

Background

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Correcting Mistakes of the 1990s Should Top the Energy Agenda for 2006

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Many factors have contributed to the sharp increase in oil and natural gas prices in recent years. While some are outside Washington's control—most notably the rapidly growing global demand for energy—others are the result of policy mistakes made by the federal government during the 1990s. Correcting these mistakes would significantly improve the nation's future energy prospects and should form the core of the federal government's energy agenda for 2006.

The 1990s were a time of relatively inexpensive fossil fuels. Oil averaged \$20 per barrel, and natural gas averaged \$2 per thousand cubic feet, compared to \$56 and \$7.50, respectively, in 2005.¹ With energy prices so low, Washington took a complacent approach to America's future energy needs. Other priorities, especially environmental concerns, were given precedence. Many environmental measures that affected energy supplies were enacted, including:

- The 1990 presidential directive placing most areas with untapped offshore oil and natural gas off-limits;
- The 1990 Clean Air Act Amendments regulating motor fuels;
- The 1995 veto of legislation opening up the Arctic National Wildlife Refuge (ANWR) to oil exploration and drilling; and
- The 1998 Environmental Protection Agency enforcement initiative against oil refiners.

These actions may have seemed justified at the time. Each had strong support from the environmental activ-

Talking Points

- During the 1990s, oil and natural gas prices were relatively low and stable.
- Oil averaged \$20 per barrel, and natural gas averaged \$2 per thousand cubic feet, compared to \$56 and \$7.50, respectively, in 2005.
- With energy prices so low, Washington took a complacent approach to America's future energy needs. Other priorities, especially environmental concerns, were given precedence.
- As a result, the federal government placed energy-rich areas off-limits and saddled energy markets with excessive and costly regulations.
- These policy mistakes have contributed to the energy problems that Americans have faced since 2000.
- Congress must revisit and correct the errors of the 1990s if it is to provide energy price relief for the American people.

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ist community, and none had any immediately adverse impact on energy costs or the economy, but all of them have since contributed to the energy challenges that the United States now faces.

Fortunately, the solution is as simple as undoing what was done. Congress should make reversing each of these policy mistakes a high priority in 2006.

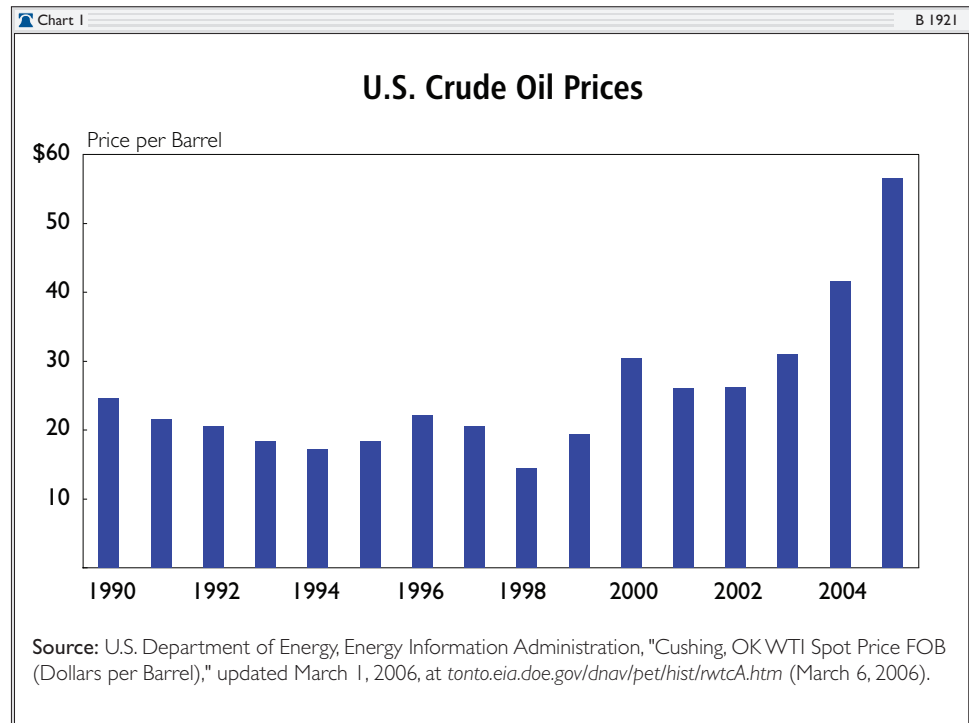
Energy Policy Mistakes of the 1990s

The 1990s may well have been the most boring decade ever for energy—boring in a good way because prices were low and stable, and few problems loomed. The only energy-related turmoil during the decade was caused by the 1990 Iraqi invasion of Kuwait and the subsequent war, which turned out to be less disruptive of global energy markets than initially feared.

For the decade, oil averaged \$20 per barrel, drivers became accustomed to paying about \$1.25 per gallon for gasoline, and natural gas stayed near \$2 per thousand cubic feet.² Few imagined that these prices would jump substantially by the next decade. (See Charts 1–3.)

With little need to create an energy policy, Washington focused on other things, with the exception of the largely inconsequential 1992 Energy Policy Act. However, some of these things were at odds with the nation's long-term energy interests.

