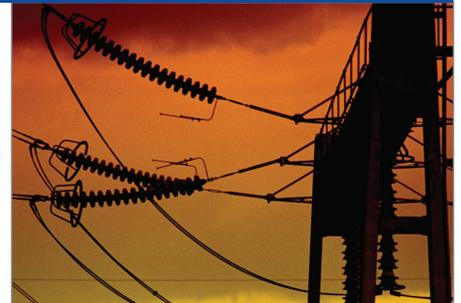


Washington Energy Update

November 2013

In This Issue...

- [Trans-Pacific and Trans-Atlantic Treaties: Opportunities and Challenges for LNG Exports](#)
- [Suit Against Chinese Solar Firms Seeks Nearly US\\$1 Billion in Damages](#)
- [Major Energy Bills Get Started in Congress, But Enactment Unlikely](#)



Each bimonthly issue of the *Washington Energy Update* highlights useful energy regulatory tips and a wide range of issues impacting the energy markets.

If you have any questions or would like more information about anything appearing in this issue, please contact the editors or your White & Case relationship lawyer. Please let the editors know if you would like a particular topic covered in a future issue or have suggestions on how this newsletter can be improved.

Editorial Contacts

Daniel Hagan
Partner, Washington, DC
+ 1 202 626 6497
dhagan@whitecase.com

Jane Rueger
Counsel, Washington, DC
+ 1 202 626 6534
jrueger@whitecase.com

White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
United States
Tel: + 1 202 626 3600
Fax: + 1 202 639 9355

Energy Highlights

- The US Internal Revenue Service (IRS) has updated its guidance for “advanced nuclear power facilities” that can claim the 1.8 cents-per-kilowatt-hour production tax credit. The rules describe the allocation method for the national megawatt capacity limit for the credit and the application process, which has been streamlined so taxpayers need only apply to IRS. As initially set forth by IRS in 2006, the application had to be sent to the IRS and the US Department of Energy (DOE) for certification. IRS will now get DOE’s approval in lieu of the taxpayer. The new guidance clarifies the rules for facilities that are owned directly or indirectly by more than one party. It also allows that the electricity can be sold to a related person if thereafter it is sold to an unrelated party. The IRS says the credit will not be reduced even if the facility claims other grants, tax-exempt bonds, subsidized energy financing and other credits. An “advanced nuclear facility” is defined as being designed and approved by the Nuclear Regulatory Commission after December 31, 1993, and placed in service before January 1, 2021. The production credit applies to electricity produced during the first eight years of service. The full text of the IRS guidance is posted at <http://www.irs.gov/pub/irs-drop/n-13-68.pdf>.
- On October 17, 2013, the US Federal Energy Regulatory Commission (FERC) issued a clarifying order requiring sellers of reactive power to file a rate schedule with FERC for such service, even where there is no compensation for the service. The new rate schedule order would likewise apply for the provision of reactive power within the reactive power deadband set forth in the applicable interconnection agreement. FERC said this new filing requirement will only be enforced on a prospective basis. To assist those affected by the new rule, FERC has directed its staff to conduct a workshop “to explore the mechanics of public utilities filing reactive power rate schedules for which there is no compensation.” At press time, the date for this workshop had not been finalized. FERC opened Docket No. AD14-1-000 for purposes of the workshop.
- The nonpartisan Joint Committee on Taxation (JCT) has provided a revenue estimate for legislation introduced by Senator Chris Coons (D-DE) that would expand the types of entities that qualify as master limited partnerships (MLPs). The bill (S. 795), which would allow certain renewable energy businesses to qualify for MLP tax treatment, would reduce federal revenues by US\$1.3 billion over ten years, JCT says. Specifically, the bill would amend section 7704 of the Internal Revenue Code to expand the definition of “qualifying income” for MLPs to include income and gains from renewable and alternative fuels (in addition to fossil fuels), including energy derived from thermal resources, waste, renewable fuels and chemicals, energy-efficient buildings, gasification, and carbon capture in secure geological storage. Income from nonrenewable natural resources currently qualifies for MLP treatment, which has led to a concentration of MLPs in the oil and gas sectors, particularly pipelines. Senator Coons argues that expanding MLPs to renewables will provide “parity” between green energy and energy from hydrocarbons. Senators Mary Landrieu (D-LA) and Susan Collins (R-ME) recently joined Senators Jerry Moran (R-KS), Lisa Murkowski (R-AK) and Debbie Stabenow (D-MI) as cosponsors of the bill.

