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Susanna Beard

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John A. Drennan and Alexander K. Haas

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KING & SPALDING

Energy Newsletter

September 2015

TRANSACTIONAL

Government Relations

Parties Finalize Nuclear Deal with Iran, But U.S. Sanctions Endure

Christine Savage, Jeff Telep, Mark Wasden, Jane Cohen, and Shannon Barna

On July 14, 2015, negotiators from Iran, the EU, and the P5+1 countries—China, France, Russia, the United Kingdom, the United States, and Germany—announced that they had reached a consensus on the *final text* of the Joint Comprehensive Plan of Action ("JCPOA"). But, initial sanctions relief will not apply equally. For example, while non-U.S. persons are expected to benefit from the sanctions relief upon the JCPOA's adoption by the EU and UN Security Council ("UNSC") set to commence in mid-October, the United States will continue to apply the current prohibitions of the Iran embargo to U.S. persons and foreign entities that are U.S. owned or controlled for at least another six months to a year. More on the applicability of the sanctions relief below.

Notwithstanding the State Department's diplomatic pact, this done deal is not done yet. Many members Congress have already voiced opposition to the JCPOA and may be able to scuttle the plan. Faced with the threat of a Presidential veto overriding legislative opposition, the looming question is whether Congress has the votes necessary to override the veto.

A Four-Stage Lift-Off

Under the JCPOA, the EU and the P5+1 countries agreed to a gradual lifting of the UNSC sanctions, multilateral sanctions, and national sanctions related to Iran's nuclear program in exchange for Iran's commitment to scale back its existing nuclear operations and limit development of its commercial nuclear program for exclusively peaceful purposes. The JCPOA is slated to proceed in four distinct phases.

Adoption Day

The first milestone, Adoption Day, is scheduled to take place 90 days after the endorsement of the JCPOA by the UNSC, which will be October 18, 2015, unless all JCPOA parties consent to moving it to an earlier date. After Adoption Day, all parties are required to begin making necessary legal and administrative preparations to implement their JCPOA commitments. As noted above, non-U.S. entities not owned or controlled by U.S. parents are expected to benefit from the sanctions relief as of Adoption Day, while non-U.S. entities with U.S. parents will be forced to stand by the sidelines until Implementation Day.

Implementation Day

Implementation Day will commence upon the delivery of the United Nation's International Atomic Energy Agency ("IAEA") report verifying that Iran has implemented its nuclear-related commitments. There is no set date for Implementation Day; however, experts predict it will likely occur in the spring or summer of 2016, or perhaps even as late as fall of 2016. Although existing legislation and sanctions not directly related to Iran's nuclear program will remain in place, the United States and the European Union will cease applying certain nuclear-related sanctions on Implementation Day. At that time, the U.S. Government is expected to take certain actions, including the Treasury Department's Office of Foreign Assets Control ("OFAC") issuing one or more general licenses authorizing foreign entities owned or controlled by U.S. persons to engage in activities with Iran permitted under the JCPOA.

With respect to the energy and petrochemical sectors, at this stage the United States has committed to cease the application of sanctions on non-U.S. persons involving the following activities and associated services: (1) investment, including participation in joint ventures, goods, services, information, technology and technical expertise and support for Iran's oil, gas, and petrochemical sectors; (2) purchase, acquisition, sale, transportation, or marketing of petroleum, petrochemical products and natural gas from Iran; (3) export, sale or provision of refined petroleum products and petrochemical products to Iran; and (4) transactions with Iran's energy sector including with the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO) and the National Iranian Tanker Company (NITC).

The United States is also committed to suspending its efforts to reduce Iran's crude oil sales, including by removing limitations on the quantities of Iranian crude oil sold and the nations that can purchase Iranian crude oil.

Transition Day

Transition Day is scheduled to take place eight years after Adoption Day (*i.e.*, October 18, 2023), or the date on which the Director General of the IAEA submits a report stating that all nuclear material in Iran remains in peaceful activities (known as "the Broader Conclusion" in the JCPOA), whichever occurs earlier. After Transition Day, the United States is required to seek appropriate legislative action to terminate the sanctions against non-U.S. persons that it ceased to apply as of Implementation Day.

Termination Day

Termination Day is scheduled to take place ten years after Adoption Day (*i.e.*, October 18, 2025), at which time the provisions of UNSC Resolution 2231 against Iran will terminate. This will take place provided that all obligations under the JCPOA have been met by all parties and that sanctions have not been reinstated.

Verification and Snap Back Sanctions

The JCPOA establishes a Joint Commission to settle any disputes that may arise between the JCPOA parties. In the event that the parties consider the issue unresolved after the Joint Commission's review, the issue may be used as grounds to cease performance under the JCPOA or to notify the UNSC that the issue constitutes significant non-performance. In the event that the UNSC is notified of significant non-performance by Iran, it would have the ability to reinstate sanctions against Iran under the previous UNSC resolutions. That said, the reinstated "Snap Back" sanctions would not apply with retroactive effect to contracts signed prior to the date of reinstatement, and general licenses will be made available for the winding down of activities in Iran.

No Relief for U.S. Companies

If the JCPOA moves forward in accordance with the stages described above, the anticipated sanctions relief will not have an immediate impact on U.S. companies. U.S. sanctions against Iran currently in effect will continue to apply, as the U.S. Government made no commitment under the JCPOA to lift primary sanctions applicable to U.S. persons up until Termination Day. Although it is not yet clear how OFAC and other relevant U.S. Government agencies will implement the relaxation of the sanctions under the JCPOA, it appears that U.S. companies will not be able to enter the Iranian energy market any time soon.

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KING & SPALDING

Energy Newsletter

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TRANSACTIONAL
Government Relations

Inconsistent Rulings by U.S. Courts Concerning ICSID Enforcement Create Uncertainty for Foreign Energy and Oil & Gas Investors

James E. Berger and Charlene C. Sun

Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention") has become a critical mechanism for the settlement of investor-State disputes and provides binding and streamlined procedures for the enforcement of arbitral awards rendered in accordance with its framework. The ICSID Convention is of particular importance to companies, such as energy and resource exploration companies, whose activities often require them to make large investments in infrastructure projects in developing nations where a lack of transparency and clear rule of law often plagues the foreign investment landscape.

The United States is party to the ICSID Convention and has implemented its obligations under the Convention into the U.S. Code by providing that U.S. courts must recognize every arbitral award rendered pursuant to the ICSID Convention as if it were a "final judgment of a court in [the United States]."[1] Notwithstanding this mandate, exactly what procedures federal courts may utilize to domesticate and enforce ICSID awards in the United States remains unsettled, and recent decisions of the New York and District of Columbia district courts appear to illustrate a developing rift between courts in those jurisdictions about the proper procedure to be followed when asked to enforce an ICSID award; the courts' disagreement specifically concerns whether the *ex parte* procedures for recognizing sister-state judgments under state law may be used to recognize an ICSID award. While the state of the law on this issue is still uncertain in the District of Columbia, the New York courts have made clear that ICSID award creditors may take advantage of expedited, *ex parte* procedures in seeking recognition of an ICSID award.

Background

The recognition and enforcement of ICSID awards is provided for in Articles 53 through 55 of the Convention. Collectively, these passages demonstrate a desire to eliminate review of awards by national courts. *See, e.g.*, ICSID Convention Art. 53 (awards "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.").

Nevertheless, ICSID awards must still be brought to national courts for recognition and enforcement should the losing party refuse to comply with their terms. Article 54 of the ICSID Convention allows Contracting States with federal constitutions to treat ICSID awards as if they were final judgments of a court in a constituent state. ICSID Convention Art. 54(1). The Convention, however, does not require any particular procedure for recognition or enforcement of an ICSID award by the courts of each Contracting State.

Congress implemented the ICSID Convention via 22 U.S.C. § 1650a. This enabling statute provides that "pecuniary obligations imposed by […] an [ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Importantly, the statute only expressly mentions enforcement, and not recognition.

Pre-2015 Cases Involving Ex Parte Recognition Proceedings

Prior to 2015, only five federal district court cases had addressed the *ex parte* recognition of an ICSID award—all issued in the Southern District of New York. That court has repeatedly upheld the use of *ex parte* proceedings to confirm an ICSID award, beginning with its 1986 decision in *Liberian Eastern Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986) ("LETCO"), in which the court granted LETCO's application for ex parte recognition and directed entry of judgment for the amount of the award in question. *Id.* at 75.