President George H. W. Bush proclaimed himself “the environmental President” and attempted to appease the environmental activist community. He was followed by President Bill Clinton, who also



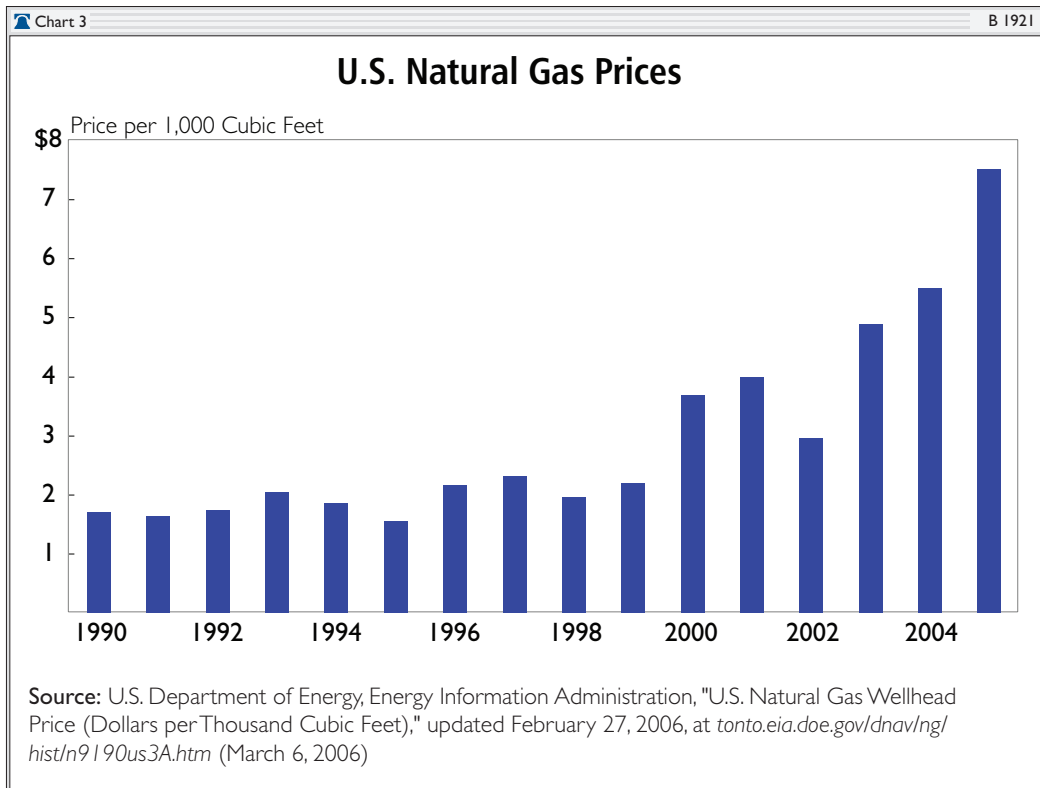
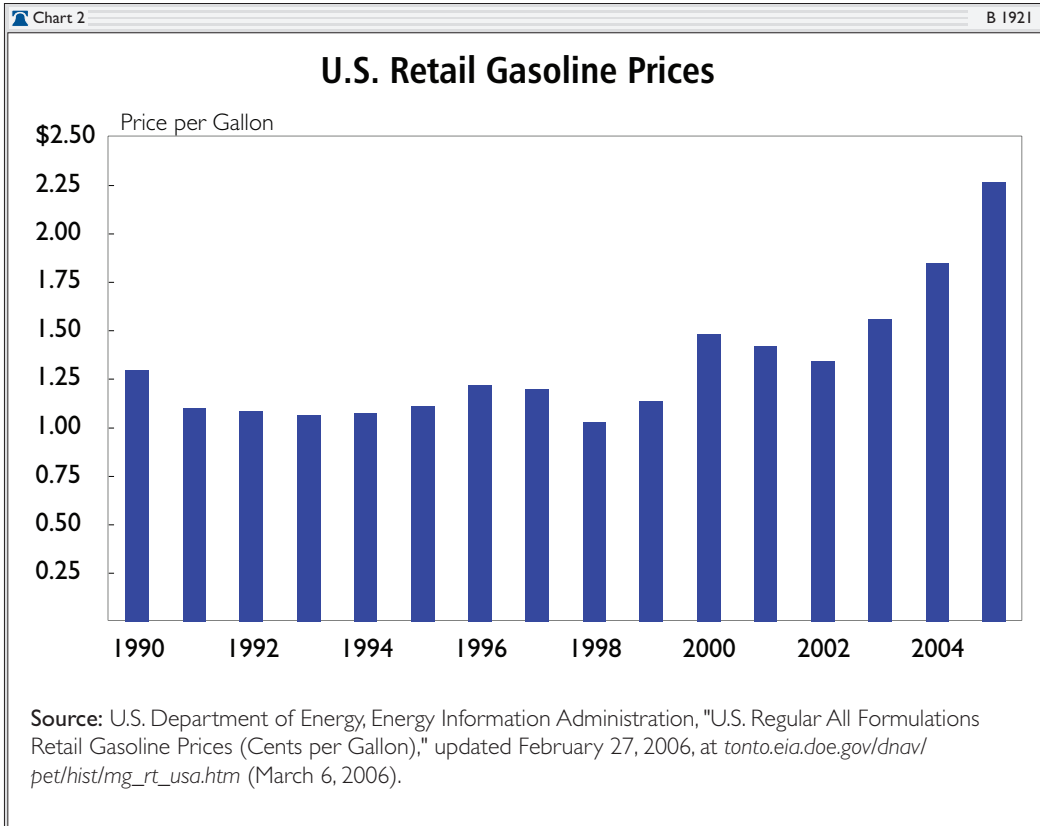
made an effort to advance an environmental agenda. Placing energy-rich areas off-limits and saddling the energy infrastructure with new environmental restrictions were popular measures during both Administrations.

