A Sticky Situation: Tar Sands, Alternative Fuels, Energy Security and the EISA Section 526 Petroleum Procurement Problem

Surya Gablin Gunasekara
A Sticky Situation: *Tar Sands, Alternative Fuels, Energy Security and the EISA Section 526 Petroleum Procurement Problem*

**Surya Gablin Gunasekara*\(^{\ast}\)**

**ABSTRACT**

The Department of Defense (DOD) is one of the world’s single largest consumers of energy. To support two wars in hostile parts of the world, the DOD’s energy procuring agency, the Defense Logistics Agency Energy (DLA Energy), has been forced into the difficult position of doing business with sheikdoms and petro-dictatorships. This dependence on foreign oil, and the critical need for energy security, has prompted several legislative initiatives aimed at promoting renewable energy and alternative fuels. While much of this legislation has been transformative for DOD energy policy, one provision, in application, has complicated the petroleum procurement process. This article examines the Energy Independence and Security Act § 526 as it applies to Canadian oil sands crude and analyzes the recent Sierra Club challenge to DLA Energy procurements of this nonconventional petroleum source.

Control of, or at least access to, large sources of oil has long constituted a strategic prize. Of that there can be no doubt. It enables nations to accumulate wealth, to fuel their economies, to produce and sell goods and services, to build, to buy, to move, to acquire and manufacture weapons, to win wars.\(^{1}\)

**I. INTRODUCTION**

Since the mid-1970’s politicians from both sides of the aisle have been advocating for energy independence and security. Almost like clockwork, the ebb and flow of socio-

* Surya Gablin Gunasekara ([surya.gunasekara@dla.mil](mailto:surya.gunasekara@dla.mil)) is Assistant Counsel at the Defense Logistics Agency Energy. He advises petroleum procuring contracting officers and program directors in matters pertaining to acquisitions, contract administration, as well as international and domestic fuel taxes. The author received a B.A. from the University of Colorado – Boulder, a Masters degree in Natural Resource Law from the University of Denver Strum College of Law and his J.D. *cum laude* from the University of Mississippi. The views expressed herein are solely those of the author and do not represent the United States Government, the Department of Defense, or the Defense Logistics Agency.

political unrest in the Middle East and petrol-dictatorships in North Africa threaten to disrupt the United States’ supply of oil. Prices inevitably rise and political calls for energy independence return. President Nixon sounded the alarm during the 1973-74 Arab oil embargo and declared Project Independence to end the country’s dependency on imported oil. President Carter followed during the Iranian revolution, calling for an effort to reduce dependency on foreign oil “the moral equivalent of war.” George W. Bush referred to oil as America’s “addiction” and the Obama administration has once again focused on lowering dependence on oil from unstable, unfriendly, and unreliable countries.

With wars in Iraq and Afghanistan, however, the logistics of energy independence seem more like fantasy than inevitability. In order to support the warfighter, the Department of Defense (DOD) has been forced to procure fuel from a slew of petroleum sheikdoms and dictators in hostile regions of the world. For instance, Abu Dhabi, the wealthiest of the United Arab Emirates, hosts a U.S. Air Force base, which is a vital refueling hub in the region. As is the case in most Gulf states, Abu Dhabi is ruled by a single family, the Nahyan family, that dominates both government and business. The emir is 63-year-old Sheik Khalifa bin Zayed Al Nahyan, who is known for his interest in camel racing, is worth $15 billion, and controls the country’s national oil company, ADNOC. Consequently, every drop of fuel the military buys for its planes at Al Dhafra, costing $5.2 billion since 2005, is comes from ADNOC and pads the pockets of the Nahyan family.

---

3 Id.
4 Id.
5 Aram Roston, Welfare for Dictators, NEWSWEEK, June 26, 2011, at 34.
6 Id.
7 Id.
8 Id.
9 Id.
Unfortunately, the Department of Defense (DOD) is often forced to deal with volatile regions and unsavory leaders in order to fill its massive fuel requirements. As the single largest purchaser of energy in the world, the DOD consumes more oil in a single day than 85 percent of the world’s countries.\textsuperscript{10} “It requires approximately 125 million barrels annually,”\textsuperscript{11} costing taxpayers an estimated 15 billion dollars in 2011.\textsuperscript{12} As the cost of fuel rises, the DOD will spend $1.3 billion for every $10 increase in the price of a barrel of crude oil.\textsuperscript{13} Behind much of this spending is the Defense Logistics Agency Energy (DLA Energy), formerly known as the United States Defense Energy Support Center (DESC), which is the U.S. Military’s principal purchaser of energy products.\textsuperscript{14} DLA Energy is the integrated material manager for the DOD and other Federal agencies for bulk petroleum products and other energy commodities such as coal, natural gas, electricity and aerospace fuels. One of DLA Energy’s primary missions is to supply fuel worldwide to the U.S. Military, providing petroleum products such as jet fuel, diesel, and marine gas oil to installations and active operations.\textsuperscript{15} This energy supply is crucial in the DOD’s ability to accomplish its mission.\textsuperscript{16}

