

CRS Issue Brief for Congress

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Energy Policy: The Continuing Debate and Omnibus Energy Legislation

Updated December 23, 2004

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CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

The Arctic National Wildlife Refuge (ANWR)

Other Non-Tax Energy Production Initiatives

Energy Tax Policy

Electricity Restructuring

Nuclear Energy

Fuel Economy

The President's Hydrogen Fuel Initiative

Renewable Energy and Fuels

Energy Efficiency and Conservation

An Overview of the Senate Debate on S. 14

LEGISLATION

Energy Policy: The Continuing Debate and Omnibus Energy Legislation

SUMMARY

The 108th Congress adjourned without passing comprehensive energy legislation. In mid-November, Representative Tom DeLay and Senator Pete Domenici indicated that new comprehensive energy legislation will be introduced in the 109th Congress. Representative Joe Barton, chairman of the House Energy and Commerce Committee, indicated on December 1, 2004, that any major energy legislation will need to originate in the Senate.

The debate over omnibus energy legislation in the 108th Congress was protracted. The House debated energy legislation in the week of June 14. Bills passed included H.R. 4503, which was essentially identical to the conference version of a comprehensive energy bill (H.R. 6) previously passed by the House. A bill to limit environmental reviews of renewable energy projects, H.R. 4513, also passed, as did H.R. 4517, a bill to expedite federal authorization for siting and operation of refineries. Legislation (H.R. 4529) to allow oil and gas development in the Arctic National Wildlife Refuge (ANWR) was withdrawn after the United Mine Workers (UMW) expressed its opposition. The bill would have used bonus bid revenues to help fund the UMW Combined Benefit Fund, which provides health care to roughly 17,000 retired coal miners.

The House passed the conference version of H.R. 6 on November 18, 2003. On November 21, a cloture motion to limit debate in the Senate on the H.R. 6 conference report failed (57-40). Efforts to bring the bill back to the Senate floor early in the second session were unsuccessful. The most contentious provision of H.R. 6 has been the “safe harbor” provision to protect MTBE refiners from product liability suits, a provision for which there is strong

support in the House.

The closest consensus was that the cost of the bill had to be reduced. On February 12, 2004, following agreement between the Senate Majority and Minority Leaders, Senator Domenici introduced S. 2095, a revision of the omnibus energy legislation. The revised bill was described as “lean” in so far as it was estimated to cost less than \$14 billion, in contrast to the \$31 billion estimated for H.R. 6. However, S. 2095 dropped the “safe harbor” provision to protect MTBE refiners. With some skepticism developing over the prospects for S. 2095, many of the energy tax credits were appended by the Senate to S. 1637, the Jumpstart Our Business Strength (JOBS) Act. The Senate then included these provisions in H.R. 4520, the bill sent to conference. On September 29, 2004, it was indicated that the energy tax credits would not appear in the conference bill.

On September 28, 2004, Senator Domenici indicated that comprehensive legislation was “dead” for the current session. Some policymakers floated the idea of breaking up the bill and passing less controversial provisions, but others argued that the balances struck in the conference bill were extremely sensitive ones that would not survive treating major provisions separately.

S. 2095 would not have authorized oil exploration, development, and production in ANWR. The bill would have provided \$18 billion in loan guarantees for construction of an Alaskan natural gas pipeline. S. 2095 also included an Alaskan gas price floor. See also CRS Report RL32204, *Omnibus Energy Legislation (H.R. 6): Overview of Conference Report Non-Tax Provisions*.



MOST RECENT DEVELOPMENTS

The 108th Congress adjourned without passing comprehensive energy legislation. In mid-November, Representative Tom DeLay and Senator Pete Domenici indicated that new comprehensive energy legislation will be introduced in the 109th Congress. Representative Joe Barton, chairman of the House Energy and Commerce Committee, indicated on December 1, 2004, that any major energy legislation will need to originate in the Senate.

The Senate Energy and Natural Resources Committee posted a summary (available at [http://energy.senate.gov/news/rep_release.cfm?id=217948]) of differences between major bills H.R. 6 and S. 2095. The conference bill for H.R. 6, like previous drafts, is posted on the Senate Committee on Energy and Natural Resources website (at [<http://energy.senate.gov/legislation/energybill2003/energybill2003.cfm>]) and the House Committee on Energy and Commerce website (at [<http://energycommerce.house.gov>]). For a summary of the provisions of the conference bill, see CRS Report RL32204, *Omnibus Energy Legislation (H.R. 6): Overview of Conference Report Non-Tax Provisions*. For a side-by-side of the Senate and House versions of H.R. 6, see CRS Report RL32033, *Omnibus Energy Legislation (H.R. 6): Side-By-Side Comparison of Non-tax Provisions*. For a side-by-side of the tax provisions in the Senate and House versions of H.R. 6, see CRS Report RL32042, *Energy Tax Incentives in H.R. 6: The Conference Agreement as Compared with the House Bill and Senate Amendment*. For a comparison with major provisions of S. 14, see CRS Report RL32078, *Omnibus Energy Legislation: Comparison of Major Provisions in House- and Senate-Passed Versions of H.R. 6, Plus S. 14*. EIA analysis of selected provisions of the energy legislation is available at [[http://www.eia.doe.gov/oiaf/servicerpt/eleg/pdf/sroiaf\(2003\)04.pdf](http://www.eia.doe.gov/oiaf/servicerpt/eleg/pdf/sroiaf(2003)04.pdf)].

BACKGROUND AND ANALYSIS

The 108th Congress adjourned without passing comprehensive energy legislation. In mid-November, Representative Tom DeLay and Senator Pete Domenici indicated that new comprehensive energy legislation will be introduced in the 109th Congress. Representative Joe Barton, chairman of the House Energy and Commerce Committee, indicated on December 1, 2004, that any major energy legislation will need to originate in the Senate.