Trans-Pacific and Trans-Atlantic Treaties: Opportunities and Challenges for LNG Exports

Corey Neal

The shale gas boom in the United States is often referred to as a windfall to customers, an unexpected lifeline to domestic manufacturers, and a game-changer in US energy (and national) security. With an abundant economically recoverable gas supply and increasingly efficient production techniques, producers are seeking to export liquefied natural gas (LNG) to markets abroad where LNG prices can be four or more times the natural gas prices in the United States. These efforts have been slowed by the long-delayed and deliberate US Department of Energy (DOE) review of LNG exports to countries with which the United States does not have a free trade agreement (FTA) that provides for “national treatment” of natural gas, many of which happen to be major global LNG importing countries.

By contrast, the Natural Gas Act (NGA) requires automatic DOE approval of LNG exports to countries with FTAs that provide for national treatment of natural gas. For that reason, shale gas may also be a key chip at the bargaining table of two of the largest FTAs ever reached by the United States that are currently under negotiation with the Europe Union and Pacific Rim countries. However, there are many challenges that may prevent these FTAs from freeing up LNG export authorizations.

DOE Export Authorization

DOE approval is required for any LNG export, regardless of destination. Under Section 3 of the NGA, DOE must authorize the export of natural gas unless it determines that the proposed export is “not consistent with the public interest.”

Applications to export LNG to countries without FTAs with the United States undergo a rigorous “public interest” review by the DOE’s Office of Fossil Energy. DOE considers many factors such as domestic need, adequacy of supply, the environment, geopolitics, and energy security. As part of its review of non-FTA country export applications, DOE took a two-year hiatus between its first non-FTA country approval to the Sabine Pass terminal in 2011 and the May 2013 authorization for exports by Freeport LNG. The DOE used that time to commission a study by NERA Economic Consulting to assess the potential macroeconomic impact of LNG exports. NERA concluded in December 2012 that the US would net economic benefits from LNG exports under each scenario it studied, such as amounts of 6 bcf/day, 12 bcf/day and unlimited exports. Upon review of the NERA study, and in the face of stiff opposition from domestic manufacturers and environmental interests, DOE approved the Freeport LNG application and three additional applications this year.

However, in reviewing individual applications, DOE considers the cumulative amount of domestically produced LNG and available domestic gas supply compared to domestic demand, so previously approved export volumes can impact successive projects. In the order approving non-FTA exports from Dominion Cove Point LNG, LP, DOE noted that cumulative export volume now authorized “moderately exceeds the 6bcf/d volume evaluated by NERA in its ‘low’ export cases.” The order also commits to “continue to assess the cumulative impacts of each succeeding request for export authorization on the public interest with due regard to the effect on natural gas supply and demand fundamentals.” So far, DOE has only authorized five applications for the export of LNG to non-FTA countries:

| Company | Quantity | Conditionally Approved |
|--|--|------------------------|
| Sabine Pass Liquefaction | 2.2 (bcf/d) | 5/20/2011 |
| Freeport LNG Expansion & FLNG Liquefaction | 1.4 (bcf/d) | 5/17/2013 |
| Lake Charles Exports | 2.0 (bcf/d) | 8/7/2013 |
| Dominion Cove Point LNG | 1.0 (bcf/d): FTA 0.77 (bcfd): non-FTA | 9/11/2013 |
| Freeport LNG Expansion & FLNG Liquefaction | 0.4 (bcf/d) | 11/15/2013 |

Some opponents to LNG exports have called on DOE to reject additional applications beyond the volume already authorized or at least to pause again to re-evaluate economic impacts of authorizing additional export volumes. More than 20 applications to export LNG to non-FTA countries await approval.