None of these provisions immediately affected energy prices, which remained modest until 2000. However, since 2000, especially in 2005, Americans have begun to pay the price for the energy policy mistakes of the 1990s.

Energy affordability can no longer be taken for granted and has emerged as a major political issue. Americans who came to expect gasoline prices near \$1.25 per gallon (and chose their vehicles accordingly) have endured a year of prices above \$2 per gallon, as well as a brief Hurricane Katrina-induced taste of \$3 per gallon. During the winter of 2005–2006, heating oil and natural gas have been very expensive, adding to public anger.³ Industries dependent on natural gas, particularly chemicals manufacturers, have suffered in the past five years.⁴

1. U.S. Department of Energy, Energy Information Administration, "Short-Term Energy Outlook," January 10, 2006, Table A4, at www.eia.doe.gov/pub/forecasting/steo/oldsteos/jan06.pdf (March 2, 2006).

2. *Ibid.*



To their credit, many in Washington have recognized that their energy policy decisions during the 1990s are contributing to the problems and have introduced a host of reforms. Over the past year, there has been a vigorous debate over revising or eliminating these provisions to expand domestic energy production and streamline energy regulations.

However, despite the impetus of high energy costs, Washington has found it difficult to undo the mistakes of the past. The necessary changes are invariably derided as environmental rollbacks and have faced great difficulty in moving through a divided Congress. Further, opponents challenge each proposed reform as being insufficient by itself to lower energy prices substantially and point out that no such measures would provide immediate relief.

The Energy Policy Act of 2005,⁵ enacted in August 2005, was more remarkable for what it left out than for what it included. In its zeal to respond to the public outcry and pass an energy bill, Congress jettisoned several useful but controversial reforms that could have reversed much of the damage done by past energy measures. Attempts to attach such provisions to other bills or as stand-alone legislation were also unsuccessful.

In sum, Washington's outdated and counterproductive energy policy has survived. Nonetheless, Congress must revisit and correct the errors of the 1990s if it is to provide energy price relief for the American people.

Problem #1: The 1990 moratoria on offshore drilling.

Domestic oil and natural gas production has failed to keep pace with growing demand, but not

because the nation is running out of energy. In the 1990s, the federal government placed severe restrictions on new energy development, especially in many promising offshore areas.

The federal government controls the Outer Continental Shelf—generally the area more than three miles from the shoreline where most of this offshore energy potential exists—and grants leases to energy companies that wish to produce energy there.⁶ In 1990, President Bush issued a directive restricting new oil and natural gas leases.⁷ Congress had previously enacted several temporary moratoria on offshore drilling in specific areas, but this sweeping presidential directive made the restrictions more widely applicable and was not subject to annual renewals from Congress.

As a result, access to 85 percent of federally controlled offshore areas was restricted, including the Pacific and Atlantic coasts, portions of offshore Alaska, and the eastern Gulf of Mexico. (See Figure 1.) Existing leases were grandfathered in, and the central and western Gulf, where the oil and gas industry was an established presence that enjoyed state and local support, became the only location where new offshore activity was allowed. The moratoria were set to expire in 2000, but in 1998, President Clinton extended them through 2012.

Coming on the heels of the 1989 *Exxon Valdez* oil spill, President Bush felt the need to respond by taking steps to protect coastal areas from the risk of oil spills. Thus, in addition to new laws cracking down on oil tankers, he imposed the moratoria on new offshore drilling.

In a political calculation that was repeated throughout the decade, Washington placed environmental concerns over energy considerations. Low domestic oil and natural gas prices made the