The energy policy debate in the 108th Congress was a protracted one and took place against the backdrop of elevated crude oil prices that briefly breached the \$50 level on September 28, 2004. On November 17, 2003, House and Senate conferees approved an omnibus energy bill (H.R. 6). On November 18, the House approved the conference report (246-180). On November 21, 2003, a cloture motion to limit debate in the Senate on omnibus energy legislation (H.R. 6) failed (57-40). Efforts to secure two more votes for the bill were not successful. On February 12, 2004, following agreement between the Senate Majority and Minority Leaders, Senator Domenici introduced S. 2095, a revision of the omnibus energy legislation (H.R. 6) reported by a conference committee last November. The revised bill was described as “lean” in so far as it was estimated to cost less than \$14 billion, in contrast to the estimated \$31 billion estimated for H.R. 6. With skepticism developing over the prospects for S. 2095, many of the energy tax credits were appended in May 2004 to S. 1637, the Jumpstart Our Business Strength (JOBS) Act, and the Senate version of H.R. 4520. On

September 29, 2004, it was indicated that the energy tax credits would not appear in the H.R. 4520 conference bill.

Major issues addressed by the conference on H.R. 6 are noted below. Major changes in S. 2095 from the conference version of H.R. 6 are noted as well. For additional specifics, see CRS Report RL32042, *Energy Tax Incentives in H.R. 6: The Conference Agreement as Compared with the House Bill and Senate Amendment*.

- **Ethanol.** Treatment of ethanol was especially contentious. The conference text included a mandate to increase ethanol production to 3.1 billion gallons annually by 2005 and 5 billion gallons by 2012. However, regions would have been able to opt out if the mandate would have economic repercussions, but loss of revenue to the highway trust fund was an excluded condition.
- **MTBE.** One of the most controversial provisions in the entire bill was the establishment of a “safe harbor” from product liability lawsuits for producers of MTBE and renewable fuels. It would have protected anyone in the product chain, from manufacturers down to retailers, from liability for cleanup of MTBE and renewable fuels or for personal injury or property damage based on the nature of the product (a legal approach that has been successfully used in California to require refiners to shoulder liability for MTBE cleanup). The safe harbor would have been retroactive to September 5, 2003. Prior to that date, five lawsuits had been filed. After that date, at least 150 suits were filed, on behalf of 210 communities in 15 different states. S. 2095 does not include these provisions.
- **ANWR.** The bill did not include language that would open up the Arctic National Wildlife Refuge (ANWR) to oil and gas development. The House-passed bill included such language while the Senate bill did not. While the Administration and many Members wanted to include ANWR, it became apparent to the bill managers that a bill with ANWR language would not pass the Senate. As noted above, the House debated but did not vote on legislation to open ANWR (H.R. 4529) in mid-June. In light of additional Republicans joining the House and Senate in the 109th Congress, some expect that opening ANWR will again be an issue.
- **Electricity.** In part, the electricity section of H.R. 6 would have repealed the Public Utility Holding Company Act (PUHCA) and establish mandatory standards for interstate transmission. Standard market design (SMD) would have been remanded to the Federal Energy Regulatory Commission (FERC); no rule would be allowed before the end of FY2006. The Department of Energy (DOE) would have identified “transmission corridors” that require new construction or upgrading. The bill would have granted eminent domain authority to the federal government for construction of interstate power lines on these transmission corridors if the states did not act.

- **Hydrogen.** The bill would have authorized \$2.1 billion for research and development of hydrogen fuel and fuel cells over the course of FY2004-FY2008.
- **Natural Gas Pipelines.** The bill would have provided \$18 billion in loan guarantees for construction of a natural gas pipeline from Alaska to Alberta, where it will connect to the existing Midwestern pipeline system. S. 2095 also restored language setting a price floor. Shortly before adjournment, the 108th Congress approved an \$18 billion loan guarantee for the construction of this pipeline (P.L. 108-357), and a proposal to build the project was made at the end of 2004 by the major holders of North Slope gas reserves.
- **CAFE.** The bill did not specify Corporate Average Fuel Economy (CAFE) levels, but would have authorized \$2 million annually during FY2004-FY2008 to the National Highway Traffic Safety Administration (NHTSA) to conduct rulemaking as provided in current law.
- **Renewable Portfolio Standard (RPS).** The bill did not include an RPS. The Senate-passed bill included a 10% RPS target for power production. The Administration opposed it, citing concern about impact on power costs; however, a DOE report found that the impact would be negligible, largely offset by lower costs for natural-gas-fired electricity.
- **Renewable Energy Production Tax Credit.** The bill would have extended the existing credit, which would otherwise expire on December 31, 2003, for three more years. It has been lauded as critical to cost-competitiveness for power production from certain renewable energy resources.
- **Energy Efficiency Standards.** The energy efficiency section legislated new efficiency standards for several consumer and commercial products and appliances. For certain other products and appliances, DOE would have been empowered to set new standards.

The Congressional Budget Office (CBO) issued a preliminary estimate November 18, 2003, that the conference report would increase direct spending by \$5.4 billion and decrease revenues by \$25.7 billion through 2013. The estimate is available at [http://energy.senate.gov/legislation/energybill2003/cbo_report.pdf]. For a summary of the conference bill's provisions, see CRS Report RL32204, *Omnibus Energy Legislation (H.R. 6): Overview of Conference Report Non-Tax Provisions*. For an expanded background discussion about energy policy, see CRS Report RL31720, *Energy Policy: Historical Overview, Conceptual Framework, and Continuing Issues*. For a review of factors affecting gasoline prices, see CRS Report RL32343, *Gasoline Price Surge Revisited: Crude Oil and Refinery Issues*.

The conference version of H.R. 6 developed out of a number of proposals. Several energy bills were reported from House committees on April 2, 2003. The House Energy and Commerce Committee reported energy legislation (H.R. 1644) by a vote of 36-17. The House Science Committee marked up legislation (H.R. 238) that would provide \$30 billion for DOE research and development (R&D) programs during fiscal years 2004-2007. The House Committee on Resources reported a bill, H.R. 39 (32-14), that would have authorized

exploration, development and production of oil in ANWR. On April 3, 2003, the House Ways and Means Committee passed (24-12) H.R. 1531, the Energy Policy Tax Act of 2003. The House bills were merged into H.R. 6, introduced on April 7, 2003, and the House passed H.R. 6, as amended, on April 11, 2003.