By contrast, export applications to countries with which the United States has an FTA are generally allowed to sidestep this process. Section 3(c) of the Natural Gas Act automatically deems proposals to export natural gas to counties with which the United States has an FTA to be in the public interest, so long as the FTA requires “national treatment” for trade in natural gas. Most US FTAs provide for “national treatment” of natural gas; only two US FTAs—with Costa Rica and Israel—do not. For all of the US’s other free trade partners including South Korea, the world’s second largest importer of natural gas—authorization to export LNG is automatic upon application. The countries with which the United States currently has an FTA requiring national treatment of natural gas are: Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea and Singapore.

Trade Agreements Under Negotiation

While DOE works through its backlog of export applications and the volume of economically recoverable natural gas in the United States continues to rise, the United States is negotiating two of the largest FTAs since NAFTA: the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union and the Trans-Pacific Partnership Agreement (TPP) between nations on both sides of the Pacific basin.

On June 14, EU member states gave the European Commission permission to begin talks on a trade agreement with the United States that, if completed, would be the largest bilateral trade agreement ever negotiated. The TTIP, colloquially known as the “economic NATO,” aims to eliminate remaining tariffs and harmonize regulations to lower the costs of business and pave the way for investment. While details of the negotiations are confidential, it was reported that the energy sector was an area of focus in the latest round of talks on November 11 through 15.

The next round of talks will take place in Washington, DC, in December and LNG trade will loom large over negotiations between the United States and the world’s largest single market. Demand for EU natural gas exports is now largely met by Russia, but the relationship is less than amicable. The EU recently brought antitrust claims against Gazprom, Russia’s state-owned gas company. Moreover, the increased US domestic supply has already impacted European markets even before LNG exports leave US ports. The increased domestic supply of natural gas in the United States has diverted LNG previously destined for import into the United States elsewhere, increasing global supply and putting price pressure on other suppliers. Several EU countries such as Bulgaria—which last year was able to obtain a 20 percent price cut on Gazprom supplies—have successfully renegotiated long-term contracts. With European gas prices still hovering at US\$11 to \$12 per MMBTU (million British thermal units), however, EU nations likely would welcome direct LNG trade with the United States and automatic access to cheaper US supplies. US natural gas prices are currently around US\$3.50 and, even adding liquefaction and transportation costs, would be less than current European prices.

Meanwhile, negotiators from 12 Pacific Rim nations are sprinting to meet an ambitious year-end goal to finalize a sweeping multilateral trade partnership, the TPP. The TPP pact aims to meet two goals of the Obama administration simultaneously: to strengthen relationships with Southeast Asia to counterbalance China’s growing regional influence and to increase the amount of exports from the United States. The TPP is a key piece of both strategies. According to the US Trade Representative’s office, the countries taking part account for nearly 40 percent of global economic output and one-third of world trade. Nations currently engaged in negotiations with the United States are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

Many of these nations are not major LNG importers or already have FTAs with the United States that qualify for automatic export authorization under NGA Section 3(c). Japan’s entrance into TPP negotiations earlier this year, however, stretched the potential accord’s economic reach, especially with respect to US LNG exports. Japan is currently the world’s largest importer of natural gas by volume. According to the US Energy Information Administration (EIA), Japan consumed about 37 percent of global LNG in 2012. Following the March 2011 tsunami that damaged several nuclear reactors, Japan idled the majority of its nuclear generation fleet, becoming even more reliant on natural gas for electricity. The EIA states that Japan, with which the United States currently does not have a FTA, relies on LNG supplies from Malaysia, Russia, Qatar, Australia and Indonesia. Japanese prices of imported LNG remained above US\$16 per MMBTU last winter, more than four times the price of natural gas in the United States. In March 2013, Japan announced that it intended to participate in TPP talks, officially joining negotiations in July. Japan has been clear that access to US LNG is a top priority driving its decision to engage in TPP negotiations.

