House GOP challenges EPA chief on coal plant rule

BY CHRIS HOLLY

In pre-emptive attacks on the impending rulemaking, House Republicans Wednesday challenged the head of the Environmental Protection Agency over an expected Obama administration proposal to require new coal-fired power plants to be equipped with carbon capture and storage technology, saying the technology is not yet commercially available, as the proposal—due Friday—is expected to assert.

At a hearing called by the House Subcommittee on Energy and Power on President Obama’s sweeping proposal to reduce U.S. greenhouse gas emissions through regulatory initiatives, Republicans said EPA’s coming (Continued on p. 4, click here)

Applies court gives partial backing to California’s low-carbon fuel standard

BY ERIC LINDEMAN

In a ruling providing partial support for the state’s pioneering greenhouse initiative, a federal appeals court Wednesday struck down a preliminary injunction granted by a lower court blocking implementation of California’s Low Carbon Fuel Standard, but remanded to the lower court for further review several constitutional issues raised by fuel industry groups that say the program unfairly discriminates against out-of-state ethanol and oil by effectively barring them from the state’s huge market.

In a 2-1 decision, a divided three-judge panel of the U.S. Court of Appeals for the 9th Circuit found that the Low Carbon Fuel Standard (LCFS) was “not facially discriminatory” and did not violate constitutional bans against “extraterritorial regulation”—that is, it does not regulate how ethanol is produced in the Midwest or elsewhere in the nation. The panel also said the LCFS did not discriminate against out-of-state oil.

However, the panel remanded the case to the lower court to determine whether the LCFS’ ethanol provisions discriminate in “purpose or effect.”

The remand would appear to give complaining ethanol groups another opportunity to press their case that the life-cycle carbon standards set by the LCFS cannot be economically met by out-of-state ethanol providers because they must transport their fuel long distances to California, thus generating car-

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DOE eyes new plutonium strategy amid changes at Livermore lab

BY GEORGE LOBSENZ

With the Energy Department planning to outline a new plutonium strategy in its fiscal year 2015 budget, the operator of DOE’s Lawrence Livermore National Laboratory is moving to restore or preserve operational capabilities needed for new warhead refurbishment and special nuclear material missions, according to recently released documents and a congressional audit released last week.

The potential use of the California lab for plutonium-related operations has prompted protests by a Livermore watchdog group, which says DOE is planning to bring nuclear warhead cores to the facility even though the department recently removed special nuclear material from the lab due to security concerns.

The changes at Livermore come as the National Nuclear Security Administration (NNSA), DOE’s semi-autonomous nuclear weapons agency, is considering options for maintaining critical plutonium capabilities following the planned shutdown of the aging Chemistry and Metallurgy Research (CMR) facility at Los Alamos National Laboratory in 2019 due to earthquake safety risks.

In a report released September 11, the Government Accountability Office (GAO), the auditing arm of Congress, said NNSA is consider-

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GAO said NNSA officials believed the CMRR facility cannot be completed until 2029 at the earliest and that the agency was considering an alternative plan to develop "modular" plutonium facilities at Los Alamos that could be scaled to produce the number of plutonium pits ultimately determined to be necessary to maintain the nation's nuclear warhead arsenal.

However, the GAO report made clear that NNSA had no clear strategy at present for carrying out critical plutonium missions in the interval between closure of the CMR and development of new modular facilities or the long-delayed CMRR project, which has raised budget concerns in the administration and Congress due to its estimated $5.8 billion price tag.

GAO said NNSA had conducted only preliminary evaluations of the costs and risks of shifting plutonium operations now performed at the retiring CMR to other buildings at Los Alamos or other DOE sites.

GAO said an April 2012 study done by Los Alamos National Security LLC (LANS), the contractor that operates Los Alamos for DOE, concluded that relocating analytical chemistry and materials characterization capabilities among facilities at Los Alamos would require upgrades costing roughly $480 million to $820 million and potentially disrupt other plutonium operations.

GAO said the April 2012 study did not include any estimated costs for the option of relocating some plutonium research capabilities to other sites.

In sum, the GAO report said: "The information in the April 2012 study was not sufficient for a meaningful assessment of the costs associated with any of the options for meeting NNSA's plutonium research needs identified in the study."

GAO recommended that DOE reassess its plutonium needs given the uncertainties that had developed with the CMRR project and questions about the future size of the nation's nuclear weapons stockpile and what plutonium manufacturing capabilities are needed to support it. In particular, it said a re-evaluation is clearly necessary because much had changed since DOE had last validated the need for the CMRR in 2008.