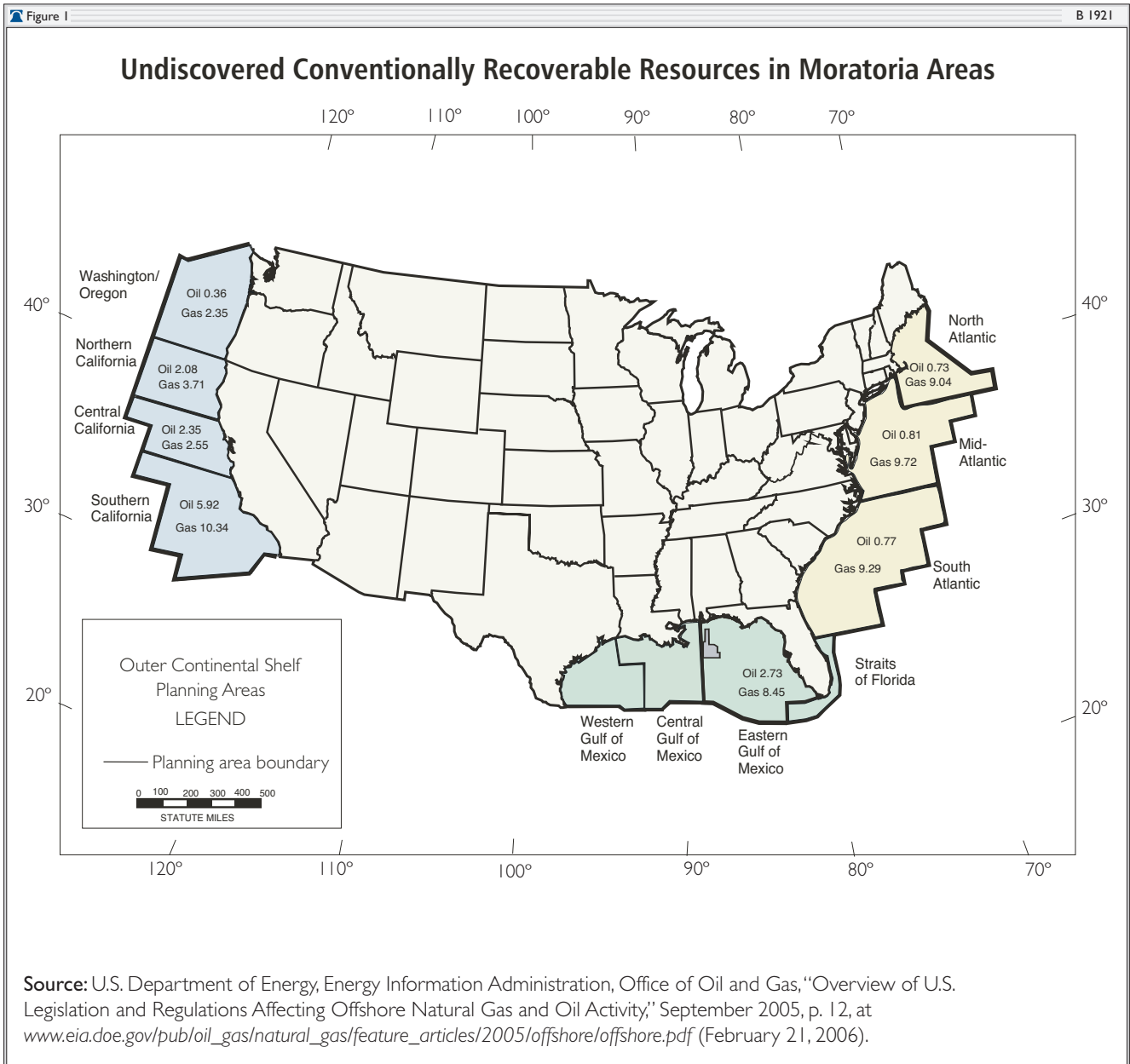
3. *Ibid.*, Table WF01.

4. Joint Economic Committee, U.S. Congress, "The Pressures on Natural Gas Prices," October 6, 2004, at jec.senate.gov/_files/NaturalGas.pdf (March 2, 2006).

5. Public Law 109-58.

6. U.S. Department of Energy, Energy Information Administration, Office of Oil and Gas, "Overview of U.S. Legislation and Regulations Affecting Offshore Natural Gas and Oil Activity," September 2005, at www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf (March 2, 2006).

7. *Ibid.*, p. 11.



choice easier for Bush because they led to the perception that there was less need to keep new offshore areas open for future energy development.

Of course, much has changed in the 15 years since the moratoria were first imposed. The need for that extra offshore energy has increased substantially due to growing demand. The moratoria areas are conservatively estimated to hold nearly 16 billion barrels of oil and 60 trillion cubic feet of natural gas.⁸ This is more than enough oil and natural gas to help moderate prices for many years to come. Furthermore, subsequent studies suggest that the moratoria areas may have more oil and gas than once thought.

Not only have the offshore moratoria reduced the potential for new domestic oil and gas production, but they have made existing production more vulnerable to supply disruptions by concentrating it geographically. This risk was realized in August and September 2005, when Hurricanes Katrina and Rita devastated the central and western Gulf of Mexico, America's only unrestricted offshore area. This region alone accounts for about one-quarter of domestic oil and gas production, and the hurricanes knocked much of it off-line for several weeks.⁹ Politics, not geology, is the reason that America had put so many energy eggs in this one hurricane-prone basket.

Many of the environmental concerns that gave rise to the offshore restrictions have since been addressed by advances in drilling technology. Today, offshore wells are much safer, and the risk of oil spills has been greatly diminished since 1990. A recent National Academy of Sciences study concluded that "improved production technology and

safety training of personnel have dramatically reduced both blowouts and daily operational spills" and that such spills now "represent about one percent of petroleum inputs in North American waters."¹⁰ The fact that Katrina and Rita did not cause a single significant offshore spill is further evidence that the risks associated with offshore drilling have been minimized.¹¹

Solution: Congress should open up at least some areas to offshore drilling.