Three subsequent cases used ex parte procedures without directly analyzing the propriety of doing so. *See Grenada v. Grynberg*, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 20, 2007); *Sempra Energy Int'l v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007). In each of these cases, the award debtor did not object to the entry of judgment.

In 2009, the court in *Siag v. Arab Republic of Egypt*, No. M-82 (PKC), 2009 WL 1834562 (S.D.N.Y. June 19, 2009) paused to consider more fully the propriety of using Article 54's *ex parte* procedures to confirm an ICSID award . In that case, Judge Kevin Castel ultimately granted an *ex parte* recognition application after consideration of whether the foreign state award debtor was entitled to advance notice and an opportunity to be heard prior to recognition of the award. *Id*. at *1. The Court interpreted Sec.1650a to require that an ICSID award be treated as a final judgment of a state court, and found that Article 54 of the New York Civil Practice Law and Rules ("CPLR") set forth the appropriate procedure for recognizing out-of-state judgments in the State of New York.[2] *Id.* at **1-2. While CPLR Article 54 by its terms provides only for registration of judgments in New York *state* courts, Judge Castel took note of certain Second Circuit precedent that extended Article 54's applicability in federal courts. *Id.* at *2. The Court found that because CPLR Article 54 allows for *ex parte* recognition proceedings, it was not necessary for the award creditors to file a plenary action. *Id.* at *3.

Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela

In December 2014, the New York District Court once again took the opportunity to analyze whether the use of Article 54's *ex parte* recognition procedures was proper to confirm an ICSID award in *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015). In October 2014, various ExxonMobil entities filed an *ex parte* petition in the New York District Court seeking recognition of a $1.6 billion ICSID award rendered against Venezuela. Judge Oetken, sitting in Part I, granted the petition, relying upon the precedent established in *Siag*, and ExxonMobil promptly notified Venezuela's counsel of the Court's entry of judgment. *Mobil Cerro*, 2015 WL 631409 at *2. A few days later, Venezuela moved to vacate the judgment, claiming that the court had erred in applying CPLR Article 54 and its streamlined *ex parte* recognition process. *Id.* Venezuela argued 1) that Sec. 1650a did not authorize borrowing from New York state law; and 2) that in any event, the Foreign Sovereign Immunities Act ("FSIA)[3] supersedes Sec.1650a with regard to recognition actions brought against foreign sovereigns, and imposes procedural requirements that ExxonMobil did not meet. *Id.* at *3. Ultimately, Venezuela claimed a plenary lawsuit was required to enforce an ICSID award against a foreign sovereign. *Id*.

In addressing Venezuela's first argument, the Court identified what it viewed as a crucial statutory gap in Sec. 1650a, which is silent as to the procedure for recognizing ICSID awards despite the fact that such recognition is mandated by the Convention. *Id.* at *7. In order to fill this gap, the Court found it appropriate to look to state law, citing the Rules of Decision Act which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[4] *Id.* Noting that Venezuela had identified no real conflict between the use of state law and some federal policy or interest, the Court concluded that the use of CPLR Article 54 as a gap-filler effectuated the policy interests underlying Sec. 1650a by facilitating the granting of "full faith and credit" to ICSID awards as mandated by the enabling statute. *Id.* at **9-10. The Court also remarked that "[s]ymbolism aside, a foreign party has no valid ground to claim offense at a streamlined recognition procedure" for ICSID awards, which are not subject to any substantive review. *Id.* at *10.

Venezuela's next argument was that the FSIA, passed ten years after Sec. 1650a, supersedes the ICSID enabling statute and imposes additional procedural requirements in recognition proceedings against foreign sovereigns. After rejecting Venezuela's argument that the Court lacked subject matter jurisdiction under the FSIA, the Court determined that the FSIA could not be read to supersede any procedures for recognizing ICSID awards that were in use prior to the FSIA's enactment, relying upon several textual clues in the FSIA and other statutory sources for this conclusion. First, the Court noted that "the FSIA evinces an intention to leave existing practice under international treaties undisturbed," as Sec. 1604 explicitly states that a foreign state's immunity under that section is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." *Id.* at *17 (citing 28 U.S.C. § 1604). The Court also found that the "FSIA repeatedly uses terms that presuppose litigation over a contested issue," suggesting that Congress did not contemplate that the FSIA would apply in proceedings where there were no substantive issues being decided. *Id.*

Indeed, the Court's review of the history and text of both the ICSID Convention and Sec. 1650a yielded the conclusion that "requiring a plenary lawsuit to obtain recognition of an ICSID award would be, at minimum, in significant tension with the intentions of the Convention and the enabling statute as to the process of recognition." *Id.* at **19-20. Specifically, the Court noted that drafters of the ICSID Convention decided that national courts' recognition of an ICSID award should be automatic, and deliberately departed from the more substantive review provisions contained within the New York Convention, which was already in existence when the ICSID Convention was being drafted. *Id.* The Court found that Venezuela's argument that an ICSID award creditor must file a plenary action to recognize an ICSID award would nonsensically give an ICSID award debtor "more process than it was due under the New York Convention, under which at least a streamlined petition-based confirmation process is used." *Id.* at *21. In sum, the Court construed the FSIA to permit *ex parte* recognition proceedings, while reaffirming that the FSIA's execution immunities would still function as a protection against seizure of a foreign state's sovereign assets. *Id.* at **21-23.

Micula I

In May 2015, three months after *Mobil Cerro* was decided, the D.C. District Court was also called upon to assess the propriety of *ex parte* ICSID award recognition in *Micula v. Govt. of Romania* ("*Micula I*"), No. 1:14-cv-00600 (APM), U.S. Dist. LEXIS 64461 (D.D.C. May 18, 2015). Petitioner Viorel Micula had filed a petition with the D.C. District Court for *ex parte* recognition of a $116 million ICSID award rendered against Romania. He argued that because Sec. 1650a is silent as to the proper procedure for recognition of ICSID awards, the Court should borrow an expedited procedure from local District of Columbia law, which, like New York law, permitted the *ex parte* recognition of sister-state judgments. *Micula I*, 2015 WL 2354310 at *4. Micula also cited the line of cases dealing with *ex parte* recognition in the Southern District of New York, up to and including *Mobil Cerro*. *Id.* While Romania did not file a formal response, the Court nonetheless analyzed the question of whether it had the authority to confirm an ICSID award on an *ex parte* basis, citing the traditional importance of service of process and concerns of comity as factors motivating this scrutiny. *Id.* at **3-4.

In an opinion by Judge Amit Mehta, the Court rejected Micula's petition for *ex parte* recognition based principally on a textual analysis of Sec. 1650a. The Court first noted an apparent split of authority concerning whether *ex parte* procedures may be used to recognize an ICSID award, citing the line of cases decided by the New York District Court which allowed such procedures, as well as a decision of the U.S. District Court for the Eastern District of Virginia ("Virginia District Court") which found that *ex parte* state law procedures could not be used to recognize an ICSID award. *Id.* at **5-6. The D.C. District Court agreed with the Eastern District of Virginia's analysis, which rejected any distinction between recognition and enforcement of arbitral awards, and therefore effectively denied the existence of any statutory gap that would justify borrowing recognition procedures from state law. *Id.* at *5.

The D.C. District Court found statutory support for its view in the text of Sec. 1650a, which provides that the federal courts "shall have exclusive jurisdiction over the *actions and proceedings* under subsection (a) of this section…" *Id.* at *6 (citing 28 U.S.C. § 1650a) (emphasis supplied). Specifically, the Court found that the words "action" and "proceedings" connoted a congressional intent to domesticate ICSID awards through a plenary action, as Congress could have used the word "confirm" as it did in Chapter 2 of the Federal Arbitration Act ("FAA"), implementing the provisions of the New York Convention, if it had wanted. *Id.* at *6.