\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{14} Michael E. Canes & Rachael G. Jonassen, EISA Section 526: Impacts on DESC Supply 1-1, (LMI Government Consulting) (2009) [Hereinafter Canes].
\textsuperscript{15} Id. at 3-1.
DLA Energy “conducts a full and open, multi-stage, competitive procurement process with respect to each contract.”17 As fuel costs continue to rise this process ensures the DOD is receiving the most competitive prices available in the commercial market. Overseas fuel requirements are usually obtained from foreign sources, while domestic requirements are purchased from suppliers based in the United States.18 “Companies throughout the country sell to DLA Energy refined petroleum products from a variety of crude oil feedstocks, including light, medium, and heavy crudes from a variety of sources, which are comingled at various stages of the shipping and refining process prior to market.”19

Overall, Canada is the single largest importer of crude oil into the United States supplying 16% of the United States' total petroleum products.20 Canadian refiners use several sources of crude oil, one of which is tar and oil sands crude from Alberta, Canada.21 Of the oil produced from the oil sands approximately 66% is exported to the United States.22 One provision in Energy Independence and Security Act of 2007 (EISA), 23 an act that purports to reduce dependence on energy from volatile foreign regions,24 could potentially disrupt the Federal Government and DLA Energy's ability to procure this fuel from our neighboring ally and largest supplier of fuel.

17 United States v. Wilkinson, 590 F.3d 259, 262 (4th Cir. 2010).
18 Id.
20 Duff Harper, American Domestic Policy Creates Unintended Turmoil in the Canadian Oil Sands, INSIDE COUNSEL, Nov. 2008 at 33.
21 Id.
22 Id.
First, this article will discuss EISA and the effects that Section 526 has on the military’s ability to purchase alternative fuels. Specifically, this section will detail the interaction between Canadian oils sands crude, DLA Energy’s fuel acquisitions and ESIA Section 526. Second, it will analyze the recent Eastern District of Virginia case, in which the Sierra Club challenged DLA Energy’s procurement process relating to EISA Section 526. Finally, this article will discuss the impacts of the recently introduced Department of Defense Energy Security Act of 2011, its expansion of Section 526, and the attempts to enhance security by reducing dependence on foreign oil.

II. ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, CANADIAN OIL SANDS AND PETROLEUM PROCUREMENT

A. EISA BACKGROUND

The preamble of the Energy Independence and Security Act of 2007 echoes other grandiose Presidential statements from the last forty years, proclaiming that it will “move the United States toward greater energy independence and security.” EISA seeks to achieve this goal by increasing the production of clean renewable fuels and enhancing the efficiency of products, buildings, and vehicles, while promoting research on and deploying greenhouse gas capture and storage options and improving the energy performance of the Federal Government.

EISA was structured in a piecemeal legislative fashion amending several older laws to enhance environmental regulations. For instance, EISA amended the 1975 Energy Policy

\footnote{Id. at 1492.}
and Conservation Act\textsuperscript{27} to impose more stringent “efficiency standards for consumer appliances, heating and air conditioning equipment, and lighting.”\textsuperscript{28} The Act created additional requirements and provided incentives for developing more energy efficient buildings.\textsuperscript{29} EISA also increased the corporate average fuel economy (CAFE) standards for passenger and non-passenger vehicles to 35 miles per gallon by 2020\textsuperscript{30} and amended the Clean Air Act.\textsuperscript{31} One area in particular that EISA focused was alternative fuel. Over the last 20 years Congress has established standards, programs, and incentives aimed at promoting alternatives through the Energy Policy Act of 1992\textsuperscript{32} and the Energy Policy Act of 2005.\textsuperscript{33} EISA strengthened the renewable fuel standards set forth in these laws and, for the first time, required consideration of the greenhouse gas emissions (GHG) in their production and combustion.\textsuperscript{34} All of these additions and modifications to existing laws serve the broader goal of EISA to increasing energy independence and security.

B. CANADIAN OIL SANDS AND EISA SECTION 526

Oil sands or tar sands\textsuperscript{35} are naturally occurring viscous mixtures of sand or clay, water and an extremely heavy substance called bitumen.\textsuperscript{36} “Bitumen will not flow unless

\textsuperscript{27} Pub. L. No. 94-163, 89 Stat. 871 (1975). As a reaction to the 1973-74 oil embargo, the Energy Policy and Conservation Act of 1975 (EPCA) was enacted “to reduce the demand for energy through the implementation of energy conservation plans.” The Act, signed by President Ford, mandated vehicle fuel economy standards, extended oil price controls until 1979, and directed the creation of the strategic petroleum reserves. \textit{Id}. at section 2.