The House bill included several provisions that were part of comprehensive, but not enacted, energy legislation (H.R. 4) debated during the 107th Congress. These provisions touched upon energy efficiency and conservation, and clean coal technology. A separate bill in the 107th Congress would have reauthorized the Price-Anderson Act nuclear liability system; language to do so was incorporated into H.R. 6. The bill passed by the House would have provided roughly \$15.5 billion in net energy tax incentives. The House bill also addressed a number of controversial issues left unresolved by the 107th Congress. It included an electricity title that would, in part, repeal the Public Utility Holding Company Act, would prospectively repeal the mandatory purchase requirement under the Public Utility Regulatory Policies Act, and would create an electric reliability organization. H.R. 6 would also have established a renewable fuels standard of 2.7 billion gallons by 2005 and 5 billion gallons by 2015.

The House version of H.R. 6 went to conference in September with the Senate version, passed on July 31 (84-14). The Senate debate had begun in May, and the Senate was working to pass a bill prior to the August recess. However, when the debate on S. 14 became mired and passage appeared unlikely, Senate Minority Leader Daschle suggested that the body pass the comprehensive energy legislation that the Senate had sent to conference in the 107th Congress. After several hours of discussion off the floor, both parties agreed to this proposal, and the text of the Senate version of the previous year's H.R. 4 was inserted into H.R. 6. (A summary of the debate on the unpassed S. 14 appears at the end of this issue brief.)

There were identical or similar provisions in both S. 14 and the substitute measure that the Senate passed as H.R. 6, but there were also significant differences. Both the House and Senate energy bills would have provided for an extension of the Price-Anderson nuclear liability program, and the bills either encouraged or required the National Highway Traffic Safety Administration (NHTSA) to initiate a rulemaking to establish new corporate average fuel economy (CAFE) standards. Both versions of H.R. 6 authorized construction of an Alaskan natural gas pipeline. However, the Senate bill required electric utilities to provide a minimum percentage of power from renewable sources; the House bill had no such provision. The Senate bill authorized R&D on global climate change; the House bill had no climate change provisions, nor did the draft conference language that was initially released. For a more complete description of the treatment of these and other issues in the two different bills, see CRS Report RL32078, *Omnibus Energy Legislation: Comparison of Major Provisions in House- and Senate-Passed Versions of H.R. 6, Plus S. 14*.

Conferees on the House and Senate energy bills (H.R. 6) met on September 4, 2003. Senator Domenici indicated that he and Representative Tauzin would draft the bill and release sections for comment as they were developed. Senator Domenici expressed his belief that it was the periodic meeting of the conferees to discuss individual provisions that scuttled passage of an energy bill in the last Congress — and that the process he outlined would make expeditious passage of a bill more likely. His expressed objective was to complete the conference by October 1, 2003. In a letter to Senator Domenici on September 11, Senator

Bingaman took vigorous exception to the process, arguing that excluding Democrats from the drafting process is not an effective way to build consensus.

On September 9, 2003, the Administration sent its own comments, urging inclusion of drilling in the Arctic National Wildlife Refuge (ANWR) and stating that it would like to see the conferees retain language that would provide for streamlined oil and gas permitting on public lands. Secretary of Energy Abraham indicated that the Administration would support a loan guarantee, rather than tax credits, to encourage construction of a natural gas pipeline from Alaska. The Administration indicated that it would support a renewable fuel standard calling for a tripling in ethanol use. However, the Administration believed that both the House and Senate bills would set unrealistic targets for development of hydrogen-powered vehicles. The Secretary of Energy was explicit in calling for the conferees to reduce “excessive” spending on energy projects and research and development.

Senator Domenici and Representative Tauzin released draft sections as they were developed, and revisions of these sections — including some provisions suggested by Democrats — were released on September 29, 2003. On October 1, Senator Domenici released a letter announcing that conference action on H.R. 6 would be delayed until the third week in October. This was attributed to the need for time to work on tax provisions. The Senator said that agreement was near on controversial sections; some believed consensus was proving more elusive.

In the intervening weeks, agreement between the House and Senate managers had been reported on a number of issues, but resolution of differences over the tax treatment of ethanol proved almost insurmountable until the White House proposed a compromise. Agreement was announced on November 5, 2003, to repeal the current 5.2 cents per gallon exemption for ethanol, and institute a tax credit in its place. The bill reported from conference on November 17 did not include the exemption, but added new tax credits. Incentives for the construction of an Alaskan natural gas pipeline were provided. Inclusion of language extending deadlines for certain metropolitan areas to meet clean air deadlines was cited as potentially injurious to passage of a final bill.

On November 18, the House approved the conference report (246-180) on H.R. 6, the omnibus energy bill. On November 21, a cloture motion to limit debate in the Senate on H.R. 6 failed (57-40). Prior to the vote, Senate Majority Leader Frist indicated to the Senate that the legislation would not be remanded for further negotiation, nor would the majority bring individual sections of the bill to the floor for separate consideration. After the vote, he indicated that another vote on cloture would be scheduled in the days before Thanksgiving. However, on November 24, leadership staff indicated that negotiations to craft a compromise had been unsuccessful, and that the bill would receive no further attention during the first session.

In the first months of the second session, there were many different — and sometimes contradictory — reports of possible strategies to secure passage of an omnibus bill or some of its provisions. Some argued that breakup of the bill would not be viable because of the careful regional and political compromises that were reached to get a bill out of conference and through the House. On February 12, 2004, following agreement between the Senate Majority and Minority Leaders, Senator Domenici introduced S. 2095, a revision of the omnibus energy legislation. The revised bill was described as “lean” in so far as it was

estimated to cost less than \$14 billion, in contrast to the \$31 billion estimated for H.R. 6. However, S. 2095 dropped what may have been the most contentious provision of H.R. 6 — the “safe harbor” provision to protect MTBE refiners from product liability suits, a provision for which there is strong support in the House. With some skepticism developing over the prospects for S. 2095, many of the energy tax credits were appended in May 2004 to S. 1637, the Jumpstart Our Business Strength (JOBS) Act, and the Senate version of H.R. 4520. On September 29, 2004, it was indicated that the energy tax credits would not appear in the H.R. 4520 conference bill.

Fresh energy legislation was scheduled for floor action in the House on June 15. Bills passed included H.R. 4503, which is essentially identical to the conference version of a comprehensive energy bill (H.R. 6) previously passed by the House. A bill to limit environmental reviews of renewable energy projects, H.R. 4513, was also passed, as was H.R. 4517, a bill to expedite federal authorization for siting and operation of refineries. Legislation (H.R. 4529) to allow oil and gas development in the Arctic National Wildlife Refuge (ANWR) was withdrawn after the United Mine Workers (UMW) expressed its opposition. The bill would have used bonus bid revenues to help fund the UMW Combined Benefit Fund, which provides health care to roughly 17,000 retired coal miners.