Opportunities and Challenges

Given the streamlined approval of LNG export applications to FTA nations under NGA Section 3(c), any potential free trade deal that provides for national treatment of natural gas has positive implications for the domestic natural gas industry. With long construction lead times and billions in capital costs, financing for LNG export projects hinges on securing supply contracts in advance of construction. Opening new FTA markets, particularly with Japan, could help both to reduce regulatory uncertainty and increase market access. The United States is not currently a major supplier of natural gas to Japan, but that could change. Already, Freeport LNG, which plans to reconfigure its existing import terminal in Texas to produce and export LNG and received authorization to export LNG to non-FTA nations in May and November 2013, has signed a supply deal with two Japanese utilities. Dominion Resources, which received the fourth DOE permit to export LNG to non-FTA countries, will supply LNG from its Cove Point LNG Terminal in Maryland to a Japanese trading house as well as an Indian customer. Other Japanese utilities and trading companies have agreements in place to purchase US-produced LNG from facilities that are still awaiting DOE approval. Including Japan among the ranks of FTA nations that qualify for automatic export authorization under Section 3(c) of the NGA would expedite US exporters’ opportunity to lock up Japanese demand that offers a significant premium to domestic gas prices.

Since approvals to export to the US’s free trade partners are statutorily deemed in the public interest, so long as the FTA includes a “national treatment of natural gas” provision, FTAs with major LNG importers may allow LNG export projects to continue to move forward even if DOE takes another prolonged break in

approving non-FTA exports. Other than specifying the order in which it will process applications, DOE has not provided details of its timetable for review, and there is no statutory deadline by which DOE must act. Given the lengthy, uncertain review process and DOE's cautionary approach, both the TPP and TTIP offer some cause for optimism to exporters, especially those near the bottom of DOE's queue.

In addition, US negotiators recognize the value of natural gas as a bargaining chip when negotiating with nations in need of additional gas supply or looking to break the grip of current producers. Having LNG on the table could bring down tariff barriers in other "sensitive industries," such as agriculture and automotive. How much leverage natural gas provisions afford can only be guessed, however; consistent with the US practice of negotiating trade pacts, both the TTP and TTIP are being negotiated in private, and talks will remain confidential until an agreement is reached.

But hopes that these agreements will unleash a fury of domestically produced natural gas exports must be tempered. "National treatment of natural gas" provisions are not guaranteed in any final accord, and will undoubtedly encounter political pressure in both the TTIP and TPP negotiations. Already these trade agreements face domestic opponents, raising objections similar to those raised against DOE approval of NGA Section 3 LNG export applications. For example, environmentalists argue that additional exports will hasten the practice of hydraulic fracturing in the United States and increase carbon emissions abroad. The Sierra Club, for example, has consistently vocalized its objections to facilitating natural gas exports through FTAs. In addition, domestic energy-intensive industries, such as those using manufacturing processes that are heavily dependent on natural gas and gas-fired power producers, have also questioned the net economic benefits of LNG exports. Executives are concerned that natural gas exports will erode the competitive advantage associated with the cheap supply of natural gas at home. They argue that exporting LNG from the United States will raise historically low domestic prices and threaten a potential industrial renaissance. These concerns arise in the context of TTIP and TPP as well as the DOE review process.

Moreover, negotiating a trade agreement is a slow process, and the window of opportunity for US LNG exports may be narrow. Other difficult trade issues, unrelated to energy and natural gas, remain and could trip negotiations. Neither agreement has been finalized, let alone approved by the US Congress. TPP negotiations are moving briskly, but the self-imposed year-end target for an agreement looks more and more unlikely. TTIP negotiations are expected to move at an even slower pace.

While it remains unclear the speed at which the DOE will process non-FTA export applications, the possibility remains that the DOE application process for many would-be exporters may yet outpace TPP and TTIP finalization and approval. Many developers will want to get the ball rolling on LNG projects in the United States long before these trade deals are likely to be finalized.

The steep returns from US LNG exports that LNG exporters are hoping to chase may not be available for long. As Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) argued in her August 6, 2013 white paper, "The Narrowing Window: America's Opportunity to Join the Global Gas Trade," while global demand for natural gas is growing, new consumers are quickly becoming locked into long-term supply contracts with LNG exports from competing countries such as Australia and Qatar. In addition, on October 17, Canada announced a long-awaited, and wide-ranging, trade deal with the EU: the Comprehensive Economic and Trade Agreement (CETA). Canada, also a party to the TPP talks, is forging ahead with its own plans to export LNG and has already approved several LNG export projects on its west coast. For example, British Columbia recently announced an agreement with Chinese energy company CNOOC Ltd. giving CNOOC exclusive rights to pursue the proposed Aurora LNG export terminal on government-owned land in a joint venture with Japanese oil company Inpex Corp. and engineering firm JGC Corp. China is also promoting its own Asian trade bloc, the Regional Comprehensive Economic Partnership. If these agreements result in trade with new LNG consumers, those customers may be off the market for decades due to the typical long-term nature of supply contracts.