\textsuperscript{29} \textit{Id}.

\textsuperscript{30} 42 U.S.C. § 39902(b). EISA also required a fuel economy program for commercial vehicles. \textit{Id}. § 39902(k).

\textsuperscript{31} Tracy, supra note 24, at 173.


\textsuperscript{34} Grossman, supra note 28, at 240.

\textsuperscript{35} The author notes that oil sand is the correct term, as bitumen is naturally occurring while tar is manmade. However, bitumen looks like tar and as such has deposits are commonly referred to as tar sands; consequently the author uses tar sands and oil sands interchangeably for the purposes of this article.
it’s heated or diluted,” so it is unlike liquid petroleum.\(^{37}\) Canada, and Alberta specifically, contains the largest concentration of tar sands in the world.\(^{38}\) “Alberta’s three major areas contain approximately 1.7 trillion barrels of bitumen in place; proven measures indicate there are 173 billion barrels of recoverable oil in the oil sands.”\(^{39}\) Bitumen must be recovered and processed to separate it from the sands and produce consumer petroleum products.\(^{40}\) “For oil sands near the surface, it can be mined and moved by trucks to a cleaning facility where the sand is mixed with warm water to separate the bitumen.”\(^{41}\) For underground oil sands, extraction is done by in-situ methods.\(^{42}\) “In-situ separates the bitumen from the sand underground by using steam to heat it to a point that allows it to be pumped by a well to the surface.”\(^{43}\)

Both of these extraction processes have higher well-to-tank (WTT) GHG emissions than conventional petroleum.\(^{44}\) WTT GHG emissions are associated with fuel production (e.g. extraction and refining) and do not include combustion.\(^{45}\) With respect to WTT GHG emission, heavy crudes, like those from the Canadian oil sands, are 144% high than those

---


\(^{37}\) Id.

\(^{38}\) Id.; see also Harper, supra note 20, at 33 (“[T]he amount of oil in place in the Canadian oil sands is huge. It equates to approximately 15% of the world reserves – second only to Saudi Arabia.”).

\(^{39}\) Id. at 1.

\(^{40}\) Id.

\(^{41}\) Id.; see also Canes, supra note 14, at 4-2 (“Hot water and caustic soda is added to the sand, and the resulting slurry piped to an extraction plant where it is agitated and the oil skimmed from the top. Provided that the water chemistry is appropriate to allow bitumen to separate from sand and clay, the combination of hot water and agitation release bitumen from the tar sand and allows small air bubbles to attach to the bitumen droplets. The bitumen froth floats to the top of separation vessels, and is further treated to remove residual water and fine solids.”).

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Kristin J. Gerdes & Timothy J. Skone, CONSIDERATION OF CRUDE OIL SOURCE IN EVALUATING TRANSPORTATION FUEL GHG EMISSIONS at 1 (March 20, 2009) [Hereinafter Gerdes].

\(^{45}\) Id. at n. 2
from domestic crude oil.\footnote{Id. at 1.} WTT emissions, however, only make up 20% of the total life cycle GHG emissions,\footnote{"[L]ifecycle greenhouse gas [GHG] emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential. 42 U.S.C. § 7545(o)(1)(H).} the vast majority of emissions come from combustion, which does not vary based on crude source.\footnote{Gerdes, supra note 44, at n. 2.} Therefore, Canadian oil sands crude only has more emissions during the extraction process, which represents a small fraction of the total lifecycle GHG emissions.

While the aggregate lifecycle GHG emissions of Canadian oils sands crude is not significantly higher than conventional crude oil, the statistical disparity is very important with regards to the Energy Independence and Security Act of 2007. One section in particular, prohibits U.S. Federal agencies from procuring alternative fuels or fuels derived from nonconventional petroleum sources, such as Canadian oil sands,\footnote{Heavy crudes imported from Venezuela and oil sands crude imported from Canada are considered nonconventional “because the extraction process for these crudes require heat processes and are not typical of extracting liquid petroleum.” INTERIM IMPLEMENTATION PLAN REGARDING SECTION 526 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007 at 7 (Aug. 2009), https://www.desc.dla.mil/DCM/Files/Interim%20Implementation%20Plan%20Aug%202009.pdf (last visited Sept. 30, 2011)[Hereinafter Interim Plan].} with elevated GHG emissions.\footnote{Id.}

Section 526 states:

No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, for any mobility-related use, other than for research or testing, unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.\footnote{Energy Independence and Security Act of 2007 §526, 42 U.S.C. § 17142 (2007).}
Essentially, Federal agencies are restricted from procuring mobility related fuel\textsuperscript{52} from unconventional or alternative fuel\textsuperscript{53} sources with lifecycle GHG emissions above those from conventional petroleum, with the exception of fuels for research and development.\textsuperscript{54}