On September 28, 2004, Senator Domenici indicated that comprehensive energy legislation was “dead” for the current session. However, he suggested that some eye was being turned to passing some provisions of the legislation. This would be a departure from insistence earlier in 2004 that breaking up the bill was not an option. Some argued that the compromises struck in the effort to report a bill from conference were very sensitive and would not survive piecemeal treatment of the bill’s proposals. In mid-November, Representative Tom DeLay and Senator Pete Domenici indicated that new comprehensive energy legislation will be introduced in the 109th Congress. Representative Joe Barton, chairman of the House Energy and Commerce Committee, indicated on December 1, 2004 that any major energy legislation will need to originate in the Senate.

Some of the major energy issues that received attention during the debate in the 108th Congress are discussed briefly below.

The Arctic National Wildlife Refuge (ANWR). Domestic oil production continues to fall. Some argue that the nation should be seizing the opportunity to develop the oil and natural gas resources that remain untapped. The potential Alaskan resources are high on this list, and the debate over whether or not to open ANWR for leasing continues after more than a decade. While the House bill would have opened up ANWR, the Senate bill did not. In a letter to Senator Domenici on September 11, 2003, Secretary of Energy Abraham indicated that the Administration would strongly like to see ANWR included in the conference bill. Once it became apparent that there were insufficient votes in the Senate to pass an energy bill with ANWR provisions, the managers decided to leave ANWR out of the final conference bill. However, a separate ANWR bill (H.R. 4529) was debated on the House floor June 15, 2004, but was pulled from the floor before a vote.

With the increased Republican majorities in the House and Senate in the 109th Congress, some expect that ANWR will again be an issue, with better prospects for passage of legislation that would open ANWR to leasing. (For additional information, see CRS Issue Brief IB10111, *The Arctic National Wildlife Refuge: Controversies for the 108th Congress.*)

There are other prospects for oil development in northern Alaska, including two fields scheduled for development just outside the National Petroleum Reserve — Alaska (NPR-A). The press has reported oil industry interest in the potential of NPR-A. See *Petroleum Intelligence Weekly*, November 22, 2004. (For earlier background and history on NPR-A, see also CRS Report RL31573, *National Petroleum Reserve — Alaska (NPR-A)*.)

Other Non-Tax Energy Production Initiatives. The Department of the Interior has estimated that roughly a quarter of oil resources and less than one-fifth of gas resources on Indian lands have been developed. H.R. 6, as passed by the House, included a controversial provision that would allow Indian tribes to enter into business agreements with energy developers without obtaining prior approval from the Department of the Interior, but only if DOI has already approved the tribe's regulations governing such energy agreements. The provision also absolved the United States from any liabilities for tribal losses stemming from such a business agreement, which tribes objected to. The Senate had a similar provision, as did S. 14, and the bill reported from conference included many aspects of these bills' provisions. The bill retains the federal government's general Indian trust responsibility and a specific trust responsibility to protect tribal rights in cases of violations of tribal regulations or business agreements, but it absolves the federal government from liability for losses resulting specifically from the terms of a tribal energy business agreement.

Some critics of the proposal also argued that tribal energy business agreements without DOI approval could enable tribes to initiate projects without going through the environmental review required by the National Environmental Policy Act (NEPA). The Senate defeated an amendment to strengthen an environmental review process for development of energy projects on Indian lands (52-47). The bill reported from conference retains House language requiring that the tribal energy regulations include an environmental review process. The Senate version of H.R. 6 would establish a broader program than the House version, including the establishment of an Office of Indian Energy Policy and Programs. Among other provisions, the Senate bill would require the Secretary of Energy to report on "barriers to the development of renewable energy" resources on tribal lands. The bill reported from conference retains many Senate provisions but not the report on barriers to renewable energy development. The largest national Indian organization, the National Congress of American Indians (NCAI), opposes the bill because of the reduction in federal trust responsibility for tribal energy business agreements.

Alaska currently holds 30 trillion cubic feet of undeveloped proven natural gas reserves, about 18% of total U.S. reserves. Because these reserves are located on Alaska's North Slope, they have not been developed due to the very high cost of building and operating the transportation infrastructure to reach distant markets. There also was debate during the 107th Congress over whether construction of a natural gas pipeline to carry gas to the lower 48 states would require loan guarantees and other incentives and over the most desirable route for the pipeline. The energy legislation, H.R. 6, passed by the House on April 11, 2003, would have authorized construction of a natural gas pipeline from the Alaskan North Slope to the lower 48 states, but would have allowed the Federal Energy Regulatory Commission (FERC) — which must issue a certificate of convenience and necessity for construction of the pipeline — to consider only the southern route through Alaska to which conferees on omnibus energy legislation had agreed in the last Congress (H.R. 4). The Senate bill authorized the same pipeline, but also included loan guarantees of up to \$10 billion for construction. The Administration raised potential problems with Canada over loan

guarantees for pipeline construction. The conference bill would have provided \$18 billion in loan guarantees for pipeline construction. Efforts to include a price floor were defeated, but a price floor was included in S. 1637. Some argued that the absence of a price floor makes the likelihood of pipeline construction remote. Shortly before adjournment, the 108th Congress approved an \$18 billion loan guarantee for the construction of this pipeline (American Jobs Creation Act of 2004, P.L. 108-357), and a proposal to build the project was made at the end of 2004 by the major holders of North Slope gas reserves.

Energy Tax Policy. Since the 106th Congress, proposals to significantly expand energy tax subsidies and incentives have been incorporated into comprehensive energy reform legislation, but all have failed. With the expiration of some existing energy tax incentives, the 108th Congress enacted retroactive extension of several provisions as part of the Working Families Tax Relief Act of 2004 (P.L. 108-311). When prospects for enactment of comprehensive energy legislation appeared unlikely during the 108th Congress, Congress included an expansion or liberalization of some of the more popular energy tax provisions in the American Jobs Creation Act of 2004 (P.L. 108-357) It also created some new energy tax incentives, as discussed below.