In 2005, several bills were proposed that would have attempted to revitalize domestic offshore energy production by opening some of the restricted areas. The most promising approaches seek to get around the opposition from coastal states, especially Florida and California. They would do this by giving every coastal state the choice of keeping federal moratoria in place or opting out and allowing drilling off its coasts.¹² Provisions would also give states that allow drilling in the Outer Continental Shelf a share of the leasing and royalty revenues, which under current law go only to the federal government.¹³

Such provisions should be enacted. Even if only a relative few off-limits areas are initially opened, this would break the domestic drilling logjam and likely lead the way to further changes in this overly restrictive policy.

Problem #2: The motor fuels provisions in the Clean Air Act Amendments of 1990.

President Bush's most far-reaching environmental measure was the Clean Air Act Amendments

8. U.S. Department of the Interior, Minerals Management Service, "National Assessment, 2000." Other estimates are higher. For example, see National Petroleum Council, *Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy*, Vol. 1, September 2003, pp. 35–36. Pursuant to the Energy Policy Act of 2005, the Department of the Interior is currently conducting a more thorough offshore inventory.
9. U.S. Department of Energy, Energy Information Administration, "Short-Term Energy Outlook," September 2005, at www.eia.doe.gov/pub/forecasting/steo/oldsteos/sep05.pdf (March 2, 2006).
10. National Academy of Sciences, *Oil in the Sea III: Inputs, Fates, and Effects* (Washington, D.C.: National Academies Press, 2002), p. 2.
11. Press release, U.S. Department of the Interior, "Interior Secretary Gale Norton Reports on Gulf of Mexico Energy Status," October 4, 2005, at www.doi.gov/news/05_News_Releases/051005.htm (March 2, 2006).
12. See Natural Gas Price Reduction Act, S. 726, and Deficit Reduction Act of 2005, H.R. 4241, Title VI.
13. See Louisiana Katrina Reconstruction Act, S. 1765.

(CAAA) of 1990. Though this massive law failed to win much environmentalist support for the President, its provisions continue to affect the price that consumers pay at the pump.

The CAAA's motor fuels provisions substantially altered America's gasoline marketplace. Prior to 1990, the composition of motor fuels was not extensively regulated by the federal government, with the exception of the phaseout of leaded gasoline. The 1990 law sharply changed the emphasis by imposing detailed motor fuels regulations designed to reduce vehicle pollution.¹⁴ Specialized blends—namely, reformulated gasoline (RFG) and oxygenated gasoline—were mandated for certain areas of the country.

The CAAA also set standards for conventional gasoline and granted the Environmental Protection Agency (EPA) administrator broad discretion to create additional fuel specifications.¹⁵ During the Clinton Administration, the EPA aggressively implemented these provisions, including a costly rule limiting sulfur content in gasoline, which is currently being phased in.¹⁶ At the same time, some states began to set their own fuel requirements, often to obtain the required federal approval for their CAAA compliance plans.

When the 1990s began, gasoline was a national commodity, but today the market is balkanized with as many as 12 distinct types of motor fuels in

use at any given time.¹⁷ Several of these specialized blends are more expensive to produce than conventional gasoline.¹⁸ In addition, the logistical burden of separately refining, storing, and shipping so many non-fungible “boutique fuels” adds to costs and raises the likelihood of temporary localized shortages.¹⁹

In 1999, the Energy Information Administration noted the growing fuel problem created by the CAAA, concluding that “the proliferation of clean fuel requirements over the last decade has complicated petroleum logistics” and predicting that “additional clean fuels programs could make the system more vulnerable to local outages and price spikes.”²⁰ This has proven to be the case, especially since 2000 as the cumulative effect of numerous requirements began to have a noticeable impact at the pump.²¹ The hodgepodge of gasoline regulations has been especially problematic in the late spring and summer, when gasoline demand increases and more stringent summer-grade requirements take effect.

These regulations have also exacerbated the growing problem of tight refinery capacity. Even without the new requirements, America's refineries would be hard-pressed to keep up with the growing demand for gasoline, but these rules make it an even greater challenge to produce sufficient fuel. For example, some components of gasoline must now be removed

14. 42 U.S. Code § 211.

15. “The Administrator may, from time to time...control or prohibit...any fuel or fuel additive...if in the judgment of the Administrator any emissions product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare.” 42 U.S. Code § 211(c).

16. *Federal Register*, Vol. 64, No. 92 (May 13, 1999), p. 26,004.

17. U.S. Environmental Protection Agency, “Study of Unique Gasoline Fuel Blends (‘Boutique Fuels’), Effects on Fuel Supply and Distribution and Potential Improvements,” *Staff White Paper*, EPA420-P-01-004, October 24, 2001, pp. 9–11, at www.epa.gov/otaq/regs/fuels/p01004.pdf (March 2, 2006). Other sources claim that the number of fuel blends is higher.

18. Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition*, 2005, pp. 56–58, at www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf (March 3, 2006).

19. *Ibid.* and National Petroleum Council, “Observations on Petroleum Product Supply,” December 2004, pp. I23–I24, at www.npc.org/reports/R-I_121704.pdf (March 3, 2006).

20. Tancred Lidderdale and Aileen Bohn, “Demand and Price Outlook for Phase 2 Reformulated Gasoline, 2000,” U.S. Department of Energy, Energy Information Administration *Petroleum Supply Monthly*, April 1999, p. 8.