The legislative history of Section 526 is scarce at best and consists primarily of a series of congressional letters exchanged between various members. In a March 2008 letter from Congressman Henry Waxman to Senator Jeff Bingaman, Waxman wrote “[t]he purpose of the provision is to bar federal agencies from spending taxpayer dollars to support the development and expansion of alternative fuels and fuels from unconventional sources, if those fuels have higher life greenhouse gas emissions than comparable conventional fuels.”\textsuperscript{55} It has been speculated that Section 526 was drafted in response to the proposed use by the U.S. Air Force of coal-to-liquid fuels.\textsuperscript{56} This conjecture was seemingly confirmed by Waxman’s letter as it goes on to state that “[S]ection 526 would clearly apply to a contract that specifically requires the contractor to provide an alternative fuel, such as coal-to-liquid fuel, or a fuel produced from a nonconventional petroleum source, such as tar sands.”\textsuperscript{57} The provision would also apply to contracts where the

\textsuperscript{52} “Mobility related use... covers most liquid fuels purchased by the federal government for ground, aviation, and marine uses. It would not cover home heating oil and diesel used in ground equipment nor would it cover electricity and natural gas used in buildings or power plants on installations.” Interim Plan, supra note 49, at 2.

\textsuperscript{53} Alternative fuel is defined as “methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more (or such other percentage, but not less than 70 percent, as determined by the Secretary, by rule, to provide for requirements relating to cold start, safety, or vehicle functions) by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials; electricity (including electricity from solar energy); and any other fuel the Secretary determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits.” 42 U.S.C. § 13211 (2) (2008).

\textsuperscript{54} Canes, supra note 14, at 2-1.

\textsuperscript{55} Id., see also Letter from Congressman Henry Waxman, Chairman, Committee on Oversight and Government Reform, to Senator Jeff Bingaman, Chairman, Senate Committee on Energy and Natural Resources (March 17, 2008).

\textsuperscript{56} Harper, supra note 20, at 33.

\textsuperscript{57} See supra note 37.
purpose is to obtain alternative fuel or nonconventional petroleum-sourced fuel, even if the source of the fuel is not specifically identified in the contract. In addition, a contract, which supports or provides incentives for a refinery upgrade or expansion to increase the use of tar sands oil would likewise be subject to Section 526.

It seems clear that Congress intended to prevent Federal agencies from specifically procuring alternative fuels that involve coal-to-liquid technology and nonconventional fuels derived from tar sands oil. This provision, however, would not apply to contracts to purchase generally available fuel if that fuel is not an alternative fuel or predominately produced from a nonconventional source. With respect to tar sands and other heavy crudes, Congressman Waxman clarified that Section 526 would not bar fuels with incidental amounts of fuel from tar sands, concluding that it “must be interpreted in a manner that makes sense in light of federal contracting practices.”

C. DLA ENERGY AND COMMERCIAL PETROLEUM PROCUREMENTS

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), to create a preference for the acquisition of commercial items. FASA requires that agency heads ensure, to the maximum extent practicable, that requirements be defined such that commercial items may be procured to fulfill such requirements. The DOD, following the enactment of FASA, promulgated regulations for commercial items procurements in the Federal Acquisition Regulation (FAR) Part 12 and Department of Defense FAR Supplement.

58 Id.; see also Harper, supra note 20, at 33 (“Oil from the Canadian oil sands is generally referred to as non-conventional petroleum and has elevated [GHG] emissions vis-à-vis conventional petroleum.”).
59 Canes, supra note 14, at 2-2.
60 Id.
61 Id. at 2-1.
(DFARS) Part 212. These provisions proscribe the policies and procedures unique to the acquisition of commercial items and implement FASA by creating a procurement environment more like the commercial marketplace.

DLA Energy follows the standard procurement procedure as required by the FAR and DFARS for all of its procurements. Virtually all of the contracts DLA Energy awards use full-and-open competition under the commercial contracting procedures found in Part 12 of the FAR and DFARS Part 212. Since DLA Energy purchases are commercial items,

---

64 McClure, supra note 63, at 270.
65 FAR 2.101 defines a commercial item as: (a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that -- (1) Has been sold, leased, or licensed to the general public; or, (2) Has been offered for sale, lease, or license to the general public; (b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation; (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for -- (1) Modifications of a type customarily available in the commercial marketplace; or (2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor; (d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public; (e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services -- (1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and (2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public; (f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed; (g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or (h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.
66 McClure, supra note 63, at 271.
67 Interim Plan, supra note 49, at 1.
the Agency relies on industry standards for manufacture, delivery, inspection, and acceptance of fuel.\textsuperscript{68}