Summary of Energy Tax Provisions in the Working Families Tax Relief Act of 2004 (P.L. 108-311). On October 4, 2004, the President signed into law a \$146 billion package of middle class and business tax breaks that retroactively extended four energy tax subsidies: the \$45 renewable tax credit, suspension of the 100% net income limitation for the oil and gas percentage depletion allowance, the \$4,000 tax credit for electric vehicles, and the deduction for clean fuel vehicles (which ranges from \$2,000 to \$50,000). The \$45 tax credit and the suspension of the 100% net income limitation had each expired on January 1, 2004; they are retroactively extended through December 31, 2005. The electric vehicle credit and the clean-vehicle income tax deduction were being phased out gradually beginning on January 1, 2004. P.L. 108-311 arrests the phase-down — provides 100% of the tax breaks — through 2005, but resumes it beginning on January 1, 2006, when only 25% of the tax break will be available. (For more information, see CRS Report RL32265, *Expired and Expiring Energy Tax Incentives*.)

Energy Tax Provisions of the “Jobs” Bill (P.L. 108-357). The 108th Congress debated a more extensive list of tax incentives to promote energy efficiency, greater use of renewable fuels, and production of additional supplies of oil, gas, and coal. However, when passage of the comprehensive energy legislation appeared unlikely, Congress agreed to a scaled down package of energy tax incentives from the Senate-passed version of the FSC-ETI “jobs” bill (H.R. 4520). This bill, enacted as The American Jobs Creation Act of 2004 (P.L. 108-357) on October 22, 2004, contains several energy-related tax breaks:

- Expansion of the renewable electricity credit to open-loop biomass, geothermal, solar, small irrigation power, and municipal solid waste facilities, and created the production tax credit for refined coal. The latter provides a new tax credit of \$4.375/ton for refined coal — not for the electricity produced from the coal. (The refined coal tax credit was originally part of the proposed expansion of the \$29 tax credit, which already benefits “synfuels” from coal and was inserted into the renewable electricity section of the tax code). Expansion of the \$45 tax credit also includes minimum tax relief.

- liberalization of the tax treatment of electric cooperatives under a restructured electricity market;
- treatment of certain Alaska pipeline property as seven-year depreciation property (rather than 15 years under prior law) and extension of the 15% enhanced oil recovery credit to Alaska gas processing facilities;
- reform of the tax subsidies for fuel ethanol — basically replacement of the excise tax exemption with an equivalent immediate tax credit — and expansion of the credit to include biodiesel (at a higher rate for biodiesel made from virgin oils). Liberalization includes allowance of the credits against the alternative minimum tax;
- creation of a new tax credit for oil and gas from marginal (small) wells; this credit is triggered when oil prices are below \$18/barrel (\$2/mcf for natural gas), which means that currently, with oil prices above \$40/barrel, it would provide no benefits;
- repeal of the general fund component (4.3¢/gal.) excise tax on diesel fuel used in trains and barges;
- a \$2.10/barrel tax credit for production of low-sulfur diesel fuel and “expensing” of (basically, faster depreciation deductions for) the capital costs to produce such fuels. Both tax subsidies are subject to limits;
- and a host of provisions to prevent fuel tax fraud, including one changing the collection point of the tax on aviation fuels.

Electricity Restructuring. Electricity was one of the most controversial issues yet to be resolved by negotiators on the energy bill. Historically, electric utilities have been regarded as natural monopolies requiring regulation at the state and federal levels. The Energy Policy Act of 1992 (EPACT, P.L. 102-486) removed a number of regulatory barriers to electricity generation in an effort to increase supply and introduce competition, but further legislation has been introduced and debated to resolve remaining issues affecting transmission, reliability, and other restructuring concerns. In part, the electricity section in the bill reported from conference would repeal the Public Utility Holding Company Act (PUHCA) and establish mandatory reliability standards. Standard market design (SMD) would be remanded to the Federal Energy Regulatory Commission (FERC); no rule would be allowed before the end of FY2006. The Department of Energy (DOE) would identify “transmission corridors” that require new construction or upgrading. The bill would grant eminent domain authority to the federal government for construction of interstate power lines if the states do not act.

Title VI of H.R. 6, the House-passed version of omnibus energy legislation, provided for incentive-based transmission rates, allowed transmission owners in certain instances to exercise the right of eminent domain to site new transmission lines, allowed transmission owners that do not belong to a regional transmission organization to preferentially serve native load customers, created an electric reliability organization, and would have given new, but limited authority to the Federal Energy Regulatory Commission (FERC) over municipal and cooperative transmission systems. The House bill also repealed the Public Utility Holding Company Act (PUHCA) and gave FERC and state public utility commissions access to books and records, prospectively repealed the mandatory purchase requirement of the Public Utility Regulatory Policies Act of 1978 (PURPA), and required utilities to provide real-time rates and time-of-use metering. The House bill would also have established market

transparency rules, explicitly prohibit round-trip trading, and significantly increase criminal penalties under the Federal Power Act.

In general, the Senate-passed version of the energy bill repealed PUHCA and gave FERC and the state utility commissions access to utility books and records. It also repealed the PURPA mandatory purchase requirement where FERC finds that a competitive electric market exists. In addition, the Senate-passed H.R. 6 gave FERC more review authority over certain electric utility mergers and increase the value of asset transfers that would trigger FERC review. It required FERC to apply cost-of-service rates when market-based rates are unjust, unreasonable, unduly discriminatory, or preferential; required an electric reliability organization to develop and enforce mandatory reliability standards; provided access to the transmission system for certain intermittent generators; created an Office of Consumer Advocacy within the Department of Justice; and gave states the authority to prescribe and enforce laws regarding the application of the Consumer Protection Subtitle.

On July 23, 2003, Senator Domenici announced that “bipartisan” agreement had been reached on a comprehensive electricity amendment that he would offer as an amendment to S. 14. This amendment was on the Senate floor when agreement was reached to send last year’s energy bill to conference with H.R. 6. Its electricity section would have given FERC additional review authority over certain electric utility mergers; required FERC to apply cost-of-service rates when market-based rates are unjust, unreasonable, unduly discriminatory or preferential; required an electric reliability organization to develop and enforce mandatory reliability standards; provided access to the transmission system for certain intermittent generators; and would have given states the authority to prescribe and enforce laws regarding the application of the Consumer Protection Subtitle.