Further, the differential between US and European/Asian natural gas prices may evaporate as additional global supply moderates prices. As Sen. Murkowski's report notes: "[t]he gap between US and world prices for natural gas will narrow in the coming years. As other suppliers come online, importers will pay less for the LNG they purchase." Supporters of US LNG exports are already critical that the DOE has not hastened its review of Section 3 applications, but the same concern that the United States may "miss out" on LNG markets—allowing billions of dollars of investment to go elsewhere—applies to trade negotiations.

Thus, TTIP and TPP have the potential to speed the development of new markets for US LNG exports, without the need to clear unpredictable and protracted DOE "public interest" assessments under NGA Section 3. But the debate over the extent free trade dialogue will or should encourage LNG exports remains far from settled, much like the debate over LNG exports in general. What is certain is that the debate over natural gas treatment in these proposed FTAs will heat up as the negotiations progress.

Suit Against Chinese Solar Firms Seeks Nearly US\$1 Billion in Damages

Justin Miller

On October 4, 2013, US solar company Energy Conversion Devices Liquidation Trust (ECDLT) filed an antitrust suit in the Southern Division of the Eastern District of Michigan District Court against several foreign solar panel manufacturers alleging price fixing and dumping. The company alleges that the Chinese firms—Trina, Yingli and Suntech—engaged in price fixing and sold solar panels at unreasonably low and/or predatory prices in violation of US antitrust laws, specifically Section 1 of the Sherman Act and Section 445.772 of the Michigan Antitrust Reform Act.

ECDLT claims that the Chinese companies drove it out of business and is seeking damages of US\$950 million to compensate for the loss of its book value and more. The company says the entire US solar panel manufacturing industry was eliminated through a coordinated effort to flood the US market with cheap solar panels starting in 2008. Prices sunk by 75 percent over five years, the suit claims. The complaint alleges that co-conspirators assisted the “scheme,” including Chinese trade associations and China’s National Energy Administration on grounds that it issued several commercial directives for the Chinese solar industry, and Chinese polysilicon manufacturers. ECDLT cites as evidence the US Department of Commerce’s (DOC) 2012 finding that the companies dumped solar panels in the US market, leaving an antitrust action as the only avenue for redress.

The suit is the latest development in the global trade spat between the United States and China over solar energy products. The United States announced in late 2012 that it would impose antidumping (AD) and countervailing (CVD) duties on imports of solar panel products from China at rates of 23.75 to 35.97 percent for certain exporters and 254.66 percent for all other exporters. China responded with its own investigation into imports of US polysilicon, a key component in solar panel production. The Chinese investigation made a preliminary determination earlier this year that US manufacturers/exporters dumped polysilicon in China. As a result, Chinese customs were authorized to begin imposing duties of up to 57 percent and CVD duties at a rate of 6.5 percent on imports into China of US polysilicon as of September 20, 2013.

Since then, US and Chinese government officials have been negotiating to resolve the trade row and remove the high duties on both sides. Although details of the negotiations are not yet available, a likely outcome may center on setting a minimum floor price for Chinese solar panels, limiting Chinese exports to a certain share of the US market, and ending duties affecting imports of US polysilicon.

China recently reached a similar compromise with the European Union (EU) to remedy a conflict over imports of Chinese solar panels. The EU announced in June 2013 that it would impose AD duties on Chinese solar panels at a rate of 11.8 percent on a preliminary basis, and 47.6 percent as of August 2013. When China threatened trade remedy investigations of its own into other industries—including wine, automobiles and steel—certain EU member states opposed the EU’s imposition of the provisional duties. This led to a compromise agreement between China and the EU in July 2013, which set a floor price for Chinese solar panel exporters to avoid the EU’s AD duties. EU member states must decide by December 5, 2013, whether to back the compromise deal.