Finally, the Court determined that its interpretation of Sec. 1650a did not conflict with the United States' obligations under the ICSID Convention because the Convention itself "does not obligate its contracting states to adopt any specific method for fulfilling those obligations." *Id.* at *7. In reaching its conclusion that Sec. 1650a did not permit *ex parte* recognition of ICSID awards, the *Micula* court did not engage in an analysis of the FSIA or its applicability.
Notably, Judge Mehta's decision conflicts with another decision of the D.C. District Court issued a few months earlier in *Miminco, LLC v. Democratic Republic of the Congo*, No. CV 14-01987 (RC), 2015 WL 1061555 (D.D.C. Feb. 9, 2015), in which Judge Contreras held that "*ex parte* proceedings suffice for recognition of ICSID arbitral awards." Id. at *1. In *Miminco*, Judge Contreras determined that "[s]uch a procedure is consistent with the statutory mandate that ICSID awards 'shall be enforced and shall be given the same full faith and credit' as a state court judgment," and took note of the several decisions of the New York District Court employing such *ex parte* procedures.

Micula II

Five days after the D.C. District Court denied Viorel Micula's *ex parte* application to recognize the ICSID award, petitioners other than Mr. Micula sought *ex parte* recognition of the award in the New York District Court. *See Micula v. Government of Romania* ("Micula II"), No. 15 MISC. 107, 2015 WL 4643180, at *1 (S.D.N.Y. Aug. 5, 2015). That application was granted by Judge Buchwald sitting in Part I, and Mr. Micula was permitted to intervene in the enforcement action.

Romania sought to vacate the judgment entered by the Court, asserting that it violated the FSIA, and arguing that the Court should abstain from exercising jurisdiction on the basis of international comity, the act of state doctrine and the foreign sovereign compulsion doctrine. Judge Schofield, to whom Romania's motion was assigned, rejected each of these arguments.

Relying upon Judge Engelmeyer's thorough analysis in *Mobil Cerro*, the Court dismissed Romania's arguments that the FSIA required the petitioners to commence a plenary proceeding to confirm the ICSID award, holding that "given the spirit of the ICSID Convention (to which the United States is a party), the language of its enabling statute, the clear exceptions to the FSIA that apply, and precedent in this District, the expensive and time-consuming process of a plenary proceeding to recognize an ICSID award in the United States is unnecessary as a matter of law." *Id.* at *3.

Judge Schofield expressly rejected Judge Mehta's determination in the D.C. District Court's opinion that there was no statutory gap in Section 1650a. The Court held that "[r]egardless of how state judgments are typically treated in federal courts … the ICSID Convention, a treaty to which the United States is a party, mandates both recognition and enforcement," and "by addressing only 'enforcement,' § 1650a created a statutory gap that is appropriately filled by looking to the law of the forum state…" *Id.* Finally, Judge Schofield stressed that because "there can be no substantive review of an ICSID award … even if Petitioners were directed to commence a plenary action for recognition … nothing would change substantively." *Id.* at *4. Indeed, "[a]ll that a plenary proceeding would accomplish is delaying the inevitable recognition of the Award." *Id.*

Conclusion

These recent decisions represent early stages of a discussion that will likely require guidance from the United

States Courts of Appeals and potentially the Supreme Court, none of which have addressed whether state law *ex parte* recognition procedures may be utilized to recognize an ICSID award. Thus, in the absence of any appellate authority on the matter, energy-sector investors that are ICSID award creditors should be aware of these decisions when selecting an enforcement venue. By departing from prior decisions of the D.C. District Court, *Micula I* appears to have muddied the law on the issue in the District of Columbia, leaving substantial uncertainty in that jurisdiction as to whether ICSID award creditors may utilize expedited, *ex parte* procedures to domesticate their awards. On the other hand, the New York District Court's decisions in *Mobil Cerro* and *Micula II* are fully consistent with the court's five previous cases employing the *ex parte* sister-state judgment recognition procedures authorized by New York law to confirm an ICSID award, and reinforce both the predictability and practicality that have made the Southern District of New York a desirable enforcement venue.

[1] 28 U.S.C. §1650a.
[2] CPLR § 5403 provides that allows for the ex parte recognition of an out-of-state judgment, but requires that the judgment creditor notify the judgment debtor of entry of the judgment within 30 days, and must wait 30 days after proof of service before he may execute on the judgment.
[3] 28 U.S.C. § 1602 et seq.
[4] 28 U.S.C. § 1652.

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KING & SPALDING

Energy Newsletter

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LITIGATION
Power / U.S.

Even With Changes To Its Final Clean Power Plan, More Litigation Is On the Horizon for EPA

Ilana Saltzbart

Responding to over 4 million comments received on its June 2014 proposed rule, the United States Environmental Protection Agency (EPA) has made changes to its controversial plan to regulate carbon dioxide (CO_2) emissions from existing fossil fuel-fired power plants—the Agency's "*Clean Power Plan*," which it released August 3, 2015. While some changes may ease implementation for the 49 states subject to the rule, the final rule arguably retains certain vulnerabilities, and legal challenges are expected. Even as it moves forward with this rulemaking, EPA's enforcement arm continues to pursue the Administration's carbon strategy through its *national enforcement initiative* aimed at the power sector, securing commitments to reduce CO_2 emissions by shutting down coal-fired boilers or repowering them to combust natural gas, as well as investments in renewable energy.

Legal Challenges Already Filed Prior to Publication in the Federal Register

Under Section 307(b) of the Clean Air Act, a final rule may be challenged within sixty days of publication in the Federal Register. Although the rule has yet to officially publish, States and others affected by the rule have filed petitions challenging the rule, including an emergency petition under the All Writs Act to stay the rule.

Overview of the Final Rule

Pursuant to Section 111(d) of the Clean Air Act, EPA's Clean Power Plan establishes final statewide CO_2 emission standards for existing fossil fuel-fired electric generating units that will reduce CO_2 emissions by 32% as measured from a 2005 baseline. The rule specifies state goals in three forms: a rate-based goal measured in lbs/MWh; and two mass-based goals measured in total short tons of CO_2. The rule also specifies interim performance rates, which are to be achieved from 2022 through 2029, with the final rate effective in 2030.

The rule allows states to choose between two types of plans for EPA approval. The first type—an "emission standards plan"—must include source-specific requirements for all affected sources sufficient to enable the state to meet its 2030 goal. The other type is a "state measures plan," which can include a mixture of measures (including renewable energy and demand-side efficiency). In his August 3, 2015 remarks announcing the Clean Power Plan, the President indicated that this optionality allows each state to develop a plan that reflects its state-specific energy mix.

EPA's final rule also gives states the option to work together on multi-state approaches, including emissions trading. This would enable sources to meet the prescribed emissions standards through either emission rate credits (for rate-based plans) or emission allowances (for mass-based plans), similar to other Clean Air Act programs that utilize market-based emission trading programs, such as the Acid Rain cap and trade program for sulfur dioxide (SO_2) and nitrogen oxides (NO_x).

The Clean Power Plan incorporates various features intended to ensure that it does not interfere with energy reliability. These include a longer compliance period compared to the initial proposal, flexibility to include a variety of different approaches to achieve the state-specific CO_2 goal, a mechanism for states to revise their plans in the event of unanticipated or significant reliability challenges, and a "reliability safety valve" that would address situations where a power plant had to provide "reliability-critical generation" due to unanticipated or extraordinary circumstances despite the CO_2 constraint that would otherwise apply.

EPA is proposing a model rule that states can adopt, as well as a federal plan that EPA will implement if a state fails to submit an adequate plan. Both the proposed model rule and the federal plan focus on emissions trading mechanisms. States are required to submit plans to EPA for approval within 13 months from promulgation of the rule (or by September 6, 2016, according to EPA). States may request an extension, with final plans due no later than September 6, 2018. The plan must include provisions demonstrating that the state is making progress toward meeting the final 2030 goal – *e.g.*, interim goals. The rule offers three multi-year step-down goals and allows states to develop a "glide path" that is both cost-effective and feasible. States are required to compare actual emissions from their sources to projected emissions enumerated in the state plan and to report this information to EPA.

EPA Eliminated Demand-Side Energy Efficiency as a Building Block

One controversial aspect of the proposed rule, what EPA called building block 4, was an attempt to include outside the fence line reductions (*i.e.*, demand-side energy efficiency) as a building block of the state plans. EPA is not requiring demand-side energy efficiency as a building block for meeting state goals, though the rule allows states to include energy efficiency as part of their strategy to achieve their CO_2 targets. Further, EPA is providing an optional *Clean Energy Incentive Program* to reward early investments in demand-side energy efficiency and renewable energy. EPA describes the program as a "matching fund" program that states can use to incentivize early investments in programs that will reduce CO_2 emissions. EPA will make emission credits available to states to incentivize the early reductions.