After the blackout on August 14, 2003, President Bush called upon Congress to enact an energy bill that would include electric reliability provisions. At the initial meeting of the conferees, Representative Dingell argued that the conference bill should include reliability provisions while other, more controversial provisions should be treated in separate legislation. S. 1637 included language to provide accelerated depreciation for investment in electric transmission facilities. However, owing to insufficient money available to offset the costs of the provision, the language would have expired at the end of June 2006. (For additional information, see CRS Report RL32728, *Electric Utility Regulatory Reform: Issues for the 109th Congress.*)

Nuclear Energy. Reauthorization of the Price-Anderson Act nuclear liability system has been one of the top nuclear items on the energy agenda. Under Price-Anderson, commercial reactor accident damages are paid through a combination of private-sector insurance and a nuclear industry self-insurance system. Liability is capped at the maximum coverage available under the system, currently about \$10.9 billion. Price-Anderson also authorizes the Department of Energy (DOE) to indemnify its nuclear contractors. The House version of H.R. 6 would have reauthorized the Price-Anderson Act through August 1, 2017. The Senate version of H.R. 6 would have extended it until 2012 for new reactors and indefinitely for DOE contractors. The conference committee on H.R. 6 would have provided a 20-year extension to the end of 2023. The nuclear industry contends that the system has worked well and should be continued, but opponents charge that Price-Anderson’s liability limits provide an unwarranted subsidy to nuclear power. The conference report would also

have required the Nuclear Regulatory Commission (NRC) to issue new regulations on nuclear power plant security and to conduct force-on-force security exercises.

The energy bill first debated by the Senate, S. 14, would have authorized federal loan guarantees and power purchase agreements to aid construction of six or seven reactors that would add up to 8,400 megawatts to the current nuclear generation capacity of 98,000 megawatts. On June 10, 2003, an amendment to strike the federal nuclear assistance from the bill narrowly failed (48-50). The version of H.R. 6 ultimately passed by the Senate makes no provision for construction of commercial nuclear power plants. However, the conference agreement provides a tax credit of 1.8 cents per kilowatt-hour for electrical generation from up to 6,000 megawatts of new nuclear power capacity that is placed in service by 2020.

Another provision that was included in S. 14, but was not part of the Senate-passed version of H.R. 6, was an authorization of \$1.1 billion for the design and construction of a nuclear-hydrogen cogeneration project at the Idaho National Engineering and Environmental Laboratory. The purpose would have been to explore production of hydrogen fuel from nuclear energy. Currently, natural gas is the main source for hydrogen fuel. There was no provision for this in the House version of H.R. 6. The conference language would have provided \$635 million for the project during FY2004-FY2008, and “such sums as necessary” after 2008, plus \$500 million for construction.

Fuel Economy. Energy problems can be addressed on both the supply and demand side; at issue since the Arab oil embargo in the mid-1970s is what balance should be struck between policies affecting supply and demand. One of the first initiatives designed to have a significant effect on demand was passage of corporate average fuel economy standards (CAFE) in the Energy Policy and Conservation Act of 1975 (EPCA, P.L. 94-163). In the years since, there have been periodic calls for stiffening or broadening the CAFE standards — especially as consumer demand has turned more to light-duty trucks and sport utility vehicles (SUVs).

The 107th Congress lifted a prohibition on expenditure of appropriated funds by the National Highway Traffic Safety Administration (NHTSA) to undertake CAFE rulemakings. Subsequently, on April 1, 2003, NHTSA issued a final rule to boost the CAFE of light-duty trucks by 1.5 mpg by 2007. The rule sets the interim standards at 21.0 mpg for model year (MY)2005, 21.6 mpg for MY2006, and 22.2 for MY2007, and is the first increase in CAFE since MY1996.

The bill reported from conference would have required a CAFE study, would prescribe several considerations that must be weighed in determining maximum feasible fuel economy, would have authorized \$2 million annually during FY2004-FY2008 for NHTSA rulemakings and CAFE analysis, and would extend the fuel economy credit for the manufacture of alternative-fueled vehicles.

H.R. 6, the omnibus energy bill passed in the House on April 11, 2003, also authorized appropriations to NHTSA to conduct rulemakings, and would have required a study on the feasibility and effects of reducing fuel use by automobiles. During markup in the House Committee on Energy and Commerce, an amendment by Representative Markey to require reductions of 5% in automotive fuel usage by 2010 and an additional 5% by 2015 was

defeated (14-38). An amendment offered on the floor of the House to include only the 5% savings by 2010 was defeated (162-268) as well.

The Senate version of H.R. 6 also authorized NHTSA to determine by rule appropriate standards, as provided in current law. However, the Senate version of H.R. 6 retained an amendment approved on the Senate floor in 2002. The Senate language — originally passed before the latest NHTSA rulemaking — would have required NHTSA to issue new CAFE standards, except for “pickup trucks.” This provision would have rolled back the standard for pickup trucks to 20.7 miles per gallon, the level in effect when the Senate first approved this language in 2002. The CAFE freeze on pickup trucks, which were undefined, could have shifted at least some of the burden for achieving fuel savings to the passenger automobile portion of the fleet. This language was not retained in the conference bill.

Some hailed as an alternative to tightening CAFE an amendment to S. 14 proposed by Senator Landrieu that was agreed to (99-1) by the Senate on June 9. The provision would have required the Administration to develop a plan to reduce U.S. oil consumption by 1 million barrels by 2013 from projected consumption levels. The amendment did not create any new authorities. Rather, it would have given the Administration the latitude to use currently existing authorities, including CAFE. Opponents of an increase in CAFE especially embraced the amendment because it required a significant reduction in petroleum consumption without necessarily using CAFE as one of the levers. Some have expressed disappointment that the Landrieu amendment is not in the bill reported from conference.

Currently, light truck fuel economy standards do not apply to vehicles above 8,500 pounds gross vehicle weight (GVW). In December 2003, NHTSA also invited comment on the current CAFE infrastructure and the possible extension of CAFE requirements to heavier vehicles. Senator Feinstein introduced legislation (S. 255) during the first session that, among other provisions, would have expanded the applicability of fuel economy standards to vehicles up to 10,000 pounds GVW. During consideration of the energy bill in committee, the Senate Energy and Natural Resources Committee, an amendment to require light trucks and sport utility vehicles (SUVs) to achieve a CAFE of 27.5 mpg by MY2011 was defeated (15-7). (For additional information, see CRS Issue Brief IB90122, *Automobile and Light Truck Fuel Economy: The Cafe Standards*.)