GAO said NNSA officials agreed in principle with that recommendation and indicated DOE would provide a path forward on a plutonium strategy in its fiscal year 2015 budget.

"NNSA noted that it has begun an evaluation of options for the plutonium strategy to inform the fiscal year 2015 budget request," GAO said. "NNSA added that it believes the results of this effort will be responsive to our recommendation."

While providing no other detail on the focus of NNSA's evaluation, GAO said the other DOE sites considered for plutonium operations in the April 2012 report by Los Alamos included New Brunswick Laboratory, located at Argonne National Laboratory in Illinois; Savannah River National Laboratory in South Carolina; Pacific Northwest National Laboratory and the analytical laboratory at DOE's Hanford site in Washington; Idaho National Laboratory; Oak Ridge National Laboratory in Tennessee; and the Livermore lab, located in the San Francisco Bay area.

Of those sites, GAO said only Livermore was capable of carrying out both the analytical chemistry and materials characterization missions now conducted at the CMR.

The GAO report comes amid disclosures that some analytical and testing capabilities at Livermore are being restored or preserved by the lab operator, Lawrence Livermore National Security LLC (LLNS), a consortium led by Bechtel and the University of California, which also are the two lead partners of LANS, the Los Alamos contractor.

A June 21 report by the Defense Nuclear Facilities Safety Board (DNFSB), which oversees safety at DOE sites, says so-called "Shaker" testing capabilities at Livermore were being restored, reversing a previous decision to end such operations.

Tri-Valley CARES, a local antinuclear group, charged in an August 2 press release that the refurbished Shaker apparatus is approved to operate with up to five kilograms of fuel-grade equivalent plutonium—enough to handle a nuclear bomb core, which needs between two to four kilograms of weapons-grade plutonium.

"The lab claims the refurbishment was needed on the equipment that has gone largely unused for years, in order to prepare for 'potential future operations,'" the group said. "This is cause for concern because it suggests the lab is paving the way for plutonium bomb cores to arrive from Los Alamos for testing in the Shaker."

A July 12 report by the DNFSB's site representative at Livermore is even more explicit about the potential for new warhead testing at Livermore, saying LLNS met with NNSA's Livermore Field Office (LFO) to talk about the need to perform certain testing in the lab's Superblock plutonium facility to support life extension programs for warheads.

"[S]enior contractor program managers briefed LFO on the potential need for certain engineering, environmental and safety tests to be performed in the Superblock in support of upcoming life extension programs," the DNFSB report said. "The contractor noted that while National Nuclear Security Administration headquarters has not decided on the need for the tests or where to perform them, the capabilities to perform them ought to be maintained in the safety bases at Livermore."

The DNFSB report suggested LFO officials saw significant obstacles to such operations from security issues and environmental review requirements, saying: "The LFO manager emphasized that security considerations and National Environmental Policy Act coverage were greater impediments to re-establishing the capabilities at Livermore."

Tri-Valley CARES raised the same issues, saying such operations would appear to go against previous DOE decisions to remove large amounts of weapons-usable plutonium from Livermore because the lab had security vulnerabilities due to its location in a busy urban area.

"Livermore lab previously lost its high security status and is no longer authorized to handle, test, and store nuclear bomb-usable quantities of plutonium like those that would be used in the Shaker," the group said. "It is unclear whether the DOE plans to grant itself a variance in order to do this testing. Meanwhile, there has also been no National Environmental Policy Act review of this agency project."
CFTC names market oversight chief

The Commodity Futures Trading Commission this week named Vincent McGonagle, a senior official in its enforcement office, to be the director of its Division of Market Oversight.

McGonagle will be responsible for the agency’s market surveillance operations and the review of new derivative products to ensure they are not susceptible to manipulation.

He has been in the CFTC’s Division of Enforcement for 16 years and served since March 2002 as senior deputy director of that office.

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bon emissions that in-state fuel producers can largely avoid because they are closer to the state’s market.

If the lower court finds discrimination on that issue, the appeals court ordered that it apply a balancing test that sets a relatively high bar for aggrieved parties to show that they are suffering substantial adverse economic effects from a state program that outweigh the local concerns that a state was seeking to address with its law.

But while leaving the door open for further deliberations by the lower court—Judge Lawrence O’Neill of U.S. District Court in Fresno, Calif.—the majority of the appeals court panel vacated a preliminary injunction granted by O’Neill in December 2011 that prevented the California Air Resources Board (CARB) from enforcing the LCFS.