The vast majority of DLA Energy’s purchases are petroleum products,\textsuperscript{69} which are divided into two separate acquisition programs: bulk and direct delivery. “The large bulk fuel contracts are normally one year contracts, usually for military specification fuels such as JP-8 and JP-5 aviation fuels and F76 marine distillate fuel.”\textsuperscript{70} By contrast, DLA Energy contracts under the direct delivery program are typically 3-5 years in duration and involve the delivery of gasoline, diesel and heating fuel to military and federal installations.\textsuperscript{71} Both of these programs include petroleum products that contain oil sands crude mixed with conventional crude oil as part of the normal refining and distribution process.\textsuperscript{72}

As such, DLA Energy developed the Interim Implementation Plan Regarding Section 526 of the Energy Independence and Security Act of 2007 (Interim Plan) to “provide guidance to the agency’s workforce, suppliers and customers on how DLA Energy [would] comply with Section 526 on a preliminary basis.”\textsuperscript{73} The language of EISA Section 526 is undefined, so DLA Energy relied upon the most commonly used statutory definitions, commercial usage, and the agency’s extensive knowledge with regard to commodities in developing the Interim Plan.\textsuperscript{74} In addition, DLA Energy examined the limited legislative

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 6 (“These consist of aviation fuels, marine distillate fuels, heating oils, gasoline and diesel fuels. For the federal civilian customers, these purchases are largely domestic. However, the products are purchased worldwide for the military services and other DOD customers. For example, DOD sells fuel to DOD contractors, such as airline carriers who transport goods for DOD, and provides fuels under international agreements to other countries.”).
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. (While oil sands constitutes only 10\% of the total amount of crude refined in the U.S., it is widespread in all U.S. markets “due to the extensive crude oil pipeline distribution network in Canada and the United States.”).
\textsuperscript{73} Sierra Club, 2011 U.S. Dist. LEXIS 84852 at *4-5.
\textsuperscript{74} Interim Plan, supra note 49, at 1.
history to clarify the intent of Section 526. With respect to petroleum, more specifically petroleum from oil sands, the Interim Plan found, that because DLA Energy was purchasing commercially available fuel, these procurements would be outside the purview of Section 526. “Even where the amount of oil sands in the fuel could be more than incidental, such as in Canada, so long as [DLA Energy] does not target or specify oil sands as a source of crude” the statute would not apply to these acquisitions. Thus, DLA Energy concluded that the majority of its acquisitions, petroleum products, would not be subject to the requirements of EISA Section 526.

III. SIERRA CLUB V. U.S. DEFENSE ENERGY SUPPLY CENTER

Shortly after the Interim Plan was issued, the Sierra Club and Southern Alliance for Clean Energy (Southern Alliance, collectively the Plaintiffs) brought suit against DLA Energy (the Defendant) seeking declaratory judgment and injunctive relief for “alleged violations of federal law arising from purchasing contracts for fuel derived from Canadian oil sands.” The Plaintiffs’ suit consisted of three counts. First, they asserted that the mobility-related fuel procurements violated EISA Section 526 because (1) fuel derived from oil sands are allegedly a nonconventional petroleum source; (2) “some mobility-related fuels supplied from DOD to the U.S. military under these contracts are refined from crude derived in part from Canadian oil sands; and (3) the contracts for those fuels omit Section 526’s lifecycle greenhouse gas emissions certification.” Second, they contended

---

75 Canes, supra note 14, at 2-2.
76 Interim Plan, supra note 49, at 8.
77 Id.
78 Sierra Club, 2011 U.S. Dist. LEXIS 84852 at *4-5.
79 Id. at *5-6
that DLA Energy violated the Administrative Procedures Act (APA) in developing the Interim Plan without following the rulemaking procedures of 5 U.S.C. § 553(b)\textsuperscript{80} and that the Interim Plan was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right in violation of 5 U.S.C. § 706.” Finally, Plaintiffs alleged that, under the National Environmental Policy Act (NEPA) Section 102(2)(C), “DLA Energy must conduct, for both its mobility-related fuel purchases and the Interim Implementation Plan, an environmental assessment to review the environmental impacts of these agency activities. Because these assessments were not conducted, Plaintiffs allege[d] DLA Energy violated NEPA and thus the APA.”\textsuperscript{81}

Based upon these alleged violations, the Plaintiffs claimed two types of injuries: (1) they asserted an increased risk of harm to their recreational, economic, and aesthetic interests as a result of the Defendants conduct; and (2) they argued DLA Energy’s failure to include the lifecycle certification in their contracts, in part, increased risk to the Plaintiffs respective members.\textsuperscript{82} The second claim was predicated under the theory that by requiring DLA Energy to comply with Section 526, consequently restricting the use of oil sands derived petroleum products, would in turn mitigate the impacts from mining, refining, GHG emissions, and global warming.\textsuperscript{83} The Plaintiffs also alleged that had DLA Energy complied with the APA and NEPA procedures, the agency might have included

\begin{flushleft}
\textsuperscript{80} 5 U.S.C. § 553(b) provides “General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-- (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”
\textsuperscript{81} Id. at *6.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at *6-7.
\end{flushleft}
Section 526 certifications in its future contracts.84 The Plaintiffs moved for summary judgment, and Defendants, with the Defendant Intervenors,85 moved for dismissal, or alternatively, for summary judgment due to lack of subject matter jurisdiction.86

