

ENERGY CONFERENCE TODAY

A DAILY REPORT ON THE ENERGY POLICY ACT CONFERENCE

ISSUE 5

JULY 25, 2005

This edition of Energy Conference Today reports on energy conference-related events that occurred on Friday, July 22, and Sunday, July 24, 2005. It also discusses one of the controversial issues that the conferees are expected to address today — an amendment to the Clean Air Act to substantially delay the deadlines for cleaning up smog.

MTBE ANNOUNCEMENT AND MEETING OF THE ENERGY CONFEREES

On Friday, July 22, 2005, Chairman Barton and Rep. Bass unveiled their MTBE proposal. Relevant stakeholders universally condemned the proposal. The Association of Metropolitan Water Agencies said that the proposal would “leave communities with MTBE-contaminated water supplies stranded with billions in cleanup costs”.¹ The National Association of Convenience Stores stated that it would “actively and strongly oppos[e] the Barton/Bass MTBE Proposal.”² Even the American Petroleum Institute and the National Petrochemical and Refiners Association said that they were unable to support the proposal.³ Sen. Judd Gregg (R-NH) issued a statement announcing that he would not support the proposal.⁴

The title containing MTBE had been scheduled for consideration on Sunday, but was pulled from the schedule. Overall, instead of tackling the seven titles originally scheduled, the conferees only considered three of the less controversial titles — Geothermal, Hydropower, and Research and Development. Chairman Barton announced that he would finish the bill today, on Monday, July 25, 2005.

CLEAN AIR ACT AMENDMENT TO EXTEND DEADLINE FOR SMOG CLEAN-UP

One of the issues for today’s meeting of the conferees that is expected to be controversial is section 1443 in the Miscellaneous Title of the House energy bill, which amends the Clean Air Act. There is no comparable provision in the Senate-passed bill. This is also referred to as the “bump up” provision, although the title of the section is a more accurate description of its function: “Extended Attainment Date for Certain Downwind Areas.”

¹ Diane VanDe Hei, Executive Director, Association of Metropolitan Water Agencies, Statement on Barton-Bass MTBE Proposal (July 22, 2005).

² Email from John Eichberger, Director, Motor Fuels, National Association of Convenience Stores (July 22, 2005).

³ API, NPRA, SGMA, NACS, *Industry Statement Regarding Barton, Bass Proposal* (July 22, 2005).

⁴ GOP Lawmaker Offers Deal on Energy Measure, Washington Post (July 23, 2005) (online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072201710.html>).

Section 1443 amends CAA section 181 to extend the deadlines for cleaning up smog across much of the country. EPA has recently issued new smog regulations requiring most localities to achieve air that is safe for people to breathe by 2007 or 2010, depending on how polluted the area is now.⁵ Under section 1443, the clean air deadlines for polluted areas extending from Georgia to Connecticut, as well as in Wisconsin, Michigan, Ohio, and Texas, would be extended to 2015 or beyond.

Section 1443 provides that EPA must extend the clean air deadline for any area that (1) receives a “significant contribution” of air pollution from upwind areas; and (2) submits a plan to meet the later deadline. EPA has defined “significant contribution” as occurring when the upwind state is responsible for more than one percent of the downwind state’s air pollution problem.⁶

In EPA’s recent “Clean Air Interstate Rule,” EPA found that 40 urban areas with unhealthy air across the East Coast, Southeast, Mid-West and Texas receive at least one percent of their smog problem from upwind areas.⁷ Each of these areas currently must clean up its smog by 2007 or 2010, but could have its deadline extended under section 1443.

The length of the deadline extension under section 1443 is uncertain. The section provides that the new deadline shall be “as expeditiously as practicable” and “no later than the date on which the last reductions in pollution transport necessary for attainment in the downwind area are required to be achieved by the upwind area.” Under EPA’s Clean Air Interstate Rule, the bulk of the emissions reductions are required to begin in 2015.⁸ Thus, at a minimum, the 2007 and 2010 deadlines would be extended until 2015.

However, because the Clean Air Interstate Rule establishes a cap-and-trade system to reduce pollution, it is not clear when the full emission reductions will be achieved. By overcomplying in the early years, companies can bank pollution credits that they can use to emit above the cap level in the later years. Furthermore, in the Clean Air Interstate Rule, EPA acknowledged that the rule does not eliminate all transported air pollution.⁹ Thus, additional reductions might be necessary to fully address transported pollution. If this occurs, the clean air deadlines under section 1443 could be extended for well over a decade, until the future deadline for compliance with a rule that EPA has not yet adopted.

When it was initially proposed in 2003, section 1443 was offered as a limited fix to a limited problem. It was designed to address fewer than 10 areas, which faced

⁵ U.S. EPA, *Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard — Phase 1*, 69 Fed. Reg. 23951 (Apr. 30, 2004).

⁶ See U.S. EPA, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call: Final Rule*, 70 Fed. Reg. 25162, 25175, 25191 (May 12, 2005).

⁷ See *Id.* at 25249-25250.

⁸ See *Id.* at 25167.

⁹ See *Id.* at 25166.

“bump up” to a higher air pollution classification as they had failed to achieve clean air on schedule. A higher classification would require the area to adopt additional local pollution control measures. As a result of EPA’s subsequent adoption of new classifications for areas across the country and the Clean Air Interstate Rule, the language in section 1443 would now have a far more sweeping effect, as described above.

While initially described as a codification of EPA’s Clinton-era “bump-up policy,” section 1443 substantially expands that policy.¹⁰ EPA applied the bump-up policy to a handful of areas that were particularly affected by transported air pollution, while section 1443 would apply to most of the areas with unhealthy air quality across the Eastern half of the country.¹¹ The Clinton policy also simply gave EPA discretion to grant extensions on a case-by-case basis, rather than mandating them across the board.

Clean air and public health advocates have modeled the health impacts of enacting section 1443.¹² According to their analysis, the resulting extended unhealthy air quality would be responsible for more than one million asthma attacks, more than one-and-a-half million missed school days, and over 15,000 hospital admissions for respiratory problems.¹³

ENERGY CONFERENCE SCHEDULE

On Sunday, July 24, 2005, Chairman Barton announced the schedule for the planned completion of the energy conference. He stated that unfinished business related to the titles already considered and the remaining titles of the energy bill would be addressed at the final meeting of the energy conferees at 2:00 p.m. on Monday, July 25, 2005. The remaining titles of the energy bill are: Oil and Gas, Renewable Portfolio Standard, Climate Change, Ethanol and Fuels, Incentives, Studies, and Miscellaneous. The base text for these titles was provided to conferees between 2:30 and 4:30 am, on Monday, July 25, 2005.

¹⁰ See U.S. EPA, *Guidance on Extension of Attainment Dates for Downwind Transport Areas* (July 16, 1998), reprinted in 64 Fed. Reg. 14441 (Mar. 25, 1999).

¹¹ EPA applied the bump up policy to: Beaumont/Port Arthur, TX; St. Louis, MO and IL; Washington, DC; Atlanta, GA; Baton Rouge, LA; Hartford, CT; Springfield, MA. EPA, *Briefing on the Attainment Date Extension Policy* (Jan. 7, 2003) (power-point presentation by Lydia Wegman, EPA).

¹² See Letter from American Lung Association, Public Citizen, Clean Air Task Force, et al to U.S. Representatives (Apr. 12, 2005).

¹³ *Id.*