Further, the majority made clear it believed the LCFS should be given some legal leeway because it served an important purpose for the state, the nation and the world by encouraging the use of low-carbon fuels to combat climate change.

“California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise,” Judge Ronald Gould wrote in the majority opinion. “If no such solution is found, California residents and people worldwide will suffer great harm.

“We will not at the outset block California from developing this innovative, nondiscriminatory regulation to impede global warming. If the fuel standard works, encouraging the development of alternative fuels by those who would like to reach the California market, it will help ease California’s climate risks and inform other states as they attempt to confront similar challenges.”

The case turned on the question of whether the LCFS violated the United States Constitution’s Commerce Clause, which bars states from interfering with interstate commerce.

The court majority found that the LCFS is not discriminatory on its face because it was not designed as a protectionist measure against out-of-state fuel providers. But whether the program is discriminatory “in purpose or practical effect” must now be decided by the district court, which the appeals court said should apply the so-called Pike balancing test.

Pike is a 1970 Supreme Court decision that said, in part: “Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

“If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”

In a partial dissent, Judge Mary Murgia disagreed with the majority on the constitutionality question and the need for balance testing.

“The LCFS is the latest chapter in California’s long history of innovative solutions to complicated environmental problems,” she said. “But the current version of the LCFS facially discriminates against interstate commerce, and California has failed to meet its onerous burden of demonstrating that a nondiscriminatory version of the regulation could not achieve its legitimate local interest of reducing greenhouse gas emissions.”

The LCFS was mandated under California’s landmark greenhouse reduction law, which requires the state’s emissions to be reduced to 1990 levels by 2020 and charges CARB with developing and enforcing regulatory measures to achieve the statutory goal.

At issue in the far-reaching legal challenge are analyses by CARB that assign “carbon intensity” (CI) scores to each type of fuel based on estimated life-cycle carbon emissions generated during their production, transportation and distribution.

The CI of each biofuel is based on estimated emissions from land-use changes associated with the production of each biofuel’s feedstock, such as the clearing of carbon-absorbing forests to plant fields of corn, soybeans or cane sugar. Also included in the CI are emissions from biofuel refining operations, from power plants providing electricity to those refineries, and from trucks, ships or other transportation used to ship biofuels to distributors.

In granting a preliminary injunction against the LCFS in December 2011, O’Neill appeared to say that the “practical” effect of the LCFS was to cut the Midwest ethanol and certain oil producers, out of the California market.

He agreed with the Rocky Mountain Farmers’ Union and American Fuels & Petrochemical Manufacturers Association, which brought the original suit against CARB, that the LCFS violated the Constitution’s Commerce Clause program. Specifically, the judge said the program discriminated against out-of-state fuels—especially Midwest corn ethanol—because the CI calculation includes emissions from transport of biofuels, unfairly disadvantaging producers that have to ship their fuel longer distances to reach the California market than do in-state producers.

Because the LCFS program requires fuel providers to continually lower their carbon content in comparison to conventional gasoline, fuels with higher CI scores will in coming years get increasingly pushed out of the California biofuel market—the nation’s largest at nearly 1.5 billion gallons annually. Providers that want to use high-CI fuels would have to get allowances under an LCFS cap-and-trade mechanism.

On the question of “facial discrimination,” Gould wrote, “We conclude it was not. The fuel standard is novel in some ways, but it is not the first time that a state has faced harms from products made in its sister states, and it is not the first time that a state has defined categories for purposes of regulation with reference to state boundaries.” Gould cited as precedents cases upholding taxes applied to out-of-state articles.
In blow to Binz, Manchin says no

Citing potential threats to the coal industry in his home state of West Virginia, Sen. Joe Manchin declared flatly Wednesday that he will vote against the nomination of Ron Binz to chair the Federal Energy Regulatory Commission, delivering a major blow to Binz’s hopes of getting approved by the Senate Energy and Natural Resources Committee.

The decision by Manchin (D) is not a huge surprise—he has expressed reservations to reporters for days about the former chairman of the Colorado Public Utilities Commission—and at Binz’s confirmation hearing Tuesday Manchin suggested Binz’s nomination would be bad for his state’s huge coal industry.

But in joining what appears to be solid GOP opposition to Binz on the energy panel, Manchin appears to make it all but impossible for Binz to win a favorable recommendation from the committee. Even if the currently undecided Sen. Mary Landrieu (D-La.) decides to back Binz, the nomination would remain locked in committee on an 11-11 tie.