A recent shift in solar cell production to Taiwan may incentivize Chinese solar panel producers and the Chinese government to negotiate and settle the dispute with the United States as soon as possible. Nevertheless, an agreement is unlikely to satisfy US solar manufacturing companies, including ECDLT, in the most recent antitrust action, which allege that their businesses continue to suffer or have gone bankrupt. US solar companies have also challenged the original DOC determinations in the US Court of International Trade (CIT), on the basis that the scope of the order is too limited and the AD duties were too low.

[Click here for a copy of ECDLT’s complaint.](#)

Major Energy Bills Get Started in Congress, But Enactment Unlikely

Patrick Holten

Eleven months into the 113th Congress, a number of ambitious energy bills are being introduced and advanced, many of which are designed to speed up, modify or block entirely the administration’s energy policies. The bills cover a wide array of energy issues and federal agencies, including the US Federal Energy Regulatory Commission (FERC), the US Environmental Protection Agency (EPA), the US Department of Energy (DOE) and the US Department of Interior (DOI). The chances for enactment of these bills, or even more modest energy policy legislation, in the current Congress appears slim at best given the partisan and regional divides between and among the two Congressional chambers and the White House. Nonetheless, the bills serve as policy markers for the parties and can provide a platform for lawmakers to call attention to issues sensitive to state and regional interests. They can also be used as potential leverage in an effort to win concessions from the administration.

The following recaps some of the major energy legislation pending in Congress:

FERC Pipeline Permitting

A House vote is imminent on the “Natural Gas Pipeline Permitting Reform Act.” The bill (H.R. 1900) seeks to speed up the permitting process by directing FERC to approve or deny applications for the siting, construction, expansion, or operation of any natural gas pipeline within 12 months. Other agencies tasked with conducting follow-on reviews would be forced to complete their respective reviews within 90 days. Failing that, the reviews would be considered approved by default.

The bill addresses the perceived lag in infrastructure construction and capacity for the transport of newly developed natural gas deposits trapped in the Bakken and Marcellus shale formations. The bill is likely to draw a veto threat from the White House but will likely pass the Republican-controlled House. It is difficult to imagine that the Senate will take up the bill, much less pass it. Nonetheless, the bill serves as a rallying point for those who want to speed up natural gas development, especially in light of newly proposed carbon emission rules from the EPA that could effectively make natural gas the primary energy source for electricity generation in new power plants.

A related bill, the “North American Energy Infrastructure Act,” would address similar concerns about delays in the permitting of cross-border energy transmission projects. The bill (H.R. 3301) would set a 120-day review period for approving/rejecting such projects. Under the bill, requests for approval for cross-border oil pipelines would go to the US Department of Commerce, natural gas pipeline requests would go to FERC and electric transmission requests would go to DOE. (A Presidential Permit obtained from the US Department of State would no longer be required.) The standard for rejecting a project would be a finding that its “construction, connection, operation or maintenance is not in the national security interests of the United States.” The bill would also repeal the requirement that the DOE approve the export or import of natural gas to or from the US, Canada, or Mexico across the boundary of the United States and repeal the DOE’s export authorization of electric energy transmission from the United States to a foreign country.

A House Energy and Commerce Committee Subcommittee hearing on the bill in late October featured testimony from Jeff C. Wight, Director of FERC’s Office of Energy Projects. He said that FERC strives to quickly review proposed transmission projects but warned that the bill’s 120-day deadline “would not permit construction of an adequate record, enable important agency consultation, or allow for meaningful public interaction in arriving at a decision.” He pointed out a number of other potential pitfalls and concluded that “the bill’s processes raises questions as to conflicting federal authorities and procedures that would be followed to authorize natural gas border facilities.”

The next step for the bill would be a full committee markup session to consider amendments and then a vote on the measure.