21. Federal Trade Commission, “Midwest Gasoline Price Investigation,” March 29, 2001, at www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/petroleum_supply_monthly/historical/1999/1999_04/pdf/art9904.pdf (March 3, 2006).

to meet the federal specifications, adding to production costs and decreasing output. The new regulatory requirements have also added tens of billions of dollars to refining costs without increasing output. This leaves the refining sector with considerably less in resources to invest in expanding capacity and makes those expansions more expensive.²² Several older refineries, facing costly upgrades to meet the new standards, have closed down instead.

Although designed to clean the air further, the experiment in federally micromanaged gasoline blends has accomplished little to justify the costs. Motor vehicles have become much cleaner, and overall air pollution has declined dramatically over the past three decades.²³ However, the gains are attributable mostly to improvements in the vehicles themselves rather than to the proliferation of specialized fuels.²⁴ Indeed, the rate of decline in vehicular pollution shows little change after these blends were introduced. Looking forward, new vehicle emissions standards currently being phased in will ensure continued declines in exhaust emissions, regardless of whether conventional or specialized blends are used.²⁵ These regulations, imposed late in the Clinton Administration, are unnecessarily stringent, but they are already being implemented and will further reduce the fuel requirements' marginal benefits.

Some provisions of the 1990 law have actually proven to be environmentally counterproductive. In particular, the requirement that RFG contain 2 percent oxygen led to the widespread use of methyl tertiary butyl ether (MTBE). Not only has MTBE done little to help clean the air, but it has contaminated many water supplies.²⁶

Solution: Congress should begin by streamlining motor fuels requirements.

The Energy Policy Act of 2005 did make some changes in the fuel requirements, but they were a wash overall. The MTBE requirement was repealed, and the law modestly streamlined gasoline regulations.²⁷ However, it also contained a requirement that ethanol be added to the fuel supply, which will likely add to the cost and complexity of providing motor fuels.²⁸

Bills have been introduced to streamline the gasoline regulations further. Some have proposed a strict limit on the number of different gasoline types in use.²⁹ Others would slowly eliminate blends one at a time.³⁰ Some proposals would provide more flexibility in implementing the substantive requirements of the Clean Air Act so that fewer areas will need to use specialized fuel blends.³¹ Although the complex motor fuels provisions warrant more comprehensive reforms, these streamlining efforts rep-

22. National Petroleum Council, "Observations on Petroleum Product Supply," pp. 116-118.

23. U.S. Environmental Protection Agency, "The Ozone Report: Measuring Progress Through 2003," EPA 454/K-04-001, April 2004, at www.epa.gov/airtrends/pdfs/2003ozonereport.pdf (March 3, 2006); Environmental Protection Agency, *National Air Quality and Emissions Trends Report: 2003 Special Studies Edition*, EPA 454/R-03-005, September 2003, pp. 1-5, at www.epa.gov/air/airtrends/aqtrnd03/toc.html (March 3, 2006); and Joel Schwartz, "No Way Back: Why Air Pollution Will Continue to Decline," American Enterprise Institute, 2003, at www.aei.org/docLib/20030804_4.pdf (March 3, 2006).

24. Andrew J. Kean, Robert F. Sawyer, Robert A. Harley, and Gary R. Kendall, "Trends in Exhaust Emissions from In-Use California Light-Duty Vehicles, 1994-2001," Society of Automotive Engineers, 2002, at www.uctc.net/papers/584.pdf (March 3, 2006).

25. *Federal Register*, Vol. 65, No. 28 (February 10, 2000), p. 6,698, and Vol. 66, No. 12 (January 18, 2001), p. 5,002.

26. National Research Council, *Ozone-Forming Potential of Reformulated Gasoline* (Washington, D.C.: National Academy Press, 1999), at darwin.nap.edu/books/0309064457/html (March 3, 2006), and Environmental Protection Agency, "The Blue Ribbon Panel on Oxygenates in Gasoline," July 27, 1999.

27. Public Law 109-58, §§ 1504 and 1541.

28. *Ibid.*, § 1501.