Changes Related to Nuclear Energy

States hoping to rely on nuclear energy as part of their strategy will likely applaud certain changes that EPA made in the final rule. In the proposed rule, EPA included nuclear generation under construction as a component of a state's emission performance standards. However, in the final rule, generation from those sources will not count until the units come on line, meaning that states can rely on nuclear generation currently under construction to meet their CO_2 goals. EPA also made a change related to nuclear capacity at existing plants. Specifically, if an existing nuclear plant increases its capacity, that increase will also count as a zero-carbon source, which may make projects to increase capacity at existing plants more attractive.

Potential Legal Vulnerabilities Remain Despite Changes Made In Response to Comments

A fundamental issue underlying the EPA's Clean Power Plan is whether these electric generating units can be regulated for CO_2 under Section 111(d). There is an argument based on the text of the Clean Air Act that "sources" subject to regulation under Section 112 cannot also be regulated under Section 111(d). In 2012, EPA issued the Mercury and Air Toxics Standards ("MATS"), which subjected these electric generating units to regulation under Section 112. On June 29, 2015, the *Supreme Court held* that EPA acted unreasonably when it deemed cost irrelevant to its decision to regulate power plants under Section 112, and remanded the rule to the D.C. Circuit. The intersection of the Supreme Court's MATS decision and promulgation of the Clean Power Plan could be seen as undermining this legal argument. However, in a brief filed in the D.C. Circuit on August 10, 2015, EPA indicated that it will reissue the MATS rule by spring of 2016, and will submit a declaration in future proceedings establishing the Agency's plan to complete the required consideration of costs. Further, EPA will argue that the limitation under Section 111(d) only applies to "pollutants" (as opposed to "sources"), and thus, even if it regulates power plants under Section 112 for hazardous air pollutants, it may still regulate these sources' CO_2 emissions under Section 111(d). We expect that this argument will be part of the legal challenges to the rule.

Other vulnerabilities likely to be raised by opponents to EPA's Clean Power Plan pertain to both the substance and contours of EPA's authority to promulgate emission rates under Section 111(d). For instance, under Section 111(d), EPA is authorized to establish a "procedure" for states to submit plans to EPA for approval. The states, in turn, are to establish standards of performance for their sources. As defined under Section 111(a), a "standard of performance" reflects the "best system of emission reduction which (taking into account the cost of achieving such reduction and . . . energy requirements) the Administrator determines has been adequately demonstrated." Arguably, by specifying emission rates that must be met by the states, EPA's rule may go beyond its authority under Section 111(d). Further, litigants may challenge EPA's authority to establish the best system of emission reduction on a statewide basis as opposed to a source-specific approach.

Additionally, litigants may argue that the rule impermissibly limits a state's authority to apply source-specific considerations in establishing a source-specific emission rate. Notably, EPA's regulations implementing Section 111(d) allow states to consider the useful life, age, location, basic process design, physical impossibility, and other factors, in establishing the performance standards. *See 40 C.F.R. § 60.24(f)*. Yet, EPA's approach may deprive a state of its ability to take these source-specific issues into account in developing its plan to meet the statewide CO_2 goal prescribed by EPA in the rule.

EPA's Coal-Fired Power Plant Enforcement Initiative Continues to Push CO_2 Reductions

After 15 years, EPA's coal-fired power plant enforcement initiative remains active, with the most *recent settlement announced on July 15, 2015*, with Iowa electricity producer, Interstate Power and Light Company (IPL). EPA's enforcement initiative targets companies under the Clean Air Act's New Source Review program for allegedly illegal physical or operational changes commenced without first obtaining appropriate permits.

The settlement with IPL covers all seven coal-fired power plants (1,900 megawatts) owned and operated by the company in the state. To resolve its alleged New Source Review liability, IPL agreed to pay a civil penalty of $1.1 million, spend $6 million on environmental mitigation projects, and invest more than $620 million at its facilities. Notably, the company agreed to shut down 10 coal-fired boilers and to either shut down or repower/refuel to natural gas another 11 boilers. These commitments run from entry of the consent decree through 2025. Through a menu of environmental mitigation project options, the settlement also promotes renewable energy, allowing IPL to spend $3 million on a long-term power purchase agreement for solar power and $3 million to develop anaerobic digestion systems (*e.g.*, biogas).

In the past, EPA's enforcement program regarded itself as "fuel neutral"—giving companies the option to retrofit existing coal-fired boilers with pollution controls in addition to shutting down or repowering. This most recent settlement with IPL appears to signal a shift away from fuel neutrality, however, in line with the Agency's current agenda to reduce electricity generation from coal. Further, by securing coal-fired boiler retirements, greater use of natural gas, and investments in renewable energy projects, EPA's enforcement program is leveraging CO_2 reductions through a regulatory program intended to reduce traditional criteria pollutants (*e.g.*, SO_2, NO_x, and particulate matter—PM). There is no indication that EPA will curtail these efforts, especially given the Agency's recent judicial setbacks in other programs, most notably before the Supreme Court under the *Mercury and Air Toxics Standards Rule* and before the D.C. Circuit under the *Cross-State Air Pollution Rule* (finding that EPA promulgated invalid SO_2 and NO_x budgets for 13 states, including Texas).

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Energy Newsletter

September 2015

TRANSACTIONAL

Government Relations

Comprehensive Energy Bills Introduced In The House And Senate Dodge The Tough Issues

Michael A. Andrews

On July 22, 2015, the leadership of the Senate Energy and Natural Resources Committee and the House Energy and Commerce Committee introduced bipartisan energy bills that address a broad range of important issues. While the bills reflect compromise on a range of significant energy issues, they leave the hardest and most contentious issues for later. Both bills are the result of months of negotiations, but they fail to address a number of controversial energy policy issues such as construction of the Keystone Pipeline and the repeal of the 40 year ban on domestic oil exports. It has been eight years since a comprehensive energy bill passed Congress, primarily because energy policy decisions have been entangled in partisan politics, regional differences, and other unrelated issues.

Senate Energy Bill

During the last week of July, the Senate Energy and Natural Resources Committee held a three-day markup to review their bipartisan energy bill. The Energy Policy Modernization Act of 2015 includes five titles focusing on a wide range of energy issues, including energy efficiency, infrastructure, supply, accountability, and conservation.

The bill includes a number of energy efficiency measures; the Department of Energy's ("DOE") loan guarantee program; modernizing the electric grid; re-defining DOE's responsibilities in cybersecurity; permanently reauthorizing the Land and Water Conversation Fund; and restating Federal Energy Regulatory Commission's ("FERC") role in hydropower permitting. The legislation firmly underscores the committee's position that the Strategic Petroleum Reserve only be used to pay for upkeep and improvements of the reserves.

Key provisions in the legislation target the liquid natural gas ("LNG") industry. The bill would speed decision-making on LNG exports by requiring DOE to approve or deny applications to export LNG to non-free trade agreement ("FTA") countries within 45 days of final action at FERC or the Maritime Administration. Currently, DOE quickly approves applications to FTA countries, and while DOE has as of late issued non-FTA approvals within days of FERC wrapping up its rehearing process, that has not always been the case. This issue remains controversial and will be contested when the legislation is debated on the Senate floor.

The bill also provides for expedited review of legal challenges to LNG facilities, and would change the Natural Gas Act to require public disclosure of where exported LNG is headed.

A number of provisions are welcomed by the renewable industry. For the geothermal industry, the bill sets a 50,000-MW geothermal goal, directs federal agencies to identify areas for development and allows federal oil and gas lease holders to obtain a geothermal lease to encourage production.

The Energy Policy Modernization Act was approved by the committee by a vote of 18-4, with 10 Republicans and eight Democrats voting in support. Debate over the most contentious issues that were not included in the bill will surely return, by way of amendments, when the legislation reaches the Senate floor. Because of Senate rules and partisanship, final passage of the bill is far from certain.

In another bill, the committee also passed, by a highly partisan vote, legislation to end the 40-year-old ban on exporting crude oil and expand areas of offshore drilling. An attempt will likely be made on the Senate floor to add this provision to the comprehensive energy bill.