The President’s Hydrogen Fuel Initiative. In January 2003, President Bush announced a new research and development (R&D) initiative for hydrogen as a transportation fuel. A goal of the Hydrogen Fuel Initiative, and previously established FreedomCAR initiative, is to produce hydrogen-fueled engine systems by 2010 that achieve double to triple the efficiency of today’s conventional engines at a cost competitive with conventional engines.

Over five years, the Administration is seeking a total funding increase of \$720 million. These initiatives would fund research on hydrogen fuel and fuel cells for transportation and stationary applications. In the FY2004 Energy and Water Development (P.L. 108-137) and Interior and Related Agencies (P.L. 108-108) appropriations bills, Congress approved an increase of approximately \$50 million for the initiatives (\$20 million less than the Administration request) above FY2003 levels. For FY2005, Congress approved an additional \$25 million above the FY2004 level (P.L. 108-447).

In addition to appropriations legislation, the 108th Congress considered comprehensive energy legislation (H.R. 6). Among other provisions, the conference report on H.R. 6 (H.Rept. 108-375) would have authorized hydrogen and fuel cell R&D funding slightly above the Administration's request. In addition, the bill would have set a goal of producing hydrogen-fueled passenger vehicles by 2020. The Senate version of H.R. 6 would have required the production of 100,000 hydrogen-fueled cars by 2010 and 2.5 million vehicles by 2020 and annually thereafter.

Critics of the Administration suggest that the hydrogen program is intended to forestall any attempts to significantly raise vehicle CAFE standards, and that it relieves the automotive industry of assuming more initiative in pursuing technological innovations. In addition, critics argue that hydrogen-fueled vehicles may ultimately be infeasible, and that attention and funding should be focused on other research areas. On the other hand, some will argue that it is appropriate for government to become involved in the development of technologies that are too costly to draw private sector investment. At issue for these policymakers will be whether or not the federal initiative and level of funding is aggressive enough. (For additional information, see CRS Report RS21442, *Hydrogen and Fuel Cell R&D: FreedomCAR and the President's Hydrogen Fuel Initiative*.)

Renewable Energy and Fuels. The conference version of the bill would have amended the Clean Air Act to eliminate the requirement that reformulated gasoline (RFG) contain 2% oxygen to reduce automotive emissions, a requirement which prompted the widespread use of MTBE (methyl tertiary butyl ether) and, to a lesser degree, ethanol. Instead, the bill would have established a new requirement that an increasing amount of gasoline contain renewable fuels such as ethanol. The bill would have required that 3.1 billion gallons of renewable fuel be used in 2005, increasing to 5.0 billion gallons by 2012 (as compared to 2.1 billion gallons used in 2002). However, concerns were raised that this requirement could significantly raise the pump price for gasoline in some areas.

Because of concerns over drinking water contamination by MTBE (a major competitor with ethanol), the bill would have banned the use of MTBE in motor vehicle fuel, except in states that specifically authorize its use, not later than December 31, 2014. The ban had two possible exceptions. First, EPA would have been able to allow MTBE in motor fuel up to 0.5 percent by volume, in cases that the Administrator determines to be appropriate; and second, the President would have been able to make a determination, not later than June 30, 2014, that the restrictions on the use of MTBE would not take place. The bill would also have authorized \$2.0 billion to assist the conversion of merchant MTBE production facilities to the production of other fuel additives. Further, the bill would have preserved the reductions in emissions of toxic substances achieved by the RFG program.

One of the most controversial provisions in the entire bill was the establishment of a "safe harbor" from product liability lawsuits for producers of MTBE and renewable fuels. It would have protected anyone in the product chain, from manufacturers down to retailers, from liability for cleanup of MTBE and renewable fuels or for personal injury or property damage based on the nature of the product (a legal approach that has been successfully used in California to require refiners to shoulder liability for MTBE cleanup). The safe harbor would have been retroactive to September 5, 2003. Prior to that date, five lawsuits had been filed. After that date, at least 150 suits were filed, on behalf of 210 communities in 15 different states.

It was indicated early the week of September 29, 2003, that the final bill presented to the conference committee would not include a renewable portfolio standard (RPS). Nevertheless, a bipartisan “dear colleague” letter for RPS was signed by 53 Senators. Several Democrats, and some Republicans, expressed strong objection to its exclusion, but an effort to include it in the bill reported from conference failed. An RPS would impose a requirement on electric utilities to increase the use of renewable fuels in electric power generation. In the 107th Congress, a 10% RPS provision was adopted (58-42) into the Senate version of H.R. 4, the omnibus energy bill. The same provision was in the Senate-passed version of H.R. 6. (While S. 14 did not include an RPS provision, S.Amdt. 1480 would have added one.)

The Bush Administration stated its opposition to the RPS provision in the Senate version of H.R. 6, noting concern that it could “... raise consumer costs, especially in areas where [renewable] resources are less abundant and harder to cultivate or distribute.” However, proponents of RPS have cited an Energy Information Administration’s (EIA) report that found that the RPS provision in the Senate version of H.R. 6 would have a negligible impact on consumer electricity prices. (The EIA report has been posted on the web at [<http://tonto.eia.doe.gov/FTPROOT/service/oiaf2001-03.pdf>].) For additional information, see CRS Issue Brief IB10041, *Renewable Energy: Tax Credit, Budget and Electricity Production Issues*.)

Also, the bill would have extended the existing renewable energy production tax credit, which would otherwise expire on December 31, 2003, for three more years. It has been lauded as critical to cost-competitiveness for power production from certain renewable energy resources. S. 1637 included some energy tax provisions in support of renewable energy and fuels. (For additional information, see CRS Report RL31912, *Renewable Fuels and MTBE: Side-by-Side Comparison of the House and Senate Energy Bills and the Conference Report on H.R. 6*, CRS Report RL30369, *Fuel Ethanol: Background and Public Policy Issues*, and CRS Report 98-290, *MTBE in Gasoline: Clean Air and Drinking Water Issues*.)