Before reaching the merits, the court first addressed the Defendants motion to dismiss for lack of subject matter jurisdiction. Here, the Defendants asserted that the Plaintiffs lacked standing, and therefore the court lacked subject matter jurisdiction.87 As the standing elements are an essential part of any case, the Plaintiff must support each element in the same way as any other matter where the burden of proof rests with the Plaintiff.88 Organizations purporting to bring suit on behalf of their members must demonstrate that (1) their members would have individual standing to sue; (2) the protected interests are germane to the organizations’ purpose; and (3) that the suit does not require participation of individual members.89 In this case, the Defendants did not challenge the second or third prongs, but instead, argued that the individual members of the Sierra Club and the Southern Alliance would not have standing. In order to establish standing, the Plaintiffs must demonstrate that their members suffered an “injury-in-fact,” which was caused by the Defendant’s conduct and that can be redressed by a favorable outcome in the suit.90 In this case, the Plaintiffs claimed their injuries were the result of climate changes associated with the emission of GHGs that have caused, or will cause,
environmental impacts, “such as increased frequency of intense storms, increased risk of fire to public lands, increased risk of damage to costal properties, and loss of plant species.” \footnote{Id. at *9-10.} The court, however, found that this argument was without merit as the Plaintiff failed to sufficiently allege that they or their members have or will suffer an injury from the pipeline transmission or the refining of oil sands, let alone DLA Energy’s procurement of petroleum products which contain incidental amounts of tar and oil sands crude. \footnote{Id. at *10.}

The court also determined that, with respect to Counts Two and Three, the Plaintiffs could not satisfy the procedural injury requirement. \footnote{Id. at *10.} The Plaintiffs failed to demonstrate a particularize injury stemming from DLA Energy’s purchase and contracts for fuel refined from oil sands, and without such an injury the Plaintiffs lack standing to sue. \footnote{Id.} The court noted that the Plaintiff’s failed to sufficiently plead a causal connection between their claimed injuries and DLA Energy’s fuel procurements. \footnote{Id.} To create such a connection, the Plaintiffs’ injuries must be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” \footnote{Lujan, 504 U.S. at 560-61.}

In this case, the court determined that the Plaintiffs did not satisfy their causation requirement for two reasons: (1) the alleged injuries were not fairly traceable to the challenged actions of DLA Energy, and (2) “those alleged injuries [were] the result of independent third parties, namely producers of fuel from Canadian oil sands and persons
who would purchase that fuel if DLA Energy did not.\textsuperscript{97} In rejecting the Plaintiff's causal connection the court explained:

For Plaintiffs to satisfy the causation requirement, the following logical leaps and attenuated assumptions would have to be made. First, if Defendants had complied with Section 526, they would not have been able to purchase fuels which are refined in part from COSRC. Second, without those purchases, U.S. refineries would not have been able to sell such fuels refined in part from COSRC to other purchasers and thus would have reduced their demand for and refining of such crude. Third, if those domestic refiners had reduced their demand for COSRC, no other purchasers would have purchased the same or comparable amounts. Fourth, based on these assumptions, producers of fuel from COSRC would have and will commensurately reduce the mining and production activities that emit greenhouse gases. Fifth, this reduction would not have been offset by increased emissions anywhere else. Sixth, as a result, fewer overall greenhouse gases would have mixed in the earth's atmosphere. Seventh, as a result of the emissions reduction, the accumulated atmospheric emissions would trap less heat. Eighth, the resulting reduction in atmospheric heat would result in a reduction in the risk of harm Plaintiffs allegedly face to their health, recreation, economic, and aesthetic interests as a result of climate change.\textsuperscript{98}

The court used this causal chain to conclude that the lack of a lifecycle GHG emission certification in DLA Energy contracts would not logically encourage the producers of oil sands fuel to mine or refine in manner they would not have otherwise done.\textsuperscript{99}

Finally, the court examined redressability, concluding that even if the alleged injuries could be connected to DLA Energy's conduct, the courts could not fashion relief for the actions of countless parties.\textsuperscript{100} For example, enjoining DLA Energy from entering into contracts for petroleum products which contain oil sands would not reduce the climate change risk as another entity will inevitably purchase that same fuel that DLA Energy would be forced to forgo.\textsuperscript{101} Moreover, such an injunction would not reduce the risks from