House Energy Bill

In the House, Republican members of the Energy and Commerce Committee introduced their own energy bill, which has received approval from the Energy and Power Subcommittee. While it is a more modest bill than its Senate counterpart, it does address many of the same issues that are included in the Senate bill and, as written, will have Democratic supporters. Like the Senate bill, it too avoids the most difficult issues such as the ban of oil exports and the Keystone Pipeline. Senior Republicans conceded that the legislation only includes non-controversial matters. Democrats called it weak and incomplete. Members of the committee are working over the August recess to develop a more comprehensive bill.

The legislation does address a number of issues critical to improving the infrastructure and delivery of natural gas such as speeding the permitting process for interstate natural gas pipelines. The bill commissions a study to improve and build new energy infrastructure for natural gas pipelines and transmission lines and more efficient ways to connect renewable power to the grid.

The bill focuses on the security and reliability challenges to the electric grid. It grants the Secretary of Energy emergency authority to act in case the grid is in danger of security threats such as a cyber-attack. In addition, the legislation gives electric companies permission to violate environmental laws in case of an emergency and to maintain reliability.

What's Next

In the Senate, the real debate over the legislation begins on the Senate floor, when controversial amendments will be offered to approve the Keystone pipeline and the oil export ban.

In the House, the full Energy and Commerce Committee will consider their legislation when Congress returns from the August recess.

The good news about both bills is that they address a wide range of energy policy issues that are important to modernizing, streamlining and protecting the nation's energy infrastructure. There is strong bipartisan agreement that these energy policy provisions are necessary and important. The disappointing news is that the bills fail to address some of the most critical and contentious energy policy issues. If politics really is the "art of the possible," both bills, as introduced, may meet that test. But this stage is only the first round of a much more contentious debate to be held in the fall.

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UK Government Implements Fast-Track Planning Process for Fracking Applications in Time for Latest Onshore Licensing Round Announcement

Susanna Beard

Planning applications for fracking well-sites will be fast-tracked through the UK's planning system under new plans announced by the UK Government in August. The move supports the UK's Conservative-led Government policy to promote shale gas development for energy security and economic growth.

The past few months have been turbulent for the UK's nascent shale gas industry. Good news came in early June when Lancashire County Council's senior legal and planning advisers announced it had recommended the approval of an application by Cuadrilla Resources to carry out test fracking at a site in the county. But, later that month, Lancashire County Councillors unexpectedly defied their own advisers' recommendations, rejecting Cuadrilla's application amid concerns about noise and impact on the landscape. Cuadrilla has confirmed it will appeal the decision, but the decision nevertheless came as a blow to the 95 bidders vying for exploration and development licenses in the UK's latest 14th onshore licensing round, the first tranche of awards for which were announced in August.

UK oil and gas regulation is now overseen by the Oil and Gas Authority, an executive agency of the Department for Energy and Climate Change (**DECC**), formed in April this year. The results of the latest onshore round, which closed in October 2014, will be announced in two tranches. The first tranche of awards was announced on 18 August. Twenty-seven blocks were screened out as not requiring further environmental assessment under the UK Conservation of Habitats and Species Regulations 2010. For blocks which do require assessment under the Regulations, a consultation will be initiated and, subject to its outcome, a second tranche of awards will be announced later in the year.

Successful bidders will want assurance that planning authorities will support shale in line with the Government objective so that shale companies can maximize the potential in the licenses awarded. The recent decision on Cuadrilla's well-site application will have heightened concern and the Government has now taken steps to divest ultimate control of shale development planning decisions away from local authorities if they are obstructing or unduly delaying the decision-making process.

Safe development of shale gas was a core part of the Conservative party's manifesto in the run up to this May's general election. Since coming to power the Government has made it clear that shale gas development is a national priority. On 13 August, Amber Rudd, Secretary of State for Energy and Climate Change, announced that shale gas planning applications will be fast-tracked through a new, dedicated planning process. The move has been perceived as a direct response to Lancashire Council's adverse decision on Cuadrilla's application. The measures will permit the Government to intervene in planning decisions if a local council fails to meet statutory timeframes.

The new policy measures will surely be welcomed by shale gas companies, and include:

- The Secretary of State for Communities and Local Government actively considering "calling-in" on a case by case basis shale planning applications and considering recovering appeals. Calling-in of a planning application refers to the power of the Secretary to take the decision-making power on a particular planning application out of the hands of the local planning authority for his/her own determination. This can be done at any time during the planning application process, up to the point at which the local planning authority actually makes the decision. If a planning application is called-in, there will be a public inquiry chaired by a planning inspector, or lawyer, who will make a recommendation to the Secretary. The Secretary can choose to reject these recommendations if he/she wishes and will make the final decision;

- Identifying councils that repeatedly fail to determine oil and gas applications within the 16-week statutory timeframe requirement (unless the applicant agrees to an extension). Underperforming councils' oil and gas planning applications could be determined by the Secretary;

- Adding shale applications as a specific criterion for recovery of appeals, to ensure no application can "fall through the cracks". The Secretary has a power to "recover" a planning appeal which has been submitted to the planning inspectorate. A recovered inquiry is a planning appeal (against a local authority's decision) which the Secretary can decide to determine him/herself, rather than allowing a planning inspector to take the final decision, as is the normal process;

- Ensuring planning call-ins and appeals involving shale applications are prioritized by the planning inspectorate; and

- Taking forward work on revising permitted development rights for drilling boreholes for groundwater monitoring.

The Government has also stressed the need to focus decision making on planning matters and for local authorities to make full use of the funding available to enable timely decision making in 2015/16 by utilizing its £1.2m shale support programme.

Rudd's announcement was accompanied by a shale gas and oil policy paper issued jointly by Rudd and her counterpart for the Department of Communities and Local Government (which has oversight for the national planning system). The paper set out 5 key policy statements for shale gas:

- **Energy security and economy:** There is a national need to explore the UK's shale gas an oil resources. Exploration and the development of these resources will help meet Government objectives for secure energy supplies, economic growth and lower carbon emissions.
- **Regulation:** Safety and environmental protection will be ensured through responsible development and robust regulation by the Health & Safety Executive, the Environment Agency and the UK's oil and gas regulator, DECC (acting by the Oil and Gas Authority). Shale gas development must be carried out whilst maintaining the highest safety and environmental standards within a rigorous framework of regulation.
- **Transparency:** Transparency and the provision of objective information on shale development to the public is important. Communities affected by shale development must be properly engaged with the opportunity to hear from expert regulators at the Health & Safety Executive and the Environment Agency.
- **Planning:** The Government is committed to ensuring that local communities are involved in planning decisions that affect them and that the planning system is made faster and fairer. Local planning authorities are expected to ensure that decisions on planning applications are made within the 16-week statutory timeframe and, going forward:

- Appeals against planning refusals for shale gas exploration and development, or against non-determination, are to be treated as a priority for urgent resolution. The Government will revise recovery criteria for recovery appeals for shale exploration and development.

- The Government will also consider calling in shale applications, which will be considered on individual merit in line with policy. These applications will be prioritized.

- Where local authorities are identified as repeatedly underperforming by failing to meet statutory timeframes, the Government will consider whether to step in and determine the application itself.

- The Government will progress amending permitted development rights to allow drilling of boreholes for groundwater monitoring, and will invite views on proposal for further rights, as permitted development, the drilling of boreholes for seismic investigation and to appraise shallow mine workings for health, safety and environmental protection purposes.

- **Community Benefit:** Communities hosting shale gas developments should share in the financial returns generated. This will come in part from the existing requirement that shale gas companies contribute £100,000 per well-site to local communities and also from ring fencing a proportion of the tax revenues recouped from shale gas production for local community benefit.

It will be some time before the new Government policy is put to the test, but the move will be welcomed by shale companies with interests in existing onshore licenses and successful bidders in the latest round. We will monitor with interest how the new policy directions appear to influence the planning process, and how eagerly the Government is willing to call in applications.

Details of the first tranche of 14th round winners are available here: www.gov.uk/guidance/oil-and-gas-licensing-rounds

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KING & SPALDING

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REGULATORY
FERC / U.S.
FERC Reaffirms Filing Requirement For Jurisdictional Service Where No Compensation Is Received
Neil L. Levy, David G. Tewksbury, Bruce L. Richardson

The Federal Energy Regulatory Commission (FERC) recently issued an Order on Rehearing in *Chehalis Power Generating, L.P.*, Docket No. ER05-1056-008, where it reaffirmed its October 17, 2013 finding that Chehalis Power Generating, L.P.'s (Chehalis) May 2005 filing of a rate schedule was a changed rate and not an initial rate. The Rehearing Order has potential implications with respect to FERC-jurisdictional service provided for no compensation.