Energy Efficiency and Conservation. While the bill reported out of conference included a number of tax incentives to promote conservation and efficiency, critics of the bill argue that incentives favored energy production. The bill would have legislated new energy efficiency standards for several consumer and commercial products and appliances. For other products and appliances, DOE would have been empowered to set new standards. Also, the bill provided increased funding authorizations for the DOE weatherization program and establishes a voluntary program to promote industrial energy efficiency.

Both the House- and Senate-passed versions of H.R. 6 directed DOE to issue a rule that “determines whether” an energy efficiency standard needs to be set for “standby mode” energy use by battery chargers and external power supplies. Further, DOE was directed to create voluntary programs to reduce standby mode energy use. The House and Senate versions also would have legislated standards for illuminated exit signs, torchieres, distribution transformers, and traffic signal modules, and direct DOE to set standards by rulemaking for suspended ceiling fans, vending machines, commercial refrigerators and freezers, and unit heaters. In these respects, the provisions in S. 14 as it reached the Senate floor, and H.R. 6 as passed by the Senate, were similar. As one point of difference, S. 14 would have also legislated a standard for medium base compact fluorescent lamps (CFLs).

This provision was not in the Senate version of H.R. 6. However, in another point of difference, the Senate-passed version of H.R. 6 would have directed DOE to “amend” the energy efficiency standard for central air conditioners and heat pumps.

The House and Senate versions of H.R. 6 set goals for further energy efficiency in federal buildings. Although the baseline years and associated coverage periods have different dates, the provisions in the House and Senate versions were nearly identical, setting progressive annual 2% reductions over a 10-year period that end with a 20% reduction from baseline. Both bills called for DOE to review results by the end of the 10-year period and recommend further goals for an additional decade. S. 14 had closely similar provisions.

Since the late 1970s, there have been some tax incentives to promote fuel switching and alternative fuels as a way to conserve gasoline and reduce oil import dependence. In contrast, tax incentives for energy efficiency and for electricity conservation have been rare, and generally short-lived. The House- and Senate-passed versions of H.R. 6 proposed some modest new tax incentives for energy efficiency. S. 1637 included some energy tax provisions in support of energy efficiency and conservation. (For additional information, see CRS Issue Brief IB10020, *Budget, Oil Conservation and Electricity Conservation Issues*.)

An Overview of the Senate Debate on S. 14. On April 30, 2003, the Senate Energy and Natural Resources Committee ordered reported its own comprehensive energy legislation (13-10) (S. 14). Debate began on the Senate floor during the week of May 5, 2003. On July 23, 2003, Senator Domenici had announced that “bipartisan” agreement had been reached on a comprehensive electricity title that he offered as an amendment to S. 14. Several amendments to the electricity substitute were defeated just before the Senate debate stalled. It was at this point that Senator Daschle proposed that the Senate go back to, and pass, the energy bill (H.R. 4) agreed to during 2002. Both parties conferred off the floor, and during the evening of July 31, the Senate agreed (86-14) to substitute the previous year’s H.R. 4 in the text of H.R. 6. The bill went to conference with the House. (For a complete discussion of S. 14 in relation to the House, Senate and conference versions of H.R. 6, see *Omnibus Energy Legislation: Comparison of Major Provisions in House- and Senate-Passed Versions of H.R. 6, Plus S. 14*.)

LEGISLATION

H.R. 6 (Tauzin)

Enhances energy conservation and research and development, provides for security and diversity in the energy supply for the American people, and for other purposes. Incorporates H.R. 39, H.R. 238, H.R.1531, and H.R. 1644. Introduced April 7, 2003; referred to several committees. Passed by the House, April 11, 2003. Senate version passed July 31, 2003 (84-14). Reported from conference, November 17, 2003. Passed House (246-180) November 19, 2003. Motion to invoke cloture failed in the Senate (57-40) November 21, 2003.

H.R. 4503 (Barton)

Energy Policy Act of 2004. Nearly identical to conference version of H.R. 6. Introduced June 3, 2004; referred to multiple committees. Passed House, June 15, 2004 (244-178).

H.R. 4513 (Pombo)

Would restrict federal environmental reviews for renewable energy projects to the proposed federal action and the “no action” alternative. Introduced June 4, 2004; referred to Committee on Resources. Passed House, June 15, 2004 (229-186).

H.R. 4529 (Pombo)

Arctic Coastal Plain and Surface Mining Improvement Act of 2004. Authorizes oil and gas development in ANWR. Nearly identical to ANWR provisions in House-passed version of H.R. 6, but does not earmark royalties for the Low-Income Home Energy Assistance Program. Instead, royalties would go toward health benefits for retired coal miners. Introduced June 9, 2004; referred to Committee on Resources.

H.R. 4517 (Barton)

U.S. Refinery Revitalization Act. Would expedite federal authorization for siting and operation of refineries. Introduced June 4, 2003; referred to Committee on Energy and Commerce. Passed House, June 16, 2004 (239-192).

H.R. 4520 (Thomas)

To amend the Internal Revenue Code of 1986 to remove impediments in such Code and make U.S. manufacturing, service, and high-technology businesses and workers more competitive and productive both at home and abroad. Introduced June 4, 2004. Reported (amended) by the Committee on Ways and Means. H.Rept. 108-548, Part I, June 16, 2004. Passed by recorded vote (251-178), June 17, 2004. Passed Senate by voice note with text of S. 1637 inserted, July 15, 2004.

S. 14 (Domenici)

Enhances the energy security of the United States, and for other purposes. Introduced April 30, 2003; Chairman’s Mark reported May 6, S.Rept. 108-43. For technical reasons, the Senate report read to accompany S. 1005; however, the debate referred only to S. 14. On July 31, 2003, the Senate suspended debate on S. 14, and substituted in H.R. 6 the text of the energy bill the Senate had passed in 2002 (H.R. 4).

S. 1637 (Grassley)

A bill to amend the Internal Revenue Code of 1986 to comply with the World Trade Organization rulings on the FSC/ETI benefit in a manner that preserves jobs and production activities in the United States, to reform and simplify the international taxation rules of the United States, and for other purposes. Energy tax package appended as an amendment, April 5, 2004. Passed the Senate, May 11, 2004.

S. 2095 (Domenici)

Enhances energy conservation and research and development and provides for security and diversity in the energy supply for the American people. Introduced February 12, 2004, as an omnibus energy bill estimated by its sponsors to be 55% less costly than the conference version of H.R. 6. Placed on Senate Legislative Calendar.