave, current, etc.) of activity included in the lease. Multiple companies could hold a lease for a location, but each would hold the exclusive right to a different form of energy. Id. at 39393 (to be codified at 30 C.F.R. pt. 285).

Lease and Grant Information

In addition to initial fees such as up-front acquisition fees or bid deposits, the MMS proposes that the United States receive a return throughout the duration of the lease. For commercial leases, the annual operating fee would equal the product of the installed capacity expressed in megawatts, the total hours in a year (8760), the capacity factor (the anticipated efficiency of the facility's operation expressed as a decimal between zero and one), the retail electric power price expressed in dollars per megawatt hour, and the operating fee rate (beginning at 0.01 and increasing over time). Id. at 39412 (to be codified at 30 C.F.R. pt. 285). Limited leases would be charged an acreage-based rental fee during their assessment activities. Id. at 39477 (to be codified at 30 C.F.R. pt. 285). Additionally, a minimum annual fee per acre or per turbine may be assessed during periods of inactivity. Id. at 39407 (to be codified at 30 C.F.R. pt. 285).

States with a coastline within fifteen miles of the geographic center of the project would receive a share of the revenues under the proposed rule. Under the EPAct, the sharing rate of the total revenues is mandated to be 27 percent. States within fifteen miles of the geographic center of the project would get a portion of this 27 percent proportional to their relative distance from the center of the project. Id. at 39481 (to be codified at 30 C.F.R. pt. 285).

Required Preparation

The MMS is proposing to require three types of plans from an interested company, depending on the type of instrument held and the activity conducted, before a company conducts activities on the lease or grant. Id. at 39482 (to be codified at 30 C.F.R. pt. 285). The three types of plans are a Site Assessment Plan (SAP), a Construction and Operations Plan (COP), and a General Activities Plan (GAP). Id. The plans must demonstrate, among other requirements, that the proposed activities conform to applicable laws, do not unreasonably interfere with other uses of the OCS such as national security or defense, and do not cause undue harm to natural resources. Id. at 39483, 39485, 39490 (to be codified at 30 C.F.R. pt. 285). Additionally, each plan must describe how the visual impact of the project will be analyzed. Id. at 39484, 39486, 39491 (to be codified at 30 C.F.R. pt. 285).

Conclusion

Wind Energy is playing an increasingly important role in providing a source of clean affordable energy in the United States electricity grid. The Department of Interior's Minerals Management Service proposed July 9 rule establishes a program for participation in a balanced wind energy program on the OCS of the United States.

This article is the joint product of several Venable attorneys. If you have questions on the proposed rule or participation in the OCS program, please call Jim Burnley, our Partner in Venable's Legislative Practice Group, at 202-344-4054.

VENABLE IN THE NEWS

Jim Burnley discussed the prospects of privatizing some public roads, bridges and tunnels in a segment on Fox Business, broadcasted on July 31. Jim is a Partner in Venable's Legislative Practice and served as Secretary of Transportation for President Ronald Reagan.

The Chair of Venable's Legislative Practice Group, **Mike Ferrell**, was quoted on the process of recruiting former Members of Congress in the July 30 issue of Legal Times.

Our Partner, **Bill Donovan**, was quoted in the July 27 issue of Bloomberg on the impact of the new housing legislation.

Tiffany Moore, a Senior Legislative Advisor in Venable's Legislative Practice Group, was recently recognized for her achievements by the Western Michigan University Alumni Association. Prior to joining Venable, Tiffany served as the Assistant United States Trade Representative for Intergovernment Affairs and Public Liaison.

The Indiana Historical Society named former **Senator Birch Bayh** an Indiana "Living Legend" at the annual Living Legend Gala on July 18. Birch is a Partner in Venable's Legislative Practice Group and served for 18 years as a United States Senator from Indiana.

NEW VENABLE PARTNER

Gregory Gill has joined Venable's Legislative Practice Group as a Partner. Prior to joining Venable, Greg served as Executive Vice President of the government affairs firm of Cassidy and Associates. He was also Legislative Director for then House Minority Whip Steny Hoyer (D-MD) and advised Representative Hoyer as a Staff Associate on the House Appropriations Committee.

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Capitol view

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