29. See Gasoline for America's Security Act of 2005, H.R. 3893, § 108.

30. See Gasoline Petroleum Refiner Improvement and Community Empowerment Act, S. 1772, § 402.

31. See Gasoline for America's Security Act of 2005, H.R. 3893, § 109.

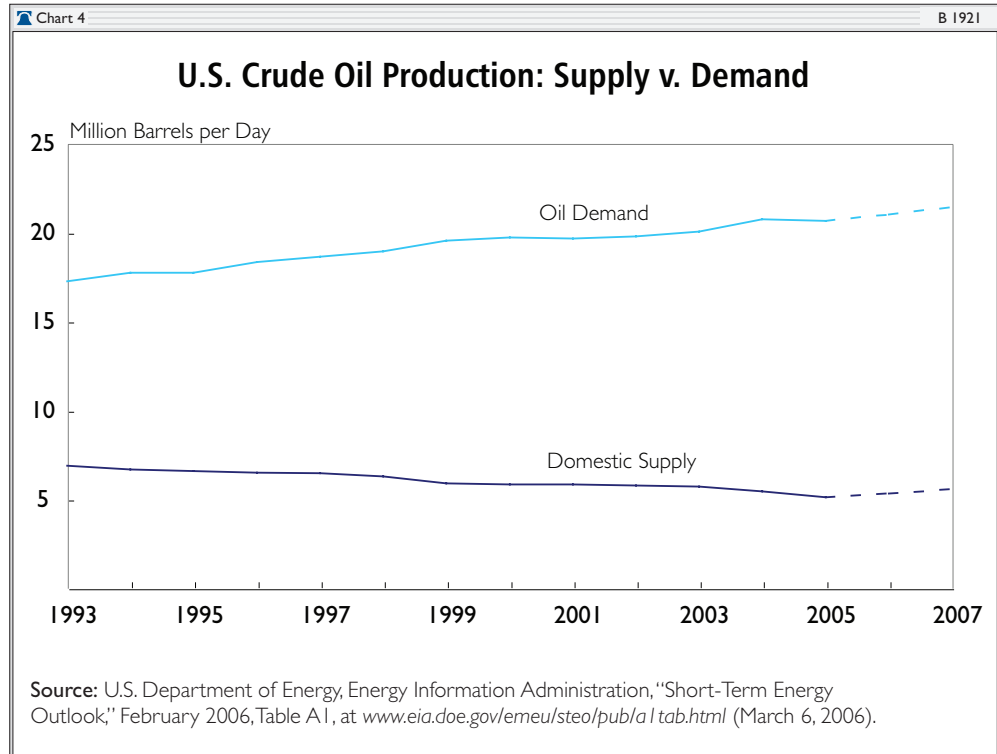
resent useful steps toward removing unnecessary regulatory costs.

Problem #3: The 1995 veto of ANWR drilling.

In 1995, President Clinton vetoed a budget bill that included provisions for opening a portion of Alaska's Arctic National Wildlife Refuge to oil exploration and drilling. ANWR, located in northeast Alaska, is the largest untapped on-shore source of oil in the U.S., with an estimated 10.4 billion barrels of recoverable crude.³² Along with the offshore restrictions, this veto helped to ensure that domestic oil production would continue to decline. It left America with too few new areas to drill at the same time that production from many mature wells was declining and demand was growing. (See Chart 4.)

The 1980 Alaska National Interest Lands Conservation Act (ANILCA) created the 19 million-acre refuge.³³ It placed 17.5 million acres off-limits to economic development, but Section 1002 set aside the 1.5 million-acre coastal plain for oil development, subject to future approval.³⁴

Alaskan oil production has been a success story. Since the 1970s, 15 billion barrels of oil, mostly from the Prudhoe Bay fields to the west of ANWR, have been delivered to the American market via the Alaska pipeline. Yet by the early 1990s, Alaskan oil output was beginning to decline. Many saw ANWR's untapped potential as a way to reverse this



trend and revitalize Alaska's oil production. Thus, Congress sent the President a bill seeking approval for ANWR drilling.

President Clinton refused to sign the bill. As with the offshore moratoria, the perceived need for additional production was not seen as urgent at the time. Environmental considerations dictated the decision not to allow drilling.

Estimates indicate that developing ANWR will take up to 10 years. Thus, if Clinton had not vetoed ANWR drilling in 1995, an estimated additional million barrels of oil per day would probably be available by now. It would have been particularly helpful given the tight global markets, high prices, and hurricane-induced disruptions in Gulf supplies.

32. E. D. Attanasi, "Economics of 1998 U.S. Geological Survey's 1002 Area Regional Assessment: An Economic Update," U.S. Geological Survey, 2005, at pubs.usgs.gov/of/2005/1359/OF2005-1359.pdf (March 3, 2006).

33. U.S. Department of Energy, Energy Information Administration, "Analysis of Oil and Gas Production in the Arctic National Wildlife Refuge," SR/OIAF/2004-04, March 2004, pp. 2-3, at [tonto.eia.doe.gov/FTP/ROOT/service/sroiaf\(2004\)04.pdf](http://tonto.eia.doe.gov/FTP/ROOT/service/sroiaf(2004)04.pdf) (March 3, 2006).

34. *Ibid.*

As with offshore drilling, improvements in onshore drilling technology have substantially reduced the environmental risk from what it was in 1995.³⁵ The strong environmental record of existing Alaska drilling, most of which was done with older technology that is far less sensitive to the environment than technology available today, provides further evidence that drilling on a portion of ANWR could be done with minimal environmental impact.

Solution: Congress should open a small portion of ANWR to drilling.

Measures to open a small portion of ANWR to drilling have gained momentum in recent years and came very close to passage in 2005. Both the House and the Senate voted in favor of legislation opening ANWR but could not do so in the same bill. First, the House supported it in the energy bill, but the Senate was unable to muster a filibuster-proof majority and was forced to leave it out of the final version, which was passed last August. The Senate did manage to include ANWR in its budget reconciliation bill, which is not subject to a filibuster, but the House was unable to follow suit. At the end of the year, the House added ANWR to the defense appropriations bill, but the Senate again could not override the filibuster against it.

Not only would the extra oil help to bring down prices and add stability to a market dominated by unstable foreign suppliers, but ANWR drilling would also be an economic boon in other ways. The project would create thousands of private-sector jobs and, at current oil prices, over \$650 billion in wealth over the next few decades. For these reasons, passage of ANWR should be very high on Congress's to-do list for 2006.

Problem #4: EPA enforcement actions against refiners.