Background

The background of this proceeding spans more than a decade, beginning in May 2005, when Chehalis filed a rate schedule for the provision of Reactive Supply and Voltage Control from Generation Sources Service (Reactive Service) to Bonneville Power Administration (BPA) as an initial rate filing under Section 35.12 of FERC's regulations. In its July 2005 Order Accepting and Suspending Proposed Rate Schedule and Establishing Hearing and Settlement Procedures (July Order), FERC disagreed with Chehalis' characterization that the rate schedule was an initial rate schedule. Specifically, FERC stated that an initial rate schedule must involve a new customer and a new service, but because Chehalis had been providing Reactive Service to BPA without compensation under the interconnection agreement, the rate schedule was for a changed rate.

In its December 2005 Order Denying Request for Rehearing, FERC reaffirmed its finding. Chehalis petitioned the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), which remanded the case back to FERC to address whether or not the zero rate for Reactive Service should have been filed with FERC. In its February 2011 Order on Remand, FERC found that Chehalis should have filed a rate schedule for service to BPA and affirmed that the May 2005 rate schedule filing was a changed rate. In its November 2012 Order Denying Rehearing, FERC reaffirmed its prior finding.

Chehalis again petitioned the DC Circuit, but FERC moved for a voluntary remand to consider Chehalis' arguments. FERC issued its Order on Voluntary Remand and Clarifying Policy on Filing of Reactive Power Service Rate Schedule in October 2013 (October 2013 Order), wherein it (i) reaffirmed its prior finding that Chehalis' rate schedule was a changed rate and (ii) clarified its policy with respect to jurisdictional Reactive Service rate schedules for which no compensation is provided, stating that such rate schedules containing the rates, terms, and conditions are to be filed with FERC on a prospective basis. FERC also directed its Staff to conduct a workshop to explore the mechanics for filing Reactive Service rate schedules for which there is no compensation.

In October 2013, FERC issued its Notice Announcing Workshop in Zero Rate Reactive Power Rate Schedules, Docket No. AD14-1-000 (Workshop Notice). The workshop was held in December 2013 and comments filed in January 2014. No further FERC action has been taken in that docket.

The Rehearing Order was issued in response to the October 2013 Order.

Rehearing Order

In continuing to hold that Chehalis' May 2005 rate schedule filing was for a changed rate, FERC focuses on the distinction between an initial rate and a changed rate. Applying the same criteria as it did in the July Order, FERC restates the criteria that must be applied for a rate schedule to be considered an initial rate: the rate schedule must be a new service to a new customer. Because Chehalis had been providing Reactive Service to BPA under the interconnection agreement prior to the May 2005 rate schedule filing, FERC states that it properly deemed the filing a changed rate. Focusing on Chehalis' argument that a document cannot be considered to be a schedule showing rates and charges for service if no rates and charges are prescribed, FERC states that its:

> regulations provide that utilities must submit to the Commission rate schedules governing *not just* rates and charges, but also the provision of "electric service." 18 C.F.R. § 35.1(a) thus provides: "Every public utility shall file with the Commission … full and complete rate schedules and tariffs … clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, *the classifications, practices, rules and regulations affecting such* rates, charges, classifications, *services*, rules, regulations or practices."

Chehalis Power Generating, L.P., 152 FERC ¶ 61,050 at P 15 (2015). FERC cites Section 35.2 of its regulations and Section 205 of the Federal Power Act as additional support that the filing of tariffs and rate schedules includes filing non-rate terms and conditions of service regardless of the rate.

Potential Implications

Although Chehalis' May 2005 filing was for Reactive Service and the Commission issued the Workshop Notice to address filing options for Reactive Service rate schedules with zero compensation, the analysis in the Rehearing Order could certainly apply to all FERC-jurisdictional services. While many generation-based services may be subsumed under agreements for the sale of power at market-based rates, this may not be the case in all situations. For example, in February 2015, FERC issued a notice of proposed rulemaking in Third Party Provision of Primary Frequency Response Service, Docket No. RM15-2-000 (NOPR). In the NOPR, FERC describes primary frequency response to be "the autonomous, automatic, and rapid action of a generator, or other resource, to change its output (within seconds) to rapidly dampen large changes in frequency." Citing North American Electric Reliability Corporation's BAL-003-1 Frequency Response and Frequency Bias Setting Reliability Standard, FERC explains that it is the Balancing Authority with the obligation to maintain frequency. With its approval of BAL-003-1, FERC is exploring whether the sale of frequency response service should be at market-based rates or cost-based rates. Now, in light of the Rehearing Order, should a generator that is currently providing this service, albeit at zero compensation, have an agreement in place with a Balancing Authority? Would the filing be a cost-based filing with FERC or could it be captured under the generator's market-based rate filing and included in the Electric Quarterly Reports filed with FERC?

While frequency response is one example that raises questions with respect to the application of FERC's filing requirements, generators should evaluate whether there are other generation-based services being provided at zero compensation that should be subject to FERC's "newly clarified" filing requirements.

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Chemical Regulation Reporter®

Pipeline Safety

Security

The Support Antiterrorism by Fostering Effective Technologies Act of 2002, a section of the Homeland Security Act of 2002 (Pub. L. 107-296), is a little-known means to address liability issues that might arise when pipelines are attacked by terrorists. The act provides incentives for developing and deploying antiterrorism technologies by providing liability protections for claims arising out of, relating to, or resulting from an act of terrorism. John A. Drennan and Alexander Haas of King & Spalding LLP discuss the terrorism threat to the nation's pipelines, the role of the federal government in protecting pipeline infrastructure, the protection offered by the SAFETY Act and applying those protections to pipeline security programs.

Pipelines and Terrorism: Parlaying Your Company's Pipeline Security Program Into Legal Liability Protections

By John A. Drennan and Alexander K. Haas

Introduction

Domestic terrorism poses unique legal challenges for pipeline owners and operators. Half a million miles of pipeline crisscross the country, transporting volatile, flammable, and toxic materials. While part of the country's critical infrastructure, they are also well-recognized and tempting ''soft targets'' that have been attacked in the past. The yearly number of such attacks worldwide is on the rise, according to government reports.

At the same time, pipeline companies face a legal landscape that is far from forgiving. Details vary depending on a variety of factors (such as the impact of the attack and a company's role in the supply chain), but organizations that are attacked can expect a variety of adverse legal consequences. Negligence actions may be brought under state law for failure to provide adequate security; shareholder derivative lawsuits are common. Moreover, regulatory investigations and enforcement actions and increased governmental scrutiny from public utility commissions or other state or federal regulatory bodies may occur. Harms to plaintiffs, whether individuals or classes, may involve physical injuries, wrongful death, and environmental damages. On the company side, loss of revenue and incident-response costs (including perhaps data-ransom payments) can result in material setbacks, and the reputational damage alone may be devastating. In short, domestic terrorism leaves the companies that are legally responsible for pipelines in an especially vulnerable position—highly exposed to attack and, if attacked, highly exposed to adverse legal consequences.

One little-known means by which to address this quandary was provided by Congress in 2002 as part of the Homeland Security Act of 2002 (Pub. L. No. 107-296, §§ 861-65). The act, passed in the wake of the Sept. 11, 2001, attacks, included the Support Antiterrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act. The SAFETY Act provides incentives for developing and deploying antiterrorism technologies by providing liability protections for claims arising out of, relating to, or resulting from an act of terrorism. Importantly, these protections extend beyond technological devices to services, including security programs.

Among the protections are a clear and indisputable basis for removal from state court; a sharp limit on liability for compensatory damages (up to and including full immunity); a complete bar on punitive damages; sharp limits on noneconomic damages; and an offset to damages for collateral benefits to the plaintiff. No other tool offers pipeline owners and operators the direct and concrete advantages of the SAFETY Act.