However, Senate Majority Leader Harry Reid (D-Nevada), who has proven tenacious in the past on nominations he supports, could still bring Binz’s nomination directly to the Senate floor. In a press release Wednesday explaining his decision on Binz, Manchin said: “As a former executive, I truly believe that the president should have the utmost discretion when assembling his team; however, after my conversations with Mr. Binz, I respectfully cannot support his appointment as FERC chairman.

“I believe that his leadership will threaten the reliability of our electrical grid, irreparably damage the coal industry, cost jobs and impose higher energy costs for hardworking Americans.”

Manchin’s decision comes despite persistent efforts by Binz in Tuesday’s hearing to demonstrate that he supports natural gas and that his reputation as a coal-killer is inaccurate. Much of the criticism stems from Binz’s work helping to craft a Colorado law requiring Xcel Energy and other utilities in the state to retrofit, repower or shutter much of their coal-fired generation to reduce regional haze pollution.

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rule setting new source performance standards (NSPS) for greenhouse emissions from new coal-fired plants effectively would prohibit new coal generation in the United States because the standard would be set at a level that would require new plants to have carbon capture and storage (CCS) technology.

Obama in June directed EPA to propose the NSPS for new coal and natural gas combined cycle plants by Friday. The proposal would replace an earlier version, issued in March 2012, that was widely viewed as being vulnerable to legal challenge. The president also directed EPA to propose a standard for existing plants in June 2014, and finalize that rulemaking a year later.

EPA Administrator Gina McCarthy, who appeared at the hearing with Energy Secretary Ernest Moniz, provided few details about the rulemakings, but said they would not constitute a death knell for coal-fired generation in the United States.

“The rule will provide certainty for the future of new coal moving forward, and in terms of existing facilities, coal will continue to represent a significant source of energy for decades to come,” she said.

Republican, however, didn’t accept McCarthy’s answer. Saying the proposal was “effectively a ban on new coal-fired power plants,” Rep. John Shimkus (R-Ill.) pressed McCarthy and Moniz to justify using CCS as the benchmark for its rulemaking.

“Is DOE aware of any U.S. commercial-scale power generation plant using coal as a fuel that has technology to capture and store carbon dioxide?” Shimkus asked.

Moniz said that carbon capture technology has been in use for decades in the U.S. chemical industry, that a coal gasification plant in North Dakota has shipped 20 million metric tons of carbon dioxide (CO2) for enhanced oil recovery in Saskatchewan over the last 10 years, and that oil producers operating along the Gulf Coast also have injected millions of tons of CO2 below ground for enhanced oil recovery.

But Shimkus emphasized that no power plant currently is operating with those systems.

“The point is that CCS is not commercially available,” he said. “Unless the technology is mature, the concern is that the costs are going to be too great.”

Shimkus then asked McCarthy if EPA had ever established an NSPS for an emissions source “on the basis of a technology that has not been commercially proven by operations at a commercial facility.”

McCarthy suggested that the first NSPS for sulfur dioxide (SO2) emissions from power plants came at a time when SO2 scrubber technology was in only limited use, and suggested the industry is in a similar position today with CCS.

But Shimkus countered that SO2 scrubbers were much further along at that time than CCS is now, and repeated his charge that the EPA proposal would block new coal plants.

In her back-and-forth with Shimkus, McCarthy appeared to suggest that the proposal, as reported last week by IHS The Energy Daily, indeed may require new coal plants to be equipped with CCS.

“There are four plants that are now being constructed that are planning on running with CCS at levels that would meet anything that we would propose in our rulemaking,” McCarthy said.

She did not name the plants, but apparently was referring to Mississippi Power Co.’s gasified coal plant in Kemper County, Mississippi; an NRG Energy plant under development in Texas; the DOE-backed FutureGen project in Indiana; and another gasified coal plant under development in Texas by Seattle-based Summit Power Group LLC.

And in response to a question from Rep. Mike Doyle (D-Pa.), who said his state “is seeing coal plants retire every month,” McCarthy seemed to go even further, saying: “I will say that on the basis of information that we see out in the market today... that CCS technology is feasible, it is available today...”

In establishing an NSPS, EPA must determine the “best system of emission reduction” BSER for the pollutant targeted by the regulation. Sources told IHS The Energy Daily last week that in its BSER analysis for the power plant NSPS, EPA has determined that “partial CCS,” defined as a CO2 capture rate of about 65 percent, is BSER for CO2 from coal-fired power plants.