\textsuperscript{97} Sierra Club, 2011 U.S. Dist. LEXIS 84852 at *12.
\textsuperscript{98} Id. at *14-15.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at *16-17.
\textsuperscript{101} Id. at *17
GHG emissions as any reduction from DLA Energy purchases of oil sands fuel would be offset by others around the world.\textsuperscript{102} Essentially, the court acknowledged the commercial nature of fuel, as a fungible commodity taking one buyer out of the market, namely DLA Energy, would not mean that oil sand fuel would cease to be purchased and combusted. Therefore, an injunction would not prevent the release of GHGs and the Plaintiffs’ alleged injury could not be redressed by the court.\textsuperscript{103}

Ultimately, the court ruled that the Plaintiffs failed to meet their prudential standing requirements.\textsuperscript{104} Without standing, the court appropriately dismissed the case. It is important to note, however, that DLA Energy agreed to prepare an environmental assessment in accordance with NEPA, thus rendering count three moot.\textsuperscript{105} Since this decision was issued, Sierra Club and the Southern Alliance have not appealed, effectively ending their challenge to DLA Energy’s procurement of fuel that contains oil sands-derived crude.\textsuperscript{106} Consequently, DLA Energy will be able to continue to purchase commercially available petroleum products, which use oil sands, for the foreseeable future. The disposition of \textit{Sierra Club v. U.S. Defense Energy Support Center}, however, does not indicate an end for EISA Section 526 restrictions on government procurement.

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at *17-18 (“Plaintiffs’ failure to demonstrate the causation and redressability necessary to establish their standing to litigate their Section 526 claim is also fatal to other counts, which depend on an even more attenuated causal relationship between DLA Energy’s conduct at issue and the threat to concrete interests alleged by the Plaintiffs.”).
\textsuperscript{104} \textit{Id.} at 19
\textsuperscript{105} \textit{Id.} at 20.
\textsuperscript{106} Sierra Club had 60 days to appeal the July 29, 2011 decision, that time limit has expired as of Sept. 28, 2011.
IV. THE DEPARTMENT OF DEFENSE ENERGY SECURITY ACT OF 2011: THE ROAD TO A SUSTAINABLE MILITARY?

Recently, Senator Mark Udall introduced the Department of Defense Energy Security Act of 2011 (DODESA)." According to Senator Udall, this bill addresses the serious national security implications caused by the DOD’s energy consumption. DODESA “authorizes increased development of alternative fuels and increased usage of hybrid drive systems and electric vehicles.” The bill also “streamlines communication between agencies responsible for energy programs across the DOD, and authorizes DOD to examine where the greatest potential exists for renewable energy programs.” Overall, DODESA aims to reduce dependency on foreign oil and enhancing security all while saving taxpayers money and soldiers’ lives.

With respect to alternative fuels, DODESA would apply EISA Section 526 to liquid fuels and natural gas. Specifically, Section 103 of the bill states “[c]ontracts for the procurement of liquid fuels, or natural gas entered into pursuant to this section shall comply with the requirements of section 526 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17142).” Presumably, Section 103 would require DLA Energy and other Federal agencies to have lifecycle GHG certifications in contracts for natural gas and liquid fuels that are derived from nonconventional sources. As these definitions remain

109 Id. (Section 105 will create the Department of Defense Joint Task Force for Alternative Fuels).
110 Id.
111 Id. (“DODESA is not a silver bullet that will solve all of our problems. However, it’s part of a silver buckshot solution that will require multiple changes in the way that we do business.”).
112 Id. § 104.
113 Conventional natural gas production is defined as gas produced by a well drilled into a geologic formation in which the reservoir and fluid characteristics permit the natural gas to readily flow to the wellbore. Interim Plan, supra note 49, at 15 n. 18.
undefined, similar situations to those in *Sierra Club v. U.S. Defense Energy Support Center* could arise. For instance, nonconventional natural gas, possibly from hydraulic fracturing could be comingled with conventional natural gas in the United States’ extensive pipeline system. 114 Thus, when DLA Energy procures this commercially available natural gas, it may have in fact violated Section 103, or at the very least, expose DLA Energy to litigation.

Over the last few years there has been a big push within DOD to promote energy independence. 115 The DOD has committed to obtaining 25% of its energy from renewable sources by 2025, and alternative fuels are a large part of that goal. 116 “The Air Force aims to use alternative fuels for half its domestic aviation needs by 2016 ... and cut total aviation fuel use by 10% by 2015.” 117 Some of the services have set even more ambitious goals. The Navy, for example, intends on ensuring 50% of its energy comes from alternative energy sources such as bio-fuels and solar power. 118 Adhering to Section 526, the Navy, through DLA Energy, does not procure advanced bio-fuels with lifecycle GHG emissions greater than conventional petroleum. 119 For bio-fuels and other alternative fuels Section 526, and potentially Section 103, serve as good baselines for the fuel of the future. 120 Moreover, EISA and DODESA could have a transformational effect throughout the DOD. 121 In the end, however, there must be a balanced approach within DOD to achieve energy independence.