Gauging the Threat of Terrorism to Pipelines

Security has been a long-standing concern for the pipeline industry. The Congressional Research Service, for example, observed in 2013 that ''[o]il and gas pipelines, globally, have been a favored target of terrorists, militant groups, and organized crime.''[1] It is easy to see why. In 2007, federal authorities arrested members of a terrorist group planning to blow up jet fuel pipelines and storage tanks at the John F. Kennedy International Airport in New York. That same year, a U.S. citizen was convicted of attempting to conspire with Al Qaeda to attack the Trans-Alaska Pipeline System and a second major natural gas pipeline in the eastern United States. In 2011, federal authorities arrested a U.S. citizen for planting an explosive device (which failed to detonate) under a natural gas pipeline in Oklahoma. And, in June 2012, a man was critically injured attempting to plant an improvised explosive device along a natural gas pipeline in Plano, Texas.

Physical attacks are not the only problem. Cyberthreats have escalated dramatically with the availability of new technologies, and cyberattackers appear intent on doing everything from conducting industrial espionage to exploiting and interrupting company operations. It has been reported that in 2008, the Baku-Tbilisi-Ceyhan pipeline in Turkey was sabotaged by attackers who injected malicious software into the control network, causing an explosion that sent flames high into the air.[2] In connection with the domestic energy industry, the U.S. Department of Homeland Security (DHS) has observed that between October 2012 and May 2013, oil and gas companies reported 111 cyber incidents—nearly 30 attacks more than were reported for all of fiscal year 2012.

The problem is not going away anytime soon. A recent report by the Aspen Institute and Intel Security indicates that the U.S. government anticipates cyberthreats to expand in every dimension (frequency, scale, sophistication, and impact), and that a survey they conducted of 625 IT executives in the U.S., U.K., France and Germany found that 48 percent said they think it is likely there will be a cyberattack on critical infrastructure in the next three years that will result in loss of life.[3]

Pipelines are an attractive target for several reasons. The U.S. economy depends on pipeline transportation, and pipelines transport dangerous, toxic materials that have the potential to cause public injury and environmental damage. Virtually every inch of the thousands upon thousands of miles of pipelines in the United States constitutes a potential point of attack. Moreover, pipeline operations typically utilize industrial supervisory control and data acquisition, or SCADA, systems. SCADA systems are highly distributed, because they control geographically dispersed assets, where centralization is critical to the system's operation. These systems—while invaluable because they enable pipeline operators to monitor and control critical variables such as pressure and flow rates through remote management of valves, pumps and compressor stations[4]—are frequently vulnerable to cyberintrusions.[5]

The Federal Government Role in, and Limited Resources for, Addressing the Threat

To respond to national security risks posed by pipelines, Congress tasked the Transportation Security Administration (TSA), an agency within DHS, with protecting them.[6] TSA has the legal authority to promulgate mandatory regulations for pipeline security, but it has chosen not to do so and instead relies on the voluntary adoption of best practices that it developed with industry input. Specifically, TSA has issued Pipeline Security Guidelines to provide recommendations for pipeline-industry security practices.[7] The guidelines generally call for pipeline companies to develop corporate security plans, conduct security assessments, and implement enhanced security measures at critical facilities.

TSA's resources are limited. TSA conducts security inspections, but focuses these inspections on the 100 largest pipeline and distribution system operators to make the best use of the resources available. Congress has long questioned whether those resources are sufficient. It has been reported that one senator remarked in 2005 that ''aviation security has received 90% of TSA's funds and virtually all of its attention. There is simply not enough being done to address . . . pipeline security.''[8]

Similarly, it has been reported that, at a congressional field hearing in April 2010, another member expressed concern that TSA's pipeline division did not have sufficient staff to carry out a federal pipeline security program on a national scale.[9]

The SAFETY Act

Congress's purpose in enacting the SAFETY Act was to ensure that the threat of liability does not deter com-

[1] http://fas.org/sgp/crs/homesec/R42660.pdf

[2] http://www.bloomberg.com/news/2014-12-10/the-map-that-shows-why-a-pipeline-explosion-in-turkey-matters-to-the-u-s-.html

[3] http://blogs.wsj.com/riskandcompliance/2015/07/24/survey-roundup-deadly-cyberattack-worries/.

[4] http://green.blogs.nytimes.com/2013/01/10/cyberstalkers-threaten-pipeline-security/?_r=1

[5] http://www.pgjonline.com/cyber-security-and-pipeline-control-system; *see also* 2009 National Infrastructure Protection Plan at 11, 114 (recognizing that SCADA systems are important elements of the nation's cyber infrastructure).

[6] There are a host of other federal agencies that have *some* level of say over matters relating to pipeline security issues. These include the Department of Energy (DOE), Federal Bureau of Investigation (FBI), Federal Emergency Management Agency (FEMA), National Transportation Safety Board (NTSB), Environmental Protection Agency (EPA), Federal Energy Regulatory Commission (FERC), and Occupational Safety and Health Administration (OSHA).

[7] https://www.tsa.gov/sites/default/files/assets/pdf/Intermodal/tsa_pipeline_sec_guideline_april2011.pdf.

[8] http://fas.org/sgp/crs/homesec/R42660.pdf (citation omitted).

[9] http://fas.org/sgp/crs/homesec/R42660.pdf (citation omitted).

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panies from developing, deploying, and commercializing antiterrorism technologies that could save lives. The SAFETY Act defines an antiterrorism technology broadly as ''any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.'' This includes ''any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing.'' Technology includes ''[d]esign services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security.'' These definitions are broad enough to encompass security programs for physical sites, and in fact SAFETY Act protection has been extended to many of them, including for example the security program protecting Yankee Stadium.

If DHS certifies a technology or security program, the SAFETY Act creates liability limitations for ''claims arising out of, relating to, or resulting from an act of terrorism'' where Qualified Anti-Terrorism Technologies, or QATTs, have been deployed.[10] Specifically, these provisions provide the following protections if the technology is fully certified:

- exclusive jurisdiction in federal court for lawsuits against the sellers of Qualified Anti-Terrorism Technologies, which extends to the buyers, the buyers' contractors, and downstream users;[11]

- a limitation on the liability of sellers of Qualified Anti-Terrorism Technologies to an amount of liability insurance coverage specified for each Qualified Anti-Terrorism Technology, providing that sellers cannot be required to obtain any more liability insurance coverage than is reasonably available ''at prices and terms that will not unreasonably distort the sales price'' of the technology;[12]

- a prohibition on joint and several liability such that sellers are liable only for the percentage of noneconomic damages that is proportionate to their responsibility;[13]

- a complete bar on punitive damages and prejudgment interest;[14]

- a reduction of the plaintiff's recovery by the amount of collateral-source compensation, such as insurance benefits or government benefits;[15] and

- a rebuttable presumption that sellers are entitled to the ''government contractor defense'' even if the technology is not sold to a government entity.[16]

The scope of the SAFETY Act is broad. For example, the term ''seller'' in the act refers to all parties that are eligible for coverage, and it can include any person, firm, or other entity that provides a Qualified Anti-Terrorism Technology. To be clear, there is no requirement that the Qualified Anti-Terrorism Technology's sole purpose be antiterrorism.

SAFETY Act recognition provides additional benefits. For instance, it provides an immediate market differentiator because a company may advertise the fact that, and the degree to which, its product or service has been recognized by the government as an antiterrorism tool. Recognition also may well provide benefits in connection with the company's liability insurance rates. Additionally, such recognition could only assist the company to establish that it meets the industry standard of care for pipeline security in tort litigation outside the context of a terrorist incident.

While not an exclusive list, some of the factors that may influence whether the Department of Homeland Security will extend SAFETY Act protection to a technology or service include its utility and effectiveness; the magnitude of the risk exposure to the public if the technology or service is not deployed; prior use by the government; its availability for immediate deployment; the risk to the seller (or other provider) of extraordinarily large or unquantifiable third-party liability exposure; or a substantial likelihood that the technology or service will not be deployed unless SAFETY Act protections are granted.

Application to Pipeline Security Programs

While the pipeline companies largely have not yet taken advantage of the SAFETY Act, the unparalleled litigation and liability protections it offers are available to them. For example, a pipeline operator's programs to protect pipelines from attack are eligible to receive legal recognition under the SAFETY Act just like any other antiterrorism technology or service. This is true for both physical and cybersecurity programs.