In 1998, the EPA announced its Petroleum Refinery Initiative and began a number of enforce-

ment actions against the industry. Most of these actions claimed that refiners made significant facility upgrades without meeting the requirements of the Clean Air Act. These enforcement actions have made it difficult for U.S.-based refiners to keep pace with growing demand for their products.

Specifically, the federal government argued that these facilities violated a Clean Air Act program called New Source Review (NSR). NSR requires newly constructed industrial facilities to undergo a lengthy permitting process and install the best available pollution control technologies.³⁶ It also applies to major modifications of existing facilities. However, routine maintenance, repair, and replacements were exempted from these costly and time-consuming procedures. Such activities occur with regularity at refineries.

Thus, the dividing line between a major modification and routine maintenance, repairs, or replacements became critical. However, EPA guidance on this important distinction was very murky.

Nonetheless, the EPA launched a number of lawsuits and administrative enforcement actions against refiners, claiming that hundreds of activities that had been exempted as routine maintenance, repairs, and replacements should have been treated as major modifications and thus failed to follow the NSR requirements.³⁷ Most of these activities, which stretched back for a decade or more, were known to the EPA but were not objected to at the time, leading to allegations that the agency was engaging in an after-the-fact rewrite of the law.

The enforcement actions exacerbated an already problematic NSR program, which had been widely criticized for imposing costs out of proportion to its benefits. Many refinery upgrades have been postponed because of fear that they might trigger onerous NSR requirements.³⁸

The enforcement actions greatly expanded NSR's potential scope. Even relatively minor refinery

35. See U.S. Department of Energy, Office of Fossil Energy, "Environmental Benefits of Advanced Oil and Gas Exploration and Production Technology," 1999.

36. Dana Joel Gattuso "Why the New Source Review Program Needs Reform: A Primer on NSR," Heritage Foundation *Background* No. 1518, February 21, 2002, at www.heritage.org/Research/EnergyandEnvironment/BG1518.cfm.

37. *Ibid.*, pp. 8-11.

projects that in the past were thought to fit squarely within the routine maintenance, repair, and replacement exemption could now be fair game. This included projects that could improve plant efficiency and output. As a result, the pace of refinery expansion has suffered, especially with the boutique fuels and other requirements being simultaneously imposed on the sector.

Facing protracted enforcement actions, which can take years to resolve and leave facilities in a state of legal limbo in the interim, many targeted companies have chosen to settle with EPA and agree to additional emissions cuts. Nonetheless, there is reason to believe that the refinery enforcement actions were not necessary. Even before the refinery enforcement initiative was launched, refinery pollution had declined substantially, and a host of new regulations ensured additional declines even without the massive EPA crackdown.³⁹

When these enforcement actions were initiated in the late 1990s, gasoline was only slightly above \$1 per gallon, and the decline in excess refining capacity was only beginning to emerge as a problem. Thus, the refining sector could be taken for granted, and there was little immediate political price for appeasing the environmental activist community by imposing these restrictions. Today, however, it is widely recognized that expansions in refinery capacity have not kept up with increases in demand, putting additional pressure on prices.⁴⁰

Solution: Congress should eliminate NSR.

NSR regulatory reforms have gone forward. The EPA has promulgated several useful provisions, providing refiners with more regulatory certainty

and greater flexibility. This includes a new rule that creates a broader exemption for routine maintenance, repair, or replacement.⁴¹ However, this rule has been blocked by a court challenge. For this reason, legislative change is preferable.

However, all legislative attempts to reform NSR have been unsuccessful. Even attempts to codify the new EPA regulations have been rejected. More modest efforts that allowed states to streamline the refinery permitting process but made no substantive changes in NSR were also unsuccessful.⁴²

NSR should be eliminated entirely, but any effort to reduce its impact on future expansions of refinery capacity would be a useful step.

Conclusion

Despite the high energy prices in recent years, Washington has done little to deal with them beyond producing a 1,700-page energy bill that is unlikely to do much good. The energy policy mistakes of the 1990s largely remain in place and contribute to the problems. The nation is still failing to make full use of its available oil and natural gas resources, and Washington continues to hamper the energy sector with a host of costly and unnecessary regulatory requirements. Congress can and should correct these mistakes to alleviate the high cost of energy for 2006 and beyond.

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38. *Ibid.*, pp. 9–11 and 16–17; Environmental Protection Agency, *New Source Review: Report to the President*, June 2002, at www.epa.gov/nsr/documents/nsr_report_to_president.pdf (March 3, 2006); Jonathan Adler, Associate Director, Center of Business Law and Regulation, Case Western Reserve University, testimony before the Committee on Environment and Public Works, U.S. Senate, December 18, 2005.

39. Gattuso, “Why the New Source Review Program Needs Reform,” pp. 13–14, and National Petroleum Council, “Observations on Petroleum Product Supply,” Appendix D, p. D1.

40. National Energy Policy Development Group, *National Energy Policy*, May 2001, pp. 7-13–7-14, at www.whitehouse.gov/energy/Chapter7.pdf (March 3, 2006), and National Petroleum Council, “Observations on Petroleum Product Supply,” pp. 5–6.

41. *Federal Register*, Vol. 68, No. 207 (October 27, 2003), p. 61,248.

42. See Gasoline Petroleum Refiner Improvement and Community Empowerment Act, S. 1772, § 201.