---

114 Hydraulic fracturing, or “fracing,” the method of wringing oil or gas out of stubborn underground sources through the high-pressure injection of vast amounts of fluid, would not be considered conventional under the industry definition. Adam J. Bailey, Comment, *The Fayetteville Shale Play and the Need to Rethink Environmental Regulation of Oil and Gas Development in Arkansas*, 63 Ark. L. Rev. 815, 816 (2010).
116 Id.
117 Id.
118 Id.
119 Id.
120 Burke, *supra* note 13.
121 Udall, *infra* note 128, at 27.
and security by increasing domestic alternative fuels without limiting the procurement of traditional petroleum products from friendly, reliable allies.\textsuperscript{122}

Since Section 526’s passage in 2007 there has been discussion on Capitol Hill to repeal the provision.\textsuperscript{123} While repeal is unnecessary, a clear exemption for commercially available fuel would be beneficial. Interestingly enough, the National Aeronautics and Space Administration (NASA) has such an exemption even though DLA Energy procures much of NASA’s fuel requirements. The NASA exemption from alternative fuel procurement requirement, provides:

Section 526(a) of the Energy Independence and Security Act of 2007 (42 U.S.C. 17142(a)) does not prohibit the Administration from entering into a contract to purchase a generally available fuel that is not an alternative or synthetic fuel or predominantly produced from a nonconventional petroleum source, if-- (1) the contract does not specifically require the contractor to provide an alternative or synthetic fuel or fuel from a nonconventional petroleum source; (2) the purpose of the contract is not to obtain an alternative or synthetic fuel or fuel from a nonconventional petroleum source; and (3) the contract does not provide incentives for a refinery upgrade or expansion to allow a refinery to use or increase its use of fuel from a nonconventional petroleum source.\textsuperscript{124}

Essentially, this exemption reflects the intent expressed by Congressman Waxman with respect to the implementation of Section 526 by allowing NASA to purchase “generally available fuels” from nonconventional sources.\textsuperscript{125} Without such an exemption for the DOD, DLA Energy, as the primary purchaser of petroleum products, could continue to be subject to litigation as a result of the uncertainty surrounding Section 526. As it stands Section 526 remains undefined and the Sierra Club litigation did not resolve the uncertainty.

\textsuperscript{123} \textit{Id}.
\textsuperscript{124} 51 U.S.C. § 30310.
\textsuperscript{125} Canes, \textit{supra} note 14, at 2-2.
Ultimately, it is up to Congress to ensure the DOD can advance its alternative fuel program within the confines of EISA and DODESA, while reducing dependence of foreign oil and enhancing national security.

V. CONCLUSION

The Department of Defense is the largest industrial consumer of oil in the world. DLA Energy as the principal purchaser of fuel for the military has a primary mission of meeting the needs of the warfighter. It is clear that those needs are evolving. Today, renewable energy and alternative fuels are becoming a central part of DOD's move toward energy independence as national security is directly related to energy security. Aggressive energy sustainability goals will enable the military to transition to alternative fuels quickly. DOD is advancing “cutting-edge energy technologies such as portable solar power, algae-based diesel fuel, and microgrids.” The fact of the matter is that many clean technology alternative fuels are not financially viable for the DOD beyond experimentation. While the DOD and DLA Energy have huge purchasing power, they cannot single handedly drive the market for alternative fuels. As such, DLA Energy is engaging in long-term contracts in order to stimulate the commercial markets.

126 Davenport, supra note 10, at 24.
127 146 Cong. Rec. S3832 (daily ed. June 15, 2011) (statement of Sen. Mark Udall) (“Energy needs to be the first thing we think about before we deploy another soldier, before we build another ship or plane.”) (quoting Admiral Mike Mullen).
130 Eilperin, supra note 115, at A1.
In the meantime, however, the DOD cannot remain “handcuffed to the Middle East, North Africa and other volatile-but-oil-rich parts of the world.”\textsuperscript{131} DLA Energy must be able to procure commercially available fuel for our forces from our largest supplier and closest ally, Canada, no matter if the product is refined from tar sands or oil shale. Despite the dismissal of \textit{Sierra Club v. U.S. Defense Energy Supply Center}, there is still uncertainty surrounding Section 526 and alternative fuel acquisitions. With respect to commercial items contracts, the EISA Section 526 requirements must be tailored by Congress “in a manner that makes sense in light of federal contracting practices.”\textsuperscript{132}

\textsuperscript{131} Davenport, \textit{supra} note 10, at 24.
\textsuperscript{132} Case, \textit{supra} note 14, at 2-1.