To be sure, there is no one-size-fits-all security program for pipeline companies. Because their operations, assets, and facilities (including SCADA systems) are highly individualized, the details of their security plans vary tremendously. That said, pursuant to their adoption of the TSA Pipeline Security Guidelines, many, if not most, pipeline companies already have fully developed security programs, either in-house or on a contract basis. If appropriately packaged and developed into a SAFETY Act application, these programs—which were initially designed to minimize the company's security risks—can be parlayed into a way to minimize the company's legal risk.

The process for obtaining SAFETY Act certification is relatively inexpensive and efficient. Companies submit pre-applications and full applications to the Department of Homeland Security, a process that is comparable to submitting a regulatory filing. The contents of the application are strictly confidential, and applications normally require approximately 120 days to be granted. If the application is granted, SAFETY Act protection extends for five years, and can be renewed in five-year increments thereafter.

Because the SAFETY Act and its implementing regulations are legally intricate, and because certain sensitive conversations concerning risk vulnerabilities must be protected by privilege, we strongly urge companies that are considering applying for SAFETY Act recognition to involve experienced counsel at an early stage of the process.

[10] 6 C.F.R. § 25.2.
[11] Pub. L. No. 107-296, § 863(a)(2); 6 CFR Part 25, at 33150.
[12] Pub. L. No. 107-296, § 864(a)(2).
[13] Pub. L. No. 107-296, § 863(b)(2).
[14] Pub. L. No. 107-296, § 863(b)(1).
[15] Pub. L. No. 107-296, § 863(c).
[16] Pub. L. No. 107-296, § 863(d).

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Proposed Emissions Standards for Oil and Gas Sector: EPA Delivers on Regulatory Expansion Foreshadowed in 2012

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On August 18, 2015, the United States Environmental Protection Agency (EPA) issued its proposed amendments to the New Source Performance Standards (NSPS) for the oil and natural gas sector.[1] The proposal adds methane emissions requirements for all segments in the sector, and it also expands the standards for emissions of volatile organic compounds (VOCs), amending the rules issued in 2012 to include additional sources. The proposed rules are part of the President's Climate Action Plan and Methane Strategy. Specifically, the proposal aims to deliver on the Administration's announcement earlier this year of its goal of reducing oil and gas sector methane emissions by 40 to 45 percent by 2025.[2]

Key Aspects of the Proposal

EPA proposes to expand the reach of its oil and gas NSPS to sources in additional segments of the oil and gas chain and in doing so layer methane requirements across the sector.[3]

- Transmission and Storage – The 2012 rule left this segment largely untouched, citing a lack of information necessary to set standards.[4] Accordingly, the proposed rule would have a substantial incremental impact on transmission and storage assets. Methane and VOC requirements are proposed for compressors,[5] pneumatic controllers,[6] and pneumatic pumps; and leak detection and repair (LDAR) programs would be required at compressor stations.[7]

- Production Segment – The proposed rule supplements the 2012 rules by establishing methane and VOC requirements to cover pneumatic pumps, completions of hydraulically fractured oil wells,[8] and fugitive emissions. It also adds methane requirements to sources already regulated for VOCs (wet-seal centrifugal compressors, reciprocating compressors,[9] pneumatic controllers, and completions of hydraulically fractured gas wells).

- Natural Gas Processing Plants – The 2012 rules regulated most VOC emission points at natural gas processing plants, adding to then-existing rules. The proposed rule adds methane requirements for these same emission points, and sets a zero-emission standard for pneumatic pumps.

The proposal discusses in detail the preferred technologies for each source type. However, EPA also solicits comments on a wide range of issues and alternatives. Many of these invitations are notable:

- Are there states with rules more stringent than the proposal, such that EPA should consider compliance with state rules as compliant with the proposed rule?

- Are there corporate-wide LDAR programs that should be considered alternate compliance methods, and how would EPA incentivize and ensure enforceability of such programs?
- Is 30 days enough time after startup to conduct initial LDAR surveys?
- Should Method 21 be a permitted alternative to optical gas imaging (OGI), and are there other detection technologies that EPA should consider?
- Are one percent and three percent the appropriate thresholds for reducing LDAR survey frequency to semiannually and annually, respectively, and should performance-based frequencies be allowed at all?
- What LDAR records should be submitted electronically to EPA for "remote review"?
- Does the proposed rule set the well exemption parameters at appropriate levels?
- Do the well completion requirements for hydraulically fractured oil wells require a phase-in period (similar to the 2012 rule)?
- Are the monitoring frequencies for the LDAR program set at appropriate intervals?
- Are there sufficient numbers of qualified OGI contractors and OGI equipment to meet the demand the proposed rule will generate?

If the variety of invitations to comment is any indication of EPA's focus, companies should at the very least provide thorough comments on the LDAR and oil well completion aspects of the proposed rule. Operators for whom a particular requirement is of concern should look to the comment solicitations on that aspect to assess EPA's flexibility.

Not Just for New Sources?

On its face, the proposed rule has limited scope because it applies only to new, modified, or reconstructed sources. However, a well that is fractured or refractured after the proposal date would constitute a modified source. Thus, depending on how assertively EPA applies this definition, many existing sources could be drawn into the new rule's coverage. Moreover, EPA also proposes new control technology guidelines (CTG) for VOCs, against which states must assess (and potentially revise) their state implementation plans. Thus, the CTG proposal provides another potential avenue for drawing in existing sources.

In addition to the CTG, EPA also issued a third proposal concerning the definition of a "source" in the oil and gas sector. Current rules define a "source" to include the aggregated emissions of multiple facilities if they (a) are under common control, (b) share the same standard industrial classification code, and (c) are "contiguous or adjacent" in location. The last condition has been the subject of substantial discussion and dispute, particularly in the oil and gas industry. EPA therefore proposes to define facilities to be "adjacent" if they are within a quarter-mile of each other. However, EPA requests comment on whether to adopt only the quarter-mile interpretation or also use the "functional interrelation" test.[10] If EPA were to make this change in the final rule, operators would likely see more sources elevated to "major source" status, triggering additional requirements.

One Good Turn of Foreshadowing Deserves Another

As it did in the 2012 rules, EPA uses its proposal to foreshadow a subsequent round of regulation.

- Liquids Unloading – The Agency did not impose emissions requirements on liquids unloading, but it seeks comment on whether and how to regulate this source. Many of the sources added in the new proposal were excluded in 2012 for the same reason cited for liquids unloading – lack of information. A later rule to follow after the information gap is closed would be of little surprise.

- "Next Gen" Options – Like many other federal agencies, the burden of EPA's enforcement and compliance efforts have fallen on increasingly limited resources. "Next generation" compliance management looks to third-party options to make up the shortfall, and the proposed rule seeks input on independent compliance verification (particularly for LDAR), certification of vent system capability by independent professional engineers, and third-party information submittals. In the proposed rule, EPA specifically seeks input on establishing these programs, and EPA notes where such mechanisms were included in consent decrees generated in past enforcement actions. Companies should pay particular attention in their comments to this aspect of the proposal, as it has the potential for substantial cost implications for operators.

EPA's 2012 oil and gas NSPS focused on the surge in domestic natural gas production, and the new proposal focuses on the current "surge" – oil production and infrastructure (pipelines). EPA appears to be looking ahead, even as it finishes the current proposal. Prudence suggests that comments on the proposal similarly anticipate future regulations.

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[1] A pre-proposal version is available at www.epa.gov/airquality/oilandgas/pdfs/og_nsps_pr_081815.pdf.
[2] The percentage reduction goal uses a 2012 baseline.
[3] Detail summaries by sector are available at www.epa.gov/airquality/oilandgas/actions.html.
[4] *See* 77 Fed. Reg. 49, 489 (Aug. 16, 2012).
[5] Reciprocating compressors would require timed replacement of rod packing systems (or routing to vent system), and centrifugal compressors (wet seal) must use closed vent system or route emissions to process system.
[6] Pneumatic controllers must achieve a "zero" bleed rate at gas processing plants, and no more than 6 scfh at other locations.
[7] The proposed LDAR progam would use optical gas imaging (OGI) to identify leaks, and repairs would be required within 15 days.
[8] As it did in the 2012 rule, the Agency proposes to require reduced emissions completions (RECs), but would exempt certain wells from the requirements.
[9] Well-head compressors are not included in the proposed rule's coverage.
10 This test, in "policy" form, was rejected in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).

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