EPA Carbon Emission Rules for New Plants

Senator Joe Manchin (D-WV) and Representative Ed Whitfield (R-KY) have proposed a draft bill to curtail the aforementioned EPA proposed carbon emission control rules for new power plants. The lawmakers claim that the new rules are based on impractical and overly optimistic assumptions about the economic feasibility of installing and operating carbon capture and storage (CCS) technologies. The bill would force EPA to set separate standards for natural gas and coal-fired plants and set standards for coal that have a one-year period of demonstrated achievement by at least six unrelated power plants. The bill also would block any EPA rule establishing new carbon emission standards for existing plants unless a federal law is enacted specifying the effective date.

On November 14, 2013, the House Energy and Commerce Committee held a hearing on the draft bill that featured Senator Manchin as a supporting witness. He argued that the EPA rules would lock in “impossible standards” for coal-fired plants and effectively block construction of any new coal plants. He noted steady progress by the coal industry on CCS, but EPA is mandating “technologies that are not currently commercially viable,” he warned.

On the other side of the issue, an EPA witness at the hearing cited “serious concerns” with the bill, saying it would “stifle progress in reducing carbon pollution by discouraging the adoption of innovative technology that is available and effective today...”

The conflict over EPA’s proposed carbon emission rules for new power plants presages an even larger battle expected next year when EPA proposes similarly aimed regulations for existing power plants.

Preempting Federal Hydraulic Fracturing Rules

At press time, the House was scheduled to consider passage of the “Protecting States’ Rights to Promote American Energy Security Act.” In essence, the bill (H.R. 2728) seeks to block federal regulation of hydraulic fracturing—the drilling process (commonly termed “fracking”) that uses pressurized liquid to crack open, gather and force out natural gas trapped in shale deposits. DOI has issued proposed rules that would: (1) require drillers to publicly disclose the chemicals used in hydraulic fracturing operations on federal and Indian lands; (2) impose construction standards for these operations; and (3) require plans in place for managing flowback waters from fracturing operations. DOI says the construction standards and flowback management would “ensure that operators demonstrate wellbore integrity with pressure tests on 100 percent of the hydraulically fractured wells and with [cement evaluation logs] CELs on the casing strings that protect usable water on each type well.”

H.R. 2728 would amend the Mineral Leasing Act to prohibit DOI from enforcing any federal regulation, guidance or permit requirement regarding hydraulic fracturing on any lands where a state already has applicable regulations, guidance or permit requirements. The deferral to state regulatory authority would remain regardless of whether those rules are duplicative, more or less restrictive, have different requirements or do not meet federal guidelines.

EPA is studying the potential impacts of hydraulic fracturing on drinking water resources, including the full lifespan of water used in the process. EPA's final report on the issue is expected sometime late in 2014. Knowing the report could spark additional regulatory initiatives, House GOP leaders added a provision to H.R. 2728 that would require scientific peer reviews of the study's data, require probability, uncertainty and consequence disclosures on its conclusions regarding potential impacts, and set a September 30, 2016 deadline for publication. More information on the EPA study is posted at <http://www2.epa.gov/hfstudy>.

Keystone Pipeline Approval

On May 22, 2013, the House passed legislation (H.R. 3) that seeks to hasten construction of the proposed Keystone XL pipeline from Canada's oil sands in Alberta to US refineries in the Midwest and on the Gulf Coast. The "Northern Route Approval Act" would deem the project as having satisfied the requirements of various federal statutes and provide for expedited consideration of any legal challenges. It passed by a wide 241 to 175 margin, with nearly 20 Democrats in support.

The President strongly opposes the bill and has threatened to veto it. An official Statement of Administration Policy issued by the White House in advance of the House vote said the bill "prevents the thorough consideration of complex issues that could have serious security, safety, environmental, and other ramifications." Notwithstanding those concerns, the President's veto pen probably will not be needed as Senate Democrats have no plans to consider the bill.

Whether the President will approve or reject the pipeline is still not known. However, shortly after the House approved H.R. 3, the President added a new hurdle for the pipeline to win his assent, saying: "The net effects of the pipeline's impact on our climate will be absolutely critical to determining whether this project is allowed to go forward." He made it clear that the project cannot "significantly exacerbate the problem of carbon pollution" to be approved.

Stalemate on Energy Legislation

With Republicans in firm control of the House and Democrats holding the White House and Senate, the prospects for anything beyond incremental legislative changes to energy policy are not likely to improve before the elections in November 2014.